Right to health, thresholds of vulnerability and humane standards of detention in prisons and other detention settings.

Marie Claire Van Hout

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"It always seems impossible until it is done"
(Nelson Mandela, 1918-2013)

To my Dad who never got to see me finish my Law degree or become Professor. This is for you.

To my Mum who is always excited to hear about my work.

To my dear husband Barry who always supports me no matter what.

To Lannah and Tanya, my daughters, this might inspire you that it is never too late.

To my UNODC friends and mentors, you know who you are, thank you for this meaningful journey to make a difference to the lives of people deprived of their liberty, often in very challenging socio-political and fragile environments.

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Contents

Abstract

On any given day, over 11.5 million people globally are deprived of their liberty. Detention spaces are high risk environments for poor health, exposure to inter-personal violence and disease outbreaks. The Portfolio of Works concerns normative standards of detention and the varying degrees to which the health rights of people deprived of their liberty are upheld in different detention spaces (prisons, immigration, prisoner of war).

The 23 Works focus on right to health of people deprived of their liberty in African prisons; in European and South African immigration detention settings; and during the Russian invasion of Ukraine. They were compiled in 2018-2023 and are underpinned by timespans before, during and beyond the SARS-CoV-2 virus (COVID-19) global pandemic. To varying degrees, the health rights of these detainees were/are not sufficiently upheld despite the various international human rights, refugee and humanitarian law frameworks and the United Nations normative standards of detention.

*Hence, there is a coherent theme of '**right to health and humane standards of detention'** connecting the Works, cognisant of the myriad of distinct and intersectional vulnerabilities and equality rights of all detainees who are wholly reliant on the State to **'respect, protect and fulfil'** their health (and basic human) rights. A holistic definition of health is adopted beyond the basic right to access free non-discriminatory healthcare equivalent to that available in the community; and encompasses broader dimensions of environmental health relating to humane treatment and accommodation standards.*

*A preamble to the chosen socio-legal approach is presented in this Introduction, followed by a human rights mapping exercise of the Works underpinned by the health in detention conceptual (and legal) framework of **'respect, protect and fulfil.'** The mapping is cognisant of the equalising parameters of the ambitious Sustainable Development Agenda 2030 in order to identify areas for detention reform and various actions and solutions to ensure rule of law is upheld and ultimately advance human rights (including right to health) in detention spaces. Firstly it presents the argument to uphold right to health in its broadest sense by working towards improving environmental, occupational and infrastructural standards of detention beyond COVID-19 timeframes. Secondly it encourages State reconsideration and appreciation of the contextual, intersectional and evolving nature of vulnerability of those deprived of their liberty beyond age, gender, indigenous descent, minority group membership and extreme poverty and recommends to include concepts of health vulnerability cognisant of ill-health and risk to health in closed spaces.*

The Portfolio as a whole illustrates how collectively and individually each Work advocates for policy, practice and legislative reforms to better respect, protect and fulfil the health rights of all deprived of their liberty globally, regionally and domestically.

Abbreviations

Acquired Immune Deficiency Syndrome (AIDS)
Anti-Retroviral Treatment (ART)
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)
Convention on the Elimination of all Forms of Discrimination against Women (CEDAW)
Convention on the Rights of Persons with Disabilities (CRPD)
Convention on the Rights of the Child (CRC)
Council of Europe (CoE)
European Centre for Disease Prevention and Control (ECDC)
European Committee for the Prevention of Torture (CPT)
European Court of Human Rights (ECtHR)
European Monitoring Centre for Drugs and Drug Addiction (EMCDDA)
European Union Agency For Fundamental Rights (FRA)
Gender-Based Violence (GBV)
Global Detention Project (GDP)
Human Immune Deficiency Virus (HIV)
International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)
International Covenant on Civil and Political Rights (ICCPR)
International Covenant on Economic, Social and Cultural Rights (ICESRC)
International Committee of the Red Cross (ICRC)
International Network on Health and Hepatitis in Substance Users—Prisons Network (INHSU Prisons)
International Organisation for Migration (IOM)
Joint United Nations Programme on HIV and AIDS (UNAIDS)
Judiciary Inspectorate of Correctional Services (JICS)
Lesbian, Gay, Bisexual, Transgender, Queer (or sometimes questioning), and others (LGBTQ+)
Liverpool John Moore's University (LJMU)
Middle East and North African Harm Reduction Association (MENAHRA)
National Preventive Mechanisms (NPMs)
Office of the High Commissioner for Human Rights (OHCHR)
Organization of African Unity(OAU)
Penal Reform International (PRI)
SARS-CoV-2 virus (COVID-19)
Special Rapporteur on the Human Rights of Migrants (SRHRM)
Sustainable Development Agenda (SDA)
Sustainable Development Goals (SDGs)
The Joint United Nations Programme on HIV and AIDS (UNAIDS)
Tuberculosis (TB)
UN Human Rights Committee (UN HRC)
United Nations Committee on Economic, Social and Cultural Rights (UN CESCR)
United Nations High Commissioner for Refugees (UNHCR)
United Nations Office on Drugs and Crime (UNODC)
Universal Declaration of Human Rights (UDHR)
World Health Organization (WHO)
World Medical Association (WMA)

Chapter One: The Portfolio of Works

> *"Education is the most powerful weapon which you can use to change the world."*
> (Nelson Mandela, 1918-2013)

The Submission for PhD by Publications (Law) consists of two parts in accordance with Liverpool John Moores University (LJMU) guidelines (*An Introduction*[1]; *The Portfolio of Works*). The 23 Works focus on right to health of people deprived of their liberty in African prisons; in European and South African immigration detention settings; and during the Russian invasion of Ukraine. Collectively they originate from a broad range of multi-disciplinary research projects held by me as *Principal Investigator* in Europe, the Middle East and North Africa, and sub-Saharan Africa. They were compiled in 2018-2023 and are underpinned by timespans before, during and beyond the SARS-CoV-2 virus (COVID-19) global pandemic.

There is a coherent theme of '***right to health and humane standard of detention***' connecting the ***Works,*** cognisant of the myriad of distinct and intersectional vulnerabilities and equality rights of detainees who are wholly reliant on the State to ***'respect, protect and fulfil'*** their health (and other basic human) rights. A holistic definition of health is adopted beyond the basic right to access free non-discriminatory healthcare equivalent to that available in the community; and encompasses broader dimensions of environmental health relating to humane treatment and accommodation standards. To varying degrees, the ***Works*** illustrate how the health rights of these detainees were/are not sufficiently upheld despite the various international human rights, refugee and humanitarian law frameworks and the UN normative detention and medical ethics standards. A human rights mapping exercise underpinned by the health in detention conceptual (and legal) framework of ***'respect, protect and fulfil'*** illustrates how collectively and individually each ***Work*** advocates for broader vulnerability assessment, and policy, practice and legislative reforms to better respect, protect and fulfil the rights of all deprived of their liberty globally, regionally and domestically.

Structure of the Introduction

Chapter Two provides a brief background to the global detention population and health in detention.

Chapter Three provides a detailed overview of the universal right to health as it relates to the core international human rights treaties and instruments; international humanitarian law; declarations relating to right to health; right to health standards for specific groups reflecting age, gender, impairment and ethnicity; and right to health standards for people deprived of their liberty.

Chapter Four provides a substantive section on the chosen socio-legal approach which connects the various ***Works***.[2]

[1] An Introduction, approximately 10,000 words in length, demonstrating that the published works contain unifying themes and comprise a coherent body of academic work that meets the requirements for the award of PhD and demonstrates rigour of research process.

[2] Each ***Work*** has a detailed methodology section.

Chapter Five provides an overview of the ***Portfolio of Works*** which connect right to health within the remit of normative standards of detention in two substantive and overlapping areas of interest; *Gender, age and other vulnerabilities in detention spaces;* and *COVID-19 and the further amplification of vulnerability.*

Chapter Six concludes by presenting a human rights mapping exercise of the Works underpinned by the health in detention framework of ***'respect, protect and fulfil.'*** The mapping is cognisant of the equalising parameters of the ambitious Sustainable Development Agenda 2030 in order to identify areas for detention reform and various actions and solutions to ensure rule of law is upheld and ultimately advance human rights (including right to health) in detention spaces. Firstly it presents the argument to uphold right to health in its broadest sense by working towards improving environmental, occupational and infrastructural standards of detention beyond COVID-19 timeframes. Secondly it encourages State reconsideration and appreciation of the contextual, intersectional and evolving nature of vulnerability of those deprived of their liberty beyond age, gender, indigenous descent, minority group membership and extreme poverty and recommends to include concepts of health vulnerability cognisant of ill-health and risk to health in closed spaces. This Chapter illustrates how collectively and individually each Work advocates for policy, practice and legislative reforms to better respect, protect and fulfil the health rights of all deprived of their liberty globally, regionally and domestically.

Chapter Seven presents a brief synopsis of how evidence and aspects from the various ***Works*** have been used by UN agencies, civil society and human rights defenders to advocate for the rights of people deprived of their liberty, inform legislative change, policy reforms, capacity building and other changes in the lives of people deprived of their liberty.

The Portfolio of Works

Annexes present the ***Works*** in reverse chronological order of proof/publication date, with support documentation. I confirm that as first author I took full responsibility for writing all manuscripts.[3]

2023

Van Hout MC. 2023. Environmental health rights and concepts of vulnerability of immigration detainees in Europe before and beyond COVID-19. *Oxford Journal of Human Rights Practice*. [Epub ahead of print]. https://doi.org/10.1093/jhuman/huac063

Van Hout MC, Wessels J. 2023. "#Foreigners Must Go versus '*in favorem libertatis"*": Human rights violations and procedural irregularities in South African immigration detention law. *Journal of Human Rights*. [Epub ahead of print] DOI: 10.1080/14754835.2023.2170709

2022

Van Hout MC. 2022a. Ensuring oversight and protection of life and health of all detained by the Russian Federation and Russian held territories of Ukraine. *Public Health.* 213: 68-70. https://doi.org/10.1016/j.puhe.2022.10.001

Van Hout. MC 2022b. Navigating the complexities of (trans) gender equality rights within the parameters of reasonable accommodation and security tensions in South African prisons: The judgement of *September v Subramoney'. Forensic Science International Mind and Law*. 3 (100077):1-10. https://doi.org/10.1016/j.fsiml.2022.100077

Van Hout MC. 2022c. Using COVID-19 to address environmental threats to health and leverage for prison reform in South Africa, Zimbabwe and Malawi. *Oxford Journal of Human Rights Practice*. [Epub ahead of print] https://doi.org/10.1093/jhuman/huac050

[3] See **Annex One** for journal pdfs (and proofs) and **Annex Two** for signed co-author statements.

Van Hout MC, Fleißner S, Stöver H. 2022. Women's right to health in detention: United Nations Committee observations since the adoption of the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (*'Bangkok Rules'*). *Oxford Journal of Human Rights Practice*. [Epub ahead of print] https://doi.org/10.1093/jhuman/huac058

Van Hout MC, Bigland C, Mariniello T. 2022. A legal-realist assessment of the Zimbabwean correctional system response to COVID-19 during state disaster measures. *International Journal of Prisoner Health*. [Epub ahead of print] https://doi.org/10.1108/IJPH-10-2021-0104

Van Hout MC, Srisuwan L, Plugge E. 2022. A human rights assessment of menopausal women's access to age- and gender-sensitive non-discriminatory health care in prison. *Menopause.* 29(11):1338-1348. DOI: 10.1097/GME.0000000000002065

Van Hout MC, Kaima R, Mhango V, Mariniello T. 2022a. Moving beyond the politization of same-sex sexuality and leveraging right to health to counter inter-personal sexual violence and HIV in Malawi's prisons. *Forensic Science International Mind and Law*. 3 (100077):1-8. https://doi.org/10.1016/j.fsiml.2022.100103

Van Hout MC, Fleißner S, Klankworth U, Stöver H. 2022b. Children in the prison nursery: Global progress in adopting the Convention on the Rights of the Child in alignment with United Nations minimum standards of care in prisons. *Child Abuse and Neglect* 134:105829. doi: 10.1016/j.chiabu.2022.105829

Van Hout MC, Mhango V, Kaima R, Bigland C, Mariniello T. 2022c. A legal-realist assessment of human rights, right to health and standards of healthcare in the Malawian prison system during COVID-19 state disaster measures. *International Journal of Prisoner Health*. [Epub ahead of print] DOI:10.1108/IJPH-10-2021-0108.

2021

Van Hout MC. 2021. Human rights violations, detention conditions and the invisible nature of women in European immigration detention: A legal realist account. *International Journal of Prisoner Health*. [Epub ahead of print] doi: 10.1108/IJPH-03-2021-0023.

Van Hout MC, Crowley D. 2021. The *"double punishment"* of transgender prisoners: a human rights-based commentary on placement and conditions of detention. *International Journal of Prisoner Health.* [Epub ahead of print] doi: 10.1108/IJPH-10-2020-0083

Van Hout MC, Wessels J. 2021a. Navigating the complexities of the mentally ill and mentally incapacitated in the criminal justice system in South Africa. *Forensic Science International: Mind and Law*. 2(100068): 1-6. https://doi.org/10.1016/j.fsiml.2021.100068

Van Hout MC, Wessels J. 2021b. Human rights and the invisible nature of incarcerated women in post-apartheid South Africa: prison system progress in adopting the Bangkok Rules. *International Journal of Prisoner Health* 18(3):300-315. DOI: 10.1108/IJPH-05-2021-0045

Van Hout MC, Fleißner S, Stöver H. 2021. *"#Me Too"*: Global progress in tackling continued custodial violence against women. The 10 year anniversary of the Bangkok Rules. *Trauma, Violence, & Abuse: A Review Journal.* 3(15248380211036067) [Epub ahead of print].https://doi.org/10.1177/15248380211036067

2020

Van Hout MC. 2020a. Leaving no one behind: The human tragedy of children in African prisons during COVID-19. *Health and Human Rights Journal*. [Online] https://www.hhrjournal.org/2020/05/leaving-no-one-behind-the-human-tragedy-of-children-in-african-prisons-during-covid-19/

Van Hout MC. 2020b. COVID-19: Urgent Need to Find Alternatives to Prison Sentences in Malawi. *Health and Human Rights Journal* [Online] https://www.hhrjournal.org/2020/09/covid-19-urgent-need-to-release-women-from-prison-in-malawi/

Van Hout MC. 2020c. Prison staff exposure to pathogenic disease and occupational health research in African prisons: A neglected area. *Journal of Sustainable Development: Africa.* 22(1): 166-171.

Van Hout MC, Aaraj E. 2020. Pandemic Stresses the Human Rights Imperatives of Tackling HIV and Hepatitis in Middle East and North African Prisons. *Health and Human Rights Journal* [Online]. https://www.hhrjournal.org/2020/05/pandemic-stresses-the-human-rights-imperatives-of-tackling-hiv-and-hepatitis-in-middle-east-and-north-african-prisons/

Van Hout MC, Chimbga D. 2020. Tackling the intersectionality of drug offences, gender based violence and victimisation in the South African Criminal Justice System: Leveraging for greater implementation of the Tokyo Rules within a sustainable development agenda. *Journal of Sustainable Development -Africa*. 22(3): 157-165.

2019

Van Hout MC, Mhlanga-Gunda R. 2019a. Prison health situation and health rights of young people incarcerated in sub-Saharan African prisons and detention centres: a scoping review of extant literature' *BMC International Health and Human Rights*. 19(1): 17. https://doi.org/10.1186/s12914-019-0200-z

Van Hout MC, Mhlanga-Gunda R. 2019b. Mankind owes to the child the best that it has to give: prison conditions and the health situation and rights of children incarcerated with their mothers in sub-Saharan African prisons. *BMC International Health and Human Rights.* 19(1): 13. https://doi.org/10.1186/s12914-019-0194-6

Chapter Two: Background in Brief

> *"For to be free is not merely to cast off one's chains, but to live in a way that respects and enhances the freedom of others."*
> (Nelson Mandela, 1918-2013)

Prisons and other forms of detention

Most recent prison trend data compiled by Penal Reform International indicates that the global prison population has reached its highest level to date, with an increase of 24% observed since 2000 (PRI 2022). On any given day, over 11.5 million are deprived of their liberty (PRI 2022). The female prison population (about 740,000) whilst a minority prison population has also increased by about 33% in the past two decades, compared to a 25% increase in the male prison population (PRI 2022). The UN Global Study on Children deprived of Liberty has documented 410,000 children living in detention, of which 19,000 live in prison with their mother (UN 2019). About one in five (approximately 2.2. million people) are held for drug offences under punitive drug laws which impose disproportionate criminal sanctions (PRI 2022). Despite the best efforts by UN agencies, civil society and human rights defenders, people from minority and indigenous communities represent a disproportionate share of the global prison population, and systemic discrimination and racism continues across prison systems and regimes (PRI 2022).

Pre-trial detention rates have remained stable since 2000 (ranging between 29% and 31% of the global prison population), with one in three people in prison held in pre-trial detention, without conviction or sentencing (PRI 2022). Application and utilisation of non-custodial measures as alternative sentencing continues to be slow, despite encouragement by various UN agencies, European and government efforts to implement '*reductionist'* strategies and decongest prisons during the COVID-19 pandemic (Dünkel, Harrendorf and Van Zyl Smit 2022; UNODC 2020a; PRI 2022). Prison overcrowding remains a substantial issue in many countries, with 121 countries reported to continue to operate over capacity (for example in some African countries at over 200%), and with 24 countries shifting toward increased scale and geographic remoteness of detention facilities (for example Egypt, Turkey, Sri Lanka) (PRI 2022). Of note is that the PRI annual global prison trend data excludes people in police/administrative custody and does not reflect the actual numbers of people who move in and out of prison annually, which remains undetermined.

With regard to other forms of detention such as for deportation purposes, there are substantial shortcomings in immigration detention data globally (FRA 2010; IOM 2011; UNHCR 2012; CPT 2017; Lungu-Byrne et al. 2020; CoE 2020; GDP 2015:2016:2021).

Prison health is public health

Addressing the multiple vulnerabilities and complex health needs of people deprived of their liberty is an imperative to reduce health inequalities at the population level (WHO 2013; Kinner and Young 2018; WHO 2023; ICRC 2023). Detention systems are generally under funded by governments and in many countries (particularly low and middle income countries) suffer a lack of prioritisation leading to

insufficient healthcare provision and poor post release continuity of care, and with poor infrastructure and insufficient human resources contributing to sub-standard conditions of detention (for example lack of access to adequate nutrition, clean water, hygiene, sanitation and ventilation) (PRI 2022; ICRC 2023). This is especially the case in low resource settings or in fragile states.

Trauma, chronic ill health and rates of communicable (HIV/AIDS), TB, viral hepatitis, sexually transmitted infections) and non-communicable disease (cancers, mental disorders) remain disproportionately high among detainee populations (Rubenstein et al. 2016; Telisinghe et al. 2016; Dolan et al. 2016; Wirtz et al. 2018; Kinner et al. 2018; EMCDDA 2021; Van Hout et al. 2021; Pillay, Chimbga and Van Hout 2021; Akiyama and INSHU 2022; WHO 2023; ICRC 2023). Exposure to custodial violence in detention remains high all over the world, with routine reporting of torture and violence (physical and sexual) against for example women, juveniles, children, and LGBTQ+[4] communities (Van Hout, Fleißner and Stöver 2021).

COVID-19 has amplified how closed settings are high risk environments for infectious disease outbreaks, with potential for rapid transmission due to traffic into and out of facilities, high population density and turnover, inadequate quarantine, disinfection and ventilation measures and consequent onward spread of disease into surrounding communities (Beaudry et al. 2020; Simpson and Butler 2020; Lines, Burke-Shyne and Girelli 2020; Amon 2020; Pont et al. 2021). Closed settings in many countries were rarely included in initial national public health emergency responses, including vaccination roll outs (OHCHR 2020; UNODC 2020b; WHO 2020a: 2020b; Amon 2020; Beaudry et al. 2020; Knight et al. 2022).

[4] LGBTQ+ stands for lesbian, gay, bisexual, transgender, queer (or sometimes questioning), and others.

Chapter Three: Right to Health: International Human Rights Treaties and Normative Standards of Detention

> *"No one truly knows a nation until one has been inside its jails. A nation should not be judged by how it treats its highest citizens but its lowest ones."*
> (Nelson Mandela, 1918-2013)

The highest attainable standard of health is a fundamental right of every human being (UN General Assembly 1947). Health is part of a wide range of civil, political, economic, social, and cultural rights, including rights to life, adequate standard of living, participation in decision-making, and a healthy environment (UN CESCR 2000; UN Human Rights Special Procedures 2018).

Universal standards on the right to health

The human right to health is provided for in the Constitution of the WHO (UN General Assembly 1947). The WHO Constitution requires State signature and ratification, and WHO has a legislative capacity to develop international health regulations (Kinney 2001). The Constitution defines health as universal (to include ***all persons without discrimination***) and as; *"a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity."* It goes onto highlight that: *"the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition"* (UN General Assembly 1947). *Article* 2 specifies 20 areas of action required to achieve the attainment of the highest possible standard of health. Several are very relevant to detention spaces and low resource settings, and include health services strengthening (*Article* 2 c); disease prevention (*Article* 2 g); and improving nutrition and environmental determinants of health (hygiene, space and sanitation) (*Article* 2 i).

The Universal Declaration of Human Rights whilst not a directly legally binding international instrument[5], includes the right to health in *Article* 25(1); *''Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control''* (UN General Assembly 1948). This right applies to all people in all circumstances, including those deprived of their liberty (ICRC 2023). Several other Universal Declaration of Human Rights' provisions are applicable to detention spaces, in particular the prohibition of torture and racial discrimination, and are components of customary international law; through State practice viewed as legally binding (*"opinio juris"*) (OHCHR 2012).

[5] With regard to the non-binding nature of the Universal Declaration of Human Rights, much of the text is now accepted as part of customary international law.

Core international human rights treaties

Expanding on the Universal Declaration of Human Rights, the treaty-based obligations in the International Covenant on Economic, Social and Cultural Rights provide for the steps required for full realization of right to health (UN General Assembly 1966a). *Article* 12(1) provides a definition of the right to health, while *Article* 12 (2) enumerates illustrative, non-exhaustive examples of States parties' obligations including many which are relevant to health in detention and persons deprived of their liberty (UN CESCR 2000 *para 7*); for example; "*(a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;(b) The improvement of all aspects of environmental and industrial hygiene;(c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;(d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness"* (UN General Assembly 1966a).

General legal obligations of the State are to respect, protect and fulfil the right to health

The obligation to respect *the right to health requires States to,* inter alia*, refrain from denying or limiting equal access for all persons, including prisoners or detainees, minorities, asylum seekers and illegal immigrants, to preventive, curative and palliative health services; abstain from enforcing discriminatory practices as a State policy; and abstain from imposing discriminatory practices relating to women's health status and needs.*

The obligation to protect *the right to health includes,* inter alia*, the duties of States to adopt legislation or to take other measures ensuring equal access to health care and health-related services provided by third parties. States should also ensure that third parties do not limit people's access to health-related information and services.*

The obligation to fulfil *the right to health requires States parties,* inter alia*, to give sufficient recognition to the right to health in the national political and legal systems, preferably by way of legislative implementation, and to adopt a national health policy with a detailed plan for realizing the right to health. This obligation entails also the state to take positive measures that enable and assist individuals and communities to enjoy the right to health."*

United Nations Committee on Economic, Social and Cultural Rights(UN CESCR). 2000.*General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*(11 August 2000) E/C.12/2000/4, *paras 34-37.*

General legal obligations of the State are to *respect, protect* and *fulfil* the right to health (UN CESCR 2000 *paras 34-37*). The UN Committee on Economic, Social and Cultural Rights (UN CESCR) which promotes, implements and enforces the ICESRC states that; *"Health is a fundamental human right indispensable for the exercise of other human rights. Every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity. .. Moreover, the right to health includes certain components which are legally enforceable"* (UN CESCR 2000 *para 1*).[6] State parties are obliged to recognize the right of all to the enjoyment of the highest attainable standard of health; *"The right to health is closely related to and dependent upon the realization of other human rights, as contained in the International Bill of Rights, including the rights to food, housing, work, education, human dignity, life, non-discrimination, equality, the prohibition against torture, privacy, access to information, and the freedoms of association, assembly and movement. These and other rights and freedoms address integral components of the right to health"* (UN CESCR 2000 *para 3*).

[6] For example the legal enforcement of the principle of non-discrimination relating to health facilities, goods and services.

The right to health as an inclusive right to timely and appropriate healthcare encompasses the underlying determinants of health (adequate food, nutrition, housing, safe and potable water, sanitation, occupation and environmental conditions, health information), and the right to timely and appropriate health care (UN CESCR 2000 *para 11*). The right to health however is not to be interpreted as a right to be healthy (Special Rapporteur on Health OHCHR *no date*). Health rights including when one is deprived of their liberty have *freedoms* (for example the right to control one's health and body; detention free from torture) and *entitlements* (for example the equal right of detainees to access healthcare equivalent to that available in the community). The broad right to physical and mental health includes specific entitlements (also pertinent to detention spaces) such as maternal, child and reproductive health; informed consent, bodily integrity and freedom from torture, ill-treatment and harmful practices; healthy natural and workplace environments; the prevention, treatment and control of diseases, including access to essential medicines; and access to safe and potable water (Special Rapporteur on Health OHCHR *no date*).

Core obligations under right to health unequivocally relevant to health in detention

(a) To ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalized groups;
(b) To ensure access to the minimum essential food which is nutritionally adequate and safe, to ensure freedom from hunger to everyone;
(c) To ensure access to basic shelter, housing and sanitation, and an adequate supply of safe and potable water;
(d) To provide essential drugs, as from time to time defined under the WHO Action Programme on Essential Drugs;
(e) To ensure equitable distribution of all health facilities, goods and services;
(f) To adopt and implement a national public health strategy and plan of action, on the basis of epidemiological evidence, addressing the health concerns of the whole population; the strategy and plan of action shall be devised, and periodically reviewed, on the basis of a participatory and transparent process; they shall include methods, such as right to health indicators and benchmarks, by which progress can be closely monitored; the process by which the strategy and plan of action are devised, as well as their content, shall give particular attention to all vulnerable or marginalized groups.

44. The Committee also confirms that the following are obligations of comparable priority*:*

(a) To ensure reproductive, maternal (prenatal as well as post-natal) and child health care;
(b) To provide immunization against the major infectious diseases occurring in the community;
(c) To take measures to prevent, treat and control epidemic and endemic diseases;
(d) To provide education and access to information concerning the main health problems in the community, including methods of preventing and controlling them;
(e) To provide appropriate training for health personnel, including education on health and human rights

United Nations Committee on Economic, Social and Cultural Rights(CESCR),*General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*(11 August 2000)E/C.12/2000/4, para 43-44.

States have minimum core obligations which are of immediate effect and include the; *"guarantees of non-discrimination and equal treatment, as well as the obligation to take deliberate, concrete and targeted steps towards the full realization of the right to health, such as the preparation of a national public health strategy and plan of action*" and *" that even in times of severe resource constraints, the vulnerable members of society must be protected by the adoption of relatively low-cost targeted programmes"* (UN CESCR 2000 *paras 18-19*).

The right to a healthy environment and right to health care when deprived of ones liberty are clearly linked and pertinent to other "*first generation*" rights, such as non-discrimination, privacy and confidentiality. The principles of *equality* and *non-discrimination* seeks *"…to guarantee that human*

rights are exercised without discrimination of any kind based on race, colour, sex, language, religion, political, or other opinion, national or social origin, property, birth or other status such as disability, age, marital and family status, sexual orientation and gender identity, health status, place of residence, economic and social situation"(UN CESCR 2009 *para 2*). *Article* 12 of the International Covenant on Economic, Social and Cultural Rights encompasses several areas of broad application where it relates to the principles of non-discrimination and equal treatment (for example equality of access to healthcare, prohibiting of indirect discrimination by inappropriate health resource allocation), and gender and age perspectives (see *paras* 18 -25 *General Comment 14*) and vulnerability relating to disability and ethnicity (see *paras* 26-27 *General Comment 14*). The UN CESCR (2000) General Comment 14 *para 34* underpins this ***Portfolio of Works*** and states; *''The obligation to respect the right to health requires States to, inter alia, refrain from denying or limiting equal access for all persons, including* ***prisoners or detainees****,* ***minorities, asylum seekers and illegal immigrants****, to preventive, curative and palliative health services; abstain from enforcing discriminatory practices as a State policy; and abstain from imposing discriminatory practices relating to women's health status and needs. "*

State parties are (at the very least) required to meet a threshold of a "*core minimum"* of social and economic rights, including the right to health, and that people deprived of their liberty are entitled to the same *"core minimum"* health rights as other citizens. Although the ICESRC recognises the "*progressive realisation"* of health rights (the specific and continual obligation of the State to move forward and as effectively as possible towards optimal realisation of health rights) and acknowledges resource constraints faced by State parties, States are required to take *"deliberate, concrete and targeted steps"* to realise the right to health and to identify indicators and benchmarks to track its progress (UN CESCR 2000 *para 43*). Fundamental health rights take into consideration the individuals biological and socio-economic pre conditions *and* the States available resources, thereby situating right to health within the enjoyment of facilities, goods, services and conditions requisite to realize the highest attainable standard of health(UN CESCR 2000 *para 9*). Other determinants of health which represent challenges to the fullest health realisation (and very relevant to the impact on health in detention) include prison system resource distribution, gender differences of detainees, violence and armed conflict, communicable diseases (for example HIV/AIDS, TB, viral hepatitis, COVID-19 and others) and non-communicable diseases (cancers, mental disorders) (UN CESCR 2000 *paras 10*).

Complexities centre on distinguishing State inability from State unwillingness or indeed State omission or failure to take necessary measures and to comply with *Article* 12 (UN CESCR 2000 *paras 18-19; 47-49*). Whilst public health issues are sometimes used by States as grounds for limiting the exercise of other fundamental rights, the Covenant's limitation clause, *Article* 4, is primarily intended *to protect the rights* of individuals rather than to permit the imposition of limitations by States, and that limitations must be proportional, of limited duration and subject to review. (UN CESCR 2000 *paras 28-29*).

Retrogressive measures regarding right to health are not permitted (UN CESCR 2000 *paras 32*). Examples could include the substantial COVID-19 restrictions placed on detention communities during State disaster measures. Although people in detention may be subject to the restrictions required by their closed environment, their conditions of confinement should not unnecessarily aggravate the suffering inherent in imprisonment (UN HRC 1992). For example State parties are required to submit periodic reports to the Committee on Economic, Social and Cultural Rights on measures and progress in upholding fundamental rights. The Optional Protocol of 2008 provides for a comprehensive complaints mechanism (individual, inquiries and inter-State) (UN General Assembly 2009).

Whilst the International Covenant on Civil and Political Rights does not expressly provide for a right to health; it provides for the right to humane treatment when in detention in *Article* 10; *"all persons deprived of their liberty should be treated with humanity and with respect for the inherent dignity of the human person"* (UN General Assembly 1966b). *Article* 26 provides for non-discriminatory protection of the law and equality before the law of a State and is supported by *Article* 2 which outlines the right to an effective remedy for violations. The State is obliged to take appropriate action to safeguard the health of people deprived of their liberty (Lines 2006:2008). Also relevant are *Article* 6 (1) right to life and *Article* 7 (1) prohibition of torture or cruel, inhuman or degrading treatment and punishment) (UN General Assembly 1966b). State parties are required to provide periodic reports to the Committee, with the 1966 Optional Protocol providing for right to individual complaint (UN General Assembly 1966c). The second Optional Protocol promotes the abolition of the death penalty (UN General Assembly 1989a).

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment presents binding obligations on States to prevent acts of cruel, inhuman or degrading treatment or punishment (*Article* 16) (UN General Assembly 1984). The UN has explicitly stated that prohibition on torture and other ill treatment extends to all individuals detained by the State (as *jus cogens*) (UN CAT 2007; Nowak and McArthur 2008).[7] The UN Human Rights Committee (UN HRC 1997) outlines that *"the State party by arresting and detaining individuals takes the responsibility to care for their life."* and that it is "*incumbent on States to ensure the right of life of detainees, and not incumbent on the latter to request protection."* The Committee also specifies that *"adequate or appropriate and timely medical care must be provided to all detainees as part of State duties"* (UN HRC 1997). The Committee against Torture further recognises *"an inadequate level of health care [in detention spaces] can lead rapidly to situations falling within the scope of the term 'inhuman and degrading treatment"*(UN General Assembly 1984). UN human rights experts have for example argued that *"loss of life occurring in custody in unnatural circumstances creates a presumption of arbitrary deprivation of life"* and that *"the duty to protect life also requires regular monitoring of prisoners'*

[7] '*Jus Cogens'* a peremptory norm of customary international binding on every State regardless of whether it has ratified any particular treaty prohibiting such treatment.

health."[8] *Articles* 12 to 14 go beyond the *"right to an effective remedy"* and clearly stipulate the right to prompt and impartial investigations of allegations of torture, including financial compensation and rehabilitation of the victim (OHCHR 2012). State parties are required to submit periodic reports to the Committee against Torture, and with the option for States to accept the Committee's competence to consider individual complaints and complaints from other State parties (under *Articles* 21 and 22). The Committee against Torture is further supported by the 2003 Optional Protocol (entered into force in 2006) which provides for a system of international and national inspection, and capacity building mechanisms to prevent violation of the Convention (UN General Assembly 2003).

Beyond right to health in detention, the ***Portfolio of Works*** contains some aspects around race, gender, age and disability related vulnerability due to its focus on the disproportionate impact of incarceration on indigenous people in South Africa, the situation of women and their children in prison and immigration, and various human rights violations relating to juveniles, older women and the mentally ill/incapacitated in prison. The right to health is recognized in *Article* 5 (e) (iv) of the International Convention on the Elimination of All Forms of Racial Discrimination which obliges State parties to ensure that no person is denied basic healthcare on the basis of their nationality, colour and creed (*Article* 5) (UN General Assembly 1965). Gendered right to health and healthcare is provided for in the Convention on the Elimination of all Forms of Discrimination against Women (*Article 12*)(UN General Assembly 1979). The Convention on the Rights of the Child guarantees the right to health and medical care to young detained persons in *Article* 24 centred on the principle of the "*best interests of the child*" ("*Children have the right to the best health care possible, clean water to drink, healthy food and a clean and safe environment to live in*") (UN General Assembly 1989b). *Article* 37 further expands on this that; *"Children who are accused of breaking the law should not be killed, tortured, treated cruelly, put in prison forever, or put in prison with adults. Prison should always be the last choice and only for the shortest possible time"* (UN General Assembly 1979: 2010a). Right to health and prohibition of discrimination regarding health rights and access of healthcare is further provided for in the Convention on the Rights of Persons with Disabilities (*Article* 25) (UN General Assembly 2007a).

The ***Portfolio of Works*** includes a focus on immigration detention (detention pre deportation). The right to the highest attainable standard of physical and mental health in international human rights law is a right of all, irrespective of immigration status. In addition to the aforementioned, the right to adequate conditions of immigration detention are mandated by the UN with State obligations to uphold the rights of those in their custody (including migrants) explicit in the Refugee Convention (and its 1967 Protocol) and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (*Article* 28).(UN General Assembly 1951:1990). *General Comment No. 36* of the UN Human Rights Committee further specifies that states parties to the International

[8] Mandates of the Special Rapporteur on extrajudicial, summary or arbitrary executions, the Working Group on Arbitrary Detention, the Special Rapporteur on the right to food, and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.

Covenant on Civil and Political Rights *"must respect and protect the right to life of all individuals arrested or detained by them, even if held outside their territory"* and are obliged to *"take special measures of protection towards persons in situation of vulnerability,"* a category that includes *"displaced persons, asylum seekers, refugees, and stateless persons."*(*Article* 6). There is further *"a heightened duty to protect the right to life which also applies to individuals quartered in liberty-restricting State-run facilities, such as… refugee camps and camps for internally displaced persons"* and *"states parties may not rely on lack of financial resources or other logistical problems to reduce this responsibility"*(UN HRC 2019).

Finally in times of war, the right to health is increasingly used to challenge discriminatory and inequitable health care in conflict settings, and the prohibition of torture and other ill-treatment of people deprived of their liberty is shared in international human rights and humanitarian law whereby the Geneva Convention (III) relative to the Treatment of Prisoners of War provide that all detainees be treated in a humane manner and have access to medical care without discrimination (ICRC 1949). Of note is that the Universal Declaration of Human Rights makes no reference to war except to assert that respect for human rights is a means of preventing it (Rubenstein 2020).

General declarations relating to right to health

There are a broad range of declarations pertinent to right to health in general, and with applicability to the intersectional nature of detention environments and the rights of people deprived of their liberty to protection from ill-health and disease, and of access to appropriate adequate medical care. These briefly include the 1978 Declaration of Alma Ata on Primary Health Care (reaffirmed in the 2018 Declaration of Astana on Primary Health Care (WHO 2019); the Declaration on the Right to Development (*Article* 8) (UN General Assembly 1986); the Programme of Action of the International Conference on Population and Development refers to reproductive rights and reproductive health (*Chapter* VII) and health, morbidity and mortality (*Chapter* VIII) (UN FPA, 1995); and the Declaration of Commitment on HIV/AIDS which recognises that "*Realization of human rights and fundamental freedoms for all is essential to reduce vulnerability to HIV/AIDS and that respect for the rights of people living with HIV/AIDS drives an effective response"*(UN General Assembly 2001 *para 1*).

Standards for specific groups

The ***Portfolio of Works*** includes reference to gendered equality health rights and entitlements whilst detained. These include the Beijing Platform for Action–Women and Health which affirms the equal rights and protections for women outlined in the Declaration on the Elimination of Violence against Women (*Article* 3) (UN 1995; UN General Assembly 1993a). Similar rights for children living in detention are outlined in the Declaration of the Rights of the Child (*Principle* 4) (UN General Assembly 1959). Equally relevant regarding health protection during the detention of the mentally ill or the impaired are the Standard Rules on the Equalization of Opportunities for Persons with Disabilities (UN

General Assembly 1993b) and the United Nations Principles of Older Persons relevant to the aging prison population (UN General Assembly 1991a). For example with regard to the disproportionate incarceration of indigenous people in South Africa, *Article* 24 (2) of the Declaration on the Rights of Indigenous Peoples is applicable in that it provides that; *"Indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health. States shall take the necessary steps with a view to achieving progressively the full realization of this right"* (UN General Assembly 2007b). Finally, with regard to sexual orientation and (trans) gender identity in closed settings, the Yogyakarta Principles (+10) are applicable regarding the application of international human rights law in relation to sexual orientation, gender identity, gender expression and sex characteristics (ICJ 2007).

Standards for people deprived of their liberty [9]

There are a broad range of non-binding UN General Assembly resolutions, norms and minimum standards for the treatment of people deprived of their liberty. They have developed over time and include the Standard Minimum Rules on the Treatment of Prisoners (UN 1955); the Code of Conduct for Law Enforcement Officials (UN General Assembly 1980); the Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UN General Assembly 1982); the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (UN General Assembly 1988); the Basic Principles for the Treatment of Prisoners (UN General Assembly 1991b); and the Rules for the Protection of Juveniles Deprived of their Liberty (UN General Assembly 1991c).

States have an obligation to ensure that people deprived of their liberty are entitled to the same level and quality of healthcare as is available in the surrounding community, without discrimination based on their status as prisoners (Lines 2006:2008). The 2011 World Medical Association Declaration and the Principles of Medical Ethics mandate for the right to humane treatment and appropriate medical care in prisons (with *Principle* 6 containing a non-derogation clause, including in public emergencies) (UN General Assembly 1982; WMA 2011). The Moscow Declaration states ''*All prisoners have the right to receive health care, including preventive measures, equivalent to that available in the community without discrimination ... with respect to their legal status''* (*Article* 1) (WHO 2003). It observes that the right to the highest attainable standard of health is heavily underpinned by standards of prison conditions and health care; and that *"prison health is public health"*, recommending that prison based health care be closely linked with the health care of the community. The World Medical Association (2011) further mandates for the right to appropriate medical care in prisons, by protecting

[9] See Table of extant Nelson Mandela and Bangkok Rules, World Medical Association Declaration and UN Principles for Medical Ethics and in **Annex Three.**

the rights of prisoners the same as other patients, and with reference to disease in prisons stipulate that "*prisoners must be provided with measures to prevent the transmission of disease".* Specifically the Principles of Medical Ethics provide that; *"Health personnel, particularly physicians, charged with the medical care of prisoners and detainees have a duty to provide them with protection of their physical and mental health and treatment of disease of the same quality and standard as in the community"*(UN General Assembly 1982 *Principle 1*). This positive State obligation derives from the fact that prisoners are *"powerless and can no longer protect [their] rights through their own initiative"* (UN General Assembly 2009). Failure to provide adequate medical care can violate the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment's prohibition of cruel, inhuman, or degrading treatment. The State's obligation to safeguard the lives and health of people in custody and to protect them from ill-treatment, may in certain instances require the authorities to ensure a *higher* standard of care to people in detention than to those in the community, who are not wholly dependent upon the State for the protection of their health and welfare (Lines 2006).

The 2016 UN Standard Minimum Rules for the Treatment of Prisoners (*"Nelson Mandela Rules"*) (a revision of the 1955 Standard Minimum Rules on the Treatment of Prisoners) are however the most comprehensive set of 122 normative standards for the health realization and care of people in detention spanning the right to access free non-discriminatory healthcare; aspects of inspections and preventative medicine, and environmental determinants of health (UN General Assembly 2016). *Rule* 1 is most applicable to right to health in the broadest sense and states that; "*All prisoners shall be treated with the respect due to their inherent dignity and value as human beings and no prisoner shall be subjected to, and all prisoners shall be protected from, torture and other cruel, inhuman or degrading treatment or punishment, for which no circumstances whatsoever may be invoked as a justification."* The *"Nelson Mandela Rules"* mandates equivalence of healthcare similar to that available in the community (*Rule* 24 (1)). The Rules draw attention to the State duty to provide prisoners with access to necessary health-care services in terms of free non-discriminatory care, medical assessment, care and treatment (including continuity of prevention and care for communicable diseases) and that medical facilities and personnel must be readily available at prisons. The *"Nelson Mandela Rules"* further cover States' responsibility for the physical, mental and special health needs of those detained (*Rule* 25 (1)); that decisions on prisoner health be made by qualified health personnel (*Rules* 25 (2), 27 (2)); and mandate confidentiality and informed consent with respect to medical treatment (*Rule* 32). Right to health in prison also includes preventative medicine (*Rule* 25) administered by healthcare staff and those staff supervising conditions of hygiene in prison (hygiene, sanitation, clothing, bedding etc). It recognises the importance of environmental determinants of health in prison crucial to health (and disease mitigation) with *Rule* 13 providing that; *"All accommodation provided for the use of prisoners and in particular all sleeping accommodation shall meet all requirements of health, due regard being paid to climatic conditions and particularly to cubic content of air, minimum floor space, lighting, heating and ventilation."*

Doctors or public health bodies should make regular inspections on the adequacy of food, hygiene, cleanliness and physical conditions of the prison (*Rules* 31 and 35). With regard to the environmental health aspects of prison settings, the *"Nelson Mandela Rules"* outline the State obligation to provide prisoners with sufficient standards of care including those crucial to health and disease mitigation. These include recognition of infrastructure deficits, bio-hazards and related vulnerabilities to ill-health; and uphold that regular prison health inspections should occur pertaining to the adequacy of clean water, sanitation and hygiene, food and the physical conditions of the prison (*Rules* 24, 25, 27, 30, 31, 32, 35). With regard to mitigation od disease *Rule 30* stipulates that attention be paid to *"where prisoners are suspected of having contagious diseases, providing for the clinical isolation and adequate treatment of those prisoners during the infectious period*."

The *"Nelson Mandela Rules"* are supported by the UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (*"Bangkok Rules"*) which provide for the specific characteristics and needs of women in the criminal justice system, and their children (UN General Assembly 2010b). The *"Bangkok Rules"* are not intended to replace the 1955 Standard Minimum Rules for the Treatment of Prisoners, but instead present an internationally accepted gendered reference point regarding the treatment of women by prison systems and its officials (admission and search procedures, healthcare, humane treatment, children who accompany their mothers into prison) (PRI 2023). They operate in conjunction with the UN Minimum Rules for Non-custodial Measures (*"Tokyo Rules"*) which constitute a comprehensive guide to the operation of non- custodial measures at all stages of the criminal justice process, and together they strive to ensure that the treatment of women in prison and non-custodial measures for women offenders is applied with dignity and respects their human rights (UN General Assembly 1991d).

Chapter Four: The Adopted Socio-Legal Approach

"Overcoming poverty is not a task of charity, it is an act of justice."
(Nelson Mandela, 1918-2013)

Socio-legal theory

The ***Portfolio of Works*** sits squarely within a socio-legal theoretical approach by combining doctrinal and empirical research, legal theory and policy, in considering the impacts of the law on the social welfare and the protection of human including health rights in detention settings, and in observing the legal world as a means to advocate for and promote justice and right to health in the broadest sense for people deprived of their liberty.

Socio-legal theories are fully compatible with the idea that legal texts are not neutral, objective and fully determinate. They always contain a significant degree of indeterminacy, which is resolved by *inter alia* historical, cultural, and political forces. Socio-legal scholars are unanimous that the law does not function in a vacuum and they underscore the importance of consideration of wider socio-contextual, political and/or economic factors (Schiff 1976; Harris 1983; Cotterrell 1998; Salter and Mason 2007; Feenan 2013; British Library 2017). Scuro-Neto (2010) for example views this treatment of law and justice as fundamental institutions of the basic structure of society mediating *"between political and economic interests, between culture and the normative order of society, establishing and maintaining interdependence, and constituting themselves as sources of consensus, coercion and social control."*

Socio-legal studies are generally defined as '*multidisciplinary study of law and legal institutions or real law'*(Garth and Sterling 1998; Sterett 2015; Calavita, 2016; Tamanaha 2012; Menkel-Meadow 2019). Whilst there is no agreed definition of this type of approach, socio-legal studies generally focus on the realities of the law in action, the social impacts of the law, and the relationships of the law to broader questions of social structures (Harris 1983; McCrudden 2006; Feenan 2013). Interdisciplinary approaches used in socio-legal studies are therefore heavily cognisant of mutually constitutive and interactive relations of law and society, particularly socio-cultural, economic and political structures, forces, processes and dynamics as situated in societies, institutions, systems, communities and localities (Mezey 2015; Menkel-Meadow 2019). The description, analysis and evaluation of the interaction of law, legal actors and legal institutions "***with*** *and* ***within*** *society"* is key to the approach (Travers 2010). Evaluating the '*law in action'* thereby occurs in various ways and directly relates to how the law is affected by such social forces, processes and institutions; how the law consequently affects social institutions; how extant relevant social, cultural, economic and political realities impact on social (and *lived*) situations and contexts to which the law applies; and how the law creates, maintains and/or changes these situations and contexts (Schiff 1976; Epstein and King 2002; Epstein and Martin 2014).

By moving beyond doctrinal developments and arguments for law reforms, socio-legal studies are also particularly effective in focusing on '*non-uniform impacts* of *law'* (e.g. aspects of *'gender,*

ethnicity, race, class and other characteristics'), '*contextual conditions*' that may be necessary for legal policies to be effective; and observations of the '*unintended consequences*' of the operation of laws and legal institutions (Handler 1986; Seron 2016; Mant 2020).

My positionality as public health and human rights scholar

The importance of engaged socio-legal research in evaluating the various dimensions of the law in action as they relate to humane standards of detention and the right to health of people deprived of their liberty is central to this ***Portfolio of Works.*** Detention spaces to my mind function as distinct systems, institutions and communities operating ***'inside, across and within society'***, with varied communities and vulnerable groups living and working in detention spaces. I am fascinated by the social and structural dynamics and lived realities of confinement.

The ***Portfolio of Works*** illustrates how people in detention are among the most marginalised, stigmatised and invisible members of society. This is especially the case in Africa where the bulk of the ***Works*** were conducted, and where punishment and security remains at the forefront of public sentiment, and the situation (and health) of people living in prisons are neglected politically (Sarkin 2009; Jefferson and Jalloh 2019; Salah 2020; Van Hout and Wessels 2021c). We see the same in the growing securitisation agendas regarding immigration control in Europe (Frontex, 2023; Knipper 2016) and elsewhere (e.g in South Africa) (Van Hout and Wessels 2023).

Recognizing the fluidity between prison/detention and community/society as it relates to right to health is important to me. **"*Prison health is public health"*** was the underpinning principle of the Moscow Declaration (WHO 2003) and continues to be widely advocated for at the global levels (ICRC, 2023). Hence, the socio-legal approach felt best suited to me in the pragmatic sense given my various missions as technical expert on prison health (see UNODC, 2018:2021:2022; Van Hout et al. 2021; MENAHRA 2021; CoE 2021; UNAIDS 2023) and my experience as international UN evaluation consultant of HIV programmes in prisons in sub-Saharan Africa (Angola, Ethiopia, Kenya, Lesotho, Malawi, Mozambique, Namibia, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe) (UNODC ROSAF 2015:2017:2021); the Middle East and North Africa (Egypt, Morocco, Tunisia, Algeria, regional) (UNODC ROMENA 2019; MENAHRA 2021; UNAIDS 2023) and the South Mediterranean region (Algeria, Jordan, Morocco and the Occupied Territories of Palestine) (CoE 2021). Whilst I did not collate the ***Portfolio of Works*** with a value neutral stance, what was important to me was that the various socio-legal assessments were realistic, relevant and accepted by the various actors, including prison and immigration detainee communities themselves. See Chapter Seven.

The socio legal approach in the various ***Works*** also aligned to my research interests and grant portfolios at the time, given my academic background as Professor of International Health Policy and Practice. Many of the ***Works*** formed a component of multi-disciplinary health research projects funded by the Medical Research Council and Global Challenges Research Fund conducted in various countries (South Africa, Malawi, Zimbabwe) and regions (sub-Saharan Africa)(Van Hout and Mhlanga-Gunda

2019a;2019b; Van Hout and Chimbga 2020; Van Hout 2022c; Van Hout, Bigland and Mariniello 2022; Van Hout et al. 2022a; 2022c). Others were created out of pure interest and the need (I/we felt) to advocate for people deprived of their liberty and to highlight extraordinary phenomena and inadequate conditions of detention to the scientific, legal and policy communities (Russia, Ukraine, Europe, South Africa, global) (Van Hout 2020a:b:c; Van Hout and Aaraj 2020; Van Hout 2021; Van Hout and Crowley 2021; Van Hout and Wessels 2021a:2021b; Van Hout 2022a: 2022b; Van Hout, Fleißner and Stöver 2021: 2022; Van Hout, Srisuwan and Plugge 2022; Van Hout et al. 2022b; Van Hout 2023; Van Hout and Wessels 2023).

Adopting a socio-legal approach to assess right to health in detention spaces

The ***Portfolio*** recognises that whilst human and health rights of people in detention are enshrined in various core international human rights treaties which specify the standards for the promotion and protection of their rights, the extent to which these treaties and the treaty bodies operate depends on State acceptance (universal and effective ratification) and the Committees established under the treaties themselves (OHCHR 2012). Despite the human rights treaties and UN normative frameworks, States have discretion to define standards of humane treatment and adequate medical care of people deprived of their liberty (Lines 2008).

My ***Portfolio of Works*** is essentially concerned with how vulnerable groups and individuals deprived of their liberty are treated by institutions (for example immigration detention, penal), including the State itself, and how these are accountable to publicly promulgated laws, with equal enforcement and independent adjudication, and consistent with international human rights norms and standards. Socio-legal study formed the basis of my approach to scrutinise human rights, right to health and concepts of vulnerability in detention spaces before, during and beyond COVID-19. I felt that this was most appropriate in order to investigate the '*law in action'* as it related/relates to how legal norms (e.g. various detainee right to health obligations of the State under the international and regional human rights treaties and international instruments; application of UN normative standards of detention in prison and immigration detention systems and facilities; discrepancies between laws, UN normative standards, rule of law indicators) actually function in reality (e.g. societal, cultural, system and public respect for rule of law; the lived experience inside) and what actors shape their implementation (e.g. legislators, policy makers, prison authorities, civil society organisations, UN agencies, detainees and their families). The ***Portfolio*** acknowledges that this hinges on respect for rule of law as principle of governance (UN 2011) and government prioritisation, political will and domestic resources available to ensure detention systems respect and uphold the rights of those detained (Miller 1978). The respective ***Works*** consider whether the selected detention systems in Africa, Europe and the Russian held territories of Ukraine had/have a culture of respect for the rule of law regarding health and human rights assurance for those deprived of their liberty in various timeframes (historically, before, during and after COVID-19 contagion).

The various aspects of rule of law pertinent to detention spaces as contained in the ***Portfolio of Works*** are presented (and not limited to) in the Table *below*.

Rule of Law Indicator	**Key Aspects**
Due process	Arbitrary immigration deportation procedures, criminal justice functioning
Pre-trial detention and access to courts	Lack of respect to the set limits of pre-trial duration, high pre-trial rates in Africa, prisons over capacity
Conditions of detention	Environmental determinants of health (space, air, sanitation, hygiene, clean water, food, bedding, ventilation etc)
Access to medical care	Gender responsive, age appropriate (for example paediatric, older), timely, and competent.
Segregation	Racial, medical if HIV or COVID positive/symptomatic
Solitary confinement	Punishment or as form of medical isolation during COVID-19 lockdown measures
Disciplinary punishment	Transgender identity expression, deliberate exposure of political prisoners to COVID-19
Right to rehabilitation	Prison throughcare, reinsertion

Data collection in the various ***Works*** were deliberately multi-disciplinary (Banakar and Travers 2005) in order to explore the intricacies and various interpretations of the law and related phenomena pertinent to the right to health framework of ***'respect, protect and fulfil'*** in detention spaces. Data sources included empirical literature (systematic and scoping reviews, qualitative and quantitative, including rapid situation assessments collected in my own multi-stakeholder projects where the WHO (2020c) checklist[10] was used to evaluate human rights and preparedness, prevention and control of COVID-19 in prisons and other places of detention), UN agency reports, UN treaty body Committee reports, government and non-governmental organisation reports, investigative media reporting, UNODC/GDP global data and domestic and regional case law databanks). In my various ***Works*** relevant actors are the various governments, prison and immigration systems, individuals and groups deprived of their liberty, staff working in detention spaces, human rights defenders and civil society organisations, and UN agencies providing technical support in the selected countries. See also Chapter Seven.

Whilst the ***Works*** include some aspects of classic doctrinal research and positivism regarding legislation and judicial decisions (domestic, regional), this is compatible with the socio-legal approach (O'Donovan 2017). Assessments of situation and the law in action went beyond the *"black letter of the law"* and explored contextual phenomena, concepts and interplay of public, prison and individual health dynamics, and the relevant social and political dimensions which underpin the right to health of those deprived of their liberty. Analysis of the law, jurisprudence and due process were thereby directly linked to the right to health in detention phenomenon, the established realities on the ground, domestic and system degrees of respect for rule of law pertinent to detention, grounds for strategic litigation, and routes to legislative and policy reforms.

[10] See **Section A** Aim: To ensure that good principles and practice in prisoner treatment and prison management, as indicated by the United Nations Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules), are adhered to in the presence of a possible epidemic outbreak. To remind Member States that protective measures must never result in inhuman or degrading treatment of persons deprived of their liberty.

Many ***Works*** sought to garner an interrelated understanding of right to health within a broader appreciation of normative standards of detention and vulnerability of the detainee, by including an *analytic focus* on the processes of system decision-making by prison and immigration authorities who administer policies and the law; a *contextual analysis* of daily operational situations *('social facts'*) (Burns 2013) underpinned by key insights into socio-political and cultural dimensions, and the lived experiences of detention communities (staff, detainees); and a *thematic analysis* of diverse empirical and textual sources. They were cognisant of the dynamic relationship of the law which protects the rights of people deprived of their liberty, regardless of setting, and how it applies to social situations vital to understanding their unique situation behind closed walls. Of note is that many of the ***Works*** originate from low resource and fragile settings. This was carefully considered in order to avoid '*conceptual overreach'* in adopting an inflated notion of health (see Tasioulas 2021).

The ***Works*** illustrate the indeterminate nature of the law in action (see Banaker 2005; O' Donovan 2017), as it relates to conditions of detention and right to health when evaluated against the rule of law. They focus on the role and effect of the law in everyday life (legal consciousness and linkage to policy priorities including access to justice) and how law actually functions in particular contexts (e.g. in the rubicon of legal and human rights scholarship, political science, criminology and social science understanding of the lived realities in prisons, immigration detention and other closed spaces) and in society (see Ewick and Sibley 1998; Cowan 2004; Coomans, Grumfeld and Kamminga 2010; Daems, Van Zyl Smit and Snacken 2013; Van Zyl Smit and Appleton 2019). To various degrees and domestic and regional contexts, the various ***Works*** illustrate how the law itself is often unclear, and conceptualisation, interpretation and contextualisation forms substantive components of the legal process and legal thinking at various domestic (for example in South Africa, Zimbabwe, Malawi) and regional courts (African, European). Key case law is detailed in each ***Work*** [11] in combination with the aforementioned international human rights treaty standards and UN normative standards or soft law (previous chapter).

The ***Portfolio*** carefully considers how small steps will go a long way in incorporating a modest understanding of health in alignment with various rule of law indicators pertinent to living in detention spaces. In so doing, the combined empirical social sciences, review and public health approaches in my multi-disciplinary projects recognise the contextual forces of various dynamic socio-cultural and political realities impacting on prioritisation of health in detention, the upholding of rule of law and the rights of those living and working in detention spaces, supported *'bottom up'* mediation of the law, and help/helped to shape legal decisions, legislation and government policy. Various themes, non-uniform impacts of the law, contextual conditions and unintended consequences of the law in action are further unpacked in the human rights mapping exercise in Chapter Six.

[11] Key case law is presented in the **Works** themselves. See **Annex One**. For example see Table 1 in Van Hout MC. 2023; see Tables 2-4 in Van Hout and Wessels, 2023; see Table 2 in Van Hout. MC 2022b, see Tables 1-2 in Van Hout MC. 2022c. Others have key case law references cited in text.

Chapter Five: Overview of the Works

> *"It is in your hands, to make a better world for all who live in it."*
> (Nelson Mandela, 1918-2013)

Essentially the ***Portfolio of Works*** focuses on right to health when deprived of liberty and includes a pertinent focus on the unique situational, gendered and health vulnerabilities of those deprived of their liberty spanning a range of detention spaces.

Gender, age and other vulnerabilities in detention spaces

Six ***Works*** (global, European, South African) focus on the situation of women in detention (prison and immigration detention), their exposure to violence and poor conditions, and their protracted access to gender responsive healthcare during deprivation of liberty (Van Hout and Chimbga 2020; Van Hout 2021; Van Hout and Wessels 2021b; Van Hout, Fleißner and Stöver 2021; 2022; Van Hout, Srisuwan and Plugge 2022). Collectively at the global level; and focusing in on both the unique situation in African prisons (Malawi, South Africa, Zimbabwe) and that in immigration detention settings in South Africa and Europe, the ***Works*** illustrate the precarious situation of women in detention (often accompanied by their babies and infants). They support continued global evidence of systemic failures to maintain minimum and equivalent standards of care for women, resource women's health needs and uphold their gendered health rights, and protect them from inter-personal custodial violence (peers, prison officials). They also highlight the need for States to utilise non-custodial measures, particularly for non-violent minor offences perpetrated by women.

These ***Works*** on women in detention are further complemented by three ***Works*** which assess the situation of babies and infants living with their mothers in detention at the global level and in sub-Saharan African prisons; and the situation of juveniles in sub-Saharan African prisons (Van Hout and Mhlanga-Gunda 2019a;2019b; Van Hout et al. 2022b). The global socio-legal assessment of progress in adopting the Convention on the Rights of the Child and alignment with United Nations normative standards of care in prisons with regard to these children reveals continued challenges worldwide in achieving a balance between protection and '*best interests of the child'*; and punishment of the mother. Multiple health and developmental vulnerabilities of the infant living in prison are exacerbated. In the sub-Saharan African region, and many other low resource settings, their situation is underpinned by the lack of basic necessities, inadequate hygiene, sanitation and safe drinking water, exposure to disease in overcrowded cells, inadequate nutrition, lack of clothing and bedding, and difficulties accessing paediatric care. In many cases prison systems do not hold a separate resource allocation for babies and infants, and mothers are expected to share basic staples. Reported paediatric morbidity and mortality is deeply concerning. Juveniles in the region are held for lengthy periods in pre-trial detention in deplorable conditions and systemic detention of juveniles with adults continues. Sexual violation and rape of juveniles is reported, and indicative of the lack of safety assurances by prison systems, and exploitation of the young by officials and older prisoners.

A more recent ***Work*** builds on this aspect of prison life where prisoners' (often under-age or young) exposure to same-sex sexual violence is invisible in political, legal and public health agendas in Malawi, despite congested prison conditions which fuel exposure of the vulnerable to sexual violence (and HIV) and the necessity to engage survival sex (Van Hout et al. 2022a). There is substantial neglect in terms of prison health responses to sexual power dynamics, rape and prevention of exposure to HIV/AIDS.

When assessing further unique often sexual vulnerabilities in detention spaces the ***Portfolio of Works*** includes a specific focus on transgender prisoners (globally/South Africa) who are exposed to substantial challenges, risks and harm when deprived of their liberty. There is limited global data on the numbers of incarcerated transgender people. There are also inherent difficulties for prison authorities regarding placement, security aspects and management of transgender persons. Two ***Works*** illustrate how transgender prisoners' situation has been viewed as a *''double punishment''* in terms of the common prison system's general lack of gender identity recognition and consequent exposure of trans prisoners to sexual abuse and traumatic experiences of detention often tantamount to torture (Van Hout and Crowley 2021; Van Hout 2022b). These ***Works*** employ a particular lens focusing on the rights assurances of transgender prisoners in terms of the principles of equality, dignity, freedom of expression, dignified detention and the prohibition of inhumane treatment. The equality rights of trans-prisoners (particularly trans-women as most vulnerable) are framed to encompass their need to gender express and be treated with dignity and respect as positioned within the boundaries of reasonable and safe accommodation. There are also competing rights to safety in terms of women in prison, where transgender women are placed.

Vulnerability in this ***Portfolio*** also relates to various procedural irregularities in South Africa; one ***Work*** relates to the situation of the mentally ill and mentally incapacitated (for example learning, speech and language difficulty) in the criminal justice system, and how the Criminal Procedure Act still does not fully comply with the Protocol to the African Charter on the Rights of Person with Disabilities in criminal proceedings (Van Hout and Wessels 2021a). The second South Africa ***Work*** illustrates procedural irregularities in immigration detention processes, rising xenophobic sentiment and securitisation of immigration and deplorable standards of detention for people awaiting deportation (Van Hout and Wessels 2023).

Lastly, at the tail end of the COVID-19 pandemic, and during the onset of the Russian invasion of Ukraine, one ***Work*** was published as an invited commentary focusing on the right to life and of health of those detained in the course of the Russian military operation (Van Hout 2023). Prohibition of torture and other ill-treatment of people deprived of their liberty is shared across international human rights and humanitarian law frameworks. It discusses the (*at the time*) pending departure of Russia from the European Court of Human Rights (16 September 2022) and the imperatives of a swift response by the UN Human Rights Council to instigate new mechanisms to monitor Russian detention standards (for

example the Special Rapporteur on the Russian Federation) and to ensure that the lives, health and well-being of those detained are protected, regardless of their status as prisoner, prisoner of war or other.

COVID-19 and the further amplification of vulnerability

The ***Portfolio of Works*** essentially contributes to the public health and human rights literature base concerning the myriad vulnerabilities of various populations deprived of their liberty (and those working in same environments), the extent to which normative standards of detention were/are upheld in various detention spaces (prison, immigration detention, prisoner of war facilities), and the impact of contagion (before, during and beyond COVID-19) on their fundamental right to life, right to health (including disease preventative measures and access to appropriate medical care) and protection from cruel, degrading or inhuman treatment.

Seven ***Works*** concern the unique impact of COVID-19 on standards of detention in several sub-Saharan African countries (Malawi, Zimbabwe, South Africa) and in European immigration detention settings (Van Hout 2020a; 2020b; Hout and Aaraj 2020; Van Hout 2022c; Van Hout, Bigland and Mariniello 2022; Van Hout et al. 2022c; Van Hout 2023). They include detail on the very vulnerable groups of detained during COVID-19 State disaster measures (women, children, the chronically ill). Health rights during this time focused broadly on detainee right to protection against disease, the risks of exposure to airborne diseases such as COVID-19 and TB, but also HIV and viral hepatitis during cell lockdowns and prison restrictions; difficulties in ensuring adequate medical isolation and disinfection measures, and access to diagnostics and healthcare, and upholding of normative standards of care pertaining to the general environmental determinants of health (ventilation, minimum floor space, clean water, sanitation, hygiene and nutrition, access to outside air).

Of note is that the occupational health rights of detention facility staff were also ill considered at the time. A final COVID-19 ***Work*** builds on this startling lack of State focus of the rights of prison staff in sub-Saharan Africa, and disregard for their right to safe working environments and protection from disease (Van Hout 2020c).

Chapter Six: A Human Rights Mapping of Right to Health in Detention Spaces

> *"What counts in life is not the mere fact that we have lived. It is what difference we have made to the lives of others."*
> (Nelson Mandela, 1918-2013)

As a collection and individually the ***Works*** provide substantive detail on States' positive obligations under international, African/European regional and domestic human rights law to protect those living and working in detention spaces from contagion, and ensure adequate standards of detention for health and wellbeing are provided by the State. The normative content of right to health entitlements and State obligations, and minimum standards of detention, and subsequent assessments for potential rights violations according to the international and regional human rights treaties, UN norms and standards and jurisprudence (domestic, African, European, global) are detailed in each ***Work*** relevant to each context/region of the world. Where pertinent some significant cases are referred to in this final *Chapter* of the *Introduction.*

In order to avoid repetition and to provide an adequate *Introduction* to the coherence of the ***Portfolio***, this *Chapter* presents a human rights mapping exercise of the ***Works*** underpinned by the health in detention conceptual (and legal) framework of ***'respect, protect and fulfil'***. Illustrative examples for each ***Work*** are provided, linking international human rights frameworks to right to heath in detention, and to UN norms and standards regarding health rights of people deprived of their liberty. Following the mapping exercise (see Table *following page*), a thematic narrative is provided which connect the ***Works*** together..

- *Conditions of Detention*
- *Access to healthcare equivalent to that in the community*
- *Exposure to communicable diseases and COVID-19 disruption*
- *Intersectional discrimination and unequal treatment within detention spaces: The case for expanding vulnerability concepts*
- *Securitisation agendas, de-prioritization of resourcing and barriers to accountability*
- *Furthest behind first: Leveraging for detention reforms*

Two main arguments are presented. *First,* the argument to uphold right to health in its broadest sense by working towards improving environmental, occupational and infrastructural standards of detention beyond COVID-19 timeframes and cognisant of the equalising parameters in the Sustainable Development Agenda 2030 (UN General Assembly 2015). This is followed by a *second* argument to encourage State reconsideration and appreciation of the contextual, intersectional and evolving nature vulnerability of those deprived of their liberty (beyond age, gender, indigenous descent, minority group membership, extreme poverty) to include concepts of health vulnerability cognisant of ill-health and risk to health in closed spaces. It then illustrates how collectively and individually each Work advocates for policy, practice and legislative reforms to better respect, protect and fulfil the health rights of all deprived of their liberty globally, regionally and domestically

Table: Human rights mapping of health in detention (respect, protect and fulfil) [12]

Human rights and human rights principles	Relevance to Detention Spaces	Relevance to Vulnerable Groups of Detainees	Relevant United Nations normative standard of detention	Potential violations of United Nations normative standards and areas for development in settings of the Works
The obligation to respect *the right to health requires States to,* inter alia, *refrain from denying or limiting equal access for all persons, including prisoners or detainees, minorities, asylum seekers and illegal immigrants, to preventive, curative and palliative health services; abstain from enforcing discriminatory practices as a State policy; and abstain from imposing discriminatory practices relating to women's health status and needs.*				
Core obligations under right to health (CESCR *para 43*) unequivocally relevant to healthcare in detention	To ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalized groups. To provide essential drugs, as from time to time defined under the WHO Action Programme on Essential Drugs; To ensure equitable distribution of all health facilities, goods and services To adopt and implement a national public health strategy and plan of action, on the basis of epidemiological evidence, addressing the health concerns of the whole population; the strategy and plan of action shall be devised, and periodically reviewed, on the basis of a participatory and transparent process; they shall include methods, such as right to health indicators and benchmarks, by which progress can be closely monitored; the process by which the strategy and plan of action are devised, as well as their content, shall give particular attention to all vulnerable or marginalized groups.	As above	Nelson Mandela Rule 4(2),24,25,26,27,28, 29, 30,31,32,33,34, 55,109,110 Bangkok Rule 6,7,8,9,10,11,12,13,14,15,16,17,18, 25,33,34,35,48 WMA Actions 5-12 Principles of Medical Ethics 1-6	(Inadequate) standards of healthcare in detention spaces (Global, African, European) • Coverage and scale • Quality of provision (clinical competence and staff resourcing) • Lack of trust in staff, concerns around confidentiality of COVID-19 testing results • Medicines and testing kits supply (interrupted, insufficient) • Alignment of prison monitoring data to domestic public health surveillance • Alignment to domestic COVID 19 information communication (public health) • Alignment to domestic COVID 19 mitigation measures (restrictions) • Consideration of particularly vulnerable groups based on age (children, juveniles, older detainees), gender (sex and gender expression), minority community (LGTBTQI; migrants, refugees and asylum seekers)
Obligations of comparable priority under right to health (CESCR *para 43*)	To ensure reproductive, maternal (prenatal as well as post-natal) and child health care;	As above	Nelson Mandela Rule 4(2),24,25,26,27,28, 29,	(Inadequate) standards of healthcare in detention spaces (Global, African, European) • Coverage, scale and accessibility of paediatric and women's healthcare • COVID-19 and other disease vaccination equity

[12] Part of the table is adapted Table from L Ferguson and colleagues, 'Leaving No One Behind: Human Rights and Gender as Critical Frameworks for U=U' (2022) 24(2) *Health and Human Rights* 1.

unequivocally relevant to environmental determinants of health relative to standards of detention	To provide immunization against the major infectious diseases occurring in the community; To take measures to prevent, treat and control epidemic and endemic diseases; To provide education and access to information concerning the main health problems in the community, including methods of preventing and controlling them; To provide appropriate training for health personnel, including education on health and human rights		30,31,32,33,34, 55,109,110 Bangkok Rule 6,7,8,9,10,11,12,13,14,15,16,17,18, 25,33,34,35,48 WMA Actions 5-12 Principles of Medical Ethics 1-6	• COVID-19 and other communicable disease mitigation, treatment and care • Public health information and awareness raising (especially HIV, COVID-19) • Training and skills acquisition of medical staff in prisons (clinical competencies, human rights).
Participation	The inclusion and full participation of all key stakeholders and affected detention communities of detainees and of staff, is key to prison health responses.	Meaningful participation of detention communities, those living and working in detention spaces helps ensure prison healthcare availability, acceptability, decision-making and effectiveness in terms of continuity of care spanning detention and community.	Bangkok Rule 67,68,69,70	Transgender participation in South African[13] prison reforms and staff capacity building is minimal. Staff and prisoners were ill informed and ill resourced to protect themselves from disease in prisons during COVID-19 (Africa, Malawi[14], Zimbabwe[15], South Africa). Invisible nature of women in prison and immigration health systems and policies (global, European immigration, South Africa post apartheid) Exposure to sexual violence in Malawi's prisons is invisible in political, legal, human rights and public health/HIV agendas
Equality and non-discrimination	Standards of detention and related health services in detention settings should respect, protect, and fulfill the	Efforts are needed to stop discrimination against more vulnerable detainees (those living	Nelson Mandela Rule 2, 5, 109,110 Bangkok Rule 5,38,39,41	Transgender equality rights in global and South African prisons positioned within the boundaries of safe and reasonable accommodation, and ability to gender express. Prison settings were initially not part of domestic COVID-19 responses in South Africa, Malawi and Zimbabwe.

[13] South Africa ratified the ICCPR (signed 3 Oct 1994) on10 Dec 1998; CCPR OP2 on 28 Aug 2002; CAT (signed 29 Jan 1993) on 10 Dec 1998; CAT OP (signed 20 Sep 2006) on 20 Jun 2019; ICESCR (signed 3 Oct 1994) on 12 Jan 2015; CRC (signed 29 Jan 1993) on 16 Jun 1995; CEDAW (signed 29 Jan 1993) on 15 Dec 1995. It a**ccepts** individual complaints under the CCPR-OPT1, CEDAW-OP, CAT Article 22, and **accepts** inquiry procedures under CAT Article 20 and CEDAW-OP Articles 8-9. It does **not accept** individual complaints/ inquiry mechanisms under CRC-OP.

[14] Malawi ratified ICESCR on 22 Dec 1993; ICCPR on 22 Dec 1993; CAT on 11 Jun 1996; CRC on 2 Jan 1991; CEDAW on 12 Mar 1987. It has **not** ratified the CAT-Optional Protocol. It a**ccepts** individual complaints procedures under ICCPR-OP1 and a**ccepts** the inquiry procedure under CAT Article 20. It d**oes not accept** individual complaints procedures under ICESCR -OP the Optional Protocol to the ICESCR-OP, CEDAW-OP or under the CAT Article 22.

[15] Zimbabwe ratified ICCPR; ICESCR and CEDAW on 13 May 1991; CRC was ratified (signed 8 Mar 1990) on 11 Sep 1990. It has **not** ratified the CAT or the CAT-Optional Protocol. It d**oes not accept** individual complaints procedures or inquiry procedures under any of these treaties.

	rights to equality and to non-discrimination for all detainees	with HIV or other chronic conditions, sexual minorities, victims of sexual assault, transgender, women, children, people with mental illness or impairment, older detainees). Equitable distribution of treatment and support services to all on a non discriminatory basis is essential.		Health and gender/child vulnerability within European and South African immigration detention. Inadequate accommodation and standards of detention of women (global, European immigration, South Africa post apartheid) Lack of care of mentally ill/incapacitated into South African prisons. Womens and children's ability to access gender sensitive and age appropriate healthcare (HIV, mental health, drug dependence, reproductive, paediatric, menopause) (global, African) Discrimination against same-sex sexualities and criminalisation of same-sex activity in Malawi.
The right to health includes the availability, accessibility, acceptability, and quality of the goods and services provided. CESCR General Comment 14. (CESRC 2000)				
	Availability: Information, facilities, goods, and services should be available in detention spaces and address the underlying determinants of health, including those relevant to the prevention, care, and treatment of poor health and diseases (communicable and non-communicable)	Availability: Preventative, curative and support health services must be available to all living and working in detention spaces, including those identified as minority or vulnerable detention groups.	Nelson Mandela Rule 4(2),24,25,26,27,28, 29, 30,31,32,33,34, 55,109,110 Bangkok Rule 6,7,8,9,10,11,12,13,14,15,16,17,18, 25,33,34,35,48 WMA Actions 5-12 Principles of Medical Ethics 1-6	(Inadequate) standards of detention in Russia[16] and Russian held territories of Ukraine (environment/healthcare) Insufficient COVID detection and mitigation measures in prisons in South Africa, Malawi and Zimbabwe during COVID-19 (public health information, testing capacity, treatment, quarantine capacity). (Inadequate) standards of detention of European and South African immigration detention spaces (environment/healthcare) Inadequate coverage of gender and responsive healthcare services (HIV, gender affirming, mental health, drug dependence, reproductive, paediatric, menopause) (global and African prisons, European immigration detention) Lack of HIV coverage and ability to protect against HIV transmission (condom provision) in Malawi prisons, exploitation of the vulnerable young males. Lack of care of mentally ill/incapacitated into South African prisons.
	Accessibility: Accessibility of health facilities, goods and services to all living and working in detention spaces, especially the most vulnerable and affected, encompasses non-discrimination, physical accessibility, affordability, and access to information. Health related information, treatment, and services	Accessibility: Access to clear information is fundamental, alongside sustained access to gender and age sensitive preventative, curative and support services for all living and working in detention spaces,		(Inadequate) standards of detention in Russian held territories of Ukraine (healthcare) COVID detection and mitigation measures in prisons in South Africa, Malawi and Zimbabwe during COVID-19 (public health information, testing capacity, treatment, quarantine capacity). (Inadequate) standards of European and South African immigration detention spaces Inadequate accessibility of gender and age responsive healthcare services (HIV, gender affirming, mental health, drug dependence, reproductive, paediatric, menopause) (global and African prisons, European immigration detention) Lack of HIV coverage and ability to protect against HIV transmission (condom provision) in Malawi prisons

[16] The Russian Federation has ratified ICCPR (signed 18 Mar 1968) on 16 Oct 1973; CAT (signed 10 Dec 1985) on 3 Mar 1987; ICESCR (signed 18 Mar 1968) on 16 Oct 1973; CRC (signed 26 Jan 1990) on 16 Aug 1990; and CEDAW (signed 17 Jul 1980) on 23 Jan 1981. It has **not** ratified the CCPR OP2 or the CAT-Optional Protocol. It a**ccepts i**ndividual complaints under the CCPR-OPT1, CEDAW-OP, and CAT Article 22, and a**ccepts** inquiry procedures under CAT Article 20 and CEDAW-OP Articles 8-9. It d**oes not accept** individual complaints under ICESCR-OP or the CRC-OP-IC.

	should be available without fear of stigma, discrimination, or abuse from prison management, prison officials, detention health care providers, or individuals. These should be promoted in laws and detention policies to increase physical accessibility, resourcing, and relevant information.	including those identified as minority or vulnerable detention groups.		
	Acceptability: Health information, facilities, goods, and services in detention spaces must be respectful of the sex, gender, gender expression and lifecycle requirements in detention spaces; and designed to respect confidentiality.	Acceptability: Health information, facilities, goods, and services in detention spaces requires ongoing engagement with public health surveillance and with primary/secondary/tertiary care services in the domestic health systems.		Transgender equality rights in South Africa positioned within the boundaries of safe and reasonable accommodation, and ability to gender express. Delays and concerns around COVID-19 testing confidentiality and delays. (Inadequate) standards of of European and South African immigration detention spaces (healthcare) Inadequate gender and age responsive healthcare services (HIV, gender affirming, mental health, drug dependence, reproductive, paediatric, menopause) (global and African prisons, European immigration detention) Discrimination against same-sex sexualities in Malawi prisons
	Quality: Information, goods, and services must be scientifically and medically appropriate and of good quality in detention spaces. Preventative, curative and support responses requires accurate information and diagnostics, effective medications and a well-trained detention health workforce.	Quality: Poor-quality health information, services, drugs, or diagnostics will compromise the health of those living in detention spaces, and can lead to low uptake and mistrust of providers and care plans.		(Inadequate) standards of detention in Russian held territories of Ukraine (healthcare) Poor COVID detection and mitigation measures in prisons in South Africa, Malawi and Zimbabwe during COVID-19 (public health information, testing capacity, treatment, quarantine capacity). Inadequate) standards of European and South African immigration detention spaces (healthcare) Low quality of gender and age responsive healthcare services (HIV, gender affirming, mental health, drug dependence, reproductive, paediatric, menopause) (global and African prisons, European immigration detention) Lack of HIV coverage and ability to protect against HIV transmission (condom provision) in Malawi prisons. Lack of care of mentally ill/incapacitated into South African prisons.
The obligation to protect *the right to health includes,* inter alia*, the duties of States to adopt legislation or to take other measures ensuring equal access to health care and health-related services provided by third parties. States should also ensure that third parties do not limit people's access to health-related information and services.*				
Accountability	Governments should be held accountable for the steps they take toward ensuring adequate standards of detention and access to health care is ensured, including the most vulnerable in detention spaces; and laws and policies relevant to people living and working in detention spaces.	Detention communities should have access to functional accountability mechanisms if they perceive government to be failing to fulfill their health rights obligations.	Nelson Mandela Rule 71, 83,84,85. WMA Action 12	Russian exit of the European Court of Human Rights Role of the UN Special Rapporteur on the Russian Federation. Transgender equality rights in prisons (global, South Africa). Strategic litigation by civil society in South Africa, Malawi and Zimbabwe post COVID-19. Litigation by vulnerable immigration detainees at various African and European levels Advocacy for women and children living in prisons, low visibility in prison policies and practices (global, African) Lack of protection against HIV and sexual violence in Malawi prisons. Irregularities in due process regarding the mentally ill/incapacitated in South African justice systems.

The obligation to fulfil *the right to health requires States parties,* inter alia*, to give sufficient recognition to the right to health in the national political and legal systems, preferably by way of legislative implementation, and to adopt a national health policy with a detailed plan for realizing the right to health. This obligation entails also the state to take positive measures that enable and assist individuals and communities to enjoy the right to health."*				
Human and health rights	Human rights are legally guaranteed under international human rights law. Relevant to health in deprivation of liberty, they protect against actions that interfere with fundamental rights and human dignity and support the agency of individuals and detention population to achieve health rights.	Human rights norms and standards provide mechanisms to guarantee equal access to adequate standards of detention, health information and health care services and treatment.	Nelson Mandela Rule 1, 3, 5, 11-23,35,42-46 Bangkok Rule 5, 6 WMA Actions 1-5 Principles of Medical Ethics 1-6	Inadequate standards of detention in Russian held territories of Ukraine (environment/healthcare) Violation of transgender human rights in prisons (global, South African). Systemic deficits in infrastructure, resourcing and efficiency of criminal justice systems: disease mitigation and environmental determinants of health (ventilation, minimum floor space, water, sanitation, hygiene and nutrition) in prisons during COVID-19 (Africa, Malawi, Zimbabwe, South Africa). Inadequate standards of European and South African immigration detention spaces (environment/healthcare) Ill-resourced and inadequate detention conditions for all women and children living with them (global, European immigration, African) Women's (in) ability to access gender sensitive and age appropriate healthcare (global) Inadequate protection of the vulnerable against custodial forms of sexual and physical violence (juveniles, women, Malawi) Direct violations of the best interests of the child (treatment of children as prisoners, difficulties in securing identity documents, poor detention conditions, exposure to violence, lack of access to child-appropriate healthcare, and lack of transparent data) (global, African). Lack of care of mentally ill/incapacitated into South African prisons.
Core obligations under right to health (CESCR *para 43*) unequivocally relevant to environmental determinants of health relative to standards of detention	To ensure access to the minimum essential food which is nutritionally adequate and safe, to ensure freedom from hunger to everyone To ensure access to basic shelter, housing and sanitation, and an adequate supply of safe and potable water;	As above	As above	(Inadequate) standards of accommodation in detention spaces (Global, African, European) • Safety from violence • Space • Ventilation • Food • Clean water, disrupted supply of water. • Sanitation and hygiene • Bedding and clothing • Access to outside spaces and fresh air Particularly worsened during COVID-19 and State disaster measures.

Conditions of detention

The coherent theme of '*right to health and humane standard of detention'* connecting the ***Portfolio of Works*** spans the rights of all detained (regardless of degree of vulnerability) to attain health rights, protect their health and ensure access to healthcare equivalent to that available in the community, and stresses the requirement to fully consider broader dimensions of health relating to environmental determinants of health and right to humane treatment of those deprived of their liberty. There are inherent complexities with regard to providing and maintaining normative standards of detention which impact on right to health spanning obligations to respect, protect and fulfil right to health, for example the right to access medical care, the right to adequate environmental determinants of health and so forth, but also on establishing the threshold of severity of inhuman conditions of detention.

The ***Portfolio*** stresses the importance of adopting a broad definition of prison health (not limited to healthcare), one which fully considers the impact of inadequate environmental conditions of detention on individual, community and staff health and wellbeing. Inadequate conditions of detention (including those which exacerbate risk to health in the form of disease or exposure to violence and harm) can amount to ill treatment, and impact substantially on detainee population morbidity and mortality rates. The UN Subcommittee on the Prevention of Torture (2012:2014) has considered that "*extreme*" overcrowding (in this instance in Brazil, and in Mali resp) potentially amounts to ill-treatment and possibly torture when prolonged and combined with unacceptable material conditions (see also CoE 2015; UN CAT 2018; UNODC 2013). In addition to overcrowding, congestion itself is underpinned by the inter-dependencies of inadequate food, clean water, accommodation, access to outside air, sanitation and hygiene, space, exposure to violence and sub-optimal access to healthcare, all of which compromise the realisation of health and safety of those living and working in detention spaces (see UN CESRC 2000 *para 3*). Poor conditions, necessity to negotiate survival and overcrowding fuels violence. Some of the ***Works*** (global, African) refer to exposure to interpersonal and custodial violence, with particular reference to the very vulnerable navigating prison dynamics and power hierarchies (for example (trans) women, sexual violation of the weak or juveniles). Of note is that in its judgment of 2 May 2023 in *S.P. and Others v. Russia,* the European Court of Human Rights found that prison violence resulting from informal hierarchy of prisoners undermined detainees' dignity in breach of Article 3 of the European Convention of Human Rights.

Several of the African ***Works*** (regional, South African, Malawi) including where same sex sexuality is criminalised highlight the complexities of homosexuality, sexual violence, HIV transmission, and survival sex transactioning in prisons. The right to be protected from violence goes beyond the right to request protection in solitary cells or the separation of juveniles from adults (UN General Assembly 1991c). Sex between men in prisons remains '*vastly underreported, as an internal kind of "omertà" is common in the prison milieu'*(Reyes 2001). This is especially the elephant in the room where Africa is concerned.

At the European Court of Human Rights there have been challenges in determining sufficient personal space (under *Article* 3), in terms of quantifying a specific number of square metres that should be allocated to a detainee in order to comply with the Convention (ECtHR 2021). Spatial density defines living space per detainee or number of beds (Simpson et al. 2019). There are two quantifiable international standards (3.4m2 and 3.5m2 per person for multiple occupancy cells), and two regional standards (4m2 per person in Europe and 5.75m2 or 4m2 per person in Australia and New Zealand). For example the average South African prisoner in a communal cell does not have the bare minimum which could be declared by courts as cruel or degrading (Steinberg 2005; Muntingh 2020). In Europe, when the space per detainee falls below 3 sq m, violation of the CAT is automatically assumed by the ECtHR (see *Muršić v. Croatia)*. Crucial additional factors considered by the European Court of Human Rights regarding health rights in prisons include the duration of detention, access to outdoor exercise, access to private toilets, natural light and fresh air, ventilation, adequacy of room temperature, general compliance with basic sanitary and hygiene requirements, and the health status of the detainee (see *Muršić v. Croatia*; *Samaras and Others v. Greece*; *Varga and Others v. Hungary*). Hygiene and sanitation in particular are crucial components of an environmental health response (for example the presence of fleas, bedbugs, lice, rodents), and are identified in the European Court of Human Rights jurisprudence as underpinning the right of a prisoner to a humane environment of detention (see *Ananyev and Others v. Russia*; *Neshkov and Others v. Bulgaria*). These European cases on rights of prisoners are relevant to the context of immigration detention, even though the UN Special Rapporteur on the Human Rights of Migrants has emphasised many times that *"Migration-related detention centres should not bear similarities to prison-like conditions"*(IOM 2011).

In terms of key case law, at the African Court/Commission systems violations of the African Charter on Human and People's rights (OAU 1982) to health regarding poor conditions of detention have been established (e.g. *Free Legal Assistance Group,Lawyers' Committee for Human Rights, Union Interafricaine de l'Homme, Les Te´moins de Jehovah v. Zaire; International PEN and Others v. Nigeria ; Malawi African Association and others v. Mauritania*). Several refer to congestion, inadequate nutrition, poor sanitation, hygiene and ventilation (all of which are crucial to mitigation of disease transmission and general ill-health of detainees) (e.g *Konate´ v. Burkina Faso*; *Abubakari v. Tanzania*; *Guehi v. Tanzania*). A broad range of cases at the African Commission on Human and Peoples Rights also refer to arbitrary detention, violence, abuses and poor conditions of immigration detention (e.g. *Organisation Mondiale contre la torture and Others v Rwanda*; *Abdel Hadi, Ali Radi & Others v Republic of Sudan*; *African Institute for Human Rights and Development (on behalf of Sierra Leonean Refugees in Guinea) v Republic of Guinea*; *Doebbler v. Sudan* and others).

South Africa as another example has a more developed jurisprudence than Malawi and Zimbabwe regarding the right to health of prisoners, including the abolition of capital punishment in 1995 *(S v. Makwanyane and Another*) and establishment of the fundamental rights of prisoners to adequate accommodation, nutrition and care (*Van Biljon and Others v. Minister of Correctional*

Services and Others; *B and Others v. Minister of Correctional Services and Others)* (Nagisa-Keehn and Nevin, 2018) (see also the next section on *Access to healthcare equivalent to that in the community, and exposure to transmissible diseases*). In *McCallum v. South Africa*, the UN Human Rights Committee ruled that South Africa had violated *Articles* 10(1), and 7 of the International Covenant on Civil and Political Rights in conjunction with *Article* 2(3) because prison officials had not investigated a prisoner's ill-treatment and sexual abuse in prison (and denied him access to medical care (including HIV testing), legal assistance and his family). In 2016, the inhumane and congested conditions for pre-trial detainees in Pollsmoor prison were challenged by civil society, which resulted in a court ruling that the State had violated prisoners' constitutional rights to health and that conditions of detention were inconsistent with human dignity (*Sonke Gender Justice v. Government of South Africa*). Not too far away in Malawi, for example there is one ground-breaking case from 2009 which illustrated the deplorable conditions of detention in its prisons (*Gable Masangano vs The Attorney General, Minister of Home Affairs and Chief Commissioner)* where the *Court* stated; *"…packing inmates in an overcrowded cell with poor ventilation with little or no room to sit or lie down with dignity, but to be arranged like sardines violates basic human dignity and amounts to inhuman and degrading treatment."* Despite reference to absence of adequate nutrition (amongst other basic provisions such as clean water, clothing) little has changed and at the time of writing, Malawi prisons continue to experience a substantial lack of food provisions for its prison population (including children living in prisons with mothers), in part due to climate change and the scarcity of grain supplies coming from the Ukraine into Africa (see UN Human Rights Special Rapporteur on Right to Food 2013; The Malawi Times 2022).

Access to healthcare equivalent to that in the community

Healthcare in prisons and other closed settings should act to promote fundamental human rights, should not focus solely on curative care, and should incorporate preventive measures, information and health promotion in order to ensure sustainable health outcomes beyond detention and into the community (Rogan 2017; ICRC 2023). Given the general poor health of detention populations achieving equivalence of care is challenging (Niveau 2007; Exworthy et al. 2011; Charles and Draper 2012; ICRC 2023). The balance of equivalence versus equity are applicable, with regard to entry level ill-health, and the requisite need for healthcare and treatment in these very vulnerable communities of detainees. The ***Works*** collectively illustrate to varying degrees how dimensions of availability, accessibility, acceptability and quality are inadequate in the select detention spaces. The ***Portfolio of Works*** touches upon aspects of inequitable health outcomes linked to discriminatory practices in prison healthcare, for example the protracted access to gender affirming products and healthcare itself, lack of consideration of women, and older women's health needs, lack of health resources allocated to children in prison and so on.

The UN Human Rights Committee (2019) specifies that governments (in the cross cutting *"due diligence"* obligation) have a "*heightened duty of care to take any necessary measures to protect the lives of individuals deprived of their liberty"* as they "*assume responsibility to care for their lives*." The State's failure to provide preventative health services) and access to healthcare may implicate prisoners' right to life (as observed by UN treaty body committee reports on Russia, Moldova and Georgia) (UN HRC 2002; UN CESRC 2003:2011) (see also the following section *Exposure to communicable diseases and COVID-19 disruption*). The protection of human dignity and the prevention of cruel, inhuman and degrading treatment (for example violations observed in the ***Works*** include denial of right to access to disease testing, medical care, and medical parole) should underpin all healthcare decisions in the detention space (see UN 1955; UN General Assembly 1988; UN HRC 2003; Van Zyl Smit and Snacken 2009; Kerr 2015; Cliquennois and Snacken 2018, ICRC 2023). The key example here is COVID-19 and other examples include the lack of access to the comprehensive HIV package in African prisons and the unwillingness to consider harm reduction (condoms, opioid substitution treatment) in prisons continues to protract efforts to eliminate HIV transmission (for example Malawi).

For example at the African regional level, in addition to establishing inadequate conditions of detention, cases also refer to the rights of prisoners to adequate medical care (medication and appropriate nutrition for chronic ill health) when in detention *(Lohe´ lssa Konate´ v. Burkina Faso*; *Mugesera v. Rwanda*). Where denial of medical intervention is cited, this is additional to a ruling of inhumane or degrading treatment as constituting physical abuse of prisoners (*Krishna Achuthan (On behalf of Aleke Banda), Amnesty International (On behalf of Orton and Vera Chirwa) v. Malawi; Constitutional Rights Project and Civil Liberties Organisation v. Nigeria*). South African judgements have ruled that people living with HIV in prison have a right to medical treatment and ordered correctional services to provide anti-retroviral treatment to those prescribed treatment (*Van Biljon and Others v. Minister of Correctional Services and Others*; *B and Others v. Minister of Correctional Services and Others; EN and Others v. Government of RSA and Others* and others). Several others concern prisoner right to medical parole for the terminally ill (including those living with HIV), where denial of the same violated the right to detention conditions consistent with human dignity (*Stanfield v. Minister of Correctional Services*; *Du Plooy v. Minister of Correctional Services*; *Mazibuko v. Minister of Correctional Services*). Despite these various rulings, implementation and scale up of HIV programming in South African prisons was challenged and took several years. Similar efforts are observed in Malawi with regard to conditions of detention, exposure to TB and addressing multi-drug resistance TB in prisons (*Banda & Others v the Attorney General & Others, Makwiza & Another v the Attorney General & Others).*

In Europe, in the recent case of *Feilazoo v. Malta,* (see also the following section *Exposure to transmissible diseases and COVID-19 disruption*) the European Court of Human Rights emphasized that while immigration detainees have a right to a certain level of medical treatment, this obligation is limited, and that there is no state obligation to guarantee equivalent medical treatment to that available

in the best establishments outside the facility (para 86) (similar to *Pentiacova and Other v. Moldova*). It also did not find a breach of Article 3 regarding overcrowding and did not hold the state accountable.

Exposure to communicable diseases and COVID-19 disruption

The ***Works*** highlight that prisons and immigration detention settings are ***concentrators*** of disease (HIV, TB and more recently COVID-19). In Europe, there are a plethora of key cases at the European Court of Human Rights which refer to communicable disease (generally referring to TB, HIV and viral Hepatitis) as a public health concern in prisons (see *Catalin Eugen Micu v. Romania*; *Khokhlich v. Ukraine*) and inadequate disease mitigation measures in prisons (*Vlamis and Others v. Greece*); overcrowding in prisons leading to COVID infection (*Rus v. Romania*); multi-morbidity of prisoners as a COVID- 19 vulnerability factor (*Riela v. Italy*; *Faia v. Italy*); and the unique risks to COVID-19 encountered by HIV positive prisoners (*Maratsis and Others v. Greece*; *Vasilakis and Others v. Greece*). There are inherent complexities in decisions around State duty to detect and mitigate communicable disease, safety considerations regarding *'real'* transmission risk (e.g sexual transmission of HIV), placement with infected prisoners, isolation procedures and treatment of the unwell (see *Korobov and Others v. Russia*; *Testa v. Croatia*; *Kotsaftis v. Greece*; *Aleksanyan v. Russia*; *Poghossian v. Georgia*; *Ghavtadze v. Georgia*; *Artyomov v. Russia*; *Fedosejevs v. Latvia*; *Cătălin Eugen Micu v. Romania*). They are generally considered on a case by case basis, with due consideration of compatibility with human dignity and *'the practical demands of imprisonment'* (*Blokhin v. Russia*; *Aleksanyan v. Russia*; *Patranin v. Russia*).

Similar case law is observed in South Africa for example where the *Lee v. Minister of Correctional Services* case referred to a pre-trial detainee contracting TB after almost five years on remand in Pollsmoor prison, having entering in good health. The court ruled that the Department of Correctional Services had violated its constitutional obligations to provide humane conditions of detention, given that it was aware of TB prevalence and the complete lack of TB screening and disease management in the prison.

COVID-19 has amplified the need for closed systems to prioritise disease mitigation. Global criminal justice, prison and immigration systems have faced unprecedented challenges during COVID-19 (Hargreaves et al. 2020; ICJ 2020; UNODC 2020a; PRI 2022; ICRC 2023). A range of UN technical guidance's and detention checklists were published; regarding human rights assurance, disease preparedness and mitigation in detention spaces during State declaration of emergency and application of restrictions in compliance with key human rights principles of legality, proportionality, oversight and access for inspections, time-limitation and non-discrimination (UNODC 2020b; PRI 2020; WHO 2020c). Fundamental rights assurances during COVID-19 centred on the premise that *"Protective measures must never result in inhuman or degrading treatment of persons deprived of their liberty"* (CPT 2020). Any restriction or limitation on the grounds of health was advised to be *"temporary,*

necessary, proportionate, non-discriminatory, legally authorized, subject to review, and the least-restrictive alternative" (UNHCR 2020; Pont et al. 2021).

Many States instigated disaster measures and declared a state of emergency. However, States had/have *"the burden of justifying such serious measures"* with respect to *"demonstrat[ing] that restrictive measures are necessary to curb the spread of infectious diseases so as to ultimately promote the rights and freedoms of individuals"*(UN CESCR 2000). Especially important during times of immense public health crisis during State disaster measures was the core principle of non-retrogression, and observed in the ***Works*** conducted in African prisons. People in detention were however not only vulnerable to COVID-19 and severe forms of this infection but also to a range of human rights violations induced by inappropriate restrictions under the pretext of infection control (PRI 2020; Amon 2020; Pont et al. 2021). The WHO (2020a) recognised that *"people in prisons and other places of detention are not only likely to be more vulnerable to infection with COVID-19, they are also especially vulnerable to human rights violations."* Compassionate or early release of detainees was a critical component of the COVID-19 response, alongside ensuring adequate conditions and human rights were upheld (food, sanitation, hygiene, quarantine, medical care) (UNHCR 2020; OHCHR 2020; WHO 2020b; UNICEF 2020). Many countries including those of focus in the ***Works*** however responded in an '*ad hoc'* reactive manner and did not adequately protect staff and prisoners (masks, sanitiser, testing kits, quarantine space). Many also did not publish accurate COVID-19 positivity rates in their prisons and immigration detention settings (with exception of South Africa), despite the State obligation to transparency.

On reflection, the COVID-19 experience has the potential to lay the foundation for better protection of the rights of people in detention, moving beyond a disease protection approach. The public health emergency has radically changed detention spaces. COVID-19 has heightened vulnerability of all, but substantially for vulnerable detainees, along with their significant exposure to violence, disease and other aspects of chronic ill-health. It has strengthened the argument around the imperatives to decongest prisons, and to update spatial density standards in prisons, reflective of graded levels of risk particular to airborne transmission of disease in detention spaces (UNODC 2020b:c; UNICEF 2020; WHO 2020a; PRI 2020; Amon 2020; Simpson and Butler 2020; Lines, Burke-Shayne and Girelli 2020 Beaudry et al. 2020; Knight et al. 2022; ICRC 2023). COVID-19 has in the various ***Works*** shone the spotlight on the need to decongest detention facilities, improve infrastructure and accommodation design (for example old colonial infrastructure in Africa; deportation facilities in South Africa and in Europe), improve basic needs provisions in order to maintain adequate health levels of the prison community and mitigate disease (for example clean water, disinfection, ventilation) and reduce sexual exploitation of the vulnerable; and provide adequate and accessible healthcare for all. The reliance of prisoners in Africa on family members to support basic needs provisions is well evidenced, and during COVID-19 restrictions resulted in substantial unrest (Muntingh 2020). Several ***Works*** illustrate severe restrictions on movement in prisons in Malawi, South Africa and Zimbabwe (for example solitary confinement, 24 hour cell lock downs, closure to visitors such as family and lawyers) coupled with

concerns around medical confidentiality of COVID-19 tests, inability to apply basic public health measures and maintain social distancing, access essential medicines and avoid congregation of the sick.

In Europe immigration detention facilities also did not escape COVID-19 and the recent *Feilazoo v. Malta* at the European Court of Human Rights considered important complementary environmental factors crucial to the mitigation of airborne disease in determining severity threshold of Article 3 ('*the State must ensure that a person is detained in conditions which are compatible with respect for human dignity and that the manner and method of the execution of the measure do not subject the individual to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention para 81'*) These included duration of detention in specific conditions, hygiene and sanitation, personal space, isolation and access to the outdoors for open air and exercise.

Intersectional discrimination and unequal treatment within detention spaces: The case for expanding vulnerability concepts

States must fulfil minimum core obligations with respect to health, without exception or derogation (for example to *"ensure the right of access to health facilities, goods and services, on a non-discriminatory basis, especially for vulnerable and marginalised groups"* (Sander and Lines 2016). The ***Portfolio*** underscores how a broad health rights based approach to ensure State respect for, protection and fulfilment of the right to health of all detainees is warranted, without discrimination on the grounds of age, race, gender (and gender expression), ethnicity or any other status). Detainees with diverse and specific vulnerabilities experience additional challenges (ICRC 2023). The balance of detainee health entitlements are underpinned by equivalence versus equity, promotion and protection of public health, reducing morbidity and mortality, and upholding of community versus individual rights (WHO 2001; ICRC 2023). Any discrimination is in theory prohibited, for example in access to prison health care, as well as in means and entitlements for achieving this access, the uneven distribution and substandard provision of resources and health services in prisons which impairs equal enjoyment or exercise of right to health (Williams, Blaiklock and Hunt 2021).

In many of the countries where my ***Works*** were undertaken, people in prisons and immigration detention settings experience substantial discrimination, risk to health and wellbeing, and poor living conditions. The ***Portfolio*** by virtue of its focus on the very vulnerable within detention communities exemplifies broad detention system aspects of discrimination and unequal treatment of various minority group detainees (for example migrant or incarcerated (trans) women, juveniles, circumstantial children living in prisons or awaiting deportation, detainees with mental illness or impairment, political prisoners in Zimbabwe and Malawi deliberately exposed to disease, prisoners of war in Russian held territories of Ukraine).

State consideration of a broader vulnerability framework cognisant of ***individual and environmental health f***actors in closed spaces is warranted when establishing risk to life, health and establishing inadequate conditions of detention. These are not limited to that of health vulnerability in

light of COVID-19 and threats of airborne and other diseases, but also should consider gendered, child best interests, equality and occupational rights. Vulnerability examples from the ***Portfolio*** include age (for example unaccompanied migrant minor, circumstantial child in prison with their mother, juveniles housed with adults), gender (women, transgender women), sexual orientation (exposure to sexual violence and survival sex in prison), disability (mental capacity and illness) and those detained in the course of war (prisoners of war, forcibly detained civilians). Of note is that this is not confined to detention system officials, but also inner detention space dynamics causing inequalities of power and vulnerability to exploitation by fellow detainees. Examples in my ***Works*** include the poverty driven transactional sex between men in prison in Malawi, the situation of transgender women in male prisons, the situation of women and children living in prisons and various unsuitable immigration detention facilities, and exposure of the weak to interpersonal violence. Neglecting the rights of prison staff in Africa should also not be ignored as they often live in poor and marginalised communities themselves and were substantially impacted during COVID-19 (Van Hout 2020c).

Central to my ***Portfolio*** however is the glaring omission of people deprived of their liberty in any UN definition of vulnerability or vulnerable groups, even though people deprived of their liberty are likely to represent one or more of these groups, and experience multiple, aggravated, compounding and inter-sectional vulnerability. The UN generally identifies these as people of African descent, indigenous peoples, Roma, Sinti and Travellers, Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, Migrants, Refugees, Asylum-seekers, and Internally Displaced People, People Living in Extreme Poverty, Women and LGBTQI+ People. Vulnerability is defined by the UN as Risk + Response+ Vulnerability (Turner et al. 2003) and derives from the environmental sciences where it involves a status of susceptibility, an evaluation of potential exposure to health harming circumstances and health consequences, and (more crucially) the inability to protect or defend oneself against those risks (UN 2001; Adger 2006; MacKenzie et al. 2014; Brown et al. 2017). People deprived of their liberty should be included in the UN parameters of vulnerable group and vulnerability. It goes without saying that COVID-19 amplified their inability to protect oneself to health risk (illness, severe conditions and death). Additionally many of the ***Works*** were undertaken in detention sites in low resource settings. The UN states however that whilst poverty could be seen as an underpinning factor, poverty cannot solely used as proxy measure for vulnerability levels. In my opinion, poverty is an underpinning factor to substantial health risk in prisons and immigration detention, and should be included in all estimations of vulnerability. This is especially the case now in very low resource settings (for example prisons in Africa, the impact of climate change on access to food and clean water, the impact of COVID-19 on domestic budgets to support and resource basic provisions in prisons and immigration detention)

Several ***Works*** discuss key cases in South Africa point to the various gendered, health and capacity related vulnerabilities of individuals deprived of their liberty. In South Africa, since 2015 a prisoner's ill health (i.e. HIV status) and the potential impact of prison conditions regarding health risk are recognised at the sentencing stage (see *S v.Magida*), and the Department of Correctional Services

bears a greater duty of care to people living with HIV in prison given their unique health vulnerabilities (*Van Biljon and Others v. Minister of Correctional Services and Others*; *B and Others v. Minister of Correctional Services and Others*).

For example in Europe, protection from gender maltreatment and abuse by prison staff and other prisoners is mandated in European Convention on Human Rights (*Articles* 3, 14) (*Sizarev v Ukraine*; *G.G. v. Turkey; Bogdanova v Russia*). Elsewhere the unique vulnerabilities of weaker groups of detainees are recognised. More recently a transgender woman won her constitutional right to express her gender identity by wearing women's clothes, makeup and wearing her hair long in a male prison, despite concerns for safety and risk of harms (*September v Subramoney*). Various amicus curiae in South Africa submit that the best option for an accused with an intellectual disability is to be placed in a rehabilitation centre and not in a psychiatric centre (*De Vos NO v Minister of Justice and Constitutional Development*). Holistic assessment of capacity are required (*Chauke v The State*).

Finally, lessons can shared between immigration and penal systems. The concept of vulnerability (albeit simplistic and of a categorical nature) is central in European refugee and asylum law and policy, and yet not so visible in penal systems (SRHRM 2002:2012; Freedman 2018). Definitions of vulnerability also vary, ranging from the supplementation of anti-discrimination approaches not primarily concerned with exclusion and inequality, to those focusing on the nature, functioning and dynamics of institutions in society (Fineman 2019; Van der Ven et al. 2021). Whilst the legal and policy discourse on refugee vulnerability definitions and assessment tools appears more developed, it still must navigate multidimensionality of vulnerability, vagueness in definition and complexities around operationalisation (Mendola et al. 2020; Mendola and Pera 2021). Recognising concepts of *inherent vulnerability* (for example people deprived of their liberty as dependent on others) and s*ituational vulnerability* regarding the detention environment, and the broader influence by socio-political circumstances, directly and indirectly causing injustice, oppression and human rights violations are vital. In so doing, there is potential for integrating health and human rights into a new vulnerability framework pertinent to ***all detention spaces***, thereby offering a flexibility that the original ' *equality and non-discrimination'* approach lacks. Consideration of detainee vulnerability regardless of settings through an intersectionality lens is recommended to allow for a thorough investigation of vulnerability situational dimensions, factors and traits and their interplay, and can inform policy and practice reforms.

Securitisation agendas, de-prioritization of resourcing and barriers to accountability

The State is obliged to respect and protect the human rights of people deprived of their liberty, even though they are removed from society and experience legal deprivation of freedom of movement (Van Zyl Smit 2012). The right to health is *universal, indivisible from other human rights and interdependent* and is crucial to the realisation of other fundamental rights such as right to water, food, reasonable accommodation, information and participation (Hunt et al. 2015; Hunt 2016). These are all pertinent to life in detention. The rights of people deprived of their liberty to the enjoyment of this unalienable right

to the enjoyment of the highest attainable standard of health (conducive to living a life in dignity) however remains difficult to achieve, and for many unrealistic (Special Rapporteur on Health OHCHR *no date*). The politics behind international law indicate that whilst civil and political rights versus economic, social and cultural rights such as right to health, right to housing etc) are recognised in international law, the fulfilment of the International Covenant on Economic, Social and Cultural Rights is meant to be achieved '*progressively'* depending on *'available resources'*(*Article* 2(1) IESRC). States may also be reluctant to accuse another State of violations due to the risk of being accused of the same or worse in reciprocity (Krasner 1993:2002).

Accountability forms the basis of observance of human rights. Enforcing compliance with these international legal obligations is generally weak in most of the countries where the ***Works*** originated, and depends on political will and available resources. There are inherent complexities between various dimensions of state and political accountability, maximum available resources and minimum core obligations, degrees of strategic litigation, presence of external and internal monitoring mechanisms and the involvement of people with lived experience of detention and co-production of policies and programmes (see Van Zyl Smit 2010; McAuliffe 2021;2022). The ***Portfolio of Works*** regardless of global or country level focus highlights how upholding of the rule of law indicators pertinent to deprivation of liberty, including right to health is subject to political prioritisation of people in detention, resource allocation to the prison system and progressive realization by the State dependent on maximum available resources.

In many countries the Ministry of Health and Ministry of Justice work in silos, where prison health is the responsibility of the Ministry of Justice, and where prison budgeting falls lowdown on the criminal justice list, and where punishment not rehabilitation remains the main focus of incarceration. This is despite the 2003 Moscow Declaration calling for collaboration and inter-ministerial joint actions; *"Member governments are recommended to develop close working links between the Ministry of Health and the Ministry responsible for the penitentiary system so as to ensure high standards of treatment for detainees, protection for personnel, joint training of professionals in modern standards of disease control, high levels of professionalism amongst penitentiary medical personnel, continuity of treatment between the penitentiary and outside society, and unification of statistics."* The lack of prioritisation (and allocation of financial/human resources) or even consideration of the basic fundamental rights of those in detention has substantial implications when applied to thresholds of humane treatment and ability to live a dignified life deprived of liberty (UN CESCR 2000). Regarding immigration detention, privatisation (such as in South Africa) of detention facilities weakens the State obligation to uphold the right to health of those detained on their soil. Regarding those awaiting deportation, the State reluctance to seriously apply human rights ''*at home''* is not a surprise (Knipper 2016; ICRC 2023).

Cognisant of these various shortcomings, the ***Portfolio of Works*** advocates for an enhanced focus on a broad range of human rights obligations as they relate to the '***respect, protect and fulfil'***

principles of right to health in detention. International human rights law recognizes that the realization of the right to health is subject to resource availability. However, even in times of resource constraints, vulnerable members of society such as those in the care of the State must be protected via low cost targeted programmes (Williams, Blaiklock and Hunt 2021). This is easier said than done. Lack of resourcing and resource allocation to detention spaces was amplified during COVID-19 timeframes where many of the ***Works*** illustrate the complexities around State ability to resource prisoner/immigration detainee health, operate transparent expenditure analysis and indeed the adequate prioritisation of the disease mitigating responses in closed settings (see also ICRC 2023). For example COVID-19 mitigation measures for prisoners and prison staff in many African countries initially were not included in domestic COVID-19 budgeting, nor were they targeted as a vulnerable group in public health surveillance and communications (Muntingh 2020; Mhlanga-Gunda et al. 2022; Jumbe et al. 2022). Other more general health examples include the maintenance of adequate immigration detention conditions (and disease mitigation measures) in various types of facilities in Europe, or at the *Lindela* facility in South Africa; the absence of provision of information and prison based HIV programmes targeting same sex sexual activity in Malawi prisons; the low coverage of healthcare and paediatric supports catering for the gendered needs of women and that of their children globally). In this sense, inappropriate or even neglectful resource allocation by States results in discrimination which may not be overt.

Many of the ***Works*** discuss the barriers to accountability which include ineffective complaints mechanisms and recording systems, fears for disclosure, and lack of internal and external independent prison monitoring systems. They underscore the need to encourage States to develop and operationalise independent and robust oversight mechanisms and the mechanisms under the OP-CAT (for example the national preventive mechanisms) to ensure States uphold the health rights of all deprived of their liberty, and monitor measurable change regarding living and working conditions in detention spaces. When rule of law indicators pertinent to the rights of people deprived of their liberty (e.g. due process, pre-trial detention and access to courts, conditions of detention, access to medical care, segregation, solitary confinement, disciplinary punishment, right to rehabilitation) are measured regularly, they offer an ability to monitor improvements and setbacks over time in the formal justice system. Bridging the gaps centre on ensuring independent inspections (and routine access in detention spaces), and for those States which ratify OP-CAT the establishment of national preventive mechanisms and agreement to regular preventive monitoring of places of detention by the UN Subcommittee on Prevention of Torture, the respective European counterparts and African Special Rapporteurs. With regard to the in-depth ***Works*** conducted in Malawi, South Africa and Zimbabwe, only South Africa has ratified the OP-CAT (UN General Assembly 2003).[17] Malawi and Zimbabwe are reliant on government inspection bodies.

[17] See footnotes 12-14 regarding treaty ratification and signature, Table page 26.

Strategic public litigation by prisoners and prisoner advocacy organisations also increasingly seek to see international human rights doctrines as a source of rights even where conventions have not been ratified as a sort of best practice (Perlin and Dlugacz 2009). Some of them may also be part of customary international law and/or may be used to inform the interpretation of treaty standards that are applicable to a particular country. In 2020 there was an significant case in South Africa brought by the civil society organisation *Sonke Gender Justice* at the Constitutional Court which challenged the independence of the Judiciary Inspectorate of Correctional Services and which held that this body as was formulated was neither financially, nor operationally independent (*Sonke Gender Justice NPC v. President of the Republic of South Africa and Others).* In so doing it encourages greater impartiality and independence of the Judiciary Inspectorate of Correctional Services to conduct robust investigation of conditions and human rights violations in South African prisons.

The ICRC reiterates that migrants should not be placed in detention (ICRC 2023). At the time of submission in February 2023, the South African High Court rendered sections of the Refugees Act unconstitutional where asylum seekers are treated as undocumented if they do not renew visas within one month of expiry (*Scalabrini Centre of Cape Town and Another v Minister of Home Affairs and Others*).

Furthest behind first: Leveraging for detention reforms

There are inherent challenges in encouraging legislative reforms, in shaping and implementing effective and humane detention policy and practice reforms; and in the openness of the law and legal institutions to consider evidence generated from public health, social and political sciences (Gauri and Brinks 2008; Samuel 2009; Gruskin, Bogecho and Ferguson 2010; Ferraz 2018; Paget Zeegers and Patterson 2020). Whilst the law can leveraged for the purposes of advancing global health, it remains underutilized and (at times) poorly understood within the various global processes that contribute to ill-health (Goldsmith and Posner 2005; Landman 2006; Gostin 2015; Gostin et al. 2019). Whilst primarily concerned with the UN norms and standards of detention (linked to rule of law indicators), and improving prison policies, practices and inspection mechanisms, the ***Portfolio*** also showcases that the law can be used to '***respect, protect and fulfil'*** health in detention, particularly with regard to the health related sustainable development goals, ensuring '*no one is left behind'* (see Paget Zeegers and Patterson 2020). It recognises however the inherent challenges and complexities between strategic litigation, national prison policy, securitisation agendas and various system level programmatic approaches (see McAuliffe 2021) to upholding the rights of people deprived of their liberty to acceptable and humane standards of detention. The ***Works*** identify the minimum State obligations to comply with human (and humanitarian) rights norms, and the extent to which human, health and occupational health rights of immigration detainees, prisoners, prisoners of war and staff were upheld. Contextualisation of the link between domestic or regional policy and practice (prison system, immigration) and an explicit focus on judicial/quasi-judicial processes (UN, regional, and/or national) were important to serve as potential

gateways to incorporating international initiatives to promote standards of detention (see Van Zyl Smit and Dünkel 2021), and subsequent legislative or policy reforms. Complexities however arise in some of my ***Works*** where states withdraw from human rights order (for example Russia leaving the European Court of Human Rights), enact repressive and violent acts against political activists (e.g. Zimbabwe political prisoners) or move toward greater repression of the public since COVID-19 disaster measures.

The 2030 Sustainable Development Agenda and its goals (UN General Assembly 2015) underpins the human and health rights imperatives of equality and non-discrimination, and global commitments to reduce inequities (Paget Zeegers and Patterson 2021). Despite criticism of the Agenda and its goals for lack of explicit reference to human rights, or even to define a human rights based agenda, it provides a normative standpoint for global social and environmental commitment to development, and one which is supported by a myriad of important actors, not least specialised and mobilised civil society with international, regional and national actors and institutions (De Búrca 2021). If detention policy, strategies and programmes were designed explicitly with a human (and right to health) rights lens, the focus on health would explicitly target *'the furthest behind first'* and adopt a '*healthy detention for all'* approach (see ICRC 2023). All sustainable development goals contain references to vulnerability pertinent to similar target groups (e.g. the poor, marginalised, socially deprived) and similar topic areas (e.g. food, water, housing), all of which apply to detention and the experience of people deprived of their liberty. However, like the omissions in UN vulnerable groups definition, the Sustainable Development Agenda 2030 does not explicitly refer to people deprived of their liberty and instead defines vulnerable groups as *"all children, youth, persons with disabilities (of whom more than 80% live in poverty), people living with HIV/AIDS, older persons, indigenous people, refugees and internally displaced persons and migrants [and] people living in areas affected by complex humanitarian emergencies and in areas affected by terrorism" (para. 23)* (UN General Assembly 2015).

The *Portfolio* further exemplifies the tension created by the ambitious and equalising global commitment to achieving the various sustainable development goals between the requirements for multi-stakeholder comprehensive rights based approaches seeking to '*close gaps'* and the imperatives to demonstrate impact (Thomas et al. 2015). The impact of human rights based approaches to health are best measured across a spectrum of change-at the individual, programmatic, structural, and societal levels (Thomas et al. 2015). Prisons and other detention spaces are no different. The prioritisation of security in prisons and other detention spaces must not eliminate the human and health rights of those who live and work in prisons, nor must they ignore the public health issues at hand (Nagisa-Keehn and Nevin 2018). Tackling disease and chronic ill health in these closed spaces requires a strategic public health and human rights based approach to mitigate transmission of disease and improve health for all affected, including as an occupational health and community issue. Evidence generated throughout the course of my ***Works*** can inform transformative solutions to systemic practices of injustice in various

detention systems all over the world, and considers real and sustainable change in the lives of people deprived of their liberty (see also the Miller and Redhead 2019 process and outcomes framework).

The 2021 United Nations Common Position on Incarceration has underscored the continued fundamental challenges which undermine the purpose of incarceration (protection of society from crime, the prevention of recidivism via rehabilitation and social re-integration), and how prisons continue to be impacted by neglect of overcrowding, poor conditions, under resourcing of prison services and low priority of prison reforms within the dominant securitisation agenda in many countries (UNODC 2021). It states; *"addressing the challenges associated with incarceration, including its overuse, should be a key part of the effort to "build back better".* Laws which stigmatise and discriminate against marginalised groups are harmful (for example criminalisation of transgender expression and same sex activity in African countries, criminalisation of people who use drugs), and can drive both health disparities (HIV/AIDS and others) and the ever increasing prisoner population itself. All ***Works*** provide detailed discussion around implications for laws, policies and practices relevant to the respective country/region. In essence, they centre on respecting and upholding human rights of people in detention, by supporting detention and immigration reforms, strengthening weak justice systems (for example high pre-trial detention rates), shifting policies toward alternatives to sentencing/deportation detention, strengthening detention management and healthcare in detention itself, capacity building of all staff, human rights awareness of staff (and the public), enhancing forms of medical parole, rehabilitation and reintegration of those on release, encouraging data sharing between public and prison health surveillance, and general resourcing of the system. These are all key to advancing the global commitment to achieving the targets set in the Sustainable Development Agenda 2030.

Practical operationalisation of socio-economic rights and normative standards in programmes and policies, especially in development contexts remains challenging (McAuliffe 2021). This is additionally complex in detention programming and standards of detention characterised by the underpinning focus on securitisation and punishment (and to a lesser degree depending on the country, rehabilitation and reinsertion). De Búrca (2021) offers an innovative insight into the resilient and adaptive nature of human rights advocacy and promotion of progressive social change, as an alternative to *top-down*, and *bottom up* dynamics, spanning domestic activism and international accountability via multiple domestic, regional and international stakeholders, processes and institutions, the leveraging of transnational and domestic networks of support, as well as the various mutually reinforcing and iterative dimensions of international human rights in practice. There is no doubt that people deprived of their liberty, and people with experience of living in detention are the driving force to meaningful transformative policy and practice. The importance of hearing the voices and ensuring the participation of people in health related decision-making at all levels is especially pertinent to the ***Portfolio of Works*** where the voices of detainees are seldom heard, with exception of via civil society strategic litigation and human rights advocacy (UN CESRC 2000; Potts and Hunt 2008; Snacken 2010; Van Zyl Smit

2013; Smith 2016; Mhlanga-Gunda et al. 2019; Van der Valk and Rogan 2021; Corbet and Cook 2022). Approaches to encourage detention policy and legislative reform should be supported by meaningful participation of national stakeholders including former prisoners and their families, civil society and non-governmental organisations in all phases of programming (assessment, analysis, planning, implementation, monitoring and evaluation). The ICRC recommends that both internal and external inspection bodies, and strategic planning committees should include people with lived experience of detention in their teams (ICRC 2023).

Finally there are substantial challenges for academics and research teams to enter into prisons (and other closed settings) and consult with those deprived of their liberty. Evidence informing policy, practice and standards is vital. Academic research in prisons warrants prioritisation and financial support by donors, research councils, research funding and philanthropic agencies.

Depriving people of their liberty should be used only as a last resort. Leave no one behind.

Chapter Seven: Personal Impact Achievements

> *"A winner is a dreamer who never gives up."*
> (Nelson Mandela, 1918-2013)

Evidence and aspects from the various ***Works*** have been used by UN agencies, civil society and human rights defenders to advocate for the rights of people deprived of their liberty, inform legislative change, policy reforms, capacity building and other changes in their lives and conditions of detention. State efforts, policy making processes and outcomes were/are acknowledged in the various ***Works,*** including how these operate within the systems (penal, immigration, conflict) themselves, along with examples of successes where my public health and socio-legal research has informed policy change. Each was/is intended to link the law to society, to government and to prison societies by functionalising the law, and rendering it as an effective tool to achieve rights based approaches to development, public health, health disparity, socio-economic and socio-political objectives.

There is a direct link of my ***Works*** to advocacy and reformed government policy and practice, and they exemplify on the need for a broad synergetic understanding of legal standards, conceptualisations in how key case law can contribute to sensitisation, awareness-raising and development of detention standards, activism by civil society via advocacy and strategic litigation and institutional responses in encouraging and enacting detention policy reforms.

Many have been used as part of government consultations for legislative reforms by my Malawian co-authors (Mhango, Kaima[18]) to;

- Advocate for the inclusion of harm reduction HIV programming cognisant of same-sex relations between men in the new 2023 Malawi Correction Service Bill which is set to replace the 1956 Prison Bill;
- Inform part of the SALC/CHREAA training guide for people working in places of detention in Malawi (Southern Africa Litigation Centre and Centre for Human Rights Education, Advice and Assistance 2022)
- Leverage successfully at Parliament for increased fiscal resourcing of prisons in domestic health budgeting (COVID-19 and women's health).
- Form part of the Joint Civil Society Submission to the UN Committee on Economic, Social and Cultural Rights (2023).

Others have been employed by my South African co-authors (Wessels, Chimbga) to;

- Inform aspects of the three South African 2022 gender-based violence Bills[19]
- Inform the capacity building of prison staff around equality rights of transgender prisoners following the *Jade September* case in South Africa

[18] On behalf of the Centre for Human Rights Education, Advice and Assistance, Blantyre, Malawi. CHREAA | Home

[19] Sexual Offences and Related Matters) Amendment Bill, the Criminal and Related Matters Amendment Bill, and the Domestic Violence Amendment Bill 2022.

- Support the design and set-up of the new Gender Responsive Correctional Centre for women.[20]

Some are cited in routine UNAIDS updates on HIV in prisons, ICRC Health in Detention and Penal Reform International annual global reports (PRI 2022; UNAIDS 2021; ICRC 2023). Several (Fleißner, Stöver) have recently been promulgated by the UNODC to sensitise and raise government awareness on the *Bangkok* and *Nelson Mandela Rules*, as it relates to the exposure of women to custodial violence; and in relation to the situation and rights of women (and their children) living in prisons all over the world.

[20]At the Atteridgeville Centre situated in Thaba–Tshwane, west of Pretoria, one of the six centres under Kgoši Mampuru II Management Area in the Gauteng region. See www.youtube.com/watch?app=desktop&v=8-Sc4TyRysk

References

Chapter One

United Nations (UN) General Assembly. 2015. *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1.

Van Hout MC. 2023. Environmental health rights and concepts of vulnerability of immigration detainees in Europe before and beyond COVID-19. *Oxford Journal of Human Rights Practice*. [Epub ahead of print]. https://doi.org/10.1093/jhuman/huac063

Van Hout MC, Wessels J. 2023. "#Foreigners Must Go versus '*in favorem libertatis*": Human rights violations and procedural irregularities in South African immigration detention law. *Journal of Human Rights*. [Epub ahead of print] DOI: 10.1080/14754835.2023.2170709

Van Hout MC. 2022a. Ensuring oversight and protection of life and health of all detained by the Russian Federation and Russian held territories of Ukraine. *Public Health.* 213: 68-70. https://doi.org/10.1016/j.puhe.2022.10.001

Van Hout. MC 2022b. Navigating the complexities of (trans) gender equality rights within the parameters of reasonable accommodation and security tensions in South African prisons: The judgement of *September v Subramoney'*. *Forensic Science International Mind and Law.* 3 (100077):1-10 https://doi.org/10.1016/j.fsiml.2022.100077

Van Hout MC. 2022c. Using COVID-19 to address environmental threats to health and leverage for prison reform in South Africa, Zimbabwe and Malawi. *Oxford Journal of Human Rights Practice.* [Epub ahead of print] https://doi.org/10.1093/jhuman/huac050

Van Hout MC, Fleißner S, Stöver H. 2022. Women's right to health in detention: United Nations Committee observations since the adoption of the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (*'Bangkok Rules'*). *Oxford Journal of Human Rights Practice.* [Epub ahead of print] https://doi.org/10.1093/jhuman/huac058

Van Hout MC, Bigland C, Mariniello T. 2022. A legal-realist assessment of the Zimbabwean correctional system response to COVID-19 during state disaster measures. *International Journal of Prisoner Health*. [Epub ahead of print] https://doi.org/10.1108/IJPH-10-2021-0104

Van Hout MC, Srisuwan L, Plugge E. 2022. A human rights assessment of menopausal women's access to age- and gender-sensitive non-discriminatory health care in prison. *Menopause.* 29(11):1338-1348. DOI: 10.1097/GME.0000000000002065

Van Hout MC, Kaima R, Mhango V, Mariniello T. 2022a. Moving beyond the politization of same-sex sexuality and leveraging right to health to counter inter-personal sexual violence and HIV in Malawi's prisons. *Forensic Science International Mind and Law*. 3 (100077):1-8. https://doi.org/10.1016/j.fsiml.2022.100103

Van Hout MC, Fleißner S, Klankworth U, Stöver H. 2022b. Children in the prison nursery: Global progress in adopting the Convention on the Rights of the Child in alignment with United Nations minimum standards of care in prisons. *Child Abuse and Neglect* 134:105829. doi: 10.1016/j.chiabu.2022.105829

Van Hout MC, Mhango V, Kaima R, Bigland C, Mariniello T. 2022c. A legal-realist assessment of human rights, right to health and standards of healthcare in the Malawian prison system during COVID-19 state disaster measures. *International Journal of Prisoner Health*. [Epub ahead of print] DOI:10.1108/IJPH-10-2021-0108.

Van Hout MC. 2021. Human rights violations, detention conditions and the invisible nature of women in European immigration detention: A legal realist account. *International Journal of Prisoner Health*. [Epub ahead of print] doi: 10.1108/IJPH-03-2021-0023.

Van Hout MC, Crowley D. 2021. The *"double punishment"* of transgender prisoners: a human rights-based commentary on placement and conditions of detention. *International Journal of Prisoner Health.* [Epub ahead of print] doi: 10.1108/IJPH-10-2020-0083

Van Hout MC, Wessels J. 2021a. Navigating the complexities of the mentally ill and mentally incapacitated in the criminal justice system in South Africa. *Forensic Science International: Mind and Law.* 2(100068): 1-6 https://doi.org/10.1016/j.fsiml.2021.100068

Van Hout MC, Wessels J. 2021b. Human rights and the invisible nature of incarcerated women in post-apartheid South Africa: prison system progress in adopting the Bangkok Rules. *International Journal of Prisoner Health* [Epub ahead of print] DOI: 10.1108/IJPH-05-2021-0045

Van Hout MC, Fleißner S, Stöver H. 2021. *"# Me Too"*: Global progress in tackling continued custodial violence against women. The 10 year anniversary of the Bangkok Rules. *Trauma, Violence, & Abuse: A Review Journal.* 3(15248380211036067) [Epub ahead of print].https://doi.org/10.1177/15248380211036067

Van Hout MC. 2020a. Leaving no one behind: The human tragedy of children in African prisons during COVID-19. *Health and Human Rights Journal*. [Online] https://www.hhrjournal.org/2020/05/leaving-no-one-behind-the-human-tragedy-of-children-in-african-prisons-during-covid-19/

Van Hout MC. 2020b. COVID-19: Urgent Need to Find Alternatives to Prison Sentences in Malawi**.** *Health and Human Rights Journal* [Online https://www.hhrjournal.org/2020/09/covid-19-urgent-need-to-release-women-from-prison-in-malawi/
Van Hout MC. 2020c. Prison staff exposure to pathogenic disease and occupational health research in African prisons: A neglected area**.** *Journal of Sustainable Development: Africa***.** 22(1)**:** 166-171.
Van Hout MC, Aaraj E. 2020. Pandemic Stresses the Human Rights Imperatives of Tackling HIV and Hepatitis in Middle East and North African Prisons. *Health and Human Rights Journal* [Online]. https://www.hhrjournal.org/2020/05/pandemic-stresses-the-human-rights-imperatives-of-tackling-hiv-and-hepatitis-in-middle-east-and-north-african-prisons/
Van Hout MC, Chimbga D. 2020. Tackling the intersectionality of drug offences, gender based violence and victimisation in the South African Criminal Justice System: Leveraging for greater implementation of the Tokyo Rules within a sustainable development agenda. *Journal of Sustainable Development -Africa*. 22(3): 157-165.
Van Hout MC, Mhlanga-Gunda R. 2019a. Prison health situation and health rights of young people incarcerated in sub-Saharan African prisons and detention centres: a scoping review of extant literature' *BMC International Health and Human Rights*. 19(1): 17. https://doi.org/10.1186/s12914-019-0200-z
Van Hout MC, Mhlanga-Gunda R. 2019b. Mankind owes to the child the best that it has to give: prison conditions and the health situation and rights of children incarcerated with their mothers in sub-Saharan African prisons**.** *BMC International Health and Human Rights***.** 19(1)**:** 13. https://doi.org/10.1186/s12914-019-0194-6

Chapter Two

Akiyama MJ, Kronfli N, Cabezas J, Sheehan Y, Scheibe A, Brahni T, Naik K, Mashabela P, Chan P, Luhmann N, Lloyd AR; International Network on Health and Hepatitis in Substance Users—Prisons Network (INHSU Prisons). 2022. The role of low-income and middle-income country prisons in eliminating hepatitis C. *Lancet Public Health.* 7(7):e578-e579.
Amon J.J. 2020. COVID-19 and Detention: Respecting Human Rights. *Health and Human Rights Journal*. March 23 2020. Available at: https://www.hhrjournal.org/2020/03/covid-19-and-detention-respecting-human-rights/(Accessed 22 January 2023)
Beaudry G, Zhong S, Whiting D, Javid B, Frater J, Fazel S. 2020. Managing outbreaks of highly contagious diseases in prisons: a systematic review. *BMJ Global Health.* 5(11):e003201.
Council of Europe (CoE). 2020. *Recommendation Rec(2006)2-rev of the Committee of Ministers to member States on the European Prison Rules*. Available at: Result details (coe.int) (Accessed 22 January 2023)
Dolan K, Wirtz AL, Moazen B, Ndeffo-Mbah M, Galvani A, Kinner SA, Courtney R, McKee M, Amon JJ, Maher L, Hellard M, Beyrer C, Altice FL. 2016. Global burden of HIV, viral hepatitis, and tuberculosis in prisoners and detainees. *Lancet.* 388(10049):1089-1102.
Dünkel F, Harrendorf S, Van Zyl Smit D. 2022.*The impact of COVID-19 on prison conditions and penal policy.* Routledge.
European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. (CPT). 2017. *Immigration detention. European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*. Available at: 09000016806fbf12 (coe.int) (Accessed 22 January 2023)
European Monitoring Centre for Drugs and Drug Addiction (EMCDDA). 2021. *Prison and drugs in Europe: current and future challenges*. Available at: www.emcdda.europa.eu/publications/insights/prison-and-drugs-in-europe_en (Accessed 22 January 2023)
European Union Agency For Fundamental Rights (FRA). 2010. *Detention of third country nationals in return procedures.* Available at: https://fra.europa.eu/en/publication/2010/detention-third-country-nationals-return-procedures Fundamental Rights Agency 2010 (Accessed 22 January 2023)
Global Detention Project (GDP). 2021. *Annual Report 2020*. Available at: www.globaldetentionproject.org/wp-content/uploads/2021/04/GDP-Annual-Report-2020-Online-Version.pdf (Accessed 22 January 2023)
Global Detention Project (GDP). 2016. H.S. Bhui. *Can inspection produce meaningful change in immigration detention? Global Detention Project Paper No. 12* (GDP 2016) Available at: www.globaldetentionproject.org/can-inspection-produce-meaningful-change-in-immigration-detention (Accessed 22 January 2023)
Global Detention Project (GDP). 2015. *The Uncounted: Detention of Migrants and Asylum Seekers in Europe* (GDP 2015) Available at: www.access-info.org/wpcontent/uploads/DetentionReport_AIE_GDP_HighRes_17Dec15.pdf (Accessed 22 January 2023)
International Committee of the Red Cross (ICRC) 2023. *1st World Conference on Health in Detention. Conference Report.* Available at: www.icrc.org/en/publication/4681-first-world-conference-health-detention-report (Accessed 21 February 2023)
International Organisation for Migration (IOM). 2011. *International Standards on Immigration Detention and non-custodial Measures. IOM Submission to the Working Group on Arbitrary Detention*. Available at: www.ohchr.org/Documents/Issues/Detention/DraftBasicPrinciples/IOM3.pdf (Accessed 22 January 2023)

Kinner S, Young J.T,. 2018. Understanding and Improving the Health of People Who Experience Incarceration: An Overview and Synthesis. *Epidemiologic Reviews* 40(1):4-11.
Kinner SA, Snow K, Wirtz AL, Altice FL, Beyrer C, Dolan K. 2018. Age-Specific Global Prevalence of Hepatitis B, Hepatitis C, HIV, and Tuberculosis Among Incarcerated People: A Systematic Review. *Journal of Adolescent Health.* 62(3S):S18-S26
Knight K, Bleckner J, Cameron E, Amon J. 2022.Pandemic Treaty Should Include Reporting in Prisons. *Health and Human Rights Journal* 24(1):117-119. Available at: www.hhrjournal.org/2022/04/pandemic-treaty-should-include-reporting-in-prisons/ (Accessed 22 January 2023)
Lines R, Burke-Shyne N, Girelli G. 2020. Gaol Fever: What COVID-19 Tells us about the War on Drugs. *Health and Human Rights Journal*. April 19 2020. Available at: www.hhrjournal.org/2020/04/gaol-fever-what-covid-19-tells-us-about-the-war-on-drugs/ (Accessed 22 January 2023)
Lungu-Byrne C, Germain J, Plugge E, Van Hout MC. 2020. Contemporary Migrant Health Experience and Unique Health Care Needs in European Prisons and Immigration Detention Settings. *International Journal of Forensic Mental Health* 20(1): 80-99.
Office of the High Commissioner for Human Rights (OHCHR). 2020. *Urgent action needed to prevent COVID-19"rampaging through places of detention" –Michelle Bachelet*(25 March 2020). Available at: www.ohchr.org/en/statements/2020/03/urgent-action-needed-prevent-covid-19-rampaging-through-places-detention (Accessed 22 January 2023)
Penal Reform International (PRI). 2022. *Global Prison Trends*. Available at: www.penalreform.org/global-prison-trends-2022/ (Accessed 22 January 2023)
Pillay N, Chimbga D, Van Hout MC. 2021. Gender Inequality, Health Rights, and HIV/AIDS among Women Prisoners in Zimbabwe. *Health and Human Rights Journal*. 23(1):225-236.
Pont J, Enggist S, Stöver H, Baggio S, Gétaz L, Wolff H. 2021. COVID-19-The Case for Rethinking Health and Human Rights in Prisons. *American Journal of Public Health.* 111(6):1081-1085.
Rubenstein LS, Amon JJ, McLemore M, Eba P, Dolan K, Lines R, Beyrer C. 2016. HIV, prisoners, and human rights. *Lancet*. 388(10050):1202-14.
Simpson PL, Butler TG. 2020. Covid-19, prison crowding, and release policies. *BMJ*. 20;369:m1551.
Telisinghe L, Charalambous S, Topp SM, Herce ME, Hoffmann CJ, Barron P, Schouten EJ, Jahn A, Zachariah R, Harries AD, Beyrer C, Amon JJ. 2016. HIV and tuberculosis in prisons in sub-Saharan Africa. *Lancet.* 388(10050):1215-27.
United Nations (UN). 2019. *UN Global Study on Children deprived of Liberty*. Nowak, M. 74th session of the General Assembly. A/74/136, 2019. Available at: www.ohchr.org/en/treaty-bodies/crc/united-nations-global-study-children-deprived-liberty (Accessed 22 January 2023)
United Nations High Commissioner for Refugees (UNHCR). 2012. *Detention guidelines: guidelines on the applicable criteria and standards relating to the detention of asylum-seekers and alternatives to detention* Available at: www.unhcr.org/publications/legal/505b10ee9/unhcr-detention-guidelines.html (Accessed 22 January 2023)
United Nations Office on Drugs and Crime (UNODC). 2020a.*COVID-19 in prisons – Member States and UNODC reiterate their commitment to the Nelson Mandela Rules* (UNODC 22 July 2020). Available at: www.unodc.org/unodc/en/frontpage/2020/July/covid-19-in-prisons--member-states-and-unodcreiterate-their-commitment-to-the-nelson-mandela-rules.html (Accessed 22 January 2023)
United Nations Office on Drugs and Crime (UNODC). 2020b. *Position paper COVID-19 preparedness and responses in prisons.* Available at: www.unodc.org/documents/hiv-aids/publications/UNODC_position_paper_COVID-19_in_prisons_-_FINAL.pdf (Accessed 22 January 2023)
Van Hout MC, Stöver H, Benamara K, Bauer P, Salah E. 2021. 90-90-90: catalysing the response to HIV by enhancing prison visibility in the Joint United Nations Programme on HIV and AIDS (UNAIDS) strategy beyond 2021. *Public Health*. 190:e5-e6.
Wirtz AL, Yeh PT, Flath NL, Beyrer C, Dolan K. 2018. HIV and Viral Hepatitis Among Imprisoned Key Populations. *Epidemiologic Reviews.* 40(1):12-26.
World Health Organization (WHO). 2023. *Status report on prison health in the WHO European Region 2022*. Available at: www.who.int/europe/news-room/events/item/2023/02/15/default-calendar/launch-of-status-report-on-prison-health-in-the-who-european-region-2022 (Accessed 21 February 2023)
World Health Organization (WHO). 2020a. *Preparedness, prevention and control of COVID-19 in prisons and places of detention*. Available at: Preparedness, prevention and control of COVID-19 in prisons and other places of detention: interim guidance, 8 February 2021 (who.int) (Accessed 22 January 2023)
World Health Organization (WHO). 2020b. *UNODC, WHO, UNAIDS and OHCHR joint statement on COVID-19 in prisons and other closed settings*. Available at: www.who.int/news/item/13-05-2020-unodc-who-unaids-and-ohchr-joint-statement-on-covid-19-in-prisons-and-other-closed-settings (Accessed 22 January 2023)

World Health Organization (WHO). 2013. *Good governance for prison health in the 21st century. A policy brief on the organization of prison health.* Available at: www.euro.who.int/__data/assets/pdf_file/0017/231506/Good-governance-for-prison-health-in-the-21st-century.pdf (Accessed 22 January 2023)

Chapter Three

International Commission of Jurists (ICJ). 2007. *Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity*, March 2007.
International Committee of the Red Cross (ICRC).1949. *Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)*, 12 August 1949, 75 UNTS 135.
International Committee of the Red Cross (ICRC) 2023. *1st World Conference on Health in Detention. Conference Report.* Available at: www.icrc.org/en/publication/4681-first-world-conference-health-detention-report (Accessed 21 February 2023)
Kinney E. 2001. The international human right to health: what does this mean for our nation and world? *Indiana Law Review* 43:1457-1475.
Lines R. 2008. The right to health of prisoners in international human rights law. *International Journal of Prisoner Health* 4(1): 3-53.
Lines R.2006. From equivalence of standards to equivalence of objectives: The entitlement of prisoners to health care standards higher than those outside prisons. *International Journal of Prisoner Health*. 2(4); 269-280.
Nowak M, McArthur E. 2008.*The United Nations Convention Against Torture: A Commentary* . Oxford University Press.
Penal Reform International (PRI). 2023. *United Nations Bangkok Rules* Available at: www.penalreform.org/issues/women/bangkok-rules/ (Accessed 22 January 2023)
Rubenstein L. 2020. War, Political Conflict, and the Right to Health. *Health and Human Rights* 22(1). 339-341.
Special Rapporteur on Health. OHCHR. No date. *About the right to health and human rights*. Available at: www.ohchr.org/en/special-procedures/sr-health/about-right-health-and-human-rights (Accessed 22 January 2023)
United Nations (UN). 1955. *Standard Minimum Rules for the Treatment of Prisoners*, 30 August 1955.
United Nations (UN). 1995. *Beijing Declaration and Platform of Action, adopted at the Fourth World Conference on Women*, 27 October 1995.
United Nations (UN) Committee Against Torture (UNCAT). 2007. *General Comment No. 2: Implementation of article 2 by States Parties*. UN Doc. CAT/C/GC/2/CRP.1/Rev.4, para. 1. United Nations Committee Against Torture
United Nations (UN) Committee on Economic, Social and Cultural Rights (UN CESCR). 2009., *General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, 2 July 2009, E/C.12/GC/20.
United Nations (UN) Committee on Economic, Social and Cultural Rights (UN CESCR). 2000.*General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)* (11 August 2000)E/C.12/2000/4.
United Nations (UN) General Assembly. 2016. *Standard Minimum Rules for the Treatment of Prisoners(Nelson Mandela Rules)*(8 January 2016)A/RES/70/175.
United Nations (UN) General Assembly. 2010a. *Guidelines for the Alternative Care of Children: resolution /adopted by the General Assembly*(24 February 2010)A/RES/64/142.
United Nations (UN) General Assembly. 2010b. *United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (Bangkok Rules)*(6 October 2010)A/C.3/65/L.50.
United Nations (UN) General Assembly. 2009. *Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. UN Doc. A/64/215.
United Nations (UN) General Assembly. 2007a. *Convention on the Rights of Persons with Disabilities: resolution / adopted by the General Assembly* (24 January 2007) A/RES/61/106.
United Nations (UN) General Assembly. 2007b. *United Nations Declaration on the Rights of Indigenous Peoples : resolution / adopted by the General Assembly*, 2 October 2007, A/RES/61/295.
United Nations (UN) General Assembly. 2003. *Optional Protocol to the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment* (9 January 2003)A/RES/57/199.
United Nations (UN) General Assembly. 2001. *Declaration of Commitment on HIV/AIDS*, 2 August 2001, A/RES/S-26/2.
United Nations (UN) General Assembly. 1993a. *Declaration on the Elimination of Violence against Women*, 20 December 1993, A/RES/48/104.
United Nations (UN) General Assembly.1993b. *Standard rules on the equalization of opportunities for persons with disabilities : resolution / adopted by the General Assembly*, 20 December 1993, A/RES/48/96.
United Nations (UN) General Assembly. 1991b. *Basic Principles for the Treatment of Prisoners: resolution/adopted by the General Assembly*(28 March 1991)A/RES/45/111.

United Nations (UN) General Assembly. 1991a. *UN Principles* for *Older Persons* (16 December *1991*) A/RES/46/*91*.
United Nations (UN) General Assembly. 1991c. *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty :resolution /adopted by the General Assembly*(2 April 1991)A/RES/45/113.
United Nations (UN) General Assembly. 1991d. *United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules)* (2 April 1991) A/RES/45/110.
United Nations (UN) General Assembly. 1990. *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families* (18 December 1990) A/RES/45/158.
United Nations (UN) General Assembly. 1989a.*Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty*(15 December 1989)A/RES/44/128.
United Nations (UN) General Assembly. 1989b. *Convention on the Rights of the Child* (20 November 1989)United Nations, Treaty Series,1577:3.
United Nations (UN) General Assembly. 1988. *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment: resolution / adopted by the General Assembly* (9 December 1988)A/RES/43/173.
United Nations (UN) General Assembly. 1986. *Declaration on the Right to Development : resolution / adopted by the General Assembly*, 4 December 1986, A/RES/41/128.
United Nations (UN) General Assembly.1982. *Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*(18 September 1982) A/RES/37/194.
United Nations (UN) General Assembly.1984. *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*(10 December 1984)United Nations, Treaty Series,1465:85.
United Nations (UN) General Assembly.1980. *Code of Conduct for Law Enforcement Officials*(5 February 1980) A/RES/34/169.
United Nations (UN) General Assembly. 1979. *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*(18 December 1979)A/RES/34/180.
United Nations (UN) General Assembly. 1966a. *International Covenant on Economic, Social and Cultural Rights (ICESRC)* (16 December 1966)United Nations, Treaty Series,993:3.
United Nations (UN) General Assembly. 1966b. *International Covenant on Civil and Political Rights (ICCPR)*(16 December 1966) United Nations, Treaty Series, 999.
United Nations (UN) General Assembly. 1966c. *Optional Protocol to the International Covenant on Civil and Political Rights*(19 December 1966c)United Nations, Treaty Series,vol.999,171.
United Nations (UN) General Assembly. 1965. *International Convention on the Elimination of All Forms of Racial Discrimination(ICERD)*(21 December 1965)United Nations, Treaty Series,660:195.
United Nations (UN) General Assembly. 1959. *Declaration of the Rights of the Child*, 20 November 1959, A/RES/1386(XIV).
United Nations (UN) General Assembly. 1951. *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189.
United Nations (UN) General Assembly.1948. *Universal Declaration of Human Rights*(10 December 1948)217A(III).
United Nations (UN) General Assembly. 1947. *Entry into force of the constitution of the World Health Organization* (17 November 1947) A/RES/131.
United Nations (UN) Human Rights Committee (UN HRC). 2019. *General comment no. 36, Article 6 (Right to Life)* (3 September 2019) CCPR/C/GC/35.
United Nations (UN) Human Rights Committee (UN HRC). 1997. *Lantsova v Russian Federation*. 763/1997, UNHCR 74th session, UN Doc. CCPR/C/74/763/1997.
United Nations (UN) Human Rights Committee (UN HRC). 1992. *General Comment 21, Article 10, Forty-fourth session, 1992*. Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev. 1 at 33.
United Nations (UN) Human Rights Special Procedures. 2018. *Framework Principles on Human Rights and the Environment*. Available at: www.ohchr.org/Documents/Issues/Environment/SREnvironment/FrameworkPrinciplesUserFriendlyVersion.pdf (Accessed 22 January 2023)
United Nations (UN) Office of the High Commissioner for Human Rights (OHCHR). 2012. *The Human Rights Treaty System*. Available at: www.ohchr.org/sites/default/files/Documents/Publications/FactSheet30Rev1.pdf (Accessed 22 January 2023)
United Nations (UN) Population Fund (UNFPA).1995.*Report of the International Conference on Population and Development, Cairo, 5-13 September 1994*, 1995, A/CONF.171/13/Rev.1

World Health Organization (WH0).2019. *Declaration of Astana: Global Conference on Primary Health Care*: Astana, Kazakhstan, 25 and 26 October 2018. Available at: https://apps.who.int/iris/handle/10665/328123 (Accessed 22 January 2023)
World Health Organization(WHO). 2003. *WHO Moscow Declaration: Prison Health as part of Public Health*. Available at: Declaration on prison health as part of public health: adopted in Moscow on 24 October 2003 (who.int) (Accessed 22 January 2023)
World Medical Association (WMA). 2011.*Declaration of Edinburgh on Prison Conditions and the Spread of Tuberculosis and Other Communicable Diseases.* Available at: www.wma.net/policies-post/wma-declaration-of-edinburgh-on-prison-conditions-and-the-spread-of-tuberculosis-and-other-communicable-diseases/ (Accessed 22 January 2023)

Chapter Four

Banakar R, Travers M. 2005. Law, Sociology and Method. In *Theory and Method in Socio-Legal Research*. Edited by Banakar R, Travers M. Hart Publishing.
Banakar R. 2005. Studying Cases Empirically: A Sociological Method for Studying Discrimination Cases in Sweden' in R Banakar and M Travers (eds), *Theory and Method in Socio-Legal Research.* Hart Publishing.
British Library. 2017. *Socio-Legal Studies: An Introduction to Collections*. Available at : http://www.bl.uk/reshelp/findhelpsubject/busmanlaw/legalstudies/soclegal/sociolegal.html&gt (Accessed 22 January 2023)
Calavita K. 2016. *Invitation to Law and Society: An Introduction to the Study of Real Law.* University of Chicago Press.
Coomans F, Grunfeld F, Kamminga M. 2010. Methods of Human Rights Research. *Human Rights Quarterly.* 32(1): 197-186.
Cotterrell. R. 1998. Why Must Legal Ideas Be Interpreted Sociologically?' *Journal of Law & Society*. 25(2): 171-192.
Council of Europe (CoE). 2021. *Evaluation of the MedNET programme: the Mediterranean network for co-operation on drugs and addictions of the Pompidou Group. It promotes co-operation, exchange and mutual transfer of knowledge between countries from both sides of the Mediterranean, respecting human rights and gender equality*. Co-operation Group to Combat Drug Abuse and Illicit Trafficking in Drugs. Pompidou Group.
Cowan D. 2004. Legal Consciousness: Some Observations. *Modern Law Review* 67(6): 928-958.
Daems, T., Van Zyl Smit, D., & Snacken, S. (Eds.). 2013. *European Penology?* Hart Publishing.
Epstein L, King G. 2002.The Rules of Inference. *University of Chicago Law Review*. 69: 1- 134.
Epstein L, Martin A. 2014. *An Introduction to Empirical Legal Research*. Oxford University Press.
Ewick P, Sibley S. 1998. *The Common Place of Law: Stories from Everyday Life* . University of Chicago Press.
Feenan D. 2013. *Exploring the 'Socio' of Socio-Legal Studies*. Palgrave Macmillan.
FRONTEX. 2023. *2022 In Brief.* Available at: 2022_in_brief.pdf (europa.eu) (Accessed 04 May 2023)
Garth B, Sterling J. 1998. From Legal Realism to Law and Society: Reshaping Law for the Last Stages of the Social Activist State. *Law & Society Review* 32: 409-71.
Handler J. 1986. *The Conditions of Discretion: Autonomy and Bureaucracy*. Russell Sage.
Harris. D. 1983. The Development of Socio-Legal Studies in the United Kingdom. *Legal Studies.* 3(3): 315-333.
International Committee of the Red Cross (ICRC) 2023. *1st World Conference on Health in Detention. Conference Report.* Available at: www.icrc.org/en/publication/4681-first-world-conference-health-detention-report (Accessed 21 February 2023)
International Committee of the Red Cross (ICRC) 2023. *1st World Conference on Health in Detention. Conference Report.* Available at: www.icrc.org/en/publication/4681-first-world-conference-health-detention-report (Accessed 21 February 2023)
Jefferson A. M, Jalloh A. S. 2019. Health Provision and Health Professional Roles under Compromised Circumstances: Lessons from Sierra Leone's Prisons. *Criminology & Criminal Justice* 19(5): 572–90.
Knipper M. 2016. Migration, public health and human rights. *International Journal of Public Health* 61(9):993-994.
Lines R. 2008. The right to health of prisoners in international human rights law. *International Journal of Prisoner Health* 4(1): 3-53.
Mant J. 2020. Working Politically: Combining Socio-Legal Tools to Study Experiences of Law. *German Law Journal* 21(7): 1464-1480.
McAuliffe P. 2021. Programmatic approaches to realising socio-economic rights: Debates, definitions and trends. *Melbourne Journal of International Law* 22(1): 24-56.
McCrudden C. 2006. Legal Research and the Social Sciences. *Law Quarterly Review* 122. 632-650.
Menkel-Meadow C. 2019. *Uses and abuses of socio-legal studies*. Routledge Handbook of Socio-Legal Theory and Methods. ISBN: 9781138592902. Available at www.routledgehandbooks.com/doi/10.4324/9780429952814-3 (Accessed 04 May 2023)

Mezey N. 2003.Erasure and Recognition: The Census, Race and the National Imagination. *Northwestern Law Review* 97(4): 1701-67,
Middle East and North African Harm Reduction Association (MENAHRA). 2021. *Assessment of Situation and Response of Drug Use and its Harms in the Middle East and North Africa 2020.* Middle East and North African Harm Reduction Association (MENAHRA), Beirut, Lebanon. Available at: www.menahra.org/images/pdf/Situation_Assessment_2021_-_Web.pdf (Accessed 22 January 2023)
Miller H.S. 1978. Taking the rule of law to prison. *American Bar Association Journal* 64; 990-992
O'Donovan D. 2017. Socio-Legal Methodology: Conceptual Underpinnings, Justifications and Practical Pitfalls. In book: *Legal Research Methods: Principles and Practicalities* (pp.31) Clarus Press.
Paget Zeegers D, Patterson D. 2020. The essential role of law in achieving the health-related Sustainable Development Goals. *European Journal of Public Health* 30(1): pi32-135.
Penal Reform International (PRI). 2022. *Global Prison Trends* Available at: www.penalreform.org/global-prison-trends-2022/ Accessed 22 January 2023)
Salah E. 2020. Women's health in prisons in Africa: prevalence and challenges to address HIV among women in prison in Africa. *European Journal of Public Health.* 30(5): 501.
Salter M, Mason J. 2007. *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research.* Pearson Education.
Sarkin J. 2008. Prisons in Africa: an evaluation from a human rights perspective. *Sur-Revista Internacional de Direitos Humanos*, 5: 22-51.
Schiff D. 1976. Socio-legal theory: social structure and law. *The Modern Law Review*. 39(3): 287-310.
Scuro-Neto P. 2010. *Sociologia Geral e Jurídica*. São Paulo: Saraiva, 7th ed. Available at: www.researchgate.net/publication/360018214_Resenha_-_Sociologia_geral_e_juridica (Accessed 04 May 2023)
Seron C. 2016. The Two Faces of Law and Inequality: From Critique to the Promise of Situated, Pragmatic Policy. *Law & Society Review* 50: 9-33.
Southern Africa Litigation Centre and Centre for Human Rights Education, Advice and Assistance. 2022. *Health care and human rights: A training guide for people working in places of detention in Malawi.* Southern Africa Litigation Centre and Centre for Human Rights Education, Advice and Assistance *Personal copy.*
Sterett S. 2015.What is Law and Society? Definitional Disputes. In The Handbook of Law and Society (Sarat & Ewick, eds). Wiley Blackwell.
Tamanaha BZ. 2012. Introduction: the Problematic State of Socio-legal Studies. *Realistic Socio-Legal Theory: Pragmatism and a Social Theory of Law*, Oxford Socio-Legal Studies. (Accessed 04 May 2023)
Tasioulas. J. 2021. *Conceptual overreach threatens the quality of public reason*. Available at: Conceptual overreach threatens the quality of public reason | Aeon Essays (Accessed 22 January 2023)
The Joint United Nations Programme on HIV and AIDS (UNAIDS) (2023). *Access to health care and HIV screening, treatment and care in the Middle East and North Africa.* UNAIDS Middle East and North Africa Regional Office.
The Joint United Nations Programme on HIV and AIDS(UNAIDS) (2021). *Update on HIV in prisons and other closed settings*. Available at:
www.unaids.org/sites/default/files/media_asset/PCB49_HIV_Prisons_Closed_Settings_rev1__EN.pdf(Accessed 22 January 2023)
Travers M. 2010. *Understanding Law and Society*. Routledge.
United Nations (UN) Office of the High Commissioner for Human Rights (OHCHR). 2012. *The Human Rights Treaty System.* Available at: www.ohchr.org/sites/default/files/Documents/Publications/FactSheet30Rev1.pdf (Accessed 22 January 2023)
United Nations (UN). 2011. *The United Nations Rule of Law Indicators*. Available at: un_rule_of_law_indicators.pdf (Accessed 22 January 2023)
United Nations Office for Drugs and Crime (UNODC). 2018. *Technical guide on the Prevention of Mother to Child Transmission (PMTCT) of HIV in Prisons.* HIV in Prisons, HIV/AIDS Section, United Nations Office for Drugs and Crime (UNODC) Vienna, Austria. Available at: see press release https://www.unodc.org/unodc/en/hiv-aids/new/stories/unodc-hiv-aids-section-at-the-28th-session-of-the-commission-on-crime-prevention-and-criminal-justice-ccpcj.html Technical guide https://www.unodc.org/documents/hiv-aids/publications/Prisons_and_other_closed_settings/19-02279_Technical_Guide_PMTCT_ebook.pdf(Accessed 22 January 2023)
United Nations Office for Drugs and Crime (UNODC). 2021. Global consultation. *UNAIDS Strategy beyond 2021. HIV among people in prisons and other closed settings.* HIV in Prisons, HIV/AIDS Section, United Nations Office for Drugs and Crime (UNODC 2020), Vienna, Austria.
United Nations Office for Drugs and Crime (UNODC). 2022. *Transgender People and HIV in Prisons and Other Closed Settings.* Available at: www.unodc.org/documents/hiv-aids/publications/Prisons_and_other_closed_settings/22-03088_Transgender_HIV_E_ebook.pdf (Accessed 22 January 2023)

United Nations Office for Drugs and Crime Regional Office for Southern Africa (UNODC ROSAF). 2021. *A stocktaking exercise of relevant national laws, policies and practices in South Africa, aiming to identify legal, policy, and practical gaps and obstacles for using alternatives to imprisonment with a specific focus on women arrested or detained for drug offences.* United Nations Office for Drugs and Crime. www.unodc.org/documents/southernafrica/Stories/2021/UNODC_Assessment.pdf (Accessed 22 January 2023)
United Nations Office for Drugs and Crime Regional Office for Southern Africa (UNODC ROSAF). 2017. *Independent Evaluation of Project XSS V02 HIV Prevention, Treatment, Care and Support in Prison Settings in Sub Saharan Africa.* United Nations Office for Drugs and Crime. http://www.unodc.org/documents/evaluation/Independent_Project_Evaluations/2017/XSSV02_independent_project_evaluation_report_2017.pdf (Accessed 22 January 2023)
United Nations Office for Drugs and Crime Regional Office for Southern Africa (UNODC ROSAF). 2015. *Independent Evaluation of Project XAFK 45: Response to the Social and Livelihood Needs for HIV/AIDS Prevention in East Africa.* United Nations Office for Drugs and Crime. Available at: http://www.unodc.org/unodc/en/evaluation/independent-project-evaluations-2015.html (Accessed 22 January 2023)
United Nations Office for Drugs and Crime Regional Office for the Middle East and North Africa (UNODC ROMENA) 2019. *Independent Evaluation of Project XAMZ96. HIV and AIDS Prevention, Treatment, Care and Support in Prison Settings in the Middle East and North Africa* United Nations Office for Drugs and Crime. www.unodc.org/romena/en/hiv-aids.html (Accessed 22 January 2023)
Van Hout MC, Aaraj E. 2020. Pandemic Stresses the Human Rights Imperatives of Tackling HIV and Hepatitis in Middle East and North African Prisons. *Health and Human Rights Journal* [Online]. https://www.hhrjournal.org/2020/05/pandemic-stresses-the-human-rights-imperatives-of-tackling-hiv-and-hepatitis-in-middle-east-and-north-african-prisons/
Van Hout MC, Bigland C, Mariniello T. 2022. A legal-realist assessment of the Zimbabwean correctional system response to COVID-19 during state disaster measures. *International Journal of Prisoner Health*. [Epub ahead of print] https://doi.org/10.1108/IJPH-10-2021-0104
Van Hout MC, Chimbga D. 2020. Tackling the intersectionality of drug offences, gender based violence and victimisation in the South African Criminal Justice System: Leveraging for greater implementation of the Tokyo Rules within a sustainable development agenda. *Journal of Sustainable Development -Africa*. 22(3): 157-165.
Van Hout MC, Crowley D. 2021. The *"double punishment"* of transgender prisoners: a human rights-based commentary on placement and conditions of detention. *International Journal of Prisoner Health.* [Epub ahead of print] doi: 10.1108/IJPH-10-2020-0083
Van Hout MC, Fleißner S, Klankworth U, Stöver H. 2022b. Children in the prison nursery: Global progress in adopting the Convention on the Rights of the Child in alignment with United Nations minimum standards of care in prisons. *Child Abuse and Neglect* 134:105829. doi: 10.1016/j.chiabu.2022.105829
Van Hout MC, Fleißner S, Stöver H. 2021. *"#Me Too"*: Global progress in tackling continued custodial violence against women. The 10 year anniversary of the Bangkok Rules. *Trauma, Violence, & Abuse: A Review Journal.* 3(15248380211036067) [Epub ahead of print].https://doi.org/10.1177/15248380211036067
Van Hout MC, Fleißner S, Stöver H. 2022. Women's right to health in detention: United Nations Committee observations since the adoption of the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (*'Bangkok Rules'*). *Oxford Journal of Human Rights Practice*. [Epub ahead of print] https://doi.org/10.1093/jhuman/huac058
Van Hout MC, Kaima R, Mhango V, Mariniello T. 2022a. Moving beyond the politization of same-sex sexuality and leveraging right to health to counter inter-personal sexual violence and HIV in Malawi's prisons. *Forensic Science International Mind and Law*. 3 (100077):1-8. https://doi.org/10.1016/j.fsiml.2022.100103
Van Hout MC, Mhango V, Kaima R, Bigland C, Mariniello T. 2022c. A legal-realist assessment of human rights, right to health and standards of healthcare in the Malawian prison system during COVID-19 state disaster measures. *International Journal of Prisoner Health*. [Epub ahead of print] DOI:10.1108/IJPH-10-2021-0108.
Van Hout MC, Mhlanga-Gunda R. 2019a. Prison health situation and health rights of young people incarcerated in sub-Saharan African prisons and detention centres: a scoping review of extant literature' *BMC International Health and Human Rights*. 19(1): 17. https://doi.org/10.1186/s12914-019-0200-z
Van Hout MC, Mhlanga-Gunda R. 2019b. Mankind owes to the child the best that it has to give: prison conditions and the health situation and rights of children incarcerated with their mothers in sub-Saharan African prisons**.** *BMC International Health and Human Rights***.** 19(1)**:** 13. https://doi.org/10.1186/s12914-019-0194-6
Van Hout MC, Srisuwan L, Plugge E. 2022. A human rights assessment of menopausal women's access to age- and gender-sensitive non-discriminatory health care in prison. *Menopause.* 29(11):1338-1348. DOI: 10.1097/GME.0000000000002065
Van Hout MC, Stöver H, Benamara K, Bauer P, Salah E. 2021. 90-90-90: catalysing the response to HIV by enhancing prison visibility in the Joint United Nations Programme on HIV and AIDS (UNAIDS) strategy beyond 2021. *Public Health*. 190:e5-e6.

Van Hout MC, Wessels J. 2023. "#Foreigners Must Go versus '*in favorem libertatis*"': Human rights violations and procedural irregularities in South African immigration detention law. *Journal of Human Rights*. [Epub ahead of print] DOI: 10.1080/14754835.2023.2170709
Van Hout MC, Wessels J. 2021a. Navigating the complexities of the mentally ill and mentally incapacitated in the criminal justice system in South Africa. *Forensic Science International: Mind and Law*. 2(100068): 1-6 https://doi.org/10.1016/j.fsiml.2021.100068
Van Hout MC, Wessels J. 2021b. Human rights and the invisible nature of incarcerated women in post-apartheid South Africa: prison system progress in adopting the Bangkok Rules. *International Journal of Prisoner Health* [Epub ahead of print] DOI: 10.1108/IJPH-05-2021-0045
Van Hout MC, Wessels J. 2021c. "Ubuntu" I am because we are: COVID-19 and the legal framework for addressing communicable disease in the South African prison system. *International Journal of Prisoner Health.* Early Online doi: 10.1108/IJPH-05-2021-0046.
Van Hout MC. 2020a. Leaving no one behind: The human tragedy of children in African prisons during COVID-19. *Health and Human Rights Journal*. [Online] https://www.hhrjournal.org/2020/05/leaving-no-one-behind-the-human-tragedy-of-children-in-african-prisons-during-covid-19/
Van Hout MC. 2020b. COVID-19: Urgent Need to Find Alternatives to Prison Sentences in Malawi**.** *Health and Human Rights Journal* [Online] https://www.hhrjournal.org/2020/09/covid-19-urgent-need-to-release-women-from-prison-in-malawi/
Van Hout MC. 2020c. Prison staff exposure to pathogenic disease and occupational health research in African prisons: A neglected area**.** *Journal of Sustainable Development: Africa*. 22(1): 166-171.
Van Hout MC. 2021. Human rights violations, detention conditions and the invisible nature of women in European immigration detention: A legal realist account. *International Journal of Prisoner Health*. [Epub ahead of print] doi: 10.1108/IJPH-03-2021-0023.
Van Hout MC. 2022a. Ensuring oversight and protection of life and health of all detained by the Russian Federation and Russian held territories of Ukraine. *Public Health.* 213: 68-70. https://doi.org/10.1016/j.puhe.2022.10.001
Van Hout MC. 2022c. Using COVID-19 to address environmental threats to health and leverage for prison reform in South Africa, Zimbabwe and Malawi. *Oxford Journal of Human Rights Practice.* [Epub ahead of print] https://doi.org/10.1093/jhuman/huac050
Van Hout MC. 2023. Environmental health rights and concepts of vulnerability of immigration detainees in Europe before and beyond COVID-19. *Oxford Journal of Human Rights Practice*. [Epub ahead of print]. https://doi.org/10.1093/jhuman/huac063
Van Hout. MC 2022b. Navigating the complexities of (trans) gender equality rights within the parameters of reasonable accommodation and security tensions in South African prisons: The judgement of *September v Subramoney'*. *Forensic Science International Mind and Law.* 3 (100077):1-10 https://doi.org/10.1016/j.fsiml.2022.100077
Van Zyl Smit D, Appleton, C. 2019. *Life imprisonment a global human rights analysis*. Harvard University, Harvard Law School.
Van Zyl Smit D, Dünkel F. 2021. *Imprisonment today and tomorrow: International perspectives on prisoners' rights and prison conditions.* Kluwer Law International.
World Health Organization(WHO). 2003. *WHO Moscow Declaration: Prison Health as part of Public Health*. Available at: Declaration on prison health as part of public health: adopted in Moscow on 24 October 2003 (who.int) (Accessed 22 January 2023)

Chapter Five

Van Hout MC. 2023. Environmental health rights and concepts of vulnerability of immigration detainees in Europe before and beyond COVID-19. *Oxford Journal of Human Rights Practice*. [Epub ahead of print]. https://doi.org/10.1093/jhuman/huac063
Van Hout MC, Wessels J. 2023. "#Foreigners Must Go versus '*in favorem libertatis*"': Human rights violations and procedural irregularities in South African immigration detention law. *Journal of Human Rights*. [Epub ahead of print] DOI: 10.1080/14754835.2023.2170709
Van Hout MC. 2022a. Ensuring oversight and protection of life and health of all detained by the Russian Federation and Russian held territories of Ukraine. *Public Health.* 213: 68-70. https://doi.org/10.1016/j.puhe.2022.10.001
Van Hout. MC 2022b. Navigating the complexities of (trans) gender equality rights within the parameters of reasonable accommodation and security tensions in South African prisons: The judgement of *September v Subramoney'*. *Forensic Science International Mind and Law.* 3 (100077):1-10 https://doi.org/10.1016/j.fsiml.2022.100077
Van Hout MC. 2022c. Using COVID-19 to address environmental threats to health and leverage for prison reform in South Africa, Zimbabwe and Malawi. *Oxford Journal of Human Rights Practice.* [Epub ahead of print] https://doi.org/10.1093/jhuman/huac050

Van Hout MC, Fleißner S, Stöver H. 2022. Women's right to health in detention: United Nations Committee observations since the adoption of the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (*'Bangkok Rules'*). *Oxford Journal of Human Rights Practice*. [Epub ahead of print] https://doi.org/10.1093/jhuman/huac058
Van Hout MC, Bigland C, Mariniello T. 2022. A legal-realist assessment of the Zimbabwean correctional system response to COVID-19 during state disaster measures. *International Journal of Prisoner Health*. [Epub ahead of print] https://doi.org/10.1108/IJPH-10-2021-0104
Van Hout MC, Srisuwan L, Plugge E. 2022. A human rights assessment of menopausal women's access to age- and gender-sensitive non-discriminatory health care in prison. *Menopause.* 29(11):1338-1348. [Epub ahead of print] DOI: 10.1097/GME.0000000000002065
Van Hout MC, Kaima R, Mhango V, Mariniello T. 2022a. Moving beyond the politization of same-sex sexuality and leveraging right to health to counter inter-personal sexual violence and HIV in Malawi's prisons. *Forensic Science International Mind and Law*. 3 (100077):1-8. https://doi.org/10.1016/j.fsiml.2022.100103
Van Hout MC, Fleißner S, Klankworth U, Stöver H. 2022b. Children in the prison nursery: Global progress in adopting the Convention on the Rights of the Child in alignment with United Nations minimum standards of care in prisons. *Child Abuse and Neglect* 134:105829. doi: 10.1016/j.chiabu.2022.105829
Van Hout MC, Mhango V, Kaima R, Bigland C, Mariniello T. 2022c. A legal-realist assessment of human rights, right to health and standards of healthcare in the Malawian prison system during COVID-19 state disaster measures. *International Journal of Prisoner Health*. [Epub ahead of print] DOI:10.1108/IJPH-10-2021-0108.
Van Hout MC. 2021. Human rights violations, detention conditions and the invisible nature of women in European immigration detention: A legal realist account. *International Journal of Prisoner Health*. [Epub ahead of print] doi: 10.1108/IJPH-03-2021-0023.
Van Hout MC, Crowley D. 2021. The *"double punishment"* of transgender prisoners: a human rights-based commentary on placement and conditions of detention. *International Journal of Prisoner Health.* [Epub ahead of print] doi: 10.1108/IJPH-10-2020-0083
Van Hout MC, Wessels J. 2021a. Navigating the complexities of the mentally ill and mentally incapacitated in the criminal justice system in South Africa. *Forensic Science International: Mind and Law.* 2(100068): 1-6 https://doi.org/10.1016/j.fsiml.2021.100068
Van Hout MC, Wessels J. 2021b. Human rights and the invisible nature of incarcerated women in post-apartheid South Africa: prison system progress in adopting the Bangkok Rules. *International Journal of Prisoner Health* [Epub ahead of print] DOI: 10.1108/IJPH-05-2021-0045
Van Hout MC, Fleißner S, Stöver H. 2021. *"#Me Too"*: Global progress in tackling continued custodial violence against women. The 10 year anniversary of the Bangkok Rules. *Trauma, Violence, & Abuse: A Review Journal.* 3(15248380211036067) https://doi.org/10.1177/15248380211036067
Van Hout MC. 2020a. Leaving no one behind: The human tragedy of children in African prisons during COVID-19. *Health and Human Rights Journal*. [Online] https://www.hhrjournal.org/2020/05/leaving-no-one-behind-the-human-tragedy-of-children-in-african-prisons-during-covid-19/
Van Hout MC. 2020b. COVID-19: Urgent Need to Find Alternatives to Prison Sentences in Malawi**.** *Health and Human Rights Journal* [Online] https://www.hhrjournal.org/2020/09/covid-19-urgent-need-to-release-women-from-prison-in-malawi/
Van Hout MC. 2020c. Prison staff exposure to pathogenic disease and occupational health research in African prisons: A neglected area**.** *Journal of Sustainable Development: Africa***.** 22(1)**:** 166-171.
Van Hout MC, Aaraj E. 2020. Pandemic Stresses the Human Rights Imperatives of Tackling HIV and Hepatitis in Middle East and North African Prisons. *Health and Human Rights Journal* [Online]. https://www.hhrjournal.org/2020/05/pandemic-stresses-the-human-rights-imperatives-of-tackling-hiv-and-hepatitis-in-middle-east-and-north-african-prisons/
Van Hout MC, Chimbga D. 2020. Tackling the intersectionality of drug offences, gender based violence and victimisation in the South African Criminal Justice System: Leveraging for greater implementation of the Tokyo Rules within a sustainable development agenda. *Journal of Sustainable Development -Africa*. 22(3): 157-165.
Van Hout MC, Mhlanga-Gunda R. 2019a. Prison health situation and health rights of young people incarcerated in sub-Saharan African prisons and detention centres: a scoping review of extant literature' *BMC International Health and Human Rights*. 19(1): 17. https://doi.org/10.1186/s12914-019-0200-z
Van Hout MC, Mhlanga-Gunda R. 2019b. Mankind owes to the child the best that it has to give: prison conditions and the health situation and rights of children incarcerated with their mothers in sub-Saharan African prisons**.** *BMC International Health and Human Rights***.** 19(1)**:** 13. https://doi.org/10.1186/s12914-019-0194-6

Chapter 6

Adger W.N. 2006.Vulnerability. *Global Environmental Change.* 16(3): 268– 281.

Amon J.J. 2020. COVID-19 and Detention: Respecting Human Rights. *Health and Human Rights Journal*. March 23 2020. Available at: https://www.hhrjournal.org/2020/03/covid-19-and-detention-respecting-human-rights/ (Accessed 22 January 2023)
Beaudry G, Zhong S, Whiting D, Javid B, Frater J, Fazel S. 2020. Managing outbreaks of highly contagious diseases in prisons: a systematic review. *BMJ Global Health*. 5(11):e003201.
Brown K, Ecclestone K, Emmel N. 2017. The many faces of vulnerability. *Social Policy & Society* 16(3): 497– 510.
Charles A Draper H. 2012; 'Equivalence of care' in prison medicine: Is equivalence of process the right measure of equity? *Journal of Medical Ethics*. 8(4):215-8.
Cliquennois G, Snacken S. 2018. European and United Nations monitoring of penal and prison policies as a source of an inverted panopticon? *Crime, Law and Social Change.* 70(1):1–18.
Corbet S, Cook L. 2022. *EU nations debating borders, migration policies*. Available at: EU nations debating borders, migration policies - ABC17NEWS (Accessed 22 January 2023)
Council of Europe (CoE). 2015. European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT). (CPT). *Living space per prisoner in prison establishments: CPT standards*, 15 December 2015.
De Búrca G. (2021). *Reframing Human Rights in a Turbulent Era.* Oxford University Press.
European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT). 2020. *Statement of principles relating to the treatment of persons deprived of their liberty in the context of the coronavirus disease (COVID-19) pandemic* March 20, 2020. Available at https://rm.coe.int/16809cfa4b (Accessed 22 January 2023)
European Court of Human Rights. 2021. *Guide on the Case-Law of the European Convention on Human Rights Prisoners' Rights*. Available at https://www.echr.coe.int/Documents/Guide_Prisoners_ rights_ENG.pdf (Accessed 22 January 2023)
Exworthy T, Samele C, Urquía N, Forrester A. 2011. 2011. Beyond equivalence: Prisoners' right to health. *Psychiatrist* 35(6): 270-275.
Fineman M. 2019. Vulnerability and Social Justice. *Valparaiso University Law Review* 53(2): 341-369.
Freedman J. 2018. The uses and abuses of "vulnerability" in EU asylum and refugee protection: protecting women or reducing autonomy? *International Journal on Collective Identity Research* 204(1):1-15.
Gauri V, Brinks D. 2008. *Courting Social Justice: Judicial Enforcement of Social and Economic Rights.* Cambridge University Press.
Goldsmith J, Posner E. 2005. *The Limits of International Law* (Oxford University Press 2005)
Gostin L.O. 2015. Law and the public's health. In: Detels R, Gulliford M, Abdool Karim Q, Chuan C, editors. *Oxford Textbook of Global Public Health*. Oxford University Press.
Gostin LO, Monahan JT, Kaldor J, DeBartolo M, Friedman EA, Gottschalk K, Kim SC, Alwan A, Binagwaho A, Burci GL, Cabal L, DeLand K, Evans TG, Goosby E, Hossain S, Koh H, Ooms G, Roses Periago M, Uprimny R, Gruskin S, Bogecho D, Ferguson L. 2010. 'Rights-based approaches' to health policies and programs: articulations, ambiguities, and assessment. *Journal of Public Health Policy*. 31(2):129-45.
Hargreaves S, Kumar BN, McKee M, Jones L, Veizis A. 2020. Europe's migrant containment policies threaten the response to covid-19. *BMJ.* 368:m1213.
Hunt P. 2016. Interpreting the international right to health in a human rights-based approach to health. *Health and Human Rights Journal*. 18(2):109-130.
Hunt P, Backman G, Bueno de Mesquita J, Finer L, Khosla R, Korljan D, Oldring L. 2015. The right to the highest attainable standard of health. In: Detels, R., et al. (eds.) *Oxford Textbook of Global Public Health*(6th ed) Oxford University Press.
International Commission of Jurists (ICJ). 2020. *The Impact of COVID-19 Related Measures on Human Rights of Migrants and Refugees in the EU: Briefing Paper*. Available at: www.icj.org/wpcontent/uploads/2020/06/Covid19-impact-migrans-Europe-Brief-2020-ENG.pdf (Accessed 22 January 2023)
International Committee of the Red Cross (ICRC) 2023. *1st World Conference on Health in Detention. Conference Report.* Available at www.icrc.org/en/publication/4681-first-world-conference-health-detention-report (Accessed 21 February 2023)
International Organisation for Migration (IOM). 2011. *International Standards on Immigration Detention and non-custodial Measures. IOM Submission to the Working Group on Arbitrary Detention*. Available at: www.ohchr.org/Documents/Issues/Detention/DraftBasicPrinciples/IOM3.pdf (Accessed 22 January 2023)
Jumbe V.C, Mhango V, Muula A, Kaima R, Chimbwete L, Mangwana A, Msutu B, Tembo L, Bigland C, Kewley S, Van Hout MC. 2022. A multi-stakeholder situation assessment of COVID-19 disease preparedness and mitigation measures in a large prison complex in Malawi. *International Journal of Prisoner Health.* Early Online DOI: 10.1108/IJPH-10-2021-0105. PMID: 35148041

Keehn EN, Nevin A. 2018. Health, Human Rights, and the Transformation of Punishment: South African Litigation to Address HIV and Tuberculosis in Prisons. *Health and Human Rights.* 20(1):213-224.
Kerr L. 2015. The chronic failure to control prisoner isolation in US and Canadian law. *Queen's Law Journal.* 40(2). 482-530.
Knight K, Bleckner J, Cameron E, Amon J. 2022.Pandemic Treaty Should Include Reporting in Prisons. *Health and Human Rights Journal* 24(1):117-119. Available at: www.hhrjournal.org/2022/04/pandemic-treaty-should-include-reporting-in-prisons/ (Accessed 22 January 2023)
Knipper M. 2016. Migration, public health and human rights. *International Journal of Public Health*. 61(9):993-994.
Krasner S. 2002. Realist Views of International Law. *Proceedings of the Annual Meeting (American Society of International Law)* 96: 265.
Krasner S. 1993. *Sovereignty, Regimes, and Human Rights. Regime Theory and International Relations.* Oxford University Press.
Landman. T. 2005. *Studying Human Rights*. Routledge.
Lines R, Burke-Shyne N, Girelli G. 2020. Gaol Fever: What COVID-19 Tells us about the War on Drugs. *Health and Human Rights Journal.* April 19 2020. Available at: www.hhrjournal.org/2020/04/gaol-fever-what-covid-19-tells-us-about-the-war-on-drugs/ (Accessed 22 January 2023)
Mackenzie C, Rogers W, Dodds S. 2014. Introduction: What is vulnerability and why does it matter for moral theory? In: Mackenzie C, Rogers W, Dodds S. *Vulnerability.* Oxford University Press.
McAuliffe P. 2021 Programmatic approaches to realising socio-economic rights: Debates, definitions and trends. *Melbourne Journal of International Law* 22(1) 24-56.
Mendola D, Parroco A.M, Li Donni, P. 2020. Accounting for interdependent risks in vulnerability assessment of refugees. In A. Pollice, N. Salvati & F. Schirippa Spagnolo (eds.), *Book of short papers SIS 2020*. London: Pearson, pp. 1418– 1423.
Mendola D, Pera A. 2021. Vulnerability of refugees: Some reflections on definitions and measurement practices. *International Migration* 60(5):108-121.
Mhlanga-Gunda R, Rusakaniko S, Chinyuku A, Pswarayi V, Robinson C, Kewley S, Van Hout MC 2022. "We sleep 10cm apart so there is no social distancing": COVID-19 preparedness in a Zimbabwean prison complex. *International Journal of Prisoner Health*. Early Online DOI:: 10.1108/IJPH-10-2021-0101.
Mhlanga-Gunda R, Motsomi-Moshoeshoe N, Plugge E, Van Hout MC. 2020. Challenges in ensuring robust research and reporting of health outcomes in sub-Saharan African prisons. *Lancet Global Health*. Jan;8(1):e25-e26.
Miller H, Redhead, R. 2019. Beyond 'rights-based approaches'? Employing a process and outcomes framework. *The International Journal of Human Rights.* 23(5):699-718.
Muntingh L. 2020. Africa, Prisons and COVID-19. *Journal of Human Rights Practice* 12(2):284-292.
Niveau G. 2007. Relevance and limits of the principle of "equivalence of care" in prison medicine. *Journal of Medical Ethics.* 33(10):610-613.
Office of the High Commissioner for Human Rights(OHCHR). 2020. *Urgent action needed to prevent COVID-19"rampaging through places of detention" –Michelle Bachelet* . 25 March 2020. Available at: www.ohchr.org/en/statements/2020/03/urgent-action-needed-prevent-covid-19-rampaging-through-places-detention (Accessed 22 January 2023)
Organization of African Unity(OAU). 1982. *African Charter on Human and Peoples' Rights ("Banjul Charter")*(27 June 1981)CAB/LEG/67/3 rev.5,21I.L.M.58.
Paget Zeegers D, Patterson D. 2020. The essential role of law in achieving the health-related Sustainable Development Goals. *European Journal of Public Health* 30(1): pi32-135.
Penal Reform International (PRI). 2022. *Global Prison Trends*. Available at: www.penalreform.org/global-prison-trends-2022/ (Accessed 22 January 2023)
Penal Reform International (PRI). 2020. *Coronavirus: Healthcare and human rights of people in prison*. Available at: www.penalreform.org/resource/coronavirus-healthcare-and-human-rights-of-people-in/ (Accessed 22 January 2023)
Perlin ML, Dlugacz HA. 2009."It's doom alone that counts": can international human rights law be an effective source of rights in correctional conditions litigation? *Behavioural Sciences and the Law*. 27(5):675-94.
Pont J, Enggist S, Stöver H, Baggio S, Gétaz L, Wolff H. 2021. COVID-19-The Case for Rethinking Health and Human Rights in Prisons. *American Journal of Public Health.* 111(6):1081-1085.
Potts H, Hunt P. 2008. *Participation and the Right to the Highest Attainable Standard of Health*. University of Essex Human Rights Centre.
Reyes H. 2001. Health and human rights in prisons. Extract from "*HIV in Prisons: A reader with particular relevance to the newly independent states"*, chapter 2, pp.9-18. World Health Organization-Europe.
Rogan M. 2017. Human rights and correctional health policy: a view from Europe. *International Journal of Prisoner Health*. 13(1): 3-9.

Snacken S. 2010. Resisting punitiveness in Europe? *Theoretical Criminology* 14(3):273-292.
Samuel G. 2009. Interdisciplinarity and the Authority Paradigm: Should Law Be Taken Seriously by Scientists and Social Scientists?' *Journal of Law and Society* 36(4):431-459.
Sander G, Lines R. 2016. HIV, Hepatitis C, TB, Harm Reduction, and Persons Deprived of Liberty: What Standards Does International Human Rights Law Establish? *Health and Human Rights Journal*. 18(2) 171-182.
Simpson PL, Butler TG. 2020. Covid-19, prison crowding, and release policies. *BMJ*. 20;369:m1551.
Simpson PL, Simpson M, Adily A, Grant L, Butler T. 2019. Prison cell spatial density and infectious and communicable diseases: a systematic review. *BMJ Open*. 9(7):e026806.
Smith P.S. 2016. Prisons and human rights: past, present and future challenges. In Weber, L., Fishwick, E. and Marmo, M. (Eds), *The Routledge International Handbook of Criminology and Human Rights*. Routledge.
Special Rapporteur on Health. OHCHR. No date. *About the right to health and human rights*. *Available at:* www.ohchr.org/en/special-procedures/sr-health/about-right-health-and-human-rights (Accessed 22 January 2023)
Special Rapporteur on the Human Rights of Migrants (SRHRM). 2012. *Report of the Special Rapporteur on the human rights of migrants, François Crépeau: Detention of Migrants in an Irregular Situation*. A/HRC/20/24. Geneva, Switzerland: Office of the Special Rapporteur on the Human Rights of Migrants. Available at: www.undocs.org/A/HRC/20/24 (Accessed 22 January 2023)
Special Rapporteur on the Human Rights of Migrants (SRHRM). 2002. *Report of the Special Rapporteur on the Human Rights of Migrants*, Gabriela Rodrıguez Pizarro submitted pursuant to Commission on Human 564 Rights resolution. 2002/62. Geneva, Switzerland: Office of the Special Rapporteur on the Human Rights of Migrants. Available at: https://digitallibrary.un.org/record/485997?ln=en (Accessed 22 January 2023)
Steinberg J. 2005. *Prison Overcrowding and the Constitutional Right to Adequate Accommodation in South Africa*. Centre for the Study of Violence and Reconciliation. Available at: prisoncovercrowding.pdf (csvr.org.za) (Accessed 22 January 2023)
The Malawi Times. 2022. *Food Crisis in Prisons.* 17 October 2022. Available at Food crisis in prisons - The Times Group Malawi (Accessed 22 January 2023)
Thomas R, Kuruvilla S, Hinton R, Jensen SL, Magar V, Bustreo F. 2015. Assessing the Impact of a Human Rights-Based Approach across a Spectrum of Change for Women's, Children's, and Adolescents' Health. *Health and Human Rights Journal*. 17(2):11-20.
Turner, B. L., Kasperson, R. E., Matsone, P. A., McCarthyf, J. J., Corell, R. W., Christensene, L., . . . Schillerb, A. (2003). A framework for vulnerability analysis in sustainability science. *Proceedings of the National Academy of Sciences of the United States of America*. 100(14): 8074-8079.
UN (United Nations). (2001). *Report on the world social situation, social and human rights questions: social development*. Division of Social Policy and Affairs. New York: United Nations.
United Nations (UN). 1955. *Standard Minimum Rules for the Treatment of Prisoners*, 30 August 1955.
UNICEF.2020. *Technical Note:COVID-19 and Children Deprived of their Liberty*. Alliance for Child Protection in Humanitarian Action. Available at Technical Note: COVID-19 and Children Deprived of their Liberty | UNICEF Global Development Commons (Accessed 22 January 2023)
United Nations (UN) Committee against Torture (UN CAT). 2018. Decision adopted by the Committee under article 22 of the Convention, concerning communication No. 493/2012 (2018). *Damien Ndarisigaranye v Burundi*.
United Nations (UN) Committee on Economic, Social, and Cultural Rights (UN CESCR). 2011. *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Russian Federation*. Doc. No.E/C.12/Rus/CO/5.
United Nations (UN) Committee on Economic, Social, and Cultural Rights (UN CESCR).2003. *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Republic of Moldova*. Doc. No.E/C.12/Add.91.
United Nations (UN) Committee on Economic, Social and Cultural Rights (UN CESCR). 2000.*General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)* (11 August 2000)E/C.12/2000/4.
United Nations (UN) General Assembly. 2015. *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1.
United Nations (UN) General Assembly. 2003. *Optional Protocol to the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment* (9 January 2003)A/RES/57/199.
United Nations (UN) General Assembly. 1991c. *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty :resolution /adopted by the General Assembly*(2 April 1991)A/RES/45/113.
United Nations (UN) General Assembly. 1988. *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment: resolution / adopted by the General Assembly* (9 December 1988)A/RES/43/173.

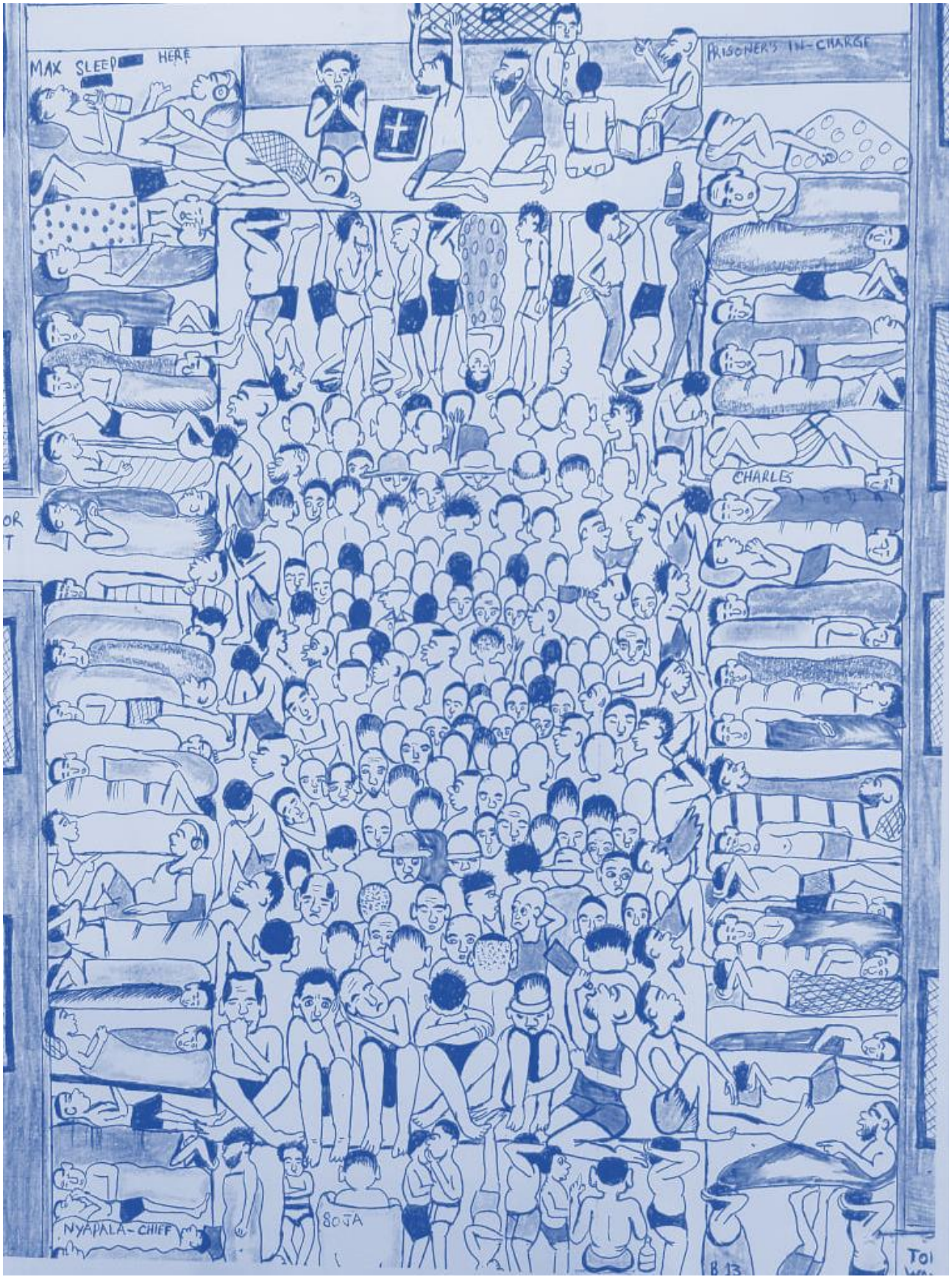
United Nations (UN) Human Rights Committee (UN HRC). 2019. *General comment no. 36, Article 6 (Right to Life)* (3 September 2019) CCPR/C/GC/35.
United Nations (UN) Human Rights Committee (UN HRC). 2003. *Concluding Observations: Portugal*. UN Doc. CCPR/CO/78/PRT.
United Nations (UN) Human Rights Committee (UN HRC). 2002. *Concluding Observations: Georgia*. UN Doc. CCPR/CO/74/GEO.
United Nations (UN) Human Rights Council. 2013. *End of mission statement by the Special Rapporteur on the right to food, Malawi* 12 to 22 July 2013", 22 July 2013. Available at: https://www.ohchr.org/en/statements/2013/07/end-missionstatement-special-rapporteur-right-food-malawi-12-22-july-2013 (Accessed 24 February 2023).
United Nations (UN) Office of the High Commissioner for Human Rights (UNHCR). 2020. *Working Group on Arbitrary Detention Deliberation No. 11 on prevention of arbitrary deprivation of liberty in the context of public health emergencies*. Available at : https://www.ohchr.org/Documents/Issues/Detention/DeliberationNo11.pdf (Accessed 22 January 2023)
United Nations (UN) Subcommittee on the Prevention of Torture (SPT). 2014. SPT, U. S. on the P. of T, *Country Visit Report: Mali*, CAT/OP/MLI/1, 2014.
United Nations (UN) Subcommittee on the Prevention of Torture (SPT). 2012. SPT, U. S. on the P. of T, *Country Visit Report: Brazil*, CAT/OP/BRA/1, 2012.
United Nations Office on Drugs and Crime (UNODC). 2021. *United Nations Common Position on Incarceration* . Available at: www.unodc.org/res/justice-and-prison-reform/nelsonmandelarules-GoF/UN_System_Common_Position_on_Incarceration.pdf (Accessed 22 January 2023)
United Nations Office on Drugs and Crime (UNODC). 2020a. *COVID-19 in prisons – Member States and UNODC reiterate their commitment to the Nelson Mandela Rules* (UNODC 22 July 2020). Available at: www.unodc.org/unodc/en/frontpage/2020/July/covid-19-in-prisons--member-states-and-unodcreiterate-their-commitment-to-the-nelson-mandela-rules.html (Accessed 22 January 2023)
United Nations Office on Drugs and Crime (UNODC). 2020b. *Position paper COVID-19 preparedness and responses in prisons.* Available at: www.unodc.org/documents/hiv-aids/publications/UNODC_position_paper_COVID-19_in_prisons_-_FINAL.pdf (Accessed 22 January 2023)
United Nations Office on Drugs and Crime(UNODC). 2020c. *Protecting children deprived of liberty during the COVID-19 outbreak.* Available at www.unodc.org/documents/Advocacy-Section/MoS_Children_in_detention_COVID-19.pdf (Accessed 22 January 2023)
United Nations Office on Drugs and Crime (UNODC). 2013. *Handbook on Strategies to Reduce Overcrowding in Prisons.* Available at: www.unodc.org/documents/justice-and-prison-reform/Overcrowding_in_prisons_Ebook.pdf (Accessed 22 January 2023)
Van der Valk S, Rogan M. 2021. Experiencing human rights protections in prisons: The case of prison monitoring in Ireland. *European Journal of Criminology* :18(1): 101–119.
Van der Ven LGL, Duinhof EL, Dückers MLA, Jambroes M, van Bon-Martens MJH. 2021. Conceptualizing Vulnerability for Health Effects of the COVID-19 Pandemic and the Associated Measures in Utrecht and Zeist: A Concept Map. *International Journal of Environmental Research and Public Health* 18(22):12163.
Van Hout MC. 2020c. Prison staff exposure to pathogenic disease and occupational health research in African prisons: A neglected area**.** *Journal of Sustainable Development: Africa***.** 22(1): 166-171.
Van Zyl Smit D. 2013. Punishment and human rights in Sparks R.and Simon, J. (Eds). *The Sage Handbook of Punishment and Society*. SAGE Publications Ltd.
Van Zyl Smit D. 2012. *Prisoners' rights Handbook on prisons*. Routledge.
Van Zyl Smit D . 2010. Regulation of Prison Conditions. *Crime and Justice* 39(1); 503-563.
Van Zyl Smit D, Snacken S. 2009. *Principles of European Prison Law and Policy: Penology and Human Rights*. Oxford University Press.
Williams C, Blaiklock A, Hunt P. 2021. The right to health supports global public health. *Oxford Textbook of Global Public Health* . Oxford University Press.
World Health Organization (WHO). 2020a. *Preparedness, prevention and control of COVID-19 in prisons and places of detention*. Available at Preparedness, prevention and control of COVID-19 in prisons and other places of detention: interim guidance, 8 February 2021 (who.int) (Accessed 22 January 2023)
World Health Organization (WHO). 2020b. *UNODC, WHO, UNAIDS and OHCHR joint statement on COVID-19 in prisons and other closed settings*. Available at www.who.int/news/item/13-05-2020-unodc-who-unaids-and-ohchr-joint-statement-on-covid-19-in-prisons-and-other-closed-settings (Accessed 22 January 2023)
World Health Organization (WHO) 2020c.*Checklist to evaluate preparedness, prevention and control of COVID-19 in prisons and other places of detention.* Available at www.euro.who.int/__data/assets/pdf_file/0020/438041/Covid19-PrisonsChecklist-eng.pdf (Accessed 22 January 2023)

World Health Organization(WHO). 2001. *HIV in Prisons.* Available at: HIV in prisons: a reader with particular relevance to the newly independent states/ edited by Paola Bollini (who.int) (Accessed 22 January 2023)

Cases

Abdel Hadi, Ali Radi & Others v Republic of Sudan (2009). Communication 368/09.
Abubakari v. Tanzania (merits)(2016)1AfCLR599.
African Institute for Human Rights and Development (on behalf of Sierra Leonean Refugees in Guinea) v Republic of Guinea (Communication 249/200) (ACHPR 2004)
Aleksanyan v. Russia, Application No. 46468/06, Council of Europe: European Court of Human Rights, 22 December 2008.
Ananyev and Others v. Russia, Application No. 41461/10, Council of Europe: European Court of Human Rights, 27 November 2012.
Artyomov v. Russia, Application No. 14146/02, Council of Europe: European Court of Human Rights, 27 May 2010.
B and Others v. Minister of Correctional Services and Others (1997)(4)SA441(C);1997 (6)BCLR789(C).
Banda & Others v the Attorney General & Others (Constitutional Case No 120 of 2018), Zomba District Registry.
Blokhin v. Russia, Application No. 47152/06. Council of Europe: European Court of Human Rights, 23 March 2016.
Bogdanova v Russia Application No. 63378/13. "Council of Europe: European court of human rights", 10 June 2015, available at: https://tgeu.org/wp-content/uploads/2015/07/Bogdanova-v-Russia_third-partyintervention-FINAL.pdf (accessed 20 October 2020).
Catalin Eugen Micu v. Romania, Application No. 55104/13, Council of Europe: European Court of Human Rights, 5 January 2016.
Chauke v The State (578/2015) (2015) ZASCA 181 (November 30, 2015).
Constitutional Rights Project and Civil Liberties Organisation v. Nigeria (1999) ACHPR Comm Nos 143/95,150/96 para 5.
De Vos NO v Minister of Justice and Constitutional Development 2015 (1) SACR 18 (WCC) and (CCT 150/14) (2015a) ZACC 21. De Vos NO v Minister of Justice and Constitutional Development 2015b (1) SACR 18 (WCC).
Doebbler v. Sudan, Comm. 235/2000, 27th ACHPR AAR Annex (Jun 2009 – Nov2009)
Du Plooy v. Minister of Correctional Services (2004) 3AllSA613(T).
EN and Others v. Government of RSA and Others(2006)006(6)SA575(D);2007(1)BCLR84.SAHC Durban 2006.
Faia v. Italy, Application No. 17378/20. Pending ECtHR.
Fedosejevs v. Latvia, Application No. 37546/06, Council of Europe: European Court of Human Rights, 19 November 2013.
Feilazoo v. Malta, Application No. 6865/19, Council of Europe: European Court of Human Rights, 11 March 2021.
Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine de l'Homme, Les Te´moins de Jehovah v. Zaire (1996)ACHPR Comm Nos.25/89,47/90,56/91,100/93 para 47.
G.G. v. Turkey Application No. 10684/13, "Council of Europe: European court of human rights", 31 March 2013
Gable Masangano vs The *Attorney General, Minister of Home Affairs and Chief. Commissioner of Prisons* (2009) MLR 1713
Ghavtadze v. Georgia, Application No. 23204/07, Council of Europe: European Court of Human Rights, 3 March 2009.
Guehi v. Tanzania (merits and reparations)(2018)2AfCLR477.
International PEN and Others v. Nigeria (1998) ACHPR Nos.137/94,139/94,154/86,161/ 97 para 112.
Khokhlich v. Ukraine, Application No. 41707/98, Council of Europe: European Court of Human Rights, 29 April 2003.
Konaté v Burkina Faso (reparations) (2016) 1AfCLR346.
Korobov and Others v. Russia, Application No. 67086/01, Council of Europe: European Court of Human Rights, 2 March 2006.
Kotsaftis v. Greece, Application No. 39780/06, Council of Europe: European Court of Human Rights, 12 September 2008.
Krishna Achuthan (On behalf of Aleke Banda), Amnesty International (On behalf of Orton and Vera Chirwa) v. Malawi (1994) ACHPR Comm Nos. 64/92, 68/92, 78/92 para7.
Lee v. Minister of Correctional Services(2012)ZACC30.
Lohe´ lssa Konate´ v. Burkina Faso(provisional measures)(2013)1AfCLR310.
Makwiza & Another v the Attorney General & Others (Civil Cause No 75 of 2019), Zomba District Registry.
Malawi African Association and others v. Mauritania (2000) ACHPR Nos.54/91,61/91,98/93,164/97 a,196/97 and 210/98 para 122.

Maratsis and Others v. Greece, Application No. 30335/20, Council of Europe: European Court of Human Rights, Council of Europe: European Court of Human Rights.
Mazibuko v. Minister of Correctional Services(2007)Case No:38151/05.JOL18957(T).
McCallum v. South Africa(2010) UN Doc CCPR/C/100/D/1818/2008 (2 November 2010).
Mugesera v. Rwanda (provisional measures)(2017)2AfCLR 149.
Muršić v. Croatia, Application No. 7334/13, Council of Europe: European Court of Human Rights, 20 October 2016.
Neshkov and Others v. Bulgaria, Application No. 36925/10, Council of Europe: European Court of Human Rights, 27 January 2015.
Organisation Mondiale contre la torture and Others v Rwanda (Communication no 27/89) (ACHPR 1996)
Patranin v. Russia, Application No. 12983/14, Council of Europe: European Court of Human Rights, 23 July 2015.
Pentiacova and Others v. Moldova, Application No. 14462/03. Council of Europe: European Court of Human Rights, 4 January 2005.
Poghossian v. Georgia, Application No. 9870/07, Council of Europe: European Court of Human Rights, 24 May 2009.
Riela v. Italy, Application No. 17378/20, Council of Europe: European Court of Human Rights.
Rus v. Romania, Application No. 2621/21, Council of Europe: European Court of Human Rights.
S v. Magida(2005)(2)SACR591(SCA)paras 9-10.
S v. Makwanyane and Another (1995) ZACC3 at 151,1995(3)S.A 391.
Samaras and Others v. Greece, Application No. 11463/09, Council of Europe: European Court of Human Rights, 28 February 2012.
Scalabrini Centre of Cape Town and Another v Minister of Home Affairs and Others (5441/20) [2023] ZAWCHC 28 (13 February 2023)
September v Subramoney NO and Others (EC10/2016) (2019) ZAEQC 4; (2019) 4 All SA 927 (WCC) (23
Sizarev v Ukraine; Application No. 17116/04,Council of Europe: European Court of Human Rights, 17 Jan 2013
Sonke Gender Justice NPC v. President of the Republic of South Africa and Others (2020) ZACC para 38-40.
Sonke Gender Justice v. Government of South Africa 24087/15(unreported) WC HC.
S.P. and others v. Russia, (Application 36463/11, 11235/13, 35817/13 et al). Council of Europe: European Court of Human Rights.
Stanfield v. Minister of Correctional Services(2003)ZAWCHC 46.
Testa v. Croatia, Application No. 20877/04, Council of Europe: European Court of Human Rights, 12 July 2007.
Van Biljon and Others v.Minister of Correctional Services and Others(1997)(4)SA441(C).
Varga and Others v. Hungary, 2015, Application Nos. 14097/12 45135/12 73712/12 34001/13 44055/13 64586/13, *Council of Europe: European Court of Human Rights*, 10 March 2015.
Vasilakis and Others v. Greece Application No. 30379/20, Council of Europe: European Court of Human Rights.
Vlamis and Others v. Greece, (Application No. 29655/20) and four other applications (29689/20,30240/20, 30418/20 and 30574/20) Council of Europe: European Court of Human Rights.



Drawing by a person detained at Chichiri Prison in Malawi, 2022.
Source: Southern Africa Litigation Centre and Centre for Human Rights Education, Advice and Assistance 2022.

Annex One The Portfolio of Works

2023

Van Hout MC. 2023. Environmental health rights and concepts of vulnerability of immigration detainees in Europe before and beyond COVID-19. *Oxford Journal of Human Rights Practice*. [Epub ahead of print]. https://doi.org/10.1093/jhuman/huac063

Van Hout MC, Wessels J. 2023. "#Foreigners Must Go versus '*in favorem libertatis*"': Human rights violations and procedural irregularities in South African immigration detention law. *Journal of Human Rights*. [Epub ahead of print] DOI: 10.1080/14754835.2023.2170709

2022

Van Hout MC. 2022a. Ensuring oversight and protection of life and health of all detained by the Russian Federation and Russian held territories of Ukraine. *Public Health.* 213: 68-70. https://doi.org/10.1016/j.puhe.2022.10.001

Van Hout. MC 2022b. Navigating the complexities of (trans) gender equality rights within the parameters of reasonable accommodation and security tensions in South African prisons: The judgement of *September v Subramoney'*. *Forensic Science International Mind and Law*. 3 (100077):1-10. https://doi.org/10.1016/j.fsiml.2022.100077

Van Hout MC. 2022c. Using COVID-19 to address environmental threats to health and leverage for prison reform in South Africa, Zimbabwe and Malawi. *Oxford Journal of Human Rights Practice*. [Epub ahead of print] https://doi.org/10.1093/jhuman/huac050

Van Hout MC, Fleißner S, Stöver H. 2022. Women's right to health in detention: United Nations Committee observations since the adoption of the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (*'Bangkok Rules'*). *Oxford Journal of Human Rights Practice.* [Epub ahead of print] https://doi.org/10.1093/jhuman/huac058

Van Hout MC, Bigland C, Mariniello T. 2022. A legal-realist assessment of the Zimbabwean correctional system response to COVID-19 during state disaster measures. *International Journal of Prisoner Health*. [Epub ahead of print] https://doi.org/10.1108/IJPH-10-2021-0104

Van Hout MC, Srisuwan L, Plugge E. 2022. A human rights assessment of menopausal women's access to age- and gender-sensitive non-discriminatory health care in prison. *Menopause*. 29(11):1338-1348. DOI: 10.1097/GME.0000000000002065

Van Hout MC, Kaima R, Mhango V, Mariniello T. 2022a. Moving beyond the politization of same-sex sexuality and leveraging right to health to counter inter-personal sexual violence and HIV in Malawi's prisons. *Forensic Science International Mind and Law*. 3 (100077):1-8. https://doi.org/10.1016/j.fsiml.2022.100103

Van Hout MC, Fleißner S, Klankworth U, Stöver H. 2022b. Children in the prison nursery: Global progress in adopting the Convention on the Rights of the Child in alignment with United Nations minimum standards of care in prisons. *Child Abuse and Neglect* 134:105829. doi: 10.1016/j.chiabu.2022.105829

Van Hout MC, Mhango V, Kaima R, Bigland C, Mariniello T. 2022c. A legal-realist assessment of human rights, right to health and standards of healthcare in the Malawian prison system during COVID-19 state disaster measures. *International Journal of Prisoner Health*. [Epub ahead of print] DOI:10.1108/IJPH-10-2021-0108.

2021

Van Hout MC. 2021. Human rights violations, detention conditions and the invisible nature of women in European immigration detention: A legal realist account. *International Journal of Prisoner Health*. [Epub ahead of print] doi: 10.1108/IJPH-03-2021-0023.

Van Hout MC, Crowley D. 2021. The *"double punishment"* of transgender prisoners: a human rights-based commentary on placement and conditions of detention. *International Journal of Prisoner Health.* [Epub ahead of print] doi: 10.1108/IJPH-10-2020-0083

Van Hout MC, Wessels J. 2021a. Navigating the complexities of the mentally ill and mentally incapacitated in the criminal justice system in South Africa. *Forensic Science International: Mind and Law*. 2(100068): 1-6. https://doi.org/10.1016/j.fsiml.2021.100068

Van Hout MC, Wessels J. 2021b. Human rights and the invisible nature of incarcerated women in post-apartheid South Africa: prison system progress in adopting the Bangkok Rules. *International Journal of Prisoner Health* 18(3):300-315. DOI: 10.1108/IJPH-05-2021-0045

Van Hout MC, Fleißner S, Stöver H. 2021. *"#Me Too"*: Global progress in tackling continued custodial violence against women. The 10 year anniversary of the Bangkok Rules. *Trauma, Violence, & Abuse: A Review Journal.* 3(15248380211036067) [Epub ahead of print].https://doi.org/10.1177/15248380211036067

2020

Van Hout MC. 2020a. Leaving no one behind: The human tragedy of children in African prisons during COVID-19. *Health and Human Rights Journal*. [Online] https://www.hhrjournal.org/2020/05/leaving-no-one-behind-the-human-tragedy-of-children-in-african-prisons-during-covid-19/

Van Hout MC. 2020b. COVID-19: Urgent Need to Find Alternatives to Prison Sentences in Malawi. *Health and Human Rights Journal* [Online] https://www.hhrjournal.org/2020/09/covid-19-urgent-need-to-release-women-from-prison-in-malawi/

Van Hout MC. 2020c. Prison staff exposure to pathogenic disease and occupational health research in African prisons: A neglected area. *Journal of Sustainable Development: Africa.* 22(1): 166-171.

Van Hout MC, Aaraj E. 2020. Pandemic Stresses the Human Rights Imperatives of Tackling HIV and Hepatitis in Middle East and North African Prisons. *Health and Human Rights Journal* [Online]. https://www.hhrjournal.org/2020/05/pandemic-stresses-the-human-rights-imperatives-of-tackling-hiv-and-hepatitis-in-middle-east-and-north-african-prisons/

Van Hout MC, Chimbga D. 2020. Tackling the intersectionality of drug offences, gender based violence and victimisation in the South African Criminal Justice System: Leveraging for greater implementation of the Tokyo Rules within a sustainable development agenda. *Journal of Sustainable Development - Africa*. 22(3): 157-165.

2019

Van Hout MC, Mhlanga-Gunda R. 2019a. Prison health situation and health rights of young people incarcerated in sub-Saharan African prisons and detention centres: a scoping review of extant literature' *BMC International Health and Human Rights*. 19(1): 17. https://doi.org/10.1186/s12914-019-0200-z

Van Hout MC, Mhlanga-Gunda R. 2019b. Mankind owes to the child the best that it has to give: prison conditions and the health situation and rights of children incarcerated with their mothers in sub-Saharan African prisons. *BMC International Health and Human Rights.* 19(1): 13. https://doi.org/10.1186/s12914-019-0194-6

Journal of Human Rights Practice, 2023, **XX**, 1–25
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Policy and Practice Note

Environmental Health Rights and Concepts of Vulnerability of Immigration Detainees in Europe Before and Beyond COVID-19

Marie Claire Van Hout*

Abstract

The global COVID-19 health emergency has radically changed detention spaces, by heightening state and provider obligations to provide humane conditions and protect those detained against disease and subsequent ill-health. Using a socio-legal lens, this policy and practice note focuses broadly on the balance of European immigration detention regulations, and the actual conditions and treatment of immigrant detainees, putting an emphasis on developments before and after COVID-19. The special protections afforded to detainees assessed as vulnerable is unclear in the Global Compact for Safe, Orderly and Regular Migration. While cognisant of aspects of legal positivism by outlining relevant legal provisions and extant European Court of Human Rights (ECtHR) jurisprudence where conditions of detention have violated Article 3, a socio-legal argument is presented around state obligations to protect the health of all immigration detainees; the challenges in using simplistic/categorical definitions of vulnerability; and the imperatives to broaden considerations to include health vulnerability in the context of contagion and future pandemics. By analogy extant ECtHR jurisprudence on the rights of prisoners relating to right to health and disease mitigation (human immune-deficiency, tuberculosis) may offer additional protections. Broad consideration of environmental health factors in light of threats of disease in detention spaces warrant further consideration when establishing the threshold of the severity of conditions and when assessing detainee vulnerability (not limited to age, gender or health status). A public health rights-based argument can shape effective immigration detention policy reform by enhancing protective parameters based on broad definitions of health vulnerability within immigration detention spaces.

Key Words: Deportation; disease; environment; Europe; migrants;; standards.

1. Background

Since 2015, the flow of migrants has stimulated degrees of geo-political instability in Europe. At the time of writing in early 2022, deep political divisions have occurred across European Union (EU) member states, mostly concerning border controls, use of ‘pushbacks’ and ‘instrumentalization’[1] by some states and the general migrant-management lexicon across

* Marie Claire Van Hout is Professor of International Public Health Policy and Practice at Liverpool John Moore’s University, United Kingdom.

1 When a country ‘instigates irregular migratory flows’ into the EU ‘by actively encouraging or facilitating the movement’ of migrants to the bloc. See also ‘hybrid attacks’.

Europe (Corbet and Cook 2022). The fundamental problems of who should take responsibility and what countries should provide assistance with migrant arrivals continue to create problems (Corbet and Cook 2022). For those migrating into Europe, often from conflict areas, journeys are at best traumatic, often life threatening. There are many reports of illegal 'pushbacks' and arbitrary detention of migrants, with both measures increasingly used as a tool to keep migrants out of Europe (Apap 2016; Chehayeb and Marsi 2020). Many en route to Europe are detained on the North African coast and endure deplorable inhumane conditions of detention (Human Rights Watch 2019). In 2021, during the COVID-19 public health emergency, increased and legitimized use of offshore migrant containment measures in quarantine vessels were documented (Stierl and Dadusc 2021). In early 2022, a lawsuit by an expelled Iranian national was filed at the United Nations Human Rights Committee accusing Greece of cruel and degrading treatment, summary expulsion and 'refoulement'[2] which is prohibited under the 1951 Geneva Convention on the Status of Refugees (Psaropoulos 2022). In the same month, twelve refugees froze to death near the Turkey-Greece border, as part of a larger group 'pushed back' by Greek border units who stripped them of their clothes and shoes and forced them outside (Al Jazeera 2022).

The World Health Organization declared COVID-19 a pandemic on 11 March 2020 (World Health Organization 2020a) and it recognized the unique vulnerabilities of detainees and the potential for severe harm and violation of human rights in detention settings (World Health Organization 2020b). The United Nations High Commissioner for Refugees (2020) emphasized the states' duty 'to treat all persons, including persons deprived of their liberty, with humanity and respect for their human dignity, and they must pay special attention to the adequacy of health conditions and health services in places of incarceration'. In Europe, the Committee for the Prevention of Torture (2020) recognized the extraordinary challenges posed by COVID-19 for European member states with regard to the operations of closed settings, including immigration detention facilities. Its statement recognized the absolute imperatives to protect against disease, mitigate transmission of disease and control COVID-19 outbreaks in immigration settings and stated that 'any restrictive measure taken vis-à-vis persons deprived of their liberty to prevent the spread of Covid-19 should have a legal basis and be necessary, proportionate, respectful of human dignity and restricted in time'. The Committee is further quoted: 'while it is legitimate and reasonable to suspend nonessential activities, the fundamental rights of detained persons [to maintain adequate personal hygiene, daily access to open air for at least one hour] during the pandemic must be fully respected, and States should continue to guarantee access for monitoring bodies to all places of detention, including places where persons are kept in quarantine'. Similar human rights obligations were reflected in the promulgation of technical guidance on COVID-19 responses in all closed settings (United Nations Office on Drugs and Crime 2020a, 2020b; World Health Organization 2020c, 2020d), which underscores the vulnerability of people deprived of their liberty to disease and which provided that conditions of detention should not contribute to the development, worsening or transmission of COVID-19 and other diseases in circulation, and that COVID-19 mitigation measures may not result in inhumane or degrading treatment of prisoners (unreasonable solitary confinement, denial of access legal representation).

The International Commission of Jurists has outlined the disproportionate impact of COVID-19 on the rights of migrants (and refugees) (International Commission of Jurists 2020). Europe's migrant containment policies were reported to jeopardize public health measures to mitigate COVID-19, especially in congested immigration detention facilities and migrant camps lacking basic infrastructure, power, sanitation, ablution facilities and hygiene (Hargreaves et al. 2020; Médecins Sans Frontières 2020; Orcutt et al.

2 The forcible return of refugees or asylum seekers to a country where they are liable to be subjected to persecution.

2020). These are high risk environments where social distancing is an impossibility, with high turnover of human traffic and insufficient disinfection measures. In 2020, when European borders closed and normal deportation procedures were hindered, most EU member states, with the exception of Spain and the Netherlands, held migrants in administrative detention for prolonged/indefinite durations resulting in severe overcrowding and difficult living conditions, with reports of increased use of solitary confinement and lack of access to recreation areas, and with visitation restrictions in many countries hindering access to legal representation and independent monitoring (Lebret 2020). More recently, apartheid like policies, and anti-immigrant sentiments in some European countries have influenced political decision making, with reports of detention facilities and receptions centres being closed, and the extension of quarantine measures beyond national restrictions, leading to severe overcrowding and containment of very vulnerable asylum seeking and pre-deportation populations in some countries (for example Cyprus, Greece, Malta) (Brandariz and Fernández-Bessa 2021). The EU did not allocate adequate funds to address the grave and worsening conditions in immigration detention, and none of the budgetary measures in 2020 directly addressed the health and safety of migrants during COVID-19 despite their challenges in protecting themselves from disease and unique health vulnerabilities (Lebret 2020). Most member states (with the exception of Latvia, Estonia and Romania who derogated from the European Convention on Human Rights: ECHR, and the International Covenant on Civil and Political Rights: ICCPR) did not formally derogate from their obligations under a declared state of emergency during COVID-19.

On 30 March 2020, the Human Rights Commissioner of the Council of Europe urged member states to release as many people as possible from detention centres for migrants due to facilities 'providing poor opportunities for social distancing and other measures to protect against Covid-19 infection'(ANSA 2020). On 7 April 2020, the United Nations Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment issued its advice to states parties and national preventive mechanisms relating to the COVID-19 pandemic (Office of the High Commissioner for Human Rights 2020); and with regard to the Optional Protocol to the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (United Nations 2003) advised states to 'review the use of immigration detention centres and closed refugee camps with a view to reducing their populations to the lowest possible level'. Mass release schemes were operationalized leading to reduced occupancy in immigration detention facilities in Spain, Belgium, Finland, France, United Kingdom and Sweden (International Commission of Jurists 2020; Refugee Rights Europe 2020).

The global COVID-19 health emergency has radically changed detention spaces, by heightening state and provider obligations to offer humane safe conditions and protect those detained against disease and subsequent ill-health. Using a socio-legal lens, this policy and practice note focuses broadly on the balance of European immigration detention regulations, and the actual conditions and treatment of immigrant detainees, putting an emphasis on developments before and after COVID-19. The special protections afforded to detainees assessed as vulnerable is unclear in the Global Compact for Safe, Orderly and Regular Migration. Relevant international and European legal instruments and provisions on conditions of detention are outlined and explained. An overview of European Court of Human Rights jurisprudence where poor standards of immigration detention fall within the scope of Article 3 of the ECHR is provided. The note then discusses the analogy of prison based jurisprudence, norms and standards relating to right to health and disease mitigation (human immune-deficiency: HIV; tuberculosis: TB) which may offer additional protections, and the requirements to reassess definitions and concepts of vulnerability of detainees, and health vulnerability in light of COVID-19 and threats of airborne disease in closed settings.

2. International and European legal instruments, norms and standards

Migrant health rights are intertwined with 'the right not to be subjected to arbitrary deprivation of liberty', and the right to be detained in humane conditions of detention which respect their human rights 'in conditions compatible with respect for human dignity, with execution of the measure not exceeding unavoidable levels of suffering inherent in detention' (European Committee for the Prevention of Torture 2017; European Court of Human Rights 2015).

Immigration detention as a form of administrative detention using onshore and offshore containment of migrants is routinely employed by many European member states to facilitate deportation (Apap 2016; Majcher 2019; United Nations Office of the High Commissioner for Human Rights 2020). The Global Compact on Refugees (United Nations High Commissioner for Refugees 2018), Global Compact on Safe, Orderly and Regular Migration (United Nations 2018), and the EU 'Return Directive' (Council of the European Union 2008), however, provide that administrative immigration detention should be the exception and not the norm, and explicitly prohibit arbitrary detention. General Comment 35 of the Human Rights Committee (United Nations Human Rights Committee 2014) provides that 'detention in the course of proceedings for the control of immigration is not per se arbitrary, but the detention must be justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time' (see A. v. Australia, 1993; Jalloh v. Netherlands, 1998; Nystrom v. Australia, 2011). In order to establish that detention is not arbitrary, states must provide such evidence under Article 9 of the ICCPR (United Nations 1966a). The ECHR only permits detention to prevent unauthorized entry to the country and pending deportation or extradition. Any deprivation of liberty is justified only for as long as deportation proceedings are in progress (see Chahal v. the United Kingdom, 1993). While the concept of proportionality is considered with regard to duration of detention, many challenges in determination exist regarding whether the duration of deportation proceedings are excessive at the Court level, under the 'necessity and proportionality requirements' of Article 5(1f) ECHR. The undisputed existence of these requirements cannot be assumed regarding Article 5(1)(f), as the ECtHR has decided several times that such requirements do not apply (in contrast to EU law).

The United Nations mandates for adequate conditions of detention respecting the rights and dignity of the detained (United Nations High Commissioner for Refugees 2012). State obligations to uphold the rights of those in their custody (including migrants) are explicit in the 1951 Refugee Convention (United Nations 1951) and its 1967 Protocol, the international human rights treaties including the ICCPR (United Nations 1966a), the International Covenant on Economic, Social and Cultural Rights (ICESCR) (United Nations 1966b) and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (United Nations 1984). Article 10 ICCPR enshrines the fundamental principle applicable to detention, which states that 'all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person' and which underscores the state responsibility to ensure that humane conditions are upheld. General Comment No. 36 of the Human Rights Committee further specifies that states parties to the ICCPR 'must respect and protect the right to life of all individuals arrested or detained by them, even if held outside their territory' and are obliged to 'take special measures of protection towards persons in situation of vulnerability', a category that includes 'displaced persons, asylum seekers, refugees, and stateless persons'(Article 6). There is further 'a heightened duty to protect the right to life which also applies to individuals quartered in liberty-restricting State-run facilities, such as … refugee camps and camps for internally displaced persons' and 'states parties may not rely on lack of financial resources or other logistical problems to reduce this responsibility' (United Nations Human Rights

Committee 2018). While the ICCPR and the ICESCR both require the respect of human dignity towards persons deprived of their liberty, these instruments are not legally binding for EU member states, and instead the protection of dignity can be recognized through Article 1 of the Charter of Fundamental Rights which is legally binding for all EU member states.

General Comment No. 14 of the United Nations Committee on Economic, Social and Cultural Rights (2000) outlines that states parties are (at the very least) required to meet a threshold of a 'core minimum' of social and economic rights, including the right to health, and that people deprived of their liberty are entitled to the same 'core minimum' health rights as other citizens. The right to the highest attainable standard of physical and mental health in international human rights law 'is a right of everyone, irrespective of citizenship or immigration status and wherever they may reside'. Articles 12(1) and (2) ICESCR are further relevant to the required measures to be taken by the state to ensure humane conditions, protect the health of those detained and their positive obligation to employ all measures to mitigate disease in closed settings. The Parliamentary Assembly of the Council of Europe (2008) has recognized that European member states should ensure that all settings used for immigration detention adhere to minimum standards of care (food, drinking water, clothing, bedding, sanitary products, access to outside air, heating, infrastructure, separate accommodation and sanitation of men, women and unaccompanied minors and so on) (International Organization for Migration 2011).

3. Immigration detention conditions and violations of Article 3 at the ECtHR

Since 2001, there have been a range of claims brought to the ECtHR and successful cases where conditions of detention form part of the case (Council of Europe 2021; European Court of Human Rights 2021a, 2021b; 2021c). Judgements[3] are presented as they relate to individual and environmental health rights; the duration, settings and conditions of immigration detention, detainee vulnerability assessment and arbitrary nature of detention (see Table 1). Cases from Greece, Turkey, Italy, Malta, France, Bulgaria, Russia and Hungary illustrate the range of detention settings used, many unsuitable for adult and minor detainees (airport facilities and airport transit zones, cells and basements of border police stations, hotspots and camps, detention centres, ships). Environmental conditions described by claimants and corroborated by the European Committee for the Prevention of Torture and various non-governmental organization assessments refer to: overcrowding with insufficient square metres of space for each detainee; a lack of sufficient natural daylight, ventilation, heating, and hot water; inadequate provision for sanitation, ablution and hygiene; the sharing of facilities by men and women, and the mixing of juveniles with adults; poor quality sleeping materials and bedding; the presence of contaminants in food preparation and consumption; the circulation of rodents, parasites, skin and gastro-intestinal diseases; and the denial by officials for detainees to access outdoor areas for fresh air and exercise. Some noted the denial of access to the outside world via telephone, and legal representation.

The ECtHR considered claims of inhumane and arbitrary detention in terms of the severity of environmental conditions in combination with identified vulnerability of the claimant warranting special conditions, their exposure to trauma and distress, particularly in the case of children, and other significant corroborating factors such as the duration of detention, experience of isolation and/or solitary confinement, whether claimants were awaiting deportation, or held while asylum processes were underway, and whether claimants were

3 It was beyond the scope of this socio-legal assessment to also include European Court of Justice (ECJ) jurisprudence, as the ECJ must offer at least the same level of protection as the jurisprudence of the ECtHR. It was also beyond the scope to also include dimensions of right to access healthcare when detained.

Table 1. European Court of Human Rights jurisprudence

Name of Case	Country	Claimant(s)/Vulnerability assessment if applicable	Conditions of Detention	Judgement
Dougoz v. Greece, 2001	Greece	Male Syrian national placed in police detention pending his expulsion to Syria.	Overcrowded and dirty cell with insufficient sanitation, absence of sleeping facilities, scarce hot water, no fresh air or natural daylight and no access to outdoor exercise. Inordinate length of detention	Violation of Article 3
Mubilanzila Mayeka and Kaniki Mitunga v. Belgium, 2006	Belgium	Unaccompanied five-year-old Congolese national detained for two months in a transit centre for adults at Brussels airport.	Transit centre designed for adults, with no one assigned to look after her. Child was significantly distressed with no professional support.	Violation of Article 3
Riad and Idiab v. Belgium, 2008	Belgium	Two male Palestinian nationals detained in the transit zone of Brussels airport following unlawful entry into Belgian territory for a period longer than 10 days.	Transit zone is intended for detention of individuals for very short duration (10 days maximum).	Violation of Article 3
S.D. v. Greece, 2009	Greece	A male Turkish national detained for two months in a holding facility (prefabricated cabin) at a border guard station after entering the country irregularly. Subsequently held in Patrou Rali and confined to his cell for six days.	Denied access to outdoor areas, denied telephone calls, and no access to blankets, clean sheets or hot water. Patrou Rali was reported by the European Committee for the Prevention of Torture and Inhuman or degrading Treatment or Punishment (CPT) as unacceptable following their visit in February 2007.	Violation of Article 3

Table 1. Continued

Name of Case	Country	Claimant(s)/Vulnerability assessment if applicable	Conditions of Detention	Judgement
A.A. v. Greece, 2010	Greece	A male Palestinian national detained by Greek police and placed for three months in Samos detention centre pending deportation to Lebanon.	Squalid and overcrowded conditions at the Samos detention centre described as: people eating and sleeping on a dirty floor, rubbish in corridors, windows barred, combined shower and toilet with no hot water shared by men and women, inadequate food prepared in unhygienic conditions, circulation of lice and skin diseases; defective sewer system, nauseating smells, sporadic access to outdoor areas, denial of telephone calls. Conditions corroborated by international organizations and Greek NGOs.	Violation of Article 3
Abdolkhani and Karimnia v. Turkey, 2009	Turkey	Two male Iranian nationals detained in the basement of the Hasköy police headquarters for three months.	Assuming that the Turkish Government's estimate of 42 detainees in the facility was accurate, holding that many people in 70m², even for a duration as short as one day constituted severe overcrowding.	Violation of Article 3
Kanagaratnam and Others v. Belgium, 2011	Belgium	A Sri Lankan mother with three children was detained in a closed immigration detention centre for adults.	Placing the children in a closed centre designed for adult illegal aliens in conditions which were ill-suited to their extreme vulnerability as minors.	Violation of Article 5 (1)
M.S.S. v. Belgium and Greece, 2011	Belgium and Greece	A male Afghan national entered the European Union via Greece. He subsequently arrived in Belgium, where he applied for asylum. By virtue of the 'Dublin II' Regulation 1 he was transferred back to Greece and detained at Athens airport.	Held in a small space with 20 other detainees, restricted food and access to toilets, sleeping on dirty mattresses or the bare floor and denied access to outdoor areas.	Violation of Article 3 Violation of Article 13

Table 1. Continued

Name of Case	Country	Claimant(s)/Vulnerability assessment if applicable	Conditions of Detention	Judgement
R.U. v. Greece, 2011	Greece	A male Turkish asylum seeker of Kurdish origin detained in the Soufli and Petrou Ralli detention centres.	Conditions of detention was the same and concerned the same period as the one examined by the Court in the case of S.D. v. Greece, 2009.	Violation of Article 3 Violation of Article 13
Rahimi v. Greece, 2011	Greece	A male Afghan minor held in the Pagani detention centre for two days on the island of Lesbos and subsequently released with a view to his expulsion.	Uncertainty whether the applicant had been placed together with adults. Deplorable conditions of detention regarding infrastructure, accommodation and hygiene. Minor on account of his age and personal circumstances was in a significantly vulnerable position, not duly considered by officials.	Violation of Article 3
Popov v. France, 2012	France	A married couple, Kazakhstan nationals accompanied by their two small children, detained at Rouen-Oissel administrative detention centre for two weeks, which was authorized to accommodate families.	Unsafe furniture and automatic doors, no play areas for children and insufficient child protection principles (insecurity and hostile atmosphere). Two weeks' detention, while not in itself excessive, is unacceptable for children living in an environment ill-suited to their age and despite not being separated from their parents heightens their vulnerability, trauma and distress.	Violation of Article 3 [with respect to the detention conditions of the children, not the parents.]
Mahmundi and Others v. Greece, 2012	Greece	An Afghan family, including a pregnant woman with four minors were detained in Lesbos.	Overcrowded cells, lack of medical examination including of pregnant women, mixing of juveniles with adults, and denial of access to outdoor activities for children. No specific supervision of the family despite their particular status as minors and a pregnant woman. Greek non-governmental organizations observed that there had been no improvement in the situation in the Pagani centre in spite of their alarming findings in the past.	Violation of Article 3 Violation of Article 13 Violation of Article 5(4).

Table 1. Continued

Name of Case	Country	Claimant(s)/Vulnerability assessment if applicable	Conditions of Detention	Judgement
Aden Ahmed v. Malta, 2013	Malta	A Somali national woman detained in Lyster Barracks Detention Centre for 14 and a half months.	Exposure to cold conditions, lack of female staff in the detention centre, denial of access to open air and exercise for periods of up to three months, inadequate food. Particular vulnerability due to her fragile health (previous miscarriage, separation from young child) and personal emotional circumstances.	Violation of Article 3
A.F. v. Greece, 2013	Greece	A male Iranian national held in the premises of the Feres border police for four months.	Severe lack of space and overcrowded conditions. According to the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, on the date of his visit in October 2010 there were 123 inmates in a space for 28, while according to ProAsyl in December 2010, there were 110 inmates in one dormitory. The CPT noted in January 2011, that each detainee had approximately 1m² or less in some dorms.	Violation of Article 3
Horshill v. Greece, 2013	Greece	A male foreign national was held pre-deportation in two police stations successively for 15 days post asylum application.	Cells did not have adjoining showers, denial of access to the outdoors for exercise. One of the cells was in the basement of the police station and devoid of natural light.	Violation of Article 3
Mohamad v. Greece, 2014	Greece	A male unaccompanied minor held pre-deportation at the Soufli border post.	Detained in an adult centre which was not suitable for unaccompanied minors.	Violation of Article 3 Violation of Article 5(1) Violation of Article 13
Asalya v. Turkey, 2014	Turkey	A male Palestinian national, paraplegic and wheelchair bound, held pre-deportation in Kumkapı Foreigners' Admission and Accommodation Centre.	Inadequate facilities for a wheelchair bound detainee. No bed to sleep in, no lifts and squat toilets. Reliance on the help of strangers. No evidence of any positive intention by officials to humiliate or debase the applicant.	Violation of Article 3

Table 1. Continued

Name of Case	Country	Claimant(s)/Vulnerability assessment if applicable	Conditions of Detention	Judgement
C.D. and Others v. Greece, 2014	Greece	12 asylum seekers held in pre-deportation detention at the Venna detention centre for varying durations.	Lack of hygiene, insufficient living space and no access to outdoor exercise. The CPT, the UN Special Rapporteur against Torture and the UN Special Rapporteur on the Human Rights of Migrants concluded that detention conditions at Venna were inadequate, and the centre was closed in December 2012.	Violation of Article 3 Violation of Article 5(4)
Mahamed Jama v. Malta, 2015	Malta	A Somali woman held in immigration detention at Lyster Barracks for eight months.	Overcrowding, unspecified duration of restricted access to outdoor yard. No concern regarding hygiene. On 4 July 2013 the CPT report showed improvements had been put in place. No violation of Article 3 [cumulative effect of the detention conditions *did not* reach the threshold] or of Article 5(1) concerning detention pending her asylum claim].	Violation of Article 5 (1) [with respect to the detention following the decision on her asylum claim] Violation of Article 5 (4)
Khlaifia and Others v. Italy, 2016	Italy	Three Tunisian nationals transferred to a reception centre in Lampedusa, and subsequently detained in ships moored in Palermo.	Lampedusa was overcrowded, inadequate space to sleep, unacceptable sanitation, constant police surveillance and no contact with the outside world. Palermo ships moored at the dock. Confined to overcrowded areas in the restaurant halls, with limited access to the toilets and no information provided by the authorities.	Violation of Article 5 (1), (2) and (4) Violation of Article 3 in conjunction with Article 13
Abdi Mahamud v. Malta, 2016	Malta	A Somali woman was held in prolonged immigration detention by police.	Overcrowding, insufficient methods for counteracting temperature changes, limited access to open air, lack of privacy, and lack of female staff. During this detention she developed a number of physical and psychological conditions and applied for release on medical grounds. The judge partially dissented, finding insufficient evidence of violation of Article 3. He stated that her claim for health vulnerability was not exacerbated by the severity of detention conditions and that she did not qualify for the categories of vulnerability requiring closer scrutiny (i.e. pregnant or breastfeeding).	Violation of Article 3 Violation of Article 5 (1) Violation of Article 5 (4)

Table 1. Continued

Name of Case	Country	Claimant(s)/Vulnerability assessment if applicable	Conditions of Detention	Judgement
Moxamed Ismaaciil and Abdirahman Warsame v. Malta, 2016	Malta	Two Somali women detained in Lyster Barracks Detention Centre.	Claimed arbitrary and unlawful detention and unsuccessful claim that conditions were inappropriate for young single women.	Violation of Article 5(4).
A.B. and Others v. France, 2016	France	Administrative detention of minor for 18 days in the context of a deportation procedure against his parents.	No details were provided on conditions. Authorities had not taken all the necessary steps to enforce the removal measure as quickly as possible and thus limit the time spend in detention.	Violation of Article 3 [with respect of the child held in 'de facto detention']. Violation of Article 5(1) Violation of Article 5(4) Violation of Article 8
Sakir v. Greece, 2016	Greece	A male Afghan national was a victim of a racist assault, and following hospitalization, was detained at the Aghios Panteleïmon police station.	Lack of police follow up regarding the detainees' state of health, and in spite of specific instructions from his doctors, shortcomings in how his medical condition and state of vulnerability were taken into account.	Violation of Article 3 Violation of Article 13
S.F. and Others v. Bulgaria, 2017	Bulgaria	An Iraqi couple and their three children were detained at the border police's detention facility in Vidin, Bulgaria.	Run down cell, dirty floor, no access to toilets forcing them to urinate on the floor, no food for 24 hours.	Violation of Article 3 [with respect to the detention conditions of the children, not the parents].
J.R and Others v. Greece, 2018	Greece	Three Afghan nationals (one women and two children) were detained for one month at the VIAL hotspot/ centre in Chios.	Lack of sanitation and hygiene, poor access to medical care lack of information and legal assistance, insufficient food and poor quality water. No violation of Article 3 [detention conditions *did not* reach the threshold]. The CPT had not been particularly critical of the conditions prevailing in the centre.	Violation of Article 5(2)

Table 1. Continued

Name of Case	Country	Claimant(s)/Vulnerability assessment if applicable	Conditions of Detention	Judgement
Kaak and Others v. Greece 2019	Greece	49 Syrian, Afghan and Palestinian nationals detained in the Vial hotspot/ centre and Souda camp	Overcrowding, insufficient food, and inadequate medical provision. Detention conditions could not ensure the safety of women and children who constituted particularly vulnerable categories of persons. No violation of Article 3 [detention conditions *did not* reach the threshold].	Violation of Article 5 (4)
G.B. and Others v. Turkey, 2019	Turkey	A Russian mother with three young children held in detention pending deportation in the Kumkapı and Gaziantep centres	Overcrowding, lack of hygiene, lack of access to open air, exposure to the cigarette smoke of other detainees, lack of suitable food for children.	Violation of Article 3 Violation of Article 3 in conjunction with Article 13. Violation of Article 5(1) Violation of Article 5(4)
Z.A. and Others v. Russia, 2019	Russia	Four males of Iraqi, Somalian and Syrian nationality were held for a time in the transit zone of Moscow's Sheremetyevo airport while the authorities dealt with their asylum applications.	Poor conditions of detention in the transit zone, sleeping on mattresses in the boarding area of the transit zone, a busy and constantly lit area, with no access to washing or cooking and living on emergency rations provided by the UNHCR.	Violations of Article 3 Violations of Article 5(1) and 5(1)(f)
Ilias and Ahmed v. Hungary, 2019	Hungary	Two male Bangladesh nationals detained at a Hungarian border transit zone for 23 days before being removed to Serbia after their asylum applications were rejected.	Conditions of detention in the transit zone. No violation of Article 3 [detention conditions *did not* reach the threshold].	Violation of Article 3 [with respect to failure to assess risks of not having proper access to asylum proceedings in Serbia or chain-refoulement by being sent to Greece where conditions were in violation of Article 3].

Table 1. Continued

Name of Case	Country	Claimant(s)/Vulnerability assessment if applicable	Conditions of Detention	Judgement
Sh.D. and Others v. Greece, Austria, Croatia, Hungary, North Macedonia, Serbia and Slovenia, 2019	Greece	Five unaccompanied migrant minors from Afghanistan detained in Greek police stations (Polykastro, Igoumenitsa Port, Filiata) and Idomeni camp.	Conditions in various police stations and the Idomeni camp not suitable for children due to their age and respective vulnerabilities.	Violation of Article 3. Violation e of Article 5(1)
Feilazoo v. Malta, 2021	Malta	A Nigerian national was held in pre-deportation in the Safi Barracks, a closed detention centre for immigrants.	Complaints about inadequate medical treatment, overcrowding, lengthy placement in a container with excessive isolation and without access to natural light, air and outdoor exercise (75 days), and post isolation the subsequent placement with new arrivals in Covid-19 quarantine. The ECtHR had already expressed concerns about the Safi Barracks detention facility. Although accommodation in a container might not necessarily violate Article 3, in combination with the lengthy isolation, limited light, ventilation and access to outdoor exercise increased the severity of the violation. The placement with new arrivals in COVID-19 quarantine was unnecessary and posed a risk to the applicant's health, and could not be considered as complying with basic sanitary requirements.	Violation of Article 3 Violation of Article 5(1) Violation of Article 34
Hafeez v. the United Kingdom, 2020 Communicated case	United Kingdom	Extradition proceedings of 60-year-old man arrested in the United Kingdom on an extradition request by the United States of America (US), with co-morbid ill health (diabetes and asthma) considered risk factors for severe effects of an infection with the SARS-CoV-2 virus.	The health risks associated with asthma and diabetes are considered with regard to the risk posed by incarceration in US prisons, experiencing significant outbreaks of COVID-19, and a possible breach of Article 3 ECHR	Granted Rule 39 relief [with respect to a federal sentence of life without parole and on the basis of evidence of inhuman and degrading prison conditions in New York at the Metropolitan Correctional Centre (MCC) and Metropolitan Detention Centre (MDC) under the Coronavirus pandemic]

Table 1. Continued

Name of Case	Country	Claimant(s)/Vulnerability assessment if applicable	Conditions of Detention	Judgement
Krstić v. Serbia, 2021 Communicated case	Serbia	Extradition proceedings of the nine applicants from Serbia to the United States (Texas).	If extradited, they would be subjected to severe conditions of detention, particularly taking into an account the number of Covid-19-infected people in Texas and among the inmates.	The Court gave notice of the applications to the Serbian Government and put questions to the parties under, in particular, Article 3 (prohibition of inhuman or degrading treatment) of the Convention. Declared applications inadmissible

able to challenge their detention. In many of the presented cases, there was insufficient information provided to the detainee, an inability to make a complaint, and, in some, the denial of access to legal representation.

There are observed complexities in ECtHR decision-making when considering the vulnerability aspects of special groups of migrants (women, pregnant women, juveniles, children, those with medical conditions and the disabled), when held in immigration detention, and when establishing the requisite threshold of severity of the environmental conditions of detention as per Article 3 (prohibition of torture, inhuman or degrading treatment or punishment). In addition to establishing a rights violation qualifying for Article 3 based on conditions of detention, some judgements achieved the threshold of a violation of Article 3 due to vulnerability assessment based on gender, age and disability. In some cases, the children in 'de facto detention' qualified for a violation of Article 3, but not their parents accompanying them. While not the specific focus of this policy and practice note, others succeeded in proving an additional violation of Article 5 (1), (2) and (4) (right to liberty and security) via arbitrary detention and Article 13 (right to an effective remedy), regarding the inability to challenge the lawfulness of their detention. A few included the breaches of Articles 8 (right to respect for private and family life) and 34 (right of individual application).

Between March 2020 and November 2021, the ECtHR received 370 interim measures requests related to the COVID-19 health crisis, originating from those detained in prisons, in reception centres and immigration detention settings. The majority were lodged against Italy, France, Greece and Turkey, Spain and the United Kingdom (European Court of Human Rights 2021d). Many were individual applications. While requests under Rule 39 of the Rules of the Court usually concern deportations or extraditions, many referred to interim measures to remove detainees from places of detention and to indicate measures to protect their health and protect them from contracting COVID-19. Rule 39 (interim measures) was applied in line with the usual criteria, generally in the case of very vulnerable persons (unaccompanied minors or persons with serious medical conditions, pregnant women). Most were rejected.

Three recent cases highlight the additional layer of complexity that COVID-19 contributes to the Court decision-making around humane standards of detention, environmental determinants of health, vulnerability and risk to health of those detained in the context of public health emergencies such as COVID-19 contagion. Two crucial factors emerged which centred on the potential risk of harm (and death) to a detainee with underlying co-morbidities (and vulnerability to severe or fatal COVID-19 disease), and the renewed importance of considering combinations of environmental factors such as space, ventilation, segregation, medical isolation, arbitrary solitary confinement and access to outdoor exercise. Feilazoo v. Malta, 2021, in particular, is a ground-breaking case, where the ECtHR was asked to make decisions regarding the placement of a Nigerian national in immigration detention with new arrivals in COVID-19 quarantine, the conditions and lawfulness of his detention and right to petition. Under Article 3, the ECtHR reinforced principles regarding the establishment of the severity of detention conditions to qualify for a violation of Article 3 (the State must ensure that a person is detained in conditions which are compatible with respect for human dignity and that the manner and method of the execution of the measure do not subject the individual to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention (para 81)). It also considered the applicant's placement in isolation in a container for an excessive length of time with lack of access to light, ventilation and outdoor exercise; subsequent placement following the period of isolation with new arrivals in COVID-19 quarantine; and inadequate provision of medical treatment. Important complementary environmental factors crucial to the mitigation of airborne disease were considered in determining severity threshold of Article 3 (duration of detention in specific conditions, hygiene and sanitation, personal space, isolation and access to the outdoors for open air and exercise). It emphasized that while detainees have

a right to a certain level of medical treatment, this obligation is limited, and that there is no state obligation to guarantee equivalent medical treatment to that available in the best establishments outside the facility (para 86) (similar to Pentiacova and Others v. Moldova, 2005). It also did not find a breach of Article 3 regarding overcrowding and did not hold the state accountable.

Feilazoo v. Malta is crucial in terms of spotlighting how immigration detention settings represent so called 'congregate settings' and are operating directly contra government public health guidance, notwithstanding the detainees' health vulnerabilities and identification as 'persons at risk'". While it recognizes the impact of overcrowding and high risk of transmission of COVID-19 disease in congested immigration settings with poor ventilation and disinfection measures, the judgement regrettably falls short of addressing the unique vulnerabilities of those detained in immigration detention during communicable disease outbreaks such as COVID-19. It fails to underscore the special responsibility of the state for people deprived of their liberty during public health crises, given their unique reliance on the state. The Court did not provide clear guidance on state obligations regarding the adequate conditions and standards of immigration detention during the public health crisis, despite the broad range of UN technical guidance published since 2020 around the human rights and treatment of detainees during COVID-19. A contemporary 'COVID-19 proof' definition of adequate and humane environmental standards of immigration detention was not developed. Furthermore, the Court did not establish the obligation for contracting states to separate detainees (and prisoners) under quarantine from the wider population in detention as a disease mitigation measure.

Two additional cases (Hafeez v. the United Kingdom, 2020; Krstić v. Serbia, 2021) refer to the potential risks for detainees if extradited from Europe to the United States where prisons have experienced worrying COVID-19 outbreaks (Marquez et al. 2021), with subsequent risk of violating Article 3 on arrival.

4. Analogies of ECtHR jurisprudence on protection of the rights of prisoners

Extant ECtHR jurisprudence on the rights of prisoners to humane standards of detention in the context of right to health and prevention of disease and state duty to uphold sanitation measures may offer additional protections. Principles regarding the fundamental rights of prisoners could apply to those detained in other settings, including immigration detention (European Court of Human Rights 2021e). The UN Special Rapporteur on the Human Rights of Migrants has however emphasized that 'Migration-related detention centres should not bear similarities to prison-like conditions' (International Organization for Migration 2011).

The non-binding Nelson Mandela Rules (United Nations 2016) while generally applicable to prisons and the rights of prisoners remain pertinent to the human and health rights of immigration detainees, including the right to health and humane conditions in immigration detention. Rule 13 which concerns environmental health standards of detention states: 'all accommodation shall meet all requirements of health, due regard being paid to climatic conditions and particularly to cubic content of air, minimum floor space, lighting, heating and ventilation'. A range of additional Mandela Rules apply to protection from infrastructure deficits, mitigation of bio-hazards (for example communicable disease) and state duty to respect the unique detainee vulnerabilities to ill-health when deprived of their liberty; and state obligation to ensure that routine independent inspections are facilitated to assess the adequacy of clean water, sanitation, hygiene, ventilation, light, food and physical conditions (Rules 24, 25, 27, 30, 31, 32, 35).

State failure to ensure sufficient protection of detainees' rights violates human rights and is potentially exacerbated by COVID-19 restrictions imposed during state public health

restrictions (Pont et al. 2021). With regard to the threat posed by COVID-19 in prisons, there are several pending cases at the ECtHR which concern the state obligation to protect people in prison from COVID-19 given their vulnerability and spanning individual and environmental health rights when detained. Of note is that under Article 8 there is no authority in case law that places any obligation on a contracting state to pursue any particular preventive health policy in prison. Cases regard the lack of disease mitigation measures in prisons (see *Vlamis and Others v. Greece* and four other applications: nos. 29689/20, 30240/20, 30418/20 and 30574/20); overcrowding in prisons leading to COVID infection (*Rus v. Romania*); multi-morbidity of prisoners as a COVID-19 vulnerability factor (*Riela v. Italy*; *Faia v. Italy*); and the unique risks to COVID-19 encountered by HIV positive prisoners (*Maratsis and Others v. Greece*; *Vasilakis and Others v. Greece*).

With regard to leveraging COVID-19 to support immigration management reform and investment by states to uphold the rights of all detained whether during process of asylum or deportation, key analogies can be drawn from previous case law on the rights of prisoners in general and in the context of communicable disease (generally referring to TB, HIV and viral Hepatitis) as a public health concern in prisons (see Catalin Eugen Micu v. Romania, 2016; Khokhlich v. Ukraine, 2003). Common denominators in successful cases from prisoners applicable to immigration detention settings centre on the lack of personal space and movement of those detained, and frequently amount to violations of Article 3. There have been challenges however in determining sufficient personal space (under Article 3), in terms of quantifying a specific number of square metres that should be allocated to a detainee in order to comply with the Convention (European Court of Human Rights 2021d). The judgement of Muršić v. Croatia, 2016, confirmed the standard predominant in ECtHR case law of three square metres. of floor surface per detainee in multioccupancy accommodation as the relevant minimum standard under Article 3 of the Convention. Circulation of COVID-19 and other airborne diseases such as tuberculosis in combination with the inability to socially distance, overcrowding, flow of new entries and lack of ventilation further complicate matters as they heighten the environmental threat of contagion. Crucial additional factors considered by the ECtHR regarding health rights in prisons include the duration of detention, access to outdoor exercise, access to private toilets, natural light and fresh air, ventilation, adequacy of room temperature, general compliance with basic sanitary and hygiene requirements, and the health status of the detainee under Article 3 (see Muršić v. Croatia, 2016; Samaras and Others v. Greece, 2012; Varga and Others v. Hungary, 2015). All are relevant to the context of immigration detention. Hygiene and sanitation in particular are crucial components of an environmental health response (for example the presence of fleas, bedbugs, lice, rodents), and are identified in the ECtHR jurisprudence as underpinning the right of a prisoner to a humane environment of detention (see Ananyev and Others v. Russia, 2012; Neshkov and Others v. Bulgaria, 2015).

There are several cases of interest which regard prisoner exposure to disease (HIV, Hepatitis C, TB) in prison. However, when deciding on the extent to which the state bears a duty to mitigate such diseases in prison and treat those detainees who become unwell, details are vague, and irrespective of whether the individual becomes infected during detention, rely on appropriate testing on committal and routine treatment regimens, safety considerations regarding 'real' transmission risk (for example sexual transmission of HIV), and placement of individuals with infected prisoners (see Korobov and Others v. Russia, 2006; Testa v. Croatia, 2007; Kotsaftis v. Greece, 2008; Aleksanyan v. Russia, 2008; Poghossian v. Georgia, 2009; Ghavtadze v. Georgia, 2009 and related cases; Artyomov v. Russia, 2010; Fedosejevs v. Latvia, 2013; Cătălin Eugen Micu v. Romania, 2016). For example in the case of Sakkopoulos v. Greece in 2004, no violation of Article 3 was upheld as authorities had taken measures to protect the detainee's health and it was decided that the deterioration of his state was not imputable to them. Disease mitigation measures are considered on a case by case basis, but ultimately should be 'compatible with the human dignity' of a

detainee, and take into account 'the practical demands of imprisonment' (see Blokhin v. Russia, 2016; Aleksanyan v. Russia, 2008; Patranin v. Russia, 2015).

5. Concluding remarks: (re)defining concepts of vulnerability, health protection and detention conditions

There is significant public health and human rights urgency for states to uphold their positive obligation to provide humane detention conditions in Europe (European Commission 2020). States have positive obligations to ensure that environmental conditions of detention and care of detainees respect human dignity and must not put the health of those detained at risk (International Commission of Jurists 2020). Despite the non-binding resolutions of the Council of Europe and normative standards of detention as outlined in the Reception Condition and Return Directives (Council of the European Union 2008; 2013) and other (aforementioned) instruments, detained migrants continue to encounter and navigate a range of human rights violations, environmental stressors and substantial risks to physical, mental and sexual health when detained in Europe (Lebano et al. 2020; World Health Organization 2018; 2020a). Poor environmental standards of immigration detention coupled with distress and trauma worsen the general good health of migrants on intake, and contribute to substantial mental ill-health (Lungu-Byrne et al. 2020; Van Hout 2021; Van Hout et al. 2020). This has not improved in recent times.

The United Nations Office of the High Commissioner for Human Rights (2020) emphasizes that 'Arbitrary detention can never be justified, whether it be for any reason related to national emergency, maintaining public security or health' (see also United Nations Working Group on Arbitrary Detention 2018). Tensions between state obligation to provide humane standards of detention, and the balance of key human rights challenges encountered in immigration detention settings are evident, both historically and during the COVID-19 health emergency. Government COVID-19 restrictions have added a layer of complexity and have potentially fuelled scapegoating and discrimination against migrants and exacerbated a broad range of human rights violations. For instance, detention may be lawful for public health reasons such as the prevention of the spread of communicable disease under Article. 5 (1.e) (International Commission of Jurists 2020).

The presented Court judgements against Greece, Turkey, Italy, Malta, France, Bulgaria, Russia and Hungary illustrate over time that poor environmental standards of conditions of immigration detention can fall within the scope of Article 3 of the Convention based on both environmental and administrative factors. To date, notwithstanding the COVID-19 public health emergency, a range of immigration detention settings continue to be used (airport transit zones, police stations, specialized facilities, camps, ships), and are generally unsuitable (presenting threat to health and well-being) for adult and minor detainees. There are inherent complexities with regard to establishing the threshold of severity of detention conditions and that of vulnerability of the detainee, whereby safeguards against arbitrary detention apply to those identified as vulnerable (for example the elderly, disabled, those with chronic ill-health, women, juveniles and children) (European Committee for the Prevention of Torture 2017; European Court of Human Rights 2021a; 2021b; 2021c). A broader consideration of environmental health factors is warranted by courts and providers, and processes must be cognisant of the human rights policy and practice obligations of immigration detention as a functioning societal institution.

The concept of vulnerability is central in European refugee and asylum law and policy (Freedman 2018). There are imperatives to reassess definitions and concepts of vulnerability in light of COVID-19 and threats of airborne disease in immigration detention settings. The special conditions of detention and care to be provided to those migrant detainees assessed as vulnerable remain unclear in the Global Compact for Safe, Orderly and Regular Migration (Special Rapporteur on the Human Rights of Migrants 2002; 2012).

While they may be viewed as a positive protective measure to those who are deemed vulnerable, definitions remain simplistic and of a categorical nature (for example gender) without sufficient consideration of the contextual and structural causes of vulnerability which have an impact on the agency and autonomy of those affected (Freedman, 2018). Definitions of vulnerability also vary, ranging from the supplementation of anti-discrimination approaches not primarily concerned with exclusion and inequality, to those focusing on the nature, functioning and dynamics of institutions in society (Fineman 2019). COVID-19 raises yet another concept of vulnerability of those deprived of their liberty, in terms of protection against disease and health vulnerability to more severe forms of ill-health. There are calls to redefine vulnerability in the era of COVID-19 cognisant of the evolving and dynamic nature of vulnerable individuals or marginalized groups in response to policies that might create or reinforce vulnerability. The inability of immigration detainees to practice social distancing and apply basic public health measures, and their potential for chronic-ill health are evident (Van Hout et al. 2021; 2022). The employment of concept mapping providing a broad conceptualization of vulnerability for the health effects of the COVID-19 pandemic and the associated measures is recommended. This can additionally inform practice-based interventions (van der Ven et al. 2021). Acknowledging the lived experiences of vulnerable groups as defined by epistemic injustice is paramount (Ahmad et al. 2020).

Hence, aside from the political discourse in Europe around migrant management and border control, the COVID-19 public health emergency offers a unique opportunity for civil society and human rights organizations to advocate for change and leverage for immigration detention reform, particularly with regard to improving infrastructure and environmental conditions of detention. Despite the European Fundamental Rights Agency reporting on the purposes and conditions of immigration detention with respect to public order, public health and national security (Fundamental Rights Agency 2010), there is little 'live' data regarding immigration detention rates or the routine monitoring of standards in the diverse settings of detention used in Europe (Global Detention Project 2015). Oversight mechanisms of immigration detention vary across Europe (Bhui 2016; Van Hout 2021), despite the guidelines on the detention of asylum-seekers (United Nations High Commissioner for Refugees 2012) and in the broader sense the updated European Prison Rules (Council of Europe 2020), and statement on standards of immigration detention (European Committee for the Prevention of Torture, 2017). Further decongestion measures in immigration settings, routine independent monitoring of general and environmental health standards, and the consideration of non-custodial community measures are recommended, alongside state inclusion of immigration detention settings in COVID-19 vaccination roll outs and public health surveillance and other actions.

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References

Ahmad, A., R. Chung, L. Eckenwiler *et al*. 2020. What Does It Mean to be Made Vulnerable in the Era of COVID-19? *Lancet* 395(10235): 1481–2.

Al Jazeera. 2022. *Twelve Refugees Found Frozen to Death Near Turkey-Greece Border*. https://www.aljazeera.com/news/2022/2/3/12-migrants-found-frozen-to-death-near-turkey-greece-border (referenced 8 February 2022).

ANSA. 2020. *Coronavirus Pandemic: European Rights Commissioner Calls for Migrants' Release*. https://www.infomigrants.net/en/post/23742/coronavirus-pandemic-european-rights-commissioner-calls-for-migrants-release (referenced 7 February 2022).

Apap, J. 2016. *Arbitrary Detention of Women and Children for Immigration-Related Purposes*. Brussels: European Parliamentary Research Service. https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2016)577991 (referenced 5 February 2022).

Bhui, H. S. 2016. *Can Inspection Produce Meaningful Change in Immigration Detention?* Global Detention Project Paper No. 12, Global Detention Project, Geneva.

Brandariz, J. A., and C. Fernández-Bessa. 2021. Coronavirus and Immigration Detention in Europe: The Short Summer of Abolitionism? *Social Sciences* 10(6): 226.

Chehayeb, K., and F. Marsi. 2020. *Migrants Fleeing Lebanon by Sea Accuse Greece of Abuse*. https://www.aljazeera.com/features/2022/1/12/migrants-fleeing-lebanon-by-sea-accuse-greece-of-abuse (referenced 8 February 2022).

Corbet S., and L. Cook. 2022. *EU Nations Debating Borders, Migration Policies*. EU nations debating borders, migration policies - ABC News (go.com) (referenced 5 February 2022).

Council of Europe. 2020. *Recommendation Rec(2006)2-rev of the Committee of Ministers to Member States on the European Prison Rules*. Result details (coe.int) (referenced 7 February 2022)

Council of Europe. 2021. *Migration and Asylum*. Strasbourg: Council of Europe. https://rm.coe.int/thematic-factsheet-migration-asylum-eng/1680a46f9b (referenced 7 February 2022).

Council of the European Union. 2008. *Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on Common Standards and Procedures in Member States for Returning Illegally Staying third-Country Nationals*. 16 December 2008. OJ L. 348/98-348/107; 16.12.2008, 2008/115/EC. https://www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/LIBE/DV/2020/07-02/EPRS_STU2020642840_EN.pdf (referenced 5 February 2022).

Council of the European Union. 2013. *Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 Laying Down Standards for the Reception of Applicants for International Protection (Recast)*. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0033 (referenced 5 February 2022).

European Commission. 2020. *Communication from the Commission. Covid-19: Guidance on the Implementation of Relevant EU Provisions in the Area of Asylum and Return Procedures and on Resettlement. C(2020) 2516 Final*. https://ec.europa.eu/info/sites/info/files/guidance-implementation-eu-provisions-asylum-retur-procedures-resettlement.pdf (referenced 7 February 2022)

European Committee for the Prevention of Torture. 2017. *Immigration Detention*. European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment Strasbourg: Council of Europe. https://rm.coe.int/16806fbf12) (referenced 7 February 2022).

European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. 2020. *Statement of Principles Relating to the Treatment of Persons Deprived of their Liberty in the Context of the Coronavirus Disease (Covid-19) Pandemic 20 March 2020*. CPT/Inf(2020)13. Strasbourg: Council of Europe. https://rm.coe.int/16809cfa4b (referenced 7 February 2022).

European Court of Human Rights. 2015. *Health Related Issues in the Case Law of the European Court of Human Rights*. Strasbourg: European Court of Human Rights (ECtHR). http://www.antoniocasella.eu/salute/ECHR_health_2015.pdf (referenced 7 February 2022).

European Court of Human Rights. 2021a. *Guide on the Case-Law of the European Convention on Human Rights. Immigration*. Strasbourg: European Court of Human Rights (ECtHR). https://www.echr.coe.int/Documents/Guide_Immigration_ENG.pdf (referenced 7 February 2022).

European Court of Human Rights. 2021b. *Migrants in Detention*. Strasbourg: European Court of Human Rights (ECtHR). https://www.echr.coe.int/Documents/Fs_Migrants_detention_ENG.pdf (referenced 7 February 2022).

European Court of Human Rights. 2021c. *Accompanied Migrant Minors in Detention*. Strasbourg: European Court of Human Rights (ECtHR). https://www.echr.coe.int/Documents/FS_Accompanied_migrant_minors_detention_ENG.pdf (referenced 7 February 2022).

European Court of Human Rights. 2021d. *COVID-19 Health Crisis*. https://www.echr.coe.int/Documents/FS_Covid_ENG.pdf (referenced 7 February 2022).

European Court of Human Rights. 2021e. *Guide on the Case-Law of the European Convention on Human Rights Prisoners' Rights*. Available at https://www.echr.coe.int/Documents/Guide_Prisoners_rights_ENG.pdf (referenced 7 February 2022).

Fineman, M. 2019. Vulnerability and Social Justice. *Valparaiso University Law Review* 53(2): 341–70.

Freedman, J. 2018. The Uses and Abuses of 'Vulnerability' in EU Asylum and Refugee Protection: Protecting Women or Reducing Autonomy? *Papeles del CEIC 2019(1)*(204): 1–15.

Fundamental Rights Agency. 2010. *Detention of Third Country Nationals in Return Procedures*. Vienna: European Union Agency for Fundamental Rights. https://fra.europa.eu/en/publication/2010/detention-third-country-nationals-return-procedures (referenced 5 February 2022).

Global Detention Project. 2015. *The Uncounted: Detention of Migrants and Asylum Seekers in Europe*. Geneva: Global Detention Project. https://www.access-info.org/wp-content/uploads/DetentionReport_AIE_GDP_HighRes_17Dec15.pdf (referenced 5 February 2022).

Hargreaves, S., B. N. Kumar, M. McKee *et al*. 2020. Europe's Migrant Containment Policies Threaten the Response to COVID-19 Policy Makers Must Include Migrant Camps in their National Plans. *BMJ* 368: m1213.

Human Rights Watch. 2019 *No Escape from Hell*. https://www.hrw.org/report/2019/01/21/no-escape-hell/eu-policies-contribute-abuse-migrants-libya (referenced 27 December 2021).

International Commission of Jurists. 2020. *The Impact of COVID-19 Related Measures on Human Rights of Migrants and Refugees in the EU: Briefing Paper*. https://www.icj.org/wp-content/uploads/2020/06/Covid19-impact-migrans-Europe-Brief-2020-ENG.pdf (referenced 7 February 2022).

International Organization for Migration. 2011. *International Standards on Immigration Detention and Non-custodial Measures*. IOM Submission to the Working Group on Arbitrary Detention. https://www.ohchr.org/Documents/Issues/Detention/DraftBasicPrinciples/IOM3.pdf (referenced 7 February 2022).

Lebano, A., S. Hamed, H. Bradby *et al*. 2020. Migrants' and Refugees' Health Status and Healthcare in Europe: A Scoping Literature Review. *BMC Public Health* 20(1039). doi:10.1186/s12889-020-08749-8.

Lebret, A. 2020. COVID-19 Pandemic and Derogation to Human Rights. *Journal of Law and the Biosciences* 7(1): lsaa015.

Lungu-Byrne, C., J. Germain, E. Plugge *et al*. 2020. Contemporary Migrant Health Experience and Unique Health Care Needs in European Prisons and Immigration Detention Settings. *International Journal of Forensic Mental Health* 20(1): 80–99.

Majcher, I. 2019. Immigration Detention under the Global Compacts in the Light of Refugee and Human Rights Law Standards. *Global Migration* 57(6): 91–114.

Marquez, N., J. A. Ward, K. Parish *et al*. 2021. COVID-19 Incidence and Mortality in Federal and State Prisons Compared with the US Population, April 5, 2020, to April 3, 2021. *JAMA* 326(18): 1865–7.

Médecins Sans Frontières. 2020. *Covid-19: Evacuation of Squalid Greek Camps More Urgent Than Ever in Light of Coronavirus Pandemic*. https://www.msf.org.uk/article/covid-19-evacuation-squalid-greek-camps-more-urgent-ever-light-coronavirus-pandemic (referenced 7 February 2022).

Office of the High Commissioner for Human Rights. 2020. *COVID-19: Measures Needed to Protect People Deprived of Liberty, UN Torture Prevention Body Says*. https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25756&LangID=E (referenced 7 February 2020).

Orcutt, M., R. Mussa, L. Hiam *et al*. 2020. EU Migration Policies Drive Health Crisis on Greek Islands. *Lancet* 395: 668–70.

Parliamentary Assembly of the Council of Europe. 2008. *Europe's Boat People: Mixed Migration Flows by Sea into Southern Europe, adopted by the Standing Committee, acting on behalf of the Assembly, on 28 November 2008 (see Doc. 11688, report of the Committee on Migration, Refugees and Population, Rapporteur: Mr Østergaard)*. https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17692&lang=en (referenced 7 February 2022).

Pont, J., S. Enggist, H. Stöver *et al*. 2021. COVID-19-the Case for Rethinking Health and Human Rights in Prisons. *American Journal of Public Health* 111(6): 1081–5.

Psaropoulos, J. 2022. *Lawlessness at the Border Mars Greece's Reputation Over Migration*. https://www.aljazeera.com/features/2022/2/4/lawlessness-at-the-border-mars-greeces-reputation (referenced 8 February 2022).

Refugee Rights Europe. 2020. *The Invisible Islands: Covid-19 Restrictions and the Future of Detention on Kos and Leros*. https://refugee-rights.eu/wp-content/uploads/2020/05/RRE_TheInvisibleIslands.pdf (referenced 7 February 2022).

Special Rapporteur on the Human Rights of Migrants. 2002. *Report of the Special Rapporteur on the Human Rights of Migrants, Gabriela Rodrıguez Pizarro Submitted Pursuant to Commission on Human Rights Resolution*. 2002/62. Geneva: Office of the Special Rapporteur on the Human Rights of Migrants (SRHRM). https://digitallibrary.un.org/record/485997?ln=en (referenced 7 February 2022).

Special Rapporteur on the Human Rights of Migrants. 2012. *Report of the Special Rapporteur on the Human Rights of Migrants, François Crépeau: Detention of Migrants in an Irregular Situation*. A/HRC/20/24. Geneva: Office of the Special Rapporteur on the Human Rights of Migrants (SRHRM). https://www.undocs.org/A/HRC/20/24 (referenced 7 February 2022).

Stierl, M., and D. Dadusc. 2021. The 'Covid Excuse': European Border Violence in the Mediterranean Sea. *Ethnic and Racial Studies* 45(8): 1453–74. doi: 10.1080/01419870.2021.1977367.

United Nations. 1951. *Convention Relating to the Status of Refugees*. 28 July 1951, United Nations, Treaty Series, 189, 137. New York: United Nations General Assembly.

United Nations. 1966a. *International Covenant on Civil and Political Rights (ICCPR)*. (16 December 1966) United Nations, Treaty Series, 999. New York: United Nations General Assembly.

United Nations. 1966b. *International Covenant on Economic, Social and Cultural Rights (ICESRC)*. (16 December 1966) United Nations, Treaty Series, 993:3. New York: United Nations General Assembly.

United Nations. 1967. *UN General Assembly, Protocol Relating to the Status of Refugees*. 31 January 1967, United Nations, Treaty Series, 606, 267. New York: United Nations General Assembly.

United Nations. 1984. *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. United Nations, Treaty Series, 1465 (85). New York: United Nations General Assembly.

United Nations. 2003. *Optional Protocol to the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment*. (9 January 2003) A/RES/57/199. New York: United Nations General Assembly.

United Nations. 2016. *Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules) (8 January 2016)*. A/RES/70/175. New York: United Nations General Assembly.

United Nations. 2018. *Global Compact for Safe, Orderly and Regular Migration*. A/RES/73/195. New York: United Nations.

United Nations Committee on Economic, Social and Cultural Rights. 2000. *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Article 12 of the Covenant)*. (11 August 2000) E/C.12/2000/4. Geneva: United Nations Committee on Economic, Social and Cultural Rights.

United Nations High Commissioner for Refugees. 2012. *Detention Guidelines: Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention*. Geneva: United Nations High Commissioner for Refugees (UNHCR). https://www.unhcr.org/publications/legal/505b10ee9/unhcr-detention-guidelines.html (referenced 5 February 2022).

United Nations High Commissioner for Refugees. 2018. *Report of the United Nations High Commissioner for Refugees Part II Global Compact on Refugees*. United Nations High Commissioner for Refugees. A/73/12. New York: United Nations.

United Nations High Commissioner for Refugees. 2020. *UN Refugee Agency Steps Up COVID-19 Preparedness, Prevention and Response Measures*. https://www.unhcr.org/ph/17857-covid19-2.html (referenced 7 February 2022).

United Nations Human Rights Committee. 2014. *General Comment No. 35 Article 9 (Liberty and Security of Person)*. (16 December 2014), CCPR/C/GC/35.

United Nations Human Rights Committee. 2018. *General Comment No 36 (2018), on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life*. CCPR/C/GC/36. https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1_Global/CCPR_C_GC_36_8785_E.pdf (referenced 16 January 2022).

United Nations Office of the High Commissioner for Human Rights. 2020. *Working Group on Arbitrary Detention Deliberation No. 11 on Prevention of Arbitrary Deprivation of Liberty in the Context of Public Health Emergencies*. https://www.ohchr.org/Documents/Issues/Detention/DeliberationNo11.pdf (referenced 7 February 2022).

United Nations Office on Drugs and Crime. 2020a. *Position Paper COVID-19 Preparedness and Responses in Prisons*. Vienna: United Nations Office on Drugs and Crime. www.unodc.org/documents/hiv-aids/publications/UNODC_position_paper_COVID-19_in_prisons_-_FINAL.pdf (referenced 16 January 2022).

United Nations Office on Drugs and Crime. 2020b. *COVID-19 in Prisons – Member States and UNODC Reiterate Their Commitment to the Nelson Mandela Rules (22 July 2020)*. Vienna: United Nations Office on Drugs and Crime. www.unodc.org/unodc/en/frontpage/2020/July/covid-19-in-prisons--member-states-and-unodc-reiterate-their-commitment-to-the-nelson-mandela-rules.html (referenced 25 May 2021).

United Nations Working Group on Arbitrary Detention. 2018. *Revised Deliberation No.5 on Deprivation of Liberty of Migrants*. A/HRC/39/45. New York: United Nations General Assembly.

van der Ven, L. G. L., E. L. Duinhof, M. L. A.Dückers *et al*. 2021. Conceptualizing Vulnerability for Health Effects of the COVID-19 Pandemic and the Associated Measures in Utrecht and Zeist: A Concept Map. *International Journal of Environmental Research and Public Health* 18(22): 12163.

Van Hout, M. C. 2021. Human Rights Violations, Detention Conditions and the Invisible Nature of Women in European Immigration Detention: A Legal Realist Account. *International Journal of Prisoner Health* [Epub ahead of print]. doi:10.1108/IJPH-03-2021-0023.

Van Hout, M. C., C. Bigland, A. Marsden *et al*. 2022. Precarious Migrants and COVID-19 Responses: Leave No One Behind. *Public Health*. Early Online doi:10.1016/j.puhe.2022.03.007

Van Hout, M. C., C. Bigland, and N. Murray. 2021. Scoping the Impact of COVID-19 on the Nexus of Statelessness and Health in Council of Europe Member States. *Journal of Migration and Health* 4: 100053.

Van Hout, M. C., C. Lungu Byrne, and J. Germain. 2020. Migrant Health Situation when Detained in European Immigration Detention Centres: A Qualitative Synthesis. *International Journal of Prisoner Health* 16(3): 221–36.

World Health Organization. 2018. *Report on the Health of Refugees and Migrants in the WHO European Region: No Public Health Without Refugee and Migrant Health*. Copenhagen: World Health Organization Regional Office for Europe.

World Health Organization. 2020a. *Coronavirus Disease (COVID-19) Pandemic*. Geneva,: World Health Organization.

World Health Organization. 2020b. *Migration and Health: Key Issues*. Geneva,: World Health Organization. https://www.euro.who.int/__data/assets/pdf_file/0005/293270/Migration-Health-Key-Issues-.pdf (referenced 7 February 2022).

World Health Organization. 2020c. *Preparedness, Prevention and Control of COVID-19 in Prisons and Places of Detention*. Geneva: World Health Organization. WHO/Europe | Prisons and health – Preparedness, Prevention and Control of COVID-19 in Prisons and Other Places of Detention, 15 March 2020 (produced by WHO/Europe) (referenced 27 December 2021).

World Health Organization. 2020d. *Checklist to Evaluate Preparedness, Prevention and Control of COVID-19 in Prisons and Other Places of Detention*. Copenhagen: World Health Organization-Europe. https://www.euro.who.int/__data/assets/pdf_file/0020/438041/Covid19-PrisonsChecklist-eng.pdf (referenced 27 December 2021).

List of cases

v. Australia, UN Human Rights Committee. Communication No. 560/1993, views of 3 April 1997, UN Doc. CCPR/C/59/D/560/1993, paras. 9.3–9.4.

A.A. v. Greece, Application No. 12186/08, *Council of Europe: European Court of Human Rights*, 22 July 2010.

A.F. v. Greece, Application No. 53709/11, *Council of Europe: European Court of Human Rights*, 4 October 2013.

AB and Others v. France, Application No. 11593/12, *Council of Europe: European Court of Human Rights*, 12 July 2016.

Abdi Mahamud v. Malta, Application No. 56796/13, *Council of Europe: European Court of Human Rights*, 3 May 2016.

Abdolkhani and Karimnia v. Turkey, Application. No. 30471/08, *Council of Europe: European Court of Human Rights*, 22 September 2009.

Aden Ahmed v. Malta, Application No. 55352/12, *Council of Europe: European Court of Human Rights*, 23 July 2013.

Aleksanyan v. Russia, Application No. 46468/06, *Council of Europe: European Court of Human Rights*, 22 December 2008.

Ananyev and Others v. Russia, Application No. 41461/10, *Council of Europe: European Court of Human Rights*, 27 November 2012.

Artyomov v. Russia, Application No. 14146/02, *Council of Europe: European Court of Human Rights*, 27 May 2010.

Asalya v. Turkey, Application No. 43875/09, *Council of Europe: European Court of Human Rights*, 15 April 2014.

Blokhin v. Russia, Application No. 47152/06. *Council of Europe: European Court of Human Rights*, 23 March 2016.

C.D. and Others v. Greece, Application Nos. 33441/10, 33468/10 and 33476/10, *Council of Europe: European Court of Human Rights*, 19 March 2014.
Catalin Eugen Micu v. Romania, Application No. 55104/13, *Council of Europe: European Court of Human Rights*, 5 January 2016.
Chahal v. Secretary of State for the Home Department, [1995] 1 ALL ER 658, [1995] 1 WLR 526, [1994] *Imm AR 107, United Kingdom: Court of Appeal (England and Wales)*, 22 October 1993.
Dougoz v. Greece, Application. No. 40907/98, *Council of Europe: European Court of Human Rights*, 6 March 2001.
Fedosejevs v. Latvia, Application No. 37546/06, *Council of Europe: European Court of Human Rights*, 19 November 2013.
Feilazoo v. Malta, Application No. 6865/19, *Council of Europe: European Court of Human Rights*, 11 March 2021.
G.B. and Others v. Turkey, Application No. 4633/15, *Council of Europe: European Court of Human Rights*, 17 October 2019.
Ghavtadze v. Georgia, Application No. 23204/07, *Council of Europe: European Court of Human Rights*, 3 March 2009.
Hafeez v. Government of the USA, 155, *England and Wales High Court*, 31 January 2020.
Horshill v. Greece, Application No. 70427/11, *Council of Europe: European Court of Human Rights*, 1 August 2013.
Ilias and Ahmed v. Hungary, Application No. 47287/15, *Council of Europe: European Court of Human Rights*, 21 November 2019.
J.R. and Others v. Greece, Application No. 22696/16, *Council of Europe: European Court of Human Rights*, 25 January 2018.
Jalloh v. Netherlands, *UN Human Rights Committee*, Communication No. 794/1998, views of 26 March 2002, UN Doc. CCPR/C/74/D/794/1998, para. 8.2.
Kaak and Others v. Greece 2019, Application No. 34215/16, *Council of Europe: European Court of Human Rights*, 3 October 2019.
Kanagaratnam and Others v. Belgium, Application no. 15297/09, *Council of Europe: European Court of Human Rights*, 13 December 2011.
Khlaifia and Others v. Italy, Application No. 16483/12, *Council of Europe: European Court of Human Rights*, 15 December 2016.
Khokhlich v. Ukraine, Application No. 41707/98, *Council of Europe: European Court of Human Rights*, 29 April 2003.
Korobov and Others v. Russia, Application No. 67086/01, *Council of Europe: European Court of Human Rights*, 2 March 2006.
Kotsaftis v. Greece, Application No. 39780/06, *Council of Europe: European Court of Human Rights*, 12 September 2008.
Krstić v. Serbia, Application No. 34170/19, *Council of Europe: European Court of Human Rights*, 9 December 2021.
M.S.S. v. Belgium and Greece, Application No. 30696/09, *Council of Europe: European Court of Human Rights*, 21 January 2011.
Mahamed Jama v. Malta, Application No. 10290/13, *Council of Europe: European Court of Human Rights*, 26 November 2015.
Mahmundi and Others v. Greece, Application. No. 14902/10, *Council of Europe: European Court of Human Rights*, 31 July 2012.
Mohamad v. Greece, Application No. 70586/11, *Council of Europe: European Court of Human Rights*, 11 December 2014.
Moxamed Ismaaciil and Abdirahman Warsame v. Malta, Applications Nos. 52160/13 and 52165/13, Council of Europe: European Court of Human Rights, 12 January 2016.
Mubilanzila Mayeka and Kaniki Mitunga v. Belgium, Application. No. 13178/03, *Council of Europe: European Court of Human Rights*, 12 October 2006.
Muršić v. Croatia, Application No. 7334/13, *Council of Europe: European Court of Human Rights*, 20 October 2016.
Neshkov and Others v. Bulgaria, Application No. 36925/10, *Council of Europe: European Court of Human Rights*, 27 January 2015.
Nystrom v. Australia, *UN Human Rights Committee, Communication No. 1557/2007*, views of 28 July 2011, UN Doc. CCPR/C/102/D/1557/2007, paras. 7.2–7.3.

Patranin v. Russia, Application No. 12983/14, *Council of Europe: European Court of Human Rights*, 23 July 2015.
Poghossian v. Georgia, Application No. 9870/07, *Council of Europe: European Court of Human Rights*, 24 May 2009.
Pentiacova and Others v. Moldova, Application No. 14462/03. *Council of Europe: European Court of Human Rights*, 4 January 2005.
Popov v. France, Application. Nos. 39472/07 and 39474/07, *Council of Europe: European Court of Human Rights*, 19 January 2012.
R.U. v. Greece, Application No. 2237/08, *Council of Europe: European Court of Human Rights*, 7 June 2011.
Rahimi v. Greece, Application No. 8687/08, *Council of Europe: European Court of Human Rights*, 5 April 2011.
Riad and Idiab v. Belgium, Application No. 29787/03, *Council of Europe: European Court of Human Rights*, 24 April 2008.
S.D. v. Greece, Application No. 53541/07, *Council of Europe: European Court of Human Rights*, 11 June 2009.
S.F. and Others v. Bulgaria, Application No. 8138/16, *Council of Europe: European Court of Human Rights*, 7 December 2017.
Sakir v. Greece, Application No. 48475/09, *Council of Europe: European Court of Human Rights*, 24 March 2016.
Sakkopoulos v. Greece, Application No. 61828/00, *Council of Europe: European Court of Human Rights*, 15 January 2004.
Samaras and Others v. Greece, Application No. 11463/09, *Council of Europe: European Court of Human Rights*, 28 February 2012.
Sh.D. and Others v. Greece, Austria, Croatia, Hungary, Northern Macedonia, Serbia and Slovenia, Application No. 141165/16, *Council of Europe: European Court of Human Rights*, 13 June 2019.
Testa v. Croatia, Application No. 20877/04, *Council of Europe: European Court of Human Rights*, 12 July 2007.
Varga and Others v. Hungary, 2015, Application Nos. 14097/12 45135/12 73712/12 34001/13 44055/13 64586/13, *Council of Europe: European Court of Human Rights*, 10 March 2015.
Z.A. and Others v. Russia, Application Nos. 61411/15, 61420/15, 61427/15 and 3028/16, *Council of Europe: European Court of Human Rights*, 21 November 2019.

Pending ECtHR cases regarding COVID-19

Faia v. Italy, Application No. 17378/20.
Maratsis and Others v. Greece, Application No. 30335/20.
Riela v. Italy, Application No. 17378/20.
Rus v. Romania, Application No. 2621/21.
Vasilakis and Others v. Greece Application No. 30379/20.
Vlamis and Others v. Greece, (Application No. 29655/20) and four other applications (29689/20, 30240/20, 30418/20 and 30574/20).

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Marie Claire Van Hout & Jakkie Wessels

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#ForeignersMustGo versus "*in favorem libertatis*": Human rights violations and procedural irregularities in South African immigration detention law

Marie Claire Van Hout[a] and Jakkie Wessels[b]

[a]Liverpool John Moores University; [b]Office of the Regional Court President

ABSTRACT

In 2021, an estimated 3.95 million foreign nationals resided in South Africa, with no data available on numbers of displaced persons or undocumented migrants residing without legal or valid immigration status. Surveillance data on immigration detention are scant. We present a socio-legal account of the historical evolution of South African immigration detention regulation in post-apartheid timeframes, with a view to providing a legal realist assessment of the socio- and politico-legal dimensions pertinent to human rights assurances of immigration detainees in South Africa. The realist focus is on scrutinizing South Africa's progress in upholding the rights of immigration detainees and illustrating the contemporary complexities in ensuring due process in the (co)application of the Immigration Act (and Refugees Act) explicitly regarding immigration detention processes and practices. We present the applicable international and regional African human rights treaties, domestic regulations, and relevant jurisprudence to the rights of immigration detainees in South Africa. The generated realist narrative is cognizant of the contextual forces of migration into South Africa, securitization agendas, and violations of basic human rights and due process, and illustrates various gaps in the application of domestic laws, policies, and standards of care regarding immigration detention when evaluated against the rule of law.

Background

Historically, the majority of South Africa's asylum seekers have originated from Zimbabwe, followed by Nigeria, Mozambique, other African countries, and India and Pakistan (Ncube, 2017). Most recent available data indicate that, in January 2020, the Department of Home Affairs reported there were 188,296 asylum seekers and 80,758 registered refugees in South Africa (Parliamentary Monitoring Group, 2020). The social justice and human rights nongovernmental organization Lawyers for Human Rights advised caution at the time regarding the veracity of data, and observed that the figure was much higher (Lawyers for Human Rights, 2020a, 2020b). In 2021, an estimated 3.95 million foreign nationals resided in South Africa, with no data available on the numbers of displaced persons or undocumented migrants residing without legal or valid immigration status (Myeni, 2022a). Routine surveillance data on immigration detention are scant (Global Detention Project, 2021). Available monitoring data indicate that deportation numbers

CONTACT Marie Claire Van Hout m.c.vanhout@ljmu.ac.uk Public Health Institute, Liverpool John Moores University, 3rd Floor, Exchange Station, Tithebarn Street, Liverpool L2 2QP, UK

reduced from 29,376 in 2019/2020 to 11,787 in 2020/2021 (compared with 15,033 in 2017) (Parliamentary Monitoring Group, 2021), with Zimbabwe, Mozambique, Malawi, and Lesotho accounting for well over 90% of deportations (Chambers, 2021). Detention of children and unaccompanied minors for immigration purposes has reduced in the past decade (Gadisa et al., 2020; Lawyers for Human Rights, 2020a).

Rising anti-immigrant sentiment in South Africa is underpinned by poverty, unemployment, and crime with endemic racism, xenophobia, and social tensions flourishing in townships and low-income communities (Global Detention Project, 2021). The 2016 multidisciplinary and cross-departmental government program known as Operation Fiela was initiated to tackle rising criminality in low-income communities, but was sharply criticized by human rights organizations due to its substantial focus on the arrest and deportation of undocumented foreign nationals (Africa Check, 2016). Migration and cross-border movements are increasingly viewed politically and societally using a "lens of national security, social instability, and criminality" (Global Detention Project, 2021, p. 7). The 2017 government White Paper stated that South Africa "is a destination for illegal immigrants (undocumented migrants, border jumpers, over-stayers, smuggled and trafficked persons) who pose a security threat to the economic stability and sovereignty of the country" (Department of Home Affairs, 2017). It went on to document that "enforcement of compliance, in the form of detentions and the deportations, is not sustainable since detentions and deportations require a substantial amount of funding" (Department of Home Affairs, 2017, p. 35). In 2018 the UN Committee on Economic, Social, and Cultural Rights (2018) expressed concerns about proposed asylum processing centers on South Africa's borders. The Scalabrini Centre (2018), a migrant rights organization, released a press statement indicating substantial reservations around government proposed changes to asylum processing, particularly around the use of border camps and the potential for arbitrary (and lengthy) detention periods in substandard conditions. Global detention organizations have also sharply criticized the content of the government White Paper (Global Detention Project, 2021), with plans for remote detention camps on South African borders attracting the attention of the United Nations Committee against Torture in 2019 (UN Committee against Torture, 2019). At the time of writing, no asylum processing centers have been built, and the asylum processing backlog remains.

More recently, large demonstrations have demanded the deportation of foreigners and displaced persons (Gatticchi & Maseko, 2020), with mass arrests of foreign shop owners and church attendees (Van Lennep, 2019). Xenophobic sentiments and community unrest increased substantially during the COVID-19 state disaster measures, exacerbated by social media initiatives (i.e., #PutSouthAfricaFirst, which later became #PutSouthAfricansFirst; #WeWantOurCountryBack; and #ForeignersMustGo; see Centre for Analytics and Behavioural Change, 2022). According to the Xenowatch monitor developed by the African Center for Migration and Society, Operation Dudula[1] (a faction of #PutSouthAfricansFirst) has left immigrants and refugees fearing for their safety in townships and surrounding suburbs (Myeni, 2022b). The Zimbabwean Exemption Permit regime, which initially expired on December 31, 2021 (Republic of South Africa, 2021), has since been extended by the Department of Home Affairs for another 12 months (Department of Home Affairs, 2021).

In contrast to most African countries, asylum seekers and refugees in South Africa enjoy freedom of movement and most are "urban refugees" (young men from cities and towns in their originating countries; see Jenkins & de la Hunt, 2011). For those seeking to reside in the country, there is a "policy of self-settlement and self-sufficiency for asylum seekers and refugees" (Landau & Segatti, 2009; South African Human Rights Commission, 2017a, Hiropoulos, 2017, p. 3). Social support programs during the COVID-19 public health crisis were initially restricted to those with national identity documents (Amnesty International, 2020; Migration and Coronavirus in Southern Africa co-ordination group (MiCoSA), 2020; Mukumbang et al., 2020; Zanker & Moyo 2020). Eligibility to receive the COVID-19 Social Relief of Distress grant was then widened to

include certain asylum seekers/permit holders in June 2020, following litigation (see *Scalabrini Center and Another v. Minister of Social Development and Others;* Scalabrini Centre, 2020). Those in care of the state awaiting deportation in the country's repatriation facility and prisons were excluded in COVID-19 preventative measures, with the International Detention Coalition (2020) reporting that such "measures were tailored only towards natural citizens of the state … thus amplifying the dehumanisation of migrants" (IDC, 2020, p. 48).

We present here a socio-legal account of the historical evolution of South African immigration detention regulation in post-apartheid timeframes, with a view to providing a focused legal realist assessment of the socio- and politico-legal dimensions pertinent to human rights assurances of immigration detainees in South Africa. The realist focus is on scrutinizing South Africa's progress in upholding the rights of immigration detainees and illustrating the contemporary complexities in ensuring due process in the (co)application of the Immigration Act (and Refugees Act) explicitly regarding immigration detention processes and practices. We present the applicable international and regional African human rights treaties, domestic regulations, and relevant jurisprudence to the rights of immigration detainees in South Africa. The generated realist narrative is cognizant of the contextual forces of migration into South Africa, securitization agendas, and violations of basic human rights and due process, and illustrates various gaps in the application of domestic laws, policies, and standards of care regarding immigration detention when evaluated against the rule of law.

International and regional human rights instruments and normative frameworks applicable to immigration detention

There is a broad range of international and regional human rights instruments and treaty protections applicable to the regulation of immigration and the fundamental rights and freedoms of immigration detainees (UN Human Rights Council, 2011). South Africa has ratified a broad range of international human rights treaties (see Table 1).

South Africa is a party to the UN Refugee Convention (United Nations, 1951) and its Protocol (United Nations, 1967). It has not ratified the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (United Nations, 1990) and thereby does not offer the individual complaints procedure under Article 77.

The Global Compact on Refugees (UN High Commissioner for Refugees, 2018); the Global Compact for Safe, Orderly and Regular Migration (United Nations, 2018); and the UN guidelines all provide that administrative detention should be the exception and not the norm, and explicitly prohibit arbitrary detention (UN High Commissioner for Refugees, 2012). General Comment 35 of the UN Human Rights Committee (2014) provides that "detention in the course of proceedings for the control of immigration is not per se arbitrary, but the detention must be justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time." The UN Office of the High Commissioner for Human Rights (2020) and UN Working Group on Arbitrary Detention (2018) both emphasize that "arbitrary detention can never be justified, whether it be for any reason related to national emergency, maintaining public security or health." States are required to prove that detention is not arbitrary under Article 9 of the International Covenant on Civil and Political Rights (see Table 2).

With regard to deportation facilities and standards of immigration detention, state obligations to uphold the rights of those in their custody (including immigration detainees) are explicit in the 1951 Refugee Convention (United Nations, 1951) and its 1967 Protocol, the international human rights treaties including the International Covenant on Civil and Political Rights (Article 10; see United Nations, 1966a); the International Covenant on Economic, Social and Cultural Rights (Article 12(1) and (2); see United Nations, 1966b); and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (United Nations, 1984).

Table 1. Ratification status of South Africa.

Treaty	Signature date	Ratification date	Acceptance of individual complaints procedures	Acceptance of inquiry procedures
International Covenant on Civil and Political Rights (ICCPR) (UN, 1966a) and the CCPR Optional Protocol	October 3, 1994	December 10, 1998	Yes CCPR OP-1	–
2nd Optional Protocol to the ICCPR Abolition of the death penalty (UN, 1989a)	–	August 28, 2002	–	–
International Convention on the Elimination of all forms of Racial Discrimination (CERD) (UN, 1965)	October 3, 1994	December 10, 1998	Yes CERD Article 14	–
International Covenant on Economic, Social and Cultural Rights (ICESCR) (UN, 1966b)	October 3, 1994	January 12, 2015	No CESCR-OP	No CESCR-OP Article 11
Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) (UN, 1979) and the CEDAW Optional Protocol	January 29, 1993	December 15, 1995	Yes CEDAW OP	Yes CEDAW-OP Articles 8–9
Convention against Torture and other cruel or degrading treatment or punishment (CAT) (UN, 1984)	January 29, 1993	December 10, 1998	Yes CAT Article 2	Yes CAT Article 20
Optional Protocol of the Convention on Torture (OPT-CAT) (UN, 2003)	September 20, 2006	June 20, 2019		
Convention on the Rights of the Child (CRC) (UN, 1989b)	January 29, 1993	June 16, 1995	No CRC OP-IC	–
Convention on the Rights of People with Disabilities (UN, 2007)	March 30, 2007	November 30, 2007	Yes CRPD-OP	Yes CRPD-OP Article 6–7

Source: UN Treaty Body Database Treaty Bodies Treaties (ohchr.org).

Table 2. Relevant United Nations Human Rights Committee judgments.

A v. Australia, Communication No. 560/1993, U.N. Doc.CCPR/C/59/D/560/1993, April 30, 1997.
Nystrom v. Australia, UN Doc CCPR/C/102/D/1557/2007, July 18, 2011.
Samba Jalloh v. Netherlands, CCPR/C/74/D/794/1998, UN Human Rights Committee, April 15, 2002.

General Comment No. 14 of the UN Committee on Economic, Social and Cultural Rights (2000) outlines that states parties are (at the very least) required to meet a threshold of a "core minimum" of social and economic rights, and that people deprived of their liberty (including immigration detainees) are entitled to the same core minimum rights as other citizens. The right not to be detained arbitrarily is intertwined with the right to be detained in humane conditions of detention "with execution of the measure not exceeding unavoidable levels of suffering inherent in detention" (European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 2017).

Adequate conditions respecting the rights and dignity of the detained are also mandated by the UN High Commissioner for Refugees (2012). General Comment No. 36 of the UN Human Rights Committee (2018) further specifies that state parties to the International Covenant on Civil and Political Rights (United Nations, 1966a) must "respect and protect the right to life of all individuals arrested or detained by them" and are obliged to "take special measures of protection towards persons in situation of vulnerability, a category that includes displaced persons, asylum seekers, refugees, and stateless persons" (see Article 6).

Article 17(2) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (United Nations, 1990) explicitly describes:

> [the] heightened duty to protect the right to life which also applies to individuals quartered in liberty-restricting State-run facilities, such as … refugee camps and camps for internally displaced persons" and emphasizes that "states parties may not rely on lack of financial resources or other logistical problems to reduce this responsibility.

The UN Special Rapporteur on the Human Rights of Migrants explicitly states that immigration detention facilities should not have similar conditions to prison facilities (International Organisation for Migration, 2011). The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (United Nations, 1990) also provides that "accused migrant workers and members of their families shall, save in exceptional circumstances, be separated from convicted persons and shall be subject to separate treatment appropriate to their status as un-convicted persons. Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication."

The Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules) provide a comprehensive, nonbinding framework for the physical conditions of detention (United Nations, 2016) and is applicable to the rights of immigration detainees, particularly regarding humane conditions (see Rules 13, 24, 25, 27, 30, 31, 32, and 35). The rights of female immigration detainees and their children are further supported by the Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (Bangkok Rules; see United Nations, 2010).

With regard to the situation in Europe, which has experienced mass population movement ("the migrant crisis") since 2015, the European Convention on Human Rights requires the protection of all rights without discrimination based on "national or social origin" (Article 14), similar to the International Covenant on Economic, Social and Cultural Rights (United Nations, 1966b; also see International Commission of Jurists, 2020). At the European Court of Human Rights, judgments generally center on assessment of lawfulness of detention for immigration purposes, vulnerability (e.g., women and minors), and the threshold of severity of detention conditions (Van Hout, 2021). Many European Court of Human Rights judgments have described unlawful immigration detention (including of children and unaccompanied minors), which includes the use of places not suitable for humane detention (i.e., airport transit zones), substandard detention conditions (deportation facilities, camps, police cells), and the deprivation of liberty without provision of a reason for detention on immigration grounds and without access to legal remedies (see Table 3).

Table 3. Relevant European Court of Human Rights cases.

AB and Others v. France, Application No. 11593/12, Council of Europe: European Court of Human Rights, July 12, 2016.
Abdi Mahamud v. Malta, Application no. 56796/13, Council of Europe: European Court of Human Rights, May 3, 2016.
Feilazoo v. Malta, Application No. 6865/19, Council of Europe: European Court of Human Rights, March 11, 2021.
G.B. and Others v. Turkey, Application No. 4633/15, Council of Europe: European Court of Human Rights, October 17, 2019.
Kanagaratnam and Others v. Belgium, Application no. 15297/09, Council of Europe: European Court of Human Rights, December 13, 2011.
M.S.S. v. Belgium and Greece, Application no. 30696/09, Council of Europe: European Court of Human Rights, January 21, 2011.
Mahamed Jama v. Malta, Application No. 10290/13, Council of Europe: European Court of Human Rights, November 26, 2015.
Mahmundi and Others v. Greece, Application. No. 14902/10, Council of Europe: European Court of Human Rights, July 31, 2012.
Mohamad v. Greece, Application No. 70586/11, Council of Europe: European Court of Human Rights, December 11, 2014.
Moxamed Ismaaciil and Abdirahman Warsame v. Malta, Applications Nos. 52160/13 and 52165/13, Council of Europe: European Court of Human Rights, January 12, 2016.
Sh.D. and Others v. Greece, Austria, Croatia, Hungary, Northern Macedonia, Serbia and Slovenia, Application No. 141165/16, Council of Europe: European Court of Human Rights, June 13, 2019.

In terms of relevant African regional level human rights instruments and protection mechanisms, South Africa has ratified the African Charter on Human and Peoples' Rights (Banjul Charter; see Organization of African Unity, 1981), the African Charter on the Rights and Welfare of the Child (Organization of African Unity, 1990), and the African Union Convention Governing the Specific Aspects of Refugee Problems in Africa (Organization of African Unity, 1969). These African Charters and the Refugee Convention are supported by the African Commission on Human and Peoples' Rights Guidelines on the Conditions of Arrest, Police Custody and Pretrial Detention in Africa (Luanda Guidelines; see African Commission on Human and Peoples' Rights, 2014) and the African Commission on Human and Peoples' Rights Resolution on Migration and Human Rights (African Commission on Human and Peoples' Rights, 2007). Collectively they require South Africa to respect and promote the human rights of all persons within its borders, regardless of national origin (Edwards & Stone, 2016). Sections 2, 3, 5, 6, 7, and 26 of the Banjul Charter guarantee the fundamental rights to life, dignity, equality, security, a fair trial, and an independent judiciary (see General Comment 5 on the Banjul Charter: Right to Freedom of Movement and Residence, Article 12(1)), which protects mobility into, within, and out of a state; African Commission on Human and Peoples' Rights, 2020).

In particular, the nonbinding Luanda Guidelines specifically refer to the rights and vulnerabilities of refugees, foreign nationals, and stateless persons during arrest, police custody, and detention; standards of detention conditions; and segregation of detainees, and outline the specific protections required regarding access to interpretation and legal representation (Edwards & Stone, 2016). Similarly, with regard to the rights of people deprived of their liberty, the African Commission on Human and Peoples' Rights adopted a series of regional nonbinding resolutions, largely aligned with the UN norms and standards (e.g., the 1995 Resolution on Prisons in Africa; the 1997 Resolution on the Right to Recourse Procedure and Fair Trial; the 1996 Kampala Declaration on Prison Conditions in Africa; the 2002 Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa; the 2002 Ouagadougou Declaration on Accelerating Prison and Penal Reform in Africa; and the 2003 Principles and Guidelines on the Rights to a Fair Trial and Legal Assistance in Africa).

At the African Court on Human and People's Rights level, there are cases that refer to statelessness/withdrawal of nationality and deportation orders. A broad range of cases at the African Commission on Human and Peoples' Rights have also cited unlawful immigration detention, maltreatment and bribery, forced repatriations and statelessness, lack of information provided to the detainee regarding deportation measures and access to legal recourse, severe physical abuses, and harsh conditions of detention. There also have been some submissions to the African Committee of Experts on the Rights and Welfare of the Child regarding immigration detention and child statelessness (see Table 4).

Fundamental rights assurances and regulation of immigration in South Africa over time

During the 1990s, South Africa's immigration policy was based on the 1991 Aliens Control Act, which was subsequently deemed unconstitutional and replaced with the Immigration Act 13 of 2002. First and foremost, the Constitution of South Africa (1996) guarantees fundamental and procedural protections to all persons (including citizens and documented and undocumented immigrants) (specifically in Chapter 2, Bill of Rights; Section 9, right to equality; Section 10, human dignity; Section 12(1)(a), freedom and security of the person; Section 26 right to access of adequate housing; Section 27, access to health care as a basic human right; Section 28, providing for the rights of children, including not to be detained except as a last resort; Section 32, right to access to information; Section 33, providing for the right to just administrative action; and Section 35, referring to rights specific to detention; see Hicks, 1999; Kaziboni, 2018).

Table 4. Relevant African cases and submissions.

African Court on Human and People's Rights	African Commission on Human and People's Rights
Statelessness/withdrawal of nationality and deportation orders	Unlawful immigration detention, maltreatment and bribery, forced repatriations and statelessness, lack of information provided to the detainee regarding deportation measures and access to legal recourse, severe physical abuses and harsh conditions of detention.
Anudo v. Tanzania (merit) (2018) [application no. 012/2015] AFCHPR	*Abdel Hadi, Ali Radi & Others v Republic of Sudan* (2009). Communication 368/09.
Penessis v. United Republic of Tanzania (merit) [application no 013/2015] AFCHPR	*African Institute for Human Rights and Development (on behalf of Sierra Leonean Refugees in Guinea) v. Republic of Guinea* (Communication 249/200) [ACHPR 2004]
By analogy inadequate standards of detention and care in prisons	*Doebbler v. Sudan*, Comm. 235/2000, 27th ACHPR AAR Annex (Jun 2009–Nov 2009)
Abubakari v. Tanzania (merits) (2016) 1AfCLR599	*Good v. Republic of Botswana* (Communication 313/2005) [ACHPR 2010]
Guehi v. Tanzania (merits and reparations) (2018) 2AfCLR477	*Institute for Human Rights and Development in Africa v. Republic of Angola* (Communication 292/2004) [ACHPR 2008]
Konaté v. Burkina Faso (reparations) (2016) 1AfCLR346	*Modise v. Botswana* (Communication 97/93) [ACHPR 2000]
Lohé Issa Konaté v. Burkina Faso (provisional measures) (2013) 1AfCLR310	*Organization Mondiale contre la torture and Others v. Rwanda* (Communication no 27/89) [ACHPR 1996]
Mugesera v. Rwanda (provisional measures) (2017) 2AfCLR 149	*Recontre Africaine our la defence des droits de l'homme v. Zambia* (Communication no 71/92) [ACHPR 1997]
Submissions to the African Committee of Experts on the Rights and Welfare of the Child	*Zimbabwe Lawyer for Human Rights and the Institute for Human Rights and Development (on behalf of Andrew Barclay Meldrum) v. Republic of Zimbabwe* (Communication 294/2004) [ACHPR 2009]
Immigration detention and child statelessness	By analogy inadequate standards of detention and care in prisons
The African Center of Justice and Peace Studies and Peoples' Legal Aid Center v. The Government of Republic of Sudan (Communication 001/2015) [ACERWC 2018]	*Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine de l'Homme, Les Témoins de Jehovah v. Zaire* (1996) ACHPR Comm Nos.25/89,47/90,56/ 91,100/93
	International PEN and Others v. Nigeria (1998) ACHPR Nos.137/94,139/94, 154/86,161/97
	Malawi African Association and others v. Mauritania (2000) ACHPR Nos.54/91,61/91,98/93,164/97 a,196/ 97 and 210/98

Essentially the Constitution provides that fundamental rights, which include the right to freedom and security of person, apply to all persons within the Republic's borders, regardless of their nationality or immigration status (Global Detention Project, 2021). Other relevant immigration detention related legislation include the Refugees Act of 1998 (as amended, in particular, by the later 2017 Amendment Act), the South African Human Rights Commission Act 40 of 2013, the Promotion of Administrative Justice Act 3 of 2000, the Correctional Services Act 111 of 1998, the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, and the Promotion of Access to Information Act 2 of 2000 (Van Lennep, 2019).

There is evidence of changes in South African refugee and immigration laws, and a shift toward stricter, exclusionary measures indicative of instances of State-driven xenophobia (Kavuro, 2022; Ziegler, 2020). Scholars and human rights advocates have expressed concern that the Department of Home Affairs has moved away from a "a protection-based approach to management of vulnerable foreign nationals toward that of a risk-based approach" (LHR, 2020b). These geopolitical changes are indicative of substantial deviation from the original "urban refugee" policy that was once described as "the inception and cornerstone of refugee protection" in South Africa through the Basic Agreement with the UN High Commissioner for Refugees in 1993 (Lawyers for Human Rights 2016). The Basic Agreement along with the Refugees Act of 1998 was the result of widespread public consultations with stakeholders, government departments, and civil society during the Green and White Paper process of the mid-1990s (Lawyers for Human Rights 2016). At the time, the Refugees Act was progressive and advanced in terms of

incorporating global and regional international refugee law obligations, and with regard to the scope of provisions providing protections for refugees in South Africa (Ziegler, 2020). The Refugees Amendment Act 11 of 2017 which came into force on January 1, 2020, substantively changed South African refugee protections, effectively restricting refugees' access to asylum processes and denying them substantive rights previously available to them under international refugee law and jurisprudence (Ziegler, 2020). Many provisions have been deemed to breach South Africa's Constitution. In particular, the Act introduced new restrictive changes to the South African asylum-seeker policy, many of which related to asylum seekers' right to work, restricted access to services, and resulted in unlawful policies and practices restricting access to protection, with the refugee system becoming the *de facto* immigration option for many to attain legal status, regardless of protection needs (Carciotto, Gastrow, & Johnson, 2018). This geopolitical shift is also explicit in the revised Border Management Act of 2020 (South African Government 2020), which was framed as a law that would "remedy fragmented border" controls and leverages for increased application of criminal procedures to enforce migration laws (Global Detention Project, 2021).

Immigration detention regulation and processes in South Africa

Like citizens, foreign nationals have the right not to be arrested or detained arbitrarily (Van Lennep, 2019). The Refugees Act of 1998 (as amended) operates in parallel with the Immigration Act and provides a separate legal regime for the detention of asylum seekers and refugees and prohibits their detention as illegal foreigners under the Immigration Act (Ncube, 2017). Provisions contained in the Refugees Act regard the detention of asylum seekers, in that the Act provides that an individual with an asylum seeker "permit" (given while a person awaits the outcome of his or her asylum procedure) may be detained until the asylum procedure is concluded (Section 23). The Act provides that the Minister of Home Affairs may withdraw an asylum seeker's permit under Section 23, read in conjunction with Section 22(6), resulting in the subsequent detention as per Section 29. The withdrawal of this permit subjects asylum seekers to Section 23 of the Immigration Act, as they are then considered illegal foreigners. However, the withdrawal of a Section 22 permit does not automatically translate to the detention of an asylum seeker (Mfubu, 2017). This is with exception of when an asylum-seeking status application has been rejected, triggering a right to appeal and review process based on procedural safeguards provided by Chapter 5 of the Refugees Act. Section 28 of the Refugees Act also allows for the detention of an asylum seeker pending his or her removal from the country, yet this section may only be invoked should the Minister of Home Affairs and the Department of Home Affairs deem the individual a threat to public order or national security (Mfubu, 2017). This also falls under Section 33 of The Constitution and in line with international law.

We focus here primarily on the 2002 Immigration Act, which authorizes the Department of Home Affairs to detain undocumented migrants for the purposes of deportation. Section 2 of the Immigration Act highlights one of its primary objectives as "detecting and deporting illegal foreigners," with Section 32 providing that "(1) Any illegal foreigner shall depart, unless authorized by the Department to remain in the Republic pending his or her application for a status. (2) Any illegal foreigner shall be deported." Section 33 provides the procedures for establishing the authorities that are responsible for undertaking enforcement measures, and Section 34 establishes the grounds and procedures for detention and deportation/providing specific detention provisions. Section 34(1) provides that immigration officers may:

> [A]rrest an illegal foreigner or cause him or her to be arrested, and shall, irrespective of whether such foreigner is arrested, deport him or her or cause him or her to be deported and may, pending his or her deportation, detain him or her or cause him or her to be detained in a manner and at the place under the control or administration of the Department determined by the Director-General.

Essentially the immigration status of the detained individual must be verified within 48 hours (South African Human Rights Commission, 2017a).

Section 41 regards the steps taken to verify those who warrant detention and establishes the role of the South African Police Service in immigration enforcement, stating:

> [W]hen so requested by an immigration officer or a police officer any person shall identify himself or herself as a citizen, resident or foreigner when so requested by an immigration officer or a police officer, and if on reasonable grounds such immigration officer or a police officer is not satisfied that such person is entitled to be in the Republic, such immigration officer or a police officer may take such person into custody without a warrant and if necessary detain him or her in a prescribed manner and place.

Section 41, read with regulation 37 of the 2014 Immigration Regulations, provides that, prior to any detention in terms of Section 34, an immigration officer is expected to verify a person's identity and status (Amit, 2015). As mentioned, detention for the purposes of verification can be ordered without a warrant, and for no longer 48 hours. If a person is classed as undocumented, a notice of deportation must be served that triggers the lawful detention period under Section 34(1) of the Immigration Act. Once a person is arrested and detained under Section 34, he or she must be notified of the reason for such detention, two exceptions: if the end of the 48 hour period falls on a weekend and if the person is first detained on any other criminal offense. If the person is deemed illegal, he or she is given a court hearing within 48 hours of arrest whereby the person has the right to be charged and informed of the reason for continued detention or released, and, if applicable, a notice of deportation is served, triggering the maximum detention period of 30 days. Finally, Section 37 of the Immigration Act provides for the right of a person to challenge his or her detention by requesting a judicial review and confirmation of detention by a magistrate (South African Human Rights Commission, 2017a). Section 34(3) details that the detained individual covers the cost of his or her detention and removal from the country. Chapter 2 of the Constitution provides that every detainee has the right to be released from detention if the interests of justice permit, subject to reasonable conditions. Fundamental rights protections extend to people in detention, including people in immigration detention, as Section 10(1) of the Bill of Rights (right to human dignity, the fundamental rights to respect and protection of dignity) mandates that "[e]veryone has inherent dignity and the right to have their dignity respected and protected." In terms of standards of care in immigration detention facilities, Section 35(2)(e) of the Constitution mandates that all persons deprived of their liberty be detained in conditions consistent with human dignity and provided with adequate accommodation, nutrition, reading material, and medical treatment at state expense. Sections 12(1) (prohibition of torture, inhuman and degrading treatment), 12(2) (right to freedom and security, right to bodily integrity), and 27 (right to food, water, socio security and healthcare) are further applicable. The Constitution provides for the right to be free from all forms of violence from either public or private sources (Section 12(1)(c)), the prohibition of torture (Section 12(1)(d)), and the right not to be treated or punished in a cruel, inhuman, or degrading way (Section 12(1)(e)). Section 27(3) of the Constitution additionally provides that "no one may be refused emergency medical treatment." Section 34(5)(b) empowers the Department of Home Affairs to detain illegal foreigners "in a manner and at a place determined by the Director-General" and "in compliance with minimum prescribed standards." Section 41 of the Immigration Act covers the conditions for immigration detention in Annexure B of regulation 33(5) of the Regulations, which stipulates:

> [D]etainees are to be provided with adequate space, lighting, ventilation, sanitary installations, and access to health facilities; each detainee should be provided with a bed, mattress, and blanket; unrelated male and female detainees are to be detained separately, and detained children are to be separated from unrelated adults; detainees "of a specific age" or who fall into particular health or security categories, are to be confined separately; and each detainee is to be provided with an adequate balanced diet, which takes into account the nutritional requirements of those who require special diets.

With regard to the immigration detention of children and unaccompanied minors, Section 34 provides that children may be detained as a matter of last resort. This is supported by the Section 29(2) of the Refugees Act, which provides for the specific authorization of the detention of a

child, which "must be used only as a measure of last resort and for the shortest appropriate period of time." Annexure B of the Immigration Regulations also provides that detained children should be separated from unrelated adults.

Realities on the ground and irregularities in due process along the South African immigration detention continuum

The immigration deportation regime is operated by three parties: the South African Police Service, the Department of Home Affairs, and the Lindela Repatriation Facility itself (formerly operated by the Bosasa, African Global Operations, and now EnviroMongz Projects). Police stations are generally used for immigration detention purposes pending deportation and transfer to Lindela Repatriation Center (Department of Home Affairs, 2019). The South African Human Rights Commission (2017a) has raised concerns that, in many instances, arresting SAPS officers do not appear to be advising detainees that "reasonable grounds" exist for their detention; nor are they advised of their right to satisfy the arresting officer that they are entitled to be in the country. A letter in 2018 sent to the South African President Cyril Ramaphosa by Lawyers for Human Rights (2018) referred to the vulnerability of those with black and darker skin to arbitrary arrest by police: "[P]eople are wrongfully and unlawfully detained under the current immigration legislation, that the process of arrest and detention of would-be immigrants is arbitrary and, therefore violates the rights of citizens and other residents." Immigrant detainees are routinely denied access to legal representation and interpretation supports in police custody (International Detention Coalition, 2020; Lawyers for Human Rights, 2020b; Van Lennep, 2019). The South African Human Rights Commission (2017b) has also reported on the occurrence of illegal sentencing using Section 23(b) of the Aliens Control Act. A broad range of domestic judgments refer to aspects of unlawful asylum and arbitrary immigration detention processes and practices in South Africa (see Table 5).

Several landmark cases have reformed the immigration landscape in South Africa. In 2004, in the case of *Lawyers for Human Rights and another v. Minister of Home Affairs and Another*, a High Court order declared certain provisions of the Immigration Act unconstitutional with regard to the lack of an upper limit of duration of detention prior to deportation, and underscored the constitutional rights of illegal foreigners irrespective of whether they were in South Africa legally or not.

While Section 34 of the Immigration Act affords discretion to officers who, on reasonable grounds, believe a person is in the country illegally, the scope of discretion was clarified in 2009 (see *Ulde v. Minister of Home Affairs and Another*) when the Court confirmed that an officer who decides that an undocumented migrant is liable to be deported must be guided by minimum standards and construe the exercise of discretion *in favorem libertatis* when deciding whether or not to arrest or detain a person under Section 34(1) of the Immigration Act. In 2014, the Court found that the exercise of the discretion must be consistent with Section 12(1)(b) of the Constitution, which prohibits the Department of Home Affairs from detaining undocumented migrants without trial (*South African Human Rights Commission and Others v. Minister of Home Affairs: Naledi Pandor and Others*).

Also, whilst Section 35(2) of the Constitution provides protections against all forms of arbitrary detention, the right to be brought before a Court within 48 hours of arrest and to contest the reasons for detention has only recently been awarded a right in practice to immigration detainees (Lawyers for Human Rights, 2020b). Foreign nationals in South Africa have the same right as citizens not to be detained arbitrarily (see *Lawyers for Human Rights v. Minister of Home Affairs and Others* 2017). In this judgment the Constitutional Court declared Section 34(1)(b) and (d) of the Immigration Act invalid and inconsistent with Sections 12(1) and 35(2)(d) of the Constitution. It held that:

> Section 34(1)(d) of the Immigration Act had unconstitutionally permitted detention of foreign nationals for a period of 30 days without automatic judicial intervention, and an extension of the initial period of detention without the detainee appearing before the court in person.

The Constitutional Court ruled that any foreign national detained under Section 34(1) of the Immigration Act shall be brought before a court in person within 48 hours of the time of arrest, and that anyone detained for the purposes of deportation cannot be held for longer than 30 days, and "which may be extended for an additional 90 days upon issuance of a court warrant stating 'good and reasonable grounds' for the extension."

Despite the South African Human Rights Commission (1999) and the African Policing Civilian Oversight Forum (2017) indicating that spot checks and police sweeps fail to satisfy the criteria of "reasonable grounds" and contribute to high numbers of arrests, South African police continued to use them to round up and detain foreign nationals during the COVID-19 disaster measures (2020–2022; see Xenowatch, 2022). Problems lie in the Department of Home Affairs' application of the Immigration Act, when "arresting asylum seekers as illegal foreigners and subjecting them to arbitrary, indefinite and unlawful detention pending deportation" (Ncube 2017). There are reports of the arrest of asylum seekers for deportation, often without due process, many of whom who have applications for asylum or renewal of asylum status under review (Ncube, 2017). In 2010, the Supreme Court of Appeal clearly stated that undocumented foreign

Table 5. Relevant South African judgments.

Abdi and Another v. The Minister of Home Affairs and 4 Others (734/2010) [2011] ZASCA 2 [February 15, 2011]	By analogy inadequate standards of detention and care in prisons
Abore v. Minister of Home Affairs and Another [2021] ZACC 50	*EN and Others v. Government of RSA and Others* (2006)006(6)SA575(D);2007(1)BCLR 84.SAHC Durban 2006
Amadi v. Minister of Home Affairs (unreported, no. 101/2010) SGHC (January 12, 2010).	*Goldberg v. Minister of Prisons* 1979 (1) SA 14 (A) par 39 A–C.
Arse v. Minister of Home Affairs 2010(7) BCLR 640 (SCA)	*Lee v. Minister of Correctional Services* (2012) ZACC30
Aruforse v. Minister of Home Affairs, 2010/1189, South Africa: High Court, January 25, 2010.	*McCallum v. South Africa* (2010) UN Doc CCPR/C/100/D/1818/2008 [November 2, 2010]
Bula and others v. Minister of Home Affairs and others 2012 (4) SA 560 (SCA).	*Minister of Justice v. Hofmeyer* 1993 (3) SA 131 (AD) 139H–142C.
Center for Child Law and Another v. Minister of Home Affairs and Others 2005 (6) SA 50 (T)	*Sonke Gender Justice NPC v. President of the Republic of South Africa and Others* [2020] ZACC para 38–40
Dekoba v. Director-General Department of Home Affairs, 26044/11, South Africa: High Court [22 October 2012]	*Sonke Gender Justice v. Government of South Africa* 24087/15 (unreported) WC HC
Fikre v. The Minister of Home Affairs and others, 2012 (4) SA 348 (GSJ) A	
Kumah and Others v. Minister of Home Affairs and Others (22481/2016, 22482/2016, 22393/20016)	
Lawyers for Human Rights and another v. Minister of Home Affairs and another 2004 (7) BCLR 775 (CC).	
Lawyers for Human Rights v. Minister of Home Affairs and Others (CCT 38 of 2016) [2017] ZACC 22 (29 June 2017).	
Lawyers for Human Rights v, Minister of Safety and Security and others [2009] JOL23612 (GNP).	
Okoye v. Minister of Home Affairs and 3 others, Case: 26144/2020.	
Rahim v. The Minister of Home Affairs (965/2013) [2015] ZASCA 92 [29 May 2015]	
Ruta v. Minister of Home Affairs [2018] ZACC 52	
Scalabrini Center and Another v. Minister of Social Development and Others [2021] (1) SA 553 (GP)	
South African Human Rights Commission and Others v. Minister of Home Affairs: Naledi Pandor and Others [2014] ZAGPJHC 198.	
Ulde v. Minister of Home Affairs and Another. 45 2009 (4) SA 522 (SCA).	
Zimbabwe Exiles Forum v. Minister of Home Affairs [2011] JDR 0129 (GNP)	

nationals may not be detained for more than 120 days (see *Arse v. Minister of Home Affairs*). It further stated that, throughout an appeal and review process, the individual remains an asylum seeker. This was further substantiated in 2010 by the High Court in *Amadi v. Minister of Home Affairs*, which confirmed that an asylum seeker could not be detained for the purposes of deportation. The arrest and detention of asylum seekers without verification of their status, pending the outcome of their applications, or facilitating access to the refugee system, delays in issuance of documents under the Refugees Act. The North Gauteng High Court in 2011 (see *Zimbabwe Exiles Forum v. Minister of Home Affairs*; Lawyers for Human Rights 2011) severely criticized the rearrest of detainees on their release, which circumvents the 30-day limit of detention without a warrant under the Immigration Act. In *Ruta v. Minister of Home Affairs*, the Court confirmed that if an arrested foreigner expresses the desire to apply for asylum, he or she must be given the opportunity to do so. The South Gauteng High Court further clarified in *Kumah and Others v. Minister of Home Affairs and Others* that deportation cannot be delayed by reason of administrative incapacity on the part of officials. Although legally the length of time in police custody prior to transfer to the Lindela Repatriation Center must be included in the total 120-day limit, in practice, authorities have been operating with the limit based on time of arrival at the facility (causing protracted detention periods; see Lawyers for Human Rights, 2020b).

The African Center for Migration and Society (Amit, 2015) has observed the routine failure of immigration authorities in securing extension warrants beyond 30 days, with detention periods often much longer than the legal maximum of 120 days (and also being unlawful). In *South African Human Rights Commission and Others v. Minister of Home Affairs (Naledi Pandor and Others)* the South Gauteng High Court in Johannesburg ruled that the protracted detention of migrants at the Lindela Repatriation Center was unconstitutional, and that the Department of Home Affairs had violated the Immigration Act on two counts: by detaining migrants for longer than 30 days without obtaining the necessary warrant permitting extended detention, and by detaining migrants for longer than the maximum statutory limit of 120 days (Human Rights Watch 2015). The US Department of State (2015) in its country reporting has documented that the Department of Home Affairs has generally complied with the 120-day limit, but that compliance with the specific requirement to obtain a warrant to detain migrants for longer than 30 days was poor.

The Supreme Court of Appeal in *Abdi and Another v. The Minister of Home Affairs and Others* illustrated the general lack of respect by the Department of Home Affairs for individual rights and sufficient respect for the judicial process. In 2012, the case of *Bula and Others v. Minister of Home Affairs and Others* reinforced the principle of legality regarding the interpretation and application of provisions of the Refugees Act and of regulations issued thereunder. In reality, immigration detention periods in South Africa are protracted, in some cases in excess of 120 days, in direct contravention of detention laws and constituting illegal deprivation of liberty and violation of the fundamental rights to freedom and security (Kaziboni, 2018). In 2014, the South African Human Rights Commission (2014a) reported on an individual who had been detained for 524 days. Equally important is that when a detainee is not allowed to challenge the legality of his or her detention in court, such detention is unlawful and the detainee must be released (see the 2020 case of *Okoye Johnathan v. Minister of Home Affairs and 3 others*).

Settings and standards of immigration detention

South Africa does not operate refugee camps, and the Lindela Repatriation Center near Krugersdorp West was established by the Department of Home Affairs in 1996 as a holding facility for foreigners awaiting deportation (Africa Check, 2016). Privatization of immigration detention in South Africa preceded efforts to privatize prisons (Flynn and Cannon, 2009). There is longstanding criticism of South Africa's privatization of prisons (e.g., the Mangaung Correctional

Center, operated by G4S, and the Kutama Sinthumule Correctional Center in Limpopo, operated by the GEO Group) and also of the Lindela Repatriation Center itself (Basson, 2018; Berg 2001; Global Detention Project, 2021; Hopkins, 2020). Both GEO and G4S, in addition to their private prison operations, have been heavily involved in running immigration detention centers in other countries (Flynn, 2017).

In terms of legitimate settings for immigration related detention, Lawyers for Human Rights (2020b) reported on inconsistency in application of the law in that detainees are (at times) placed in facilities that were not been officially designated as immigration detention sites. The 2015 Supreme Court judgment of *Rahim v. The Minister of Home Affairs* (and the 2009 case of *Lawyers for Human Rights v. Minister of Safety and Security and others*, regarding designation of facilities for deportation purposes) awarded damages to illegal immigrants who were unlawfully detained by the Department of Home Affairs, due to its failure in designating a proper holding facility for noncitizens in South Africa (*contra* Section 34).

On April 7, 2020, during COVID-19 state disaster measures, the UN Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment advised state parties (Office of the High Commissioner for Human Rights, 2020) with regard to the Optional Protocol to the Convention against Torture (United Nations, 2003) to decongest immigration detention centers and closed refugee camps. South Africa turned a deaf ear. The list of immigration detention facilities was, however, updated again, with an additional 15 correctional facilities to be used as temporary sites for immigration detention purposes as per Section 34(1) of the Immigration Act (Department of Home Affairs, 2020). Foreign nationals were subsequently detained in prisons for immigration purposes (Department of Justice and Correctional Services, 2020). Contrary to all normative guidance, they were not kept separate from sentenced criminals (Van Hout & Wessels, 2021).

While the South African prison release schemes were implemented in line with United Nations calls for prison decongestion, these were countered by increased pretrial detention and custodial sentencing for breaches of COVID-19 regulations, with more than 230,000 new arrests during that time (Gear & Gaura, 2020). As a direct consequence, severe delays in the deportation of foreign nationals (more than 500 individuals) occurred (Gasa, 2020; Van Hout & Wessels, 2021). In contrast to the situation of prisoners, no detention orders ceased or were restricted, no immigration detainees were released (as was the case in South African prison amnesty schemes), and no legal alternatives to immigration detention were employed by the South African government (Van Hout & Wessels, 2021).

In 2021, both Westville Prison in Durban and Pollsmoor Prison in Cape Town were regularly used to detain unauthorized immigrants on warrant from the Department of Home Affairs (Global Detention Project, 2021), as:

> [D]etention at police stations and border posts is not considered ad hoc when a person is detained under warrant from the Department of Home Affairs, or when the length of detention for suspected immigration violations (without warrant from the Department of Home Affairs) is less than 48 hours—the amount of time given authorities to investigate allegations under the Criminal Procedures Act.

Several *ad hoc* detention sites were observed: For example, the Soutpansberg Military Grounds Detention Center was classified by the Global Detention Project as an *ad hoc* detention site where police detained immigrants without proper authorization from immigration authorities. The Strandfontein Camp was also operationalized as *ad hoc* detention facility in Cape Town to hold foreign nationals rounded up by South African police during COVID-19 lockdowns, with the South African Human Rights Commission documenting congested and unhygienic conditions.

In terms of immigration detention facility standards, there have been historical failures in providing adequate conditions and care of detainees (Amit, 2010; Amit & Zelada-Aprili, 2012; Kaziboni, 2018; Sutton & Vigneswaran, 2011; Van Lennep, 2019). Deeply engrained

institutionalized xenophobia has been observed at the Lindela Repatriation Center (Kaziboni, 2018). Even after 21 fatalities were reported in eight months in 2005, and after allegations of misappropriation of funds, the Bosasa contract was renewed several times (Van Lennep, 2019). In 2009, the US Department of State (2009) mentioned the Lindela Repatriation Center in its annual human rights report, noting "allegations of corruption and abuse of detainees by officials at the overcrowded Lindela Repatriation Center." Extant human rights assessments center on standards at the Lindela Repatriation Center, with little detail available on the *ad hoc* sites, prisons, or police cells. There are conflicting reports around capacity of the Lindela Repatriation Center. For instance, a 2019 inspection of the Lindela Repatriation Center reported that "the facility is underutilized as only 800 irregular immigrants are currently being detained at the facility, which has the capacity of accommodating 5,000 people," whereas the South African Police Service is overburdened with detention of arrested immigrants (Van Lennep, 2019). There were allegations of falsification of detainee numbers to drive Lindela's revenue, hunger strikes, detainee escapes, and appalling treatment of detainees including deaths (Bornman, 2019).

With regard to particularly vulnerable immigration detainees, the Lindela Repatriation Center is not deemed fit for the detention of women and children (see the 2005 case of *Center for Child Law and Another v. Minister of Home Affairs and Others*). There have been reports of the unlawful detention of children on migration related reasons in police holding cells and at the Lindela Repatriation Center (Lawyers for Human Rights, 2014; South African Human Rights Commission, 2017a; US Department of State, 2015).

In 2020, there were reports of congestion: for example, 30 male detainees sharing one toilet, sink, and shower, and up to 60 people in a cell (Lawyers for Human Rights, 2020b). There are further concerning reports of the use of solitary confinement in the Lindela Repatriation Center, despite the fact that the minimum standards of detention in the Immigration Act Regulations do not make any provision for isolation measures or any method to regulate conflict (South African Human Rights Commission, 2017b).

Since 1997, a broad range of human rights violations have been observed at the Lindela Repatriation Center, not limited to reports of physical and sexual abuse; suspicious deaths, including of children; abuse and sexual exploitation by guards; inadequate nutrition; low-quality health care; denial of life-saving medical care; lack of communicable disease screening on entry (e.g., tuberculosis, HIV) and poor outbreak management; the illegal detention of children; and mixing of children with adults (International Detention Coalition, 2016; Kaziboni, 2018; Lawyers for Human Rights, 2020b; South African Human Rights Commission, 2017a, 2017b; Van Lennep, 2019). Conditions have been reported to be conducive to ill health and spread of disease due to overcrowding, lack of ventilation, and sanitation (South African Human Rights Commission, 2017a; Kaziboni, 2018).

Health-care provision remains inadequate at the Lindela Repatriation Center, with conditions constituting a "grave threat" to detainees' health (Lawyers for Human Rights, 2020b). Investigations by human rights organizations have revealed poor medical oversight and insufficient medical supplies, particularly relating to tuberculosis testing and tetanus vaccines (Kaziboni, 2018; South African Human Rights Commission, 2014b, 2017a). In 2018, Médecins Sans Frontières submitted a complaint to the Office of Health Standards Compliance which stated, "the Lindela health services do not prioritize access to HIV and tuberculosis care. Communicable diseases are treated outside of national protocol, and main health needs of those detained are largely neglected" (Bornman 2019). More recently, the International Detention Coalition (2022) reported on the general substandard immigration detention conditions (lack of sufficient water, food, and medical care) during and after COVID-19 state disaster measures.

Immigration detention oversight mechanisms

In 2005, the UN Working Group on Arbitrary Detention visited the Lindela Repatriation Center and documented a range of concerns based on arbitrary detention, ill-treatment, and the inability of detainees to contest the validity of their detention (UN Working Group on Arbitrary Detention, 2005). In contrast to prisons, which are routinely monitored and inspected by the Judicial Inspectorate for Correctional Services, historically, the Lindela Repatriation Center appeared to fall between two stools, with the Department of Home Affairs appearing to dodge accountability through this privatization. Lawyers for Human Rights (2008) stated at the time:

> By pointing to Bosasa as the entity responsible for the treatment of detainees, the Department of Home Affairs seeks to avoid accountability under the provisions of the Constitution and the Bill of Rights, South African administrative law, and international human rights instruments. At the same time, enforcement of these provisions against Bosasa is hindered by the status of Bosasa as a private entity that is not eager to cooperate in human rights monitoring and oversight efforts.

Little change was observed in 2011 by the UN Special Rapporteur on the human rights of migrants, a visit underpinned by concerns around minimum standards, lack of due process, lack of sufficient ability of detainees to claim asylum or protection under the Refugee Act, and the privatization itself of the Lindela operations (United Nations, 2011).

In 2016, the UN Human Rights Committee urged South Africa to commit to ensuring that immigration detention is only used only as a measure of last resort; that nonnationals are only detained in dedicated immigration detention facilities; and that adequate living conditions in immigration detention settings are provided (UN Human Rights Committee, 2017). It documented that jurisdictional oversight of Lindela Repatriation Center was to be provided by the South African Human Rights Commission, the Parliamentary Portfolio Committee on Home Affairs, and the International Committee of the Red Cross (United Nations High Commissioner for Human Rights, 2016). The 2017 Report of the Working Group on the Universal Periodic Review–South Africa outlined a range of recommendations to improve conditions in immigration detention facilities, with specific directives to ensure access to health care, psychological assistance, "appropriate physical infrastructure and sanitation," and broader recommendations to tackle xenophobia and racism in South Africa (United Nations, 2017).

The Department of Public Works and Infrastructure later purchased the Lindela Repatriation Center for 60 million *rand* (approximately $4.1 million; see Shange, 2019). The 2019 second periodic review of South Africa by the UN Committee against Torture, however, expressed continued concerns with regard to immigration regulations and processes—whereby the Immigration Act provided for the holding of an "illegal foreigner" in custody for prolonged periods without a court hearing, the refusal by immigration authorities to provide asylum seekers with asylum transit visas at ports of entry, and the prolonged detention of nonnationals at the Lindela Repatriation Facility without warrant. The Second Periodic Review urged South Africa to ensure adequate space, sanitation, hygiene, and adequate living conditions with sufficient medical care in all detention facilities and to apply alternatives to detention (United Nations Committee against Torture, 2019). The South African Human Rights Commission was reappointed in 2019 as the coordinator of the National Preventive Mechanism, in conjunction with the Judicial Inspectorate for Correctional Services and the Independent Police Investigative Directorate (South African Human Rights Commission, 2019). In partnership with the South African Human Rights Commission, Lawyers for Human Rights, *Médecins Sans Frontières*, and People against Suffering Oppression and Poverty also routinely inspect the Lindela Repatriation Center (Van Lennep, 2019). This mechanism became known as the Lindela Monitoring Framework, whereby the Department of Home Affairs must permit access to the facility and provide weekly detail on detainee detention periods. This is not without challenges, and there are longstanding difficulties

in monitoring standards of immigration detention due to the limited access permitted by the Department of Home Affairs to both Lawyers for Human Rights and *Médecins Sans Frontières*, and the due notice requiring eliminating spot check assessments. In 2020, a new private company, EnviroMongz Projects, assumed responsibility for operations at the Lindela Repatriation Facility (Mahamba, 2020). Despite operating an intense advocacy and detention monitoring program, providing training of legal practitioners, monitoring immigration hearings, and engaging in strategic litigation, Lawyers for Human Rights (2020b) found "a high incidence of unlawful detention, including a high frequency of the detention of minors, repeated disregard for statutory limits of detention, a high frequency of detention of asylum seekers with pending asylum claims and a disregard for court orders" (Global Detention Project, 2021, p. 26).

As of June 2021, although the South African Human Rights Commission regularly monitors conditions at Lindela and has made recommendations on its observations, there was still no independent oversight body for the facility (Global Detention Project, 2021). This is in contrast to the prison system, in which substandard detention conditions (see the 2016 case of *Sonke Gender Justice v. Government of South Africa*) and the level of independence of the Judiciary Inspectorate of Correctional Services have been successfully challenged and have stimulated further actions to provide independent inspections and access to prisons by human rights and UN Committee against Torture monitors (see judgment of *Sonke Gender Justice NPC v. President of the Republic of South Africa and Others*, 2020).

Conclusion

Immigration detention as a form of administrative detention continues to be routinely employed to facilitate deportation (UN Nations Working Group on Arbitrary Detention, 2018; Office of the High Commissioner for Human Rights, 2020). This realist assessment reveals that the situation of migrants, asylum seekers, and refugees in South Africa is tainted by neglect and abuse of fundamental human rights and marked by authorities' failure to abide by their constitutional and international legal obligations toward refugees, asylum seekers, and undocumented migrants. The Refugees Amendment Act of January 2020 expands the grounds for exclusion and cessation of refugee status, with many of the new provisions denying asylum seekers substantive rights and violating both the Constitution of South Africa and South Africa's international treaty obligations (Ziegler, 2020). There are ongoing discussions between South Africa and other African states (Kenya, Nigeria, Mozambique, Botswana, Lesotho, and Zimbabwe) regarding migration agreements, immigration, and deportation cooperation agreements (South African Government, 2022). Human rights activists deplore the concerning shift away from the basic protection of human rights and cognizance of human vulnerabilities, toward that of intensified xenophobia and securitized agendas by the South African authorities (Kavuro, 2022; Lawyers for Human Rights, 2016, 2018, 2020a, 2020b; Ziegler, 2020). However, lessons can be learned from other African states—for example, Kenya, where the Court confirmed that nonrefoulement cannot be jeopardized by alleging a security risk posed by refugee influx into a country (see the 2014 case of *Attorney General v. Kituo Cha Sheria;* United Nations High Commissioner for Refugees, 2013).

A broad range of human rights violations of immigration detainees in South Africa has been documented, perpetrated by the South African Police Service and the Departments of Justice, Health, Home Affairs, and others; these include noncompliance with respect to procedures for arrest of foreigners; procedural rights, sentencing, and deportation procedures; unlawful and arbitrary detention; lack of access to legal representation and medical care; and safe, adequate accommodation while awaiting deportation (Hiropoulos 2017). Courts are integral to the affirmation of the rights and freedoms of migrants, refugees, and asylum seekers via Constitutional, regional, and international principles (Lenaola, 2019). Intensified human rights advocacy and strategic litigation have stimulated increased compliance of the Department of Home Affairs with

immigration laws in recent years (Global Detention Project, 2021; Lawyers for Human Rights, 2020b). Although we could not locate any jurisprudence in which conditions of immigration detention were central to a claim of inhumane treatment, by analogy, the observed congested and unsafe immigration detention conditions, restrictions, and insufficient actions to prevent disease and provide routine medical care potentially breach the fundamental rights of immigration detainees. And parallels can be drawn with extant domestic jurisprudence regarding prison overcrowding, prisoner exposure to communicable disease, and lack of access to health care. Detention can be rendered unlawful in cases in which conditions of detention breach fundamental rights (see *Goldberg v. Minister of Prisons*; *Minister of Justice v. Hofmeyer*; see also Table 5). Alternatives to detention aligned with the Global Compact on Refugees (UN High Commissioner for Refugees, 2018) and the Global Compact for Safe, Orderly, and Regular Migration (United Nations, 2018) must also be employed in South Africa with immediate effect, leveraging existing civil society presence in communities to support safe housing during all stages of migration status determination (International Detention Coalition, 2018). There is a still a long way to go in South Africa in terms of protecting the rights of all of its citizens, including the unwelcome.

Note

1. Translated as "force out" or "knock down" in the Zulu language.

Notes on contributors

Marie Claire Van Hout is Professor of International Public Health Policy and Practice at Liverpool John Moores University, United Kingdom. She has 20 years' research and evaluation experience in public health, human rights law and vulnerable populations in Europe, Africa and the Middle East.

Jakkie Wessels is the Regional Court President of the Limpopo Regional Division in Limpopo, South Africa. She has 20 years' experience as a judicial officer in the Regional Court and has 25 years' experience in training and development of training material, for justice stakeholders in Southern Africa, including as gender expert for the United Nations Office on Drugs and Crime.

ORCID

Marie Claire Van Hout http://orcid.org/0000-0002-0018-4060

References

Africa Check (2016). *Detention and deportation of undocumented migrants in South Africa at the Lindela Repatriation Centre*. Africa Check. https://africacheck.org/factsheets/lindela-repatriation-centre-migrants/

African Commission on Human and Peoples' Rights (2007). *Resolution on Migration and Human Rights - ACHPR/Res.114(XXXXII)07.* 2nd Ordinary Session held in Brazzaville, Republic of Congo, The Gambia. www.achpr.org/sessions/resolutions?id=166

African Commission on Human and Peoples' Rights (2014). *Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (the Luanda Guidelines).* 53rd Ordinary Session. Luanda, Angola, The Gambia. http://www.achpr.org/files/special-mechanisms/prisonsand-conditions-of-detention/guidelines_arrest_police_custody_detention.pdf

African Commission on Human and Peoples' Rights (2020). *General Comment No. 5 on the African Charter on Human and Peoples' Rights: The Right to Freedom of Movement and Residence (Article 12(1)).* The Gambia. www.achpr.org/public/Document/file/English/general_comment__on_the_right_to_freedom_of_movement_and_residence_article_121.pdf

Amit, R. (2010). *Lost in the vortex: irregularities in the detention and deportation of non-nationals in South Africa.* FMSP Research Report. African Centre for Migration and Society: South Africa. https://ssrn.com/abstract=3274019

Amit, R. (2015). *Understanding Immigration Detention and Deportation in South Africa: A Summary of Law, Practice and Human Rights Violations at the Lindela Detention Centre*. African Centre for Migration and Society. http://www.migration.org.za/uploads/docs/acms-issue-brief-11--understanding-immigrationdetention.pdf

Amit, R., & Zelada-Aprili, R. (2012). *Breaking the law, breaking the bank: the cost of Home Affairs' illegal detention practices*. African Centre for Migration and Society. Breaking-the-Law-Breaking-the-Bank-The-Cost-of-Home-Affairs'-Illegal-Detention-Practices.pdf (migration.org.za)

Amnesty International (2020). *South Africa 2020*. Amnesty International. https://www.amnesty.org/en/countries/africa/south-africa/report-south-africa/

Basson, A. (2018). State capture is much bigger than the Guptas, *News 24*, September 11. https://www.news24.com/Columnists/AdriaanBasson/state-capture-is-much-biggerthan-the-guptas-20180911

Berg, J. (2001). Accountability in private corrections: monitoring the performance of private prisons in South Africa. *South African Journal of Criminal Justice*, *14*, 327.

Bornman, J. (2019). How Lindela Became Bosasa's Meal Ticket. *Mail and Guardian*. December 11. https://mg.co.za/article/2019-12-11-00-how-lindela-became-bosasas-meal-ticket/

Carciotto, S., Gastrow, V., Johnson, C. (2018). *Manufacturing illegality: The impact of curtailing asylum seekers' right to work in South Africa*. Scalabrini Institute for Human Mobility: South Africa. manufacturingillegality.pdf (sihma.org.za).

Centre for Analytics and Behavioural Change (2022). Putting xenophobia first: Analysing the hashtags behind the Twitter campaigns *Daily Maverick*. February 20. www.dailymaverick.co.za/article/2022-02-20-putting-xenophobia-first-analysing-the-hashtags-behind-the-twitter-campaigns/

Chambers, D. (2021). Covid-19 halves deportations from SA, but usual culprits head list. *Sowetan Live*. June 26. www.sowetanlive.co.za/news/south-africa/2021-06-26-covid-19-halves-deportations-from-sa-but-usual-culprits-head-list/

Constitution of the Republic of South Africa (1996). *Chapter 2, Bill of Rights, Section 35: Arrested, Detained and Accused Persons*. South African Government. https://www.saps.gov.za/faqdetail.php?fid=8

Department of Home Affairs (2017). *White Paper on International Migration for South Africa*. South African Government. http://www.dha.gov.za/WhitePaperonInternationalMigration-20170602.pdf

Department of Home Affairs (2019). Immigration Act 2002, Section 34(1), Determination of Places of Detention of Illegal Foreigners Pending Deportation. *Government Gazette*. August 8. www.gov.za/sites/default/files/gcis_document/201908/42622gon1046.pdf

Department of Home Affairs (2020). Immigration Act 2002, Section 34(1), Determination of Correctional Facilities as Places of Detention of Illegal Foreigners Pending Deportation. *Government Gazette*, May 7. https://www.gov.za/sites/default/files/gcis_document/202005/43292gon512.pdf

Department of Home Affairs (2021). *Minister's Immigration Directive No 01 of 2021 - Extension of ZEP for a period of 12 months*. South African Government. Department of Home Affairs - Minister's Immigration Directive No 01 of 2021 - Extension of ZEP for a period of 12 months (dha.gov.za).

Department of Justice and Correctional Services (2020). *Staatskoerant no 43225,government notice no. 460 of 09 April 2020. Directions issues in terms of regulation 10(2)(a) of the regulations under the Disaster Management Act, 2002*. South African Government. www.gov.za/sites/default/files/gcis_document/202004/43225fon460.pdf

Edwards, L., Stone, K. (2016). *Implementation of the Luanda Guidelines: Review of arrest, police custody, and remand detention in South Africa*. African Policing Civilian Oversight Forum (APCOF) Policy Paper # 14, December 2016. APCOF: South Africa.

European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (2017). *Immigration detention*. Council of Europe (CoE): France. 09000016806fbf12 (coe.int)

Flynn, M. (2017). *Statement to the Working Group on the Use of Mercenaries Panel on "PMSCs in places of deprivation of liberty and their impact on human rights*." Global Detention Project. https://www.globaldetentionproject.org/statement-to-the-working-group-on-the-use-of-mercenaries-panel-onpmscs-in-places-of-deprivation-of-liberty-and-their-impact-on-human-rightsinmates, its mistreatment of prison staff, and the lack of accountability or proper enforcement by government agencies

Flynn, M., Cannon, C. (2009). *The privatization of immigration detention: Towards a global view*. Global Detention Project. Available from https://www.globaldetentionproject.org/the-privatization-of-immigrationdetention-towards-a-global-view-2

Gadisa, G., Sibanda, O., Vries, K., & Rono, C. (2020). Migration-related detention of children in Southern Africa: Developments in Angola, Malawi and South Africa. *Global Campus Human Rights Journal*, *4*(2), 403–423.

Gasa, S. (2020). Anxious wait for non-South African prisoners as Home Affairs take first step to ease parolee backlog. *News 24*, October 26. https://www.news24.com/news24/southafrica/news/anxious-wait-for-non-south-african-prisoners-as-home-affairs-take-first-step-to-ease-parolee-backlog-20201026#:~:text=Lotto-,Anxious%20wait%20for%20non%2DSouth%20African%20prisoners%20as%20Home%20Affairs,step%20to%20ease%20parolee%20backlog&text=Following%20the%20move%20to%20Level,their%20long%20overdue%20release%20dates

Gatticchi, G., Maseko, L. (2020). Xenophobia surges as Covid-19 slams South African economy. *Bloomberg*, December 20. https://www.bloomberg.com/news/articles/2020-12-20/xenophobia-surges-as-covid-19-slams-southafrican-economy

Gear, S., Gaura, D. (2020). Covid-19: Whatever unfolds in our prisons will affect all of us. *Ground Up*. May 26. https://southafrica.justdetention.org/covid-19-whatever-unfolds-in-our-prisons-will-affect-all-of-us/

Global Detention Project (2021). *Immigration Detention in South Africa: Stricter Control of Administrative Detention, Increasing Criminal Enforcement of Migration*. Global Detention Project Online. www.globaldetentionproject.org/immigration-detention-in-south-africa-stricter-control-of-administrative-detention-increasing-criminal-enforcement-of-migration

Hicks, T. F. (1999). The constitution, Aliens Control Act, and xenophobia: The struggle to protect South Africa's pariah – the undocumented immigrant. *Indiana Journal of Global Legal Studies*, *7*(1), 393–417.

Hiropoulos, A. (2017). *Migration and detention in South Africa A review of the applicability and impact of the legislative framework on foreign nationals*. African Policing Civilian Oversight Forum (APCOF) Policy Brief. APCOF: South Africa. 018-migration-and-detention-in-south-africa-alexandra-hiropoulos.pdf (apcof.org).

Hopkins, R. (2020). The misery merchants: life and death in a private South African prison. *Jacana Media*, September 02. https://jacana.co.za/product/the-misery-merchants-life-and-death-in-a-private-south-african-prison/

Human Rights Watch (2015). *World Report 2015: South Africa, Events of 2014*. Human Rights. https://www.hrw.org/worldreport/2015/country-chapters/south-africa#4cd794

International Commission of Jurists (2020). *Draft Briefing Note: Non-citizens rights to work in South Africa* International Commission of Jurists. www.ohchr.org/sites/default/files/Documents/Issues/Migration/GA76thSession/CSO/ICJ.pdf

International Detention Coalition (2016). *Alternatives to immigration detention in Africa*. International Detention Coalition. https://www.refworld.org/pdfid/5a5f55e04.pdf

International Detention Coalition (2018). *There are alternatives: Africa.* International Detention Coalition: Australia. There-are-alternatives-Africa-2018.pdf (idcoalition.org)

International Organisation for Migration (2011). *International Standards on Immigration Detention and non-custodial Measures*. Submission to the Working Group on Arbitrary Detention. International Organisation for Migration: Switzerland. www.ohchr.org/Documents/Issues/Detention/DraftBasicPrinciples/IOM3.pdf

International Detention Coalition (IDC) (2020). "COVID-19 impacts on immigration detention: Global responses." Available at https://idcoalition.org/wp-content/uploads/2020/10/COVID-19-Impacts-on-Immigration-Detention-Global-Responses-2020.pdf

Jenkins, F., & de la Hunt, L. (2011). Detaining asylum-seekers: Perspectives on proposed reception centres for asylum-seekers in South Africa. In J. Handmaker, L. A. de la Hunt, and J. Klaaren, (Eds.), *Advancing Refugee Protection in South Africa* (pp. 167–185). Berghahn Books.

Kavuro, C. (2022). The disappearance of refugee rights in South Africa. *Obiter*, *43*(1), 49–78.

Kaziboni, A. (2018). The Lindela Repatriation Centre, 1996–2014: Applying theory to the practice of human rights violations. *South African Crime Quarterly*, *66*, 41–52. https://doi.org/10.17159/2413-3108/2018/v0n66a5623

Landau, L. B., & Segatti, A. K. (2009). *Human Development Impacts of Migration: South Africa Case Study*. United Nations Development Programme Human Development Reports, Research Paper 2009/05. Human Development Impacts of Migration: South Africa Case Study Munich Personal RePEc Archive (uni-muenchen.de)

Lawyers for Human Rights (2008). *Monitoring Immigration Detention in South Africa*. Lawyers for Human Rights.

Lawyers for Human Rights (2011). *Court Criticizes Home Affairs Unlawful Detention Practices*. Lawyers for Human Rights: South Africa. www.lhr.org.za/news/2011/court-criticizes-home-affairs-unlawful-detention-practices

Lawyers for Human Rights (2014). *Press Statement: LHR Responds to Detention of Immigrants at Police Stations and SAPS. Incorrect Interpretation of Immigration Laws*. Lawyers for Human Rights: South Africa. http://www.lhr.org.za/news/year/2014

Lawyers for Human Rights (2016). *Submission on the Refugees Amendment Bill, 2016*. Lawyers for Human Rights: South Africa. 170124Lawyers_for_Human_Rights.pdf (pmg.org.za)

Lawyers for Human Rights (2018). *Open Letter to President Ramaphosa*. Lawyers for Human Rights.

Lawyers for Human Rights (2020a). *Costly Protection: Corruption in South Africa's Asylum System*. Lawyers for Human Rights: South Africa. https://www.lhr.org.za/wp-content/uploads/2020/09/Corruption-Report-V4-Digital.pdf

Lawyers for Human Rights (2020b). *Monitoring Policy, Litigious and Legislative Shifts in Immigration Detention in South Africa*. Lawyers for Human Rights: South Africa. https://www.lhr.org.za/wp-content/uploads/2020/06/Detention-Report-Final-Final-Digital1.pdf

Lenaola, I. (2019). The role of African courts in promoting refugee rights. *International Journal of Refugee Law Civil Appeal*, *108*(31), 343–348.

Mahamba, C. (2020). Negligent' Guards Blamed for Escape of 27 Undocumented Migrants at Lindela. *IOL News*, May 8. https://www.iol.co.za/the-star/news/negligent-guards-blamed-for-escape-of-37-undocumentedmigrants-at-lindela-47711783

Mfubu, P. (2017). *Alternatives to detention. University of Cape Town Refugee Rights Unit report to the UNHCR*. University of Cape Town: South Africa.
Migration and Coronavirus in Southern Africa Co-ordination group (2020). *Migration and Covid-19: A review of South Africa's policy response to the pandemic Summary of issue brief #2: Key concerns and recommendations*. Migration and Coronavirus in Southern Africa Co-ordination group: South Africa. www.mahpsa.org/wp-content/uploads/2020/07/Summary-of-MiCoSA-Issue-Brief-2.pdf
Mukumbang, F., Ambe, A., & Adebiyi, B. (2020). Unspoken inequality: how COVID-19 has exacerbated existing vulnerabilities of asylum-seekers, refugees, and undocumented migrants in South Africa. *International Journal for Equity in Health*, *19*(141), 1–7. https://doi.org/10.1186/s12939-020-01259-4
Myeni, T. (2022a). South African anti-immigration vigilante leader granted bail. *Al Jazeera,* March 28. www.aljazeera.com/news/2022/3/28/south-african-anti-immigration-militia-leader-granted-bail
Myeni, T. (2022b). *What is Operation Dudula, South Africas anti-migration vigilante? Al Jazeera,* April 8. www.aljazeera.com/features/2022/4/8/what-is-operation-dudula-s-africas-anti-immigration-vigilante
Ncube, M. (2017). South Africa Steps up Deportation of Asylum Seekers. *News Deeply*, October 17. https://www.newsdeeply.com/refugees/articles/2017/10/17/south-africa-steps-updeportation-of-asylum-seekers
Office of the High Commissioner for Human Rights (2020). *COVID-19: Measures needed to protect people deprived of liberty, UN torture prevention body says*. Office of the High Commissioner for Human Rights: Switzerland. www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25756&LangID=E
Organization of African Unity (1969). *Convention Governing the Specific Aspects of Refugee Problems in Africa ("OAU Convention")*. 1001 U.N.T.S. 45. Organization of African Unity: Ethiopia. https://www.refworld.org/docid/3ae6b36018.html
Organization of African Unity (1981). *African Charter on Human and Peoples' Rights ("Banjul Charter")*. Organization of African Unity: Ethiopia. https://www.refworld.org/docid/3ae6b3630.html
Organization of African Unity (1990). *African Charter on the Rights and Welfare of the Child*. Organization of African Unity: Ethiopia. https://www.refworld.org/docid/3ae6b38c18.html
Parliamentary Monitoring Group (2020). *Question NW811 to the Minister of Home Affairs*. Parliamentary Monitoring Group: South Africa. https://pmg.org.za/committee-question/13510/
Parliamentary Monitoring Group (2021). *Question NW417 to the Minister of Home Affairs*. Parliamentary Monitoring Group: South Africa. https://pmg.org.za/committee-question/15619/
Republic of South Africa (2014). Annexure B: Minimum Standards of Detention. *Government Gazette*, May 22. https://www.vfsglobal.com/dha/southafrica/pdf/final-Immigration-Regulations-2014-1.pdf
Republic of South Africa (2021). Cabinet ends Special Zimbabwean Exemption Permit. *Government Gazette,* November 25. Available at Cabinet ends Special Zimbabwean Exemption Permit | SAnews.
Scalabrini Centre (2018). *What is the White Paper on International Migration?* Scalabrini Centre: South Africa. https://www.scalabrini.org.za/news/what-is-the-white-paper-on-international-migration/
Scalabrini Centre (2020). *Scalabrini Centre Wins Court Order to Ensure Asylum-Seekers and Special Permit Holders are able to receive the COVID-19 Social Relief of Distress Grant*. Scalabrini Centre: South Africa. www.sihma.org.za/Blog-on-the-move/scalabrini-centre-wins-court-order-to-ensure-asylum-seekers-and-special-permit-holders-are-able-to-receive-the-covid-19-social-relief-of-distress-grant
Shange, N. (2019). Government to cease leasing Lindela Repatriation Centre after buying the former Bosasa owned property. *Times Live,* December 20. https://www.timeslive.co.za/politics/2019-12-20-government-to-ceaseleasing-lindela-repatriation-centre-after-buying-the-former-bosasa-owned-property/
Sonke Gender Justice NPC v. President of the Republic of South Africa and Others. (2020). ZACC para 38–40.
South African Government (2020). *Parliament welcomes signing into law of Border Management Authority Bill*. South African Government. https://www.gov.za/speeches/parliament-welcomes-signing-law-border-management-authority-bill-22-jul-2020-0000
South African Government (2022). Government is dealing with illegal migration. *South African Government News Agency,* August 30. www.sanews.gov.za/south-africa/government-dealing-illegal-migration
South African Human Rights Commission (1999). *Report into the Arrest and Detention of Suspected Undocumented Migrants*. South African Human Rights Commission. https://www.sahrc.org.za/home/21/files/Reports/Report%20into%20the%20Arrest%20and%20Detention%20of%20suspected%20migrants19.pdf
South African Human Rights Commission (2014a). *Rights to Health of Lindela Detainees Violated* – South African Human Rights Commission. http://www.gov.za/rights-health-lindela-detainees-violated-sahrc
South African Human Rights Commission (2014b). *Investigative Reports – Volume 4," 2014*. South African Human Rights Commission. https://www.sahrc.org.za/home/21/files/4%20SAHRC%20Investigative%20Reports%20VOLUME%20FOUR%2025062015%20to%20print.pdf
South African Human Rights Commission (2017a). *Report on Lindela Monitoring and Oversight Project*. South African Human Rights Commission.

South African Human Rights Commission (2017b). *Children Illegally Detained Under Bosasa's Watch at Lindela as Healthcare Crumbles*. South African Human Rights Commission. https://www.sahrc.org.za/index.php/sahrc-media/news/item/1075-children-illegally-detained-under-bosasa-s-watch-at-lindela-as-healthcare-crumbles
South African Human Rights Commission (2019). *Media Statement: Launch of the National Torture Preventive Mechanism (NPM)*. South African Human Rights Commission. https://www.sahrc.org.za/index.php/sahrc-media/news-2/item/2009-mediastatement-launch-of-the-national-torture-preventive-mechanism-np
Sutton, R., & Vigneswaran, D. (2011). A Kafkaesque state: deportation and detention in South Africa. *Citizenship Studies*, *15*(5), 627–642.
United Nations (1951). *Convention Relating to the Status of Refugees*. United Nations, Treaty Series, vol. 189, p. 137. https://www.refworld.org/docid/3be01b964.html
United Nations (1965). *International Convention on the Elimination of All Forms of Racial Discrimination*. United Nations, Treaty Series, vol. 660, p. 195. https://www.refworld.org/docid/3ae6b3940.html
United Nations (1966a). *International Covenant on Civil and Political Rights*. United Nations, Treaty Series, vol. 999, p. 171. https://www.refworld.org/docid/3ae6b3aa0.html
United Nations (1966b). *International Covenant on Economic, Social and Cultural Rights*. United Nations, Treaty Series, vol. 993, p. 3. https://www.refworld.org/docid/3ae6b36c0.html
United Nations (1967). *Protocol Relating to the Status of Refugees*. United Nations, Treaty Series, vol. 606, p. 267. https://www.refworld.org/docid/3ae6b3ae4.html
United Nations (1979). *Convention on the Elimination of All Forms of Discrimination Against Women*. United Nations, Treaty Series, vol. 1249, p. 13. https://www.refworld.org/docid/3ae6b3970.html
United Nations (1984). *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. United Nations, Treaty Series, vol. 1465, p. 85. https://www.refworld.org/docid/3ae6b3a94.html
United Nations (1989a). *Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty*. A/RES/44/128. https://www.refworld.org/docid/3ae6b3a70.html
United Nations (1989b). *Convention on the Rights of the Child*. United Nations, Treaty Series, vol. 1577, p. 3. https://www.refworld.org/docid/3ae6b38f0.html
United Nations (1990). *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*. A/RES/45/158. https://www.refworld.org/docid/3ae6b3980.html
United Nations (2003). *Optional Protocol to the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment*. A/RES/57/199. https://www.refworld.org/docid/3de6490b9.html
United Nations (2007). *Convention on the Rights of Persons with Disabilities: resolution/adopted by the General Assembly*. A/RES/61/106. https://www.refworld.org/docid/45f973632.html
United Nations (2010). *United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (the Bangkok Rules)*. note/by the Secretariat. A/RES/65/229
United Nations (2011). *Report of the Special Rapporteur on the Human Rights of Migrants, Jorge Bustamante – Addendum – Mission to South Africa*. A/HRC/17/33/Add.4. https://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A-HRC-17-33-Add4.pdf
United Nations High Commissioner for Refugees. (2013, 12 March). *UNHCR intervention before the High Court of Kenya in the case of Kituo Cha Sheria and others v. The Attorney General*, Petition No. 115 of 2013. UN High Commissioner for Refugees. A/73/12. New York, US: United Nations. Available at: https://www.refworld.org/docid/5151b5962.html
United Nations (2016). *Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)(8 January 2016) A/RES/70/175*. United Nations General Assembly.
United Nations (2017). *Report of the Working Group on the Universal Periodic Review–South Africa*. A/HRC/36/16. https://documents-ddsny.un.org/doc/UNDOC/GEN/G17/216/43/PDF/G1721643.pdf?OpenElement
United Nations (2018). *Global Compact for Safe, Orderly and Regular Migration. A/RES/73/195*. United Nations.
United Nations Committee against Torture (2019). *Concluding Observations on the Second Periodic Report of South Africa.* CAT/C/ZAF/CO/2. https://bit.ly/2Pqfd0Z
United Nations Committee on Economic, Social and Cultural Rights (2000). *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the* Covenant), E/C.12/2000/4. United Nations Committee on Economic, Social and Cultural Rights: Switzerland.
United Nations Committee on Economic, Social, and Cultural Rights (2018). *Concluding Observations on the Initial Report of South Africa*. para 25. United Nations Committee on Economic, Social and Cultural Rights: Switzerland.
United Nations High Commissioner for Human Rights (2016). *Human Rights Committee Reviews the Report of South Africa*. http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=17175&LangID=E
United Nations High Commissioner for Refugees (2012). *Detention guidelines: guidelines on the applicable criteria and standards relating to the detention of asylum-seekers and alternatives to detention*. United Nations High Commissioner for Refugees (UNHCR). https://www.unhcr.org/publications/legal/505b10ee9/unhcr-detention-guidelines.html

United Nations High Commissioner for Refugees (2013). *UNHCR intervention before the High Court of Kenya in the case of Kituo Cha Sheria and others v. The Attorney General*, 12 March 2013, Petition No. 115 of 2013. UN High Commissioner for Refugees. A/73/12. New York, US: United Nations. https://www.refworld.org/docid/5151b5962.html

United Nations High Commissioner for Refugees (2018). *Report of the United Nations High Commissioner for Refugees Part II Global Compact on Refugees*. UN High Commissioner for Refugees.

United Nations Human Rights Committee (2014). *General Comment No. 35 Article 9 (Liberty and security of person)*. CCPR/C/GC/35.

United Nations Human Rights Committee (2017). *Concluding Observations on the Initial Report of South Africa*. CCPR/C/ZAF/CO/1.

United Nations Human Rights Committee (2018). *General Comment No 36 on the Right to Life. on article 6 of the International Covenant on Civil and Political Rights, on the right to life.* CCPR/C/GC/36. https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1_Global/CCPR_C_GC_36_8785_E.pdf

United Nations Human Rights Council (2011). *Report of the Special Rapporteur on the Human Rights of Migrants, Jorge Bustamante*. A/HRC/17/33/Add.4. https://documents-dds-ny.un.org/doc/UNDOC/GEN/G11/130/36/PDF/G1113036.pdf

United Nations Office of the High Commissioner for Human Rights (2020). *Working Group on Arbitrary Detention Deliberation No. 11 on prevention of arbitrary deprivation of liberty in the context of public health emergencies*. https://www.ohchr.org/Documents/Issues/Detention/DeliberationNo11.pdf

United Nations Working Group on Arbitrary Detention (2005). *Civil and Political Rights, Including the Question of Torture and Detention - Report of the Working Group on Arbitrary Detention, Addendum* Visit To South Africa* (4-19 September 2005)," E/CN.4/2006/7/Add.3. https://undocs.org/E/CN.4/2006/7/Add.3

United Nations Working Group on Arbitrary Detention (2018). *Revised Deliberation No.5 on Deprivation of Liberty of Migrants. A/HRC/39/45*. United Nations General Assembly.

United States Department of State (2009). *Country Reports on Human Rights Practices South Africa.* U.S. State Department.

United States Department of State (2015). *Country Reports on Human Rights Practices for 2015: South Africa*. http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2015&dlid=252729

Van Hout, M. C. (2021). Human rights violations, detention conditions and the invisible nature of women in European immigration detention: A legal realist account. *International Journal of Prisoner Health*, advance online publication. https://doi.org/10.1108/IJPH-03-2021-0023

Van Hout, M. C., & Wessels, J. (2021). "Ubuntu" I am because we are: COVID-19 and the legal framework for addressing communicable disease in the South African prison system. *International Journal of Prisoner Health*, *18*(4), 350–370. https://doi.org/10.1108/IJPH-05-2021-0046

Van Lennep, T. (2019). *Lindela And South Africa's Defective Deportation Regime*. Helen Suzman Foundation. Available at Lindela And South Africa's Defective Deportation Regime — Helen Suzman Foundation (hsf.org.za)

Xenowatch (2022). *African Centre for Migration & Society*, University of the Witwatersrand. www.xenowatch.ac.za

Zanker, F., & Moyo, K. (2020). The Corona virus and migration governance in South Africa: business as usual? *Africa Spectrum*, *55*(1), 100–112.

Ziegler, R. (2020). Access to Effective Refugee Protection in South Africa: Legislative Commitment, Policy Realities, Judicial Rectifications? *Constitutional Court Review*. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3623049

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Commentary

Ensuring oversight and protection of life, health and well-being of all detained by the Russian Federation and in Russian controlled territories of Ukraine

Marie Claire Van Hout*

Public Health Institute, Liverpool John Moore's University, United Kingdom

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ABSTRACT

Objectives: Military action by Russian forces against Ukraine commenced on 24 February 2022. The Office of the United Nations High Commissioner for Human Rights has observed serious human rights violations in the context of the Ukraine war. A range of people are detained, not limited to those meeting the definition of prisoners of war, or prisoners, but including Russian soldiers who refuse to fight and the enforced disappearance of Ukrainian civilians.
Study design: This is a Commentary article.
Methods: This Commentary concerns the detainee's right to humane conditions of detention and right to life, health and well-being (including access to medical care) when in detention in Russian-controlled territories of Ukraine and when transported into and detained in the Russian Federation itself.
Results: There is evidence of violations of the rules of war and of fundamental human rights. Prohibition of torture and other ill treatment of people deprived of their liberty is shared across international human rights and humanitarian law frameworks.
Conclusions: Russia will leave the European Court of Human Rights on 16 September 2022. The United Nations Human Rights Council must swiftly respond and create new mechanisms to monitor Russian detention standards and uphold fundamental human rights to protect the lives, health and well-being of those detained, regardless of their status as prisoner, prisoner of war or other.

Military action by Russian forces against Ukraine commenced on 24 February 2022, following parliamentary recognition of the independence of the self-proclaimed Donetsk and Luhansk People's Republics. The regional focus understandably has been on the military response to the invasion and the humanitarian response and evacuation of civilians.

On 30 March 2022, Cocco et al. highlighted the lack of attention directed towards the health and well-being of people living in Ukrainian prisons during the invasion by Russia.[1] There are however people detained by Russian military forces in Russian-controlled territories of Ukraine (number of detention settings unknown) and transferred to detention settings in the Russian Federation (hereafter *"Russia"*) itself (872 facilities[2]). These detainees are not limited to those meeting the definition of prisoners of war (POW), or indeed prisoners, but include Russian soldiers who refuse to fight and the enforced disappearance of Ukrainian civilians to unknown locations in Russia.

The United Nations High Commissioner for Human Rights has observed serious human rights violations by Russia relating to the human and health rights of those deprived of their liberty during the Ukraine conflict. The United Nations High Commissioner for Human Rights, Human Rights Watch and the World Organisation Against Torture have issued substantive reports on the torture and inhumane treatment of POW and other detainees (torture, beatings, gang rape, forced standing for long periods, prolonged interrogation, use of electroshocks, solitary confinement, deprivation of water and food, denial of medical treatment) in Russian-controlled territories, including in the 21 filtration sites used to process Ukrainian POW and civilians before forcible transfer to Russia and

* Correspondling author. LLM Professor of International Public Health Policy and Practice Public Health Institute Faculty of Health Liverpool John Moore's University 3rd Floor, Exchange Station Tithebarn Street Liverpool L2 2QP United Kingdom. Tel.: +151 231 4542; fax: +151 231 4552.
E-mail address: m.c.vanhout@ljmu.ac.uk.

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during illegal transfer of individuals including humanitarian workers to Russian penal institutions in the Kursk and Bryansk regions and other unknown locations.[3–7]

Further of note is the longstanding history of imprisonment in harsh environmental conditions of detention and associated threat to health and life of those deprived of their liberty in Russia itself.[8,9] Concerns centre on the denial of access by inspecting commissions and detention conditions characterised by congestion, extreme cold, systematic violence and abuse, inadequate food provisions, poor sanitation and ventilation, inadequate health monitoring, denial of medical responses to torture, the denial of access to medical care as punitive measure, poor disease mitigation measures resulting in disease transmission (HIV, tuberculosis, COVID-19 and other diseases in circulation) and unexplained deaths of detainees.

Blatant disregard for the lives, dignity and health of detainees during the invasion of Ukraine has also occurred in other ways. The European Court of Human Rights (ECtHR) has issued interim measures to Russia to not carry out the death penalty against two Britons and a Moroccan national accused of '*mercenary activities*' by the Donetsk Supreme Court and to ensure adequate conditions of detention with provision of sufficient medical care.[10] There are however reports that prison conditions were expressly deteriorated by the authorities across 20 regions of Russia (including St. Petersburg, Tver, Ryazan, Smolensk and Rostov) to facilitate military recruitment of prisoners (particularly those with combat experience) for operations in the Donbass.[11] Detention of Russian soldiers in eastern Ukraine for '*refusing to take part in the war*' has been documented.[12] Prisons also became military targets. On 29 July 2022, the Olenivka prison in Donetsk Oblast was attacked killing and wounding Ukrainian POW.[13]

Russian expulsion from the Council of Europe (CoE) on 16 March 2022 and the ECtHR (16 September 2022) leaves a concerning gap in access to justice by those detained by criminal justice authorities in Russia and by its armed forces in Russian-controlled territories and in the oversight and protection of the right to health of those living in Russian prisons and POW detention settings. Russia will only implement ECtHR judgements issued before 15 March 2022.[14] The majority of pending cases will be frozen in the system.

The ECtHR has been instrumental in improving the health of prison populations in Europe.[15] There are a host of ECtHR judgements against Russia regarding its treatment of people deprived of their liberty, especially concerning the violation of human and health rights under Article 3 of the European Convention on Human Rights ('*prohibition of torture*'), many of which remain unimplemented by Russia.[16] Judgements are primarily concerned with systemic inhuman and degrading treatment in detention (including in pretrial) in Russia regarding severe cell overcrowding and poor environmental health standards of detention (inadequate water, heating and ventilation, lack of separation between the sanitary and living areas, access to natural light, exposure to disease and vermin), threats to health and life in the form of exposure to violence, torture and inadequate medical care leading to chronic ill health and death (examples include *Kalashnikov v. Russia, Buntov v. Russia, Magnitsky v. Russia*, Nogin v. Russia, Khloyev v. Russia and *Ananyev and others v Russia*).[16] The ECtHR has also dealt with the context of POW detention following the Russia military conflict in Georgia (*Georgia v. Russia*) and underscored the right of Georgian civilians and POW by the Russian and/or South Ossetian forces (whose actions were attributable to the Russian authorities) to be treated humanely and detained in adequate conditions.[16] On 1 July 2022 the ECtHR issued an interim measure seeking immediate action by Russia to protect the rights of detained Ukrainian POW and to provide them with appropriate medical assistance.[17] This has been ignored.

Prohibition of torture and other ill treatment of people deprived of their liberty is shared in international human rights and humanitarian law (Common Article 3 Geneva Conventions), which provide that all detainees be treated in a humane manner. Notwithstanding these obligations during the conflict, Russia has ratified several relevant international human rights treaties (International Covenant on Civil and Political Rights (ICCPR), Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), International Covenant on Economic, Social and Cultural Rights (ICESCR)) upholding the rights of people in detention, including the right to health and life. Whilst it accepts individual complaints against the State under ICCPR and CAT and the inquiry procedures of the CAT, it has not extended a standing invitation to United Nations (UN) Special Procedures. Nor has it ratified OP-CAT (oversight/national preventive mechanisms) or the Second Optional Protocol to the ICCPR (abolition of the death penalty). This year it has failed twice in a row to appear at its review by the UN Human Rights Committee (March and July 2022).[14]

Whilst Russian authorities have allowed the CoE's Committee for the Prevention of Torture to visit the country's prisons and released some reports on conditions, there will be no more missions by this Committee, a glaring gap that requires immediate redress. This has substantial implications for ensuring the health of those detained, including their right to access appropriate medical care and the right to be protected from disease. Little is known about the access of UN agencies and independent monitors into detention sites on Russian-held territories and Russia itself and the ability to support timely and effective investigations into alleged breaches of both international human rights and humanitarian law. On 14 June 2022, Russia's oldest antitorture human rights organisation (CAT Russia) was designated as a foreign agent and subsequently liquidated.[18]

Inadequate detention conditions, exposure to torture and violence, and medical neglect without legal, public or UN agency oversight and with threat of indiscriminate attacks on detention sites constitute a substantial risk to life, health and well-being for all detained during the Ukraine war. Lack of independent facility inspections and inhibited access to justice and access to healthcare (including medical responses to victims of torture) have enormous ramifications in terms of breaching their basic human and health rights. The routine denial of chronic illness and indeed palliative care of those detained poses a grave concern. There are potential public health ramifications, which could affect Russia, Ukraine and indeed Europe in terms of lack of oversight of disease mitigation and surveillance.

We must not ignore them or allow them to be left behind in the face of the Russian-Ukraine conflict and Russia's expulsion from the CoE. Notwithstanding the lack of accountability and potential for arbitrary detention, torture, cruel and inhuman treatment, further rule of law backsliding could result in restoration of the death penalty by Russia. It is imperative that the UN Human Rights Council acts swiftly to respond and create new mechanisms to monitor all Russian detention standards wherever they are located, in times of peace and war, and regardless of detainee status as prisoner, POW or other.

Inter arma enim silent leges.

Author statement

Conflict of interest

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References

1. Cocco N, Rosello A, Tavoschi L. Protecting the health of people living in Ukrainian detention facilities. *Lancet Public Health* 2022;**7**(5):e400–1.
2. *World prison brief*. Russian Federation; 2022. www.prisonstudies.org/country/russian-federation. [Accessed 12 August 2022].
3. United Nations Office of the High Commissioner for Human Rights. *Situation of human rights in Ukraine in the context of the armed attack by the Russian Federation*. 2022. 24 February-15 May 2022. 29 June 2022, www.ohchr.org/sites/default/files/documents/countries/ua/2022-06-29/2022-06-UkraineArmedAttack-EN.pdf. [Accessed 12 August 2022].
4. United Nations Office of the High Commissioner for Human Rights. *Ukraine: UN High commissioner updates human rights Council*. 2022. 05 July 2022, www.ohchr.org/en/statements/2022/07/ukraine-high-commissioner-updates-human-rights-council. [Accessed 12 August 2022].
5. Human Rights Watch. *Russia: forcible disappearances of Ukrainian civilians detainees unlawfully transferred to Russia, Possibly Held as Hostages*. 2022. 14 July 2022, www.hrw.org/news/2022/07/14/russia-forcible-disappearances-ukrainian-civilians. [Accessed 12 August 2022].
6. World Organisation Against Torture. *Urgent Interventions Russia: torture and ill-treatment in detention of humanitarian volunteers in occupied Ukraine*. 2022. 29 July 2022, www.omct.org/en/resources/urgent-interventions/russia-torture-and-ill-treatment-in-detention-of-humanitarian-volunteers-in-occupied-ukraine. [Accessed 12 August 2022].
7. Conflict Observatory. *Mapping the filtration system in Donetsk Oblast*. 25 August 2022. New Haven: Yale School of Public Health; 2022. Available at: mapping the filtration system in donetsk oblast | conflict observatory.
8. United Nations Committee against Torture. *Concluding observations on the sixth periodic report of the Russian Federation Adopted by the Committee at its sixty-fourth session*. 2018 (23 July-10 August 2018), CAT/C/RUS/CO/R.6 (ohchr.org). [Accessed 12 August 2022].
9. United States Department of State. *Country reports on human rights practices: Russia*. 2021. www.state.gov/reports/2021-country-reports-on-human-rights-practices/russia/. [Accessed 12 August 2022].
10. Gijs C. *Human rights court calls on Russia to drop death penalty against two Britons*. 2022. 30 June 2022, www.politico.eu/article/human-right-court-intervene-block-russian-death-penalty-against-two-brits/. [Accessed 12 August 2022].
11. Radio Free Europe Radio Liberty. *Rights group says hundreds of prisoners in Russia's north caucasus recruited for war in Ukraine*. Caucasus Realities Siberia Realities; 2022. 12 July 2022, www.rferl.org/a/russia-penitentiaries-recruitment-ukraine-war/31940102.html. [Accessed 12 August 2022].
12. Sauer P. *Russian soldiers accuse superiors of jailing them for refusing to fight*. 2022. 02 August 2022, www.theguardian.com/world/2022/aug/02/russian-soldiers-accuse-superiors-of-jailing-them-for-refusing-to-fight. [Accessed 12 August 2022].
13. International Committee for the Red Cross. *ICRC statement on reports of attack on Olenivka*. 2022. www.icrc.org/en/document/icrc-statement-reports-attack-olenivka. [Accessed 12 August 2022].
14. Human Rights Watch. *Joint NGO letter to EU leadership for a special rapporteur on Russia*. 2022. 13 July 2022, www.hrw.org/news/2022/07/13/joint-ngo-letter-eu-leadership-special-rapporteur-russia. [Accessed 12 August 2022].
15. Wallace A. The European Court of Human Rights: a tool for improving prison health. *Lancet* 2020. https://doi.org/10.1016/S2468-2667(19)30258-0.
16. Council of Europe. *Guide on the case-law of the European convention on human rights*. 2022. Updated on 30 April 2022, www.echr.coe.int/Documents/Guide_Prisoners_rights_ENG.pdf. [Accessed 12 August 2022].
17. Desai S. *European court orders Russia to protect rights of Ukrainian prisoners of war*. 2022. 01 July 2022, www.aa.com.tr/en/russia-ukraine-war/european-court-orders-russia-to-protect-rights-of-ukrainian-prisoners-of-war/2628107. [Accessed 12 August 2022].
18. World Organisation Against Torture. *Urgent Interventions Russia: human rights organisation CAT-Russia designated as a foreign agent*. 2022. 14 June 2022, www.omct.org/en/resources/urgent-interventions/russia-human-rights-organisation-cat-russia-designated-as-a-foreign-agent. [Accessed 12 August 2022].

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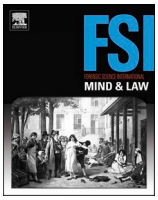

Navigating the complexities of (trans) gender equality rights within the parameters of reasonable accommodation and security tensions in South African prisons: The judgement of *September v Subramoney*

Marie Claire Van Hout

Public Health Institute, Faculty of Health, Liverpool John Moores University, 3rd Floor, Exchange Station, Tithebarn Street, Liverpool, L2 2QP, United Kingdom

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ABSTRACT

Within the heterogenous global prison population of about 11.7 million, transgender prisoners have unique vulnerabilities and are exposed to substantial risks and harm. Their situation has been viewed as a *"double punishment"* by encompassing the system lack of gender recognition and exposure to traumatic experiences of detention often tantamount to torture. In Africa, sexual minority rights remain a contentious issue, and there is little documented about the situation of incarcerated transgender people.

South Africa is one of the most progressive African countries in terms of equality legislation and advancing the rights of sexual and gender minorities. A legal realist review was conducted of the 2019 South African Equality Court judgement of *September v Subramoney*, based on case decisions and by scrutinizing the international and regional human rights protections and rights assurance mechanisms which encompass the fundamental rights of detained transgender individuals. These are not limited to protection from custodial violence, prohibition of torture and discrimination but include conditions of accommodation, right to express their gender identity and access to gender affirming healthcare. The subsequent legal realist account critiques the impact of this judgement based on extant published literature (empirical, humanitarian, and UN Committee reporting) and jurisprudence in other jurisdictions cognisant of increasing strategic litigation in the field of transgender rights. The implications of this ground-breaking judgement are considered, with a particular lens focusing on the rights of trans-prisoners (particularly trans-women as most vulnerable) to equality, but also dignity, freedom of expression, dignified detention, and the prohibition of inhumane treatment or punishment. These rights are positioned within the boundaries of safe and reasonable accommodation, ability to gender express and prison system capacity to deal with security tensions in high risk *cis*-normative detention environments.

1. Background

The global prison population continue to rise, with approximately 11.7 million people detained on any given day (Penal Reform International PRI, 2021). Within the heterogenous prison population, there are particularly vulnerable prisoner groups with unique needs and who are at greater risk of exposure to trauma, custodial violence and harm (United Nations Office on Drugs and Crime UNODC, 2009; 2016). These include transgender people (Rodgers et al., 2017; Brömdal et al., 2019; Van Hout et al., 2020; Van Hout & Crowley, 2021; Donohue et al., 2021) who are defined by the World Health Organization(WHO) (2020) as "*a diverse group of people whose internal sense of gender is different than that which they were assigned at birth and whose gender identity and expression does not conform to the norms and expectations traditionally associated with their sex at birth*". Beyond legal gender identity, transgender includes those undergoing medical treatment to support the transitioning process of their physical state to conform to their internal sense of gender identity, as well as those living in accordance with their gender identity in the absence of medical treatment (WHO, 2020). Global data on numbers of incarcerated transgender people remains limited due to the complexities around prison system reporting on committal (for example legal sex status as opposed to gender identity or expression) and under-reporting by detained individuals due to fear and disclosure concerns (PRI, 2020; United Nations Development Programme UNDP, 2020). Available evidence in some countries has indicated the over-representation of *trans*-women (male to female) compared to *trans*-men in detention settings (James et al., 2016; Van Hout et al., 2020; Van Hout & Crowley, 2021). Notwithstanding their vulnerability

E-mail address: m.c.vanhout@ljmu.ac.uk.

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to health harms (for example HIV, sexual exploitation) and involvement in crimes of poverty and disadvantage, many countries where same-sex activity is a criminal offence continue to prosecute sexual minorities, including transgender people (Clark, 2014; UNDP, 2020).

Transgender prisoners experience a myriad of trauma which includes exposure to physical and sexual violence, systemic discrimination and social stigma prior to and during incarceration (Van Hout et al., 2020; Van Hout & Crowley, 2021; Donohue et al., 2021). Their situation has been viewed as a *"double punishment''* (Erni, 2013, p. 139) by encompassing the custodial system lack of gender recognition and their exposure to substantial traumatic experiences of detention, often deemed tantamount to torture and degrading treatment (Van Hout et al., 2020). In many countries there is a lack of official and cultural understanding and concern regarding their care, treatment and support needs whilst incarcerated, leading to system suppression of their identity, frequent *'othering'* of transgender prisoners and traumatic experiences of minority stress, alienation and victimization in prison (Lydon et al., 2015; Brockmann et al., 2019; Van Hout et al., 2020; Van Hout & Crowley, 2021; Donohue et al., 2021). Transgender lived realities of incarceration are often grounded in their inability to gender express (for example restricted access to gender-appropriate clothing and products), the amplified experience of transphobia, discrimination and gender maltreatment by prison staff and fellow prisoners (for example intentional misgendering and harassment), exposure to custodial violence (sexual and physical abuse), experience of excessive solitary confinement as *"de facto"* protective measure by prison officials, and restricted or denied access to gender affirming medical care (hormone therapy and surgery) (World Professional Association for Transgender Healthcare (WPATH), 2012; Van Hout et al., 2020; UNDP, 2020).

They are particularly vulnerable to sexual violence including rape by prison officials and fellow prisoners (Amnesty International, 2011; United Nations UN Committee Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment UN-CAT, 2014; UN-CAT, 2018; UN Committee on the Elimination of all Forms of Discrimination Against Women UN-CEDAW, 2017; Human Rights Watch, 2018; Van Hout & Crowley, 2021; Van Hout et al., 2021). There are structural barriers in detention settings which compound capacities to protect *trans*-prisoners from harm. These generally centre on inadequate prison system resources and suitable infrastructure, lack of cultural sensitivity and lack of clinical competence of prison staff (Van Hout et al., 2020). Consequently high rates of poor mental health of *trans*--prisoners are reported globally which include high rates of depression and anxiety disorders, substance abuse and self-harm (including attempted auto-castration, non-suicidal self-injury, and death by suicide) whilst in detention (UNAIDS, 2014; Van Hout et al., 2020; UNDP, 2020; Kilty, 2020).

2. Upholding the rights of transgender people in South Africa

Historically same-sexual orientation and (trans) gender identity in Africa was not socially stigmatised nor was it associated with ill-health or disease. Murray et al. (2021) in *'Boy-Wives and Female Husbands: Studies in African Homosexualities'* document the presence of diversity in same-sex love and non-binary genders as widespread in African societies; and state: *"there are no examples of traditional African belief systems that singled out same-sex relations as sinful or linked them to concepts of disease or mental health — except where Christianity and Islam have been adopted"* (Murray et al., 2021). The practice of same sex marriage was documented in over 40 pre-colonial African societies, indicative that it is not homosexuality and trans identities that are a colonial import into Africa, but rather homophobia and transphobia (Elnaiem, 2021). Sexual minority rights in contemporary Africa are still a contentious issue, with same-sexuality portrayed by media and politicians in many African countries as *"un-African"* and a *"white disease"* imported from the West (Nordic Africa Institute, 2017; Hairsine, 2019; Sowemimo, 2019). Same-sexual activity is criminalised in 34 African countries (Amnesty International UK, 2018). Political, legal and religious frameworks in many of African countries exacerbate trans and homophobic attitudes, and related discrimination and hate crimes toward sexual minorities (Gloppen & Rakner, 2019). As a consequence of these socio-legal conditions, transgender people remain invisible, ignored and discriminated against in Africa (Jobson et al., 2012).

South Africa is viewed as one of the most progressive countries in Africa in terms of acknowledging the vulnerabilities of members of the lesbian, gay, bisexual, transgender, queer, intersex, and asexual (LGBTQIA+) community and advancing their rights. The South African government has promulgated its commitment to upholding transgender people's rights (including in its 2017 submission to the UN Committee on Economic Cultural and Social Rights CESC) and has an established task team to ensure transgender people's rights are broadly respected and supported by official processes regarding changes in gender status (Sloth-Nielsen, 2021a). During 2018 the South African Government mandated the drafting of the National Strategic Plan on Gender-Based Violence and Femicide (NSP on GBVF) (Department of Women, Youth and Persons with Disabilities, 2020). The NSP on GBVF provides for a cohesive strategic framework to guide the national response to the hyper endemic GBVF crisis in which South Africa finds itself. The scope and approach of the NSP focuses on comprehensively and strategically responding to GBVF, with a specific focus on a lifecycle approach to violence against ***all*** women (across age, physical location, disability, sexual orientation, sexual and gender identity, nationality and other diversities). Despite historical discrimination, harassment and abuse of transgender people in South Africa (Sanger, 2014; OUT, 2016) and stigma within South African healthcare settings (Bateman, 2011; Luvuno et al., 2019), a positive public sentiment toward the rights of transgender people has emerged in recent times (Luhur et al., 2021).

South Africa was the first African country to adopt a constitution (*Section* 9 of the South African Constitution) that explicitly prohibits discrimination on the basis of gender, sex and sexual orientation (amongst other categories) (Luhur et al., 2021). The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (hereafter PEPUDA) was *inter alia* promulgated to create a caring South African society. It prohibits unfair discrimination, hate speech and harassment on a number of prohibited grounds, including religion, conscience, belief and culture. The Bill of Rights in the South African Constitution also prohibits unfair discrimination on these and other grounds, and contains pertinent rights such as the right to freedom of association and the right to freedom of expression. All laws, including the PEPUDA, must be interpreted in accordance with the spirit, purport and objectives of the Bill of Rights (Kok, 2017). The South African government however recognises lacunas in its legislative and policy framework regarding the country's constitutional obligations to ensure equality amongst the people of South Africa. This is *inter alia* evident from the address by the South African Minister of Justice and Correctional Services, Ronald Lamola during the South Africa-European Union (SA-EU) dialogue on policy improvements for transgender and intersex persons conference in November 2021 (South African Government, 2021); *"… we must assess to what extent has the consolidation of our democracy matured to address systemic inequalities generated in this context by discriminatory practices, by patriarchy, homophobia, transphobia, toxic masculinity, toxic masculinity and stigmatization. One of the threats to the full realisation and implementation of our Constitution is the lack of consciousness in our communities.* ***Equality*** *is still conditional in many of our communities."*

Whilst gender identity is not explicitly protected by the South African Constitution, domestic jurisprudence has however interpreted that gender identity falls under the non-discrimination provisions based on gender. In recent years the South African Human Rights Commission and lower courts (including the Equality Court, Limpopo Magistrates Court) have set precedence by application of the constitutional prohibition on discrimination in cases involving harassment of transgender individuals (including school children) to constitute hate speech, unfair

discrimination and harassment and with award of damages (for example *Lallu v Van Staden* in 2011 and *Mphela v Manamela and others* in 2016) (Sloth-Nielsen, 2021a). The Civil Union Act also permits same-sex marriages in South Africa and allows for transgender people to marry someone of the same gender identity. There are however complexities with regard to this as noted in the 2017 case of *KOS and Others v Minister of Home Affairs and Others*, where three recently transitioned married persons applied to the Department of Home Affairs to have their gender marker changed on various identity documents. In one of the couples the Department refused the request and instructed the couple to divorce and remarry under the Civil Union Act, with the rationale that the previously heterosexual marriage was sanctioned under the Marriage Act, which does not permit same-sex marriages. The Court held that this denial was unconstitutional and violated the person's rights to administrative justice, equality, and human dignity, and ordered that the alteration of the gender marker on the birth register be granted regardless of the statute under which the partnership was solemnized.

3. The approach

Despite obligations and recommendations in international and regional human rights' instruments, and a range of non-binding principles mandating standards of care, very few countries fully uphold and protect the rights of transgender people in prison (WHO, 2014; UNDP, 2020; Van Hout & Crowley, 2021). The Equality Court judgement of *September v Subramoney* is the first of its kind in South Africa (and Africa). It contributes to growing jurisprudence globally which challenges the invisible nature of *trans*-prisoners, and advocates for respect of their gender expression, their right to equality and ultimately their protection from harm. It also highlights the complexities of fundamental rights assurances within prison system operations.

A legal realist review was conducted on this South African Equality Court judgement. Legal realism as naturalistic theory underpinning this review approach was selected due to its emphasis on the law as derived from real world observations regarding human rights, welfare and social interests, and public policies (Leiter, 2015). This socio-legal approach scrutinized various international and African human rights protections and rights assurance mechanisms which encompass the fundamental rights of transgender individuals deprived of their liberty (not limited to protection from custodial violence, prohibition of torture, degrading treatment and discrimination but including conditions of accommodation, right to express their gender identity and access to gender affirming healthcare). The subsequent legal realist account assesses and critiques the impact of the *September v Subramoney* judgement based on extant published literature (empirical, humanitarian, and UN Committee reporting) and jurisprudence in other jurisdictions cognisant of the increasing strategic litigation in the field of transgender rights in detention. The implications of this unique South African judgement are considered, with a particular lens focusing on the fundamental rights of *trans*-prisoners (particularly *trans*-women as most vulnerable) to equality, dignity, freedom of expression, dignified and humane detention. These rights are positioned within the boundaries of safe and reasonable accommodation, ability to gender express and prison system capacity to deal with security tensions in high risk *cis*-normative detention environments.

Human rights dimensions relevant at the global level for prison policy and practice reform, and avenues for further investigation are presented in Table 1 (*Implications for practice, policy, and research*).

Table 1
Implications for practice, policy, and research.

- Adaptation of existing good practice from other jurisdictions for example as outlined in the UNDP (2020) and WPATH (2012) guidance reports using a whole prison system approach.
- Design, development and establishment of a sustainable gender responsive prison systems with appropriate standard operating procedures and services reflecting the fundamental rights, needs and respect for dignity aligned to that prisoners' gender expression, not their sex assignment at birth, legal status or legal gender recognition.
- Development of comprehensive and non-discriminatory prison policies cognisant of the prioritisation of safety and security of transgender people in prisons, and spanning aspects of gender affirmation, non-discrimination and harm prevention, independent monitoring and supervision.
- Sensitisation of all stakeholders across the criminal justice system, and the design, development and establishment of gender sensitive policies and pathways across the criminal justice system including provision of appropriate housing in consultation with the transgender individual, equal access to gender sensitive and gender affirming medical and mental health care, humane treatment by officials in designated placements and ultimately the protection from violence and harm.
- Capacity building and sensitisation of prison officials to accept and respect self-identification of transgender prisoners, their fundamental rights and the provision of robust complaint mechanisms for transgender individuals.
- Regular independent monitoring and evaluation of rights-based gender responsive prison programmes.
- Implementation of routine health surveillance (for example HIV) and access to prison settings of academic research teams.

4. September v subramoney

The *September v Subramoney* case centres on Jade September, a transwoman convicted of murder, theft and attempted theft of a motor vehicle and serving a 15-year sentence in a male prison in Helderstroom Maximum Correctional Centre in Caledon, Cape Town. September was anatomically male but identified as a woman, and whilst incarcerated was not able to access or undergo medical treatment (including gender reassignment surgery) as provided for under the Alteration of Sex Description and Sex Status Act 49 of 2003. September claimed to be exposed to gender maltreatment, misgendering and inhumane treatment due to the system enforcement of rigid discriminatory practices and regulations regarding gender identity and expression. Prison officials refused to address September using she/her pronouns, and denied her the right to express her gender through her jewellery, gender-affirming underwear, dress, hairstyle and use of cosmetics. September also claimed to be verbally harassed by officials, with her personal items confiscated, forced to cut off her braided hair and reported experience of a period in segregated confinement as punishment for her aggressive behaviour toward prison staff when her cosmetics were confiscated.

Represented by Lawyers for Human Rights, September claimed *"her gender identity is the core and the essence of who she is as a human being"* and claimed that she had experienced unfair treatment and discrimination for expression of her gender identity contra the PEPUDA. September asserted that her treatment in prison constituted unfair discrimination, that the South African Department of Correctional Services (DCS) was denying her the space to express her gender identity, preventing her from exercising rights to equality, dignity and freedom of expression whilst in detention, and that the refusal by DCS officials to enable her to express her gender identity amounted to unfair discrimination under the South African Constitution, the PEPUDA, international law, and foreign and domestic judgments. September sought an order to enable her to express her gender identity whilst in the male prison (wearing make-up, long hair, being addressed using she/her), and an order that DCS standard operating procedures were unconstitutional to the extent that they prohibited transgender prisoners from expressing their gender identity in prisons. September also argued that placement in solitary confinement as punishment for gender identity expression amounted to *"harassment"* under the PEPUDA, and that she was not offered the opportunity to change her gender marker on her identity documents or access gender affirming health care, all of which resulted in her incarceration as a man.

The State in defence of the DCS argued that September had been treated appropriately as male (anatomically and legally as on her identity documents), that until undergoing gender reassignment surgery, September must be treated and regarded as a male prisoner, and that if any discrimination had occurred, that those actions were not unfair, as any limitations on her rights were underpinned by safety and

protection from harm (*"as expressing herself as a female, would expose the applicant to sexual violence"*). The State further disputed that September had been placed in segregated confinement for expressing her gender, and maintained that this administrative process had occurred in response to her aggressive behaviour toward staff.

The *September v Subramoney* case centred on the obligation of the DCS in terms of the PEPUDA to provide for reasonable and safe accommodation for diversity, whether a prison has to take steps to reasonably accommodate *trans*-women prisoners currently in a male prison, including permitting them to wear make-up, female clothing and to be addressed using female pronouns, and that which does not undermine her safety or the safety of detention facilities. Under the PEPUDA, the principle of *"reasonable accommodation"* requires the DCS to take reasonable steps to accommodate diversity. The Court held that the State's DCS had unfairly discriminated against September by not allowing her to express her gender identity and ruled that the denial of September's right to express her gender identity in prison amounted to cruel, degrading or inhuman treatment, as evident by the distress ensured by September. The impact of denial of gender expression in the form of clothes, makeup and hair was deemed to impact on the right to freedom of expression, and ultimately violate September's equality and dignity rights. Whilst *"transgender"* does not appear as a listed ground of discrimination in the South Africa Constitution or the PEPUDA, discrimination on the basis of gender identity was deemed to merit protection. The judge exemplified the Constitution's stance on gender identity by stating: *"Respect for human dignity thus requires the recognition of and respect for the unique identity and expression of each person"* and was critical of the DCS actions relating to failure to allow September to express her gender identity. The States argument regarding safety was rejected with the ruling that this was *"manifestly unfair"* given the extreme hardship and prejudice experienced by September.

The DCS operational procedures which prohibit transgender prisoners from wearing gender appropriate clothing were declared to be unconstitutional, and the DCS were ordered to permit September to express her identity as a woman (and be addressed as such using female pronouns), and provide for reasonable accommodation (for example an option to be placed in a single cell and enabling her to express her gender identity, or be transferred to a prison designated for females). Whilst, the Court did not find September's placement in segregation as discriminatory as it was related to a system sanction of her aggressive behaviour toward officials, it did refer to the DCS responsibility to apply least restrictive measures (*"available to ensure her safety instead of refusing to allow her to express her gender identity"*) to protect September in the event she was granted permission to express her identity, namely in the form of a single cell. Whilst it was cognisant of the resource constraints navigated by the DCS, it recommended that changes be applied to ensure *"that all inmates, including the applicant, and all other transgender inmates are treated with the necessary dignity and respect which is their constitutional right."* The Court further ordered that DCS employees undergo mandatory transgender sensitivity training, and issued a range of recommendations which centred on the adoption of policy which facilitates the access by transgender and gender diverse prisoners to clothing, make up and products designated for female prisoners/appropriate to their self-identified gender, the deferral of decision making to medical professionals and therapists not DCS prison officials, and the establishment of separate detention facilities for transgender prisoners. The piloting of separate wings for transgender prisoners in other countries (India and Thailand) were mentioned.

5. Challenging the boundaries of (trans) gender expression in South African detention settings

The *September v Subramoney* judgement aligns with extant global literature which documents the substantial trauma encountered by transgender prisoners, particularly *trans*-women and their experience of unmet gender-affirmation needs, human rights violations, traumas, harms and inadequate standards of care whilst incarcerated. The following developed legal realist account illustrates how this unique South African judgement, the first of its kind in South Africa and the African continent contributes to the growing evidence base and legal challenges worldwide.

International human rights instruments mandate States to protect all prisoners, irrespective of their sexual orientation and gender identity (SOGI) and facilitate social reintegration within the closed setting (UNODC, 2009). Fundamental rights assurances in detention settings centre on the principles of equality, dignity, freedom of expression, dignified detention and the prohibition of inhumane treatment or punishment. Principle 5 of the UN Basic Principles for the Treatment of Prisoners provides that *"except for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights, and […] United Nations covenants"*(UN, 1990). The Kampala Declaration on Prison Conditions in Africa also mandates that *"prisoners should retain all rights, which are not expressly taken away by the fact of their detention"* (African Commission on Human and Peoples' Rights ACHPR, 1996). Rule 2 of the European Prison Rules states that *"persons deprived of their liberty retain all rights that are not lawfully taken away by the decision sentencing them or remanding them in custody and Rule 5 specifies that life in prison shall approximate as closely as possible the positive aspects of life in the community"* (Council of Europe (CoE), 2020).

Recognition of and ability to express ones gender identity is central to the well-being of the *trans*-prisoner. Equality and dignity rights are the crux of the *September v Subramoney* case. Rule 1 of the non-binding UN Standard Minimum Rules for the Treatment of Prisoners (*Mandela Rules*) states that *"all prisoners shall be treated with respect because of their inherent dignity and value as human beings. No prisoner shall be subjected to, and all prisoners shall be protected from, torture and other cruel, inhumane or degrading treatment or punishment, for which no circumstances whatsoever may be invoked as a justification"* (UN, 2016). The non-binding 2017 Yogyakarta Principles are further applicable to detention settings given their central focus on SOGI. Essential is Principle 9 which mandates for the right to treatment with humanity while in detention, along with the right to bodily and mental integrity (Principle 32), whereby one's gender identity is integral *to "dignity and humanity and must not be the basis of discrimination or abuse and that, as far as possible, prisoners should be involved in decisions regarding the place of detention appropriate to their SOGI"* (Yogyakarta Principles, 2017).

With respect to women's positionality in South African detention spaces, post-apartheid historical commentaries observe the heteronormative ideology of incarcerated women, characterized by rights abuses and the invisible nature of women (notwithstanding *trans*-women) in South African criminal justice policies and practice (Van Hout & Wessels, 2021a). As elsewhere, gender blind and biologically-oriented interpretations continue to be the norm (Ciuffoletti, 2020). The *Jali Commission of Inquiry into Corruption and Maladministration in the Department of Correctional Services ('Jali Commission')* reported on serious shortcomings within the DCS including prison warden complicity in facilitating illicit sexual activities at female prisons; the sexual harassment of female staff and refer to the violation of rights of a *trans*-woman placed in a male prison (sexual exploitation, rape, denial of medical attention including HIV testing post rape, placement in solitary confinement) (van der Berg, 2007; Muntingh, 2016; Van Hout & Wessels, 2021a). Impunity for human rights violations is perhaps the most critical challenge, as the DCS has been reluctant to acknowledge the scale of this problem or to seriously address it (Muntingh, 2016).

Whilst the non-binding UN Rules for the Treatment of Women Prisoners and Noncustodial Measures for Women Offenders (*Bangkok Rules*) (UN, 2010) advocate for greater attention to women's rights whilst detained, they are attenuated in focus by their narrow patriarchal view of women as mothers, omit women who do not confirm to *cis*-normative values (for example transwomen, lesbian women) and fail to consider

aspects of intersectionality (Barberet et al., 2017; Van Hout & Crowley, 2021). The *Mandela Rules* also do not specifically refer to women or indeed transwomen, with exception of Rule 7 which recommends that authorities facilitate determination of gender identity and notate during committal *"precise information enabling determination of his or her unique identity, respecting his or her self-perceived gender"* (UN, 2016). The provision of non-discrimination is evident within the *Mandela Rules* which states *"(apply to all prisoners without discrimination … the specific needs and realities of all prisoners)"* and is further emphasised in Rule 2(2), which mandates prison administrations to *"take account of the individual needs of prisoners, in particular the most vulnerable categories"* (UN, 2016). Rule 19 offers some further support applicable to gender affirmation whereby it specifically requires that *"[prison] clothing shall in no manner be degrading or humiliating"* (UN, 2016). In Europe, whilst the 2020 European Court of Human Rights (ECtHR) guide on prisoner rights does not refer to transgender people (ECtHR, 2020), the CoE Steering Committee for Human Rights outlines measures to eliminate discrimination on grounds of SOGI, with Recommendation 4 stating *"measures should be taken so as to adequately protect and respect the gender identity of transgender persons"* (CoE, 2017). In terms of case-law, however, in 2013 in the United Kingdom (UK) (England and Wales High Court) found no discrimination in refusing gender-affirming items such as a wig, tights and a prosthetic vagina to a transgender prisoner (see *R (Green) v Secretary of State for Justice*). In contrast in the United States (US) in 2018, a District Court in Florida ruled that a transgender prisoner was permitted to gender affirm by wearing female clothing and accessing female items (see *Keohane v. Jones*).

Hence, the case of *September v Subramoney* represents a potential turning point for South Africa, and lays the foundation for progression in line with prison systems elsewhere which view gender on the basis of self-identification (for example. parts of Australia such as New South Wales and Victoria, Canada, Malta and Scotland), and policies operationalised in the UK, Italy and Thailand which have dedicated transgender prisons (UNDP, 2020). There are prisons in Australia, Canada, Italy, New-Zealand, Malta and the UK, and in some states in the US where transgender prisoners are permitted to gender affirm (for example clothing) regardless of placement, and where prison systems have training and policies which advocate for respectful gender-neutral language (Van Hout et al., 2020; UNDP, 2020). Italy in particular is reported to be leading the way in reform as they permit transgender incarcerated people to live a real-life experience and gender affirm while in detention (Chianura et al., 2010; Hochdorn et al., 2018).

The concept of *"reasonable accommodation"* as advocated for in *September v Subramoney* centres on placement in a single cell (where available in either a male or female prison) and opportunity to express gender identity safely, or transfer to a prison designated for females. The standard approach of sex segregation in detention settings (*Mandela* Rule 11, UN, 2016) based on normative binarism and conditions of perceived vulnerabilities of the sexes (Dias-Vieira & Ciuffoletti, 2014) has far reaching implications for rights assurance of a range of (trans) gendered placement needs and rights in prison. Individuals range from cisgender, pre-operative, non-operative and post-operative transgender women and men, gender nonconforming and intersex, creating a host of challenges for prison authorities. South African prisons as in other African countries continue to be congested and navigate a host of challenges pertaining to minimum standards of detention, respecting the rights to reasonable and safe accommodation and ability to protect vulnerable prisoners from custodial violence, trauma and harms (particularly for women, trans women and the mentally incapacitated) (Van Hout & Wessels, 2021a; b; c, p. p100068).

The balance of security and safety with gender recognition is then crucial, with complexity arising when the terms gender (a social construct) and sex (individual anatomy) are adopted interchangeably within the detention setting (Barnes, 1998; Mann, 2006). Placement decisions by prison system officials are generally based on pre-operative/non-operative state or on legal gender recognition of the *trans*-prisoner, and commonly hinge on the balance between accommodation, security and safety considerations (Lamble, 2012; Rodgers et al., 2017; McCauley et al., 2018; Brömdal et al., 2019; UNDP, 2020; Van Hout et al., 2020). Factors impacting on such decisions are often grounded in rigid *cis*-normative frameworks of sex and gender, binary classifications and related to prison infrastructure and accommodation capacity in terms of offering population housing, segregation or protective custody, shared or single occupancy cells, general or specialist pods/wings for trans prisoners. In terms of European human rights case law, segregation based on sexual identity has been ruled as unlawful and in breach of Article 3 (prohibition of inhuman and degrading treatment) and 14 of the European Convention on Human Rights (ECHR) (prohibition of discrimination) (see the 2012 ECtHR case of *X v Turkey*). In the UK, the refusal to move a pre-operative transgender prisoner from a men's prison to a women's prison was ruled as a violation of her human rights under the ECHR Article 8 (see the 2015 UK Supreme Court case of *R Bourgass v Secretary of State for Justice*).

The right to humane treatment whilst detained is outlined in Yogyakarta Principle 9, and one which requires routine independent monitoring by the State and it's judiciary inspectorate. Officials in the *September v Subramoney case* used solitary confinement as lawful universal sanction for aggressive behaviour. Although placement in solitary confinement or segregation may be necessary for safety, transgender status itself does not justify limitations on access to recreation, legal or medical assistance (UN Special Rapporteur on Torture, 2011). The 2017 Yogyakarta Principles (5, 7, 10, 18 and 27), and particularly Principle 9 specify that protective measures *"involve no greater restriction of their rights than is experienced by the general prison population."* Black, Latino, mixed-race, and Native American/American Indian transgender prisoners are reported to be twice as likely to be placed in solitary confinement (Lydon et al., 2015). Whilst reviews indicate that prison systems routinely use segregation and solitary confinement to protect transgender prisoners from harm (Van Hout et al., 2020), this is arguably punishment and inhumane, and further compounds the trauma experienced by transgender prisoners. Rule 57 of the Mandela Rules states that *"the prison system shall not, except as incidental to justifiable segregation or the maintenance of discipline, aggravate the suffering inherent in such a situation"* and Rule 45.2 specifies *"the imposition of solitary confinement should be prohibited in the case of prisoners with mental or physical disabilities when their conditions would be exacerbated by such measures"* (UN, 2016). The placement of transgender prisoners in specialist wards or pods (as in Australia, the UK and Canada), which in reality house *'all'* prisoners with a host of psychiatric conditions and vulnerabilities, are reported to leave transgender prisoners further traumatised (Bashford et al., 2017; McCauley et al., 2018).

Globally, many prison systems lack a robust response to the daily traumas and threats to safety encountered by trans prisoners (Brown, 2014; Simopoulos & Khin, 2014; Routh et al., 2017; Van Hout Kewley & Hillis, 2020, Van Hout & Crowley, 2021). *September v Subramoney* exemplifies the challenges encountered by DCS officials in the South African and indeed African cultural context to protect *trans*-prisoners from harm, albeit via denial of the opportunity to gender affirm, and their placement in single cell accommodation in either a male or female prison. United Nations (UN) Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (2015) amongst others has described concern regarding the situation of transgender persons in detention settings, particularly relating to exposure to sexual violence (UN CAT, 2018; Harrison, 2020). The Special Rapporteur has been at the forefront in drawing attention to human rights abuses, with concern centring on "*the absence of appropriate means of identification, registration and detention that leads in some cases to transgender women being placed in male-only prisons, where they are exposed to a high risk of rape, often with the complicity of prison personnel*" (UN Human Rights Council, 2015, UN Human Rights Office of the High Commissioner, 2016, UN Special Rapporteur on Torture, 2016). Crucial factors include the prevention of harm to transgender prisoners (for example

sexual exploitation and rape) and the protection of fellow prisoners (often in the case of female prisoners in the placement of transwomen sex offenders in female wings) (Lamble, 2012). The UN Committee on Torture (2016) provides that prison authorities must identify risks of harm imposed on those who are vulnerable, protect them by not leaving them isolated and operationalise necessary measures. At the ECtHR, while the deliberate disclosure of transgender status breaches Article 8 (right to respect for private and family life) of the ECHR, in the prison setting where there is a risk of violence, this may also breach Article 3 (see *Bogdanova v Russia* in 2015). Protection from gender maltreatment and abuse by prison staff and other prisoners is mandated in the ECHR (Articles 3, 14) (see *Sizarev v Ukraine* and *G.G. v. Turkey* at the ECtHR in 2013). In the US prison staff failures to protect transgender prisoners are ruled to violate the 8th Amendment, constituting *"cruel and unusual punishment"* (Alexander & Meshelemiah, 2010). The Prison Rape Elimination Act of 2003 was subsequently passed to establish zero tolerance toward custodial rape and sexual violence.

The judgement of *September v Subramoney* further recommends the deferral of decision making to competent medical professionals and therapists and not DCS prison officials. Guiding principles relating to the universal right to health and the entitlement to non-discriminatory and equivalence of care to that in the community for all prisoners are mandated by international treaties and also stipulated in the non-binding UN Standard Minimum Rules for the Treatment of Prisoners (UN 1955; UN 2015), Basic Principles for the Treatment of Prisoners (UN, 1991), and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (UN, 1988). Medical declarations which provide for the rights of prisoners to humane treatment and appropriate medical care include the UN Principles of Medical Ethics relevant to prisons (Principles 1, 6) (UN, 1982), WHO (2003) and World Medical Association (WMA) (2011) declarations, and the *Mandela Rules* (UN, 2016). According to the Yogyakarta Principles (2017), Principle 17 specifically recommends States to *"facilitate access by those seeking body modifications related to gender reassignment to competent, non-discriminatory treatment, care and* support*."* The WPATH (2012) standards of care apply to all transsexual, transgender, and gender-nonconforming people, irrespective of their housing situation whilst in detention. The issue of access to gender affirming therapies and gender reassignment surgery whilst incarcerated is complex, with WPATH (2012) continuing to advocate for the provision of adequate access to medical care and counselling for transgender people in prison, that which recognises their unique vulnerabilities and special health needs on the basis of their gender identity.

Countries differ in terms of medical treatment of transgender people in prison, ranging from initiation, to freeze-framing, continuation of hormone treatment at the same level as prior to committal or a continuation approach with adjusted dosage based on medical consultations (for example Australia, Malta, New Zealand and Thailand) (UNDP, 2020). Complications exist with regard to prison provision of access to necessary medical specialist input. Several district courts in the US have ruled that hormone therapy is a necessity for transgender prisoners (see *Kosilek v. Maloney* in 2002), and have permitted gender reassignment surgery for transgender prisoners (*Quine v. Beard* et al., in 2017). In 2020 the district court judgement of *Campbell v Kallas* ruled that the prison in question must facilitate access to continued hormone treatments, counselling and the wearing of some women's clothing, but denied the additional requests for breast augmentation, voice therapy and electrolysis, as the claimant failed to provide evidence that these medical interventions were specifically required to treat gender dysphoria. Court decisions elsewhere in the US advised to *"elevate innovative and evolving medical standards to be the constitutional threshold for prison medical care"* (see *Edmo v. Corizon Inc.,* 2020). Very few countries however facilitate prisoner access to gender reassignment surgery equal to that in the community (at present only Australia, UK and the US) (Van Hout & Crowley, 2021). More recently, the CoE Anti-Torture Committee (2015) has made recommendations regarding a case in Austria that *"authorities take the necessary steps to ensure that transgender persons in prisons (and, where appropriate, in other closed institutions) have access to assessment and treatment of their gender identity issue and, if they so wish, to the existing legal procedures of gender reassignment. Further, policies to combat discrimination and exclusion faced by transgender persons in closed institutions should be drawn up and implemented."*. See Table 2 Case Law.

6. Conclusive remarks: equality rights, protection from harm and moving beyond the right to express gender identity

The South Africa Equality Court judgement of *September v Subramoney* is ground-breaking with regard to transgender prisoner positioning and fundamental rights whilst in detention, not only for the transgender community in South Africa, but also across the African continent and globally in terms of spotlighting the rights assurances of transgender prisoners (particularly *trans*-women) in prison system operations (Sloth-Nielsen, 2021a). South Africa's prison system is of no exception in that it continues to operate as a heteronormative and hyper-masculine environment. The central element underpinning the experience of the transgender individual whilst incarcerated is the ability to express their gender. The core of the judgment is the obligation of the DCS under the PEPUDA to provide for reasonable and safe accommodation for diversity. It stipulates; *"**This case is primarily about equality.** Not only equality, but it is also about dignity, freedom of expression, dignified detention, and the prohibition of inhumane treatment or punishment."* The right to reasonable and safe accommodation therefore flows from the constitutionally entrenched right to equality. The court unambiguously stated in its judgment that, as it is aware of the resource implications, it would *'not order major physical changes to the existing correctional centres'* in order to make provision for transgender accommodation.

Since the judgement there has been progress in equality rights assurances of transgender people in conflict with the law in South Africa. The DCS in its Revised 2020–2025 Strategic Plan (DCS, 2020)

Table 2
Case law.

Bogdanova v Russia Application No 63378/13. Council of Europe: European Court of Human Rights, 10 June 2015.
Bogdanova v Russia, Application No. 63378/13 Council of Europe: European Court of Human Rights, 10 June 2015
Campbell v. Kallas US District Court for the Western District of Wisconsin. 16-cv-261-jdp (W.D. Wis). 8 December 2020.
Edmo v. Corizon Inc., 9th Cir., No. 19-cv-35017, Court of Appeal. 10 February 2020.
G.G. v. Turkey Application No. 10684/13, Council of Europe: European Court of Human Rights, 31 March 2013.
Keohane v. Jones, 328 F. Supp. 3d 1288 (N.D. Fla. *2018*) United States District Court for the Northern District of Florida. 22 August 2018.
KOS and Others v Minister of Home Affairs and Others, High Court (2298/2017) [2017] ZAWCHC 90; [2017] 4 All SA 468 (WCC); 2017 (6) SA 588 (WCC) South Africa. 6 September 2017.
Kosilek v. Maloney, 221 F. Supp. 2d 156 (D. Mass. 2002). US District Court for the District of Massachusetts. 22 August 2002.
Lallu v Van Staden Roodepoort Equality Court, Case No 3 of 2011. South Africa 28 September 2012
Mphela v Manamela and others Seshego Magistrates Court (Equality Court). South Africa. 9 September 2016.
Quine v. Beard et al., No. 3:2014cv02726 - Document 116 (N.D. Cal. 2017 28 April 2017.
R (Bourgass) v Secretary of State for Justice United Kingdom Supreme Court 54, 29 July 2015.
R (Green) v Secretary of State for Justice, [2013] England and Wales High Court (Administrative Court) 3491, 4 December 2013.
September v Subramoney NO and Others (EC10/2016) [2019] ZAEQC 4; [2019] 4 All *SA 927 (WCC). South African Equality Court. 23 September 2019.*
Sizarev v Ukraine, Application no 17116/04, Council of Europe: European Court of Human Rights, 17 January 2013, para 112; 9.
X v Turkey, Application no 24626/09, Council of Europe: European Court of Human Rights, 9 October 2012.

specifically mentions the matter of *September v Subramoney* and discusses the implications of the judgment in this Strategic Plan. It references the NSP on GBVF, of which the vision underpins a South Africa free from GBV directed at women, children and LGBTQIA + persons. At present the DCS aims to develop a Policy Framework, aligned to the NSP, which addresses the prevalence of GBV in correctional services, through prevention mechanisms, and outlines the steps to be taken in caring for and providing internal support to the victims, people in prison and officials. As of 2021, only the Western Cape South African Police Service (SAPS) has some form of Standard Operating Procedure (SOP) for transgender people who have been arrested. It does not apply to prisoners awaiting trial or those convicted. The SOP calls for transgender people who have been arrested to be treated with dignity and respect and to be placed *in "separate detention facilities at the police station where they were arrested"*. They must also be *"recorded in the gender column of the custody register (SAPS 14) with a red pen as 'T'"*.

The judgement of *September v Subramoney* illustrates the inherent tensions between human, gender and equality rights, prohibition of discrimination and inhuman treatment, and security considerations regarding such transgender placement and protection from harm in prisons. The principle of reasonable accommodation and least restrictive measures applies to all prisoners who identify as transgender and are entitled to express their gender identity (for example by wearing makeup and long hair, issued female underwear, placement in a single cell to protect her and fellow prisoners) while incarcerated in South Africa (Sloth-Nielsen, 2021a). This aligns to the 2020 UNDP good practices in the management of transgender prisoners, centring on self-identification without the need for medical or psychological examination or confirmation, irrespective of legal recognition, legal documents and surgical status, gender neutral access to clothes and commodities, and adequate access to a full range of appropriate medical care while detained (UNDP, 2020). Whilst adaptation of existing good practice from other jurisdictions is a starting point, the *September v Subramoney* judgement however does not provide a clear and implementable pathway for the DCS beyond *'reasonable accommodation'* to reform its prison infrastructure, its systems, policies and practices, albeit beyond recommendations to ensure they are inclusive, respect the lived experiences and needs of trans people in prison, and promote and protect the full realisation of their rights. The court acknowledged competing constitutional rights in its judgement when it stated as follows: *"Reasonable accommodation is a factor this court* ***must consider*** *when determining the fairness of the discrimination in question. There are a variety of reasonable steps open to government to accommodate the applicant. These steps should* ***balance the competing interests*** *raised by this dispute. They should* ***allow for gender expression, but also not undermine the safety of the applicant or detention facilities*** *…. the relief* granted *in casu should be nuanced and make provision for a balanced enforcement of the constitutional rights of the applicant and the constitutional obligations of the respondents."*

The *September v Subramoney* judgement is not about injuring the beliefs of fellow prisoners and prison officials, but rather ensuring that they understand what it means to uphold and protect human rights. Essentially the gist is ***not*** that fellow prisoners and prison officials should give up on any constitutional rights of theirs or change their belief systems, rather as per the above quote it is about the acknowledgment of and respect toward the fundamental rights of transgender persons in the detention space. Acknowledging the constitutionally entrenched right to equality is no different than acknowledging someone else's constitutionally entrenched right to life, liberty, privacy and so forth. Whilst the preamble of the PEPUDA and the South African Constitution provide that one cannot exercise rights in a manner which infringe others, this is dependent on the individual exercising their rights in a constitutionally acceptable manner, for example by not discriminating and infringing the dignity (etc) of others. In terms of Section 36 of the Constitution, which provides for the limitation of rights in terms of the Bill of Rights, a constitutionally enshrined right may only be limited if the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account relevant factors (a)-(e) of the aforementioned section. One can therefore argue that should a prisoner and/or prison official feel that his/her right to for instance "*freedom of association*" have been limited by the *September v Subramoney* judgment, that this limitation will be reasonable and justifiable in terms of Section 36 of the Constitution. Indeed, the court specifically, in order to balance the competing interests, made provision in its order for alternative relief options to be implemented by the DCS (in that the applicant could be placed in a single cell in either a male or female prison).

The African Charter on Human and People's Rights (Organisation of African Unity, 1981) further recognises that cultural values, beliefs and traditions must be exercised in a constitutional manner and balanced within the socio-legal context of the constitution, even though such beliefs may change over time (Maluleke, 2012). Whilst courts in South Africa are deemed pivotal in social transformation, judicial enforcement is dependent on public awareness of recognition and protection of human rights, population level commitment to respect, protect and uphold the rights of all to the values contained in Constitution, access to justice, human rights activism and independent and effective government institutional implementation of enforcement of such rights (Smith, 2014). The Minister for Justice Ronald Lamola has acknowledged the need for gender sensitivity training; *"I would like to add one more recommendation and that is that all officials in government must undergo gender sensitivity training, and in particular become familiar with what LGBTIQ + persons require and how best to serve them."* (South African Government, 2021). The purpose of such training would be not only to create an understanding of what being transgender entails, but also to reinforce the existence of everyone's right to equality, in the hope of creating tolerance.

In other (more developed) jurisdictions, whole prison approaches to tackling discrimination and supporting and responding to the needs of transgender people are advised to capacity build prison and medical staff, and operate alongside advocacy and strategic litigation to ensure that States' human rights assurances of incarcerated transgender people are upheld (Brömdal et al., 2019; Van Hout et al., 2020). Equally important however is the sensitisation of ***all stakeholders*** across the criminal justice system, and the design, development and establishment of gender sensitive pathways across the criminal justice system including provision of appropriate housing in consultation with the transgender individual, equal access to gender sensitive and gender affirming medical and mental health care, humane treatment in designated placement areas and protection from violence and harm. *September v Subramoney* whilst commendable in South Africa, and the first of its kind in Africa, highlights the lack of specific prison infrastructure, capacity and gender sensitive policy in African contexts to guide transgender prisoner management, protect them from experiencing trauma, violence and stigmatization without restricting their rights, and provide them with adequate gender sensitive and gender affirming medical and mental healthcare. The judgement however sets the foundation for future development and establishment of sustainable (trans) gender responsive prison systems, standard operating procedures and health services reflecting the fundamental rights, needs and respect for dignity aligned to that prisoners gender expression. At the SA-EU event on intersex and transgender policy in November 2021, the UN Special Rapporteur on the Right to Health Dr Tlaleng Mofokeng, underscored how right to health of transgender people is linked to the rights to equality, life, dignity and to not be tortured (Pikoli, 2021). Speaking at this dialogue event, Deputy Minister John Jeffery (2021) stated; *"Transgender and intersex persons have very distinct legal needs and often face enormous challenges when trying to access services or care that most people take for* granted*, such as accessing gender-affirming documentation, like identity documents."* Health autonomy and reduced barriers to healthcare access of transgender people in South Africa were noted by those in attendance as crucial, along with the requirement for health

workers (and other government officials *inter alia* DCS staff) to receive training in human rights (Pikoli, 2021).

Finally, the *September v Subramoney* judgement transgresses that of DCS prison system, policy and practice functioning and lends itself to a revision of the South Africa's gender recognition law, the Alteration of Sex Description and Sex Status Act, No. 49 of 2003 (Act 49) in line with the Yogyakarta Principles (2017). Essentially in South Africa this would result in the removal of the current medical requirements whereby the Act requires that medical or surgical gender reassignment procedures have taken place (which are highly exclusionary) and replacing this with a gender self-determination model permitting individuals to change their legal gender through self-declaration, including with the option of gender unspecified. Whilst *September v Subramoney* does not leverage for access to gender affirming therapy and reassignment surgery in prisons (Sloth-Nielsen, 2021a), it highlights the lack of access to legal gender recognition in South Africa and that illustrates the inaccessibility of gender affirming health care in South Africa to many in the community, where private access to gender affirming treatment is expensive and not covered by medical aid, and where waiting lists in government hospitals are approximately 25 years. *September v Subramoney* also does not challenge the binary model, or advance the rights of individuals identifying as non-binary or propose to recognise a third gender in South Africa. South African law, like many countries does not provide for one to be legally recognised as neither female nor male. Within the broader South African landscape, critiques have opined that the non-recognition of a third gender option in South Africa could amount to constitute discrimination under the analogous ground of gender identity (Sloth--Nielsen, 2021b).

Hearing the voices and appreciating the experience of transgender people in contact with the law and in prison in South Africa is a vital component in achieving prison reform. The UN Independent Expert on protection against violence and discrimination based on SOGI, Victor-Madrigal-Borloz has stated that *"information about the lived realities of lesbian, gay, bisexual, trans and gender-diverse persons around the world is, at best, incomplete and fragmented; in some areas it is non-existent […] It means that in most contexts policymakers are taking decisions in the dark, left only with personal preconceptions and prejudices or the prejudices of the people around them.''* Lessons learnt, multi-stakeholder consultations and best practices arising on foot of *September v Subramoney* in South Africa are not only of significant importance globally, but vital for prison systems operating within low resource settings in Africa and other countries, and within particular societal and cultural boundaries and dynamics. In addition to the requirements for routine health surveillance and independent inspections at the prison level by the South African Judiciary Inspectorate, further research and consultation with transgender people in South Africa is warranted.

Declaration of interests

The author declares that she has no conflict of interest to declare and has no known competing financial interests or personal relationships that could have appeared to influence the work reported in this paper.

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References

African Commission on Human and Peoples' Rights (ACHPR). (1996). *The Kampala declaration on prison conditions in Africa*. Kampala: ACHPR. Available at www.penalreform.org/resource/kampaladeclaration-prison-conditionsafrica. (Accessed 4 January 2022).

Alexander, R., & Meshelemiah, J. C. A. (2010). Gender identity disorders in prisons: What are the legal implications for prison mental health professionals and administrators? *The Prison Journal, 90*(3), 269–287.

Amnesty International. (2011). Not part of her sentence: Violations of the human rights of women in custody. Available at. https://www.amnestyusa.org/reports/usa-not-part-of-my-sentence-violations-of-the-human-rights-of-women-incustody/. (Accessed 4 January 2022).

Amnesty International UK. (2018). Mapping anti-gay laws in Africa. 31 may 2018. Available from www.amnesty.org.uk/lgbti-lgbt-gay-human-rights-law-africa-uganda-kenya-nigeria-cameroon . (Accessed 3 March 2022).

Barberet, R., Jackson, C., & Jay, J. (2017). UN rules for the treatment of women prisoners and non-custodial sanctions for women offenders (the Bangkok rules): A gendered critique. *Papers: Revista de Sociologia, 102*(2), 215–230.

Barnes, A. (1998). The sexual continuum: Transsexual prisoners. *New England Journal on Criminal and Civil Confinement, 599*, 600–602.

Bashford, J., Hasan, S., & Marriott, C. (2017). Inside gender identity: A report on meeting the health and social care needs of transgender people in the criminal justice system. Available at. https://docs.wixstatic.com/ugd/cc310197d3c7c868bd434a843546100db510f2.pdf. (Accessed 4 January 2022).

Bateman, C. (2011). Transgender patients sidelined by attitudes and labelling. *South African Medical Journal, 101*(2), 91–93.

van der Berg, A. (2007). Summary and comment on the final report of the judicial commission of inquiry into allegations of corruption, maladministration and violence in the department of correctional servicesthe jail commission, Civil society prison reform initiative, South Africa, available at. www.acjr.org.za. (Accessed 4 January 2022).

Brockmann, B., Cahill, S., Wang, P., & Levengood, T. (2019). Emerging best practices for the management and treatment of incarcerated lesbian, gay, bisexual, transgender, and intersex (LGBTI) individuals. The fenway Institute; Boston, MA, USA. Available at https://fenwayhealth.org/wp-content/uploads/TFIP-33_Best-Practices-for-LGBTI-Incarcerated-People-Brief_web.pdf. (Accessed 4 January 2022).

Brömdal, A., Clark, K. A., Hughto, J. M. W., Debattista, J., Phillips, T. M., Mullens, A. B., Gow, J., & Daken, K. (2019). Whole-incarceration-setting approaches to supporting and upholding the rights and health of incarcerated transgender people. *International Journal of Transgenderism, 20*(4), 341–350.

Brown, G. R. (2014). Qualitative analysis of transgender inmates' correspondence: Implications for department of correction. *Journal of Correctional Health Care, 20*, 334–342.

Chianura, L., Di Salvo, G., & Giovanardi, G. (2010). Clandestine transgender female convicts in Italian detention centers: A pilot inquiry. *Ecologica Della Mente, 33*, 219–238.

Ciuffoletti, S. (2020). Regardless of their sex' or 'biological differences'. An analysis of the European court of human rights' case law on women in prison. *Revista Direito e Praxis, 11*(2), 1275–1311.

Clark, F. (2014). Discrimination against LGBT people triggers health concerns. *Lancet, 383*, 500–502.

Council of Europe (CoE). (2017). *Steering committee for human rights CDDH, combating discrimination on grounds of sexual orientation or gender identity follow-up to recommendation CM/Rec(2010)5 of the committee of ministers CDDH*. Strasbourg: CoE. Available at www.coe.int/en/web/human-rights-rule-of-law/european-prison-rules. (Accessed 4 January 2022).

Council of Europe (CoE). (2020). *Revised European prison rules: New guidance to prison services on humane treatment of inmates*. Strasbourg: CoE. Available at www.coe.int/en/web/human-rights-rule-oflaw/european-prison-rules. (Accessed 4 January 2022).

Council of Europe (CoE) Anti-Torture Committee. (2015). Anti-torture committee scolds Austria over treatment of trans inmates. Available at. https://tgeu.org/anti-torture-committee-scolds-austria-over-treatment-of-trans-inmates/. (Accessed 4 January 2022).

Department of Correctional Services (DCS). (2020). *Department of correctional services (DCS) revised five-year strategic plan 2020-25*. DCS: South Africa.

Department of Women, Youth and Persons with Disabilities. (2020). *National strategic plan on gender-based violence and Femicide. Department of women, Youth and persons with disabilities*. Pretoria: South Africa.

Dias-Vieira, A., & Ciuffoletti, S. (2014). Section D: A tertium genus of incarceration? Case-study on the transgender inmates of sollicciano prison. *Journal of Law and Criminal Justice, 2*(2), 209–249.

Donohue, G., McCann, E., Brown, M., & Tchounwou, P. B. (2021). Views and experiences of LGBTQ+ people in prison regarding their psychosocial needs: A systematic review of the qualitative research evidence. *International Journal of Environmental Research and Public Health, 18*(17), 9335.

Elnaiem, M. (2021). *The "deviant" african genders that colonialism condemned. 29 april 2021. Available at the "deviant" african genders that colonialism condemned - JSTOR daily*. . (Accessed 30 May 2022).

Erni, J. N. (2013). Legitimating transphobia: The legal disavowal of transgender rights in prison. *Cultural Studies, 27*(1), 136–159.

European Court of Human Rights (ECtHR). (2020). Guide on the case-law of the European convention on human rights: Prisoners' rights. Council of Europe (CoE): European court of human rights (ECtHR). Available from https://www.echr.coe.int/Documents/Guide_Prisoners_rights_ENG.pdf. (Accessed 4 January 2022).

Gloppen, S., & Rakner, L. (2019). The perfect enemy: From migrants to sexual minorities. Bergen: Chr. Michelsen Institute (CMI Brief no. 2019:05) 4 p. Available from www.democraticbacklash.com/the-perfect-enemy-from-migrants-to-sexual-minorities. (Accessed 3 March 2022).

Hairsine, K. (2019). Why is homosexuality still taboo in many african countries? 4 december 2019. Deutsche welle (DW). Available from www.dw.com/en/why-is-hom

osexuality-still-taboo-in-many-african-countries/a-51528737. (Accessed 3 March 2022).
Harrison, V. (2020). CEDAW disapproves: The United States' treatment of transgender women in prisons. *DePaul Journal for Social Justice*. Available at https://via.library.depau l.edu/jsj/vol13/iss2/2. (Accessed 4 January 2022).
Hochdorn, A., Faleiros, V. P., Valerio, P., & Vitelli, R. (2018). Narratives of transgender people detained in prison: The role played by the utterances "not" (as a feeling of hetero-and auto-rejection) and "exist" (as a feeling of hetero-and auto-acceptance) for the construction of a discursive self. A suggestion of goals and strategies for psychological counseling. *Frontiers in Psychology, 8*, 2367.
Human Rights Watch. (2018). Submission to the UN working group on discrimination against women in law and practice. Available at https://www.hrw.org/news/2018/10/01/humanrights-watch-submission-un-working-group-discriminationagainst-women-law-an. (Accessed 4 January 2022).
James, S. E., Herman, J. L., Rankin, S., Keisling, M., Mottet, L., & Anafi, M. (2016). *The report of the 2015 U.S. Transgender survey. National center for transgender equality; Washington, DC, USA*.
Jeffery, J. (2021). *SA-EU dialogue on Policy improvements for transgender & intersex persons conference.* Welcome and opening remarks by the deputy minister of justice and constitutional development, the hon JH Jeffery, MP at the policy dialogue on the rights of transgender and intersex persons, held at the sheraton hotel, Pretoria. South African government press release. Available at www.gov.za/speeches/deputy-minister-john-jeffery-sa-eu-dialogue-policy-improvements-transgender-intersex. (Accessed 4 January 2022).
Jobson, G. A., Theron, L. B., Kaggwa, J. K., & Kim, H. J. (2012). Transgender in Africa: Invisible, inaccessible, or ignored? *Journal of Social Aspects of HIV/AIDS Research Alliance, 9*(3), 160–163.
Kilty, J. (2020). I just wanted them to see me: Intersectional stigma and the health consequences of segregating Black, HIV + transwomen in prison in the US state of Georgia. *Gender, Place & Culture, 22*, 1019–1039.
Kok, A. (2017). The promotion of equality and prevention of unfair discrimination Act 4 of 2000: How to balance religious freedom and other human rights in the higher Education sphere. *South African Journal of Higher Education, 31*(6), 25–44.
Lamble, S. (2012). Rethinking gendered prison policies: Impacts on transgender prisoners. *ECAN Bulletin, 16*, 7–12.
Leiter, B. (2015). Legal realism and legal doctrine. *University of Pennsylvania Law Review, 163*(7), 1975–1984.
Luhur, W., Mokgoroane, L., & Shaw, A. (2021). Public opinion of transgender rights in South Africa. *Rucla Williams Institute School Of Law*. Available at https://williamsinstitute.law.ucla.edu/publications/opinion-trans-rights-south-africa/. (Accessed 4 January 2022).
Luvuno, Z. P. B., Ncama, B., & Mchunu, G. (2019). Transgender population's experiences with regard to accessing reproductive health care in kwazulu-natal, South Africa: A qualitative study. *African Journal of Primary Health Care and Family Medicine, 11*(1), e1–e9.
Lydon, J., Carrington, K., Low, H., Miller, H., & Yazdy, M. (2015). Coming out of concrete closets: A report on Black & pink's national lgbtq prisoner survey. Black and pink; boston, ma, USA. Available at www.issuelab.org/resources/23129/23129.pdf. (Accessed 4 January 2022).
Maluleke, M. (2012). Culture, tradition, custom, law and gender equality. *PEL, 15*(1).
Mann, R. (2006). A comparative analysis of American, Australian, and Canadian prison policies concerning the treatment of transgender prisoners and a 'universal' recommendation to improve treatment. *Law and Sexuality, 15*, 92–133.
McCauley, E., Eckstrand, K., Desta, B., Bouvier, B., Brockmann, B., & Brinkley-Rubinstein, L. (2018). Exploring healthcare experiences for incarcerated individuals who identify as transgender in a Southern jail. *Transgender Health, 3*(1), 34–41.
Muntingh, L. (2016). Ten years after the Jali Commission: Assessing the state of South Africa's prisons. *SA Crime Quarterly, 58*, 35–44.
Murray, S. O., Roscoe, W., & Epprecht, M. (2021). *Boy-Wives and female Husbands: Studies in african Homosexualities.* State university of New York press. *Project MUSE*. https://doi.org/10.1353/book.83859. Available from . (Accessed 4 March 2022).
Nordic Africa Institute. (2017). *Homosexuality is still taboo in many African countries. 17 November 2017. Available from Homosexuality is still taboo in many African countries - the Nordic Africa Institute (uu.se).* . (Accessed 3 March 2022).
OUT. (2016). Hate crimes against transgender people in South Africa, 2016. Available at. https://out.org.za/wp-content/uploads/2020/10/Hate-Crimes-Against-Transgender-People-web.pdf. (Accessed 4 January 2022).
Penal Reform International. (2021). Global prison trends 2021- key messages, Facts and figures. PRI, london, UK. *Available at www.penalreform.org/global-prison-trends-2021/key-messages-facts-and-figures/*. (Accessed 4 January 2022).
Penal Reform International (PRI). (2020). *Global prison trends. PRI*. London: UK. Available at. https://www.penalreform.org/resource/global-prison-trends-2020/. (Accessed 4 January 2022).
Pikoli, Z. (2021). More laws are needed to protect rights of intersex and transgender people, say activists. Daily Maverick. Available from *www.dailymaverick.co.za/article/2021-11-08-more-laws-are-needed-to-protect-rights-of-intersex-and-transgender-people-say-activists/*. (Accessed 4 January 2022).
Rodgers, J., Asquith, N. L., & Dwyer, A. (2017). *Cisnormativity, criminalisation, vulnerability: Transgender People in prisons. University of tasmania, hobart*.
Routh, D., Abess, G., Makin, D., Stohr, M., Hemmens, C., & Yoo, J. (2017). Transgender Inmates in prisons: A Review of applicable Statutes and policies. *International Journal Of Offender Therapy And Comparative Criminology, 61*(6), 645–666.
Sanger, N. (2014). In *Young and transgender: Understanding the experiences of young transgender persons in educational institutions and the health sector in South Africa.* Available at http://genderdynamix.org.za/wpcontent/uploads/GDXtransyouth2015-web.pdfKwaZulu. (Accessed 4 January 2022).
Simopoulos, E. F., & Khin, E. K. (2014). Fundamental principles inherent in the comprehensive care of transgender inmates. *Journal of the American Academy of Psychiatry and the Law., 42*(1), 26–36.
Sloth-Nielsen, R. (2021a). September v. Subramoney and its implications for transgender persons in South Africa. *African Journal of International and Comparative Law, 29*(2), 325–337.
Sloth-Nielsen, R. (2021b). Failure to recognise a third gender option: Unfair discrimination or justified limitation? *Law Democracy and Development, 25*. https://doi.org/10.17159/2077-4907/2021/ldd.v25.4
Smith, A. (2014). Equality constitutional adjudication in South Africa. *African Human Rights Law Journal, 14*, 609–632.
South African Government. (2021). Minister Ronald Lamola: SA-EU dialogue on policy improvements for transgender & intersex persons conference. 4 november 2021. Available at https://www.gov.za/speeches/minister-ronald-lamola-sa-eu-dialogue-policy-improvements-transgender-intersex-persons.
Sowemimo, A. (2019). *How Britain's exported homophobia continues to drive health inequalities amongst LGBTQI communities. 15 April 2019. Available from How Britain's exported homophobia continues to drive health inequalities amongst LGBTQI communities - gal-dem.* . (Accessed 3 March 2022).
UN Human Rights Council. (2015). Discrimination and violence against individuals based on their sexual orientation and gender identity: Report of the Office of the united Nations high commissioner for human rights (4 may 2015), UN human rights Council Doc A/HRC/29/23. *Paras*, 34–36.4.
UN Human Rights Office of the High Commissioner. (2016). Targeted and tortured: UN experts urge greater protection for LGBTI people in detention. OHCHR, geneva. Available at. www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20165&LangID=E U. (Accessed 4 January 2022).
UNAIDS. (2014). *Transgender people in the GAP report. UNAIDS, geneva*.
United Nations Committee on the Elimination of Discrimination Against Women (UN CEDAW). (2017). *Concluding observations on the 7th periodic report of Paraguay: Convention on the elimination of all forms of discrimination against women (report No. CEDAW/C/PRY/CO/7). New york: UN, november 22, 2017*.
United Nations Development Programme (UNDP). (2020). *Mapping of good practices for the management of transgender prisoners*. Bangkok: UNDP. Available at www.th.undp.org/content/thailand/en/home/library/democratic_governance/mapping-of-good-practices-for-the-management-of-transgender-pris.html. (Accessed 4 January 2022).
United Nations Office on Drugs and Crime (UNODC). (2009). *Handbook on prisoners with special needs*. Vienna: UNODC. Available at www.unodc.org/pdf/criminal_justice/Handbook_on_Prisoners_with_Special_Needs.pdf. (Accessed 4 January 2022).
United Nations Office on Drugs and Crime (UNODC). (2016). *Handbook on the management of high risk prisoners*. Vienna: UNODC. Available at www.unodc.org/documents/justiceand-prison-reform/HB_on_High_Risk_Prisoners_Ebook_appr.pdf. (Accessed 4 January 2022).
United Nations (UN). (1955). *Standard minimum rules for the treatment of prisoners (30 august 1955)*. Geneva: United Nations.
United Nations (UN). (1982). *Principles of medical ethics relevant to the role of health personnel, particularly physicians, in the protection of prisoners and detainees against torture and other cruel, inhuman or degrading treatment or punishment. (18 September 1982) a/RES/37/194*. New York, NY: United Nations General Assembly.
United Nations (UN). (1988). *Body of principles for the protection of all persons under any form of detention or imprisonment: Resolution/adopted by the general assembly (9 december 1988)a/RES/43/173*. New York, NY: United Nations General Assembly.
United Nations (UN). (1991). *Basic principles for the treatment of prisoners: Resolution/adopted by the general assembly. (28 march 1991)a/RES/45/111,Para 9*. New York, NY: United Nations General Assembly.
United Nations (UN). (2010). United Nations rules for the treatment of women prisoners and non-custodial measures for women offenders (the bangkok rules). A/C.3/65/L.5. UN: New York, NY. Available at www.unodc.org/documents/hivaids/publications/Prisons_and_other_closed_settings/P_BangkokRules_2010_EN.pd. (Accessed 4 January 2022).
United Nations (UN). (2015). United Nations standard minimum rules for the treatment of prisoners (the nelson Mandela rules). A/RES/70/175" united Nations: New York. Available at www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/70/175&referer=/english/&Lang=E. (Accessed 4 January 2022).
United Nations (UN). (2016). *Standard minimum rules for the treatment of prisoners(Nelson Mandela rules)(8 january 2016)a/RES/70/175*. New York, NY: United Nations General Assembly.
United Nations (UN) Committee Against Torture (UN CAT). (2014). *Concluding observations on the combined 3rd to 5th periodic reports of the United States of America: Committee against torture (report No. CAT/C/USA/CO/3–5). Geneva: UN, december 19, 2014*.
United Nations (UN) Committee Against Torture (UN CAT). (2016). *Ninth annual report of the subcommittee on prevention of torture and other cruel, inhuman or degrading treatment or punishment (22 march 2016) CAT/C/57/4*.
United Nations (UN) Committee Against Torture (UN CAT). (2018). *Concluding observations on the 7th periodic report of Guatemala: Committee against torture (Report No. CAT/C/GTM/CO/7)*. Geneva: UN.
United Nations (UN) Special Rapporteur on Torture. (2016). Report of the special Rapporteur on torture. *A/HRC/31/57*, 34–35.
United Nations (UN) Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. (2015). *Eighth annual report of the subcommittee on prevention of torture and other cruel, inhuman or degrading treatment or punishment* (Report No. CAT/C/54/2). Geneva: UN, 5 July, 2016.

United Nations (UN). Special Rapporteur on Torture. (2011). *Interim report of the Special Rapporteur on Torture to the UN General Assembly A/66/268 (5 August 2011) para.19*.

Van Hout, M. C., & Crowley, D. (2021). The 'double punishment' of transgender prisoners: A human rights based commentary on placement and conditions of detention". *International Journal Of Prisoner Health*. https://doi.org/10.1108/IJPH-10-2020-0083 [Epub ahead of print.

Van Hout, M. C., Fleißner, S., & Stöver, H. (2021). *"# Me Too"*: Global progress in tackling continued custodial violence against women. The 10 year anniversary of the Bangkok Rules. *Trauma, Violence, & Abuse: A Review Journal*. https://doi.org/10.1177/15248380211036067 [Epub ahead of print].

Van Hout, M. C., Kewley, S., & Hillis, A. (2020). Contemporary transgender health experience and health situation in prisons: A scoping review of extent published literature (2000-2019). *International Journal of Transgender Health, 21*(3), 258–306.

Van Hout, M. C., & Wessels, J. (2021a). Human rights and the invisible nature of incarcerated women in post-apartheid South Africa: Prison system progress in adopting the Bangkok Rules. *International Journal of Prisoner Health*. https://doi.org/10.1108/IJPH-05-2021-0045 [Epub ahead of print].

Van Hout, M. C., & Wessels, J. (2021b). *"Ubuntu"* I am because we are: COVID-19 and the legal framework for addressing communicable disease in the South African prison system. *International Journal of Prisoner Health*. https://doi.org/10.1108/IJPH-05-2021-0046 [Epub ahead of print].

Van Hout, M. C., & Wessels, J. (2021c). Navigating the complexities of the mentally ill and mentally incapacitated in the criminal justice system in South Africa. *Forensic Science International: Mind and Law., 2*, p100068. https://doi.org/10.1016/j.fsiml.2021.100068 [Epub ahead of print].

World Health Organization (WHO). (2003). *WHO moscow declaration: Prison Health as Part of public health WHO, copenhagen*.

World Health Organization (WHO). (2014). *Prisons and health*. Copenhagen: World Health Organization (WHO) Regional Office for Europe. Available at https://www.euro.who.int/en/health-topics/health-determinants/prisons-and-health/publications/2014/prisons-and-health. (Accessed 4 January 2022).

World Health Organization (WHO). (2020). *Transgender health in the context of ICD-11*. Geneva: WHO. Available at http://www.euro.who.int/en/health-topics/health-determinants/gender/gender-definitions/whoeurope-brief-transgenderhealth-in-the-context-of-icd-11. (Accessed 4 January 2022).

World Medical Organisation (WMA). (2011). *Declaration of edinburgh on prison conditions and the spread of tuberculosis and other communicable diseases*. Geneva: WHO.

World Professional Association for Transgender Healthcare (WPATH). (2012). Standards of care for the health of transsexual, transgender, and gender-nonconforming people-7th ed. Available at www.wpath.org. (Accessed 4 January 2022).

Yogyakarta Principles. (2017). The Yogyakarta principles: Principles on the application of international human rights law in relation to sexual orientation and gender identity. Available at. https://yogyakartaprinciples.org/. (Accessed 4 January 2022).

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Using COVID-19 to Address Environmental Threats to Health and Leverage for Prison Reform in South Africa, Malawi and Zimbabwe

Marie Claire Van Hout

Abstract

Health rights of prisoners has long been a neglected political issue in Africa, where over one million people are detained, and almost half of whom are in pre-trial detention. African prisons constitute high-risk environments for communicable disease transmission. During the COVID-19 pandemic, the public health literature on African prison responses focused on preparedness as it related to testing capacity, quarantine practices and personal protective measures to mitigate disease spread. This article combines the right to health as narrowly defined by a prisoner's right to access non-discriminatory equivalent health care, with a broader focus on assessing normative standards of detention. A comparative legal realist assessment of prison operations in South Africa, Malawi and Zimbabwe during COVID-19 state disaster measures is presented, focusing on the environmental determinants of health (ventilation, minimum floor space, water, sanitation, hygiene and nutrition) in prisons. It reveals the inherent tensions in ensuring a balance between respecting the fundamental rights of people living and working in prisons, ensuring adequate environmental health standards and mitigating disease during public health emergencies. Despite insufficient government resourcing and inadequate coverage of COVID-19 responses, few severe outbreaks were reported. This could be due to lack of testing, reporting or other factors (asymptomatic infection, acquired immunity). Prison congestion and unrest however affected prisoners and staff fearful of hazardous living and occupational health conditions. COVID-19 as public health emergency amplifies the need to address systemic deficits in infrastructure, resourcing and efficiency of criminal justice systems. Policy level and pragmatic recommendations for enhanced human rights practice are outlined.

Keywords: Closed setting; degrading treatment; detention; disease; human rights; infection; prohibition of torture; standards

Background

The World Health Organization (WHO) declared COVID-19 (SARS-CoV-2 virus) as a pandemic on 11 March 2020 (WHO 2020a). The African Union Africa Centres for Disease Control and Prevention confirmed the first COVID-19 case in Egypt on 14 February 2020 (Africa News 2020; African Union CDC 2020), and the second in Algeria on 24 February 2020 (WHO-Africa 2020). At the time of writing (8 July 2022), over 12,373,000 reported infections and 256,000 fatalities have been reported in Africa (Reuters 2022). While predictions of the impact of COVID-19 in Africa were initially catastrophic (Badu et al. 2020; Nkengasong and Mankoula 2020), low case numbers and deaths can be partially

explained by the youthful population and limited testing strategies (Usuf and Roca 2021). The absence of systematic surveillance and seroprevalence of mild or asymptomatic SARS-CoV-2 infection and antibody positivity in Africa compounded the risk of under-reporting and underestimation of the true burden of COVID-19 (Chibwana et al. 2020; Cohen et al. 2021; Fryatt et al. 2021; Mandolo et al. 2021). There is however no doubt that health inequality and inequity in Africa were exacerbated during the pandemic, due in part to the high population density, low socio-economic status, and the chronic ill-health, social discrimination and social exclusion of particular marginalized social groups (Lucero-Prisno, Adebisi and Lin 2020; OECD 2021; UN 2020).

This article concerns the situation of prisoners in Africa during the COVID-19 pandemic. Historically, their health rights have been a neglected political issue due to continued state prioritization of prison security, and the neglect of maintenance of basic infrastructure and minimum standards of care (space, air, water, food, medical assistance) in many African states (ACoHPR 2012; O'Grady 2011; Todrys and Amon 2012). There is still reluctance to reform prisons and resource the upgrading of post-colonial facilities, despite the immense threat to public health presented by poorly managed prison systems during COVID-19 (Muntingh 2020; Van Hout 2020a; 2020b). Academic prison health research, and routine health and disease surveillance in prisons also remains underdeveloped in many African states further compounding the lack of attention to the situation of those deprived of their liberty (Ako et al. 2020; Mhlanga-Gunda et al. 2020a).

Fifty-three African states account for 1.1 million prisoners (outside of the unknown figures from Somalia and Eritrea), where on average 42 per cent are held in pre-trial detention (World Prison Brief Africa 2022). Prisons in Africa have long been identified as high-risk environments for communicable disease outbreaks (Telisinghe et al. 2016; Todrys et al. 2011; Rubinstein et al. 2016). Prison communities consisting of staff, pre-trial detainees and sentenced prisoners are particularly vulnerable to rapid COVID-19 disease transmission (Van Hout 2020a; 2020b). Co-morbidity and chronic ill-health of prisoners, high turnover and density of the prison population, severe congestion in cells and inadequate standards of nutrition, ventilation, and water, sanitation and hygiene (WASH) compound the threat that COVID-19 poses in Africa (Amnesty International 2020; Amon 2020; Muntingh 2020).

The African Commission on Human and Peoples' Rights (ACoHPR) issued several declarations in March and April 2020 cognisant of the COVID-19 threat to African prison systems. All African states were recommended to develop and operationalize decongestion schemes (early release/parole, amnesties, presidential pardons, alternative community sentencing), and initiate health and security measures to mitigate COVID-19 (ACoHPR 2020a; 2020b). Actions were aligned to the UN High Commissioner for Human Rights (OCHCR) global call on states to instigate prison decongestion measures as a critical component of the COVID-19 response on 25 March 2020 (OHCHR 2020). Global prison decongestion measures during COVID-19 were additionally supported by the UN Subcommittee on Prevention of Torture (SPT) (UN SPT 2020). Alternatives to custodial sentencing in particular were broadly advocated by the African Centre for the Constructive Resolution of Disputes (ACCORD) (ACCORD 2020). By 26 May 2020, prisons in Algeria, Cameroon, Sierra Leone, Ghana, Guinea, Egypt, Democratic Republic of Congo, Morocco, South Africa and Kenya reported detection of COVID-19 cases among staff and/or prisoners (Prison Insider, 2020). Many African states did not make their prison system COVID-19 detection data publicly available, and there is little transparency to date on the operationalization of prisoner release schemes (actual numbers and types of prisoners released) across the continent (DLA Piper 2020; Muntingh 2020; Van Hout et al. 2022a: 2022b).

The limited capacity to adequately respond to the threat of COVID-19 in African prisons was highlighted in open letters by human rights organizations to the Southern Africa Development Community (SADC) (SADC 2020). Efforts to implement effective COVID-19 prison responses in Africa were generally compromised by lack of adequate government

resourcing of a health budget in prison system operations (generally held by the Ministry of Justice as opposed to the Ministry of Health), weak judicial systems hindered by modalities of policing and existing colonial-era laws (for example vagrancy laws), and dated physical infrastructures of prisons (Amon 2020; Muntingh 2020; Nweze et al. 2020). There has been widespread media and official reporting of human rights violations, riots, protests and strikes by prisoners and prison staff in Angola, South Africa, Ethiopia, Liberia, Democratic Republic of Congo, Guinea, Zimbabwe, Uganda, Malawi and Sierra Leone. Unrest during COVID-19 emergency measures was generally due to hazardous occupational and living conditions, continued intake and mixing of pre-trial detainees with sentenced prisoners, water supply crisis, cell congestion and lockdowns, insufficient nutrition, and general lack of COVID-19 personal protective equipment (PPE) for staff and prisoners (Prison Insider 2020; Saalim et al. 2021). Visitation restrictions by external visitors (lawyers, medical professionals, family) and independent monitoring bodies including in African states party to the Optional Protocol to the Convention against Torture (OP-CAT) (UN 2003) during disaster/emergency measures further compounded unrest (Muntingh 2020; Van Hout and Wessels 2021a).

Using legal realism with an environmental health lens to assess African prison system responses to Covid-19

During the COVID-19 pandemic, the public health literature on African prison responses focused on preparedness as it related to testing capacity, quarantine practices and personal protective measures to mitigate disease spread. Multi-stakeholder situation assessments of prison health responses (including those led by the author, a public health specialist) in these countries are reported elsewhere (Jumbe et al. 2022; Mhlanga-Gunda et al. 2022; Van Hout and Wessels 2021a). This article combines the right to health as narrowly defined by a prisoner's right to access non-discriminatory equivalent health care, with a broader focus on assessing normative standards of detention. This article presents a comparative legal realist assessment of prison situation and operations in three African states of varying economic development, namely South Africa classed as upper middle income country, Zimbabwe as lower middle income, and Malawi as least developed (OECD 2022).

The Sustainable Development Agenda 2030 (UN 2015) underscores how a healthy environment is vital to 'ensure healthy lives and promote well-being for all at all ages' (SDG 3). This article assesses the right to health as narrowly defined by a prisoner's right to accessible, non-discriminatory and equivalent health care, in combination with a broader focus on assessing normative standards of care pertaining to the environmental determinants of health in prison (ventilation, minimum floor space, water, sanitation, hygiene and nutrition) during COVID-19 state disaster measures. It adopts a prison community approach, inclusive of those living and working in prisons.

Legal realism as naturalistic approach to law (Leiter 2015; Shaffer 2015; Wenander 2021) was chosen to underpin this assessment, where the emphasis was on the law as it actually exists in the practical sense and derived from real world observations within prison environments regarding prison contextual and environmental factors, health and welfare of prison communities, public health/prison policies in each country and the law itself. Illustrating the real world space of incarceration during COVID-19 restrictions in each of the selected countries (South Africa, Zimbabwe and Malawi) was intended to exemplify the law in action and related challenges in upholding the human rights of prison communities, while implementing a public health disease control response during health emergency and state declaration of disaster. The socio-legal approach yields a pragmatic and comparative focus of the social and lived experience of COVID-19 in prisons, and how the law and the law's purposes form an integral part of that experience from the perspectives of the prison community, legal representatives and families of prisoners and staff. Ultimately assessing

the law in action in the selected countries, each with distinct prison system operations and challenges using a legal realist environmental health lens sought to generate information used to inform pragmatic considerations for domestic system operations and policy reforms, and to guide future human rights based policy and practice within the African criminal justice and penal continuum.

The structure is as follows. A section on right to health, normative standards of care and the prison environment as provided for in terms of international and African regional human rights treaties, the non-binding UN normative standards of care in prisons, relevant African Court jurisprudence, and contemporary COVID-19 technical guidance issued by UN agencies is presented. These were not limited to prohibition of torture and discrimination of prisoners but encompassed all deemed relevant to environmental conditions of detention and disease control during public health emergencies. A brief contextual section provides a table and extant detail on each country in terms of prison profiles, COVID-19 promulgations, treaty ratification status and relevant case law. The generated legal realist account on South Africa, Malawi and Zimbabwe is subsequently presented, and based on academic publications, human rights, criminal justice and penal resources, government and non-government reports, and investigative reporting by the media in timeframes following first case notification in each country's prison system (April 2020 for South Africa, and July 2020 for Malawi and Zimbabwe).

Collectively they were carefully examined and compared to assess the level to which the rule of law was respected during the COVID-19 disaster measures, and how this interplayed with the environmental determinants of health pertinent to mitigation of COVID-19 and other communicable diseases and development of chronic ill-health in prisons. Themes subsequently centre on standards of WASH, humane treatment of prisoners, space to quarantine and to physically distance as per public health guidance, safe working conditions, supply of PPE, provision and quality of nutrition, and access to the outside world for prison monitoring inspections, legal and family supports. The developed realist account is illustrative of the formal tensions between pragmatism and formalism in legal and policy based measures to mitigate COVID-19 in African detention spaces. It illuminates the indeterminate nature of law and the instrumental nature of the law in serving social ends (Leiter 2015; Shaffer 2015; Wenander 2021). It is further cognisant of the inherent complexities in ensuring the appropriate balance between environmental and occupational health standards, disease mitigation during public health emergency, and the risk of inhumane or degrading treatment of those living in prison during state disaster measures. It compares and contrasts each countries' operationalization of COVID-19 standard operating procedures and respect for the rule of law, standards of health and environmental conditions in prisons, and impact of COVID-19 on prison dynamics and environments.

Human rights and right to health in detention environments

States have positive obligations under a range of international treaties to uphold the human and health rights of prison communities, including the mitigation of and treatment of disease (Lines 2008; Rubenstein et al. 2016). These include the World Health Organization (WHO) Constitution Article 2 (UN 1947), Universal Declaration of Human Rights Article 25 (UN 1948), International Covenant on Economic, Social and Cultural Rights (ICESR) Article 12(1)(2)) (UN 1966a) and the UN Committee on Economic, Social and Cultural Rights (CESCR) General Comment No. 14 (UN CESCR 2000). CESRC General Comment 14 provides that states are (at the very least) required to meet a threshold of a core minimum of social and economic rights, including the right to health, and that prisoners are entitled to the same core minimum health rights as other citizens. Article 12(1) of the ICESR is particularly relevant to standards of detention and the impact of environmental determinants of health in prisons and disease. It obliges states to take necessary measures for 'the

prevention, treatment and control of epidemic, endemic, occupational and other diseases' and 'the creation of conditions, which would assure to all medical service and medical attention in the event of sickness'. Article 12 (2) specifically outlines the necessary steps encompassing disease detection, prevention, treatment and control; and the human rights assurances regarding prisoner access to all required medical support and care during illness.

The International Covenant on Civil and Political Rights (ICCPR) (UN 1966b) further builds on the ICESR by specifically providing for the right to life and right to humane treatment of prisoners, thereby indirectly including the aspects of environmental determinants of health within standards of detention and care (Articles 2, 6, 7, 10 and 26) (OHCHR 2012). The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) (UN 1984) and OP-CAT (UN 2003) create further binding obligations on states not to ill-treat those deprived of their liberty. The rights of women and children in detention settings are further included in the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) (UN 1979) and the Convention on the Rights of the Child (CRC) (UN 1989).

A range of non-binding UN norms and minimum standards for the treatment of prisoners (UN 1982; 1988; 1991) and WHO and medical declarations (WHO 2003; World Medical Association 2011) are relevant to prisoner rights to humane treatment and basic care, protection against conditions conducive to transmission of disease and access to healthcare. The UN Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules) (UN 2016) are most well-known and cover states' responsibility for the health of prisoners. The Mandela Rules are further supported by the non-discrimination provisions contained in the 2010 United Nations Rules for the treatment of women offenders (Bangkok Rules) (UN 2010). Mandela Rule 1 is perhaps most applicable to this realist assessment and states that 'All prisoners shall be treated with the respect due to their inherent dignity and value as human beings and no prisoner shall be subjected to, and all prisoners shall be protected from, torture and other cruel, inhuman or degrading treatment or punishment, for which no circumstances whatsoever may be invoked as a justification'. Rule 13 states: 'All accommodation shall meet all requirements of health, due regard being paid to climatic conditions and particularly to cubic content of air, minimum floor space, lighting, heating and ventilation'. With regard to the environmental health aspects of prison settings, the Mandela Rules outline the state obligation to provide prisoners with sufficient standards of care including those crucial to disease mitigation. These include recognition of infrastructure deficits, biohazards and related vulnerabilities to ill-health; and uphold that regular prison health inspections should occur pertaining to the adequacy of WASH, food and the physical conditions of the prison (Rules 24, 25, 27, 30, 31, 32, 35).

The UN Human Rights Committee (UN HRC) concluding observations reflect state obligations to 'take action to safeguard the health of prisoners', and further provides that it is 'incumbent on States to ensure the right of life of detainees, and not incumbent on the latter to request protection' with explicit reference to proactive measures for communicable disease control. The right to adequate living space sufficient to safeguard health constitutes the pre-conditions of health, with the environmental health determinants (overcrowding, WASH, ventilation, food security) recognized by the UN HRC as potentially subjecting prisoners to disease, ill-health and exacerbating the risk of contagion. Jurisprudence at the UN HRC level additionally refers to state failure to instigate adequate disease mitigation measures in prisons (for example airborne precautions in tuberculosis (TB) control), and how negligence of the state system places a prisoner's right to health in serious jeopardy (violating ICCPR Articles 6, 7, 9 and 10) and reflects inhuman or degrading conditions in detention. The UN HRC (2018) in its General Comment No 36 has stated that 'States parties may not rely on lack of financial resources or other logistical problems to reduce this responsibility'. Of crucial importance during state declaration of an epidemiological emergency (as in COVID-19) is that the UN Principles of Medical Ethics relevant to prisons (UN

1982) contain a non-derogation clause during state declaration of emergency (Principles 1, 6).

In Africa, the promotion and protection of the human rights of prisoners are provided for in the legally binding treaty, the African Charter on Human and Peoples' Rights (ACHPR) (OAU 1981). Article 16 recognizes that state obligation regarding the right to health is heightened when an individual is in state custody, with their integrity and well-being wholly dependent on the state; and Article 5 equally provides for the right to dignity and freedom from cruel, inhumane or degrading treatment. The Robben Island Guidelines (ACoHPR 2008) and the Kampala declaration on prison conditions in Africa further protect the rights of prisoners by stating; 'prisoners should have living conditions that are compatible with human dignity, … retain all rights that are not expressly taken away by the fact that they are in detention and the detrimental effects of prisons should be minimised so that prisoners do not lose their self-respect and sense of personal responsibility'. While states have discretion in defining adequate levels of humane treatment of prisoners, domestic constitutions also provide for fair trail rights, and general protections against torture, inhumane and other ill treatment, and specific health related rights (Lines 2008).

Despite these rights obligations, the Special Rapporteur on Prisons, Conditions of Detention and Policing in Africa has reported on the intense difficulties for African states to provide minimum standards of care in its prisons (ACoHPR 2012). The Committee for the Prevention of Torture in Africa is concerned with the state of prisons in Africa. Scoping reviews and human rights assessments of African prisons document little improvement in the conditions of detention in the past 20 years and underscore the additional vulnerabilities of certain groups of prisoners (women, children, juveniles, the mentally ill and mentally incapacitated, and the disabled) in the system (Agomoh et al. 2008; Van Hout and Mhlanga-Gunda 2018; 2019a; 2019b; Van Hout and Wessels 2021c). In terms of African Court on Human and Peoples' Rights jurisprudence, several African states (Nigeria, Malawi, Mauritania, Zaire, Burkina Faso, Tanzania, Rwanda) have been found in violation of the Charter's right to health as it relates to conditions of detention pertinent to a prisoners right to life, and prohibition of cruel, inhumane or degrading treatment concerning neglect, abuse and prison environments as conducive to spread of diseases (human immunodeficiency virus (HIV) and TB) and chronic ill-health (lack of safe and sufficient space, food, sanitation, hygiene and ventilation). See Table 1 for relevant cases.

Table 1. African court jurisprudence relevant to prison standards and the rights of prisoners

Constitutional Rights Project and Civil Liberties Organisation v. Nigeria (1999) ACHPR Comm Nos 143/95, 150/96 para 5
Krishna Achuthan (On behalf of Aleke Banda), Amnesty International (On behalf of Orton and Vera Chirwa) v.Malawi (1994) ACHPR Comm Nos 64/92, 68/92, 78/92 para 7.
International PEN and Others v. Nigeria (1998) ACHPR Nos 137/94, 139/94, 154/86, 161/97 para 112
Malawi African Association and Others v. Mauritania (2000) ACHPR Nos 54/91, 61/91, 98/93, 164/97 a, 196/ 97 and 210/98 para 122
Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine de l'Homme, Les Te´moins de Jehovah v. Zaire (1996) ACHPR Comm Nos 25/89, 47/90, 56/ 91, 100/93 para 47
Konaté v Burkina Faso (reparations) (2016) 1AfCLR346
Abubakari v Tanzania (merits) (2016) 1AfCLR599
Guehi v Tanzania (merits and reparations) (2018) 2AfCLR477;
Lohé lssa Konaté v Burkina Faso (provisional measures) (2013) 1AfCLR310
Mugesera v Rwanda (provisional measures) (2017) 2AfCLR 149

COVID-19 normative guidance

Finally and specific to COVID-19 and disease control, UN agencies and leading human rights organizations have promulgated technical guidance on COVID-19 responses and human rights assurances in prisons (WHO 2020b; 2020c; UNODC 2020a; 2020b; Penal Reform International (PRI) 2020). These statements mandate that conditions of detention should not contribute to the development, worsening or transmission of COVID-19 and other diseases in circulation, and that COVID-19 mitigation measures may not result in inhumane or degrading treatment of prisoners. All disease control measures should be implemented in prisons to counter the risks of transmission and health harms of all in the prison community. Such measures must never result in inhumane or degrading treatment of prisoners (for example unreasonable solitary confinement, the loss of rights to access legal representation and to communicate with family). Restrictions may only be implemented on grounds of medical necessity and in compliance with the human rights principles of legality, proportionality, oversight, time-limitation, and non-discrimination. Independent prison monitoring bodies' must be guaranteed access to prisons by the state. The ACoHPR press releases were largely in alignment with these guiding principles (ACoHPR 2020a; 2020b).

Country prison contexts: South Africa, Malawi and Zimbabwe

Context with regard to COVID-19 data, prison system demographics and state promulgations during COVID-19 disaster measures, and the relevant domestic jurisprudence base pertaining to violation of prisoner rights regarding standards of detention and exposure to communicable disease in South Africa, Malawi and Zimbabwe are presented in Tables 2–4.

In South Africa, despite the prison population being at its lowest level in decades, prisons continue to operate over capacity (140 per cent in 2019; 120 per cent in March 2021) (DCS 2019; 2020a; World Prison Brief South Africa 2022). The South African bail system, its mandatory minimum sentencing regime and substantial pre-trial detention rates contribute to prison congestion (Cameron 2020a; de Ruiter and Hardy 2018; Gordin and Cloete 2013). There have been calls for increased use of parole and medical parole to relieve overcrowding (Maseko 2017; Mujuzi 2011). Minimum standards of care relating to space, WASH, bedding, toilet paper, food and access to healthcare even in recent years are not sufficiently implemented (Muntingh 2016; Nagisa-Keehn and Nevin 2018; Van Hout and Wessels 2021b). Dated colonial infrastructure and poor environmental conditions conducive to the spread of disease (HIV, TB, leptospirosis and others) challenge the South African authorities (Dissel 2016; Nevin and Nagisa-Keehn 2018). The White Paper on Corrections in South Africa (DCS 2004) and other various policies, regulations and statutes containing provisions around minimum standards of care, conditions and disease control measures inform prison system protocols (DCS 2011;2014; South African Department of Health 2013). The most recent inspection by the ACoHPR Special Rapporteur on Prisons was in 2004 (ACoHPR 2012).

In Malawi, the Prison Inspectorate reported between 2018 and 2019 that the system had reached 260 per cent capacity, and documented dire conditions of detention (Malawi Prison Inspectorate 2019). The Malawi Law Commission (2018) has documented failures of the prison system to adhere to provisions contained in the Prisons Act, and described prison overcrowding as 'leading to unacceptable and dehumanizing levels of congestion'. In 2020 overcapacity was 207 per cent (World Prison Brief Malawi 2022). Prison conditions remain poor due to outdated colonial infrastructure, understaffing and severe congestion,[1] with prisoners suffering a range of human rights violations (Chilemba 2016; Gauld 2021).

1 '…packing inmates in an overcrowded cell with poor ventilation with little or no room to sit or lie down with dignity, but to be arranged like sardines violates basic human dignity and amounts to inhuman and degrading treatment' (*Gable Masangano vs The Attorney General, Minister of Home Affairs and Chief Commissioner of Prisons* (2009) MLR 171).

Table 2. South Africa

COVID-19[1]: domestic and prison system reported data	Prison profile	State directives and policies	Treaty ratification	Relevant landmark judgements regarding the rights of prisoners to humane treatment, adequate accommodation, nutrition, medical care and protection from disease
Country wide				
South Africa Upper Middle Income Country (per capita GNI $4 096-$12 695 in 2020)				
3,996,904 COVID-19 cases; 101,868 deaths; 31.9% vaccinated; *Prison System* 6 April 2020: First notification. 5 August 2021: 15,052 cases; 9342 officials/5710 prisoners; 13882 recoveries; 311 deaths: 221 officials/90 prisoners). 68,500 prisoners and 12,000 officials vaccinated.[2]	238 prisons; 140,948 prisoners 127.2% occupancylevel[3]	15 March 2020: declared a **national state of disaster.** State and Department of Correctional Services promulgation in issuance with the Disaster Management Act of 2002 (27(2)). (18 March 2020; 9 April 2020; 22 June 2020; 4 September 2020; 10 November 2020; and 28 January 2021)[4].	ICCPR; CCPR OP2; CAT; CAT OP; ICESCR; CRC; CEDAW **Accepts:** Individual complaints under the CCPR-OPT1 (Articles 2, 10 and 26), CEDAW-OP, CAT Article 22. **Accepts:** Inquiry procedures under CAT Article 20 CEDAW-OP Articles 8–9. **Does not accept:** individual complaints/ inquiry mechanisms under CRC-OP Article 13.	*S v Makwanyane and Another* (1995) ZACC3 at 151 (1995) (3)S.A 391.[5] *Van Biljon and Others v Minister of Correctional Services and Others* (1997) (4)SA441(C) and *B and Others v. Minister of Correctional Services and Others* (1997) (6) BCLR789(C).[6] *Moses vs Minister of Safety & Security* (2000) (3) SA 106 (C)[7] *Stanfield v Minister of Correctional Services* (2003) ZAWCHC 46, *Du Plooy v. Minister of Correctional Services* (2004) 3AllSA613(T) and *Mazibuko v. Minister of Correctional Services*(2007) Case No: 38151/05. JOL18957(T)[8] *EN and Others v Government of RSA and Others* (2006) 006(6)SA575(D); (2007) (1)BCLR 84.SAHC Durban (2006)[9] *Huang & Others v The Head of Grootvlie Prison and Another* (2008) JOL 21089 (0)[10] *Lee v Minister of Correctional Services* (2012) ZACC30[11] *McCallum v. South Africa* (2010) UN Doc CCPR/ C/100/D/1818/2008 (2 November 2010)[12] *S v Magida* (2005) (2)SACR591(SCA)[13] *Sonke Gender Justice v Government of South Africa* 24087/15(unreported) WC HC[14] *Sonke Gender Justice NPC v President of the Republic of South Africa and Others* (2020) ZACC para 38–40[15]

Table 2. Continued

COVID-19[1]: domestic and prison system reported data	Prison profile	State directives and policies	Treaty ratification	Relevant landmark judgements regarding the rights of prisoners to humane treatment, adequate accommodation, nutrition, medical care and protection from disease

[1] See Johns Hopkins University of Medicine. 2022. South Africa—COVID-19 Overview—Johns Hopkins (https://coronavirus.jhu.edu/region/south-africa) (Referenced 8 July 2022).
[2] See McCann, N (2021).
[3] World Prison Brief: South Africa (2022) (Referenced 31 March 2021).
[4] See Department of Co-operative Governance and Traditional Affairs CoGTA (2020); Department of Justice and Correctional Services (2020a, b, c, d, e).
[5] Abolishment of capital punishment.
[6] Prisoners have fundamental rights to adequate accommodation, nutrition and medical care. The DCS bears a greater duty of care to people living with HIV in prison.
[7] State duty to take reasonable steps to safeguard a detained person's interests and protect against assault.
[8] Denial of medical parole for terminally ill prisoners (including those living with HIV) violates the right to access of health care and right to detention conditions consistent with human dignity.
[9] Prisoners living with HIV who qualified for ART according to national policy be treated accordingly (a wider group of people than previously).
[10] Prisoners are entitled to have special dietary requirements based on their religion accommodated under the Constitution.
[11] Constitutional obligations to provide humane conditions of detention respecting human dignity and the provision of adequate medical treatment were violated (severe congestion, and complete lack of TB screening and disease management).
[12] The UN Human Rights Committee ruled that South Africa had violated Articles 10(1), and 7 ICCPR in conjunction with Article 2(3) due to prison official neglect and denial of access to medical care.
[13] Prisoner's ill health, health vulnerability and impact of prison conditions regarding health risk must be recognized at the sentencing stage.
[14] Prisoners' constitutional rights to health were violated due to inhumane and severely congested detention conditions which were inconsistent with human dignity.
[15] The Judiciary Inspectorate of Correctional Services (JICS) was deemed neither financially, nor operationally independent when investigating conditions of detention and human rights abuses.

Table 3. Malawi

COVID-19: domestic and prison system reported data[1]	Prison profile	State directives and policies	Treaty ratification	Relevant landmark judgements regarding the rights of prisoners to humane treatment, adequate accommodation, nutrition, medical care and protection from disease.
Country wide Malawi Least Developed Country (LDC)				
86,658 COVID-19 cases; 2,646 COVID-19 deaths; 8.31% vaccinated *Prison System* 14 July 2020: First notification. There is no detail publicly available regarding COVID-19 positivity rates or vaccination coverage in prison.	30 prisons 14,500; prisoners 207.1% occupancy level[2]	30 March 2020: declared a **national state of disaster.** There was a series of standing orders for the Malawi Prisons Service on the Prevention and Management of COVID-19, in pursuance of Section 13 of the Prison Act 1956.	ICESCR; ICCPR; CAT; CRC; CEDAW It has not ratified the CAT-Optional Protocol. **Accepts:** individual complaints procedures under ICCPR-OP1 and CEDAW-OP; and **accepts:** the inquiry procedure for CAT, *Article* 20. **Does not accept:** individual complaints procedures under ISCESCR -OP the Optional Protocol to the ICESCR or under the CAT, Article 22.	*Gable Masangano vs* The *Attorney General, Minister of Home Affairs and Chief. Commissioner of Prisons* (2009) MLR 171[3]

[1] See Johns Hopkins University of Medicine. 2022. Malawi - COVID-19 Overview - Johns Hopkins (https://coronavirus.jhu.edu/region/malawi) (Referenced 8 July 2022).
[2] World Prison Brief: Malawi (2022). (Reference 31 December 2020).
[3] Prison overcrowding, lack of sanitation, hygiene and ventilation in prisons violated the Malawi Constitution and international and regional African human rights norms.

Table 4. Zimbabwe

COVID-19: domestic and prison system reported data[1]	Prison profile	State directives and policies	Treaty ratification	Relevant landmark judgements regarding the rights of prisoners to humane treatment, adequate accommodation, nutrition, medical care and protection from disease.
Country wide Zimbabwe Lower Middle Income Country and Territories (per capita GNI $1 046-$4 095 in 2020)				
255,805 COVID-19 cases; 5560 deaths; 30.78% vaccinated; *Prison System* 21 July 2020: First notification. There is no detail publicly available regarding COVID-19 positivity rates or vaccination coverage in prison.	46 prisons; 20, 407 prisoners; 120% occupancy level[2]	30 March 2020: declared a **national state of disaster.** 30 March 2020: The Civil Protection (Declaration of State of Disaster: Rural and Urban Areas of Zimbabwe) (COVID-19) Notice, followed by seventeen COVID-19 related statutory instruments[3]	ICCPR; ICESCR; CEDAW; CRC Has **not** ratified the CAT or the CAT-Optional Protocol. **Does not accept:** individual complaints procedures or inquiry procedures under these treaties.	*Muzanenhamo v Officer in Charge CID (Law & Order) & Ors* (CCZ 287 of 2012) (2013) ZWCC 3 (13 November 2013)[4] *Fikilini v Attorney-General* (1990) (1) ZLR 105, 113 A-H (SC); *Re Mlambo* (1991) (2) ZLR 339 (S) at 344B-C; *Re Masendeke* (1992) (2) ZLR 5 (S); *S v Mukwakwa* (1997) (2) ZLR 298 (H); and *S v Kusangaya* (1998) (2) ZLR 10 (H)[5] *Kanengoni v Minister of Justice, Legal & Parliamentary Affairs & 2 Ors* (HH 156 of 2018, HC 544 of 2015) (2018) ZWHHC 156[6]

[1] See Johns Hopkins University of Medicine. 2022. Zimbabwe - COVID-19 Overview - Johns Hopkins (https://coronavirus.jhu.edu/region/zimbabwe) (Referenced 8 July 2022).
[2] World Prison Brief: Zimbabwe (2022). (Reference 31 March 2021).
[3] See Lawyers for Lawyers (2020). Several regulations enabled by Section 68 (1) of the Public Health Act were enacted, which included the Statutory Instrument 77 of 2020 titled Public Health (COVID-19 Prevention, Containment and Treatment) (National Lockdown) Order; the 2020 Public Health (COVID-19 Prevention, Containment and Treatment) (National Lockdown) (No. 2) (Amendment) Order, 2020 (No. 7) and the Public Health (COVID-19 Prevention, Containment and Treatment) (Amendment) Regulations, 2020 (No. 8).
[4] Deplorable treatment of prisoners in terms of denial of medical treatment (ART), stripping of prisoner and placing in solitary confinement, with denial of access to blankets and unhygienic ablution facilities.
[5] See Zimbabwe Human Rights Forum. 2018. Lengthy pre-trial detention in Zimbabwe violates the standards set out in the Constitution (for example sections 50(2)(b) and 50(6)) and section 32(2) of the Criminal Procedure and Evidence Act (Chapter 9:07), and a range of international and regional human rights instruments.
[6] There is a duty on the part of the state to respect, protect, promote and fulfil the rights and freedoms set out in the Constitution. That includes access of prisoners to proper medical care to prevent unwarranted deaths.

A substantial lack of sanitation, ventilation and food security, and high rates of exposure to custodial violence is documented (Gadama et al. 2020; Malawi Inspectorate of Prisons 2019; 2021; USSD 2020a). Chronic ill-health of prisoners and the spread of communicable diseases (HIV, TB, scabies, Hepatitis C and sexually transmitted infections) in Malawian prisons is reported to be directly caused by environmental conditions (Banda et al. 2009; Chirwa et al. 2018; Gondwe et al. 2021; Zachariah et al. 2008). In 2020, in a report submitted to the UN CAT, it was documented that 414 people had died in Malawi prisons between January 2014 and September 2018, with no cause of death provided (UN Malawi 2020). Non-governmental organizations play a significant role in supporting and backfilling government HIV and basic needs response efforts in prisons (Gondwe et al. 2021).

In Zimbabwe, a similar lack of government resourcing and systemic poor standards of detention are reported, where prisons were documented to be 120 per over-capacity in March 2021 (World Prison Brief Zimbabwe 2022). Grave conditions of detention centre on a severe lack of safe space and adequate ventilation, water shortages and power outages and a lack of sufficient supply of food, medicines, clothing and bedding (Mhlanga-Gunda et al. 2020b; Mukwenha et al. 2021; USSD 2020b; Zimbabwe Human Rights Forum 2018). Dependence on family and NGO/faith based organizations to bring clean water, food and medicines to prisons in Zimbabwe is well documented (Prison Insider 2020). The (only) ACoHPR Special Rapporteur report on prisons in Zimbabwe reported in 1997 on poor conditions and significant overcrowding at the time (ACoHPR, 1997).

The interplay of COVID-19 mitigation measures and environment determinants of health in South Africa, Malawi and Zimbabwean prisons

The three prison systems operated at varying degrees of government resourcing of the COVID-19 response, prison capacity and congestion, and ability to adhere to the UN minimum standards of care during state disaster measures. Promulgation of COVID-19 strategic action plans were comprehensive and aligned to international and African guidance. Few severe COVID-19 outbreaks were reported. This may have been due to lack of testing, reporting or other factors (asymptomatic infection, acquired immunity).

Despite best efforts, the operationalization and coverage of COVID-19 action plans in prisons were compromised by lack of government prioritization of prison health in domestic health budgeting and reliance on prison systems largely funded by the Ministries of Justice to support their own prison health response, insufficient resourcing and extensive mismanagement of COVID-19 funds in the three countries. This led in many instances to systemic deficits in basic standards of care of prisoners during COVID-19, poor coverage of disease mitigation measures, inability to provide sufficient PPE, testing and medical isolation capacity, and ad hoc reactive approaches to (potential) COVID-19 clusters (Jumbe et al. 2022; Kateta 2021; Mhlanga-Gunda et al. 2022; Van Hout and Wessels 2021a). The legacies of post-colonial criminal justice systems and dated infrastructures in South Africa, Malawi and Zimbabwe were aggravated by COVID-19 disaster measures. Environmental determinants of health crucial to the mitigation of disease within prisons were compromised to varying degrees in each country during state disaster measures, particularly as they related to hygiene, sanitation, access to fresh air, nutrition provisions for prisoners and sufficient safe space.

Prison congestion and decongestion measures

The continued flow of human traffic into and out of prisons in South Africa, Malawi and Zimbabwe exacerbated all efforts to mitigate disease via disinfection, sanitation and PPE measures. Arrests and detention for breaches of COVID-19 restrictions, continued committals despite state prison release schemes, the mixing of pre-trial and sentenced prisoners,

lengthy pre-trial and pre-deportation detention periods was documented in all three countries (Van Hout and Wessels 2021a; Van Hout et al. 2022a; Van Hout et al. 2022b). Standards of environmental health in so doing were compromised despite the best efforts of prison officials and prison medical staff. Of crucial importance in all three countries was how prison congestion (particularly during mealtimes and at night during cell lockdowns) exacerbated attempts by officials to achieve basic standards of disinfection and disease control (for example air flow, ablution, sanitization, PPE). Screening and systems to medically isolate new committals were insufficiently implemented due to haphazard screening, delays in COVID-19 test reporting and the lack of accommodation capacity to ensure medical quarantine of new committals, and those who were sick (Jumbe et al. 2022; Mhlanga-Gunda et al. 2022; Van Hout and Wessels 2021a).

In South Africa a letter in April 2020 by the Inspecting Judge of Correctional Services with civil society urged government to consider and implement the early release of ill and elderly individuals (Cameron 2020b). The early release scheme to cover nearly 19,000 individuals (12 per cent of the prison population) was authorized in early May 2020, and included individuals convicted of minor offences, deemed low risk and those within five years of release (but excluding those convicted of violent crimes, gender based violence, child abuse, sexual offences, and murder) (JICS 2020). It was however countered by continued committals with over 230,000 new arrests during COVID-19 restrictions, and the use of South African prison facilities as pre-deportation centres (incurring lengthy arbitrary immigration detention) during border closures (Gasa 2020; Geer and Guara 2020). Hazardous levels of prison congestion were documented in June 2020, with the Minister of Justice and Correctional Services stating: 'We are confronted with a glaring impossibility of maintaining social distancing in our centres due to overcrowding'. Letters from prisoners resulted in a prison inspection at the Sun City prison, where inspectors documented deplorable environmental health conditions fuelled by severe overcrowding in cells with prisoners sleeping on floors (Prison Insider 2020). The Judiciary Inspectorate of Correctional Services (JICS) Ministers Briefing in June documented that 35.5 per cent of the total prison population was awaiting trial (JICS 2020). A series of High Court challenges referred to prison release requests of the chronically ill and those fearful of contracting COVID-19 (Ground Up 2020; Venter 2020). Despite the South African government adding 2,650 additional beds to the DCS, and the release of 7,000 prisoners, by the end of July almost 30,000 prisoners still did not have a bed space (Felix 2020). The promise of 19,000 prison releases was not achieved and there was little transparency on exactly who was released at the time (Dube 2020; Van Hout and Wessels 2021a).

Zimbabwe also proposed to enact a series of prison decongestion schemes (Marawanyika 2021; Moyo and Goldbaum 2021) with the General Notice 688 of 2020 providing detail on the qualifying categories of prisoners (Zimbabwean Government Gazette Extraordinary 2020). These generally excluded those convicted of serious or violent crime (murder, treason, rape or any sexual offence, carjacking, robbery, stock theft and public violence) (World Prison Brief: Zimbabwe 2022). Prison decongestion schemes implemented under President Mnangagwa's COVID-19 amnesty reduced the prison population from March to June 2020 by 4,208 prisoners (Mavhinga 2020). Similar to South Africa and Malawi, there was no transparency as to who was released (USSD 2020b). Provisions regarding pre-trial detention and the right to a trial within a reasonable time or unconditional release were further overlooked during COVID-19 as the state disaster measure was regarded as a vis major (USSD 2020b).

In Malawi, in March 2020 the Irish Rule of Law International (IRLI) and Reprieve released a press statement which underscored the grave situation of prisoners, especially the elderly and those with chronic ill health, and urged government to uphold the emergency COVID-19 decongestion measures (IRLI 2020). In April 2020, sentencing adjustments via the Chilungamo Programme resulted in the release of 1,397 prisoners with 499 receiving a

presidential pardon (Chilundu 2020; Masina 2020a; 2020b). Prisons however continued to be severely overcrowded (CHREAA, SALC, IRLI 2021; USSD 2020a). As with South Africa and Zimbabwe, there was little transparency in terms of who was released, and from what prisons: for example prisoners in Zomba prison were omitted from the release scheme in May 2020 despite this large prison operating at severe overcapacity (Chilora 2020). While large numbers qualified for release (for example six months deducted from those serving minor offences, the elderly and women with children), there was a lack of formal communication and transparency around the criteria employed by the Pardon Committee. Severe overcrowding and cell capacity issues continued across the Malawi prison system, particularly in the large prisons (for example Zomba, Chichiri, Maula) due to continued intake of remand detainees and with reports of prisoners sleeping in kneeling positions or side by side on the ground (CHREAA, SALC, IRLI 2021; Gauld 2021; IRLI 2020; USSD 2020a).

Prison insecurity and contact with the outside world

Prison instability and insecurity of prisoners and staff was observed in all three countries during state disaster measures. Isolation measures were compromised by accommodation capacity issues in all countries, despite efforts to enact isolation wings and quarantine sections. COVID-19 restrictions had a heavy impact on the prison environment and prisoner ability to access outside health information, and forms of legal and family assistance.

South Africa experienced significant prison unrest (riots, arson, violence, hunger strikes, striking of staff) due to cramped conditions, excessive use of cell confinement (in many instances 24 hours without access to outside air) and inadequate disease protection measures in many facilities (Kgosi Mampuru, Sun City, Lusikisiki, Leeuwkop, Pietermaritzburg, Baviaanspoort, St Albans Westville, Qalakabusha and Worcester prisons) (Khoza 2020a; Naik 2020; Van Hout and Wessels 2021a). Prisoner contact with the outside world was disrupted due to inoperable prison telephones with no alternative methods of communication provided by the DCS (Khoza 2020b). Monitoring inspections were also prohibited (Muntingh 2020). There were reports of official application of solitary confinement as a medical quarantine measure, often in cells without heating or windows (Van Hout and Wessels 2021a).

Prison insecurity was also observed in Zimbabwe, where recently released prisoners including political activists and journalists who had experienced malicious criminal prosecutions, described a range of human rights violations (arbitrary solitary confinement, denial of the right to a fair trial, access to justice and adequate standards of detention) (Chingano 2020; USSD 2020b; Van Hout et al. 2022a; 2022b). Deliberate exposure to COVID-19 disease by denial of segregation of those with symptoms was also reported in the case of political activists and journalists (Chinowaita 2020; USSD 2020b). The denial of access to legal representation during prison visitation restrictions and the lack of facilitation of contact using technology was reported (Lawyers for Lawyers 2020; Zimbabwe Peace Project 2021). The complete denial of outside contact additionally prevented prisoners from accessing public information (including COVID-19 public health guidance) and much needed family support (including provision of masks, food, clean water, medicines) (for example as reported in Chikurubi prison) (Mhlanga-Gunda et al. 2022). Despite permissions for the Zimbabwe Human Rights Commission (ZHRC) to conduct monitoring visits to its 46 prisons when conditions allowed, it is unclear as to whether such inspections occurred during state disaster measures (USSD 2020b).

In Malawi COVID-19 restriction measures in prisons centred on visitation restrictions, segregation of COVID-19 positive prisoners in isolation centres, and suspension of out of prison formations to work (Masina 2020a). For example four isolation centres for pre-trial detainees were created at Zomba, Maula, Mzimba and Thyolo prisons, three of which used their female sections (Zomba, Maula, Mzimba) (Southern African Litigation Centre 2020). The closure of the Maula prison female wing in July 2020 in order to open a COVID-19

isolation centre resulted in the large scale transfer of 71 women with infants, including remand detainees to rural prisons far away from family and legal support (Pensulo 2020; Southern African Litigation Centre 2020; Van Hout 2020c). Visitation restrictions were documented as severely disadvantaging prisoners who are dependent on family and civil society supports of food, soap and clothing (Guta 2021; Jumbe et al. 2022; Van Hout 2020c).

WASH and exposure to communicable disease

In all three countries, COVID-19 disaster measures worsened systemic deficits in the standards of care, and environmental conditions of detention were reported to be grossly inadequate. There were reports of regular failures of ablution facilities incurring faeces and other bio hazard contamination, lack of heating, ventilation and access to fresh air, lack of sufficient supplies of clean water for drinking, cooking and cleaning purposes, power outages and inadequate disinfection capability (lack of soap, disinfectant, detergents) in many South African, Malawian and Zimbabwean prisons (Jumbe et al. 2022; Mhlanga-Gunda et al. 2022; Van Hout and Wessels 2021a). In all three countries, UN agencies and civil society attempted to backfill the insufficient prison system response by providing PPE (especially masks), disinfection products, hand sanitizer, masks and cleaning detergents (Chikoti 2020; DCS 2020b; Muntingh 2020).

The ability of prisoners and staff to physically distance and protect themselves from COVID-19 were reported to be impossible in all three countries. Prisoners in Zimbabwe and Malawi were reported to be lying side by side in communal cells sleeping 10–30cm apart, often described as arranged like sardines or held in kneeling positions (CHREAA, SALC, IRLI 2021; Mhlanga-Gunda et al. 2022; USSD 2020a; 2020b). Malawi and Zimbabwe reported on the lack of adequate nutrition, medicines and other vital needs fuelling chronic ill health within their prison systems, which included the stealing of food by staff from prisoners (CHREAA, SALC, IRLI 2021; Jumbe et al. 2022; Mhlanga-Gunda et al. 2022). There was a grave lack of adequate nutrition documented in Malawi (UN 2020). In 2021 a report documented fatalities caused directly by severe malnutrition during COVID-19 (CHREAA, SALC, IRLI 2021).

While prisoners were most at risk of COVID-19, staff were equally exposed. Their occupational health situation was threatened by the poor infrastructure, the existing co-morbidities (TB, HIV, hepatitis C), malnutrition and poor health of many prisoners, and the lack of adequate COVID-19 mitigation measures in facilities where they worked. In all countries to varying degrees prison staff reported on the failures of the prison system itself to protect them from disease (including fatalities), despite worker strike actions demanding PPE and hazard pay (Marupeng 2020; Mhlanga-Gunda et al. 2022; Muheya 2020; Masina 2020c; Van Hout and Wessels 2021a). Breaches in COVID-19 guidelines and restrictions were reported in South Africa, where prison staff were recalled to work while isolating (New Frame 2020). South African prison staff were also not included in the government Directive on Compensation for Workplace-Acquired COVID-19 (Department of Employment and Labour 2020a) or the Consolidated Directive on Occupational Health and Safety Measures in Certain Workplaces (Department of Employment and Labour 2020b).

The realities of environmental standards of detention beyond Covid-19 State disaster measures

The UN High Commissioner for Human Rights, Michelle Bachelet has stated that 'Measures taken amid a health crisis should not undermine the fundamental rights of detained people, including their rights to adequate food and water. Safeguards against ill-treatment of people in custody, including access to a lawyer and to doctors, should also be fully respected'. The UN agencies joint statement on COVID-19 in prisons and other closed

settings acknowledges the disruptive effect of COVID-19 restrictions on prisoners, and states that 'restrictions that may be imposed must be necessary, evidence-informed, proportionate (i.e. the least restrictive option) and non-arbitrary' (UNODC, WHO, UNAIDS, OHCHR 2020). Equally important is that failure of the state to protect the health of prisoners can constitute inhumane treatment, discrimination and can incur fatalities, and is prohibited regardless of state disaster measures (Porchet 2021). Consideration of the state obligation to take the requisite steps regarding prevention, treatment and control of disease in prisons using a right to health and an environmental health approach is key. The right to reasonable accommodation and right to an environment free from torture and inhumane treatment warranted close examination for potential violations during COVID-19. Tackling environmental health deficits in prison systems forms a crucial component of any disease mitigation response. The Mandela Rules 13, 15, 16 and 21 provide sufficient detail regarding the minimum standards for environmental health with sanitary facilities consistent with the prison environment, its geography and climate, cubic content of air, minimum floor space, lighting, heating and ventilation. Hence, this generated legal realist account illustrates the unprecedented challenges navigated by the criminal justice and penal systems in South Africa, Malawi and Zimbabwe during the COVID-19 pandemic. COVID-19 has not only amplified the existing deficits to varying degrees in each respective criminal justice system, but it has highlighted the future imperatives to address the inadequate infrastructure of prisons in South Africa, Malawi and Zimbabwe.

There are a series of observed commonalities pertaining to the lack of government prioritization of prisons in the domestic health budgeting during COVID-19, the inadequate resourcing of prison systems and sub-standard levels of environmental determinants of health across prison systems in South Africa, Zimbabwe and Malawi during COVID-19 prison operations. The general lack of financial and human resourcing both historically and during state disaster measures affected the ability and capacity of the prison system to adhere to the normative standards of detention, prison official obligation to mitigate disease and the non-derogated rights of prisoners to equivalence of care (including testing, quarantine, medical supplies, and treatment) (as per the Mandela Rules 24(1), 25, 30, 31, UN Principles of Medical Ethics, WHO and WMA declarations). Operational challenges pertinent to ensuring adequate environmental health conditions were evident. They included old and dilapidated infrastructure (particularly in Malawi and Zimbabwe); high prison population density and throughput (particularly high in Malawi); inadequate cell capacity to support isolation measures (Malawi, South Africa, Zimbabwe), insufficient supplies of PPE for prisoners and staff (Malawi, South Africa, Zimbabwe); and varying degrees of fragile or non-functional WASH aspects in all respective countries (for example electricity loadshedding and drought conditions in Zimbabwe and South Africa affecting access to clean water). Prisons in Malawi continued to suffer inadequate nutrition provisions to prisoners. Occupational health rights of staff, including healthcare staff were neglected (particularly in Zimbabwe and South Africa) and ill-considered the risks posed to them in working in unsafe congested working conditions, and the routes to transmission into and out of the prison (see Mandela Rules 25(2), 35(1)). Of note is that prison staff were not included in COVID-19 occupational compensation schemes and staff breaches of COVID-19 regulations were documented in South Africa (Van Hout and Wessels 2021a).

Congestion is a central factor which underpins the potential for human rights violations in these prisons during COVID-19. Mixing of pre-trial detainees and those sentenced constitutes a grave risk for disease transmission and has a severe impact on environmental health conditions inside prisons. The realist assessment further supports prior literature which underscores the high (and unacceptable) pre-trial detention rates in South Africa, Malawi and Zimbabwe which were high prior to COVID-19. Despite apparent decongestion schemes, continued prison throughput and overcrowding was exacerbated by border closures (particularly South Africa), detention of political activists (Zimbabwe) and

disrupted judicial operations in all three countries (ACCORD 2020; World Prison Brief Africa 2022). Pre-trial detention may only be permissible if undertaken in accordance with procedures established by law in a place of detention that has been authorized (Robben Island Guidelines, para 23) and may not be arbitrary (UDHR, Article 9; ICCPR, Article 9(1), ACHPR Article 6). These provisions were generally overlooked in all three countries during COVID-19. Physical distancing as part of the public health guidance was therefore impossible. Due to the severe congestion, many prisons in South Africa, and especially in Zimbabwe and Malawi did not provide the bare minimum floor space set by the CAT at four square meters per person in a communal cell, which could be declared by courts as cruel or degrading (Steinberg 2005). Reports of prisoners sleeping 10–30cm apart in Malawi and Zimbabwe, 23- and 24-hour cell lockdowns (including with sick prisoners) and solitary confinement practices (particularly South Africa) was documented in all three countries (Van Hout and Wessels 2021a; Van Hout et al. 2022a: 2022b). Little information was released around efficacy of prison release schemes.

The negative impact of prison restrictions on access to family support (food, medicines, clean water) and legal assistance (incurring lengthy detention periods without aid) was documented in all three countries. Visitation restrictions and denial of contact with the outside world (not limited to those in solitary confinement and medical quarantine), where prisoner rights to access legal representation and family support for basic provisions are restricted is contra the Mandela Rules 61(1)(3)). This was particularly the case where contact via technological means (Mandela Rule 58(1a)) was not facilitated by the prison officials in South Africa, Malawi and Zimbabwe. In Malawi, the rights of women were not upheld, where the transfer of women (with children) out of Maula prison to remote rural prisons violated their right to access legal representation and resulted in complete lack of access to their family supports (Pensulo 2020; Van Hout 2020c). This contravenes the Bangkok Rules 4 and 28. It is concerning to see that prison visitation restrictions suspended access to prisons by lawyers and independent monitoring bodies (particularly in South Africa, including under the CAT) (Muntingh 2020). Although visits from the UN SPT may temporarily be denied by local authorities under exceptional circumstances, authorities are not permitted to refuse or restrict visits by national preventive mechanisms who retain full discretion in organizing monitoring visits (Porchet 2021). In Zimbabwe it was unclear as to whether visits by the ZHRC were even facilitated. Malawi in contrast continued to facilitate and publish prison inspectorate reports from 2020 and 2021 (Malawi Inspectorate of Prisons 2021).

In short, a broad range of comparable and potential rights violations spanning human, health and occupational rights were observed in South Africa, Malawi and Zimbabwe during COVID-19 state disaster measures (against the Mandela Rules 13 to 18, 21, 22(1) (2), 23(1), 24(1), 25, 30, 31, 35 and 42, WHO and WMA declarations). It remains to be seen if effective complaints mechanisms are in place in each country, if prison monitoring systems and national preventive mechanisms under OP-CAT (in the case of South Africa) are operating sufficiently or indeed if closer examinations by the respective Human Rights Commissions (SAHRC, ZHRC, MHRC) are facilitated. Complaints and strategic public litigation either by individuals or by the civil society organizations which represent their interests are crucial to leverage for future legislative and prison reforms and lobby for greater resourcing of infrastructure and operations. This amongst constructive dialogue, public reporting and other advocacy efforts will constitute a first step toward tackling harmful systemic practices and the environmental injustices largely experienced by prisoners, and additionally affecting the working conditions of staff. There are already intense advocacy efforts by human rights organizations for prisoner health and broad based torture prevention initiatives encompassing right to health and adequate accommodation (Jefferson and Jalloh 2019).

Regarding the insufficient supply of COVID-19 disease control measures and the impact on environmental standards in prisons, states could be held liable for their failure to provide adequate provisions to protect against disease. Other routes to justice centre on the

crux of the prison environment in preventing or indeed fuelling the spread of disease, and span the rights of prisoners to sufficient cubic content of air and floor space, sufficient water for ablution/sanitation/hygiene/disinfection purposes, access to clean and regular supply of water for drinking and cooking, adequate nutrition to maintain health, access to PPE and medical care, and access to their family, and legal representation. Many prisons in South Africa, Malawi and Zimbabwe potentially breach the country constitutional law regarding the right to adequate accommodation, personal hygiene and appropriate medical treatment as justiciable fundamental rights and freedoms for those deprived of their liberty right to life and the prohibition of torture, cruel, inhuman or degrading treatment (for example Sections 29 (1)(2)(3) and 35(2)(e) of South African Constitution; Sections 50 (5) (d), 76 and 85 of the Zimbabwe Constitution and Sections 12(1)(d)(e), 19, 42(2)(1)(b), 45(1) and 169 of the Malawian Constitution).There are potential questions regarding prison system implementation of humane and ethically sound medical isolation (as opposed to arbitrary solitary confinement) (Cloud et al. 2020). South Africa in particular has a fairly developed base of jurisprudence regarding prisoner right to health, protection from exposure to disease (HIV, TB) and requirements around the independence of the prison inspectorate (see all cases listed in Table 2, Van Hout and Wessels 2021a). In Malawi, even though the least developed country, the Constitutional Court's ruling in the ground-breaking case of *Gable Masangano v. Attorney General* documented the deplorable and congested prison conditions, found that conditions were conducive to disease and constituted degrading treatment, and dismissed the state position that prisoners' right to adequate nutrition and health were non-justiciable and that 'the judicial process is not equipped to deal' with questions of resource allocation of the state (see Table 3, Chilemba 2016). Zimbabwe has several cases which refer to the use of solitary confinement and denial of basic provisions (see Table 4), including the *Kanengoni v Minister of Justice* case which refers to the duty of the state to provide prisoners access to proper medical care to prevent unwarranted deaths.

With regard to international human rights law, one could surmise that the three countries (to varying degrees of severity) are not meeting their obligations under the ICSECR. Meaningful realization of the right to health within the parameters of reasonable accommodation of prisoners needs to be promoted and implemented through the ICESCR, and the combined efforts and actions of the criminal justice system, humanitarian organizations and civil society (Gauld 2021). South Africa has ratified the most treaties (ICCPR, CCPR-OP2, ICESCR, CAT, OP-CAT, CEDAW, CRC) and hence offers the broadest avenues by accepting individual complaints (CCPR-OP under Articles 2, 10 and 26, for example, regarding rights of prisoners to humane treatment, non-discriminatory protection of the law and equality before the law of a state and the right to an effective remedy for violations); CEDAW-OP, CAT Article 22) and inquiry procedures (under CAT Article 20, CEDAW OP Article 8–9). Of note regarding the rights of children in detention during COVID-19, South Africa does not accept individual complaints or inquiry mechanisms under the CRC-OP Article 13. Malawi has ratified ICESCR, ICCPR, CAT, CEDAW and CRC, but not the OP-CAT, and accepts both individual complaints procedures under the CCPR-OPT and CEDAW-OP, and inquiry procedures for CAT under Article 20. It does not accept individual complaints procedures under the ISCESCR-OP the Optional Protocol to the ICESCR or under the CAT, Article 22. Zimbabwe offers the least protections and recourse; while ratifying the ICCPR, ICESCR, CEDAW and CRC, it has not ratified the CAT or the OP-CAT, and does not accept individual complaints procedures or inquiry procedures under these treaties.

Ways forward post COVID-19: lessons learnt and recommendations for prison reform

The UN Assistant Secretary-General for Human Rights has stated that COVID-19 demonstrates the 'urgent need for institutional reforms and societal transformation where human

rights must be front and centre' (Brandze Kehris 2020). This assessment challenges the boundaries of reasonable interpretation (Amorim 2020) in state application on restrictions in prisons during COVID-19 disaster measures and illustrates the importance of evaluating the extent to which human rights values are guiding social action and practice in South Africa, Malawi and Zimbabwe. It is intended to contribute to growing the COVID-19 spotlight on human rights violations, harmful systemic practices and deplorable conditions in many prisons located in Africa, and support commitment and efforts to reform and improve conditions for those deprived of their liberty.

The social exclusion and marginalization of prisoners in Africa still continues to create difficulties in the translation of their fundamental rights into human rights based public and social policies, and exacerbates the lack of public and political interest in the right to health of prisoners (Le Marcis 2020). An anthropological understanding of human rights (Messer 1993; Wilson 2007; Martínez and Buerger 2019) pertinent to respective African countries within the broader analysis of power, politics and social inequality is therefore crucial to better understand and respond to each country's unique and distinctive prison systems, challenges and prison dynamics. Factors to consider are the overall continued neglect of health in many African prisons (including in the selected countries) due to prioritization of security and punishment, the pursuit of rights of people deprived of their liberty through legal channels, local actors (for example civil society organizations) appeals for international involvement, opportunity for greater adopting of human rights concepts into local vernaculars/prison system operations and the likelihood of evidence having a probative value.

The pandemic has highlighted the requirement to encourage the updating of Public Health and Prison Acts (particularly in Malawi) where necessary to move beyond the colonial focus on security and punishment and achieve a greater incorporation of the human rights of those deprived of their liberty and cognisant of modern (zoonotic) diseases in future public health emergencies. The lack of sufficient consideration of prison health in domestic health budgeting is evidence of the continued neglect of health in African prisons, generally due to the responsibility of prison health operations falling under the remit of the Ministry of Justice, and not Health. In essence the point is that government resourcing of the COVID-19 response in each selected country was ad hoc and reactive, and centralized on the medical approach, and was compromised/hindered in its effectiveness by the existing (poor) infrastructure, sub-standard environmental health conditions and weak operation of criminal justice systems. It is however encouraging to see that vaccination roll out with prisoners and prison staff identified as priority groups has commenced in these three selected countries, and is indicative of the growing appreciation of the continuum of public and prison health (Department of Justice and Correctional Development 2021; Mupopery 2021; Reliefweb 2021).

Addressing overcrowding is crucial. South Africa, Malawi and Zimbabwe continued to operate with unacceptable pre-trial detention rates and over capacity during COVID-19. The recognition of the international standards for minimum floor space are key. Prison congestion rates in the three countries can be better addressed via enhanced criminal justice functioning inclusive of a review of bail operations, minimum sentences and non-custodial measures, pardoning/decriminalization of poverty related offences, adherence to set pre-trial custody limits, and placement of people with mental health conditions in suitable facilities. Camp courts (such as those operated by CHREAA and IRLI in Malawi) and open prisons (as in Zimbabwe) offer an innovative route to relief capacity issues (Rupapa 2021).

In conclusion, taken together in each country and for the continent as a whole the COVID-19 experience can be leveraged to support prison and justice system improvements, structural improvements and capacity building across the sector to ensure that the right to health of people deprived of their liberty and the occupational health standards for staff are upheld. Civil society lobbying, independent and Human Rights Commission inspections,

national preventive mechanisms under OP-CAT and litigation by civil society or individuals of course are all options. Oversight mechanisms are crucial and the support of the establishment of national preventive mechanisms in countries where it does not yet exist is to be prioritized. Critical steps in ensuring prison system accountability, effective response and fundamental rights protections centre on transparency of disease surveillance and reporting, the accuracy of reported data, and ensuring visibility of the health of people living in prisons (Knight et al. 2022). Environmental health inspections and the routine monitoring of disease along with the detection, treatment and continuum of care of prisoners and released individuals within the parameters of public and prison health surveillance is an imperative. Addressing the environmental determinants of health in prisons within such a holistic approach will directly improve prison conditions and the health of the prison community, respect their human, health and occupational rights, and form a crucial component of any future pandemic response. Access of academic research teams into prisons is also to be encouraged in order to encourage prisoner and prison staff consultations and allow the voice of prison communities to be heard (Mhlanga-Gunda et al. 2020a).

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Conflict of interest

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References

Africa News. 2020. COVID-19: Egypt confirms first coronavirus case in Africa. Africa News (14 February 2020). www.africanews.com/2020/02/14/covid-19-egypt-confirms-first-coronavirus-case-in-africa// (Referenced 12 January 2022).

African Centre for the Constructive Resolution of Disputes (ACCORD). 2020. Africa's Prisoner Release Programmes: Towards Preventing the Spread of Coronavirus COVID-19. www.accord.org.za/analysis/africas-prisoner-release-programmes-towards-preventing-the-spread-of-coronavirus-covid-19/ (Referenced 12 January 2022).

African Commission on Human and Peoples' Rights (ACoHPR). 1997. Prisons in Zimbabwe. www.achpr.org/public/Document/file/English/misrep_specmec_priso_zimbabwe_1997_eng.pdf (Referenced 29 September 2021).

African Commission on Human and Peoples' Rights (ACoHPR). 2008. *The Robbin Island Guidelines Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa*. The Gambia: African Commission on Human and Peoples' Rights.

African Commission on Human and Peoples' Rights (ACoHPR). 2012. *Special Rapporteur on Prisons, Conditions of Detention and Policing in Africa*. The Gambia: African Commission on Human and Peoples' Rights.

African Commission on Human and Peoples' Rights (ACoHPR). 2020a. Press Statement of the African Commission on Human and Peoples' Rights on the Coronavirus (COVID-19) Crisis ACoHPR (8 April 2020). https://www.achpr.org/pressrelease/detail?id=480 (Referenced 25 May 2021).

African Commission on Human and Peoples' Right s(ACoHPR). 2020b. Press Statement on Human Rights Based Effective Response to the Novel COVID-19 Virus in Africa (24 March 2020). https://www.achpr.org/pressrelease/detail?id=483 (Referenced 25 May 2021).

African Union Africa Centres for Disease Control and Prevention (CDC). 2020. Africa Identifies First Case of Coronavirus Disease: Statement by the Director of Africa CDC. AU CDC (15 February 2020). https://africacdc.org/news-item/africa-identifies-first-case-of-coronavirus-disease-statement-by-the-director-of-africa-cdc/ Africa Identifies First Case of Coronavirus Disease: Statement by the Director of Africa CDC – Africa CDC (Referenced 12 January 2022).

Agomoh, U., V. Saleh-Hanna, C. Affor *et al.* 2008. Protecting the Human Rights of People with Mental Health Disabilities in African Prisons. In *Colonial Systems of Control: Criminal Justice in Nigeria*: 267–90. University of Ottawa Press. https://doi.org/10.2307/j.ctt1ckph37.20.

Ako, T., E. Plugge, R. Mhlanga-Gunda, and M. C. Van Hout. 2020. Ethical Guidance for Health Research in Prisons in Low and Middle-Income Countries: A Scoping Review. *Public Health* 186: 217–27.

Amnesty International. 2020. Sub-Saharan Africa: Protect Detainees at Risk of COVID-19, Unclog Prisons and Release Prisoners of Conscience. Amnesty International (20 April 2020). https://www.amnesty.org/en/latest/news/2020/04/subsaharanafrica-protect-detainees-at-risk-of-covid-unclog-prisons-and-release-prisoners/ (Referenced 11 October 2021).

Amon, J. 2020. COVID-19 and Detention: Respecting Human Rights. *Health and Human Rights Journal* 22(1): 367–70.

Amorim, L. J. B. 2020. Reasonable Interpretation: A Radical Legal Realist Critique. *International Journal for the Semiotics of Law* 33: 1043–57.

Badu, K., J. Thorn, N. Goonoo *et al.* 2020. Africa's Response to the COVID-19 Pandemic: A Review of the Nature of the Virus, Impacts and Implications for Preparedness. *AAS Open Research* 3: 19. (https://doi.org/10.12688/aasopenres.13060.1).

Banda, H. T., F. Gausi, A. D. Harries, and F. M. Salaniponi. 2009. Prevalence of Smear-Positive Pulmonary Tuberculosis among Prisoners in Malawi: A National Survey. *International Journal of Tuberculosis and Lung Disease* 13(12): 1557–9.

Brandze Kehris, I. 2020. If Anything, this Virus has Demonstrated the Urgent Need for Reform. Penal Reform International (11 May 2020). www.penalreform.org/blog/ if-anything-this-pandemic-has-clearly-demonstrated-the/. (Referenced 11th October 2021).

Cameron, E. 2020a. The Crisis of Criminal Justice in South Africa. *South African Crime Quarterly* 137(1): 32–71.

Cameron, E. 2020b. Open Letter to Minister of Correctional Services Lamola. Detention Justice Forum (20 April 2020). https://www.groundup.org.za/media/uploads/documents/JICS_DJF%20COVID-19%20release%20of%20prisoners_23%20April%202020%20djf-1.pdf (Referenced 25 May 2021).

Centre for Human Rights, Education, Advice and Assistance, Southern Africa Litigation Centre and Irish Rule of Law International (CHREAA,SALC, IRLI). 2021. *Reprieve, 2021Joint Stakeholder Submission to the UN Human Rights Committee for the LOIPR to be Considered in Relation to Malawi (1–26 March 2021)*. Centre for Human Rights, Education, Advice and Assistance (CHREAA), Southern Africa Litigation Centre (SALC) and Irish Rule of Law International (IRLI). https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/MWI/INT_CCPR_ICS_MWI_43941_E.pdf. (Referenced 11th October 2021).

Chibwana, M. G., K. C. Jere, R. Kamn'gona *et al.* 2020. High SARS-CoV-2 Seroprevalence in Health Care Workers but Relatively Low Numbers of Deaths in Urban Malawi. *medRxiv*. doi: 10.1101/2020.07.30.20164970. 5 August 2020. Preprint: not peer reviewed.

Chikoti, M. 2020. UNHCR Donates COVID-19 Materials to Malawi Prison Services. Malawi 24 (30 July 2020). https://malawi24.com/2020/07/30/unhcr-donates-covid-19-materials-to-malawi-prison-services/. (Referenced 11th October 2021).

Chilemba, E. M. 2016. The Domestic Legal Enforcement of the Right to Health in Malawi: Appraising the Litigation Potential. In E. Durojaye (Ed.), *Litigating the Right to Health in Africa: Challenges and Prospects*. United Kingdom: Routledge.

Chilora, S. 2020. Zomba Prisoners Miss Out on Covid-19 Release. The Times (9 May 2020). https://times.mw/zomba-prisoners-miss-out-on-covid-19-release/ (Referenced 4 October 2021).

Chilundu, S. 2020. Covid-19 initiative frees 1392 prisoners. The Nation. (27 April 2020). https://www.mwnation.com/covid-19-initiative-frees-1-392-prisoners/ (Referenced 11th October 2021).

Chingano, N. 2020. Journalist Hopewell Chin'ono Speaks Out Over Brutal Zimbabwe Prison Conditions. The Guardian (2 October 2020). https://www.theguardian.com/global-development/2020/oct/02/hopewell-chinono-zimbabwe-journalist-prison-conditions. (Referenced 29 September 2021).

Chinowaita, F. 2020. Magistrate Orders for the Immediate Sanitization of Chikurubi Maximum Prison Cells. 24 News (25 August 2020). https://bulawayo24.com/index-id-news-sc-national-byo-191018.html (Referenced 29 September 2021).

Chirwa, Z., F. Kayambo, L. Oseni *et al.* 2018. Extending beyond policy: reaching UNAIDS' three "90"s in Malawi. *Frontiers in Public Health* 6: 69.

Cloud, D. H., C. Ahalt, D. Augustine *et al.* 2020. Medical Isolation and Solitary Confinement: Balancing Health and Humanity in US Jails and Prisons during COVID-19. *Journal of General Internal Medicine* 35(9): 2738–42.

Cohen, C., J. Kleynhans, A. von Gottberg *et al.* 2021. SARS-CoV-2 Incidence, Transmission and Reinfection in a Rural and an Urban Setting: Results of the PHIRST-C Cohort Study, South Africa, 2020–1. *Lancet Infectious Diseases*. https://doi.org/10.1016/S1473-3099(22)00069-X.

Department of Co-operative Governance and Traditional Affairs (CoGTA). 2020. Staatskoerant No.43107,Government Notice No. 318 of 18 March 2020. Regulations issued in Terms of Section 27(2) of the Disaster Management Act, 2002 (Act No. 57 of 2002). https://www.gov.za/sites/default/files/gcis_document/202003/43107gon318.pdf (Referenced 25 May 2021).

Department of Correctional Services (DCS). 2004. The White Paper on Corrections in South Africa. Available at: http://www.dcs.gov.za/wp-content/uploads/2016/08/WHITE-PAPER-8.pdf (Referenced 25 May 2021).

Department of Correctional Services (DCS). 2011. Policy to Address Sexual Abuse of Inmates in DCS Facilities. https://genderjustice.org.za/publication/policy-address-sexual-abuse-inmates-dcs-facilities/ (Referenced 25 May 2021).

Department of Correctional Services (DCS). 2014. The White Paper on Remand Detention in South Africa. https://www.datocms-assets.com/7245/1574921186-white-paper-on-remand-detention-management-in-south-africa-2014.pdf (Referenced 25 May 2021).

Department of Correctional Services (DCS). 2019. DCS Annual Report 2018–19. http://www.dcs.gov.za/wp-content/uploads/2019/12/DCS-Annual-Report-_web-version.pdf (Referenced 25 May 2021).

Department of Correctional Services (DCS). 2020a. DCS Annual Report 2019–20. http://www.dcs.gov.za/wp-content/uploads/2020/11/DCS-Annual-Report-TABLING-FINAL.pdf (Referenced 25 May 2021).

Department of Correctional Services (DCS). 2020b. Kgoši Mampuru II Management Area Forges Ahead with Efforts to Combat Spread of COVID-19 and Metropolitan Donates Cloth Face Masks to DCS as Part of Youth Month. http://www.dcs.gov.za/?page_id=5507 (Referenced 25 May 2021).

Department of Employment and Labour. 2020a. Staatskoerant No 43540, Government Notice 387 of 23 July 2020. Directive on Compensation for Workplace-Acquired COVID-19. Compensation for Occupational Injuries and Diseases Act, 1993(Act No 130 of 1993). https://www.gov.za/sites/default/files/gcis_document/202007/43540gen387.pdf (Referenced 25 May 2021).

Department of Employment and Labour. 2020b. Staatskoerant No 43571, Government Notice of 1031 of 1 October 2020. Consolidated Direction on Occupational Health and Safety Measures in Certain Workplaces. Direction issued in Terms of Regulation 4(10) of the Regulations Made under Section 27(2) of the Disaster Management Act, 2002, Measures to Address, Prevent and Combat the Spread of COVID-19 in Certain Workplaces in the Republic of South Africa. Department of Employment and Labour. www.nioh.ac.za/wp-content/uploads/2020/10/Government_Gazette-CONSOLIDATED_DIRECTIONS_ON_OCCUPATIONAL_HEALTH_AND_SAFETY_MEASURES_IN_C0RTAIN_WORKPLACES.pdf (Referenced 25 May 2021).

Department of Justice and Correctional Development. 2021. Minister Ronald Lamola: Launch of Vaccination Rollout Programme for Correctional Services Officials and Inmates. www.gov.za/speeches/minister-ronald-lamola-launch-vaccination-rollout-programme-correctional-services-officials (Referenced 19 January 2022).

Department of Justice and Correctional Services. 2020a. Staatskoerant No 43225,Government Notice No. 460 of 9 April 2020. Directions Issues in Terms of Regulation 10(2)(a) of the Regulations under the Disaster Management Act, 2002. https://www.gov.za/sites/default/files/gcis_document/202004/43225fon460.pdf (Referenced 25 May 2021).

Department of Justice and Correctional Services. 2020b. Staatskoerant No 43463, Government Notice No.698 of 22 June 2020, Directions Issued in Terms of the Regulation 4(2) of the Regulations made under the Disaster Management Act, 2002. Measures to Address, Prevent and Combat the Spread of COVID-19 in all Correctional Centres and Remand Detention Facilities in the Republic of South Africa. https://www.gov.za/sites/default/files/gcis_document/202006/43463gon698.pdf (Referenced 25 May 2021).

Department of Justice and Correctional Services. 2020c. Staatskoerant No 43688, Government Notice No. 967 of 4 September 2020,Directions for Alert Level 2, Issued in Terms of Regulation 4(2), Read

with Regulation 58(a) and (b) of the Regulations made under the Disaster Management Act, 2002. Measures to Address, Prevent and Combat the Spread of COVID-19 in all Correctional Centres and Remand Detention Facilities in the Republic of South Africa. https://www.gov.za/sites/default/files/gcis_document/202009/43688gon967.pdf (Referenced 25 May 2021).

Department of Justice and Correctional Services. 2020d. Staatskoerant No 43894, Government Notice No. 1197 of 10 November 2020, Directions for Alert Level 1, Issued in terms of Regulation 4(2), Read with Regulation 74(1)(a) and (b) of the Regulations made under the Disaster Management Act, 2002. Measures to Address, Prevent and Combat the Spread of COVID-19 in all Correctional Centres and remand Detention Facilities in the Republic of South Africa. https://www.gov.za/sites/default/files/gcis_document/202011/43894gon1197.pdf. (Referenced 25 May 2021).

Department of Justice and Correctional Services. 2020e. Staatskoerant No 44111, Government Notice No. 54 of 28 January 2021, Directions Issued in Terms of Regulation 4(2), Read with Regulations 25(a), 25(b), 41(a), 41(b), 58(a), 58(b), 74(1)(a) and 74(1)(b) of the Regulations made under the Disaster Management Act 2002: Measures to Address, Prevent and Combat the Spread of COVID-19 in all Correctional Centres and Remand Detention Facilities in the Republic of South Africa. https://www.gov.za/sites/default/files/gcis_document/202101/44111gon54.pdf (Referenced 25 May 2021).

Dissel, A. 2016. *'By the Grace of God': Staffing Correctional Facilities*. South Africa: Sonke Gender Justice: 1–82. https://genderjustice.org.za/ (Referenced 25 May 2021).

DLA Piper. 2020. *A Global Analysis of Prisoner Releases in Response to COVID-19. December 2020*. London United Kingdom: DLA Piper. www.dlapiper.com/~/media/files/insights/publications/2021/03/dla-piper-prison-population-during-covid-19.pdf?la=en&hash=F5C1EBBA0D3D86BDDA-58FAC87DB9EF3CAE3815DF (Referenced 12 January 2022).

Dube, P. 2020. Covid-19: South Africa Releases 7,000 Inmates to Decongest Prison. Daily Nation (18 July 2020). https://nation.africa/kenya/news/africa/covid-19-south-africa-releases-7-000-inmates-to-decongest-prisons-1900922 (Referenced 25 May 2021).

Felix, J. 2020. Prisons Still Overcrowded Despite Special Parole for Thousands to Curb Covid-19 Spread. News 24 (28 July 2020). https://www.news24.com/news24/southafrica/news/prisons-still-overcrowded-despite-special-parole-for-thousands-to-curb-covid-19-spread-20200728 (Referenced 25 May 2021).

Fryatt, A., V. Simms, T. Bandason *et al.* 2021 Community SARS-CoV-2 Seroprevalence Before and After The Second Wave of SARS-CoV-2 Infection in Harare, Zimbabwe. *Lancet e-Clinical Medicine* 41(101172). doi: https://doi.org/10.1016/j.eclinm.2021.101172.

Gadama, L., C. Thakwalakwa, C. Mula *et al.* 2020. 'Prison facilities were not built with a woman in mind': An Exploratory Multi-Stakeholder Study on Women's Situation when Incarcerated in Contemporary Malawi Prisons. *International Journal of Prisoner Health* 16(3): 303–18.

Gasa, S. 2020. Anxious Wait for Non-South African Prisoners as Home Affairs Take First Step to Ease Parolee Backlog. *News 24* (26 October 2020). https://www.news24.com/news24/southafrica/news/anxious-wait-for-non-south-african-prisoners-as-home-affairs-take-first-step-to-ease-parolee-backlog-20201026#:~:text=Lotto-,Anxious%20wait%20for%20non%2DSouth%20African%20prisoners%20as%20Home%20Affairs,step%20to%20ease%20parolee%20backlog&text=Following%20the%20move%20to%20Level,their%20long%20overdue%20release%20dates (Referenced 25 May 2021).

Gauld, K. 2021. Prisons in a Pandemic: The Malawi Experience. In P. Carmody, G. McCann, C. Colleran and C. O'Halloran *(Eds), COVID-19 in the Global South Impacts and Responses*. United Kingdom: Bristol University Press.

Gondwe, A., A. Amberbir, E. Singogo *et al.* 2021. Prisoners' Access to HIV Services in Southern Malawi: A Cross-Sectional Mixed Methods Study. *BMC Public Health* 21(1): 813.

Gordin, J., and I. Cloete. 2013. Imprisoned Before Being Found Guilty: Remand Detainees in South Africa. *University of Cincinnati Law Review* 80(4): 1167–77.

Ground Up. 2020. Covid-19: Call for Minister to Release Prisoners. Ground Up (24 April 2020). https://www.groundup.org.za/article/covid-19-judicial-inspector-asks-minister-release-prisoners/ (Referenced 25 May 2021).

Guta, W. 2021. Maula Prison in Covid-19 SOS. Zodiak Malawi Online (21 July 2021). https://www.zodiakmalawi.com/nw/national-news/65-news-in-central-region/3674-maula-prison-in-a-covid-19-sos. (Referenced 11 October 2021).

Irish Rule of Law International (IRLI). 2020. Joint Statement: Malawi Must Act to Prevent COVID-19 in Prisons. Irish Rule of Law International (30 March 2020). http://irishruleoflaw.ie/wpcontent/

uploads/2020/03/IRLI-Reprieve-Malawi-CoronavirusJoint-Press-Statement-20200327.pdf. (Referenced 11October 2021).
Jefferson, A. M., and A. S. Jalloh. 2019. Health Provision and Health Professional Roles under Compromised Circumstances: Lessons from Sierra Leone's Prisons. *Criminology & Criminal Justice* 19(5): 572–90.
Jumbe, V. C., V. Mhango, A. Muula *et al.* 2022. A Multi-Stakeholder Situation Assessment of COVID-19 Disease Preparedness and Mitigation Measures in a Large Prison Complex in Malawi. *International Journal of Prisoner Health*. https://doi.org/10.1108/IJPH-10-2021-0105.
Justice and Correctional Services (JICS). 2020. Lockdown Case Backlogs; Overcrowding & Release of Inmates: Ministers Briefing Justice and Correctional Services (24 June 2020). https://pmg.org.za/page/Lockdowncasebacklogsovercrowding&releaseofinmatesMinistersbriefing (Referenced 25 May 2021).
Kateta, M. W. 2021. Malawi Audit Confirms Extensive Mismanagement of COVID-19 Funds. Devex. https://www.devex.com/news/malawi-audit-confirms-extensive-mismanagement-of-covid-19-funds-99766 (Referenced 11October 2021).
Khoza, A. 2020a. South Africa: Pietermaritzburg Prisoners Fear Covid-19. New Frame (1 July 2020). https://www.newframe.com/pietermaritzburg-prisoners-fear-covid-19/ (Referenced 25 May 2021).
Khoza, A. 2020b. How South African Prisons are Managing Covid-19. New Frame (16 September 2020). https://www.newframe.com/how-south-african-prisons-are-managing-covid-19/ (Referenced 25 May 2021).
Knight, K., J. Bleckner, E. Cameron, and J. J. Amon. 2022. Pandemic Treaty Should Include Reporting in Prisons. *Health and Human Rights* 24(1): 117–9.
Lawyers for Lawyers. 2020. COVID-19 Series. The impact of the Crisis in Zimbabwe. https://lawyers-forlawyers.org/en/covid-19-series-the-impact-of-the-crisis-in-zimbabwe/ (Referenced 29September 2021).
Leiter, B. 2015. Legal Realism and Legal Doctrine. *University of Pennsylvania Law Review* 163: 1975.
Le Marcis, F. 2020. Epidemics and Covid-19 in African Prisons: Towards an Inclusive Approach of Health. *Santé Publique* 5–6(32): 583–7.
Lines, R. 2008. The Right to Health of Prisoners in International Human Rights Law. *International Journal of Prisoner Health* 4(1): 3–53.
Lucero-Prisno, D. E., Y. A. Adebisi, and X. Lin. 2020. Current Efforts and Challenges Facing Responses to 2019-nCoV in Africa. *Global Health Research and Policy* 5(21). https://doi.org/10.1186/s41256-020-00148-1.
Malawi Inspectorate of Prisons. 2019. *The Report of the Inspection of Prisons and Police Service Cells Conducted by the Malawi Inspectorate of Prisons in 2018*. Zomba, Malawi: Malawi Inspectorate of Prisons.
Malawi Inspectorate of Prisons. 2021. *Inspection of Prisons in 2020 and 2021*. Zomba, Malawi: Malawi Inspectorate of Prisons.
Malawi Law Commission. 2018. *Report of the Law Commission on the Review of the Prisons Act*. Lilongwe, Malawi: Malawi Law Commission.
Mandolo, J., J. Msefula, M. Y. R. Henrion *et al.* 2021. SARS-CoV-2 Exposure in Malawian Blood Donors: an Analysis of Seroprevalence and Variant Dynamics between January 2020 and July 2021. *BMC Medicine* 19(1): 303. doi: 10.1186/s12916-021-02187-y.
Marawanyika, G. 2021. Zimbabwe Releases 320 Prisoners in Effort to Curb Virus Spread. Bloomberg (17 April 2021). www.bloomberg.com/news/articles/2021-04-17/zimbabwe-releases-320-prisoners-in-effort-to-curb-virus-spread. (Referenced 29September 2021).
Martínez, S. and C. Buerger. 2019. Human Rights. *Oxford Bibliographies*. doi: 10.1093/OBO/9780199766567-0103.
Marupeng, P. 2020. Deaths of Three Prison Warders Spark Health Fears. Sowetan Live (6 July 2020) https://www.sowetanlive.co.za/news/south-africa/2020-07-06-deaths-of-three-prison-warders-spark-health-fears/ (Referenced 25 May 2021).
Maseko, T. W. 2017. An Assessment of the Realisation of Inmates' Right to Adequate Medical Treatment since the Adoption of the South African Constitution in 1996. *De Jure Law Journal* 50(2): 263–80.
Masina, L. 2020a. Malawi President Pardons Prisoners to Reduce COVID-19 Spread. VOA News (15 August 2020). https://www.voanews.com/a/covid-19-pandemic_malawi-president-pardons-prisoners-reduce-covid-19-spread/6194474.html (Referenced 4 October 2021).

Masina, L. 2020b. Malawi Government Under Pressure to Pardon COVID-19 Prisoners. VOA News (27 July 2020). https://www.voanews.com/a/africa_malawi-government-under-pressure-pardon-covid-19-prisoners/6193522.html. (Referenced 4 October 2021).

Masina, L. 2020c. Malawi Police Clash with Prison Guards Demanding COVID-19 Protection Equipment. VOA News (24 April 2020). https://www.voanews.com/a/covid-19-pandemic_malawi-police-clash-prison-guards-demanding-covid-19-protection-equipment/6188157.html (Referenced 11 October 2021).

Mavhinga, D. 2020. Prisoners in Zimbabwe at Grave Risk of Covid-19 Spread. *Human Rights Watch* (29 July 2020). https://www.hrw.org/news/2020/07/29/prisoners-zimbabwe-grave-risk-covid-19-spread (Referenced 11 October 2021).

McCann, N. 2021. Covid-19: More than 68,500 Inmates, 12 000 Correctional Services Staff Receive Vaccine Jabs. News 24 (5 August 2021). www.news24.com/news24/southafrica/news/covid-19-more-than-68-500-inmates-12-000-correctional-services-staff-receive-vaccine-jabs-20210805 (Referenced 23 January 2022).

Messer, E. 1993. Anthropology and Human Rights. *Annual Review of Anthropology* 22: 221–49.

Mhlanga-Gunda, R., S. Kewley, N. Chivandikwa, and M. C. Van Hout. 2020b. Prison Conditions and Standards of Health Care for Women and Their Children Incarcerated in Zimbabwean Prisons. *International Journal of Prison Health* 6(3): 319–36.

Mhlanga-Gunda, R., N. Motsomi-Moshoeshoe, E. Plugge, and M. C. Van Hout. 2020a. Challenges in Ensuring Robust and Ethical Health Research and the Reporting of Health Outcomes and Standards in Sub-Saharan African Prisons. *Lancet Global Health* 8(1): 25–6.

Mhlanga-Gunda, R., S. Rusakaniko, A. Chinyuku *et al.* 2022. 'We sleep 10cm apart so there is no social distancing': COVID-19 Preparedness in a Zimbabwean Prison Complex. *International Journal of Prisoner Health*. Early Online. https://doi.org/10.1108/IJPH-10-2021-0101.

Moyo, J., and C. Goldbaum. 2021. In a Bid to Curb the Virus, Zimbabwe Releases Hundreds of Prisoners. *New York Times* (17 April 2021). https://www.nytimes.com/2021/04/17/world/zimbabwe-coronavirus-prisoners.html (Referenced 29 September 2021).

Muheya, G. 2020. Malawi Prison Warders go on Strike Demanding Cash from K157bn Covid-19 Fund. *Nyasa Times* (23 April 2020). https://www.nyasatimes.com/malawi-prison-warders-go-on-strike-demanding-cash-from-k157bn-covid-19-fund/ (Referenced 11 October 2021).

Mujuzi, J. 2011. Unpacking the Law and Practice Relating to Parole in South Africa. *Potchefstroomse Elektroniese Regsblad* 14(5): 205–40.

Mukwenha, S., T. Dzinamarira, M. P. Mapingure, and G. Musukaa. 2021. Zimbabwe's Prison Facilities: Preparedness for Institutional COVID-19 Outbreaks. *Public Health in Practice* 2: 100089.

Muntingh, L. 2016. Ten Years after the Jail Commission Assessing the State of South Africa's Prisons. *South African Crime Quarterly* 58: 35–44.

Muntingh, L. 2020. Africa, Prisons and COVID-19. *Journal of Human Rights Practice* 12(2): 284–92.

Mupoperi, E. 2021. Zimbabwe: Prison Inmates Urged to Embrace Covid-19 Vaccine. ZBC News (18 February 2021). www.zbcnews.co.zw/prison-inmates-urged-to-embrace-covid-19-vaccine/ (Referenced 29 September 2021).

Nagisa-Keehn, E., and A. Nevin. 2018. Health, Human Rights, and the Transformation of Punishment: South African Litigation to Address HIV and Tuberculosis in Prisons. *Health and Human Rights Journal* 20(1): 213–24.

Naik, S. 2020. Inmates Resort to Desperate Measures to Force Social Distancing in Crowded Prisons. Independent (13 June 2020). https://www.iol.co.za/saturday-star/news/inmates-resort-to-desperate-measures-to-force-social-distancing-in-crowded-prisons-49331172 (Referenced 25 May 2021).

Nevin, A., and E. Nagisa-Keehn. 2018. *Reducing Overcrowding in a South African remand Detention Facility*. South Africa: Sonke Gender Justice. www.saferspaces.org.za (Referenced 25 May 2021).

New Frame. 2020. Covid-19 Roundup in Food and Water Shortages. New Frame (11 September 2020). www.newframe.com/covid-19-roundup-food-and-water-shortages (Referenced 25 May 2021).

Nkengasong, J., and W. Mankoula. 2020. Looming Threat of COVID-19 Infection in Africa: Act Collectively and Fast. *Lancet* 395(10227): 841–2.

Nweze V. N., U. G. Anosike, J. F. Ogunwusi *et al.* 2020. Prison Health during the COVID-19 Era in Africa. *Public Health in Practice* 2: 100083.

O' Grady, J., M. Hoelscher, R. Atun *et al.* 2011. Tuberculosis in Prisons in Sub-Saharan Africa--the Need for Improved Health Services, Surveillance and Control. *Tuberculosis (Edinburgh Scotland)* 91(2): 173–8.

Organization of African Unity (OAU). 1981. *African Charter on Human and Peoples' Rights ("Banjul Charter")* (27 June 1981) CAB/LEG/67/3 rev.5,21I.L.M.5 Article 14(1). https://www.achpr.org/legalinstruments/detail?id=49

Organisation for Economic Co-operation and Development (OECD). 2021. COVID-19 and Africa: Socio-Economic Implications and Policy Responses. http://www.oecd.org/coronavirus/policy-responses/covid-19-and-africa-socioeconomic-implications-and-policy-responses-96e1b282/12 (Referenced 12 January 2022).

Organisation for Economic Co-operation and Development (OECD). 2022. DAC List of ODA Recipients Effective for Reporting on 2022 and 2023 Flows. www.oecd.org/dac/financing-sustainable-development/development-finance-standards/DAC-List-of-ODA-Recipients-for-reporting-2022-23-flows.pdf (Referenced 12 January 2022).

Penal Reform International (PRI). 2020. *Coronavirus: Healthcare and Human Rights of People in Prison*. London, United Kingdom: Penal Reform International. https://www.penalreform.org/resource/coronavirus-healthcare-and-human-rights-of-people-in/ (Referenced 11 October 2021).

Pensulo, C. 2020. Coronavirus Banishes Female Inmates to Far-Flung Jails in Malawi. Reuters (17 August 2020). https://www.reuters.com/article/us-health-coronavirus-malawi-women-idUSKCN25D1LE (Referenced 11 October 2021).

Porchet, M. 2021. Safeguarding Human Rights in Places of Detention: The Role of National Preventive Mechanisms during COVID-19. Universal Rights Group. www.universal-rights.org/blog/safeguarding-human-rights-in-places-of-detention-the-role-of-national-preventive-mechanisms-during-covid-19/ (Referenced 19 January 2022).

Prison Insider. 2020. Africa. Prison Insider. https://www.prison-insider.com/en/articles?page=1&tag%5B0%5D=afrique (Referenced 11 October 2021).

Reliefweb. 2021. Malawi Receives First Shipment of COVID-19 Vaccines from COVAX. Malawi receives first shipment of COVID-19 vaccines from COVAX - Malawi | ReliefWeb. https://reliefweb.int/report/malawi/malawi-receives-first-shipment-covid-19-vaccines-covax#:~:text=Malawi%20receives%20first%20shipment%20of%20COVID%2D19%20vaccines%20from%20COVAX,-News%20and%20Press&text=Lilongwe%2C%205%20March%202021%20%2D%20Today,%2C%20Gavi%2C%20UNICEF%20and%20WHO (Referenced 20 January 2022).

Reuters. 2022. COVID-19 Trackers. Africa. Africa: the latest coronavirus counts, charts and maps (reuters.com). https://graphics.reuters.com/world-coronavirus-tracker-and-maps/regions/africa/ (Referenced 08 July 2022).

Rubenstein, L. S., J. Amon, M. McLemore *et al.* 2016. HIV, Prisoners, and Human Rights. *Lancet* 388(10050), 1202–14. https://doi.org/10.1016/S0140-6736(16)30663-8.

de Ruiter, N., and K. Hardy. 2018. Study on the Use of bail in South Africa. African Policing Civilian Oversight Forum Series 23, South Africa. http://apcof.org/wp-content/uploads/023-apcof-research-study-on-the-use-of-bail-in-south-africa-nicola-de-ruiter-and-kathleen-hardy-.pdf (Referenced 25 May 2021).

Rupapa, T. 2021. Zimbabwe: Female Open Prison Brings Relief. All Africa (8 June 2021). allafrica.com/stories/202106080341.html (Referenced 19 January 2022).

Saalim, K., K. S. Sakyi, Z. Fatema-Tuz et al 2021. Reported Health and Social Consequences of the COVID-19 Pandemic on Vulnerable Populations and Implemented Solutions in six West African Countries: A Media Content Analysis. *Plos One* 16(6): e0252890.

Shaffer, G. 2015. The New Legal Realist Approach to International Law. *Leiden Journal of International Law* 189. www.law.uci.edu/faculty/full-time/shaffer/GSNewLegReal.pdf (Referenced 12 January 2022).

South African Department of Health. 2013. *Guidelines for the Management of Tuberculosis, Human Immunodeficiency Virus and Sexually Transmitted Infections in Correctional Facilities*. Pretoria, South Africa: South African Department of Health.

Southern African Development Community (SADC). 2020. *SADC Regional Response to COVID-19 Pandemic*. Gaborone, Botswana: Southern African Development Community. www.sadc.int/files/7016/0499/7092/BULLETIN_14-SADC_Response_to_COVID19_-ENGLISH.pdf (Referenced 25 May 2021).

Southern African Litigation Centre. 2020. *Civil Society Calls for the Urgent Decongestion of Prisons after COVID-19 Cases Registered in ChiChiri and Mzimba Prisons*. Johannesburg, South Africa: Southern African Litigation Centre. https://www.southernafricalitigationcentre.org/2020/07/17/civil-society-calls-for-the-urgent-decongestion-of-prisons-after-covid-19-cases-registered-in-chichiri-and-mzimba-prisons/ (Referenced 11 October 2021).

Steinberg, J. 2005. *Prison Overcrowding and the Constitutional Right to Adequate Accommodation in South Africa*. Johannesburg, South Africa: Centre for the Study of Violence and Reconciliation. http://www.csvr.org.za/docs/correctional/prisoncovercrowding.pdf (Referenced 25 May 2021).

Telisinghe, L., S. Charalambous, S. M. Topp *et al* 2016. HIV and tuberculosis in prisons in sub-Saharan Africa. *Lancet* 388(10050). https://doi.org/10.1016/S0140-6736(16)30578-5

Todrys, K., and J. Amon. 2012. Criminal Justice Reform as HIV and TB Prevention in African Prisons. *PLoS Medicine* 9(5): e1001215.

Todrys, K. W., J. Amon, G. Malembeka, and M. Clayton. 2011. Imprisoned and Imperiled: Access to HIV and TB Prevention and Treatment, and Denial of Human Rights, in Zambian Prisons. *Journal of the International AIDS Society* 14.1: 1–11.

United Nations (UN). 1947. *Entry into Force of the Constitution of the World Health Organization (17 November 1947) A/RES/131*. New York, US: United Nations General Assembly.

United Nations (UN). 1948. *Universal Declaration of Human Rights (10 December 1948) 217A(III), Article 25*. New York, US: United Nations General Assembly.

United Nations (UN). 1966a. *International Covenant on Economic, Social and Cultural Rights (ICESRC) (16 December 1966) United Nations, Treaty Series, 993:3*. New York, US: United Nations General Assembly.

United Nations (UN). 1966b. International Covenant on Civil and Political Rights (ICCPR) (16 December 1966) United Nations, Treaty Series, 999. New York, US: United Nations General Assembly.

United Nations (UN). 1979. *Convention on the Elimination of All Forms of Discrimination against Women (18 December 1979) A/RES/34/180*. New York, US: United Nations General Assembly.

United Nations (UN). 1982. *Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (18 September 1982) A/RES/37/194*. New York, US: United Nations General Assembly.

United Nations (UN). 1984. *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. United Nations, Treaty Series, 1465 (85)*. New York, US: United Nations General Assembly.

United Nations (UN). 1988. *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment: Resolution/Adopted by the General Assembly (9 December 1988) A/RES/43/173*. New York, US: United Nations General Assembly.

United Nations (UN). 1989. *Convention on the Rights of the Child (20 November 1989) Resolution 44/25.1577,3*. New York, US: United Nations General Assembly.

United Nations (UN). 1991. *Basic Principles for the Treatment of Prisoners: Resolution/Adopted by the General Assembly (28 March 1991) A/RES/45/111, para 9*. New York, US: United Nations General Assembly.

United Nations (UN). 2003. *Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (9 January 2003) A/RES/57/199*. New York, US: United Nations General Assembly.

United Nations (UN). 2010. *United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (the Bangkok Rules) (6 October 2010) A/C.3/65/L.50*. New York, US: United Nations General Assembly.

United Nations (UN). 2015. Transforming our World: The 2030 Agenda for Sustainable Development. A/RES/70/1. 21252030 Agenda for Sustainable Development web.pdf (un.org) (Referenced 12 January 2022).

United Nations (UN). 2016. *Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules) (8 January 2016) A/RES/70/175*. New York, US: United Nations General Assembly.

United Nations (UN). 2020. Policy Brief: Impact of COVID-19 on Africa. https://unsdg.un.org/sites/default/files/2020-05/Policy-brief-Impact-of-COVID-19-in-Africa.pdf (Referenced 12 January 2022).

United Nations (UN) Committee on Economic, Social and Cultural Rights (UN CESCR). 2000. *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Article 12 of the Covenant) (11 August 2000) E/C.12/2000/4*. Geneva, Switzerland: United Nations Committee on Economic, Social and Cultural Rights.

United Nations (UN) Human Rights Committee. 2018. General Comment No 36 (2018) on the Right to Life. on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life. CCPR/C/GC/36 https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1_Global/CCPR_C_GC_36_8785_E.pdf (Referenced 16 January 2022).

United Nations Human Rights Office of the High Commissioner (OHCHR). 2012. The Human Rights Treaty System. www.ohchr.org/Documents/Publications/FactSheet30Rev1.pdf (Referenced 29 September 2021).

United Nations Human Rights Office of the High Commissioner (OHCHR). 2020. *Urgent Action Needed to Prevent COVID-19 'Rampaging Through Places of Detention'—Michelle Bachelet (25 March 2020)*. Geneva: Office of the High Commissioner for Human Rights. www.ohchr.org/en/statements/2020/03/urgent-action-needed-prevent-covid-19-rampaging-through-places-detention?LangID=E&NewsID=25745 (Referenced 29 September 2021).

United Nations (UN) Malawi. 2020. Malawi COVID-19 Situation Update No.2 as of 27th March 2020. United Nations. https://malawi.un.org/en/46712-malawi-covid-19-situation-update-no2-27th-march-2020 (Referenced 4 October 2021).

United Nations Office on Drugs and Crime (UNODC). 2020a. *Position Paper COVID-19 Preparedness and Responses in Prisons*. Vienna, Austria: United Nations Office on Drugs and Crime. www.unodc.org/documents/hiv-aids/publications/UNODC_position_paper_COVID-19_in_prisons_-_FINAL.pdf (Referenced 16 January 2022).

United Nations Office on Drugs and Crime (UNODC). 2020b. *COVID-19 in Prisons—Member States and UNODC Reiterate their Commitment to the Nelson Mandela Rules (22 July 2020)*. Vienna, Austria: United Nations Office on Drugs and Crime. www.unodc.org/unodc/en/frontpage/2020/July/covid-19-in-prisons--member-states-and-unodc-reiterate-their-commitment-to-the-nelson-mandela-rules.html (Referenced 25 May 2021).

United Nations Office on Drugs and Crime (UNODC) World Health Organization (WHO), UNAIDS and Office of the High Commissioner for Human Rights (OHCHR). 2020. UNODC, WHO, UNAIDS and OHCHR Joint Statement on COVID-19 in Prisons and Other Closed Settings (13 May 2020). www.who.int/news/item/13-05-2020-unodc-who-unaids-and-ohchr-joint-statement-on-covid-19-in-prisons-and-other-closed-settings (Referenced 25 May 2021).

United Nations Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UN SPT). 2020. Advice of the Subcommittee on Prevention of Torture to States Parties and National Preventive Mechanisms relating to the Coronavirus Pandemic. CAT/OP/10. Adopted on 25th March 2020. www.ohchr.org/Documents/HRBodies/OPCAT/AdviceStatePartiesCoronavirusPandemic2020.pdf (Referenced 24 January 2022).

United States State Department (USSD). 2020a. 2020 Country Reports on Human Rights Practices: Malawi. Bureau Of Democracy, Human Rights, and Labor. https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/malawi/ (Referenced 11 October 2021).

United States State Department (USSD). 2020b. 2020 Human Rights Report: Zimbabwe. zw.usembassy.gov/2020-human-rights-report-zimbabwe/ (Referenced 29 September 2021).

Usuf, E and A. Roca. 2021. Seroprevalence Surveys in Sub-Saharan Africa: What Do They Tell Us? *Lancet Global Health* 9: 6E724–725.

Van Hout, M. C. 2020a. COVID-19, Health Rights of Prison Staff and the Bridge Between Prison and Public Health in Africa. *Public Health* 185: 128–9.

Van Hout, M. C. 2020b. Prison Staff Exposure to Pathogenic Disease and Occupational Health Research in African Prisons: A Neglected Area. *Journal of Sustainable Development in Africa* 22(1): 166–71.

Van Hout, M. C. 2020c. COVID-19: Urgent Need to Find Alternatives to Prison Sentences in Malawi. *Health and Human Rights Journal* (13 September 2020). https://www.hhrjournal.org/2020/09/covid-19-urgent-need-to-release-women-from-prison-in-malawi/ (Referenced 29 September 2021).

Van Hout, M. C. and R. Mhlanga-Gunda. 2018. Contemporary Women Prisoners Health Experiences, Unique Prison Health Care Needs and Health Care Outcomes in Sub-Saharan Africa: A Scoping Review of Extant Literature. *BMC International Health and Human Rights* 18: 31. https://doi.org/10.1186/s12914-018-0170-6.

Van Hout, M. C. and R. Mhlanga-Gunda. 2019a. 'Mankind owes to the Child the Best that it has to Give': Prison Conditions and the Health Situation and Rights of Circumstantial Children Incarcerated in Sub Saharan African Prisons. *BMC International Health and Human Rights* 19(1): 13.

Van Hout, M. C. and R. Mhlanga-Gunda. 2019b. Prison Health Situation and Rights of Juveniles Incarcerated in Sub Saharan African Prisons. *BMC International Health and Human Rights* 19: 17.

Van Hout, M. C., and J. Wessels. 2021a. 'Ubuntu' I Am Because We Are: COVID-19 and the Legal Framework for Addressing Communicable Disease in the South African Prison System. *International Journal of Prisoner Health*. doi: 10.1108/IJPH-05-2021-0046.

Van Hout, M. C., and J. Wessels. 2021b. Human Rights and the Invisible Nature of Incarcerated Women in Post-Apartheid South Africa: Prison System Progress in Adopting the Bangkok Rules. *International Journal of Prisoner Health*. doi: https://doi.org/10.1108/IJPH-05-2021-0045.

Van Hout, M. C., and J. Wessels. 2021c. Navigating the complexities of the Mentally Ill and Mentally Incapacitated in the Criminal Justice System in South Africa. *Forensic Science International: Mind and Law* 2: 100068.

Van Hout, M. C., C. Bigland and T. Mariniello. 2022a. A Legal-Realist Assessment of the Zimbabwean Correctional System Response to COVID-19 during State Disaster Measures. *International Journal of Prisoner Health*. doi: https://doi.org/10.1108/IJPH-10-2021-0104.

Van Hout, M. C., V. Mhango, R. Kaima *et al.* 2022b. A Legal-Realist Assessment of Human Rights, Right to Health and Standards of Healthcare in the Malawian Prison System during COVID-19 State Disaster Measures. *International Journal of Prisoner Health*. doi:10.1108/IJPH-10-2021-0108.

Venter, Z. 2020. Bid for Early Release to Avoid Covid-19 in Prison is Rejected by Court. IOL (8 September 2020). https://www.iol.co.za/pretoria-news/news/bid-for-early-release-to-avoid-covid-19-in-prison-is-rejected-by-court-ec3525c9-efe0-4d8a-ac83-b831ebe58d44 (Referenced 25 May 2021).

Wenander, H. 2021. Sweden: Non-Binding Rules Against the Pandemic—Formalism, Pragmatism and some Legal Realism. *European Journal of Risk Regulation* 12(1): 127–42.

Wilson, R. 2007. Tyrannosaurus Lex: The Anthropology of Human Rights and Transnational Law. In M. Goodale and S. Engle Merry *(eds), The Practice of Human Rights: Tracking Law between the Global and the Local*: 342–68. Cambridge, UK, and New York: Cambridge University Press.

World Health Organization (WHO). 2003. *WHO Moscow Declaration: Prison Health as part of Public Health*. Copenhagen, Denmark: World Health Organization-Europe.

World Health Organization (WHO). 2020a. *Coronavirus Disease (COVID-19) Pandemic*. Geneva, Switzerland: World Health Organization.

World Health Organization (WHO). 2020b. *Preparedness, Prevention and Control of COVID-19 in Prisons and Places of Detention*. Geneva, Switzerland: World Health Organization. WHO/Europe | Prisons and health - Preparedness, prevention and control of COVID-19 in prisons and other places of detention, 15 March 2020 (produced by WHO/Europe) (Referenced 14 September 2021).

World Health Organization (WHO). 2020c. *Checklist to Evaluate Preparedness, Prevention and Control of COVID-19 in Prisons and Other Places of Detention*. Copenhagen, Denmark: World Health Organization-Europe. www.euro.who.int/__data/assets/pdf_file/0020/438041/Covid19-PrisonsChecklist-eng.pdf (Referenced September 2021).

World Health Organization (WHO) Africa. 2020. A Second COVID-19 Case is Confirmed in Africa (25 February 2020). www.afro.who.int/news/second-covid-19-case-confirmed-africa (Referenced 12 January 2022).

World Medical Association (WMA). 2011. *Declaration of Edinburgh on Prison Conditions and the Spread of Tuberculosis and Other Communicable Diseases*. Geneva, Switzerland: World Medical Association.

World Prison Brief: Africa. 2022. Africa. www.prisonstudies.org/map/africa (Referenced 12 January 2022).

World Prison Brief: Malawi. 2022. Malawi. www.prisonstudies.org/country/malawi (Referenced 14 January 2022).

World Prison Brief: South Africa. 2022. South Africa. www.prisonstudies.org/country/south-africa (Referenced 14 January 2022).

World Prison Brief: Zimbabwe. 2022. Zimbabwe. www.prisonstudies.org/country/zimbabwe (Referenced 14 January 2022).

Zachariah, R., A. Harries, A. Chantulo *et al.* 2008. Sexually Transmitted Infections Among Prisoners in a Rural District of Malawi. *Transactions of the Royal Society of Tropical Medicine and Hygiene* 96(6): 617–19.

Zimbabwe Human Rights Forum. 2018. *Rights Behind Bars: A Study of Prison Conditions in Zimbabwe 2018*. Harare, Zimbabwe: Zimbabwe Human Rights Forum. www.hrforumzim.org/wpcontent/uploads/2018/10/Prison-Report-2018.pdf (Referenced 29 September 2021).

Zimbabwe Peace Project (ZPP). 2021. COVID-19 Accountability Tracker. ZPP.: https://reliefweb.int/report/zimbabwe/zpp-covid-19-accountability-tracker-june-202. (Referenced 29 September 2021).

Zimbabwean Government Gazette Extraordinary. 2020. No. 39 General Notice 688 of 2020. Published by Authority Vol. XCVIII. https://gazettes.africa/archive/zw/2020/zw-government-gazette-dated-2020-04-30-no-39.pdf (Referenced 20 January 2022).

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Review Essay

'Women's right to health in detention': United Nations Committee Observations since the adoption of the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (Bangkok Rules)

Marie Claire Van Hout, Simon Fleißner, and Heino Stöver*

Abstract

Approximately 11.7 million people are detained globally, with an observed rise in the female prison population in recent years. A range of human rights treaties, and non-binding minimum standards of care (2016 Standard Minimum Rules for the Treatment of Prisoners (the Mandela Rules), 2010 Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules)) protect the rights of prisoners. States however have discretion in defining humane treatment and adequate medical care in detention settings.

In this *Review Essay*, we focus on the right to health of detained women based on an environment conducive to adequate health, and access to gender-responsive, non-discriminatory healthcare in detention equivalent to that in the community. We scrutinized all United Nations Committee on the Elimination of Discrimination against Women and Committee against Torture Concluding Observations published since 2010, and provide a global illustration of violations of women's health rights in detention settings to date. We document the inadequate accommodation and standards of detention of women, and inadequate access to healthcare services while detained, particularly relating to HIV and reproductive health, and mental health and drug dependence treatment in some countries. Human rights violations identified in the Concluding Observations reflect 39 countries and are presented as: the United Nations Committee description of their concern pertaining to a country's treatment of women in detention; and collectively in terms of the particular Bangkok Rule (5, 6, 9, 10, 12, 14–16, 34, 35, 48 and 51).

Our investigation raises general questions around the continued lack of resourcing of female detention settings and gender-responsive healthcare programming, the lack of data and advocacy on behalf of detained women, and the lack of routine scrutiny of the unique health rights assurances of women within independent monitoring and inspection in detention settings all over the world.

Keywords. Bangkok Rules; women in prison; right to health; human rights; sustainable development agenda

* Marie Claire Van Hout is Professor of International Public Health Policy and Practice at Liverpool John Moore's University, United Kingdom; Simon Fleißner is a Social Worker and Research Assistant at the Frankfurt University of Applied Sciences in Germany; Heino Stöver is a Social Scientist and Professor of Social Scientific Addiction Research at the Frankfurt University of Applied Sciences in Germany.

Background

On any given day, approximately 11.7 million people are detained globally in prisons or other closed settings (Penal Reform International 2020). The global female prison population continues to rise, with more than 740,000 women and girls in detention in 2020, and with observed increases since 2010 in Asia (an increase of 50 per cent), Central and South America (an increase of 19 per cent), and Africa (an increase of 24 per cent) (Penal Reform International 2020). Women represent the minority in the global prison population and are generally detained for less severe and non-violent crimes (crimes of poverty). They are disproportionately affected by lower socioeconomic status, exposure to inter-personal violence (child abuse, intimate partner), custodial violence (prison staff, fellow prisoners) and mental illness; and often belong to identified vulnerable groups (sexual minorities, victims of sexual abuse, trafficking and drug related crime; and those with psychiatric illness, learning disabilities or drug dependence) (Karlsson and Zielinski 2020; Van Hout and Crowley 2021; Van Hout, Fleißner and Stöver 2021). Women's unique health needs in many regions of the world are often neglected by the male dominated and ill-resourced detention system. United Nations Human Rights Committee and Special Rapporteur reporting, and contemporary academic reviews indicate that women (including transgender women) continue to experience discrimination, poor standards of care and a lack of access to gender-appropriate healthcare when in prisons and immigration detention, including the denial of food, detention in compulsory drug treatment centres, use of physical and pharmacological restraints and denial of opioid substitution treatment (Alirezeai and Roudsari 2020; Lungu Byrne et al. 2020; Pillay, Chimbga and Van Hout 2021; Van Hout 2021; Van Hout and Crowley 2021; Van Hout and Mhlanga-Gunda 2018; Van Hout and Wessels 2021; Van Hout, Hillis and Kewley 2020; Van Hout, Lungu Byrne and Germain 2020).

Human rights and the right to health in detention

First, we outline the range of human rights protections regarding health as a fundamental human right. Positive obligations regarding right to health under the international treaties include the World Health Organization Constitution (WHO) Article 2 which requires State signature and ratification, with WHO having a legislative capacity to develop international health regulations (UN GA 1946). The Universal Declaration of Human Rights provides for the right to health in Article 25 and while it is not a directly legally binding treaty, it is widely accepted that the Declaration's provisions, in particular the prohibition of torture and racial discrimination, are now rules of customary international law; and through State practice are viewed as legally binding (UN GA 1948). The 1966 International Covenant on Economic, Social and Cultural Rights expands on the Declaration by outlining the steps required for full realization of these rights (UN GA 1966a). The International Covenant on Economic, Social and Cultural Rights is most important in terms of recognizing and safeguarding the right to health (Article 12(1)). State parties are obliged to recognize the right of all to the enjoyment of the highest attainable standard of physical and mental health (including specific issues related to environmental hygiene). The Committee on Economic, Social and Cultural Rights explicitly states: 'States are under the obligation to respect the right to health by, inter alia, refraining from denying or limiting equal access for all persons, including prisoners or detainees ... [to] curative and palliative health services'. Although the International Covenant on Economic, Social and Cultural Rights recognizes the 'progressive realization' of such rights and acknowledges resource constraints faced by State parties, General Comment No.14 requires that States take 'deliberate, concrete and targeted steps' to realize the right to health and to identify indicators and benchmarks to track its progress.

Aside from civil and political rights, the 'second generation' economic and social human rights as provided for in the International Covenant on Economic, Social and Cultural Rights apply to prisoners; where the right to a healthy environment and right to healthcare

are clearly linked to other 'first generation' rights, such as non-discrimination, privacy and confidentiality. While the International Covenant on Civil and Political Rights does not expressly provide for a right to health, it specifically provides the right to humane treatment of prisoners (Articles 2, 6, 7, 10 and 26) (UN GA 1966b). Article 26 provides for non-discriminatory protection of the law and equality before the law of a State and is supported by Article 2 which outlines the right to an effective remedy for violations.

Article 5 (e) (iv) of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination obliges State parties to ensure that no person is denied basic healthcare on the basis of their nationality, colour or creed (UN ICERED 1965). The unique gendered aspects and rights, including right to gender appropriate and gender-responsive healthcare of women is further recognized in the 1979 Convention on the Elimination of all Forms of Discrimination against Women in Article 12 which requires that: 'State parties shall take all appropriate measures to eliminate discrimination against women in the field of health care' (UN CEDAW 1979). This Convention provides that discrimination against women encompasses ill-treatment that affects women disproportionately, including detention conditions that do not respond adequately to the specific needs of women. With regard to children in detention settings, the Convention on the Rights of the Child Article 24 guarantees the right to health and medical care to young detained persons centred on the principle of the 'best interests of the child' (UN CRC 1989).

Lastly, the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (UN GA 1984) creates further binding obligations on States not to ill-treat those deprived of their liberty, and recognizes 'an inadequate level of healthcare can lead rapidly to situations falling within the scope of the term "inhuman and degrading treatment"' (Council of Europe 2015). Article 16 applies to State's official obligation to prevent acts of cruel, inhuman or degrading treatment or punishment. Going beyond the 'right to an effective remedy', Articles 12 to 14 clearly stipulate the right to prompt and impartial investigations of allegations of torture, including financial compensation and rehabilitation of the victim.

Health rights and minimum standards of care of women in detention

There are a range of non-binding United Nations norms and minimum standards for the treatment of prisoners and medical declarations particular to the rights of prisoners regarding their health and medical ethics in detention settings (Lines 2008). The United Nations Principles of Medical Ethics, WHO and World Medical Association declarations all mandate the rights of prisoners to humane treatment and appropriate medical care (UN GA 1982; World Health Organization 2003; World Medical Association 2011). The United Nations Principles of Medical Ethics relevant to prisons (Principles 1, 6) contain a non-derogation clause during State declaration of emergency (UN GA 1982). The United Nations Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules) draw attention to the State duty to ensure adequate accommodation paying attention to the environmental determinants of health (cubic content of air, minimum floor space, lighting, heating and ventilations) and to provide prisoners with access to free, non-discriminatory and equivalent healthcare, the right to receive qualified, consented and confidential medical care, and that doctors or public health bodies should make regular inspections on the adequacy of food, hygiene, cleanliness and physical conditions of the prison (Mandela Rules 13, 24, 25, 27, 30, 31, 32, 35) (UN GA 2016). While, the Mandela Rules do not specifically refer to women (with exception of Rule 7 referring to self-perceived gender identity), they are supported by the soft law principles and non-discrimination provisions contained in the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules) which are 70 rules outlining the treatment of women in detention, including pre-trial and sentenced, adopted by the United Nations

General Assembly on 22 December 2010 (UN GA 2010). Particular health rights provisions for women in detention settings are provided for the 2010 Bangkok Rules (5, 6, 9, 10, 12, 14–16, 34, 35, 48 and 51; see Table 1).

In short, there are various protections and rights assurance mechanisms respecting the right to health of women deprived of their liberty; not limited to prohibition of torture and discrimination but also including those relevant to the conditions of detention and right of access to healthcare. States however have discretion in defining humane treatment and adequate healthcare in detention settings (Lines 2008). In this Review Essay, we focus on illustrating human rights violations particular to the health of incarcerated women based on the right to an environment conducive to adequate health (which does not produce ill-health, disease or disabilities), and right to access of gender-responsive, non-discriminatory healthcare in prison equivalent to that in the community (UN GA 2010; Leiter 2015). We scrutinized all United Nations Committee on the Elimination of Discrimination against Women (CEDAW) and Committee against Torture (CAT) Concluding Observations[1] published since 2010, and we provide a global illustration of United Nations Committee documentation of violations of women's health rights while in detention. We present and collate this information relating to the geographies where violations are recorded, the United Nations Committee description of their concern pertaining to a country's treatment of women in prison, and collectively in terms of the particular Bangkok Rule breached.

Assessing standards of care pertinent to health rights assurances of women in detention

The initial sample of all Concluding Observations consisted of 178 CAT and 251 CEDAW Concluding observations (n=329) published by the Office of the High Commissioner for Human Rights from 2010 to August 2021. Detailed searches were conducted in each report using the standard UN terminology in Concluding observations which are the terms 'prison'; 'detention' in the case of CEDAW, and 'prison'; 'detention'; 'women' and 'female' in the CAT. Inclusion criteria centred on the CEDAW and CAT Concluding observations on a country published since 2010 and their reference to a violation of one or more of the relevant Bangkok Rules encompassing environmental standards of detention (hygiene, sanitation, ventilation, accommodation space) and access to gender appropriate healthcare for women, as illustrated in Table 1. Of note is that many of these United Nations Committee Concluding observations while referring to general concerns around detention conditions did not explicitly refer to women or female prisons. In this Review Essay we only included reports which explicitly refer to women in detention or female prisons.

We found violations of a broad range of relevant Bangkok Rules in the 45 included reports (14 CAT and 31 CEDAW). Thirty-nine countries are represented. The range of years was as follows: 2010 (n=3); 2011 (n=3); 2012 (n=3); 2013 (n=2); 2014 (n=1); 2015 (n=1); 2016 (n=5); 2017 (n=13); 2018 (n=8); and 2019 (n=6). Descriptions of the United Nations Committee reports are presented in Table 2 and mapped against relevant Bangkok Rules in Table 3.

The reports illustrate the continued breaches of the Bangkok Rules as reported in the CAT and CEDAW levels in a large number of countries regarding the right to health of women in detention settings. Descriptions provided by the United Nations Committee reports generally relate to the right to adequate accommodation (clean water, food, hygiene

1 United Nations Committee Concluding Observations are public and official reports of the United Nations which the Treaty Bodies (in this instance CEDAW and CAT) produce at the end of every session for every State under review. These reports refer to the positive aspects of a State's implementation of a treaty and areas where the treaty body recommends that further action needs to be taken by the State.

Table 1. Bangkok Rules pertinent to right to health and right to access of healthcare in detention settings

Rule 5: The accommodation of women prisoners shall have facilities and materials required to meet women's specific hygiene needs, including sanitary towels provided free of charge and a regular supply of water to be made available for the personal care of children and women, in particular women involved in cooking and those who are pregnant, breastfeeding or menstruating.
Rule 6: The health screening of women prisoners shall include comprehensive screening to determine primary healthcare needs, and also shall determine: (a) The presence of sexually transmitted diseases or blood-borne diseases; and, depending on risk factors, women prisoners may also be offered testing for HIV, with pre- and post-test counselling; (b) Mental health-care needs, including post-traumatic stress disorder and risk of suicide and Self-Harm; (c) The reproductive health history of the woman prisoner, including current or recent pregnancies, childbirth and any related reproductive health issues; (d) The existence of drug dependency; (e) Sexual abuse and other forms of violence that may have been suffered prior to admission.
Rule 7: (2) Whether or not the woman chooses to take legal action, prison authorities shall endeavour to ensure that she has immediate access to specialized psychological support or counselling.
Rule 8: The right of women prisoners to medical confidentiality, including specifically the right not to share information and not to undergo screening in relation to their reproductive health history, shall be respected at all times.
Rule 9: If the woman prisoner is accompanied by a child, that child shall also undergo health screening, preferably by a child health specialist, to determine any treatment and medical needs. Suitable healthcare, at least equivalent to that in the community, shall be provided.
Rule 10: (1) Gender-specific healthcare services at least equivalent to those available in the community shall be provided to women prisoners. (2) If a woman prisoner requests that she be examined or treated by a woman physician or nurse, a woman physician or nurse shall be made available, to the extent possible, except for situations requiring urgent medical intervention. If a male medical practitioner undertakes the examination contrary to the wishes of the woman prisoner, a woman staff member shall be present during the examination.
Rule 11: (1) Only medical staff shall be present during medical examinations unless the doctor is of the view that exceptional circumstances exist or the doctor requests a member of the prison staff to be present for security reasons or the woman prisoner specifically requests the presence of a member of staff as indicated in rule 10, paragraph 2, above. (2) If it is necessary for non-medical prison staff to be present during medical examinations, such staff should be women and examinations shall be carried out in a manner that safeguards privacy, dignity and confidentiality.
Rule 12: Individualized, gender-sensitive, trauma-informed and comprehensive mental health care and rehabilitation programmes shall be made available for women prisoners with mental health care needs in prison or in non-custodial settings.
Rule 13: Prison staff shall be made aware of times when women may feel particular distress, so as to be sensitive to their situation and ensure that the women are provided appropriate support.
Rule 14: In developing responses to HIV/AIDS in penal institutions, programmes and services shall be responsive to the specific needs of women, including prevention of mother-to-child transmission. In this context, prison authorities shall encourage and support the development of initiatives on HIV prevention, treatment and care, such as peer-based education.
Rule 15: Prison health services shall provide or facilitate specialized treatment programmes designed for women substance abusers, taking into account prior victimization, the special needs of pregnant women and women with children, as well as their diverse cultural backgrounds.
Rule 16: Developing and implementing strategies, in consultation with mental health care and social welfare services, to prevent suicide and Self-Harm among women prisoners and providing appropriate, gender-specific and specialized support to those at risk shall be part of a comprehensive policy of mental health care in women's prisons.
Rule 17: Women prisoners shall receive education and information about preventive healthcare measures, including on HIV, sexually transmitted diseases and other blood-borne diseases, as well as gender-specific health conditions.
Rule 18: Preventive healthcare measures of particular relevance to women, such as Papanicolaou tests and screening for breast and gynaecological cancer, shall be offered to women prisoners on an equal basis with women of the same age in the community

Table 1. Continued

Rule 25: (1) Women prisoners who report abuse shall be provided immediate protection, support and counselling, and their claims shall be investigated by competent and independent authorities, with full respect for the principle of confidentiality. Protection measures shall take into account specifically the risks of retaliation (2) Women prisoners who have been subjected to sexual abuse, and especially those who have become pregnant as a result, shall receive appropriate medical advice and counselling and shall be provided with the requisite physical and mental health care, support and legal aid.

Rule 33: (1) All staff assigned to work with women prisoners shall receive training relating to the gender-specific needs and human rights of women prisoners. (2) Basic training shall be provided for prison staff working in women's prisons on the main issues relating to women's health, in addition to first aid and basic medicine. (3) Where children are allowed to stay with their mothers in prison, awareness-raising on child development and basic training on the healthcare of children shall also be provided to prison staff, in order for them to respond appropriately in times of need and emergencies.

Rule 34: Capacity-building programmes on HIV shall be included as part of the regular training curricula of prison staff. In addition to HIV/AIDS prevention, treatment, care and support, issues such as gender and human rights, with a particular focus on their link to HIV, stigma and discrimination, shall also be part of the curriculum.

Rule 35: Prison staff shall be trained to detect mental health care needs and risk of Self-Harm and suicide among women prisoners and to offer assistance by providing support and referring such cases to specialists

Rule 38: Juvenile female prisoners shall have access to age- and gender-specific programmes and services, such as counselling for sexual abuse or violence. They shall receive education on women's healthcare and have regular access to gynaecologists, similar to adult female prisoners.

Rule 39: Pregnant juvenile female prisoners shall receive support and medical care equivalent to that provided for adult female prisoners. Their health shall be monitored by a medical specialist, taking account of the fact that they may be at greater risk of health complications during pregnancy due to their age.

Rule 41: The gender-sensitive risk assessment and classification of prisoners shall: (a) Take into account the generally lower risk posed by women prisoners to others, as well as the particularly harmful effects that high security measures and increased levels of isolation can have on women prisoners; (b) Enable essential information about women's backgrounds, such as violence they may have experienced, history of mental disability and substance abuse, as well as parental and other caretaking responsibilities, to be taken into account in the allocation and sentence planning process; (c) Ensure that women's sentence plans include rehabilitative programmes and services that match their gender-specific needs; (d) Ensure that those with mental health-care needs are housed in accommodation which is not restrictive, and at the lowest possible security level, and receive appropriate treatment, rather than being placed in higher security level facilities solely due to their mental health problems.

Rule 48: (1) Pregnant or breastfeeding women prisoners shall receive advice on their health and diet under a programme to be drawn up and monitored by a qualified health practitioner. Adequate and timely food, a healthy environment and regular exercise opportunities shall be provided free of charge for pregnant women, babies, children and breastfeeding mothers.

Rule 51: (1) Children living with their mothers in prison shall be provided with ongoing healthcare services and their development shall be monitored by specialists, in collaboration with community health services.

needs) (Rule 5); the right to gender-specific healthcare services at least equivalent to those available in the community (Rule 10); the comprehensive health screening of women and relevant responses to providing medical care for human immunodeficiency virus/acquired immunodeficiency syndrome (HIV/AIDS) and reproductive health; individualized, gender-responsive, trauma-informed and comprehensive mental healthcare and rehabilitation programmes; and drug dependence treatment (including for pregnant women who use drugs) (Rules 6, 12, 15, 16).

The majority of CEDAW and CAT reports were from the years 2017 and 2018 and highlighted a lack of basic needs provisions (food, drinking water, bedding, sanitary products), neglect of hygiene needs, insufficient privacy of sanitary facilities and unsafe, deplorable

Table 2. UN CAT and CEDAW Committee Concluding Observations per latest country report

Country	CEDAW and CAT Committee statement	Date	Symbol
Afghanistan	The UN CAT (2017c) Committee refers to inadequate sanitation and access to water, food of a sufficient amount and quality and medical services. In that connection, the Committee is particularly concerned by the situation of women in prisons.	2017	CAT/C/AFG/CO/2
Albania	The UN CEDAW (2016e) Committee identifies women in detention, secluded women and asylum-seeking women, in particular as regards their access to education, health services, employment, housing and participation in public and political life.	2016	CEDAW/C/ALB/CO/4
Argentina	The UN CEDAW (2016b) Committee refers to the limited access to education, job skills training, work opportunities and health services for women in detention.	2016	CEDAW/C/ARG/CO/7
Argentina	The UN CAT (2017e) Committee appreciates the information on programs designed to improve access to healthcare for incarcerated women, particularly pregnant women; nevertheless, in view of the deficiencies noted by various oversight bodies, it remains concerned about the inadequacy of those programs at the federal and provincial levels.	2017	CAT/C/ARG/CO/5-6
Australia	The UN CEDAW (2018a) Committee refers to high rates of mental health disorders among women in detention and their insufficient access to mental and physical healthcare.	2018	CEDAW/C/AUS/CO/8
Belarus	The UN CEDAW (2011b) Committee refers is particularly concerned about the situation of Irina Khalip, Natalia Radzina, both journalists of independent media outlets, and Anastasia Palazhanko, deputy chairperson of the youth organization 'Young Front', who are detained at the KGB pretrial detention centre in Minsk on charges of organizing riots (art. 293 of the Criminal Code), reportedly without confidential access to a lawyer and adequate medical treatment.	2011	CEDAW/C/BLR/CO/7
Belarus	The UN CEDAW (2016c) Committee indicates that prison and detention conditions for women continue to be poor, including insufficient health and sanitary conditions.	2016	CEDAW/C/BLR/CO/8
Belarus	The UN CAT (2018d) Committee regrets the absence of information from the State party as regards the conditions of women held in labor treatment facilities, which are of particular concern as they allegedly lack access to medical services, including gynecologists.	2018	CAT/C/BLR/CO/5
Botswana	The UN CEDAW (2019c) Committee is concerned about the lack of equal access to free antiretroviral treatment for members of disadvantaged groups, including indigenous women, women prisoners.	2019	CEDAW/C/BWA/CO/4
Brazil	The UN CEDAW (2012d) Committee is concerned about the lack of adequate health facilities and services for female inmates, in particular pregnant women.	2012	CEDAW/C/BRA/CO/7
Burkina Faso	The UN CEDAW (2017b) Committee is concerned about the poor conditions of detention in which women are held, including overcrowding and a lack of access to food, drinking water and adequate sanitation.	2017	CEDAW/C/BFA/CO/7
Cambodia	The UN CEDAW (2019b) Committee is concerned about the detention of women and children in overcrowded prisons that fail to meet international standards, including access to essential healthcare services, especially for pregnant women.	2019	CEDAW/C/KHM/CO/6

Table 2. Continued

Country	CEDAW and CAT Committee statement	Date	Symbol
Canada	The UN CAT (2018b) Committee remains concerned at reports indicating that there is excessive use of means of restraint and that correctional institutions lack the appropriate capacity, resources and infrastructure to manage serious mental health conditions, a problem that is particularly acute in women's institutions.	2018	CAT/C/CAN/CO/7
Chile	The UN CEDAW (2012a) Committee is concerned regarding the difficult situation faced by women in prison, particularly with regard to their access to adequate health facilities and services.	2012	CEDAW/C/CHL/CO/5-6
Chile	The UN CEDAW (2018c) Committee is concerned that women in detention have limited access to adequate healthcare as a result of a general shortage of professional staff and the absence of healthcare staff overnight and at weekends in detention centres. The Committee is further concerned about the risks faced by pregnant women in detention, owing to the lack of access to obstetric and gynecological care.	2018	CEDAW/C/CHL/CO/7
Chile	The UN CAT (2018c) Committee remains concerned about reports that the prison authorities do not take adequate account of the specific needs of women deprived of their liberty in terms of personal health and hygiene.	2018	CAT/C/CHL/CO/6
Cyprus	The UN CAT (2019) Committee remains concerned about the situation in the central prison of Nicosia, in particular overcrowding and poor material conditions, lighting and sanitation, as well as about overcrowding in the women's sections and the lack of privacy and health concerns that have been reported.	2019	CAT/C/CYP/CO/5
El Salvador	The UN CEDAW (2017h) Committee refers to the problems in gaining appropriate access to accommodation, health and sanitary facilities.	2017	CEDAW/C/SLV/CO/8-9
Ethiopia	The UN CAT (2010a) Committee remains seriously concerned about consistent reports of overcrowding, poor hygienic and sanitary conditions, lack of sleeping space, food and water, the absence of adequate healthcare, including for pregnant women and HIV/AIDS and tuberculosis patients, the absence of specialized facilities for prisoners and detainees with disabilities, co-detention of juveniles with adults, inadequate protection of juvenile prisoners and children detained with their mothers from violence in prisons and places of detention in the State party.	2010	CAT/C/ETH/CO/1
France	The UN CEDAW (2016d) Committee is concerned regarding the lack of access by female inmates to healthcare.	2016	CEDAW/C/FRA/CO/7-8
Greece	The UN CEDAW (2013) Committee is concerned regarding the lack of access by female inmates to adequate health facilities and service.	2013	CEDAW/C/GRC/CO/7
Honduras	The UN CEDAW (2016a) Committee is concerned about the insufficient health and sanitary conditions of women in detention, including pregnant women and women detained with their children.	2016	CEDAW/C/HND/CO/7-8
Iraq	The UN CEDAW (2014) Committee is concerned regarding the precarious conditions and overcrowding of some detention facilities and the lack of adequate healthcare facilities and services for women detainees.	2014	CEDAW/C/IRQ/CO/4-6

Table 2. Continued

Country	CEDAW and CAT Committee statement	Date	Symbol
Israel	The UN CEDAW (2011a) Committee is concerned at reports that approximately 25 per cent of Palestinian female prisoners suffer from treatable diseases, but that many have little or no access to medical attention, and it notes with concern the lack of adequate services provided to pregnant Palestinian prisoners.	2011	CEDAW/C/ISR/CO/5
Israel	The UN CEDAW (2017d) Committee reiterates its concern about the increased number of Palestinian women and girls who are subjected to prolonged administrative detention and forcible transfers from the Occupied Palestinian Territory to places of detention in Israel and about reports of their limited access to justice and healthcare services.	2017	CEDAW/C/ISR/CO/6
Italy	The UN CEDAW (2017e) Committee is concerned regarding the lack of access by female inmates to basic health and social services.	2017	CEDAW/C/ITA/CO/7
Kazakhstan	The UN CEDAW (2019a) Committee is concerned regarding the limited access to healthcare for and the discrimination and violence faced by women living with HIV/AIDS, women with disabilities and women using drugs, including in prisons.	2019	CEDAW/C/KAZ/CO/5
Lebanon	The UN CAT (2017d) Committee is concerned regarding the inadequate health care services in the prisons, particularly in the case of female prisoners.	2017	CAT/C/LBN/CO/1
Mexico	The UN CEDAW (2018b) Committee is concerned about the conditions in many detention centres, especially those situated in remote areas, that limit access for women to health services, including obstetric and gynecological care.	2018	CEDAW/C/MEX/CO/9
Montenegro	The UN CEDAW (2017g) Committee is concerned regarding the limited access for female prisoners to literacy and educational programs, drug dependence treatment and reinsertion programs.	2017	CEDAW/C/MNE/CO/2
Niger	The UN CEDAW (2017f) Committee is concerned about the poor conditions of detention for women, including overcrowding and lack of access to food, drinking water and adequate sanitary conditions.	2017	CEDAW/C/NER/CO/3-4
Northern Ireland	The UN CEDAW (2012c) Committee is concerned about women's limited access to mental health care in prisons.	2012	CEDAW/C/GBR/CO/7
Norway	The UN CEDAW (2017a) Committee is concerned that health services in prison are at times not tailored to the specific needs of women, including with respect to mental health care and substance abuse rehabilitation services.	2017	CEDAW/C/NOR/CO/9
Panama	The UN CEDAW (2010a) Committee is concerned at the difficult situation faced by women in prison, particularly with regard to their access to adequate health facilities and services.	2010	CEDAW/C/PAN/CO/7
Panama	The UN CAT (2017b) Committee is concerned at reports that the prison administration does not sufficiently consider the special needs of persons with disabilities and women prisoners in areas such as medical care, accessibility, the maintenance of family ties, and services and facilities for pregnant women and women with children.	2017	CAT/C/PAN/CO/4
Paraguay	The UN CEDAW (2017c) Committee is concerned regarding the limited access of female inmates to healthcare services and to items of personal hygiene.	2017	CEDAW/C/PRY/CO/7

Table 2. Continued

Country	CEDAW and CAT Committee statement	Date	Symbol
Peru	The UN CAT (2018a) Committee is concerned by reports that the prison authorities do not give sufficient consideration to the special needs of women deprived of their liberty, especially in the case of pregnant women and women with children under the age of 3. Other information received by the Committee points to the poor quality of the food provided to prisoners, water supply and sanitation problems, insufficient ventilation, significant shortages in medical and healthcare services, a lack of specialized personnel and corruption on the part of prison officials (p. 6). The Committee takes note with concern of the number of people who died while in custody between 2012 and 2014 (a total of 639 persons, including 30 women, according to data provided by the State party) and of the causes of death, which in many cases were violent assaults or infectious diseases, especially tuberculosis and acquired immunodeficiency syndrome (AIDS).	2018	CAT/C/PER/CO/7
Qatar	The UN CAT (2018e) Committee is concerned about the reports of poor conditions of detention, including inadequate sanitation, insufficient ventilation and shortage of bedding and food. In that connection, the Committee is particularly concerned by the situation of women held in this detention facility.	2018	CAT/C/QAT/CO/3
Republic of Korea	The UN CAT (2017f) Committee is concerned at the poor material conditions, including overcrowding, extremely small investigation detention rooms and insufficient privacy of sanitary facilities, in particular for women.	2017	CAT/C/KOR/CO/3-5
Republic of Moldova	The UN CAT (2017a) Committee is concerned regarding that health care and hygiene needs of women in the penitentiary system are not adequately addressed.	2017	CAT/C/MDA/CO/3
Senegal	The UN CEDAW (2015) Committee is concerned about overcrowding in detention centres and prisons for women and women detainee's lack of access to adequate healthcare.	2015	CEDAW/C/SEN/CO/3-7
Togo	The UN CEDAW (2012b) Committee is concerned regarding the situation of women in detention, including the deplorable health conditions in detention facilities.	2012	CEDAW/C/TGO/CO/6-7
UK	The UN CEDAW (2019d) Committee is concerned about the inadequacy of mental health care services in prisons and the disproportionate rates of self-harm and suicide among women.	2019	CEDAW/C/GBR/CO/8
Uzbekistan	The UN CEDAW (2010b) Committee is concerned about the conditions of detention for female detainees, including the lack of hygiene and proper nutrition.	2010	CEDAW/C/UZB/CO/4
Yemen	The UN CAT (2010b) Committee is concerned regarding the lack of specific healthcare for women prisoners, including for pregnant women and for their children.	2010	CAT/C/YEM/CO/2/Rev.1

and congested conditions for women in detention settings. Fifteen countries (Afghanistan, Belarus, Burkina Faso, Chile, Cyprus, El Salvador, Ethiopia, Honduras, Niger, Paraguay, Peru, Qatar, Republic of Korea, Republic of Moldova and Uzbekistan) were observed to breach Rule 5 pertaining to adequate accommodation (congestion, safe and sleeping space, bedding, lighting, ventilation) and environmental standards of care (access to clean water, food, sanitation and personal hygiene) in detention settings.

Further, where there was a lack of detail in some CAT and CEDAW reports, for example when referring to 'no adequate healthcare services', we assigned these to a violation

Table 3. Identified violations of the Bangkok Rules explicit to health and access to healthcare

Bangkok Rule	Violated by
Rule 5: The accommodation of women prisoners shall have facilities and materials required to meet women's specific hygiene needs, including sanitary towels provided free of charge and a regular supply of water to be made available for the personal care of children and women, in particular women involved in cooking and those who are pregnant, breastfeeding or menstruating.	Afghanistan; Belarus; Burkina Faso; Chile; Cyprus; El Salvador; Ethiopia; Honduras; Niger; Paraguay; Peru; Qatar; Republic of Korea; Republic of Moldova; Togo; Uzbekistan
Rule 6: The health screening of women prisoners shall include comprehensive screening to determine primary healthcare needs, and also shall determine: (a) The presence of sexually transmitted diseases or blood-borne diseases; and, depending on risk factors, women prisoners may also be offered testing for HIV, with pre- and post-test counselling; (b) Mental healthcare needs, including post-traumatic stress disorder and risk of suicide and self-harm; (c) The reproductive health history of the woman prisoner, including current or recent pregnancies, childbirth and any related reproductive health issues; (d) The existence of drug dependency; (e) Sexual abuse and other forms of violence that may have been suffered prior to admission	Afghanistan; Albania; Argentina; Australia; Belarus; Brazil; Cambodia; Canada; Chile; El Salvador; Ethiopia; France; Greece; Iraq; Israel; Italy; Kazakhstan; Lebanon; Mexico; Northern Ireland; Norway; Panama; Paraguay; Peru; Republic of Moldova; Senegal; Togo; UK; Yemen
Rule 9: If the woman prisoner is accompanied by a child, that child shall also undergo health screening, preferably by a child health specialist, to determine any treatment and medical needs. Suitable healthcare, at least equivalent to that in the community, shall be provided	Cambodia; Honduras; Panama Yemen
Rule 10: (1) Gender-specific healthcare services at least equivalent to those available in the community shall be provided to women prisoners. (2) If a woman prisoner requests that she be examined or treated by a woman physician or nurse, a woman physician or nurse shall be made available, to the extent possible, except for situations requiring urgent medical intervention. If a male medical practitioner undertakes the examination contrary to the wishes of the woman prisoner, a woman staff member shall be present during the examination.	Belarus; Chile; Mexico; Norway; Peru; Republic of Moldova; Yemen
Rule 12: Individualized, gender-sensitive, trauma-informed and comprehensive mental healthcare and rehabilitation programmes shall be made available for women prisoners with mental healthcare needs in prison or in non-custodial settings	Australia; Canada; Northern Ireland; Norway; UK
Rule 14: In developing responses to HIV/AIDS in penal institutions, programmes and services shall be responsive to the specific needs of women, including prevention of mother-to-child transmission. In this context, prison authorities shall encourage and support the development of initiatives on HIV prevention, treatment and care, such as peer-based education.	Botswana; Ethiopia; Kazakhstan Peru
Rule 15: Prison health services shall provide or facilitate specialized treatment programmes designed for women substance abusers, taking into account prior victimization, the special needs of pregnant women and women with children, as well as their diverse cultural backgrounds.	Kazakhstan; Montenegro; Norway

Table 3. Continued

Bangkok Rule	Violated by
Rule 16: Developing and implementing strategies, in consultation with mental healthcare and social welfare services, to prevent suicide and self-harm among women prisoners and providing appropriate, gender-specific and specialized support to those at risk shall be part of a comprehensive policy of mental healthcare in women's prisons.	Australia; Canada; Northern Ireland; Norway; UK
Rule 34: Capacity-building programmes on HIV shall be included as part of the regular training curricula of prison staff. In addition to HIV/AIDS prevention, treatment, care and support, issues such as gender and human rights, with a particular focus on their link to HIV, stigma and discrimination, shall also be part of the curriculum.	Botswana; Ethiopia; Kazakhstan
Rule 35: Prison staff shall be trained to detect mental healthcare needs and risk of self-harm and suicide among women prisoners and to offer assistance by providing support and referring such cases to specialists	UK
Rule 48: (1) Pregnant or breastfeeding women prisoners shall receive advice on their health and diet under a programme to be drawn up and monitored by a qualified health practitioner. Adequate and timely food, a healthy environment and regular exercise opportunities shall be provided free of charge for pregnant women, babies, children and breastfeeding mothers.	Argentina; Brazil; Cambodia; Chile; Honduras; Israel; Panama; Yemen
Rule 51: (1) Children living with their mothers in prison shall be provided with ongoing healthcare services and their development shall be monitored by specialists, in collaboration with community health services.	Cambodia; Honduras; Panama Yemen

of Rule 6 which summarizes general standards of medical care for women in detention settings. This reflects the particularly high allocation of information to represent violations of Rule 6. Twenty-eight countries (Afghanistan, Albania, Argentina, Australia, Belarus, Brazil, Cambodia, Canada, Chile, El Salvador, Ethiopia, France, Greece, Iraq, Israel, Italy, Kazakhstan, Lebanon, Mexico, Northern Ireland, Norway, Panama, Paraguay, Peru, Republic of Moldova, Senegal, United Kingdom and Yemen) were documented as having inadequate or no access to gender appropriate healthcare for women in detention.

Concerns around limited access to mental health care (contra Rules 12 and 16), despite the high rates of mental health disorders of women in detention settings, are recorded for Australia, Northern Ireland and Norway (UN CEDAW 2012c; 2017a; 2018a). In Canada, the 2018 CAT report remained concerned at reports indicating that there was excessive use of means of restraint (physical, pharmacological) and that correctional institutions lack the appropriate capacity, resources and infrastructure to manage serious mental health conditions, observed to be particularly acute in women's detention settings. The 2019 CEDAW report on the United Kingdom indicated concern about the inadequacy of mental health care services in prisons and the disproportionate rates of self-harm and suicide among women. These are general aspects also relevant to the Bangkok Rules particular to the rights of detained women to access specialized psychological support and counselling (Rule 7), the specialized support of victims of sexual abuse (Rule 25), and the requirement of prison staff to have sensitivities towards and the skills to detect mental distress and make appropriate referrals (Rules 13 and 35). We assigned violations to specific regulations, such as lack of access to, or provision of, substance or drug dependence treatment in detention settings, if they were explicitly mentioned. Three CEDAW reports explicitly refer to the lack

of access to specialized drug dependence treatment for detained women who use drugs, including those pregnant or with children (Kazakhstan, Montenegro and Norway) as provided for in Rule 15 and 62 (UN CEDAW 2017a; 2017g; 2019a). Several mention the lack of care of, and facilities for, detained women who are disabled in Ethiopia and Panama (UN CEDAW 2010a; 2017b).

There is a recurrent and pervasive theme of lack of provision and access to ante and post-natal care in detention settings, and specialist support of mothers detained with infants and small children in eight countries, namely Brazil, Cambodia, Yemen, Chile, Israel (discrimination regarding Palestinian female prisoners), Mexico, Peru, Honduras and Belarus (contra Rules 48 and 51) (UN CEDAW 2019b; 2018b; 2018c; 2016a; 2012d; 2011a; UN CAT 2018d; 2010b; 2018a). Four CEDAW and CAT reports explicitly refer to the inadequate care of children detained with their mothers (Cambodia, Honduras, Panama, Yemen) and violations of Rule 9 regarding their right to paediatric care while deprived of their liberty. Seven (CEDAW and CAT) explicitly refer to the lack of gender-specific healthcare services (at least equivalent to those available in the community) provided to women prisoners (contra Rule 10) (Belarus, Chile, Mexico, Norway, Peru, Republic of Moldova, Yemen). While we did not explicitly focus on the rights of the detained child, breaches in the rights of children with their mothers are observed in terms of right to access paediatric care (contra Rules 9 and 51) and prevention of mother to child transmission of HIV in detention (contra Rule 14). Several CEDAW and CAT reports document the lack of health education and basic health provisions for pregnant or breastfeeding women in detention (contra Rule 48). There are several CEDAW and CAT reports which explicitly refer to lack of access to HIV care (contra Rule 14), including for pregnant women in Ethiopia and Kazakhstan and in Botswana, where the 2019 CEDAW Committee is concerned about the lack of equal access to free antiretroviral treatment (ART) for women prisoners. Deaths due to HIV/AIDS were reported in Peru (UN CEDAW 2019a; 2019c; UN CAT 2018d; 2010a).

While not necessarily indicative of a gap or breach in the Bangkok Rules, we take note that there is no reporting by the CAT and CEDAW with regard to the training and capacity building of prison staff regarding women's health and paediatric care, capacity building programmes on HIV prevention, treatment and care, and mental healthcare needs and risks of self-harm and suicide (Rules 33, 34). Further, there was an absence of detail regarding medical confidentiality (Rule 8), presence of medical staff during medical examinations (Rule 11), gender-responsive risk assessment and classification of prisoners (Rule 41), women's access to specialized psychological support or counselling (Rules 7 and 25), age appropriate and gender-responsive medical care for juveniles (including pregnant juveniles) in detention (Rules 38 and 39), and provision of health education around preventative health measures, particularly those relevant to women (Rules 17 and 18).

Implications for human rights practice

The information garnered in this Review Essay supports previous assessments that the Bangkok Rules continue to be largely implemented in a piecemeal manner, and continue to fail to observe the human rights of women in detention settings, and meet both basic and health needs of women (Barbaret, Jackson and Jay 2017; Penal Reform International 2020; Van Hout and Crowley 2021; Van Hout, Fleißner and Stöver 2021). It underscores the continued neglect of women's specific health needs (safe space, nutrition and hygiene requirements) and healthcare (screening and treatment of infectious diseases, sexual and reproductive health, mental health, substance use disorder) in prisons all over the world, not limited to those in low resource settings. Development status of the state and level of resources available to implement the normative Bangkok Rules in female prisons are confounding factors, even though the International Covenant on Economic, Social and

Cultural Rights provides for 'progressive realization' and the 'deliberate, concrete and targeted steps' toward realization and monitoring of right to health.

Of grave concern is the lack of trauma informed medical supports and the particular discrimination against pregnant women and women with infants, lack of access to ante and post-natal care, and lack of access to ART posing a serious challenge to prevention of mother to child transmission (PMTCT) of HIV, and ultimately the 95-95-95 UNAIDS targets. Action is required to inform targeted actions for particularly vulnerable women such as those exposed to inter-personal violence and exploitation, foreign nationals and those belonging to ethnic and sexual minority groups. While not referred to in CEDAW and CAT Concluding Observations since 2010, many jurisdictions still do not have specific prison policies regarding the special needs of lesbian, gay, bisexual and transgender (LGBT) prisoners, despite heightened vulnerabilities and proportionately higher incarcerations rates than the general population (Van Hout and Crowley 2021; Van Hout, Hillis and Kewley 2020). Even the Bangkok Rules do not specifically refer to LGBT prisoners.

Our investigation raises general questions around the continued lack of resourcing of female prisons and gender-responsive healthcare programming in female prisons, the lack of data and advocacy on behalf of women in detention, and the lack of routine scrutiny of the unique and special health rights assurances of women within independent inspection of the situation of women in detention settings all over the world. It is intended to further enhance global dialogues on the visibility of women in prisons, supported by a more in-depth reporting on female prison conditions by the United Nations Committees, gender-responsive and trauma informed responses to their unique health needs, and further lobbying for the implementation of non-custodial measures (see the United Nations toolkit on gender responsive non-custodial measures, UN Office on Drugs and Crime 2020). These insights give a well-founded basis for relevant United Nations agencies and international human rights organizations to develop and support targeted actions to counterbalance gender discrimination and stigmatization, promote gender-responsive non-custodial measures and prison management, and uphold the basic and health rights of women in detention by providing technical assistance, while promoting further improvements and penal reforms worldwide. These could include the strengthening of national and prison health policies and action plans, advocacy in promoting rights-based, gender responsive, public health-centred and evidence-based approaches, capacity building of prison and prison health professional staff, legislative reforms and the application of gender-responsive non-custodial measures for minor offences and technical assistance in health screening and healthcare infrastructure in prisons. All concerted efforts are warranted within the Sustainable Development Agenda where in a male dominated and male designed system, gender-responsive healthcare (and social integration) approaches are crucial to commit to the ethos of 'leaving no one behind' (Ismail et al. 2021).

Lastly, with regard to strategic litigation beyond domestic recourse, and relevant to States party to these treaties, where human rights are violated, the 2000 Convention on the Elimination of all Forms of Discrimination against Women Optional Protocol accepts individual complaints and inquiries, and the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment provides an option for States to accept the CAT competence to consider individual complaints and complaints from other State parties (under Articles 21 and 22). This is supported by the 2003 Optional Protocol which provides for a system of international and national inspection and capacity building mechanisms to prevent violation of the Convention.

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Conflict of Interest

Authors have no conflict of interest to declare.

References

Alirezaei, S., and R. L. Roudsari. 2020. Promoting Health Care for Pregnant Women in Prison: A Review of International Guidelines. *Iranian Journal of Nursing and Midwifery Research* 25(2): 91–101.

Barbaret, R., C. Jackson, and J. Jay. 2017. UN Rules for the Treatment of Women Prisoners and Non-Custodial Sanctions for Women Offenders (the Bangkok Rules): A Gendered Critique. *Papers Revista de sociologia* 102(2): 215–30.

Council of Europe. 2015. European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, CPT standards, 2015 (CPT/Inf/E (2002) 1 - Rev. 2015). *Standard on Health Care Services in Prisons* 30: 38. http://www.cpt.coe.int/en/documents/eng-standards.pdf (Referenced 11 October 2021).

Ismail, N., A. Lazaris, E. O'Moore *et al*. 2021. Leaving No One Behind in Prison: Improving the Health of People in Prison as a Key Contributor to Meeting the Sustainable Development Goals 2030. *BMJ Global Health* 6(3): e004252.

Karlsson, M. E., and M. J. Zielinski. 2020. Sexual Victimization and Mental Illness Prevalence Rates among Incarcerated Women: A Literature Review. *Trauma Violence & Abuse* 21(2): 326–49.

Leiter, B. 2015. Legal Realism and Legal Doctrine. *University of Pennsylvania Law Review* 163(7): 1975–84.

Lines, R. 2008. The Right to Health of Prisoners in International Human Rights Law. *International Journal of Prisoner Health* 4(1): 3–53. https://doi.org/10.1080/17449200701862145.

Lungu Byrne, C., J. Germain, E. Plugge *et al*. 2020. Contemporary Migrant Prisoners' Health Experiences, Unique Prison Healthcare Needs and Health Outcomes in European Prisons and Detention Settings. *International Journal of Forensic Mental Health* 20(1): 80–99. https://doi.org/10.1080/14999013.2020.1821129.

Penal Reform International. 2020. *Global Prison Trends*. London: PRI. https://www.penalreform.org/resource/global-prison-trends-2020/#:~:text=PRI%20advocates%20for%20an%20increase,Crime%2C%20justice%20and%20imprisonment. (Referenced 9 February 2021).

Pillay, N., D. Chimbga, and M. C. Van Hout. 2021. Gender Inequality, Health Rights and HIV/AIDs among Women Prisoners in Zimbabwe. *Health and Human Rights Journal* 23(1): 225–36.

UN CAT. (Committee against Torture). 2010a. *Concluding Observations of the Committee against Torture: Ethiopia (Report No. CAT/C/ETH/CO/1). (45th sess.: 2010: Geneva)*. 20 January.

UN CAT. 2010b. *Concluding Observations of the Committee against Torture: Yemen (Report No. CAT/C/YEM/CO/2/Rev.1). (44th sess.: 2010: Geneva)*. 25 May.

UN CAT. 2017a. *Concluding Observations on the 3rd periodic Report of Republic of Moldova: Committee against Torture (Report No. CAT/C/MDA/CO/3). (62nd sess.: 2017: Geneva)*. 21 December.

UN CAT. 2017b. *Concluding Observations on the 4th Periodic Report of Panama: Committee against Torture (Report No. CAT/C/PAN/CO/4). (61st sess.: 2017: Geneva)*. 28 August.

UN CAT. 2017c. *Concluding Observations on the 2nd Periodic Report of Afghanistan: Committee against Torture (Report No. CAT/C/AFG/CO/2). (60th sess.: 2017: Geneva)*. 12 June.

UN CAT. 2017d. *Concluding Observations on the Initial Report of Lebanon: Committee against Torture (Report No. CAT/C/LBN/CO/1). (60th sess.: 2017: Geneva)*. 30 May.

UN CAT. 2017e. *Concluding Observations on the Combined 5th and 6th Periodic Reports of Argentina: Committee against Torture (Report No. CAT/C/ARG/CO/5-6). (60th sess.: 2017: Geneva)*. 24 May.

UN CAT. 2017f. *Concluding Observations on the Combined 3rd to 5th Periodic Reports of the Republic of Korea: Committee against Torture (Report No. CAT/C/KOR/CO/3-5). (60th sess.: 2017: Geneva)*. 30 May.

UN CAT. 2018a. *Concluding Observations on the 7th Periodic Report of Peru: Committee against Torture (Report No. CAT/C/PER/CO/79). (65th sess.: 2018: Geneva)*. 18 December.

UN CAT. 2018b. *Concluding Observations on the 7th Periodic Report of Canada: Committee against Torture (Report No. CAT/C/CAN/CO/7). (65th sess.: 2018: Geneva)*. 21 December.

UN CAT. 2018c. *Concluding Observations on the 6th Periodic Report of Chile: Committee against Torture (Report No. CAT/C/CHL/CO/6). (64th sess.: 2018: Geneva)*. 28 August.

UN CAT. 2018d. *Concluding Observations on the 5th Periodic Report of Belarus: Committee against Torture (Report No. CAT/C/BLR/CO/5). (63rd sess.: 2018: Geneva)*. 7 June.

UN CAT. 2018e. *Concluding Observations on the 3rd Periodic Report of Qatar: Committee against Torture (Report No. CAT/C/QAT/CO/3). (63rd sess.: 2018: Geneva)*. 4 June.
UN CAT. 2019. *Concluding Observations on the 5th Periodic Report of Cyprus: Committee against Torture (Report No. CAT/C/CYP/CO/5). (68th sess.: 2019: Geneva)*. 23 December.
UN CEDAW (Committee on the Elimination of Discrimination against Women). 2010a. *Concluding Observations of the Committee on the Elimination of Discrimination against Women: Panama (Report No. CEDAW/C/PAN/CO/7). (45th sess.: 2010: Geneva)*. 5 February.
UN CEDAW. 2010b. *Concluding Observations of the Committee on the Elimination of Discrimination against Women: Uzbekistan (Report No. CEDAW/C/UZB/CO/4). (45th sess.: 2010: Geneva)*. 5 February.
UN CEDAW. 2011a. *Concluding Observations of the Committee on the Elimination of Discrimination against Women: Israel (Report No. CEDAW/C/ISR/CO/5). (48th sess.: 2011: Geneva)*. 5 April.
UN CEDAW. 2011b. *Concluding Observations of the Committee on the Elimination of Discrimination against Women: Belarus (Report No. CEDAW/C/BLR/CO/7). (48th sess.: 2011: Geneva)*. 6 April.
UN CEDAW. 2012a. *Concluding Observations on the 5th and 6th Periodic Reports of Chile, Adopted by the Committee at its 53rd Session (1–19 October 2012): Committee on the Elimination of Discrimination against Women (Report No. CEDAW/C/CHL/CO/5-6). (53rd sess.: 2012: Geneva)*. 12 November.
UN CEDAW. 2012b. *Concluding Observations on the 6th and 7th Periodic Reports of Togo, Adopted by the Committee at its 53rd Session (1-19 October 2012): Committee on the Elimination of Discrimination against Women (Report No. CEDAW/C/TGO/CO/6-7). (53rd sess.: 2012: Geneva)*. 8 November.
UN CEDAW. 2012c. *Concluding Observations on the 7th Periodic Report of the United Kingdom of Great Britain and Northern Ireland: Committee on the Elimination of Discrimination against Women (Report No. CEDAW/C/GBR/CO/7). (51st sess.: 2012: Geneva)*. 30 July.
UN CEDAW. 2012d. *Concluding Observations of the Committee on the Elimination of Discrimination against Women: Brazil (Report No. CEDAW/C/BRA/CO/7). (51st sess.: 2012: Geneva)*. 23 March.
UN CEDAW. 2013. *Concluding Observations on the 7th Periodic Report of Greece adopted by the Committee at its 54th Session (11 February – 1 March 2013): Committee on the Elimination of Discrimination against Women (Report No. CEDAW/C/GRC/CO/7). (54th sess.: 2013: New York)*. 26 March.
UN CEDAW. 2014. *Concluding Observations on the combined 4th to 6th Periodic Reports of Iraq: Committee on the Elimination of Discrimination against Women (Report No. CEDAW/C/IRQ/CO/4-6). (57th sess.: 2014: Geneva)*. 10 March.
UN CEDAW. 2015. *Concluding Observations on the combined 3rd to 7th Periodic Reports of Senegal: Committee on the Elimination of Discrimination against Women (Report No. CEDAW/C/SEN/CO/3-7). (61st sess.: 2015: Geneva)*. 28 July.
UN CEDAW. 2016a. *Concluding Observations on the combined 7th and 8th Periodic Reports of Honduras: Committee on the Elimination of Discrimination against Women (Report No. CEDAW/C/HND/CO/7-8). (65th sess.: 2016: Geneva)*. 25 November.
UN CEDAW. 2016b. *Concluding Observations on the 7th Periodic Report of Argentina: Committee on the Elimination of Discrimination against Women (Report No. CEDAW/C/ARG/CO/7). (65th sess.: 2016: Geneva)*. 25 November.
UN CEDAW. 2016c. *Concluding Observations on the 8th Periodic Report of Belarus: Committee on the Elimination of Discrimination against Women (Report No. CEDAW/C/BLR/CO/8). (65th sess.: 2016: Geneva)*. 25 November.
UN CEDAW. 2016d. *Concluding Observations on the Combined 7th and 8th Periodic Reports of France: Committee on the Elimination of Discrimination against Women (Report No. CEDAW/C/FRA/CO/7-8). (64th sess.: 2016: Geneva)*. 25 July.
UN CEDAW. 2016e. *Concluding Observations on the 4th Periodic Report of Albania: Committee on the Elimination of Discrimination against Women (Report No. CEDAW/C/ALB/CO/4). (64th sess.: 2016: Geneva)*. 25 July.
UN CEDAW. 2017a. *Concluding Observations on the 7th Periodic report of Norway: Convention on the Elimination of All Forms of Discrimination against Women (Report No. CEDAW/C/NOR/CO/9). (68th sess.: 2017: Geneva)*. 22 November.
UN CEDAW. 2017b. *Concluding Observations on the 7th Periodic Report of Burkina Faso: Convention on the Elimination of All Forms of Discrimination against Women (Report No. CEDAW/C/BFA/CO/7). (68th sess.: 2017: Geneva)*. 22 November.

UN CEDAW. 2017c. *Concluding observations on the 7th periodic report of Paraguay: Convention on the Elimination of All Forms of Discrimination against Women (Report No. CEDAW/C/PRY/CO/7). (68th sess.: 2017: Geneva)*.
UN CEDAW. 2017d. *Concluding Observations of the 6th Periodic Report of Israel: Committee on the Elimination of Discrimination against Women (Report No. CEDAW/C/ISR/CO/6). (68th sess.: 2017: Geneva)*. 17 November.
UN CEDAW. 2017e. *Concluding Observations on the 7th Periodic Report of Italy: Committee on the Elimination of Discrimination against Women (Report No. CEDAW/C/ITA/CO/7). (67th sess.: 2017: Geneva)*. 24 July.
UN CEDAW. 2017f. *Concluding Observations on the Combined 3rd and 4th Periodic Reports of the Niger: Committee on the Elimination of Discrimination against Women (Report: CEDAW/C/NER/CO/3-4). (67th sess.: 2017: Geneva)*. 24 July.
UN CEDAW. 2017g. *Concluding Observations on the 2nd Periodic Report of Montenegro: Committee on the Elimination of Discrimination against Women (Report No. CEDAW/C/MNE/CO/2). (67th sess.: 2017: Geneva)*. 24 July.
UN CEDAW. 2017h. *Concluding Observations on the Combined 8th and 9th Periodic Reports of El Salvador: Committee on the Elimination of Discrimination against Women (Report No. CEDAW/C/SLV/CO/8-9). (66th sess.: 2017: Geneva)*. 9 March.
UN CEDAW. 2018a. *Concluding Observations on the 8th Periodic Report of Australia: Committee on the Elimination of Discrimination against Women (Report No. CEDAW/C/AUS/CO/8). (70th sess.: 2018: Geneva)*. 25 July.
UN CEDAW. 2018b. *Concluding Observations on the 9th Periodic Report of Mexico: Committee on the Elimination of Discrimination against Women (Report No. CEDAW/C/MEX/CO/9). (70th sess.: 2018: Geneva)*. 25 July.
UN CEDAW. 2018c. *Concluding Observations on the 7th Periodic Report of Chile: Committee on the Elimination of Discrimination against Women (Report No. CEDAW/C/CHL/CO/7). (69th sess.: 2018: Geneva)*. 14 March.
UN CEDAW. 2019a. *Concluding Observations on the 5th Periodic Report of Kazakhstan: Committee on the Elimination of Discrimination against Women (Report No. CEDAW/C/KAZ/CO/5). (74th sess.: 2019: Geneva)*. 12 November.
UN CEDAW. 2019b. *Concluding Observations on the 6th Periodic Report of Cambodia: Committee on the Elimination of Discrimination against Women (Report No. CEDAW/C/KHM/CO/6). (74th sess.: 2019: Geneva)*. 12 November.
UN CEDAW. 2019c. *Concluding Observations on the 4th Periodic Report of Botswana: Committee on the Elimination of Discrimination against Women (Report No. CEDAW/C/BWA/CO/4). (72nd sess.: 2019: Geneva)*. 14 March.
UN CEDAW. 2019d. *Concluding Observations on the 8th Periodic Report of United Kingdom of Great Britain and Northern Ireland: Committee on the Elimination of Discrimination against Women (Report No. CEDAW/C/GBR/CO/8). (72nd sess.: 2019: Geneva)*. 14 March.
UN. Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). 1979. Adopted 18 December. A/RES/34/180. Effective 3 September 1981.
UN. Convention on the Rights of the Child (CRC). 1989. Adopted 20 November. *United Nations, Treaty Series*, 1577: 3. Effective 2 September 1990.
UN. General Assembly (GA). 1946. *Entry into force of the constitution of the World Health Organization. 22 July. A/RES/131*. Effective 7 April 1948.
UN. General Assembly. 1948. *Universal Declaration of Human Rights. Ratified 10 December. 217A(III), Article 25*.
UN. General Assembly. 1966a. *International Covenant on Economic, Social and Cultural Rights (ICESRC)*. Adopted *16 December. United Nations, Treaty Series 993:3*. Effective 3 January 1976.
UN. General Assembly. 1966b. *International Covenant on Civil and Political Rights (ICCPR). Adopted 16 December. United Nations, Treaty Series 999*. Effective 23 March 1976.
UN. General Assembly. 1982. *Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Adopted 18 September. A/RES/37/194*. Effective 9 March 1983.
UN. General Assembly. 1984. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Adopted 10 December *United Nations, Treaty Series*; 1465(85). Effective 26 June 1987.

UN. General Assembly. 2010. *United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (the Bangkok Rules)*. Adopted *21 December. A/C.3/65/L.50*. Effective 16 March 2011.

UN. General Assembly. 2016. *Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules). 17 December 2015*. Adopted *8 January. A/RES/70/175*. Effective 8 January 2016.

UN. International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). 1965. Adopted 21 December. *United Nations, Treaty Series* 660:195, Article 5. Effective 4 January 1969.

UN Office on Drugs and Crime. 2020. *Toolkit on Gender-Responsive Non-Custodial Measures Criminal Justice Handbook Series*. www.unodc.org/documents/justice-and-prison-reform/20-01528_Gender_Toolkit_complete.pdf. (Referenced 10 October 2022).

Van Hout, M.C. 2021. Human Rights Violations, Detention Conditions and the Invisible Nature of Women in European Immigration Detention: A Legal Realist Account. *International Journal of Prisoner Health* 18(1): 1–14. https://doi.org/10.1108/IJPH-03-2021-0023.

Van Hout, M.C., and D. Crowley. 2021. The 'double punishment' of Transgender Prisoners: A Human Rights Based Commentary on Placement and Conditions of Detention. *International Journal of Prisoner Health*. https://doi.org/10.1108/IJPH-10-2020-0083.

Van Hout, M. C., S. Fleißner, and H. Stöver. 2021. '# Me Too: Global Progress in Tackling Continued Custodial Violence Against Women. The 10-Year Anniversary of the Bangkok Rules. *Trauma, Violence, & Abuse*. https://doi.org/10.1177/15248380211036067.

Van Hout, M. C., A. Hillis, and S. Kewley. 2020. Contemporary Transgender Health Experience and Health Situation in Prisons: A Scoping Review of Extent Published Literature (2000–2019). *International Journal of Transgender Health* 21(3): 258–306.

Van Hout, M.C., C. Lungu Byrne, and J. Germain. 2020. Migrant Health Situation when Detained in European Immigration Detention Centres: A Qualitative Synthesis. *International Journal of Prisoner Health* 16(3): 221–36.

Van Hout, M. C., and R. Mhlanga-Gunda. 2018. Contemporary Women Prisoners Health Experiences, Unique Prison Health Care Needs and Health Care Outcomes in Sub Saharan Africa: A Scoping Review of Extant Literature. *BMC International Health and Human Rights* 18(1): 31.

Van Hout, M. C., and J. Wessels. 2021. Human Rights and the Invisible Nature of Incarcerated Women in Post-Apartheid South Africa: Prison System Progress in Adopting the Bangkok Rules. *International Journal of Prisoner Health* 18(3): 300–15. https://doi.org/10.1108/IJPH-05-2021-0045.

World Health Organization. 2003. *WHO Moscow Declaration: Prison Health as part of Public Health*. Copenhagen: World Health Organization.

World Medical Association. 2011. *Declaration of Edinburgh on Prison Conditions and the Spread of Tuberculosis and Other Communicable Diseases*. https://www.med.or.jp/jma/jma_infoactivity/jma_activity/2011wma/2011_12e.pdf. (Referenced 10 October 2022).

A legal-realist assessment of the Zimbabwean correctional system response to COVID-19 during state disaster measures

Marie Claire Van Hout, Charlotte Bigland and Triestino Mariniello

Abstract

Purpose – *The first prison system case in Zimbabwe was notified in July 2020 shortly after State declaration of disaster. A legal-realist assessment was conducted of the Zimbabwean correctional system response to COVID-19 during state disaster measures, with a focus on assessing right to health, infectious disease mitigation and the extent to which minimum state obligations complied with human and health rights standards.*

Design/methodology/approach – *The Zimbabwean correctional system operations during COVID-19 disaster measures are scrutinized using a range of international, African and domestic human rights instruments in relation to the right to health of prisoners. This study focused particularly on standards of care, environmental conditions of detention and right of access to health care.*

Findings – *Systemic poor standards of detention are observed, where prisoners experience power outages, water shortages and a lack of access to clean drinking water and water for ablution purposes, a severe lack of safe space and adequate ventilation, poor quality food and malnutrition and a lack of sufficient supply of food, medicines, clothing and bedding. Whilst access to health care of prisoners in Zimbabwe has greatly improved in recent times, the standard of care was severely stretched during COVID-19 due to lack of government resourcing and reliance on non-governmental organisation and faith-based organisations to support demand for personal protective equipment, disinfection products and medicines.*

Originality/value – *Prison conditions in Zimbabwe are conducive to chronic ill health and the spread of many transmissible diseases, not limited to COVID-19. The developed legal-realist account considers whether Zimbabwe had a culture of respect for the rule of law pertinent to human and health rights of those detained during COVID-19 disaster measures, and whether minimum standards of care were upheld.*

Keywords *Zimbabwe, COVID-19, Infectious disease, Human rights, Minimum standards of detention*

Paper type *Research paper*

Marie Claire Van Hout and Charlotte Bigland are both based at Public Health Institute, Liverpool John Moores University, Liverpool, UK.
Triestino Mariniello is based at the School of Law, Liverpool John Moores University, Liverpool, UK.

Background

The COVID-19 global pandemic outbreak has highlighted the enormous challenges faced by criminal justice and penal systems worldwide [United Nations Office on Drugs and Crime (UNODC), 2020b; United Nations Office on Drugs and Crime (UNODC), World Health Organization (WHO), UNAIDS, and Office of the High Commissioner for Human Rights (OHCHR), 2020a; Office of the High Commissioner for Human Rights (OHCHR), 2020; World Health Organization (WHO), 2020a, 2020b; Kinner *et al.*, 2020; Barnert *et al.*, 2020]. The situation is especially grave, where in Africa, approximately one million people are incarcerated, with on average 42% of the prison population are held in pre-trial detention, and consequent severe congestion and over capacity (highest in Uganda at 318%) (World Prison Brief, 2020). The first COVID-19 case was reported in Egypt, then Algeria and spread

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across the continent to 23 Southern and East African countries, with exception of Lesotho in the period from 5 March 2020 until 15 April 2020 (Muntingh, 2020). There was variance across African states in relation to the declaration of the state disaster or emergency in the face of the COVID-19 public health crisis (Muntingh, 2020). By 26 May 2020, prisons in South Africa, Algeria, Cameroon, Guinea, Ghana, Sierra Leone, Egypt, Democratic Republic of Congo, Morocco and Kenya confirmed cases of COVID-19 (Prison Insider, 2020).

On 25 March 2020, the United Nations (UNs) High Commissioner for Human Rights called on States to decongest their prisons through a range of means (early prison release schemes, presidential pardons, alternative sentencing, amnesties) as critical component of the domestic COVID-19 response [Office of the High Commissioner for Human Rights (OHCHR), 2020; United Nations Office on Drugs and Crime (UNODC), 2020b; Amon, 2020; Simpson and Butler, 2020; Lines *et al.*, 2020; Van Hout and Wessels, 2021]. Several technical guidance documents were released from UN agencies and leading international organisations [World Health Organization (WHO), 2020b, 2020c; United Nations Office on Drugs and Crime (UNODC), 2020b; Penal Reform International (PRI), 2020]. Collectively these protocols specify that states should take all measures to address the risks posed by COVID-19, by limiting contamination, detecting ill prisoners and staff and providing medical treatment to those infected. They further outline that disease control measures must never result in inhumane or degrading treatment of prisoners and detention conditions should not contribute to the development, worsening or transmission of disease; restrictions may only be applied on the grounds of medical necessity and must comply with the human rights principles of legality, proportionality, oversight, time-limitation and non-discrimination; and lastly that monitoring bodies' must be guaranteed access to prisons. The African Commission on Human and People's Rights (ACoHPR) promulgated a range of effective human rights-based responses to COVID-19 in prisons (including decongestion and stringent disease control measures) [African Commission on Human and Peoples' Rights (ACoHPR), 2020a, 2020b]. This was echoed in regional documents published by the Southern African Development Community (SADC) [Southern African Development Community (SADC), 2020]. Despite the promulgation of guidelines for the selection of prisoners qualifying for release, there is little published data provided by African states regarding actual numbers and types of prisoners released (Muntingh, 2020; Van Hout and Wessels, 2021).

The health of prisoners is by default a neglected political issue in Africa (O'Grady *et al.*, 2011). This is due in part to the state prioritisation of prison security rather than to basic health rights and minimum standards of space, ventilation, access to clean water, nutrition and medical care (Habeenzu *et al.*, 2007; Telisinghe *et al.*, 2016). Prison conditions are historically poor and continue to be conducive to chronic ill-health of prisoners and the spread of communicable disease via poor sanitation, insufficient space, high population density and turnover [African Commission on Human and Peoples' Rights (ACoHPR), 2012; Todrys and Amon, 2012; Telisinghe *et al.*, 2016; Beaudry *et al.*, 2020; Van Hout and Aaraj, 2020]. With already weak and stretched health systems in Africa (Nkengasong and Mankoula, 2020) , the COVID-19 threat has exacerbated the existing and significant risks to health for those living and working in African prisons (Muntingh, 2020; Van Hout, 2020a; Van Hout, 2020b; Van Hout, 2020c; Van Hout, 2020d; Badu *et al.*, 2020; Nweze *et al.*, 2020; World Prison Brief, 2020; Kras and Fitz, 2020; Chireh and Kwaku Essien, 2020; Katey *et al.*, 2021; Van Hout and Wessels, 2021; Van Hout *et al.*, 2021a; Van Hout *et al.*, 2022). COVID-19 responses in African prisons are compromised by lack of general government resourcing of the prison system, and inclusion of prisons in the national COVID-19 health budget, and the existing environmental determinants of health (severe congestion, poor standards of detention, basic provisions and dated infrastructure) (Amon, 2020; Bulled and Singer, 2020; Kras and Fitz, 2020; Rapisarda and Byrne, 2020; Muntingh, 2020; Badu *et al.*, 2020; Nweze *et al.*, 2020; Chireh and Kwaku Essien, 2020; Amnesty International, 2020;

Katey *et al.*, 2021; Van Hout and Wessels, 2021). There are extensive reports of human rights breaches and protests by prisoners and prison officials in many African states amid the continued intake of prisoners, severe congestion and inadequate efforts to prevent COVID-19 outbreaks and fatalities (Prison Insider, 2020; Kras and Fitz, 2020; Muntingh, 2020; Van Hout and Wessels, 2021; Katey *et al.*, 2021; Mekonnen *et al.*, 2021; Van Hout *et al.*, 2022).

Health surveillance and academic research on standards of care in African prisons are historically under-resourced and underdeveloped (Mhlanga-Gunda *et al.*, 2020; Ako *et al.*, 2020). However, since the start of the COVID-19 pandemic, there has been a growing evidence from academic and human rights based investigations into prison system COVID-19 preparedness in African prisons (Ethiopia, South Africa, Zimbabwe, Malawi) (Van Hout and Wessels, 2021; Kras and Fitz, 2020; Mekonnen *et al.*, 2021; Van Hout *et al.*, 2022; Mhlanga-Gunda *et al.*, 2022). Hence, we conducted a legal-realist assessment of the Zimbabwean correctional system response to COVID-19 under the state of emergency, with a focus on right to health, infectious disease mitigation and the extent to which minimum state obligations complied with human and health rights standards. Legal realism as a naturalistic theory underpins this assessment due to its emphasis on the law as derived from real world observations regarding welfare, social interests and public policies (Leiter, 2015). The assessment adhered to several steps. Firstly, we present a brief contextual section on Zimbabwe and its prison system up to the COVID-19 declaration of disaster. Secondly, we present and assess all relevant international, African and domestic instruments (environmental conditions of detention, protection from infectious disease, access to and equivalence of health care, prohibition of torture and discrimination) in light of the scholarship published since the first prison system case was notified in July 2020 (Netsianda, 2020; Muronzi, 2020; Mavhinga, 2020). In the final step, by adopting a legal-realist approach, we critically assess whether and to what extent Zimbabwe complied with human and health standards of detainees and whether minimum standards of care were upheld during contagion and the application of state disaster measures.

Prison standards in Zimbabwe

The last and only ACoHPR Special Rapporteur report on prisons in Zimbabwe in 1997 placed emphasis on the serious problem of overcrowding [African Commission on Human and Peoples' Rights (ACoHPR), 1997]. The legacies of President Mugabe and now President Mnangagwa rule are evident in terms of the continued lack of government resourcing and systemic poor standards of detention, where prisoners experience power outages, water shortages and a lack of access to clean drinking water and water for ablution purposes, a severe lack of safe space and adequate ventilation, malnutrition and a lack of sufficient supply of food, medicines, clothing and bedding [United States State Department (USSD), 2016; UK Home Office, 2017; Zimbabwe Human Rights Forum, 2018; Jongwe, 2019; Chivandikwa *et al.*, 2020; Pillay *et al.*, 2021; Mhlanga-Gunda *et al.*, 2022]. The reliance on family and non-governmental organisation (NGO)/faith-based organisations to bring clean water, food and medicines to prisons in Zimbabwe is well documented (Prison Insider, 2019). The UN Committee on the Elimination of Discrimination Against Women has also more recently reported on concerning levels of inter-personal violence against women in Zimbabwean prisons [Zimbabwe & UN Committee on the Elimination of Discrimination Against Women (CEDAW), 2020; Van Hout *et al.*, 2021b]. The official occupancy level across the 46 prisons is 129.4% (World Prison Brief, 2020).

At the time of writing, Zimbabwe recorded 128,804 cases of COVID-19, 4592 deaths and 121,653 COVID-19 recoveries (Worldometer COVID-19 Data, 2021). The first prison system case was in July 2020 with a spiral of subsequent case notifications and deaths thereafter (Netsianda, 2020; Muronzi, 2020; Mavhinga, 2020). Of cautionary note however is that the Zimbabwean prison system unlike its neighbour South Africa (Van Hout and Wessels, 2021) did not publish transparent COVID-19 data on COVID-19 positivity (active or recovered) in

its prison system, nor does the prison system liaise with health authorities to track cases on release from prison (Mhlanga-Gunda *et al.*, 2022).

International and regional human rights frameworks pertinent to right to health during COVID-19

Under international law states have positive obligations to uphold the right to health and to protect those living and working in prison from contagion. The International Covenant on Economic, Social and Cultural Rights (ICESCR) specifically obliges states parties to take steps necessary regarding disease prevention, treatment and control and assurance of access and provision of all required medical support and care during illness (*Article 12* (2)). Whilst the International Covenant on Civil and Political Rights (ICCPR) [United Nations (UN), 1966b] does not expressly provide for a right to health, it specifically provides the right to humane treatment of prisoners (*Articles* 2,6,7, 10 and 26) (United Nations Office of the High Commissioner for Human Rights (OHCHR), 2012). Zimbabwe ratified the ICCPR and ICESCR in 1991 but does not accept individual complaints procedures under the ICCPR – Optional Protocol [United Nations (UN), 1966a, 1966b] or the ICESCR-OP (United Nations [UN], 2008).

The Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (CAT) [United Nations (UN), 1984] or CAT-Optional Protocol [United Nations (UN), 2003] creates further binding obligations on States not to ill-treat those deprived of their liberty. The CAT recognises "an inadequate level of health care can lead rapidly to situations falling within the scope of the term 'inhuman and degrading treatment" (Council of Europe, 2015). The UN Human Rights Committee states that it is "incumbent on States to ensure the right of life of detainees, and not incumbent on the latter to request protection" (Lines, 2008). Concluding observations by the Committee reflect the binding State obligation to "take action to safeguard the health of prisoners", with explicit reference to taking positive steps to prevent spread of communicable disease such as COVID-19. Extant UN Human Rights jurisprudence includes reference to the health rights of those detained and reference to State failure to instigate adequate measures in tackling disease in prisons, by placing a prisoner's right to health in serious jeopardy in violation of *Articles* 6, 7, 9 and 10 of the ICCPR and indicative of an overall inhuman or degrading condition whilst detained (*see for example Khokhlich v Ukraine 2003; Catalin Eugen Micu v Romania, 2016*). Of great importance to prisons in Africa is the UN Human Rights Committee jurisprudence (including where African states are concerned), which indicates that the right to adequate living space sufficient to safeguard health constitutes the pre-conditions of health, with environmental health determinants (water, sanitation, overcrowding) recognised as potentially subjecting prisoners to disease. Zimbabwe has not ratified the CAT or the CAT-Optional Protocol.

There are further a range of non-binding UN norms and minimum standards for the treatment of prisoners and medical declarations particular to the rights of prisoners regarding their health and medical ethics in detention settings [United Nations (UN), 1982, 1988, 1991; Lines, 2008]. The WHO [World Health Organization (WHO), 2003] and World Medical Association (WMA) [World Medical Organisation (WMA), 2011] declarations provide for the rights of prisoners to humane treatment and appropriate medical care, including against disease. The UN Principles of Medical Ethics relevant to prisons (*Principles* 1, 6) contain a non-derogation clause during state declaration of emergency [United Nations (UN), 1982]. The Standard Minimum Rules for the Treatment of Prisoners ("*Mandela Rules*") [United Nations (UN), 2016] specifies the State duty to provide prisoners with access to necessary health-care services (free, equivalent to the community and non-discriminatory care) and access to medical assessment, care and treatment (*Rules 24, 25, 30, 31, 35*). This includes the continuum of disease prevention, quarantine and care for communicable diseases.

At the regional African level, the African Charter on Human and Peoples' Rights (ACoHPR) [Organization of African Unity (OAU), 1981] is a legally binding treaty designed to promote and protect human rights in the African continent. The ACHPR observes that state obligations regarding the right to health are "heightened" when an individual is in the custody of the State, and with their integrity and well-being wholly dependent on the State (*Article* 16). It has two special mechanisms on prisons (Special Rapporteur on Prisons, Conditions of Detention and Policing in Africa, Committee for the Prevention of Torture in Africa) as well as non-binding instruments to support criminal justice and penal reform. These include the *Robben Island Guidelines* (African Commission on Human and Peoples' Rights (ACoHPR), 2008) which are aligned to the Basic Principles for the Treatment of Prisoners [United Nations (UN), 1991] and the *Mandela Rules* [United Nations (UN), 2016]. The African Court on Human and Peoples' Rights, which is mandated to implement the ACHPR, has developed a copious jurisprudence related to the prohibition of cruel, inhumane or degrading treatment and the right to life, based on deplorable conditions of detention (congestion, lack of adequate food, sanitation and ventilation) (Muntingh, 2020).

To date there are no cases based on the violation of human rights pertinent to conditions during COVID-19, however several African States have been found in violation of the Charter's right to health (*Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine de l'Homme, Les Témoins de Jehovah v. Zaire* in 1996*; International PEN and Others v. Nigeria* in 1998 *and Malawi African Association and others v. Mauritania* in 2000). Where denial of medical intervention is cited, this is additional to a ruling of inhumane or degrading treatment as constituting physical abuse of prisoners (*Krishna Achuthan (On behalf of Aleke Banda), Amnesty International On behalf of Orton and Vera Chirwa v. Malawi* in 1994 *and Constitutional Rights Project and Civil Liberties Organisation v. Nigeria* in 1999). More recently cases refer to deplorable conditions of detention relating to congestion, lack of food, sanitation and ventilation *(Konaté v. Burkina Faso and Abubakari v. Tanzania* in 2016*; Guehi v. Tanzania* in 2018), and the rights of prisoners to adequate medical care (medication and appropriate nutrition for chronic ill health) when in detention (*Lohé Issa Konaté v. Burkina Faso* in 2013 *and Mugesera v. Rwanda* in 2017).

Assessing human rights, right to health and management of disease in Zimbabwean prisons during COVID-19

At the domestic level, the Constitution of Zimbabwe contains a range of fundamental rights protections pertinent to detention settings and are aligned to most international human rights instruments (the UN Charter, *Article* 10 ICCPR, ICESCR, *Article* 5 ACHPR) and the non-binding minimum rules, principles and guidelines (*Rule* 1 *Mandela Rules*, *Principle* 1 of the Body of Principles) with the right of all persons deprived of their liberty to be treated with respect for their inherent dignity, and with humanity. *Section* 44 of the Constitution of Zimbabwe provides for State obligation and duty to respect fundamental human rights and freedoms of all persons; "the State and every person [. . .] and every institution and agency of the government at every level must respect, promote, protect and fulfil the rights and freedoms set out in this Chapter." Non-discrimination and equality provisions are provided for in *Section* 56 (1) "All persons are equal before the law and have the right to equal protection and benefit of the law". Additional fundamental rights applicable to detention settings are provided for in *Section* 51 (right to human dignity); "Every person has inherent dignity in their private and public life, and the right to have that dignity respected and protected" and in *Section* 52 regarding right to personal security in terms of bodily and psychological integrity. Those deprived of their liberty are further specifically protected by *Section* 50 (5) (d) of the Constitution of Zimbabwe; "[. . .] Any person who is detained, including a sentenced prisoner, has the right to conditions of detention that are consistent with human dignity, including the opportunity for physical exercise and the provision, at

State expense, of adequate accommodation, ablution facilities, personal hygiene, nutrition, appropriate medical treatment [. . .]"

Similarly to its neighbour South Africa, Zimbabwe declared a state of disaster under *Section* 27 of the Civil Protection Act. This Act provides that the state of disaster may be extended, curtailed or terminated by the President through a statutory instrument. The state of disaster in Zimbabwe was characterized by the lack of an effective parliamentary oversight and the President's statutory measures may prompt breaches of fundamental rights and freedoms. On the 30 March 2020, the Zimbabwean Government gazetted the Civil Protection (Declaration of State of Disaster: Rural and Urban Areas of Zimbabwe) (COVID-19) Notice. This essentially consisted of a national lockdown, and was followed by the promulgation of seventeen COVID-19-related statutory instruments (Lawyers for Lawyers, 2020). The basic framework guiding the COVID-19 response of Zimbabwe was the Constitution of Zimbabwe Amendment No. 20 Act 2013, the Public Health Act (particularly *Section* 68(1) pertaining to epidemic disease outbreaks), the Prisons Act and other statutory instruments enacted from time to time in terms of the enabling Acts of Parliament. Several regulations enabled by *Section* 68 (1) of the Public Health Act were enacted, which included the Statutory Instrument 77 of 2020 titled Public Health (COVID-19 Prevention, Containment and Treatment) (National Lockdown) Order; the 2020 Public Health (COVID-19 Prevention, Containment and Treatment) (National Lockdown) (No. 2) (Amendment) Order, 2020 (No. 7) and the Public Health (COVID-19 Prevention, Containment and Treatment) (Amendment) Regulations, 2020 (No. 8) which enacted the national lockdown, quarantine measures at national borders, the closing of schools and businesses, the suspension of court processes and restriction of all non-essential visits to prisons.

In June 2020, the Zimbabwe Prisons and Correctional Services (ZPCS) released a COVID-19 standard operational plan, designed to prevent and mitigate against COVID-19 transmission [Office for the Coordination of Humanitarian Affairs (OCHA), 2020], and it was largely aligned to the 2020 SADC, WHO and UN protocols [World Health Organization (WHO), 2020b, 2020c; United Nations Office on Drugs and Crime (UNODC), 2020b]. Prison decongestion schemes were implemented under the President Mnangagwa's COVID-19 amnesty, reducing the prison population from March to June 2020 by 4,208 prisoners (Mavhinga, 2020). The General Notice 688 of 2020 provided detail on the categories of prisoners considered for amnesty (Zimbabwean Government Gazette Extraordinary, 2020), with several categories of prisoners excluded (those convicted of murder, treason, rape or any sexual offense, carjacking, robbery, stock theft and public violence). This was followed by further rounds of releases in 2021 (Mutsaka, 2021; Marawanyika, 2021; Moyo and Goldbaum, 2021). By March 2021 the Zimbabwean prison population had reduced to 20,407 (March 2019 it was 22,000) (World Prison Brief, 2021). There was no detail available on who was released or on the application of non-custodial sentencing for non-violent offences (US State Department, 2020). The prison capacity to instigate robust COVID-19 prevention measures was confounded by the continued intake of remand detainees and the continued human traffic of detainees and staff from court to prison.

Lengthy pre-trial detention in Zimbabwe continues to violate the standards set out in the Constitution of Zimbabwe (for example *Sections* 50(2)(b) and 50(6) and *Section* 32(2) of the Criminal Procedure and Evidence Act (Chapter 9:07), and a range of international and regional human rights instruments (Zimbabwe Human Rights Forum, 2018) (for example as illustrated in the cases of *R v. Sambo* in 1964; *Fikilini v Attorney General* in 1990; *S v. Kusangaya* in 1998; *Re Masendeke* in 1992; *S v. Mukwakwa* in 1997 and *S v. Kusangaya* in 1998). *Section* 50 of the Constitution of Zimbabwe specifically provides that if a detained person pending trial is not tried within a reasonable time, they must be released unconditionally. Regional and international human rights frameworks mandate that pre-trial detention may only be permissible if undertaken in accordance with procedures established by law in a place of detention that has been authorised (*Robben Island*

Guidelines, para 23) and such detention must not be arbitrary (UDHR, *Article* 9; ICCPR, *Article* 9(1), ACHPR Article 6). However, this provision was overlooked in Zimbabwe during COVID-19 as the state disaster measure was regarded as a *vis major.* Whilst the Zimbabwean Prisons Act operates in compliance with the 2004 *Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa* to constitute a monitoring mechanism for the welfare of prisoners, it remains unclear as to whether inspection visits actually took place (*Section* 46 Prisons Act) during state disaster measures, despite reporting that the Zimbabwe Human Rights Commission (ZHRC) was permitted to conduct monitoring visits to its 46 prisons when conditions allowed (US State Department, 2020).

On the outside, courts were not functioning properly, judicial harassment, arrest, detention, and prosecution of lawyers occurred with many opposition activists arrested, the holding of public hearings for constitutional amendments and other laws were fast-tracked, and freedom of movement was curtailed with curfews being imposed (Lawyers for Lawyers, 2020). It is clear that malicious criminal prosecutions of high-profile human rights defenders, anti-corruption activists and journalists such as *Hopewell Chin'ono, Jacob Ngarivhume, Linda Masarira, Ostallos Siziba* and *Job Sikhala* violate the rule of law (human rights, fair trials and access to justice) (Cassim, 2016; Mavhinga, 2020; US State Department, 2020; Lawyers for Lawyers, 2021). Regarding remand detainees and those awaiting trial, access to legal representation was denied, with lawyers not defined as providing an essential service during national lockdown and excluded from visiting prisons [Lawyers for Lawyers, 2020; Zimbabwe Peace Project (ZPP), 2021]. This was in reality a "an initial total lockdown on the provision of legal services" (Lawyers for Lawyers, 2020). The net effect was that prison lockdowns and the suspension of visits by lawyers (and family) affected prisoners' rights to access legal representation and family support for basic provisions (contra the *Mandela Rules* 61(1)(3)). This was especially the case in prisons where right to contact via alternative technological means (*Mandela Rule* 58(1a)) was not facilitated by the ZPCS (Mhlanga-Gunda *et al.*, 2022) and where lack of outside contact was viewed as inhibiting access to timely COVID-19 public health information, and family supports in providing sufficient personal protective equipment (PPE) (face masks), food, water, clothing and medicines (Whiz, 2020; Mukwenha *et al.*, 2021; Mhlanga-Gunda *et al.*, 2022). There were some reports of NGOs backfilling the ZPCS response; however, these efforts were stifled due to the protracted economic crisis in Zimbabwe at the time (US State Department, 2020; Mhlanga-Gunda *et al.*, 2022).

Despite domestic law and minimum State obligations to comply with human rights norms, and the ZPCS efforts to implement a range of health responses and disease control measures aligned to international and the 2020 SADC regional responses [World Health Organization (WHO), 2020b, 2020c; United Nations Office on Drugs and Crime (UNODC), 2020b; Penal Reform International (PRI), 2020], the state of disaster declared by the Zimbabwean Government incurred significant hardship on those detained in its prisons, reinforced by the deficits in prison system resourcing, capacity and infrastructure. Media reports emerged from within the prison walls itself, from recently released prisoners, incarcerated journalists and political activists who described appalling and life threatening conditions inside (exacerbated by deprivation of PPE such as face masks and hand sanitizer, food, ablution and water), the impossibility of social distancing and a range of human rights abuses perpetrated by officials against those deprived of their liberty (solitary confinement) (Chingano, 2020; Chinowaita, 2020; Cassim, 2016; Whiz, 2020). A broad range of potential fundamental rights violations at the domestic level were observed. Conditions in prisons were contra *Sections* 48(1), 50 (5) (d), 51, 52(a) and 56 (1) of the Constitution of Zimbabwe, and where life threatening contra *Section* 48 (right to life).

Central to the fundamental rights violations of those detained in Zimbabwe during COVID-19 disaster measures were the rights to reasonable accommodation (space, ventilation, water, sanitation) and rights to an environment free from torture and inhumane treatment. The 2020

US State Department report on Zimbabwe at the time underscored the level of security forces engagement in severe human rights violations including arbitrary killings and torture of civilians, the harsh, degrading and life threatening conditions for opposition activists, political prisoners and detainees and the lack of PPE (face masks, hand sanitizer, gloves, disinfectant) for staff and prisoners in Zimbabwean prisons. Environmental health conditions were reported to be grossly inadequate (cubic content of air, floor space) with a clear lack of access to clean water and adequate disinfection measures (hygiene, sanitation, ablution) (contra *Mandela Rules* 13 to 18, 21, 25, 35). *Mandela Rule 13* is crucial here by stating; "All accommodation shall meet all requirements of health, due regard being paid to climatic conditions and particularly to cubic content of air, minimum floor space, lighting, heating and ventilation" (United Nations (UN), 2016). Cassim (2016) describes the experience of *Linda Masarira* a popular protester who said; "I am yet to be convicted but I was meant to work in the fields and fetch water; unfortunately, we had no shoes and [we were] forced to walk into sewer effluent. The water and food shortage is so acute at prisons that inmates rely on supplies from relatives; however, prison officers, who often complain about not receiving their salaries on time, would also steal food from inmates". Shortages in clean drinking water, water for personal hygiene and food experienced by those detained violate basic human rights (*Articles* 25(1) of the UDHR; 11(1) of the ICESCR, CESC General Comment No. 12 and 15) and are contra the *Mandela Rules* 22(1) and (2), and 42.

Conditions in Zimbabwean prisons are conducive to chronic ill health, and the spread of many transmissible diseases, not limited to COVID-19. Of grave importance is the complete lack of ability of those deprived of their liberty to protect themselves in severely congested and unsanitary prison conditions from COVID-19, particularly at night where prisoners sleep side by side in communal cells not more than 10-30cm apart (Chinowaita, 2020; Muronzi, 2020; Mavhinga, 2020; Whiz, 2020; Mukwenha *et al.*, 2021; Mhlanga-Gunda *et al.*, 2022). Zimbabwean prison cells do not provide the bare minimum floor space set by the CAT at four square meters per person in a communal cell, which could be declared by courts as cruel or degrading (Steinberg, 2005; Mhlanga-Gunda *et al.*, 2022). Muronzi (2020) reported; "Behind bars and confined in a tight space shared by dozens of other detainees, Zimbabwean opposition leader Jacob Ngarivhume was anxious about catching coronavirus. Designed to hold 16 people, the crammed cells at the Chikurubi Maximum Security Prison were full with more than 40 people . If prison authorities had observed social distancing rules of a metre (3.3 feet) apart, the cell would have accommodated only 10 people. Detainees were barely 30 cm (12 inches) apart. At night, the inmates spread filthy and lice-infested blankets on the hard concrete floor, forming elongated rows for going to sleep".

There are some parallels to be drawn with the historical situation in Zimbabwe regarding contagion within prison confines, especially relating to the spread of communicable diseases such as HIV/AIDS, tuberculosis (TB) and typhoid, the lack of effective disease control measures, lack of routine testing and denial of treatment for those infected in Zimbabwean prisons (see the Constitutional Court case of *Muzanenhamo v. Officer in Charge CID (Law & Order) & Ors* in 2013) (Truscott, 2012; Prison Insider, 2017a: Prison Insider, 2017b; US State Department, 2020). The 2018 briefing paper on HIV/AIDS in Zimbabwean prisons observed, "the disparity between what is known and unknown about HIV in Zimbabwean prisons is alarming" (Machingura *et al.*, 2018). More recently, Pillay *et al.* (2021) have observed this to be the case for airborne disease such as TB, and we speculate that COVID-19 is no different. For example Journalist *Lindi Whizz* reported in November 2020; "the prison complex has had no running water since November 8 following a power outage that has affected pumping. The shortage of water has resulted in an outbreak of serious diseases including diarrhoea, hepatitis B and tuberculosis. Regrettably, prison officials do not separate sick prisoners from the healthy ones". The malicious nature of deliberate exposure to disease was evident in the case of political activists and journalists. According to Chinowaita (2020); "It is reported that Sikhala was locked, in the

D class section of Chikurubi, four inmates had tested Covid 19 positive. Nevertheless, Sikhala was not given Personal Protective Equipment exposing him to the savages of the disease". A similar finding was reported by the US State Department report in 2020, "the ZPCS ignored requests from medical personnel to isolate journalist Hopewell Chin'ono when he exhibited symptoms of COVID-19 while incarcerated in August".

The right to health care is a justiciable fundamental right, and specifically enshrined in *Section* 76 (1) of the Constitution of Zimbabwe. *Section* 50(5)(d) of the Constitution of Zimbabwe provides for detained persons' right to medical treatment at the State's expense, and does not appear to be subject to progressive realisation. Health services in prisons are recognized and provided for in *Section* 29 (1)(2)(3) of the Constitution of Zimbabwe as a *"National Objective"* whereby the State must; "must take all measures to ensure the provision of basic, accessible, and adequate health facilities throughout Zimbabwe; take, appropriate, fair and reasonable measures to ensure that no person is refused emergency medical treatment at any health institution and take all reasonable measures within the limits of the resources available to it, including education and public awareness, programs against the spread of disease". The Constitution of Zimbabwe (2013) however specifics that state measures to prevent disease will be "within the limits of the resources available to it". (Chapter 4).

Right to health care is enshrined in the Prisons Act [*Sections* 36(1)(2), 37, 38(2) and 41], and includes detail on the duty of medical practitioners to prevent disease outbreaks (inspect mechanisms pertinent to COVID-19 include the screening on committal, segregation from the prison population until medically assessed and the duty to prevent spread of disease to the community on release). In general, the ZPCS complies with the obligation to take the necessary measures to protect the health of prisoners and to ensure that they receive medical attention when they are sick as required by international and domestic standards (Zimbabwean Human Rights NGO, 2018). As with other aspects of prison standards of care, the lack of resourcing impacts on the quality and coverage of care. This was especially the case during COVID-19 state disaster measures, with reliance on NGO and faith-based organisations to support demand for PPE (especially face masks), disinfection products and medicines (Mhlanga-Gunda *et al.*, 2022).

There were serious violations of normative standards of care, particularly relating to disease control and the non-derogated rights of prisoners to access to equivalence of care (including testing, quarantine and treatment) (*Mandela Rules* 24(1), 25, 30, 31, UN Principles of Medical Ethics, WHO and WMA declarations). Despite medical and correctional staff efforts and commitment to supporting the right to health of prisoners, there were difficulties in implementing routine disease surveillance and COVID-19 testing on intake (at best thermo screening and assessment of COVID-19 symptomatology was recorded), adhering to the advised length of quarantine due to lack of adequate accommodation, inability to segregate vulnerable prisoners due to severe congestion and a lack of adequate staff protection from COVID-19 when caring for prisoners who had tested positive (Netsianda, 2020; Chinowaita, 2020; Muronzi, 2020; Mavhinga, 2020; Daily News, 2020; Whiz, 2020; Mukwenha *et al.*, 2021; Mhlanga-Gunda *et al.*, 2022). The lack of health-care coverage and training, the scarcity of medicines and PPE (face masks, hand sanitizer, gloves, disinfectant) and *ad hoc* nature of medical professional access and provision of care and health education to prisoners in Zimbabwe inhibited disease mitigation responses and violated state obligation to prevent and control disease outbreaks as required by international and national law [*Articles* 12(1) and 16(2) of the ICESCR, 16(1) ACHPR, *Sections* 48, 50(5)(d), 51 and 52 of the Constitution of Zimbabwe].

Conclusion

Despite all efforts to mitigate and control COVID-19 transmission and disease in prisons, human traffic between prison and community creates a bridge of disease which cannot be

underestimated (Van Hout, 2020a; Van Hout, 2020b). A strategic public health and human rights-based approach is crucial to control warranted to mitigate transmission of disease in prisons and improve health for all affected (Amon, 2020; Kinner *et al.*, 2020; Van Hout, 2020a; Van Hout, 2020b; Van Hout, 2020c; Van Hout, 2020d). This is the first legal realist assessment of the Zimbabwean prison system approach to tackling COVID-19. Similar to neighbouring South Africa (Kras and Fitz, 2020; Van Hout and Wessels, 2021) and Malawi (Van Hout *et al.*, 2022), the Zimbabwean approach to mitigating COVID-19 in the prison system was relatively successful in preventing serious outbreaks within its prison walls (Netsianda, 2020; Muronzi, 2020; Mavhinga, 2020; Mhlanga-Gunda *et al.*, 2022). An encouraging development is that in February 2021, the COVID-19 roll out programme was approved by government, and with the ZPCS falling under the priority category first phase of the vaccination programme (Mupoperi, 2021).

This legal realist assessment during COVID-19 however highlights how the weak judicial system and the lack of resourcing of the ZPCS continues to violate basic fundamental rights of prisoners and fails to adhere to the minimum standards of care, including during state disaster measures. Continued efforts to advocate for prisoners and to improve their conditions of accommodation and their basic needs and medical care are warranted, via dedicated actions to decongest the ZPCS via pardoning of minor offences, and the application of non-custodial community based sentences; the enhancement of criminal justice system operations; upgrading of overall environmental standards of care (sanitation, hygiene, ablution) in all prisons; support of a robust disease control response via sufficient health education, medical training and PPE for prisoners and staff (face masks, hand sanitiser, disinfectant, gloves); resourcing of sufficient medical care teams to conduct assessments; and provision of a platform of enhanced technology assisted communication (video, audio) so that prisoners can access legal representation and their families. Basic level needs in the form of water and food are crucial (Mavhinga, 2020; Mukwenha *et al.*, 2021; Mhlanga-Gunda *et al.*, 2022). Open prison systems with minimal security measures such as the Marondera Female Open Prison and the Connemara Male Open Prisons, should be further expanded and utilised to relive capacity issue.

Despite the international and regional treaties, constitutional rights and non-binding normative minimum standards of care, States have discretion in defining humane treatment and the adequate medical care of prisoners (Lines, 2008). Whilst the 2018 Public Health Act of Zimbabwe seeks to align public health laws with the Constitution of Zimbabwe which enshrines the right to health, it does not incorporate a rights-based framework consistent with the Constitution of Zimbabwe, and nor does it fully support the very vulnerable such as prisoners (Pillay *et al.*, 2021). The ZHRC will play a central role in the continued monitoring and inspection of prisons, particularly in the monitoring of compliance with COVID-19 measures to protect the health of prisoners. The lack of sufficient government resourcing of the ground level implementation of the ZPCS COVID-19 standard operational plan is of grave concern and evident in the insufficient supply of COVID-19 disease control measures (testing, quarantine, distribution of PPE), and the State could be held liable for this failure to provide adequate provisions to protect against disease. The right to adequate accommodation, personal hygiene and appropriate medical treatment are justiciable fundamental rights and freedoms for those deprived of their liberty in Zimbabwe under *Section* 85 of the Constitution of Zimbabwe. Any person and or association of persons can approach a Court of law seeking redress of allegations of the State's breach of his or her or their "right to health care". Further strategic public interest litigation on the fundamental rights of those in detention is warranted, moving beyond that of civil society advocacy and inclusive of individual actions against the State (Van Hout and Wessels, 2021).

References

African Commission on Human and Peoples' Rights (ACoHPR) (1997), "Prisons in Zimbabwe", available at: www.achpr.org/public/Document/file/English/misrep_specmec_priso_zimbabwe_1997_eng.pdf (accessed 29 September 2021).

African Commission on Human and Peoples' Rights (ACoHPR) (2008), "The Robbin Island guidelines resolution on guidelines and measures for the prohibition and prevention of torture, cruel, inhuman or degrading treatment or punishment in Africa", African Commission on Human and Peoples' Rights, The Gambia.

African Commission on Human and Peoples' Rights (ACoHPR) (2012), "Special rapporteur on prisons, conditions of detention and policing in Africa", African Commission on Human and Peoples' Rights, The Gambia.

African Commission on Human and Peoples' Rights (ACoHPR) (2020a), "Press statement of the African commission on human & peoples' rights on the coronavirus (COVID-19) crisis – 08 April 2020", available at: www.achpr.org/pressrelease/detail?id=480 (accessed 29 September 2021).

African Commission on Human and Peoples' Rights (ACoHPR) (2020b), "Press statement on human rights based effective response to the novel COVID-19 virus in Africa", available at: www.achpr.org/pressrelease/detail?id=483 (accessed 29 September 2021).

Ako, T., Plugge, E., Mhlanga-Gunda, R. and Van Hout, M.C. (2020), "Ethical guidance for health research in prisons in low and middle-income countries: a scoping review", *Public Health*, Vol. 186, pp. 217-227.

Amnesty International (2020), "Sub-Saharan Africa: protect detainees at risk of COVID-19, unclog prisons and release prisoners of conscience", available at: www.amnesty.org/en/latest/news/2020/04/subsaharanafrica-protect-detainees-at-risk-of-covid-unclog-prisons-and-release-prisoners/ (accessed 29 September 2021).

Amon, J. (2020), "COVID-19 and detention: respecting human rights", *Health and Human Rights Journal*, Vol. 22 No. 1, p. 367.

Badu, K., Thorn, J., Goonoo, N., Dukhi, N., Fagbamigbe, A., Kulohoma, B., Oyebola, K., Abdelsalam, S., Doorsamy, W., Awe, O., Sylverken, A., Egeru, A. and Gitaka, J. (2020), "Africa's response to the COVID-19 pandemic: a review of the nature of the virus, impacts and implications for preparedness", *AAS Open Research*, Vol. 3, p. 19.

Barnert, E., Ahalt, C. and Williams, B. (2020), "Prisons: amplifiers of the COVID-19 pandemic hiding in plain sight", *American Journal of Public Health*, Vol. 110 No. 7, pp. 964-966.

Beaudry, G., Zhong, S., Whiting, D., Javid, B., Frater, J. and Fazel, S. (2020), "Managing outbreaks of highly contagious diseases in prisons: a systematic review", *BMJ Global Health*, Vol. 5 No. 11, p. e003201.

Bulled, N. and Singer, M. (2020), "In the shadow of HIV & TB: a commentary on the COVID epidemic in South Africa", *Global Public Health*, Vol. 15 No. 8, pp. 1231-1243.

Cassim, J. (2016), "Zimbabwe prisons 'worse than hell'. Human rights activists urge Zimbabwe to address appalling prison conditions", Africa Watch, available at: www.aa.com.tr/en/africa/zimbabwe-prisons-worse-than-hell/666119 (accessed 29 September 2021).

Chingano, N. (2020), "Journalist Hopewell Chin'ono speaks out over brutal Zimbabwe prison conditions", The Guardian, available at: www.theguardian.com/global-development/2020/oct/02/hopewell-chinono-zimbabwe-journalist-prison-conditions (accessed 29 September 2021).

Chinowaita, F. (2020), "Magistrate orders for the immediate sanitization of Chikurubi maximum prison cells", available at: https://bulawayo24.com/index-id-news-sc-national-byo-191018.html (accessed 29 September 2021).

Chireh, B. and Kwaku Essien, S. (2020), "Leveraging best practices: protecting Sub-Saharan African prison detainees amid COVID-19", *Pan African Medical Journal*, Vol. 36 No. 1.

Chivandikwa, N., Mhlanga-Gunda, R., Mahaso, S., Chinokwetu, C., Kewley, S. and Van Hout, M.C. (2020), "Empowering Zimbabwean women prisoners right to health and equivalence of care in the prison system using forum theatre", *Journal of Sustainable Development – Africa*, Vol. 22 No. 3, pp. 53-66.

Council of Europe (2015), "European committee for the prevention of torture and inhuman or degrading treatment or punishment", CPT standards, 2015 (CPT/Inf/E (2002) 1 – Rev. 2015) Standard on Health

care services in prisons, No. 30, p. 38, available at: www.cpt.coe.int/en/documents/eng-standards.pdf (accessed 29 September 2021).

Daily News (2020), "Covid 19 in prisons a disaster", Daily news. Available from:Covid-19 in prisons: A disaster – DailyNews (accessed 29th September 2021).

Habeenzu, C., Mitarai, S., Lubasi, D., Mudenda, V., Kantenga, T., Mwansa, J. and Maslow, J.N. (2007), "Tuberculosis and multidrug resistance in Zambian prisons, 2000–2001", *International Journal of Tuberculosis and Lung Disease*, Vol. 11, pp. 1216-1220.

Jongwe, F. (2019), "Prisons under siege as Zimbabwe's economic woes persist", Live News, available at: www.france24.com/en/20190618-prisons-under-siege-zimbabwes-economic-woes-persist (accessed 29 September 2021).

Katey, D., Kwame-Morga, A., Asori, M., Twum-Amofo, S. and Kwam Jumah Mpodi, R. (2021), "COVID-19 and the marginalized: an opinion piece on further measures to address COVID-19 in prisons in Sub-Saharan Africa", *International Journal of Prison Health*, Vol. 17 No. 3, pp. 373-379.

Kinner, S., Young, J., Snow, K., Southalan, L., Lopez-Acuña, D., Ferreira-Borges, C. and O'Moore, E. (2020), "Prisons and custodial settings are part of a comprehensive response to COVID-19", *Lancet Public Health*, Vol. 5 No. 4, p. e188, doi: 10.1016/S2468-2667(20)30058-X.

Kras, K. and Fitz, L. (2020), "The social and environmental implications of the novel coronavirus on institutional and community corrections in South Africa", *Victims & Offenders*, Vol. 15 Nos 7/8, pp. 1-15.

Lawyers for Lawyers (2020), "COVID-19 series. The impact of the crisis in Zimbabwe", available at: https://lawyersforlawyers.org/en/covid-19-series-the-impact-of-the-crisis-in-zimbabwe/ (accessed 29 September 2021).

Leiter, B. (2015), "Legal realism and legal doctrine", *University of Pennsylvania Law Review*, Vol. 163, p. 1975.

Lines, R. (2008), "The right to health of prisoners in international human rights law", *International Journal of Prisoner Health*, Vol. 4 No. 1, pp. 3-53, doi: 10.1080/17449200701862145.

Lines, R. Burke-Shayne, N. and Girelli, G. (2020), "Gaol fever: what COVID-19 tells us about the war on drugs", *Health and Human Rights Journal Online-April 19 2020*, available at: www.hhrjournal.org/2020/04/gaol-fever-what-covid-19-tells-us-about-the-war-on-drugs/ (accessed 29 September 2021).

Machingura, F., Mhlanga, G., Magure, T. and Hulme, D. (2018), "Sentenced and locked away, HIV/AIDs in Zimbabwean prisons", Briefing paper, University of Manchester Global Development (2018), p. 1, available at: www.gdi.manchester.ac.uk/research/groups/politics-governance-management/allowable-death-and-the-valuation-of-human-life/sentenced-and-locked-away/ (accessed 12 April 2022).

Marawanyika, G. (2021), "Zimbabwe releases 320 prisoners in effort to curb virus spread", available from: www.bloomberg.com/news/articles/2021-04-17/zimbabwe-releases-320-prisoners-in-effort-to-curb-virus-spread.Bloomberg (accessed 29 September 2021).

Mavhinga, D. (2020), "Prisoners in Zimbabwe at grave risk of covid-19 spread", Human Rights Watch, available at: www.hrw.org/news/2020/07/29/prisoners-zimbabwe-grave-risk-covid-19-spread (accessed 29 September 2021).

Mekonnen, B., Hailemariam, S., Ejigu, A., Shifera, N. and Asnake, S. (2021), "Preparedness and readiness against COVID-19 pandemic in prison institutions and detention centers in southwest Ethiopia", *International Journal of General Medicine*, Vol. 14, pp. 337-346.

Mhlanga-Gunda, R., Kewley, S., Chivandikwa, N. and Van Hout, M.C. (2020), "Prison conditions and standards of health care for women and their children incarcerated in Zimbabwean prisons", *International Journal of Prison Health*, Vol. 6 No. 3, pp. 319-336.

Mhlanga-Gunda, R., Rusakaniko, S., Chinyuku, A.N., Pswarayi, V.F., Robinson, C.S., Kewley, S. and Van Hout, M.C. (2022), "'We sleep 10cm apart so there is no social distancing': COVID-19 preparedness in a Zimbabwean prison complex", *International Journal of Prisoner Health*, doi: 10.1108/IJPH-10-2021-0101.

Moyo, J. and Goldbaum, C. (2021), "In a bid to curb the virus, Zimbabwe releases hundreds of prisoners", New York Times, available at: www.nytimes.com/2021/04/17/world/zimbabwe-coronavirus-prisoners.html (accessed 29 September 2021).

Mukwenha, S., Dzinamarira, T., Mapingure, M.P. and Musukaa, G. (2021), "Zimbabwe's prison facilities: preparedness for institutional COVID-19 outbreaks", *Public Health in Practice*, Vol. 2, p. 100089.

Muntingh, L. (2020), "Africa, prisons and COVID-19", *Journal of Human Rights Practice*, Vol. 12 No. 2, pp. 284-292.

Mupoperi, E. (2021), "Zimbabwe: prison inmates urged to embrace covid-19 vaccine", ZBC News, available from: www.zbcnews.co.zw/prison-inmates-urged-to-embrace-covid-19-vaccine/ (accessed 29 September 2021).

Muronzi, C. (2020), "In Zimbabwe's overcrowded prisons, fear of COVID-19 spreads", available at: www.aljazeera.com/news/2020/9/25/gg (accessed 29 September 2021).

Mutsaka, F. (2021), "Zimbabwe frees some inmates to reduce COVID-19 risk in jails-April 17, 2021", Associated Press, available at: https://apnews.com/article/general-news-zimbabwe-africa-1c76d674cd145a82961f369d5d009e16 (accessed 29 September 2021).

Netsianda, M. (2020), "Covid-19 hits Bulawayo prison – four inmates, officer found with virus", The Chronicle Newspaper, available at: www.chronicle.co.zw/covid-19-hits-bulawayo-prison-four-inmates-officer-found-with-virus/ (accessed 29 September 2021).

Nkengasong, J. and Mankoula, W. (2020), "Looming threat of COVID-19 infection in Africa: act collectively and fast", *Lancet*, Vol. 395 No. 10227, pp. 841-842.

Nweze, V.N., Anosike, U.G., Ogunwusi, J.F., Adebisi, Y.A. and Lucero-Prisno, D.E. (2020), "Prison health during the COVID-19 era in Africa", *Public Health in Practice*, Vol. 2, p. 100083, doi: 10.1016/j.puhip.2021.100083.

Office for the Coordination of Humanitarian Affairs (OCHA) (2020), "Zimbabwe – situation reports highlights", 7 May 2020, available at: https://reliefweb.int/sites/reliefweb.int/files/resources/Situation%20Report%20-%20Zimbabwe%20-%206%20May%202020.pdf (accessed 29 September 2021).

Office of the High Commissioner for Human Rights (OHCHR) (2020), "Urgent action needed to prevent COVID-19"rampaging through places of detention" –Michelle Bachelet (25 march 2020)", Office of the High Commissioner for Human Rights, Geneva.

O'Grady, J., Hoelscher, M., Atun, R., Bates, M., Mwaba, P., Kapata, N., Ferrara, G., Maeurer, M. and Zumla, A. (2011), "Tuberculosis in prisons in Sub-Saharan Africa–the need for improved health services, surveillance and control", *Tuberculosis (Tuberculosis)*, Vol. 91 No. 2, pp. 173-178.

Organization of African Unity (OAU) (1981), "African charter on human and peoples' rights", ("Banjul charter") (27 June 1981)CAB/LEG/67/3 rev.5,21I.L.M.5 article 14(1), available at: www.achpr.org/legalinstruments/detail?id=49 (accessed 29 September 2021).

Penal Reform International (PRI) (2020), "Coronavirus: healthcare and human rights of people in prison", Penal Reform International. London, available at: www.penalreform.org/resource/coronavirus-healthcare-and-human-rights-of-people-in/ (accessed 29th September 2021).

Pillay, N., Chimbga, D. and Van Hout, M.C. (2021), "Gender inequality, health rights and HIV/AIDs among women prisoners in Zimbabwe", *Health and Human Rights Journal*, Vol. 23 No. 1, pp. 225-236.

Prison Insider (2017a), "Zimbabwe prisoners deprived of ARVs", Prison Insider, available at: www.prison-insider.com/en/articles/zimbabwe-prisoners-deprived-of-arvs?referrer=%2Fen%2Farticles%3Fpage%3D1%26country%255B0%255D%3DZW (accessed 29 September 2021).

Prison Insider (2017b), "Zimbabwe: typhoid outbreak spreads to Harare prisons", available at: www.prison-insider.com/en/articles/zimbabwe-typhoid-outbreak-spreads-to-harare-prisons?referrer=%2fen%2farticles%3fpage%3d1%26country%255b0%255d%3dzw%20january%2017,%202017%20b (accessed 29 September 2021).

Prison Insider (2019), "Zimbabwe: water, power woes dog prison December 17 2019", Prison Insider, available at: www.prison-insider.com/en/articles/zimbabwe-water-power-woes-dog-prison (accessed 29 September 2021).

Prison Insider (2020), "Africa: Coronavirus, prison fever. What are the consequences of the pandemic on the living conditions in African prisons?", Prison Insider, available at: www.prison-insider.com/en/articles/afrique-coronavirus-la-fievre-des-prisons (accessed 29 September 2021).

Rapisarda, S. and Byrne, J.M. (2020), "An examination of COVID-19 outbreaks in African prisons and jails", *Victims & Offenders*, Vol. 15 Nos 7/8, pp. 910-920.

Simpson, P. and Butler, T. (2020), "Covid-19, prison crowding, and release policies", *British Medical Journal*, Vol. 369, p. m155, doi: 10.1136/bmj.m1551.

Southern African Development Community (SADC) (2020), "SADC regional response to COVID-19 pandemic", Southern African Development Community, Botswana, available at: www.sadc.int/files/9115/8697/9635/SADC_regional_response_to_COVID-19.pdf (accessed 29 September 2021).

Steinberg, J. (2005), "Prison overcrowding and the constitutional right to adequate accommodation in South Africa", Centre for the Study of Violence and Reconciliation, South Africa. Available at Prison Overcrowding and the Constitutional Right to Adequate Accommodation in South Africa. (csvr.org.za). (accessed 29 September 2021).

Telisinghe, L., Charalambous, S., Topp, S.M., Herce, M.E., Hoffmann, C.J., Barron, P., Schouten, E.J., Jahn, A., Zachariah, R., Harries, A.D., Beyrer, C. and Amon, J.J. (2016), "HIV and tuberculosis in prisons in Sub-Saharan Africa", *Lancet*, Vol. 388, p. 10050, doi: 10.1016/S0140-6736(16)30578-5.

Todrys, K. and Amon, J.L. (2012), "Criminal justice reform as HIV and TB prevention in African prisons", *PLoS Medicine*, Vol. 9 No. 5, p. e1001215.

Truscott, R. (2012), "HIV positive man starts legal action in Zimbabwe to ensure prisoners receive right drugs", *BMJ*, Vol. 345 No. sep13 2, doi: 10.1136/bmj.e6194.

UK Home Office (2017), "Country policy and information note – Zimbabwe: prison conditions, 6 February 2017, version 2.0", available at: www.refworld.org/docid/589d76684.html (accessed 29 September 2021).

United Nations (UN) (1966a), "International covenant on economic, social and cultural rights (ICESRC)", (16 December 1966)United Nations, Treaty Series,993:3. United Nations General Assembly, New York.

United Nations (UN) (1966b), "International covenant on civil and political rights (ICCPR)", (16 December 1966) United Nations, Treaty Series, 999. United Nations General Assembly, New York.

United Nations (UN) (1982), "Principles of medical ethics relevant to the role of health personnel, particularly physicians, in the protection of prisoners and detainees against torture and other cruel, inhuman or degrading treatment or punishment", *(18 September 1982) A/RES/37/194*. United Nations General Assembly, New York.

United Nations (UN) (1984), "Convention against torture and other cruel, inhuman or degrading treatment or punishment", United Nations, Treaty Series, Vol. 1465 No. 85. United Nations General Assembly, New York.

United Nations (UN) (1988), "Body of principles for the protection of all persons under any form of detention or imprisonment: resolution/adopted by the general assembly", *(9 December 1988)A/RES/43/173*. United Nations General Assembly, New York.

United Nations (UN) (1991), "Basic principles for the treatment of prisoners: resolution/adopted by the general assembly", *(28 March 1991)A/RES/45/111,para 9*. United Nations General Assembly, New York.

United Nations (UN) (2003), "Optional protocol to the convention against torture and other cruel, inhuman and degrading treatment or punishment", *UN General Assembly 9 January 2003, A/RES/57/199*, available at: www.refworld.org/docid/3de6490b9.html (accessed 29 September 2021).

United Nations (UN) (2016), "Standard minimum rules for the treatment of prisoners", (Nelson Mandela Rules) (8 January 2016) A/RES/70/175. United Nations General Assembly, New York.

United Nations Office of the High Commissioner for Human Rights (OHCHR) (2012), *The Human Rights Treaty System*, United Nations Office of the High Commissioner for Human Rights, Geneva.

United Nations Office on Drugs and Crime (UNODC), World Health Organization (WHO), UNAIDS, and Office of the High Commissioner for Human Rights (OHCHR) (2020a), "UNODC, WHO, UNAIDS and OHCHR joint statement on COVID-19 in prisons and other closed settings 13 may 2020", available at: www.who.int/news/item/13-05-2020-unodc-who-unaids-and-ohchr-joint-statement-on-covid-19-in-prisons-and-other-closed-settings (accessed 29 September 2021).

United Nations Office on Drugs and Crime (UNODC) (2020b), "Position paper COVID-19 preparedness and responses in prisons", United Nations Office on Drugs and Crime, Vienna.

United States State Department (USSD) (2016), "Country reports on human rights practices for 2015", available at: https://2009-2017.state.gov/j/drl/rls/hrrpt/humanrightsreport//index.htm (accessed 29 September 2021).

US State Department (2020), "2020 human rights report: Zimbabwe".

Van Hout, M.C. (2020a), "COVID-19, health rights of prison staff and the bridge between prison and public health in Africa", *Public Health*, Vol. 185, pp. 128-129.

Van Hout, M.C. (2020b), "Prison staff exposure to pathogenic disease and occupational health research in African prisons: a neglected area", *Journal of Sustainable Development in Africa*, Vol. 22 No. 1, pp. 166-171.

Van Hout, M.C. (2020c), "COVID-19: urgent need to find alternatives to prison sentences in Malawi", *Health and Human Rights Journal*, available at: www.hhrjournal.org/2020/09/covid-19-urgent-need-to-release-women-from-prison-in-malawi/

Van Hout, M.C. (2020d), "Leaving no one behind: the human tragedy of children in African prisons during COVID-19", *Health and Human Rights Journal*, available at: www.hhrjournal.org/2020/05/leaving-no-one-behind-the-human-tragedy-of-children-in-african-prisons-during-covid-19/

Van Hout, M.C. and Aaraj, E. (2020), "Pandemic stresses the human rights imperatives of tackling HIV and hepatitis in middle east and North African prisons", *Health and Human Rights Journal*, available at: www.hhrjournal.org/2020/05/pandemic-stresses-the-human-rights-imperatives-of-tackling-hiv-and-hepatitis-in-middle-east-and-north-african-prisons/

Van Hout, M.C. and Wessels, J. (2021), "Human rights and the invisible nature of incarcerated women in post-apartheid South Africa: prison system progress in adopting the Bangkok rules", *International Journal of Prisoner Health*, Vol. ahead-of-print No. ahead-of-print, doi: 10.1108/IJPH-05-2021-0045.

Van Hout, M.C., Fleißner, S. and Stöver, H. (2021b), "'# me too': global progress in tackling continued custodial violence against women. The 10 year anniversary of the Bangkok rules", *Trauma, Violence, & Abuse: A Review Journal*, [Epub ahead of print], doi: 10.1177/15248380211036067.

Van Hout, M.C., Mhango, V., Kaima, R., Bigland, C. and Mariniello, T. (2022), "A legal-realist assessment of human rights, right to health and standards of healthcare in the Malawian prison system during COVID-19 state disaster measures", *International Journal of Prisoner Health*, doi: 10.1108/IJPH-10-2021-0108.

Van Hout, M.C., Stover, H., Benamara, K., Bauer, P. and Salah, E. (2021a), "90-90-90: Catalysing the response to HIV by enhancing prison visibility in the UNAIDS strategy beyond 2021", *Public Health*, Vol. 190, pp. e5-e6.

Whiz, L. (2020), "Inmate tells high court of major health crisis at Chikurubi prison", Zim Live, available at: www.zimlive.com/2020/11/24/inmate-tells-high-court-of-major-health-crisis-at-chikurubi-prison/ (accessed 29 September 2021).

World Health Organization (WHO) (2003), "WHO Moscow declaration: prison health as part of public health", World Health Organization, Copenhagen.

World Health Organization (WHO) (2020a), "Coronavirus disease (COVID-19) pandemic", World Health Organization, Geneva.

World Health Organization (WHO) (2020b), "Preparedness, prevention and control of COVID-19 in prisons and places of detention", World Health Organization, Geneva.

World Health Organization (WHO) (2020c), "Checklist to evaluate preparedness, prevention and control of COVID-19 in prisons and other places of detention", World Health Organization, Copenhagen.

World Medical Organisation (WMA) (2011), "Declaration of Edinburgh on prison conditions and the spread of tuberculosis and other communicable diseases", World Medical Organisation, Geneva.

World Prison Brief (2020), "Africa", World Prison Brief, available at: www.prisonstudies.org (accessed 29 September 2021).

World Prison Brief (2021), "Zimbabwe", available at: www.prisonstudies.org/country/zimbabwe (accessed 14 January 2022).

Worldometer COVID-19 Data (2021), "Zimbabwe. Updated September 23rd 2021", available at: www.worldometers.info/coronavirus/country/zimbabwe/ (accessed 23 September 2021).

Zimbabwe & UN Committee on the Elimination of Discrimination Against Women (CEDAW) (2020), "Concluding observations on the sixth periodic report of Zimbabwe committee on elimination of discrimination against women (Report No. CEDAW/C/ZWE/CO/6)", New York, NY.

Zimbabwean Government Gazette Extraordinary (2020), *No. 39 General Notice 688 of 2020*, Published by Authority Vol. XCVIII, available at: https://gazettes.africa/archive/zw/2020/zw-government-gazette-dated-2020-04-30-no-39.pdf (accessed 20 January 2022).

Zimbabwe Human Rights Forum (2018), "Rights behind bars: a study of prison conditions in Zimbabwe 2018", Zimbabwe Human Rights NGO Forum. Harare, Zimbabwe, available at: www.hrforumzim.org/wpcontent/uploads/2018/10/Prison-Report-2018.pdf (accessed 29 September 2021).

Zimbabwe Peace Project (ZPP) (2021), "COVID-19 accountability tracker", ZPP, available at: https://reliefweb.int/report/zimbabwe/zpp-covid-19-accountability-tracker-june-202 (accessed 29 September 2021).

Further reading

UN Committee on Economic, Social and Cultural Rights (CESCR) (2000), "General comment no. 14: the right to the highest attainable standard of health (art. 12 of the covenant)", 11 August 2000, E/C.12/2000/4, available at: www.refworld.org/docid/4538838d0.html (accessed 29 September 2021).

UN General Assembly (2009), "Optional protocol to the international covenant on economic, social and cultural rights: resolution/adopted by the general assembly", *5 March 2009, A/RES/63/117*, available at: www.refworld.org/docid/49c226dd0.html (accessed 29 September 2021).

United Nations (UN) (1947), "Entry into force of the constitution of the world health organization", *(17 November 1947)A/RES/131*, United Nations General Assembly, New York.

United Nations (UN) (1948), "Universal declaration of human rights", *(10 December 1948)217A(III),Article 25*. United Nations General Assembly, New York.

United Nations (UN) (1966c), "General assembly- optional protocol to the international covenant on civil and political rights", *19 December 1966, United Nations, Treaty Series*, Vol. 999, p. 171, available at: www.refworld.org/docid/3ae6b3bf0.html (accessed 29 September 2021).

United Nations Human Rights Office of the High Commissioner (OHCHR) (2012), "The human rights treaty system (UN 2012)", available at: www.ohchr.org/Documents/Publications/FactSheet30Rev1.pdf (accessed 29 September 2021).

Corresponding author

Marie Claire Van Hout can be contacted at: m.c.vanhout@ljmu.ac.uk

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Review - Narrative

A human rights assessment of menopausal women's access to age- and gender-sensitive nondiscriminatory health care in prison

Marie-Claire Van Hout, MSc, PhD,[1] Lizz Srisuwan, MD,[1] and Emma Plugge, MD, PhD[2]

Abstract

Importance and Objective: Women represent about 6% of the global prison population of 11 million. The female prison population has increased significantly in the past decade. Where attention is devoted to women's unique sexual and reproductive health needs in prison, this is largely focused on menstruation management and ante/postnatal care. There is no explicit guidance regarding imprisoned menopausal women's health care in the United Nations normative standards of detention (Mandela Rules, Bangkok Rules). A human rights assessment of menopausal women's access to age- and gender-sensitive nondiscriminatory health care in prison since 2010 was conducted.

Methods: Arksey and O'Malley's scoping review methodology was adhered to. A systematic search was conducted using detailed MeSH terms on CINAHL, MEDLINE, PubMed, ProQuest Central, PsycInfo, Scopus, and the Web of Science. All published materials in the English language in the time frame of 2010-2022 were collated (n = 268). Fourteen duplicates were removed. Two hundred thirty-four were excluded after title and abstract screening, with five records remaining. Hand searching yielded an additional 11 records. Sixteen records were charted and analyzed thematically using a human rights lens. Themes were the following: environmental conditions and menopausal sequelae, gender-sensitive nondiscriminatory free health care, evidence-based age/gender-sensitive prison health policies, and medical insensitivity and incompetencies in menopausal care.

Discussion and Conclusion: Menopausal women have the right to the underlying environmental determinants of health in prison and rights to nondiscrimination and equivalence of care, essential medicines, medical care and treatment, preventive health services, and participation in the generation of prison policies and support initiatives. The lack of visibility regarding their health needs in policies and healthcare provisions is reflected in the realities of life in prison, with glaring gaps in the practical medical and lifestyle supports of menopause. Further research is warranted to inform evidence-based prison reforms to improve the quality of life of older women in prison.

Key Words: Bangkok Rules – Detention – Health care – Incarceration – Menopause – Women.

Nearly three-quarters of a million women and girls are imprisoned across the world.[1] Although they make up a small minority of the 11 million people in prisons globally, since 2010, the female prison population has increased by 17% compared with an overall increase of 8%.[1] This increase has not been uniform across all regions and has been particularly marked in certain parts of the world, especially Asia and Oceania, where the number of women in prison has increased by around 50%. In contrast, in Europe, the number of imprisoned women has fallen.[1] Although women are a small proportion of the overall total of imprisoned people, imprisonment (often due to poverty-related crimes) has a disproportionately negative impact on them and on their families.[1-3] This disproportionate impact centers on the devastating effects of poverty, stigma, trauma and untreated mental illness, the maternal-child bond for those with children and those with increased risks of child welfare involvement, generational and cyclical effects of parental incarceration and foster care placement of children, homelessness, and later offending rates in their children. Given the clear relationship between socioeconomic inequalities and health, it is not surprising that the health of imprisoned women is poorer than that of the population in general and of imprisoned men. Furthermore, as a minority in a system built by and for men, their needs are often neglected.[1] Imprisoned women have higher rates of sexually transmitted infections, viral hepatitis, human immunodeficiency virus, and tuberculosis than both the general population and imprisoned men, and they are disproportionately affected by trauma, self-harm, substance abuse, and serious mental illness.[4-9] Their sexual and reproductive health needs remain poorly researched and

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From the [1]Public Health Institute, Liverpool John Moore's University, Liverpool, United Kingdom; and the [2]Faculty of Medicine, University of Southampton, Southampton, United Kingdom.
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Address correspondence to: Marie-Claire Van Hout, MSc, PhD, Public Health Institute, Faculty of Health, Liverpool John Moore's University, 3rd Floor, Exchange Station, Tithebarn Street, Liverpool L2 2QP, UK. E-mail: m.c.vanhout@ljmu.ac.uk

ill-resourced in prison systems in many countries, with health care largely focused on pregnant and breastfeeding women and infants, and with many continuing to neglect women's needs around menstruation.[10-12]

STANDARDS OF DETENTION AND HUMAN RIGHTS

Positive obligations regarding human treatment and right to health of women in prison are provided for in the international treaties, which include the World Health Organization Constitution[13]; the Universal Declaration of Human Rights[14]; the 1966 International Covenant on Economic, Social and Cultural Rights[15]; the International Covenant on Civil and Political Rights[16]; and the 1979 Convention on the Elimination of all Forms of Discrimination against Women.[17] The Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment creates further binding obligations on states not to ill-treat those deprived of their liberty, and recognizes that inadequate health care can contribute to situations that fall within the scope of the term "inhuman and degrading treatment."[18] The United Nations (UN) Principles of Medical Ethics, World Health Organization, and World Medical Association declarations all mandate the rights of prisoners to humane treatment and appropriate medical care.[19-21]

In 2010, the promulgation of the nonbinding or "soft law" UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the *Bangkok Rules*)[22] was an important milestone in recognizing the gender-specific needs of women in criminal justice systems globally. These Rules supplemented the normative standards provided in the UN Standard Minimum Rules for the Treatment of Prisoners (the *Nelson Mandela Rules*)[23] and the UN Standard Minimum Rules for Non-custodial Measures (the *Tokyo Rules*).[24] States, however, have discretion in defining humane treatment and adequate medical care in prisons.[25] Adoption of these Rules has been variable globally, and there is current evidence that documents empirical and UN treaty body reporting of the continued violations of the fundamental rights of women deprived of their liberty in 55 countries, particularly as it relates to right to health and access to gender-sensitive health care, and the protection of women from all forms of custodial violance.[12]

MENOPAUSE IN PRISON

Little is known about the experiences of older incarcerated women, who constitute a small but growing proportion of imprisoned women.[1] A particular concern is how and to what standard the management of menopause occurs in prison. There is no explicit guidance regarding incarcerated menopausal women's health care in the UN normative standards of detention (Mandela Rules, Bangkok Rules). Menopause is defined as the permanent cessation of menstruation resulting from the loss of ovarian follicular activity and diagnosed retrospectively after 12 months of amenorrhea, for which there is no other cause (average age, 51 years).[26] Perimenopause, the years leading up to menopause, is characterized by irregular periods and a number of physical, sexual, vasomotor, and psychological symptoms.[27] Psychological issues include poor memory and concentration, depression, anxiety, irritability, and a high level of distress. The symptoms of menopause can contribute to a considerable reduction in women's quality of life.[28]

Given the increasing global population of older imprisoned women and the importance of national and international standards of detention and human rights for these women, we conducted a human rights assessment of menopausal women's access to age- and gender-sensitive nondiscriminatory health care in prison since 2010.

METHODS

The scoping method closely adhered to Arksey and O'Malley's framework[29-31] and was conducted by an experienced research

TABLE 1. *Search and special terms*

Search terms		
Key word	Alternative	
Menopause	Menopaus* OR perimenopau* OR "post menstru*" OR "Vasomotor symptom*" OR "hot fl*" OR "menopaus* symptom*" OR "climacteric"	S1
Prison	prison* OR imprison* OR incacerat* OR inmate* OR detain* OR convict* or jail* OR carceral OR "pre-trial detention" OR detention OR "immigra* detention" OR custod*	S2
Health care	"health care" OR healthcare	S3
	S1 AND S2 AND S3	
Key word	Alternative	
Menopause	Menopaus* OR perimenopau* OR "post menstru*" OR "Vasomotor symptom*" OR "hot fl*" OR "menopaus* symptom*" OR "climacteric"	
Prison	prison* OR imprison* OR incacerat* OR inmate* OR detain* OR convict* or jail* OR carceral OR "pre-trial detention" OR detention OR "immigra* detention" OR custod*	
Health care	"health care" OR healthcare	
	Special terms	
MeSH	• Menopause, perimenopause, postmenopause • Jails, prisoners, prisons • Health facilities, health services	
CINAHL subheading	• Menopause, postmenopause, perimenopause • Prisoners, correctional facilities • Health facilities, health services	

team consisting of two physicians and one prison health and human rights expert, two of which were qualified to doctoral level. A systematic search for literature was conducted in May 2022 on CINAHL, MEDLINE, ProQuest Central, PsycInfo, PubMed, Scopus, and the Web of Science. The search was not limited to peer-reviewed journals and included gray literature. Citations were managed using the bibliographic software manager EndNote. See Table 1.

All published materials in the English language in the time frame of 2010-2022 that explicitly referred to provision of menopausal management in prison were collated (n = 268). Fourteen duplicates were removed, and 234 were excluded after title and abstract screening, with 5 records remaining. Hand searching yielded an additional 11 records. See Figure 1.

A spreadsheet was generated to facilitate charting by author 1 (author and year of publication, location, aim, method, result, and conclusion) with support from authors 2 and 3 to ensure that no useful information was dismissed by collecting and grouping key idea of information from each record to generate themes and by extracting multifaceted perspectives. Sixteen records were charted and analyzed thematically.[32] See Table 2.

Four key themes emerged: environmental conditions and menopausal sequelae, gender-sensitive nondiscriminatory free health care, evidence-based age/gender-sensitive prison health policies, and medical insensitivity and incompetencies in menopausal care. See Table 3.

Information was subsequently assessed using a human rights lens pertaining to the right to health of menopausal women, which is based on access to age- and gender-sensitive, nondiscriminatory and free health care in detention equivalent to that in the community, and an environment conducive to adequate

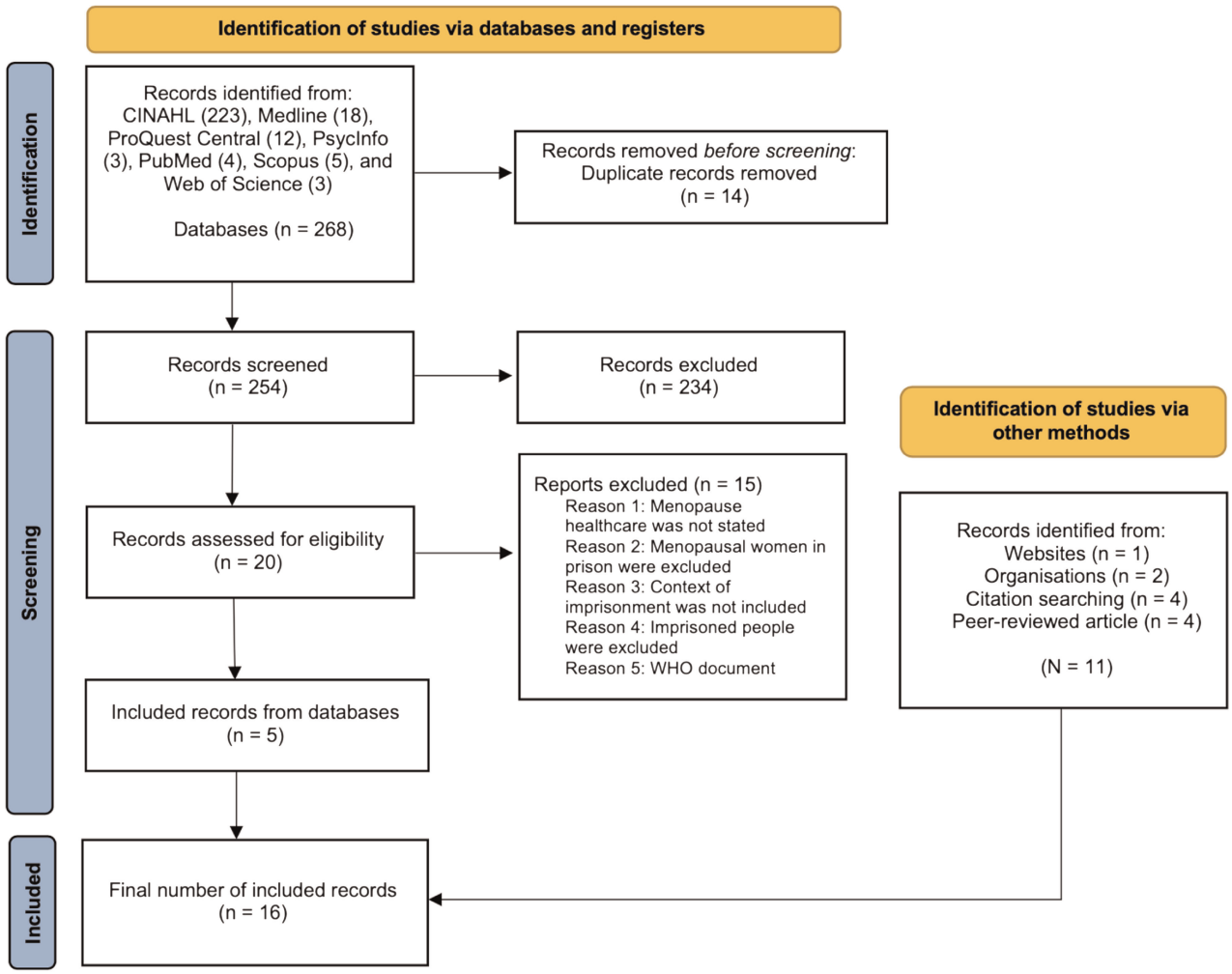

FIG. 1. PRISMA flowchart. Shown here is the flow of study identification and selection. The original database search resulted in 268 records from seven databases. Fourteen duplicates were removed, and 234 records were excluded after title and abstract screening. Fifteen from 20 records were removed after the assessment for the eligibility by screening the full-text articles for the following reasons: menopausal health care was not stated, menopausal women in prison were excluded, context of imprisonment was not included, imprisoned people were excluded, and the WHO document. This process left the remaining five records. An additional 11 records were identified from other sources including citation searching, leaving 16 records included for charting and thematical analysis. CINAHL, Cumulative Index to Nursing and Allied Health Literature; PRISMA, Preferred Reporting Items for Systematic Reviews and Meta-analyses; WHO, World Health Organization.

TABLE 2. *Charted studies*

Aim	Method	Result	Conclusion
Opinion pieces, reviews, and editorials (n = 6)			
Schach et al[33] To review existing menopause health management for imprisoned women	Global review/opinion piece	Although there is an increase of older women in prison, there is a lack of health information, sufficient assessment, emotional and education supports, and personalized treatment (medical and nonmedical) for menopausal inmates. Menopausal sequelae are typically exacerbated by prison conditions and by a lack of health support.	It is important for prison healthcare systems to specifically recognize and include menopausal inmates' unique health needs. Further staff training and research to improve health care for incarcerated menopausal women is warranted.
Grammatikopoulou et al[34] To discuss the CVD risk factors and mediators that enhance the risk of CVD among incarcerated women	Global review/opinion piece	Several factors were identified as mediators of CVD, including incarceration and health related. Incarceration related: Incarcerated women experienced inadequate menstrual hygiene, which could highly affect inmates who experience perimenopause bleeding. There were various barriers to access health care in prison such as delay and/or delay the treatment and a limited working hours (only on weekdays from 9 AM to 3 PM). Health related: Although menopause does not increase the CVD risk directly, it increases the risk of weight gain and exacerbates depression, which multiples CVD risk. Diabetes mellitus and hypertension are common health comorbidities, which increase the CVD risk.	Importantly, specific health services for menopause-related issue in prison remains unclear. The study enlightens the need of carceral healthcare reform and gender-specific health care, including menopause care. Frequent screening and lifestyle intervention should be initiated and applied universally to ensure health for all.
Walsh[35] To examine New York State policies addressing reproductive health care for incarcerated women	Sociolegal review	Health services for imprisoned menopausal women were considered under gynecological examination and contraception section. Legal, medical, and international standards specifically addressed the access to hormone medication as HT.	New York's policies for incarcerated women are relatively substandard because they failed to recognize the unique health needs such as specific detail of treatment for imprisoned menopausal women.
Friedman et al[36] To discuss the prescribing needs of incarcerated women in the United States	Editorial	The number of aging women detainees has increased. Approximately 30% of women detainees reported that menopause was a common health concern. Because menopause inmates may hold several comorbidities, drug-drug interaction is potentially of concern. Importantly, there was no standard guideline available for menopause care, including HT in prison.	The treatment for imprisoned women is complex, especially when involving with comorbidities. Prescribing for women in prisons requires special consideration and should be informed by extant evidence.
Mignon[37] To provide a summary of health concerns about incarcerated women in the United States	Editorial	Health care within prisons in the United States is typically insufficient to meet the medical and psychological needs of imprisoned women. Health services are often of low quality, especially in the areas of reproductive medicine. Mental illness, substance abuse, a trauma history, and sexual victimization while incarcerated compound adjustment to prison life.	In the United States, imprisoned women's specific health needs are often unmet. There is a lack of gender equity and sensitivity within the prison system. Public health services should integrate with prison health services to improve inmates' health.

Continued on next page

TABLE 2 *(Continued)*

Aim	Method	Result	Conclusion
Knittel et al[38] To describe standards for evidence-based reproductive health care for incarcerated women in the United States	Editorial	Among five domains of recommendations, one was about menstruation related. Menopause was reported a common health concern among incarcerated older women because physical and emotional symptoms could be exacerbated. To improve these concerns, it was suggested that imprisoned women must be provided the following: 1. Clean undergarments 2. Sufficient sanitary pads 3. Access to healthcare providers for the menstrual abnormalities and menopause symptoms	There is the need to adopt national and international guidelines in providing gender-specific health needs for women detainees. Therefore, rigor evaluation of policy changes and implementation is needed within in criminal justice system.
Primary research: qualitative studies (n=5)			
Barry et al[39] To gain insight into the unique needs of older women inmates by eliciting the perspectives of the correctional health care providers who care for them in the United States	Focus group using a semistructured interview guide with 10 female healthcare providers in prison	Insufficient mattress and beddings, which affected inmates with perimenopausal bleeding. Sometimes inmates were asked to pay for more blankets. Transportation hindered older female inmates to access health services. Interpersonal relationship issues were raised. They revealed the rules that prohibited empathy as a restriction of a hug, hand holding, or verbal comfort, so-called undue familiarity.	Correctional healthcare workers' insights can provide guidance regarding how to optimize the health of the older women inmates. Healthcare providers suggested that separate housing units (eg, preferred housing unit) could enable them to address unmet healthcare needs, and enhance quality of life.
Jaffe et al[40] To explore the experience of menopause women in imprisonment in the United States	Interviews with four women who experienced menopausal symptoms in incarceration	Menopausal women were forced to live with no air conditioning while experiencing hot flashes and night sweating. Besides, there were not sufficient sanitary pads for heavy bleeding. Several challenges to managing menopausal symptoms were reported (denial of care, cost, lack of staff competency). There was a scarcity of health support and information from providers for menopause-related distress. Women detainees did not recognize menopausal symptoms. Menopausal detainees who rolled up their sleeves and trousers to relieve hot flash symptoms were sanctioned.	Critical gaps in access to menopause-related resources and medical care. Menopausal imprisoned women experienced several barriers to access health services, which equally inhumanely devastate autonomy and dignity. Policy and practice changes should address menopause-related needs of women in prison.
dos Santos R et al[41] To identify sign and symptoms that affected the health of incarcerated menopausal inmates in Brazil	Interview 4 women who experienced menopause symptoms in incarceration	Experiencing menopause in prison was uncomfortable. Several adverse health problems were reported, such as sadness, tiredness, changed sleeping pattern, and stress. Underlying health conditions included diabetes, osteoarthritis, and asthma. These health problems are related to menopause, which require HT for treatment.	Incarcerated menopausal women experienced barriers to access health services, and limited right to health. It was recommended that healthcare providers should be more humanized in providing health services. Lastly, development of appropriate public health policies for women inmates should be prioritized.
Paynter[42] To understand incarcerated women's reproductive health experiences, knowledge, and needs. There is little research examining the reproductive health of people incarcerated in prisons for women in Canada.	Workshops with 12 detainees	The Correctional Service Canada is responsible in providing health services for inmates; however, women inmates' reproductive health has never been studied. Participants shared considerable difficulties to access care for menopausal symptoms. There was a difficulty to access sanitary products.	Health professional students and workers should receive training. Prison staff should be familiar with guidelines for reproductive health. Better understanding of inmates' reproductive health experience, knowledge, and needs is needed.

Continued on next page

TABLE 2 *(Continued)*

Aim	Method	Result	Conclusion
Office of the inspection[43] To examine the needs of women in prison To examine if women inmates are being treated in the manner of fair, safe, secure and humane To observe and recommend gender-responsive and trauma informed management	Thematic inspection report Routine inspection and 68 interviews with women in prison, to women's prison in 2020	Care for menopausal women was specifically stated within prison policy regarding that bedding provision should be provided more regularly, especially to women undergoing menopause. There is insufficient availability of clothing, bedding, and hygiene products. New detainees are assessed for immediate healthcare needs, but there is no specific assessment for menopause.	Experts agreed on the need for gender-responsive practices to be informed in prison. Correction should consider gender-specific needs and ability to access essential items for women detainees.
Primary research: mixed method (n = 3)			
Besney et al[44] To explore incarcerated women's health and whether a WHC improved care within this vulnerable population in Canada	Mix methods (1) Retrospective chart review (n = 109) (2) Focus group semistructured interviews (11 incarcerated women and 6 healthcare providers)	There was a lack of access to comprehensive and gender-specific health services during imprisonment, although detainees and healthcare providers suggested that these services should be provided. Mistrust was developed from negative experience while seeking care in the past, and providers' lack of professionalism and respect. WHC improved access to comprehensive and gender-specific services. It enhanced providers' knowledge, skill, and empathy in providing care. WHC was beneficial for the treatment continuity during releasing transition gap between in prison and community.	WHC has proved that specific health needs could be addressed, and ability to access comprehensive and gender-specific health services was enhanced. Larger implementation of WHC would be beneficial for women inmates during imprisonment and releasing transition period and could reduce health inequalities between male and female detainees. This study provided a benchmark foundation to develop healthcare services for women within criminal justice system in Canada.
Kraft-Stolar[45] To report on reproductive health care in the New York State Department of Corrections and Community Supervision	Interviews with 950 incarcerated women, 20 visits to prisons housing women, 1,550 surveys, and reviews of medical charts items	The study revealed a shockingly poor standard of care, the routine denial of basic reproductive health, and hygiene. Although menopause is a special health issue in older women inmates, there are neither medical or nonmedical recommendations for menopausal treatment. Many women were dismissed and denied healthcare appointments. Menopausal imprisoned women suggested that information and emotional support would help them to tackle menopause symptoms.	DOCC's policies should be revised and included specific treatment information for imprisoned menopausal women. In addition, healthcare providers should be trained for age- and gender-specific care for older women inmates including menopause-related symptoms, and adequate health information should be provided.
Aday and Farney[46] To explore incarcerated aging women's perception of healthcare policy in the carceral system in the United States	Survey with quantitative and open-ended questions (n = 327)	30% of participants reported that menopause was a health concern. They suffered from mental, emotional, and physical health problems during imprisonment. There were financial and healthcare provider barriers to health care.	Inmates have a right to access appropriate care for their unique health needs. With older women having the greatest need for health care, an age- and gender-sensitive approach is advised.
Secondary data review (n = 2)			
Jaffe et al[47] To estimate the prevalence of individuals receiving HT for menopause management and the prevalence of underlying conditions that may constrain options for pharmacologic menopause management in the United States prison context	Retrospective review of prescription dispensed relevance to menopause management aged 45–75 y (n = 283)	Many women older than 45 y experiencing incarceration are living with health conditions that may complicate menopause symptom management with HT. Medication use by healthcare providers should consider comorbid health conditions, which may constrain the management of menopause. Unfortunately, there was an absence of health services for menopause in prison; thus, comprehensive and treatment programs for menopause detainees should be commenced.	There was a considerable pharmacological challenge between menopause management and treatment for other underlying conditions. Thus, healthcare providers should concern about other comorbidities to ensure appropriate care. Future research must examine the prevalence of menopause-related symptoms as well as access to and quality of comprehensive menopause management in prisons.

Continued on next page

TABLE 2 *(Continued)*

Aim	Method	Result	Conclusion
Woodall et al [48] To assess levels of health promotion in female prisons using prison inspection reports of women's prisons in England and Wales	Review of inspection reports (n = 13)	There was often an absence of a strategic approach to health promotion. Several health promotions in prisons were reported by inspectors, such as healthy lifestyle by exercise and eating habit. Thirteen inspections reported that health screening program for blood-borne viruses, cancer, and hepatitis health screening program were provided. Although sexual health support was available in the most of institutions, a very limited number of inspections found that health services were provided for menopausal inmates. Besides, there was a paucity of health-related information available in some institutions.	Greater focus on the health promotion needs of women in prison is recommended. Health promotion often focused on male inmates, whereas female inmates have been excluded, which led to several challenges. Excellent sexual and reproductive health services do exist, but high-quality provision is not consistent and depends on prison. In developing health promotion in prison, more sensitive policy and practice should be commenced.

CVD, cardiovascular disease; DOCC, Department of Corrections and Community; HT, hormone therapy; WHC, Women's Health Clinic.

health, during menopause (Bangkok Rules 5, 6, 8, 10, 12, 13, 16, 17, 33, 35).[22] See Table 4.

DISCUSSION AND OBSERVATIONS

The final data set (n = 16) consisted of a broad range of methodologies based on consultations, prison inspections, and prescribing/chart data with qualitative studies using interviews with women in prison and healthcare providers (the United States, Brazil, Canada, New Zealand; n = 5)[39-43]; mixed-method studies with women who experienced incarceration and healthcare providers (the United States, Canada; n = 3)[44-46]; global reviews/opinion pieces (n = 2),[33,34] and US-based social legal reviews (n = 1) [35] and editorials (n = 3)[36-38]; and secondary analysis of data (the United States, the United Kingdom; n = 2).[47,48]

Environmental conditions and menopausal sequelae

Despite the observed increases in numbers of older women in prisons globally, and although menopause was described as a unique and yet common health issue within the detention space, documentation around detention conditions experienced during menopause in prison remains underexplored.[33,34,39-41,45,46] The assessment reveals a violation of Bangkok Rule 5; "accommodation

TABLE 3. *Summary of Themes*

Theme	Summary points
Environmental conditions and menopausal sequelae	Violations of Bangkok Rule 5 relating to accommodation and environmental determinants of health (meeting women's specific health and hygiene needs) Menopausal symptoms (insomnia, hot flushes, night sweats, vaginal bleeding, urinary incontinence, lower bone density, fatigue, and mood changes) are uncomfortable and exacerbated in detention spaces because of the following: • Lack of sufficient ventilation, access to outside air and space • Insufficient basic health provisions (menstrual hygiene products, clothes, underwear, bedding)
Gender-sensitive nondiscriminatory free health care	Failure of prison systems to consider needs of older women and provide for adequate menopausal care Complexities of menopause and comorbid health of women living in detention settings, which are ill considered (psychiatric illness, drug dependence, prior trauma). Lack of life-course appropriate information, mental health supports, pharmacological and lifestyle interventions, supply of therapy drugs, denial and cost of health care, and unavailability of medical care due to restricted clinic opening times (contra Bangkok Rules 6, 8, 10, 16)
Evidence-based age/gender-sensitive prison health policies	Appropriate health policies and pharmacological and lifestyle practices to manage menopause in prison, which remain underdeveloped Need for evidence-based policies, prescribing guidance, and health care recommendations to support menopausal women in prison Policies and pathways to support continuity of menopausal care spanning prison and community reinsertion, which warrant improvement Preferred housing unit or age-segregated housing for helping older women in prison to access health care to meet their unique health needs and improve quality of life
Medical insensitivity and incompetencies in menopausal care	Menopausal women having a right to access competent, qualified medical care in prison (Bangkok Rule 13) Reports of prison staff insensitivity toward menopausal women and the denial of care, the sanctioning of those unable to wear uniforms correctly, and including the lack of choice around gender of the clinician treating them Lack of menopause-specific competency of prison-based medical professionals and prison system failure to fail to communicate social and health information to support distressing menopause-related symptoms Need for prison systems to allocate funding to support staff training in providing care to menopausal imprisoned women (Bangkok Rules 33,35)

TABLE 4. *Bangkok Rules relevant to menopausal health in prison*

Rule 5: The accommodation of women prisoners shall have facilities and **materials required to meet women's specific hygiene needs, including sanitary towels** provided free of charge and a regular supply of water to be made available for the personal care of children and women, in particular women involved in cooking and those who are pregnant, breastfeeding, or menstruating.
Rule 6: The health screening of women prisoners shall include (*a*) comprehensive screening **to determine primary healthcare needs**, and also shall determine (b) mental healthcare needs, including posttraumatic stress disorder and risk of suicide and self-harm, and (c) the reproductive health history of the woman prisoner, including current or recent pregnancies, childbirth and any related reproductive health issues.
Rule 8: The right of women prisoners to **medical confidentiality**, including specifically the right not to share information and not to undergo screening in relation to their reproductive health history, shall be respected at all times.
Rule 10: (1) **Gender-specific healthcare services at least equivalent to those available in the community** shall be provided to women prisoners. (2) If a woman prisoner requests that she be examined or treated by a woman physician or nurse, a woman physician or nurse shall be made available, to the extent possible, except for situations requiring urgent medical intervention. If a male medical practitioner undertakes the examination contrary to the wishes of the woman prisoner, a woman staff member shall be present during the examination.
Rule 12: **Individualized, gender-sensitive, trauma-informed, and comprehensive mental healthcare** and rehabilitation programs shall be made available for women prisoners with mental healthcare needs in prison or in noncustodial settings.
Rule 13: Prison staff shall be made aware of times when women may feel particular **distress, so as to be sensitive to their situation** and ensure that the women are provided appropriate support.
Rule 16: Developing and implementing strategies, in consultation with **mental healthcare and social welfare services**, to prevent suicide and self-harm among women prisoners and providing **appropriate, gender-specific, and specialized support** to those at risk shall be part of a comprehensive policy of mental health care in women's prisons.
Rule 17: Women prisoners shall receive education and information about preventive healthcare measures, including those on HIV, sexually transmitted diseases, and other blood-borne diseases, as well as **gender-specific health conditions**.
Rule 33: (1) All staff assigned to work with women prisoners shall receive training relating to the **gender-specific needs and human rights** of women prisoners. (2). Basic training shall be provided for prison staff working in women's prisons on the main issues relating to women's health, in addition to first aid and basic medicine.
Rule 35: Prison staff shall be trained to detect **mental healthcare needs and risk of self-harm and suicide** among women prisoners and to offer assistance by providing support and referring such cases to specialists.

of women prisoners shall have facilities and materials required to meet women's specific hygiene needs, including sanitary towels provided free of charge."[22] Women's experiences of menopausal symptoms were observed to be particularly uncomfortable within detention spaces.[34,38,40] Menopausal sequelae are all typically exacerbated by prison conditions (and by a lack of health support).[33,41] Common symptoms requiring both medical and general health-related supports in prisons included insomnia, hot flushes, night sweats, vaginal bleeding, urinary incontinence, lower bone density, fatigue, and mood changes.[33,34,36,40,41] Global reviews/opinion pieces[33] and qualitative studies in the United States[40] reveal that the prison environment exacerbated menopausal symptoms pertaining to sufficient ventilation and access to outside air and space. The lack of access to basic health provisions (menstrual hygiene products, clothes, underwear, bedding) was documented at the global level, in Canada and in the United States.[33,38,40,42,45] Menopausal women in a US study reported having to purchase additional blankets and mattress for their hygiene at personal costs.[39] An inspection in New Zealand reported that, although pregnant women could ask for a second mattress, menopausal (and detoxing) women were not aware of the opportunity to request changes in bedding.[43] Quotes from menopausal women incarcerated in the United States[40(p2)] illustrate the challenges and consequences: "If I could have just cooled down a little bit, perhaps it would not have been so bad" and "My mental health deteriorated, I had no control."

Gender-sensitive nondiscriminatory free health care

Prison system failures to consider the needs of older women and to provide for adequate menopause management are frequently documented across the sources.[33,34,39,40,42,45,46] Complexities of menopause and comorbid health of women living in detention settings are ill considered (psychiatric illness, drug dependence, prior trauma).[37] Global reviews/opinion pieces observed the lack of life-course appropriate information, mental health supports, and pharmacological and lifestyle interventions for detained menopausal women, and underscored the need for effective personalized management of menopause in prison.[33,38] Critical prison failures center on the lack of medicines, and denial of and lack of access to free age- and gender-specific care equivalent to that in the community and to lifestyle interventions, causing considerable distress (contra Bangkok Rules 6, 8, 10, 16). Lack of supply of therapy drugs, denial of health care and unavailability of medical care for menopausal women due to restricted opening hours, and costs of treatment are documented in global reviews/opinion pieces,[33,34] US-based surveys,[46] mixed-method studies,[45] and editorials.[37] In 2014, a woman in a US prison[46(p365)] said, "We do not have money to go to medical all the time that we really need to. It takes three days to work to pay for this." This was reiterated again in 2020 in another US[40(p2)] study: "They would dock from my pay, they would take 3 dollars from 7 dollars I get each week if I went to medical. So, I never went back to medical for it [menopause]." Transport logistics impeding access tertiary care was reported by prison health professionals in one US study.[39] A secondary analysis of dispensing data in the United States documented women's lack of access to hormone therapy, with less than 15% of women in prison prescribed any kind of menopausal management and only 3.6% of menopausal women in prison who received estrogen therapy.[47] "Patient Care" in New York provides hormone medication for imprisoned menopausal women to manipulate menstrual irregularity.[35]

Evidence-based age/gender-sensitive prison health policies

Appropriate health policies and pharmacological and lifestyle practices to manage menopause in prison remain underdeveloped.[33,37,40-42,45,48] US-focused editorials and sociolegal reviews, in particular, underscore the need for evidence-based policies, prescribing guidance and health care recommendations

TABLE 5. *Standards of menopausal health care in prison*

The American College of Obstetricians and Gynecologists: Practice Bulletin Number 141 (2014)[50,51]	Vasomotor and vaginal symptoms are known as "cardinal symptoms" in menopausal symptoms. This document provides guidelines for the treatment of these cardinal symptoms. Vasomotor symptoms are the most common physical manifestations in menopause. The hormone treatment for vasomotor symptoms could be either oral or transdermal form of estrogen therapy or estrogen with progestin, or so-called systematic hormone therapy. Although there is evidence of benefit with the use of hormone therapy, their risks and benefits must be discussed with menopausal women, including the increased risk of thromboembolic and breast cancer and reduced risk of bone fracture and colorectal cancer. Discontinuation might induce recurrent of vasomotor symptoms. Nonhormonal medication such as antidepressants agents (SSRIs and serotonin and SNRIs), antihypertensive agent (clonidine), and anticonvulsant agent (gabapentin) can also be used to relieve vasomotor symptoms. There are also alternative options to relieve vasomotor symptoms, such as acupuncture and behavioral and lifestyle changes, but the evidence of benefit is not strong. Hormone therapy (estrogen) has proved to alleviate the symptoms of vaginal symptoms.
NICE guideline [NG23]: Menopause diagnosis and management (2015)[52]	The guideline suggests that laboratory and imaging tests are not recommended to make menopausal diagnosis in women older than 45 y. The only exception of follicle-stimulating hormone test is for women aged 40 to 45 y with menopausal symptoms. Among women older than 45 y, vasomotor symptoms and irregular period, and the absent of menstrual period for at least 12 months are criteria to make diagnosis. Health information and advice should be given to menopausal women, such as stages of menopause, common symptoms, diagnosis, general health care and type of treatment, and benefits and risks of menopausal treatment. Regarding the treatment, several options of the treatment should be discussed with menopausal women: hormone therapy, nonhormonal and nonpharmaceutical. Individuals who experience vasomotor and psychological symptoms should be offered hormone therapy. SSRIs and SNRIs, and clonidine are alternative options but should not be used at the first-line option for vasomotor symptoms. The treatment should be followed up every 3 mo and then annually. Long-term risks from hormone therapy should be discussed, such as venous thromboembolism. In special circumstances, such as women who experienced menopause because of medical or surgical treatment, women should be referred to experts in menopause.
The 2020 Menopausal Hormone Therapy Guideline: South Korea (2020)[53]	The guideline from South Korea suggested that history taking, physical examinations, blood test, and discussion of indications and contraindications should take place before starting hormone therapy for menopausal women. Blood tests of liver function, kidney function, red blood cell, sugar, and lipid should be performed. Mammogram, bone mineral density, and Papanicolaou test should be undertaken. The following optional examinations should be considered individually: thyroid test, breast ultrasound, and endometrial biopsy. The prescription of hormone therapy should not be started because of laboratory test (hormone level), but menopausal symptoms such as vasomotor symptoms should be used as an indication to start hormone therapy. Regarding health information, this information should be informed to menopausal women. Hormone therapy could reduce the risk of coronary artery disease, cerebral stroke, and colorectal cancer. It was found to increase the risk of venous thromboembolism and breast cancer. In addition, hormone therapy could prevent Alzheimer disease and osteoporosis.

NICE, National Institute for Health and Care Excellent; SNRI, norepinephrine reuptake inhibitors; SSRIs, selective serotonin reuptake inhibitor.

to support menopausal women in prison.[35-38] Examples include the recommendation to reform and bring New York's policies in line with legal, medical, and international standards[35] and the need for evidence-based prescribing of menopause management in US prisons.[36] Policies and pathways to support continuity of menopausal care spanning prison and community reinsertion warrant improvement.[33,44] The Women's Health Clinic in Canada helped the continuity of treatment as it assisted the transition gap between in prison and community during the release.[44]

Participants in a different Canadian consultation[42(p38)] described menopause as "an overlooked area of reproductive health." This view is supported by prison healthcare professionals themselves in the United States.[39] In the United Kingdom, health-promoting prisons with screening programs for communicable and noncommunicable diseases, including sexual health services, were described during inspection reviews as supporting healthy lifestyles among older women, despite a lack of strategic approach to health promotion and omitting menopause-specific care.[48] US healthcare providers suggested that preferred housing unit or age-segregated housing could help older women in prison to access health care to meet their unique health needs, including menopause care more conveniently, and could potentially enhance older persons' quality of life.[39]

Medical insensitivity and incompetencies in menopausal care

It is vital that prison systems operate with skilled healthcare providers who are understanding and knowledgeable to address the unique health and often comorbid needs of menopausal women.[34,37-39,41,42,44,46,47] Menopausal women have a right to access competent, qualified medical care in prison (Bangkok Rule 13; "Prison staff shall be made aware of times when women may feel particular distress, so as to be sensitive to their situation and ensure that the women are provided appropriate support."[22] Many reported on prison staff insensitivity toward menopausal women and the denial of care, the sanctioning of those unable to wear uniforms correctly, and including the lack of choice around the gender of the clinician treating them.[40,45,46] A menopausal imprisoned woman in the United States[40(p2)] shared that: "If you are not dying, they will not do anything… with regards to menopause, they just said 'you will get through it." Several US studies reported on lack of menopause-specific competency of prison-based medical professionals.[40] Both global reviews/opinion pieces and qualitative studies in the

United States observe how healthcare providers in prison fail to communicate social and health information to support distressing menopause-related symptoms.[33,40] Empathy expression such as verbal comfort, hugging, and holding hands was observed to be restricted in a US prison.[39] Narratives of women living in prison in the United States include the following: "It's hell going through menopause here… I would like for the doctors and nurses to take the issue more seriously."[45(p172)] as well as describe nurses dismissing their concerns, refusing to provide information and schedule doctor appointments: [NURSE] "Everybody gets menopause. Join the club." and "Why are you here? There is nothing wrong with you."[45(p172)] In Canada, the establishment of Women's Health Clinic enhanced comprehensive and gender-specific care capability by encouraging healthcare providers to be more understanding and enabling them to provide multiple and holistic health services.[44]

The Bangkok Rules provide that "all staff assigned to work with women prisoners shall receive training on the gender specific and human rights of women prisoners" (Rule 33) and "shall be trained to detect mental health-care needs…to offer assistance by providing support and referring such cases to specialists." (Rule 35). Schach et al[33] observed the need for prison systems to allocate funding to support staff training in providing care to menopausal imprisoned women. Training is recommended to support the achievement of an age- and gender-sensitive, and trauma-informed approach to prison health care,[34,38,41,42,44,45,47] garners trust,[44] and does not dismiss or ignore the requests of menopausal women for support.[33,40,46]

CONCLUSIONS

At the time of submission, *The Lancet* published an editorial underscoring the need for societal change of attitudes toward menopause.[49] Our investigation highlights the continued lack of sufficient resourcing of gender- and age-sensitive healthcare programming in prisons. We recognize that, in many countries, medical funding models in prisons differ, with the majority of countries funding prison health from the Ministry of Justice portfolios and not that of Ministry of Health, and that, in many countries, health care is provided by private companies.

Women's experiences of and ability to manage menopausal symptoms are, however, particularly difficult in prison conditions. The prison system particularly fails to consider and provide for the needs of older women. Menopausal women have the right to an environment that does not damage their health in prison, and rights to nondiscrimination and equivalence of care, essential medicines, medical care and treatment, preventive health services, and participation in the generation of prison policies and support initiatives. It seems, however, as if these rights are not recognized. There is no explicit guidance regarding perimenopausal and menopausal women's health care in the UN normative standards of detention (Mandela and Bangkok Rules). The lack of visibility regarding incarcerated menopausal women's health rights in prison policies and healthcare responses is reflected in the difficult realities of life for older women in prison. Their unique health needs in prison are largely unmet, with glaring gaps in the practical medical supports of both perimenopausal and menopausal women. Imprisoned people are entitled to the same standard of health care as they would receive in the community—the principle of "equivalence of care." The standards of menopausal care in prison should be the same as those in the community (Table 5). In addition to these guidelines relating to the diagnosis and treatment of imprisoned women, prison staff need to ensure that these women have access to appropriate clothing and bedding and that environmental factors, such as poor ventilation and overcrowding, do not aggravate menopausal symptoms.

Increasingly, the failings in provision for menopause care in the community are being recognized, and menopause is increasingly recognized as a chance to implement preventive strategies to enable women to live longer and healthier lives.[49] This opportunity should also be seized for imprisoned women where the health gains are likely to be even greater for the individual. Further research with both imprisoned women and prison staff (both health care and custodial) is warranted to raise awareness and to inform evidence-based policies and practices to improve quality of life of older women in prison.[33,39,47]

REFERENCES

1. Penal Reform International. Global prisons trends 2021. Available at: https://www.penalreform.org/global-prison-trends-2021/women/. Published May 2021. Accessed June 5, 2021.
2. Barbaret R, Jackson C, Jay J. UN Rules for the treatment of women prisoners and non-custodial sanctions for women offenders (the Bangkok rules): a gendered critique. *Papers* 2017;102:215-230. doi:10.5565/rev/papers.2336
3. Freudenberg N. Jails, prisons, and the health of urban populations: a review of the impact of the correctional system on community health. *J Urban Health* 2001;78:214-235. doi:10.1093/jurban/78.2.214
4. Alirezaei S, Roudsari RL. Promoting health care for pregnant women in prison: a review of international guidelines. *Iran J Nurs Midwifery Res* 2020;25:91-101. doi:10.4103/ijnmr.IJNMR_169_19
5. Fazel S, Bains P, Doll H. Substance abuse and dependence in prisoners: a systematic review. *Addiction* 2006;101:181-191. doi:10.1111/j.1360-0443.2006.01316.x
6. Hawton K, Linsell L, Adeniji T, Sariaslan A, Fazel S. Self-harm in prisons in England and Wales: an epidemiological study of prevalence, risk factors, clustering, and subsequent suicide. *Lancet* 2014;383:1147-1154. doi:10.1016/S0140-6736(13)62118-2
7. Fazel S, Hayes AJ, Bartellas K, Clerici M, Trestman R. Mental health of prisoners: prevalence, adverse outcomes, and interventions. *Lancet Psychiatry* 2016;3:871-881. doi:10.1016/S2215-0366(16)30142-0
8. Dolan K, Wirtz AL, Moazen B, et al. Global burden of HIV, viral hepatitis, and tuberculosis in prisoners and detainees. *Lancet* 2016;388:1089-1102. doi:10.1016/S0140-6736(16)30466-4
9. Karlsson ME, Zielinski MJ. Sexual victimization and mental illness prevalence rates among incarcerated women: a literature review. *Trauma Violence Abuse* 2020;21:326-349. doi:10.1177/1524838018767933
10. Bard E, Knight M, Plugge E. Perinatal health care services for imprisoned pregnant women and associated outcomes: a systematic review. *BMC Pregnancy Childbirth* 2016;16:285. doi:10.1186/s12884-016-1080-z
11. Van Hout MC, Mhlanga-Gunda R. Contemporary women prisoners health experiences, unique prison health care needs and health care outcomes in sub Saharan Africa: a scoping review of extant literature. *BMC Int Health Hum Rights* 2018;18:31. doi:10.1186/s12914-018-0170-6
12. Van Hout MC, Fleißner S, Stöver H. # Me too: global progress in tackling continued custodial violence against women: the 10-year anniversary of the Bangkok rules. *Trauma Violence Abuse* 2021:15248380211036067. doi:10.1177/15248380211036067
13. United Nations (UN). *Entry Into Force of the Constitution of the World Health Organization. Nov 17, 1947. A/RES/131*. New York, NY: UN General Assembly;1947.
14. United Nations (UN). *Universal Declaration of Human Rights. Dec 10, 1948. 217A(III), Article 25*. New York, NY: UN General Assembly;1948.

15. United Nations (UN). *International Covenant on Economic, Social and Cultural Rights (ICESRC). Dec 16, 1966. United Nations, Treaty Series; 993:3*. New York, NY: UN General Assembly;1966.
16. United Nations (UN). *International Covenant on Civil and Political Rights (ICCPR). Dec 16, 1966. United Nations, Treaty Series; 999*. New York, NY: UN General Assembly;1966.
17. United Nations (UN). *Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). Dec 18, 1979. A/RES/34/180*. New York, NY: UN General Assembly; 1979.
18. United Nations (UN). *Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment. United Nations, Treaty Series; 1465(85)*. New York, NY: United Nations General Assembly; 1984.
19. United Nations (UN). *Principles of Medical Ethics Relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Sept 18, 1982. A/RES/3e7/194*. New York, NY: United Nations General Assembly;1982.
20. World Health Organization (WHO). *WHO Moscow Declaration: Prison Health as Part of Public Health*. Copenhagen, Denmark: World Health Organization; 2003.
21. World Medical Organisation (WMA). *Declaration of Edinburgh on Prison Conditions and the Spread of Tuberculosis and Other Communicable Diseases*. Geneva, Switzerland: World Medical Organisation; 2011.
22. UN General Assembly. *United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok rules): Note/By the Secretariat, October 6, 2010, A/C.3/65/L.5*. New York, NY: UN General Assembly; 2010. Available at: https://www.refworld.org/docid/4dcbb0ae2.html. Accessed June 5, 2022.
23. UN General Assembly. *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules): Resolution/Adopted by the General Assembly, January 8, 2016, A/RES/70/175*. New York, NY: UN General Assembly; 2016. Available at: https://www.refworld.org/docid/5698a3a44.html. Accessed June 5, 2022.
24. UN General Assembly. *United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules: Resolution/Adopted by the General Assembly)*. New York, NY: UN General Assembly; 1991. Available at: https://www.refworld.org/docid/3b00f22117.html. Accessed June 5, 2022.
25. Lines R. The right to health of prisoners in international human rights law. *Int J Prison Health* 2008;4:3-53. doi:10.1080/17449200701862145
26. Burger HG. The endocrinology of the menopause. *Maturitas* 1996; 23:129-136. doi:10.1016/0378-5122(95)00969-8
27. Elavsky S, McAuley E. Physical activity and mental health outcomes during menopause: a randomized controlled trial. *Ann Behav Med* 2007; 33:132-142. doi:10.1007/BF02879894
28. Afridi I. Psychological and social aspects of menopause. In: Rodriguez-Landa JF, Cueto-Escobedo J. *A multidisciplinary Look at Menopause*. London, United Kingdom: IntechOpen; 2017:136. Available at: https://www.intechopen.com/books/5984 doi: 10.5772/66558. Accessed June 5, 2022.
29. Arksey H, O'Malley L. Scoping studies: towards a methodological framework. *Int J Soc Res Methodol* 2005;8:19-32. doi:10.1080/1364557032000119616
30. Levac D, Colquhoun H, O'Brien KK. Scoping studies: advancing the methodology. *Implement Sci* 2010;5:69. doi:10.1186/1748-5908-5-69
31. Daudt HML, van Mossel C, Scott SJ. Enhancing the scoping study methodology: a large, inter-professional team's experience with Arksey and O'Malley's framework. *BMC Med Res Methodol* 2013;13:48. doi:10.1186/1471-2288-13-48
32. Hsieh HF, Shannon SE. Three approaches to qualitative content analysis. *Qual Health Res* 2005;15:1277-1288. doi:10.1177/1049732305276687
33. Schach E, Kothari J, Perkiss E, et al. Symptomatic menopause: additional challenges for incarcerated women. *Maturitas* 2021;150:37-41. doi:10.1016/j.maturitas.2021.05.009
34. Grammatikopoulou MG, Lampropoulou MA, Milapidou M, Goulis DG. At the heart of the matter: cardiovascular health challenges among incarcerated women. *Maturitas* 2021;149:16-25. doi:10.1016/j.maturitas.2021.05.002
35. Walsh K. Inadequate access: reforming reproductive health care policies for women incarcerated in New York state correctional facilities. *Columbia J Law Soc Problems* 2016;50:45-95. Available at: https://www.proquest.com/scholarly-journals/inadequate-access-reforming-reproductive-health/docview/1844208986/se-2?accountid=12118. Accessed May 2022.
36. Friedman SH, Tamburello AC, Kaempf A, Hall RCW. Prescribing for women in corrections. *J Am Acad Psychiatry Law* 2019;47:476-485. doi:10.29158/JAAPL.003885-19
37. Mignon S. Health issues of incarcerated women in the United States. *Cien Saude Colet* 2016;21:2051-2060. doi:10.1590/1413-81232015217.05302016
38. Knittel A, Ti A, Schear S, Comfort M. Evidence-based recommendations to improve reproductive healthcare for incarcerated women. *Int J Prison Health* 2017;13(3-4):200-206. doi:10.1108/IJPH-07-2016-0031
39. Barry LC, Adams KB, Zaugg D, Noujaim D. Health-care needs of older women prisoners: perspectives of the health-care workers who care for them. *J Women Aging* 2020;32:183-202. doi:10.1080/08952841.2019.1593771
40. Jaffe EF, Palmquist AEL, Knittel AK. Experiences of menopause during incarceration. *Menopause* 2021;28:829-832. doi:10.1097/GME.0000000000001762
41. dos Santos RDCF, Pereira AV, Alves VH, dos Santos MV, Rodrigues DP, Marchiori GRS. Health status of climacteric women in the prison system. *Cogitare Enferm* 2017;22:1-7. doi:10.5380/ce.v27i0
42. Paynter MJ. Reproductive (in)justice for women in Canadian federal prisons. Available at: https://johnhoward.ca/blog/reproductive-injustice-in-canadian-federal-prisons-for-women/. Published February 2021. Accessed May 2022.
43. Office of the Inspection. *Thematic Report: The Lived Experience of Women in Prison*. Wellington, New Zealand: Department of correction; 2021. Available at: https://inspectorate.corrections.govt.nz/reports/thematic_reports/thematic_report_the_lived_experience_of_women_in_prisons. Accessed May 28 2022.
44. Besney JD, Angel C, Pyne D, Martell R, Keenan L, Ahmed R. Addressing women's unmet health care needs in a Canadian remand center: catalyst for improved health? *J Correct Health Care* 2018;24:276-294. doi:10.1177/1078345818780731
45. Kraft-Stolar K. *Reproductive Injustice: The State of Reproductive Health Care for Women in New York State Prisons*. New York, NY: Correctional Association of New York; 2015. Available at: https://static.prisonpolicy.org/scans/Reproductive-Injustice-FULL-REPORT-FINAL-2-11-15.pdf. Accessed May 2022.
46. Aday R, Farney L. Malign neglect: assessing older women's health care experiences in prison. *J Bioeth Inq* 2014;11:359-372. doi:10.1007/s11673-014-9561-0
47. Jaffe E, Rosen D, Palmquist A, Knittel AK. Menopause-related medication use among women age 45-75 experiencing incarceration in North Carolina 2015-2016. *Int J Prisoner Health* 2022;18:176-184. doi:10.1108/IJPH-07-2021-0068
48. Woodall J, Freeman C, Warwick-Booth L. Health-promoting prisons in the female estate: an analysis of prison inspection data. *BMC Public Health* 2021;21:1582. doi:10.1186/s12889-021-11621-y
49. Lancet. Attitudes towards menopause: time for change. *Lancet* 2022; 399:2243. doi:10.1016/S0140-6736(22)01099-6
50. ACOG Practice Bulletin No. 141: Management of menopausal symptoms [published correction appears in Obstet Gynecol. 2016;127(1):166] [published correction appears in Obstet Gynecol. 2018 Mar;131(3):604]. *Obstet Gynecol* 2014;123:202-216. doi:10.1097/01.AOG.0000441353.20693.78
51. Practice Bulletin No. 141: Management of menopausal symptoms: correction. *Obstet Gynecol* 2016;127:166. doi:10.1097/AOG.0000000000001230
52. National Institute for Health and Care Excellent (NICE). *Menopause: Diagnosis and Management*. London, United Kingdom: NICE; 2015. Available at: https://www.nice.org.uk/guidance/ng23. Accessed June 24, 2022.
53. Academic Committee of the Korean Society of MenopauseLee SR, Cho MK, Sungwook C, et al. The 2020 menopausal hormone therapy guidelines. *J Menopausal Med* 2020;26:69-98. doi:10.6118/jmm.20000

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Moving beyond the politization of same-sex sexuality and leveraging right to health to counter inter-personal sexual violence and HIV in Malawi's prisons

Marie Claire Van Hout [a,*], Ruth Kaima [b], Victor Mhango [b], Triestino Mariniello [c]

[a] Public Health Institute, Liverpool John Moores University, Liverpool, L2 2QP, United Kingdom
[b] Centre for Human Rights Education Advice Assistance (CHREAA), Kenyatta Road, Chitawira Location, Roots Complex, Blantyre, Malawi
[c] School of Law, Liverpool John Moores University, Liverpool, L32ET, United Kingdom

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ABSTRACT

Sexual minority rights in contemporary Africa is a contentious issue, where in some countries, same-sexuality is portrayed by media and politicians as *"un-African"* and a *"white disease"* imported from the West. Same-sex sexual activity is criminalised in 31 African countries. Political, legal and religious frameworks exacerbate homophobic attitudes, and related discrimination and hate crimes toward individuals who identify as lesbian, gay, bisexual or transgender (LGBT). We focus here on the rights of people in prison to protection from harm (same-sex sexual violence and sexually transmitted diseases), and who (in many African countries) are ignored in national HIV prevention programming. Prison conditions in Africa are harsh and congested, with inadequate basic needs provisions and this fuels exposure of the vulnerable to sexual violence and engagement in survival sex. HIV rates in prisons are also disproportionately higher than in the community. We present a socio-legal assessment on Malawi where same-sex sexual behaviours are criminalised. The assessment highlights how inmates' exposure to sexual violence is invisible in political, legal, human rights and public health/HIV agendas in Malawi. Notwithstanding that the Malawi Penal Code and Prison Act prohibits same-sex sexual activity, there are enormous complications with victim disclosure, as claims of rape infer that sodomy has occurred, resulting in victim arrest. We focus here on tackling sexual violence and HIV, and advocate for broad based torture prevention initiatives in prisons to protect the vulnerable from inter-personal sexual violence, and consequent acquisition and onward transmission of HIV. The voices of people in prison in Malawi are regrettably still kept out of societal and public health discourses.

1. Introduction

The UNAIDS Zero Discrimination Day held on March 1, 2022 under the mantra *"Remove laws that harm, create laws that empower"* has highlighted the need for continued global efforts to end all forms of discrimination, including the eradication of discriminatory laws, and the encouragement of States to enact anti-discrimination laws (UNAIDS, 2022). Despite these efforts, the substantial stigma and discrimination of homosexual people worldwide continues. Lesbian, gay, bisexual and transgender (LGBT) activism and same-sex sexuality rights are at the core of international human rights and health discourse (McKay, 2012). In 2011, the United Nations Human Rights Committee (UN HRC) passed a "Resolution on Human Rights, Sexual Orientation and Gender Identity (UN HRC, 2011) designed to affirm the cross cutting nature of LGBT rights and human rights, and to combat related human rights violations. The Committee expressed *"grave concern at acts of violence and discrimination, in all regions of the world, committed against individuals because of their sexual orientation and gender identity."*

Historically same-sex orientation and gender identity in Africa was not socially stigmatised or associated with ill-health. Murray et al. (2021) state; *"there are no examples of traditional African belief systems that singled out same-sex relations as sinful or linked them to concepts of disease or mental health — except where Christianity and Islam have been adopted."* LGBT rights in contemporary Africa however remains

* Corresponding author. Public Health Institute, Faculty of Health, Liverpool John Moores University, 3rd Floor, Exchange Station, Tithebarn Street, Liverpool, L2 2QP, United Kingdom.
E-mail addresses: m.c.vanhout@ljmu.ac.uk (M.C. Van Hout), ruththokokaima@gmail.com (R. Kaima), victormhango@chreaa.org (V. Mhango), T.Mariniello@ljmu.ac.uk (T. Mariniello).

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contentious and in many African countries is taboo (Human Rights Watch (HRW), 2008; McKay, 2012; Nordic Africa Institute, 2017). Many criminalise same-sex sexual activity, a legacy of the colonial sodomy laws prohibiting *"unnatural carnal desires and acts"* (Kyomya et al., 2012). In 2010, 16 out of the 18 African Commonwealth nations had sodomy laws (Polity, 2010). In 2019 the British Prime Minister Theresa May offered an apology to former Commonwealth countries for Britain's role in exporting homophobic laws to its former colonies (Sowemimo, 2019). Same-sex sexual activity is illegal in 31 African countries (International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA), 2020) (see Table 1). Enforcement varies in severity of sanctions, and ranges from death penalty, life imprisonment, public stoning, flogging, forced labour and fines (Hairsine, 2019).

Table 1
Criminalization of same-sexuality in Africa (IGLA, 2020; p325).

Country	Are Same Sex Sexual Acts Legal?	Date of Decriminalization	Max Penalty
Algeria	No	-	2
Angola	Yes	Never criminalised	-
Benin	Yes	2019	-
Botswana	Yes	Never criminalised	-
Burkina Faso	Yes	Never criminalised	-
Burundi	No	-	2
Cameroon	No	-	5
Cabo Verde	Yes	2004	-
Central Africa Republic	Yes	Never criminalised	-
Chad	No	-	2
Comoros	No	-	5
Congo	Yes	Never criminalised	-
Côte d'Ivoire	Yes	Never criminalised	-
DRC	Yes	Never criminalised	-
Dijbouti	Yes	Never criminalised	-
Egypt	De Facto	-	Undetermined
Equatorial Guinea	Yes	Never criminalised	-
Eritrea	No	-	7
Eswatini	No	-	Undetermined
Ethiopia	No	-	3
Gabon	Yes	2020	
Gambia	No	-	14
Ghana	No	-	3
Guinea	No	-	3
Guinea-Bissau	Yes	1993	-
Kenya	No	-	14
Lesotho	Yes	2012	-
Liberia	No	-	1
Libya	No	-	5
Madagascar	Yes	Never criminalised	-
Malawi	No	-	14
Mali	Yes	Never criminalised	-
Mauritania	No	-	Death
Mauritius	No	-	5
Morocco	No	-	3
Mozambique	Yes	2015	-
Namibia	No	-	Undetermined
Niger	Yes	Never criminalised	-
Nigeria	No	-	Varies
Rwanda	Yes	Never criminalised	-
Sao Tome and Principe	Yes	2012	-
Senegal	No	-	5
Seychelles	Yes	2016	-
Sierra Leone	No	-	10
Somalia	No	-	Death penalty
South Africa	Yes	1998	
South Sudan	No	-	10
Sudan	No	-	Life
Tanzania	No	-	Life
Togo	No	-	3
Tunisia	No	-	3
Uganda	No	-	Life
Zambia	No	-	Life
Zimbabwe	No	-	1

Media campaigns and punitive politico-legal frameworks in many African countries exacerbate homophobia, stigmatisation, social discrimination of LGBT people and hate crimes toward them (Kyomya et al., 2012; Nordic Africa Institute, 2017; Sowemimo, 2019). Gloppen and Rakner (2019) comment on the politization of same-sexuality in Africa and state that; *"Africa may be considered a "front-runner" continent in terms of employing homophobia as an issue of political contestation and conflict"*. Same-sexuality is portrayed by politicians and in the media as *"un-African"* and a *"white disease"* imported to Africa from the West, and this fuels the association of same-sexuality with the HIV/AIDS epidemic (Human Rights Watch (HRW), 2008; McKay, 2012; Nordic Africa Institute, 2017). Homophobia is further driven by the promotion of ultra-conservative religious agendas by Pentecostal churches who recruit local Africans and manipulate influential religious leaders in domestic politics, and the establishment of anti-LGBT legal infrastructures (Nordic Africa Institute, 2017; Amnesty International UK, 2018; Hairsine, 2019).

In 2013 Uganda passed the Anti-Homosexuality Bill known as *"Kill the Gays Bill"* (later overturned in 2014) followed by plans in 2019 to impose the death penalty for gay sex (later backtracked due to pressure from international aid donors) (Deutsche Welle, 2019; Gloppen & Rakner, 2019; Hairsine, 2019; Reuters, 2020). The Ugandan Anti-Homosexuality Bill of 2013 increased the severity of sentences for consensual homosexual sex, and was broad in that it included sanctions to those *'promoting'* homosexuality and resulting in the detention of LGBT activists (Hairsine, 2019). Sanctions for *'those'* promoting same-sex sexuality were similar to provisions in the Nigerian Same-Sex Marriage Prohibition Act (SSMPA) of 2014. Commenting on the situation in Nigeria since enactment of the SSMPA, the Special Rapporteur on Human Rights Defenders in Africa expressed concern regarding: *"the increase in physical violence, aggression, arbitrary detention and harassment of human rights defenders working on sexual minority issues"* (Human Rights Watch (HRW), 2016). Other examples include Tanzania (Dar es Salaam) where, in 2018, homosexuals were hunted down and arrested by a dedicated task force. In 2020, two men in Zambia were imprisoned for 15 years for gay sex and were later pardoned. On a more positive note, progressive countries such as South Africa, Mozambique and Botswana have revised their penal codes to remove dated laws criminalising same-sex relations, and others which criminalise same-sex sexual behaviours (for example the Gambia, Malawi) choose not to prosecute under their existing legal frameworks (Amnesty International UK, 2018; Hairsine, 2019).

2. HIV, dimensions of vulnerability and interpersonal sexual violence in African prisons

Prisons are rather ignored in the debate around LGBT rights in Africa and are particularly invisible in the HIV agendas in conservative African countries where same sex relations are criminalised. We focus here on sexual transmission of HIV, and the subject of same-sex sexual behaviour and exposure to inter-personal sexual violence in African prisons. The rationale is that injecting drug use, tattooing and scarification practices in prison pose minimal transmission routes in African prisons. There is substantial global and African regional evidence to support the identification of men who have sex with men (MSM), and people in prison as key populations at risk of HIV acquisition (Todrys et al., 2011; Todrys & Amon, 2012; Telisinghe et al., 2016; Golrokhi et al., 2018; World Health Organization (WHO), 2021; UNAIDS GLOBAL AIDS Update, 2021). HIV prevalence among people in sub-Saharan African prisons is higher than domestic rates, and varies from 2.3% to 34.9% (Telisinghe et al., 2016). In some African countries (where data is available, Zambia, Nigeria) higher HIV rates are observed among already incarcerated inmates than those tested on entry, with studies and systematic reviews demonstrating the association between transactional same-sex sexual activity and sexual violence perpetrated by adult inmates, and the transmission of HIV and sexually transmitted diseases during incarceration (Saliu and

Akintunde, 2014; Egelund-Ryberg, 2014; Golrokhi et al., 2018; Joshua & Ogboi, 2008; Kumwenda et al., 2017; Lawan et al., 2016; Phiri, 2020; Sabitu et al., 2009; Ikuteyijo and Agunbaide, 2008; Telisinghe et al., 2016; Usman et al., 2020, 2021).

A recent scoping review of the past twenty years in sub-Saharan African prisons has documented the exposure of people in prison to sexual violence (peers and to a lesser degree staff) and the engagement of inmates in survival sex in exchange for protection, food, soap and sleeping space (Van Hout & Mhlanga-Gunda, 2019). Corruption, the operation of gangs and vulnerability of juveniles, disabled and LGBT minorities to rape, sexual exploitation and transactional *("survival")* same-sex sexual activity in prisons is documented in Zambia, Mozambique, Uganda, Burundi, Côte d'Ivoire, Nigeria, Malawi and South Africa (Van Hout & Mhlanga-Gunda, 2019). The African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Prisons and Conditions of Detention in Africa has reported that the lack of segregation of young people from adult inmates heightened their exposure to sexual violence, non-consensual same-sex sexual activity and exploitation (ACHPR, 2012). Country mission reports by the ACHPR indicate concerns around rape and coercive same-sex activity in prisons, with officials ignoring victim disclosures in Uganda, South Africa, Namibia and Malawi (ACHPR 2001, 2002, 2003a, 2004). Juveniles in Zambia were documented to agree to pair with adults for their survival and protection within prison confines; *"… Forced sexual activity is very common. The way we sleep, we are in one another's lap."* (Human Rights Watch (HRW) (2010); Todrys & Amon, 2011; Todrys et al., 2011). Similar power dynamics between older inmates and young boys was reported in Malawi where older males would provide food and a place to sleep, in return for sexually violating them and controlling them as their *"wives"*(ACHPR, 2002). Same-sex sexual activity in South African prisons is also not a newly documented phenomenon (Achmat, 2008), with extensive literature describing the interplay of sexual victimisation, exploitation, co-dependency and violent homosexual male gang dynamics (particularly the *Numbers* gang) (Gear & Ngubeni, 2002; 2003; Gear, 2005; Booyens & Bezuidenhout, 2014; Lindegaard & Gear, 2014; Fortuin, 2018). Similar is reported in Namibia (Legal Assistance Center AIDS Law Unit and the University of Wyoming College of Law, 2008).

3. The situation in Malawi: the imperatives of tackling HIV in prisons

We focus on Malawi, which is classified as a least developed country by the Organisation for Economic Co-operation and Development (OECD, 2022). Same-sex sexual activity between men in Malawi is criminalised and punishable by a custodial sentence of eight to 14 years. In late 2009 two men were arrested for sodomy (Demone, 2016). Human Rights Watch (HRW) (2018) has reported on the routine discrimination and violence experienced by LGBT Malawians. The recent public attitudes survey conducted by Africa Scope (2019) reports that 80% believe homosexual sex is wrong and 60–68% do not yet envisage legal protection of LGBT people in Malawi. In June 2021, Malawi held its First LGBTQ + Pride Parade in Defiance of Anti-Gay Laws (Lang, 2021).

Malawi has a complex relationship and economic dependence on foreign aid donors, many of whom focus on the HIV/AIDS agenda (MacNamara, 2014; McKay, 2012). Whilst the country has made great strides in curbing HIV at the domestic level, with deaths and new infections declining, it continues to have high HIV prevalence rates among adults aged 15–49 years (8.1% [7.6–8.5]) (UNAIDS, 2020). Key populations most affected by HIV in Malawi are sex workers (HIV prevalence of 60%); and gay men and other MSM (HIV prevalence of 17.3%) (UNAIDS, 2015). There has been little progress in addressing policy gaps and legal barriers experienced by MSM, sex workers, transgender people, people who use drugs and people in prison in Malawi (Frontline AIDS, 2022).

The country has 30 prisons, with most recent data from December 2020 indicating 14,500 inmates (1.1% female, 7.7% juveniles) with an official occupancy level of 7000 (World Prison Brief, 2022). Most recent data indicates that the prison system is operating at 207% (December 2020) (World Prison Brief, 2022). In 2018 and 2019 it was 260% over capacity (Malawi Law Commission, 2018; Malawi Inspectorate of Prisons, 2021). Whilst Malawi's prison system has tried to improve its HIV programming in recent years, it suffers from lack of government resourcing, with civil society and faith based organisations backfilling basic needs provisions and supporting HIV (and COVID-19) responses (Gadama et al., 2020; Gondwe et al., 2021; Jumbe et al., 2022). Severe congestion contributes to food insecurity, inadequate sanitation, unrest and inter-personal violence and deaths (Chirwa, 2002; Kapindu, 2013; Chilemba, 2016; Malawi Inspectorate of Prisons, 2019, 2021; Water Supply & Sanitation Collaborative Council, 2020; Van Hout, 2020a; US Department of State, 2020; UN Malawi, 2020; Gauld, 2021). Extant academic literature illustrates the chronic ill health of people in prison, exacerbated by daily exposure to disease and disease outbreaks (Banda et al., 2009; Chirwa et al., 2018; Gadama et al., 2020; Jumbe et al., 2022; Zachariah et al., 2008).

Since 2004, studies in two of Malawi's largest prisons (Chichiri, Zomba) have been documenting particularly high rates of HIV (up to 36.6%), TB and sexually transmitted infections (STI), including incidence cases of STIs acquired in prison (indicative of same-sex sexual activity) (Banda et al., 2009; Chimphambano et al., 2007; Gondwe et al., 2021; Harries et al., 2004; Kanyerere et al., 2012; Makombe et al., 2007; Mpawa et al., 2017; Singano et al., 2020; Zachariah et al., 2008). Reports of same-sex sexual activity and sexual violence are documented in some prison investigations and HIV/public health studies (Kanguade, 2014; Nyadani, 2009). Others observe there is *"overwhelming evidence of sex in prisons"* (Jolofani & DeGabriele, 1999; Mwakasungula, 2013), with same-sexualities (spanning the consensual, transactional, becoming a prison *"wife"* and rape) remaining covert and ill-considered by Malawi's officials (Biruk, 2014; Currier, 2020). Efforts to address these risk have come from within the prison walls. For example in Zomba Central prison, an *"Inmates Anti AIDS"* club was created to sensitise inmates around same-sexuality and HIV risks. These peer led initiatives however operate in complete isolation from mainstream donor and government funded HIV programmes and neglect to acknowledge prison to community HIV transmission (Currier, 2020).

4. International and normative human rights frameworks pertinent to prisons

A broad range of international and regional human rights instruments are relevant to the protection of fundamental rights of the LGBT community and people deprived of their liberty. The fundamental rights of people in prison are enshrined in international instruments that are binding for Malawi under *Section* 211(2) of its national Constitution. Malawi has ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR) (United Nations (UN), 1966a) and International Covenant on Civil and Political Rights (ICCPR) (United Nations (UN), 1966b). It accepts individual complaints procedures under the Optional Protocol to the ICCPR (United Nations (UN), 1966c). It has not ratified the Optional Protocol to the ICESRC (United Nations (UN), 2009). Right to equality and non-discrimination is provided in *Articles* 2 (1) of the ICCPR, and supported by *Article* 26 (see ICCPR General Comment No. 18, United Nations Human Rights Committee (UN HRC), 1989). In the 1992 case of *Toonen v Australia*, the UN HRC that monitors compliance with the ICCPR, established that: *"reference to 'sex' in articles 2, para. 1, and 26 is to be taken as including sexual orientation"*(United Nations Human Rights Committee (UN HRC), 1992). The ICESCR recognises several other prohibited grounds in a non-exhaustive list, including health status, age, disability, nationality, marital and family status, sexual orientation and gender identity. The UN Committee on Economic Social and Cultural Rights (UN CESCR, 2009), in defining the same right to non-discrimination in the ICESCR, has stated in their General Comment No. 20 that *"a flexible approach to the ground of 'other*

status' is needed." Laws against sodomy are deemed to violate international human rights treaties (United Nations (UN), 2011).

Secondly, relevant to the obligation of the State to protect those deprived of their liberty from violence, inhumane, cruel and degrading treatment, and other health harms, a range of positive obligations exist concerning the rights of inmates, which include the right to health, protection from disease and right to access healthcare under the international treaties (Lines, 2008). This is most pertinent regarding general health rights, protection from violence and disease acquisition, and the right to access of HIV testing and treatment. *Article* 10 of the ICCPR specifically provides *"that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."* ICESR *Article* 12 (United Nations (UN), 1966a) is applicable to the rights of inmates to healthcare and obligations of States to take necessary measures to mitigate disease and ensure access to healthcare. The stipulations contained in General Comment No. 14 provides that CESRC States are (at the very least) required to meet a threshold of a *"core minimum"* of social and economic rights (UN CESCR, 2000). This is especially pertinent when considering the hidden nature of sexual violence and sexual transmission of HIV and STIs in Malawi's prisons.

The UN HRC (2019) in its General Comment No 36 on the right to life outlines States responsibility to protect the lives of those deprived of their liberty. Concluding observations by the UN HRC reflect the binding obligation for States to *"take action to safeguard the health of prisoners."* The UN HRC (1997) has stated that it is *"incumbent on States to ensure the right of life of detainees, and not incumbent on the latter to request protection"* (see *Lantsova v. The Russian Federation*). Regarding conditions of detention and rights to protect the health of those in prison, and the potential routes for strategic litigation, whilst Malawi ratified the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) (United Nations (UN), 1984) in 1996, it has not ratified the CAT-Optional Protocol (United Nations (UN), 2003) and does not accept individual,complaints procedures under the CAT, Article 22. At the same time, Malawi accepts the inquiry procedure under the Article 20 of the CAT.

Finally with regard to non-binding normative standards of care for those deprived of their liberty, the UN Standard Minimum Rules for the Treatment of Prisoners (*Mandela Rules*) (United Nations (UN), 2016) cover States' responsibility for the physical and mental health of people in prison. *Rule* 1 states that: *"All prisoners shall be treated with the respect due to their inherent dignity and value as human beings ….all prisoners shall be protected from, torture and other cruel, inhuman or degrading treatment or punishment, for which no circumstances whatsoever may be invoked as a justification." Rule* 13 refers to the environmental determinants of health in terms of reasonable accommodation (United Nations (UN), 2016) (applicable to aggravation of sexual violence in Malawi's congested prisons). The right to State protection of LGBT inmates also fall under the *Yogyakarta Principles* (International Commission of Jurists, 2007) which outline State obligations to ensure constitutional protections from violence, discrimination and other harm to all regardless of sexual orientation and gender identity (*Principle* 30).

5. Regional African human rights frameworks and rights of people in prison

With regard to regional human rights frameworks protecting the rights of people deprived of their liberty and pertinent to African states, Malawi is a State party to the African Charter on Human and People's Rights (the *African Charter*) (Organisation of African Unity (OAU), 1981) and is bound by the provisions of the *African Charter* as well as decisions of the African Court on Human and Peoples Rights (ACoHPR) and the African Commission on Human and Peoples Rights (ACHPR) resolutions. Basic non-discrimination provisions are outlined in *Article* 2 of the African Charter. *Article* 3 provides for equality before the law as well as equal protection. In the 2009 case of *Zimbabwe Lawyers for Human Rights and Institute for Human Rights and Development in Africa (*ACHPR, 2009), the ACHPR interpreted *Article* 3 to infer that *"no person or class of persons shall be denied the same protection of the laws, which is enjoyed, by other persons or class of persons in like circumstances in their lives, liberty, property, and in the pursuit of happiness."* It has further held that the aim of *Article* 3; *"is to ensure equality of treatment for individuals irrespective of nationality, sex, racial or ethnic origin, political opinion, religion or belief, disability, age or sexual orientation." Articles* 4 and 5 contain provisions to ensure protection of dignity and respect and prohibition of cruel, inhuman or degrading punishment and treatment. Jurisprudence at the ACHPR advises to interpret this provision broadly to encompass the broadest range of physical and psychological abuse, thereby directly relevant to sexual violence and health harms in prisons (see *Doebbler v Sudan*; *Purohit and Another v The Gambia*, ACHPR, 2003b). The Charter provides that State obligations regarding the right to health and right to access healthcare are *'heightened'* when an individual is in the custody of the State in *Article* 16(1)(2). These articles are directly relevant to the protection of inmates from disease whilst in detention.

Two special mechanisms on prisons exist in Africa (Special Rapporteur on Prisons, Conditions of Detention and Policing in Africa, Committee for the Prevention of Torture in Africa). The *Kampala* declaration on prison conditions in Africa provides for the rights of people in prison to living conditions commensurate with human dignity. Further normative guidance is outlined in the *Robben Island Guidelines* (ACHPR, 2008) which are aligned to the Basic Principles for the Treatment of Prisoners (United Nations (UN), 1991) and the *Mandela Rules* (United Nations (UN), 2016). Jurisprudence at the ACoHPR level complements that of the ACHPR and where prison conditions are mentioned, generally refers to the right to life and prohibition of cruel, inhumane or degrading treatment, including health threatening conditions of detention (overcrowding, malnutrition, lack of clean water, space, sanitation and ventilation) (Muntingh, 2020).

6. Domestic law in Malawi: Aspects of equality, dignity, health, humane conditions of detention and protection from harm

Malawi has a constitutionally entrenched Bill of Rights, with a comprehensive catalogue of economic, social, cultural, civil and political rights directly enforceable by the courts. Since 1994, Malawi has been guided by the Human Rights National Action Plans (HRNAPs) designed to promote human rights in the country.

The Constitution of the Republic of Malawi has comprehensive laws for ensuring that individuals are treated fairly and justly, and includes strong provisions on equality, non-discrimination and human dignity. *Section* 12(1)(d) of the Constitution is directly applicable to inmates and LGBT communities who are entitled to this protection. The Constitution also guarantees equal protection before the law and prohibits discrimination (*Section* 20(1)). In 1999, the Supreme Court of Malawi (MSCA) in *Somanje v Somanje and Others* (MSCA, 1999) observed that: *"The right to equality under the law is an absolute right. This right cannot be limited or restricted in terms of section 44(2). Section 44(1) (g)*[1] *specifically lays down that there shall be no derogation, restrictions or limitations with regard to the right to equality and recognition before the law."* (MSCA 1999). Legal scholars in Malawi posit that as *Section* 20(1) does not provide an exhaustive list of prohibited grounds of discrimination, and was left open ended (for example it omits *age, sexual orientation and citizenship)*. Hence, this provision can be interpreted to accommodate *"other status"* not explicitly stated (Chirwa, 2011). It is commonly argued that *"other status"* also includes sexual orientation and is therefore directly applicable to same-sex sexual activity in prisons and the rights of people deprived of their liberty.

The State has obligations to provide for people in prison in accordance with fundamental rights frameworks and minimum standards of detention (see *Section* 19(1)). Similar to *Article* 5 of the Universal

[1] Now Section 45(1)(g) of the Constitution as amended in 2010.

Declaration of Human Rights (UDHR) (United Nations (UN), 1948) and the ICCPR *Article* 7, *Section* 19(3) states: *"No person shall be subject to torture of any kind or to cruel, inhuman or degrading treatment or punishment."* The Malawi High Court at Lilongwe (MLR) in the infamous case of *Gable Masangano vs The Attorney General, Minister of Home Affairs and Chief Commissioner of Prisons* in 2009 (MLR, 2009) held that deplorable and overcrowded prison conditions constituted a violation of basic human dignity; and amounted to inhuman and degrading treatment. The *Masangano* case describes how inhumane prison conditions are directly relevant to heightened risk, vulnerabilities and exposure to non-consensual same-sex relations in prison, and the exposure of individuals to rape, sexual exploitation and sexual violence; *"… … packing inmates in an overcrowded cell with poor ventilation with little or no room to sit or lie down with dignity, but to be arranged like sardines violates basic human dignity and amounts to inhuman and degrading treatment"*(MLR, 2009). The Court reaffirmed that whilst inmates are deprived of their liberty, they retain all other fundamental rights as guaranteed by the Malawi Constitution. Even if the plaintiffs in the *Masangano* case did not directly raise the issue of exposure to HIV related to sexual violence between men, the basic rights they claimed are not dissociated from same-sex sexual behaviours in prison. Respect for the right to dignity of inmates therefore encompasses protection from health harms related to sexual violence and the spread of HIV and other sexually transmitted diseases. The Court ordered, *inter alia*, that the prison authorities take steps to reduce congestion and improve conditions to meet minimum international and regional normative standards.

One of the guiding principles of the Malawi Health and Sexual and Reproductive Health Rights Policy (2017–2022) is the adoption of a human rights and equity based approach to support equality rights, right to health and access to healthcare (Ministry of Health Malawi, 2018). This is directly relevant to the situation of people in prison, and their right to access non-discriminatory equivalence of health care to that in the community. It also directly applies to situations where a prison system fails to protect an inmate from disease, and an inmate acquires HIV whilst incarcerated. In the 2005 case of *Banda v Lekha*, the Industrial Relations Court (MWIRC) held that HIV status was a prohibited ground of discrimination (MWIRC, 2005).

Difficulties arise with regard to the Malawi Penal Code which prohibits same sex relations. This stifles attempts to tackle spread of HIV and other sexually transmitted diseases in prisons, and the recognition of same-sex sexual violence in prisons. With regard to women, *Sections* 132 and 138(1) prohibit the act of having carnal knowledge of a girl under the age of 16 years and having carnal knowledge of a woman without her consent (defilement and rape respectively). The Penal Code contains contentious specifications regarding the prohibition of same sex sexual relations in *Sections* 153(a) and (c), 154, 156 and 137A. *Section* 153 states that; *"Any person who— (a) has carnal knowledge of any person against the order of nature; or (c) permits a male person to have carnal knowledge of him or her against the order of nature, shall be guilty of a felony and shall be liable to imprisonment for fourteen years."* The outdated term *"carnal knowledge against the order of nature"* is interpreted by the Courts to refer to anal intercourse (See the case of *R v Davis Mpanda* in the Malawi Supreme Court of Appeal (MSCA, 2011). In (a), the perpetrator is named while in (c), the recipient who 'permits' anal penetration is named with the 'permission' implying consent. Thus, those who do not 'permit' penetration (i.e., give consent or were raped) would not be guilty. This lack of differentiation makes Section 153 discriminatory, whereby it equates cases of rape through anal penetration of a man or a woman, with cases of consensual anal intercourse between two adults. *Section* 156 further stipulates that: *"Any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private, shall be guilty of a felony and shall be liable to imprisonment for five years, with or without corporal punishment."* Of note is that *"carnal knowledge against the order of nature"* is understood to refer to anal intercourse, while gross indecency refers to any other same-sex sexual act (Southern Africa Litigation Centre and Nyasa Rainbow Alliance, 2020). *Section* 156 violates the right to privacy between two consenting adults, either between male or female adults. Similar is observed in *Section* 137A which applies to *"indecent practices between females"* and states; *"Any female person who, whether in public or private, commits any act of gross indecency with another female person, …shall be guilty of an offence and shall be liable to imprisonment for five years."* This additional *Section* (137A) in the Malawi Penal Code (as a replica of *Section* 156) was added following the pardoning of the first ever male couple sentenced to 14 years imprisonment for having *"carnal knowledge against the order of nature"* (see the 2010 case of *R v Soko and Another*) (Malawi High Court (MWHC) (2010).· Lastly, *Section* 64(b) of the Marriages, Divorce and Family Relations Act No. 4 of 2015 cites crimes under *Section* 153 of the Penal Code regarding *"unnatural offences"* as grounds for divorce.

Notwithstanding the range of Malawi Penal Code Sections which prohibit same-sex relations, there are enormous practical and legal complications with disclosure of same-sex rape both in community and prison settings. Essentially the claim of rape regardless of setting infers that sodomy has occurred, generally resulting in victim arrest (Currier, 2019). Part XIV of the Malawi Prison Act provides for discipline of people in prison where they have committed offences under *Section* 89 ("*disorderly and indecent behaviour*"). Whilst *Section* 89 is vague, it applies to inmates of the same sex found engaging in any kind of sexually related activities. *Subsection* 44 is also vague and applies also to the victim in that it states; *"89. The following acts and omissions shall be prison offences when committed by a prisoner (39) disorderly or indecent behaviour …..; (44) any other act, conduct, disorder, or neglect to the prejudice of good order or discipline."* The recognition that sexual violence and same -sex sexual activity both consensual and non-consensual occurs in prisons thus fails to gain traction due to these legal parameters. It also creates substantial difficulties in achieving HIV prevention and harm reduction programming in prisons, for example condom provision in support of HIV sensitisation.

In 2014, the Malawi Government established a special law commission to review the Malawi Prisons Act in order to align it with the Constitution and other applicable international law and principles in the administration, governance and management of prisons and people in prison (Kitta, 2015; Kajawo, 2021a;b). *Section* 13 of the Act provides for the powers of the Commissioner of Prisons to issue standing orders in relation to a matter at hand (for instance a disease outbreak). *Sections* 74 and 75 contain provisions regarding delivery of healthcare that is equivalent to that provided in the community and the notification of serious illness/infections or communicable disease is detailed in Regulation 33 (c). *Section* 30 recognises the rights of inmates to access to appropriate healthcare and *Section* 25 outlines the responsibility of the prison medical officer for ensuring; *"that every prisoner is medically examined on admission to and before discharge from a prison."* Whilst not explicitly mentioning and recognising the presence of same-sex sexual activity between inmates and the potential for HIV and other sexually transmitted disease outbreaks, these *Sections* are restricted to the detection of spread of disease and sexually transmitted infections, and do little to tackle and address prison dynamics of same-sex sexual violence. Indeed, the Malawi Law Commission has criticized the Malawi prison legislation in its failure to; *"entrench and safeguard the right of prisoners to access health services by ensuring that the standards of services that are available to prisoners are the same as those that are available to the general public"* and documented a lack of vigilance around the health of those in prison, lack of prison monitoring inspections and lack of medical examination on entry, as well as observing that unqualified medical staff were treating inmates (Malawi Law Commission, 2018). It has observed that conditions are *"leading to unacceptable and dehumanizing levels of congestion."* (Malawi Law Commission, 2018). The Commission recommended that a new Prisons Act would require mandatory medical examination, screening for infectious diseases upon admission and

appropriate healthcare responses.

7. Conclusion

In 2014, the "*KwaZulu Natal Declaration*"(Global Faith and Justice Project, 2015) called on all African individuals, governments, and churches to action and reflection on human sexuality, religion, and equality. It includes the imperatives to eliminate colonial sodomy laws and to oppose attempts to further criminalised LGBT communities and protect all citizens, including all communities affected by, and living with HIV and AIDS.

Tackling HIV and other infectious diseases in prisons is a public health and human rights imperative given recidivism and the bridge of transmission between prison and community (Todrys & Amon, 2012; Van Hout, 2020b). These specific UN targets encompass the key ingredients in providing people centred services cognisant of international and regional human rights standards, striving for the fulfilment of health, including access to good quality healthcare, and includes legislative and policy reform to support an equitable AIDS response within a broad sustainable development agenda (UNAIDS, 2015).

The recognition of inmates exposure to HIV via sexual violence whilst detained is completely ignored in Malawi's political, human rights and public health agendas (Kanguade, 2014). The HIV/AIDS agenda in Malawi sidesteps the issue of same-sex sexual activity in prison, with people in prison notably absent in the UNAIDS list of key populations (men who have sex with men, sex workers), and ignoring the broader dimensions of sexual violence in prison. Malawi should recognise people in prison as a key population when tackling HIV/AIDs in the country, and when reaching the UNAIDS 95-95-95 targets by 2030. We recognise that prison health research in Africa is under-developed, and increasingly stifled by political sensitivities (O' Grady et al., 2011; Todrys & Amon, 2012; Mhlanga-Gunda et al., 2020; Ako et al., 2020). Further research on this issue is important, in Malawi and other African countries which criminalise same-sexuality. The need to document, understand and to engage with the factors that create prison conditions that sustain sexual violence are paramount (Southern Africa Litigation Centre and Nyasa Rainbow Alliance, 2020). Efforts will support evidence based policy and practice reforms.

Systems change is warranted. Human rights advocacy efforts striving to improve the situation in prisons could also leverage broad based torture prevention initiatives in prisons (Jefferson & Jalloh, 2019). The systemic failure of officials, the prison system and indeed fellow inmates to prevent the rape and sexual violence constitutes torture or degrading treatment and violates international human rights law (Gear, 2005). Kanguade (2014) refers to the *'inhuman and non-sexual'* official lens in Malawi regarding inmates in that; *"Prison systems foster unhealthy expressions of sexuality[same-sex sexuality and/or sexual violence] when they treat prisoners inhumanely, that is, when they fail to respect their human and sexual rights"*. Components of the comprehensive HIV package could be implemented to protect against sexual transmission of HIV and related health harms (for example condom provisions), along with conjugal visitation rights (Kajawo, 2021a;b) and targeted human rights sensitisation and capacity building of prison staff. With exception of Lesotho, prison authorities in Africa still refuse to implement condom provision for fear of promoting same-sex sexual activity.

Despite the robust international, regional and local laws to support the protection of people in prison, there are no real strategies and actions available to achieve this. This is especially the case in Malawi due to criminalization of same sex relationships, cultural and religious beliefs. Foundations for change can include advocacy, awareness raising, political sensitisation and ultimately legislative reforms drafted to promote sexual wellbeing of people in prison. Voices of those deprived of their liberty in Malawi are still regrettably kept out of the discourse (Kajawo, 2021a;b). They deserve better. Prison populations must now be included in the discourse to prevent same-sex sexual violence and HIV in prisons.

Declaration of competing interest

The authors declares that they have no conflict of interest to declare and has no known competing financial interests or personal relationships that could have appeared to influence the work reported in this paper.

References

Achmat, Z. (2008). Apostles of civilised vice": 'Immoral practices' and 'unnatural vice' in South African prisons and compounds, 1890–1920. *Social Dynamics A Journal of African Studies, 2*(19), 92–110.

Africa Scope. (2019). *Under Wraps A survey of public attitudes to homosexuality and gender non-conformity in Malawi*. Johannesburg: The Other Foundation. Available from Other-Foundation-Malawi-Paper-v7.pdf (theotherfoundation.org) . (Accessed 3 March 2022).

African Commission on Human and Peoples' Rights (ACHPR). (2001). *Namibia: Mission on Prisons and conditions of detention - 2001/Namibia/states/ACHPR. Niger, 2001*. Available from http://www.achpr.org/states/namibia/missions/prisons2001/. (Accessed 24 January 2018).

African Commission on Human and Peoples' Rights (ACHPR). (2002). *Malawi: Mission on prisons and conditions of detention - 2001/Malawi/states/ACHPR*. Paris: L'Exprimeur. 2002. Available from http://www.achpr.org/states/malawi/missions/prisons-2001/ . (Accessed 24 January 2018).

African Commission on Human and Peoples' Rights (ACHPR). (2003a). *Uganda: Mission on prisons and conditions of detention - 2001/Uganda/states/ ACHPR. Niger, 2003*. Available from http://www.achpr.org/states/uganda/missions/prisons2001/. (Accessed 24 January 2018).

African Commission on Human and Peoples' Rights (ACHPR). (2003b). *Purohit and Another v The Gambia AHRLR 96*.

African Commission on Human and Peoples' Rights (ACHPR). (2004). *South Africa: Prisons and detention conditions - 2004/South Africa/states/ACHPR. Gambia, 2004*. Available from http://www.achpr.org/states/south-africa/missions/prisons2004/. (Accessed 24 January 2018).

African Commission on Human and Peoples' Rights (ACHPR). (2008). The robben Island Guidelines resolution on Guidelines and measures for the prohibition and prevention of torture, cruel, inhuman or degrading treatment or punishment in Africa. *African Commission on Human and Peoples' Rights: The Gambia*.

African Commission on Human and Peoples' Rights (ACHPR). (2012). *Report of the special Rapporteur on Prisons and Conditions of Detention in Africa. 52nd ordinary session, African commission on human and peoples' rights*. Yamoussoukro, Côte d'Ivoire. 2012, Available from http://www.achpr.org/sessions/52nd/. (Accessed 24 January 2018).

African Commission on Human and Peoples' Rights (ACHPR). (2009). *Zimbabwe Lawyers for human rights & associated Newspapers of Zimbabwe v Zimbabwe 284/03. African commission on human and peoples' rights (ACHPR). 2003. Doebbler v Sudan AHRLR 236/00*.

Ako, T., Plugge, E., Mhlanga-Gunda, R., & Van Hout, M. C. (2020). Ethical guidance for health research in prisons in low- and middle-income countries: a scoping review. *Public Health, 186*, 217–227.

Amnesty International UK. (2018). *Mapping anti-gay laws in Africa. 31 may 2018*. Available from www.amnesty.org.uk/lgbti-lgbt-gay-human-rights-law-africa-uganda-kenya-nigeria-cameroon. (Accessed 3 March 2022).

Banda, H. T., Gausi, F., Harries, A. D., & Salaniponi, F. M. (2009). Prevalence of smear-positive pulmonary tuberculosis among prisoners in Malawi: A national survey. *International Journal of Tuberculosis & Lung Disease, 13*(12), 1557–1559.

Biruk, C. (2014). 'Aid for gays': The moral and the material in 'African homophobia' in post 2009 Malawi. *The Journal of Modern African Studies, 52*(3), 447–473.

Booyens, K., & Bezuidenhout, C. (2014). An exploratory study of sex and rape behind bars in a South African prison. *International Criminal Justice Review, 24*(4), 377–391.

Chilemba, E. M. (2016). The domestic legal enforcement of the right to health in Malawi: Appraising the litigation potential. In E. Durojaye (Ed.), *Litigating the right to health in Africa: Challenges and prospects*. United Kingdom: Routledge.

Chimphambano, C., Komolafe, I., & Muula, A. (2007). Prevalence of HIV, HepBsAg and hep C antibodies among inmates in chichiri prison, Blantyre, Malawi. *Malawi Medical Journal : The Journal of Medical Association of Malawi, 19*(3), 107–110.

Chirwa, V. M. (2002). *Prisons in Malawi: Report on a Visit, 17 to 28 June, 2001*. Paris: Penal Reform International.

Chirwa, D. M. (2011). *Human rights under the Malawi constitution*. Cape Town: Juta press. Available from www.worldcat.org/title/human-rights-under-the-malawian-constitution/oclc/759802632. (Accessed 3 March 2022).

Chirwa, Z., Kayambo, F., Oseni, L., Plotkin, M., Hiner, C., Chitsulo, C., Curran, K., Kalua, T., & Stender, S. C. (2018). Extending beyond policy: Reaching UNAIDS' three "90"s in Malawi. *Frontiers in Public Health, 6*, 69.

Currier, A. (2019). *Politicizing sex in contemporary Africa: Homophobia in Malawi*. New York: Cambridge University Press.

Currier, A. (2020). Prison same-sex sexualities in the context of politicized homophobia in Malawi. *Sexualities, 24*(1–2), 29–45.

Demone, B. (2016). LGBT rights in Malawi: One step Back, two steps forward? The case of R v Steven Monjeza Soko and Tiwonge chimbalanga Kachepa. *Journal of African Law, 60*(3), 365–387.

Deutsche, W.(D. W.) (2019). *Uganda introduces 'Kill the gays' bill. Deutsche Welle (DW). 11 October 2019*. Available from www.dw.com/en/uganda-introduces-kill-the-gays-bill/a-50797504. (Accessed 3 March 2022).
Egelund-Ryberg, A. (2014). Masculinity, sex and survival in Zambian prisons. *Prison Service Journal, 212*, 16–21.
Fortuin, B. (2018). Structuring dissident desire: Representations of same-sex prison contact in contemporary South African culture. *Safundi, 19*(2), 212–226.
Frontline, A. I. D. S. (2022). *Malawi HIV prevention shadow report*. Available from FrontlineAIDS_-Malawi_FINAL.pdf (unaids.org) . (Accessed 23 June 2022).
Gadama, L., Thakwalakwa, C., Mula, C., Mhango, V., Banda, C., Kewley, S., Hillis, A., & Van Hout, M. C. (2020). 'Prison facilities were not built with a woman in mind': An exploratory multi-stakeholder study on women's situation when incarcerated in contemporary Malawi prisons. *International Journal of Prisoner Health, 16*(3), 303–318.
Gauld, K. (2021). Prisons in a pandemic the Malawi experience. In P. Carmody, G. McCann, C. Colleran, & C. O'Halloran (Eds.), *COVID-19 in the global South impacts and responses*. United Kingdom: Bristol University Press.
Gear, S. (2005). Rules of engagement: Structuring sex and Damage in Men's prisons and beyond. In , *Vols. 89–110. Men behaving differently: Men in South Africa Since 1994*. Cape Town, South Africa: Double Storey Books. Graeme reid and Liz Walker.
Gear, S., & Ngubeni, K. (2002). *Daai ding: Sex, sexual violence and coercion in men's prisons*. Centre for the Study of Violence and Reconciliation (CSVR). Available from www.csvr.org.za. (Accessed 3 March 2022).
Gear, S., & Ngubeni, K. (2003). Your brother, my wife. Sex and gender behind bars. *South Africa Crime Quarterly, 4*, 11–16.
Global Faith and Justice Project. (2015). *The KwaZulu natal declaration*. Available from The KwaZulu-Natal Declaration (africafaith.org.za) . (Accessed 4 March 2022).
Gloppen, S., & Rakner, L. (2019). *The perfect enemy: From migrants to sexual minorities. Bergen: Chr. Michelsen Institute (CMI Brief no. 2019:05) 4 p*. Available from www.democraticbacklash.com/the-perfect-enemy-from-migrants-to-sexual-minorities. (Accessed 3 March 2022).
Golrokhi, R., Farhoudi, B., Taj, L., Pahlaviani, F. G., Mazaheri-Tehrani, E., Cossarizza, A., SeyedAlinaghi, S., Mohraz, M., & Voltarelli, F. A. (2018). HIV prevalence and correlations in prisons in different regions of the world: A review article. *The Open AIDS Journal, 12*, 81–92.
Gondwe, A., Amberbir, A., Singogo, E., Berman, J., Singano, V., Theu, J., Gaven, S., Mwapasa, V., Hosseinipour, M. C., Paul, M., Chiwaula, L., & van Oosterhout, J. J. (2021). Prisoners' access to HIV services in southern Malawi: A cross-sectional mixed methods study. *BMC Public Health, 21*(1), 813.
Hairsine, K. (2019). *Why is homosexuality still taboo in many African countries? 4 December 2019*. Deutsche Welle (DW). Available from www.dw.com/en/why-is-homosexuality-still-taboo-in-many-african-countries/a-51528737. (Accessed 3 March 2022).
Harries, A. D., Nyirenda, T. E., Yadidi, A. E., Gondwe, M. K., Kwanjana, J. H., & Salaniponi, F. M. (2004). Tuberculosis control in Malawian prisons: From research to policy and practice. *International Journal of Tuberculosis & Lung Disease, 8*(5), 614–617.
Human Rights Watch (HRW). (2008). This alien legacy: The origins of "sodomy" laws in British colonialism. Human rights Watch: New York. Available at www.hrw.org/sites/default/files/reports/lgbt1208_webwcover.pdf. (Accessed 3 March 2022).
Human Rights Watch (HRW). (2010). Unjust and unhealthy HIV, TB, and abuse in Zambian prisons. Available from https://www.hrw.org/report/2010/04/27/unjust-and-unhealthy/hiv-tb-and-abuse-zambian-prisons. (Accessed 24 January 2018).
Human Rights Watch (HRW). (2016). *Tell Me where I can Be safe. The impact of Nigeria's same sex Marriage (prohibition) act*. Available from "Tell Me Where I Can Be Safe": The Impact of Nigeria's Same Sex Marriage (Prohibition) Act | HRW . (Accessed 23 June 2022).
Human Rights Watch (HRW). (2018). *Let posterity Judge. Violence and discrimination against LGBT people in Malawi*. Available from www.hrw.org/report/2018/10/26/let-posterity-judge/violence-and-discrimination-against-lgbt-people-malawi. (Accessed 3 March 2022).
Ikuteyijo, O. L., & Agunbaide, M. O. (2008). Prison reforms and HIV/AIDS in Selected Nigerian prisons. *The Journal of International Social Research, 1*(4), 279–289.
International Commission of Jurists. (2007). *Yogyakarta Principles - principles on the application of international human rights law in relation to sexual orientation and gender identity*. March 2007. Available from: https://www.refworld.org/docid/48244e602.html. (Accessed 3 March 2022) Accessed.
International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) (2020) *State sponsored homophobia global legislation overview update*. Geneva: ILGA. Available from ENG-CovArtboard 1 (ilga.org) (Accessed 23 June 2022).
International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA). (2016). *State sponsored homophobia 2016: A world survey of sexual orientation laws: criminalisation, protection and recognition*. Geneva: ILGA. May 2016. Available from: https://ilga.org/downloads/02_ILGA_State_Sponsored_Homophobia_2016_ENG_WEB_150516.pdf. (Accessed 3 March 2022).
Jefferson, A. M., & Jalloh, A. S. (2019). Health provision and health professional roles under compromised circumstances: Lessons from Sierra Leone's prisons. *Criminology and Criminal Justice, 19*(5), 572–590.
Jolofani, D., & DeGabriele, J. (1999). *HIV/AIDS in Malawi prisons: A study of HIV transmission and the care of prisoners with HIV/AIDS in Zomba, Blantyre, and Lilongwe prisons*. Paris: Penal Reform International.
Joshua, I. A., & Ogboi, S. J. (2008). Seroprevalence of human immune deficiency (HIV) virus amongst inmates of Kaduna Prison, Nigeria. *Science World Journal, 3*(1), 17–19.
Jumbe, V. C., Mhango, V., Muula, A., Kaima, R., Chimbwete, L., Mangwana, A., Msutu, B., Tembo, L., Bigland, C., Kewley, S., & Van Hout, M. C. (2022). A multi-stakeholder situation assessment of COVID-19 disease preparedness and mitigation measures in a large prison complex in Malawi. *International Journal of Prisoner Health. Early Online*. https://doi.org/10.1108/IJPH-10-2021-0105. PMID: 35148041.
Kajawo, S. C. R. (2021a). Conjugal visits in prisons discourse: The prisoners' voice in Malawi. *Journal of Psychology & the Behavioral Sciences*. Available from Conjugal Visits in Prisons Discourse: The Prisoners' Voice in Malawi - The International Academic Forum (IAFOR) . (Accessed 4 March 2022).
Kajawo, S. C. R. (2021b). Conjugal visits in prisons discourse: Is it even an offender rehabilitation option in Africa? *Advanced Journal of Social Science, 8*(1), 67–76.
Kanguade, G. (2014). A sexual rights approach to addressing gender-based sexual violence among male prisoners in Malawi. *African Human Rights Law Journal, 14*(1), 23. Available from A sexual rights approach to addressing gender-based sexual violence among male prisoners in Malawi | African Human Rights Law Journal (journals.co.za) . (Accessed 4 March 2022).
Kanyerere, H. S., Banda, R. P., Gausi, F., Salaniponi, F. M., Harries, A. D., Mpunga, J., Banda, H. M., Munthali, C., & Ndindi, H. (2012). Surveillance of tuberculosis in Malawian prisons. *Public Health In Action, 2*(1), 10–14.
Kapindu, R. (2013). Courts and enforcement of socio-economic rights in Malawi: Jurisprudential Trends, challenges and opportunities. *African Human Rights Law Journal, 13*(1), 125-15.
Kitta, T. (2015). *Malawi law commissions, stakeholders review the prison act*. Malawi News Agency. (MANA) Online.18 June 2015. Available from https://www.manaonline.gov.mw/index.php/component/k2/item/3231-malawi-lawcommissions-stakeholders-review-the-prison-act. (Accessed 4 March 2022).
Kumwenda, M., Nzala, S., & Zulu, J. M. (2017). Health care needs assessment among adolescents in correctional institutions in Zambia: An ethical analysis. *BMC Health Services Research, 17*. https://doi.org/10.1186/s12913-017-2532-5
Kyomya, M., Todyrs, K. W., & Amon, J. J. (2012). Laws against sodomy and the HIV epidemic in African prisons. *Lancet, 380*(9839), 310–312.
Lang, N. (2021). *Malawi holds first LGBTQ+ Pride parade in defiance of anti-gay laws*. Them. 28 June 2021. Available from www.them.us/story/malawi-first-lgbtq-pride-parade-defiance-anti-gay-laws.
Lawan, U. M., Amole, G. T., & Shuaib, M. J. (2016). Sexual health of prison inmates: A case study of Kano central prison, north Western Nigeria. *African Journal of Reproductive Health, 20*(1), 98–103.
Legal Assistance Center AIDS Law Unit and University of Wyoming College of Law. (2008). *Struggle to survive A report on HIV/AIDS and prisoners' rights in Namibia*. Available from Struggle to survive: a report on HIV/Aids and Prisoner's Rights in Namibia (acjr.org.za) . (Accessed 3 March 2022).
Lindegaard, M. R., & Gear, S. (2014). Violence makes safe in South African prisons. Prison gangs, violent acts, and victimization among inmates. *Focaal, 68*, 35–54.
Lines, R. (2008). The right to health of prisoners in international human rights law. *International Journal of Prisoner Health, 4*(1), 3–53.
MacNamara, T. (2014). Not the Malawi of our parents: Attitudes toward homosexuality and perceived Westernisation in Northern Malawi. *African Studies, 73*(1), 84–106.
Makombe, S. D., Jahn, A., Tweya, H., Thambo, L., Yu, J. K., Hedt, B., Weigel, R., Nkhata, A., Schouten, E. J., Kamoto, K., & Harries, A. D. (2007). A national survey of prisoners on antiretroviral therapy in Malawi: Access to treatment and outcomes on therapy. *J Infect Dev Ctries, 1*(3), 303–307.
Malawi High Court (MWHC). (2010). *R v Soko and another (359 of 2009) [2010] MWHC 2 (19 may 2010)*.
Malawi High Court at Lilongwe (MLR). (2009). *Gable Masangano vs the Attorney general*. Minister of Home Affairs and Chief Commissioner of Prisons [2009] MLR 171.
Malawi Industrial Relations Court (MWIRC). (2005). *Banda v Lekha (IRC matter 27 of 2004) [2005] MWIRC 92 (31 may 2005)*.
Malawi Inspectorate of Prisons. (2019). *The Report of the Inspection of Prisons and police service Cells conducted by the Malawi Inspectorate of Prisons in 2018. Zomba, Malawi: Malawi inspectorate of prisons*.
Malawi Inspectorate of Prisons. (2021). *Inspection of prisons in 2020 and 2021. Zomba, Malawi: Malawi inspectorate of prisons*.
Malawi Law Commission. (2018). *Report of the law Commission on the Review of the prisons act. Lilongwe, Malawi: Malawi law commission*.
Malawi Supreme Court of Appeal (MSCA). (1999). *Somanje v Somanje & ors. Civil appeal 29 of 1999) MLR 400* (HC).
Malawi Supreme Court of Appeal (MSCA). (2011). *Republic versus Davie Mpanda, criminal appeal case Number 333 of 2011*.
McKay, T. (2012). *Money, Morals, and Modernity: Making sense of same-sex sexualities in Malawi*. UCLA Center for the Study of Women. Available from Money, Morals, and Modernity: Making Sense of Same-Sex Sexualities in Malawi (escholarship.org) . (Accessed 4 March 2022).
Mhlanga-Gunda, R., Motsomi-Moshoeshoe, N., Plugge, E., & Van Hout, M. C. (2020). Challenges in ensuring robust and ethical health research and the reporting of health outcomes and standards in sub-Saharan African prisons. *Lancet Global Health, 8*(1), 25–26.
Ministry of Health Malawi. (2018). *Malawi Health and Sexual and Reproductive Health Rights Policy (2017-2022)*. Available from UNFPA Malawi | National Sexual and Reproductive Health and Rights (SRHR) Policy 2017-2022 (Accessed 3 March 2022).
Mpawa, H., Kwekwesa, A., Amberbir, A., Garone, D., Divala, O. H., Kawalazira, G., van Schoor, V., Ndindi, H., & van Oosterhout, J. J. (2017). Virological outcomes of antiretroviral therapy in Zomba central prison, Malawi; a cross-sectional study. *Journal of the International AIDS Society, 20*(1), Article 21623.
Muntingh, L. (2020). Africa, prisons and COVID-19. *Journal of Human Rights Practice, 12*(2), 284–292.
Murray, S. O., Roscoe, W., & Epprecht, M. (2021). *Boy-wives and female husbands: Studies in African homosexualities*. State University of New York Press. https://doi.org/10.1353/book.83859. Project MUSE, Available from . (Accessed 4 March 2022).

Mwakasungula, U. (2013). The LGBT situation in Malawi: An activist perspective. In C. Lennox, & M. Waites (Eds.), *Human rights, sexual orientation and gender identity in the Commonwealth* (pp. 359–380). Institute of Commonwealth Studies: University of London press. Available from www.jstor.org/stable/j.ctv512st2.17?seq=1#metadata_info_tab_contents. (Accessed 4 March 2022).

Nyadani, D. (2009). Same-sex sexuality and HIV/AIDS: A perspective from Malawi. In V. Reddy, T. Sandfort, & L. Rispel (Eds.), *From social silence to social science: Same-sex sexuality, HIV & AIDS, and gender in South Africa* (pp. 137–142). Cape Town: HSRC.

O' Grady, J., Hoelscher, M., Atun, R., Bates, M., Mwaba, P., Kapata, N., Ferrara, G., Maeurer, M., & Zumla, A. (2011). Tuberculosis in prisons in sub-Saharan Africa–the need for improved health services, surveillance and control. *Tuberculosis, 91*(2), 173–178.

Organisation for Economic Co-operation and Development (OECD). (2022). DAC list of recipients. Available from www.oecd.org/dac/financing-sustainable-development/development-finance-standards/DAC-List-of-ODA-Recipients-for-reporting-2022-23-flows.pdf. (Accessed 4 March 2022).

Organization of African Unity (OAU). (1981). *African Charter on Human and Peoples' Rights ("Banjul Charter")"* (27 June 1981)CAB/LEG/67/3 rev.5,21I.L.M.5 Article 14 (1). Available from: https://www.achpr.org/legalinstruments/detail?id=49. (Accessed 4 March 2022).

Phiri, P. (2020). *First HIV, now coronavirus: Keeping Zambia's prisoners healthy gets even harder. Global press. 12 April 2020*. Available from First HIV, Now Coronavirus: Keeping Zambia's Prisoners Healthy Gets Even Harder (globalpressjournal.com) . (Accessed 3 March 2022).

Polity. (2010). *Colonial sodomy: Homophobic threat within common law. 4 August 2010*. Available from www.polity.org.za/article/colonial-sodomy-homophobic-threat-within-common-law-2010-08-04. (Accessed 3 March 2022).

Reuters. (2020). *Zambian president pardons gay couple sentenced to 15 years*. 27 May 2020, Available from www.nbcnews.com/feature/nbc-out/zambian-president-pardons-gay-couple-jailed-15-years-n1215376. (Accessed 4 March 2022).

Sabitu, K., Iliyasu, Z., & Joshua, I. A. (2009). An assessment of knowledge of HIV/AIDS and associated risky behavior among inmates of Kaduna convict prison: The implications for prevention programmes in Nigerian prisons. *Nigerian Journal of Medicine, 18*(1), 52–58.

Saliu, A., & Akintunde, B. (2014). Knowledge, attitude, and preventive practices among prison inmates in Ogbomoso prison at Oyo state, South west Nigeria. *International Journal of Reproductive Medicine. 2014*, Article 364375.

Singano, V., Kip, E., Ching'ani, W., & Chiwaula, L. (2020). Tuberculosis treatment outcomes among prisoners and general population in Zomba, Malawi. *BMC Public Health, 20*, 700. https://doi.org/10.1186/s12889-020-08841-z

Southern Africa Litigation Centre and Nyasa Rainbow Alliance. (2020). We get traumatized in different ways, Key issues related to sexual orientation, gender identity and expression identified by a community consultation in Malawi. Available from www.southernafricalitigationcentre.org/wp-content/uploads/2020/11/Malawi-research-report.pdf. (Accessed 3 March 2022).

Sowemimo, A. (2019). *How Britain's exported homophobia continues to drive health inequalities amongst LGBTQI communities. 15 April 2019*. Available from How Britain's exported homophobia continues to drive health inequalities amongst LGBTQI communities - gal-dem . (Accessed 3 March 2022).

Supply, W., & Sanitation Collaborative Council. (2020). *WASH assessments for COVID-19 prevention in Malawi prisons- August 21st 2020. Water supply and sanitation collaborative Council*. Available from: https://www.wsscc.org/media/resources/wash-assessments-covid-19-prevention-malawi-prisons. (Accessed 11 October 2021).

Telisinghe, L., Charalambous, S., Topp, S. M., Herce, M. E., Hoffmann, C. J., Barron, P., et al. (2016). HIV and tuberculosis in prisons in sub-Saharan Africa. *Lancet, 388*, 1215–1227.

The Nordic Africa Institute. (2017). *Homosexuality is still taboo in many African countries. 17 November 2017*. Available from Homosexuality is still taboo in many African countries - The Nordic Africa Institute (uu.se) . (Accessed 3 March 2022).

Todrys, K. W., & Amon, J. J. (2011). Human rights and health among juvenile prisoners in Zambia. *International Journal of Prison Health, 7*(1), 10–17.

Todrys, K. W., & Amon, J. J. (2012). Criminal Justice reform as HIV and TB prevention in African prisons. *PLoS Medicine, 9*(5), Article e1001215.

Todrys, K. W., Amon, J. J., Malembeka, G., & Clayton, M. (2011). Imprisoned and imperiled: Access to HIV and TB prevention and treatment, and denial of human rights, in Zambian prisons. *Journal of the International AIDS Society, 14*, 8.

UNAIDS. (2015). *Understanding fast track: Accelerating action to end the AIDS epidemic by 2030*. Available from www.unaids.org/sites/default/files/media_asset/20150_6_JC2743_Understanding_FastTrack_en.pdf. (Accessed 4 March 2022).

UNAIDS. (2020). Malawi. Available from www.unaids.org/en/regionscountries/countries/malawi. (Accessed 23 June 2022).

UNAIDS. (2022). *Remove laws that harm, create laws that empower*. Zero Discrimination Day. 1 March 2022. Available from www.unaids.org/sites/default/files/media_asset/2022_ZeroDiscrimination_Brochure_en.pdf. (Accessed 3 March 2022).

UNAIDS GLOBAL AIDS Update. (2021). Confronting inequalities — Lessons for pandemic responses from 40 years of AIDS. Available from www.unaids.org/en/resources/documents/2021/2021-global-aids-update. (Accessed 3 March 2022).

United Nations (UN). (1948). *Universal declaration of human rights* (Vol. 10). December 1948, 217 A (III).

United Nations (UN). (1966a). *International Covenant on economic, Social and cultural rights (ICESRC) (16 December 1966) United nations, treaty series,993:3*. New York: United Nations General Assembly.

United Nations (UN). (1966b). *International Covenant on Civil and political rights (ICCPR) (16 December 1966) United nations, treaty series, 999*. New York: United Nations General Assembly.

United Nations (UN). (1966c). *Optional Protocol to the international covenant on civil and political rights, 19 December 1966* (Vol. 999, p. 171). United Nations, Treaty Series.

United Nations (UN). (1984). *Convention against torture and other cruel, inhuman or degrading treatment or punishment. United Nations, treaty series* (Vol. 1465). New York: United Nations General Assembly. No.85.

United Nations (UN). (1991). *Basic Principles for the Treatment of Prisoners: resolution/adopted by the General Assembly (28 March 1991)A/RES/45/111,para 9*. New York: United Nations General Assembly.

United Nations (UN). (2003). *Optional Protocol to the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment. UN General Assembly. 9 January 2003, A/RES/57/199*. New York: UN General Assembly.

United Nations (UN). (2009). *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights : resolution / adopted by the General Assembly*, 5 March 2009, A/RES/63/117.

United Nations (UN). (2016). *Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules) (8 January 2016) A/RES/70/175*. New York: UN General Assembly.

United Nations (UN) Malawi. (2020). *Malawi COVID-19 situation update No.2 as of 27th March 2020*. United Nations. Available at: https://malawi.un.org/en/46712-malawi-covid-19-situation-update-no2-27th-march-2020. (Accessed 4 October 2021).

United Nations (UN) UN Committee on Economic, Social and Cultural Rights (UN CESCR). (2000). *General comment No. 14: The Right to the highest Attainable Standard of health (art. 12 of the covenant)*, 11 August 2000, E/C.12/2000/4.

United Nations (UN) UN Committee on Economic, Social and Cultural Rights (UN CESCR). (2009). *General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), 2 July 2009, E/C.12/GC/20*.

United Nations (UN) UN Human Rights Committee (UN HRC). (1989). *General Comment No. 18: Non-discrimination*, 10 November 1989.

United Nations Human Rights Committee (UN HRC). (1992). *Toonen v Australia 50th session*. Case No. 488/1992, UN Doc. CCPR/c/50/D/488/1992, at 8.7.

United Nations (UN) Human Rights Committee (UN HRC). (1997). *Lantsova v. The Russian federation, communication No. 763/1997*.

United Nations (UN) UN Human Rights Committee (UN HRC). (2019). *General comment No. 36, article 6 (Right to life), 3 september 2019*. CCPR/C/GC/35.

United Nations (UN). (2011). *Human rights, sexual orientation and gender identity : resolution / adopted by the Human Rights Council*, 14 July 2011, A/HRC/RES/17/19.

US Department of State. (2020). *2020 country reports on human rights practices: Malawi*. Bureau of Democracy, Human Rights and Labor. Available From: www.state.gov/Reports/2020-Country-Reports-On-Human-Rights-Practices/malawi/. (Accessed 11 October 2021).

Usman, A., Armiya'u, A. Y., & Iliyasu, Z. (2020). Profile and sexual practices of inmates in a correctional service facility in north-west Nigeria. *Annals of African Medical Research, 3*(13), 72–77.

Usman, A., Armiya'u, A. Y., & Iliyasu, Z. (2021). Determinants of risky sexual behaviour among inmates in Katsina correctional service: A mixed methods study. *Advances in Sexual Medicine, 11*(2), 17–37.

Van Hout, M. C. (2020a). COVID-19: Urgent need to find Alternatives to prison sentences in Malawi. *Health and Human Rights Journal*. Available from: https://www.hhrjournal.org/2020/09/covid-19-urgent-need-to-release-women-from-prison-in-malawi/. (Accessed 11 October 2021).

Van Hout, M. C. (2020b). COVID-19, health rights of prison staff and the bridge between prison and public health in Africa. *Public Health, 185*, 128–129.

Van Hout, M. C., & Mhlanga-Gunda, R. (2019). Prison health situation and rights of juveniles incarcerated in Sub Saharan African prisons. *BMC International Health and Human Rights, 19*, 17.

World Health Organization (WHO). (2021). WHO announces the update of the Consolidated Guidelines on HIV, Hepatitis and STI prevention, diagnosis, treatment and care for key populations. Available from www.who.int/news/item/24-06-2021-who-announces-the-update-of-the-consolidated-guidelines-on-hiv-hepatitis-and-sti-prevention-diagnosis-treatment-and-care-for-key-populations. (Accessed 3 March 2022).

World Prison Brief. (2022). *Malawi*. Available from Malawi | World Prison Brief (prisonstudies.org) . (Accessed 3 March 2022).

Zachariah, R., Harries, A., Chantulo, A., Yadidi, A., Nkhoma, W., & Maganga, O. (2008). Sexually transmitted infections among prisoners in a rural district of Malawi. *Transactions of the Royal Society of Tropical Medicine and Hygiene, 96*(6), 617–619.

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"*Children in the prison nursery*": Global progress in adopting the Convention on the Rights of the Child in alignment with United Nations minimum standards of care in prisons

Marie Claire Van Hout [a,*], Simon Fleißner [b], Ulla-Britt Klankwarth [b], Heino Stöver [b]

[a] *Public Health Institute, Liverpool John Moore's University, United Kingdom*
[b] *Institute of Addiction Research, Frankfurt University of Applied Sciences, Germany*

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ABSTRACT

Background: Out of the 11 million detained in prisons globally, the female prison population of 740,000 has increased by 50 % since 2000. 410,000 children are in detention. 19,000 live in prison with their mother.
Objective: To conduct a socio legal assessment of global progress in adopting the Convention on the Rights of the Child since 2010, and alignment with United Nations (UN) normative standards of care in prisons.
Participants and setting: Children detained with their mothers at the global level.
Methods: A comprehensive search of all published Concluding Observation reports of the UN Committees on the Rights of the Child (CRC), Elimination of Discrimination Against Women (CEDAW), Against Torture (CAT) and Human Rights (CCPR) since 2010 (n = 905). 316 CRC, 246 CEDAW, 173 CAT and 170 CCPR reports were scrutinised to examine the situation of children living with detained mothers against UN normative standards of care.
Results: 51 reports (24 CRC, 13 CEDAW, 12 CAT, 2 CCPR) representing 43 countries (majority in Africa) contained direct violations of the best interests of the child. These include the treatment of children as prisoners, difficulties in securing identity documents, poor detention conditions, exposure to violence, lack of access to child-appropriate healthcare, and lack of transparent data. Countries differed in durations of time permitting children to stay in prison (6 months to 8 years, with Eritrea observing no limit).
Conclusions: Achieving a balance between protection of the child and punishment of the mother is inconsistent globally, and exacerbates the multiple vulnerabilities of the child.

1. Background

Over 11 million people are detained in prisons globally, with many prisons operating over capacity in 119 countries (Penal Reform International, 2021). 740,000 are women, with recent data indicating an increase of over 100,000 in this minority prison population in the past ten years (Penal Reform International, 2021). The female prison population has increased by about 50 % since 2000, in comparison to the 18 % rise in male prisoners (Walmsley, 2017). Extant data indicates that at least 410,000 children are in closed

* Corresponding author.
E-mail addresses: m.c.vanhout@ljmu.ac.uk (M.C. Van Hout), simon.fleissner@fb4.fra-uas.de (S. Fleißner), ulla-britt.klankwarth@fb4.fra-uas.de (U.-B. Klankwarth), hstoever@fb4.fra-uas.de (H. Stöver).

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settings annually (Penal Reform International, 2021). This figure is primarily based on juveniles in conflict with the law, as the minimum age of criminal responsibility globally ranges from 7 to 16 years, most commonly 14 years across United Nations (UN) member states (Penal Reform International, 2022a). An estimated 19,000 children live in prison with their mother (Penal Reform International, 2022b). In 2020, 10,000 children were in detention with their mothers in Europe (World Health Organization, 2020).

Whilst ninety-seven jurisdictions globally permit children to reside with their incarcerated parent (in almost all cases the mother) in prison, there is a lack of uniformity in legislative provisions with the imposed age limit generally correlating *"with the degree to which the prison world deviates from the word outside"*(Bauer, 2018). Countries adopt a variety of rules regarding whether children are permitted to stay with their mother in prison, the length of time and type of accommodation provided for them by the prison service. This can range from complete separation of mother and child on committal; provision of mother and baby units/prison nurseries for the duration of the breastfeeding period; or for the duration of parent's sentence (Bauer, 2018; Paurus, 2017; Van Hout & Mhlanga-Gunda, 2018; VanHout & Mhlanga-Gunda 2019; Carlson, 2018; Logar & Leese, 2021). Four countries routinely separate incarcerated mothers from their new-borns (Liberia, Suriname, Bahamas, United States) (Nair et al., 2021). Whilst application of non-custodial measures to pregnant women or those with caregiving responsibilities remains a priority for many countries, it is unclear as to what extent such alternative sentences are implemented (Ogrizek et al., 2021a).

Achieving a balance between protection of the child and punishment of the mother is problematic and inconsistent worldwide (Law Library of Congress (U.S.). Global Legal Research Directorate, 2014), as by virtue of conflation, the state sanction of the mother punishes the child and there are inherent problems in separating the rights and best interests of mothers and children (Ogrizek et al., 2021a; Walker & Sullivan, 2021). The UN Children's Fund (UNICEF, 2007) however advises that infants should not be separated from their mothers due to custodial sentencing, based on the premise of the best interests of the child and their respective rights to family life. There is extensive literature on the negative impact of mother and child premature separation as justified by the State imperative to protect the child from the prison environment (Ogrizek et al., 2021a, 2021b). The bulk of academic and policy level attention is devoted to the unique and substantial vulnerabilities of children living in the community with an incarcerated parent, and on mothers in prison.

Very little is known about children in the *"prison nursery"* context. For instance in the sub-Saharan African region, these children are often described as *"hidden victims"*, with *"their reality and circumstances related to incarceration seldom recognised"* (Schoeman & Basson, 2009). Children living in detention are a significantly high-risk population, experiencing multiple health and social vulnerabilities and adverse impacts on child development (Wakefield & Wildeman, 2018; Ogrizek et al., 2021a, 2021b). The closed environment has a substantial impact on their basic needs (for example healthcare, nutrition, clothing, hygiene); the extent to which they experience safe spaces, education and spaces for play; their quality of their relationship and time spent with their mother; their ability to have contact and relationships with visiting family members; and the extent to which the prison system considers and assesses their best interests (Bauer, 2018; Cheruiyot, 2019; Easterling et al., 2019; Friedman et al., 2020; Metzler et al., 2017; Miamingi, 2020; Ogrizek et al., 2021b; Penal Reform International, 2013; Penal Reform International, 2022a). Discrimination and substantial prison environment challenges navigated by mother and child are significant, often with life changing and life ending consequences, including with reintegration difficulties post release (Gobena et al., 2019; Cheruiyot, 2019; Van Hout & Mhlanga-Gunda, 2018; Van Hout & Mhlanga-Gunda, 2019; Nowak, 2019; Zhao et al., 2021).

Table 1
Relevant international treaties and normative guidance.

International Human Rights Treaties and Committee General Comments
The World Health Organization (WHO) Constitution Article 2 (UN, 1947)
Universal Declaration of Human Rights (UDHR) Article 25 (UN, 1948)
International Covenant on Economic, Social and Cultural Rights (ICESR) Article 12(1)(2)) (UN, 1966a)
International Covenant on Civil and Political Rights (ICCPR) (UN, 1966b)
Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (CAT) (UN, 1984)
CAT-Optional Protocol (UN, 2003)
Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) (UN, 1979)
Convention on the Rights of the Child (CRC) Articles 3, 9 (UN, 1989).
General Comment 10 of the Committee on the Rights of the Child (UN CRC, 2007).
Exemplar African Guidelines and Committee Comments
African Charter on the Rights and Welfare of the Child (ACRWC) Articles 19, 30 (Organization of African Unity OAU, 1999)
General Comment 1 on 'Children of incarcerated and imprisoned parents and primary caregivers' of the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) (ACERWC, 2013)
Normative United Nations Standards
United Nations Guidelines for the Alternative Care of Children (UN, 2010a)
United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (The Bangkok Rules) Rules 2,3,9,21,28,33,48,49,51-53,60,64,68-70 (UN, 2010b)
United Nations Standard Minimum Rules for the Treatment of Prisoners (The Mandela Rules) Rules 28-29,44 (UN, 2016)
United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules) (UN, 1990).

2. Treaties and guidelines that guarantee children's rights: Best interests of the Child

The rights of children living in detention are protected by a range of positive obligations under a range of international treaties to uphold the human and health rights of people deprived of their liberty, with binding obligations to not ill-treat those in detention. Table 1 presents all relevant international treaties and guidelines that guarantee children's rights in detention settings. The rights of detained women and children are additionally provided for in the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) (UN, 1979) and the Convention on the Rights of the Child (CRC) (UN, 1989). When considering rights of children in the *"prison nursery"*, the CRC (UN, 1989) states that: *"in all actions concerning children…., the **best interests of the child** shall be a primary consideration*" (Article 3). Article 9 (1–4) draws distinction between compulsory separation of a child from his/her parents, deemed necessary in his/her best interests, and the separation of a parent from their child due to detention, incarceration, deportation, exile or death. General Comment 10 of the Committee on the Rights of the Child supports that best interests of the child supersedes punishment, correction or prevention (UN CRC, 2007). It is further supported by the UN Guidelines for the Alternative Care of Children (UN, 2010a) which mandate that: *"best efforts should be made to ensure that children remaining in custody with their parent benefit from **adequate care and protection**, while guaranteeing their own status as free individuals and access to activities in the community."* Two countries have not ratified the CRC (The United States and Somalia).

Of note is that the African Charter on the Rights and Welfare of the Child (ACRWC) (Organization of African Unity OAU, 1999) is widely applauded as the first set of international guidelines which explicitly provide for the children of detained parents, and mandate that non-custodial measures must always be considered first (Penal Reform international, 2022b). It affirms the principle of the best interests of the child, with Article 19 stating that: *"the child shall be entitled to the enjoyment of parental care and protection and shall, whenever possible, have the **right to reside** with his or her parents. No child shall be separated from his parents against his will, except when a judicial authority determines in accordance with the appropriate law that such separation is in the **best interest of the child**"* (OAU, 1999). General Comment 1 of the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) (ACERWC, 2013) supports states parties in the effective implementation of Article 30. Whilst Article 30(d) states that '*a mother shall not be imprisoned with her child*' (spanning pre-trial detention and custodial sentence), General Comment 1 stipulates the requirement to consider a broad range of factors (child's age, gender, maturity, relationship with mother, availability of alternative caregiving in the community) when deciding whether to permit the child's accommodation with their mother in prison, and to provide for the best interests of the child (Miamingi, 2020).

In terms of soft law, the humane treatment of children of detained women is provided for in a range of non-binding UN normative standards in prisons. Of greatest applicability to the situation and care of these children is the UN Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (The Bangkok Rules) and the UN Standard Minimum Rules for the Treatment of Prisoners (The Mandela Rules) (UN, 2016). The Bangkok Rules recommend that *"[d]ecisions to allow children to stay with their mothers in prison … be based on the **best interests of the children**, and if permitted, the children should **never be treated as prisoners**."* and that the prison environment *"be as **close as possible to that of a child outside prison**."* It provides additional safeguards relating to the application of non-custodial measures if the parent is a sole caregiver, and above all that children must be considered throughout all stages of the parent's contact with the criminal justice system (Penal Reform International, 2022b). Rules 49 to 52 are especially pertinent with regard to the special provisions for women and children in the *"prison nursery"* context. It also outlines a process based on individual assessment when deciding to end the period of time of the child in detention: *"in **the best interest of the child** within the scope of relevant national laws"* and provides that *"the removal of a child from prison shall be undertaken with **sensitivity,** [and] only when **alternative care arrangements** for the child have been identified."*

Hence we focus here on the human rights and situation of babies born in prison and infants detained with their mothers, largely invisible in prison systems and extremely vulnerable, not least due to the observed rise in the female prison population globally. Despite these international and regional human and child rights assurances, there is observed discrepancy in the prison system resourcing of children's paediatric and developmental needs in the prison setting, particularly in low and middle-income countries (LMICs) (Van Hout & Mhlanga-Gunda, 2019). In order to examine global progress in protecting and upholding the rights of children living with detained mothers since the adoption of the 2010 UN Bangkok Rules, we conducted a socio-legal assessment (Leiter, 2015) of all UN Committee treaty body reports (also known as Concluding Observations) promulgated from the relevant CRC, CEDAW, CAT and ICCPR Committees (2010−2022). These reports refer to the positive aspects of a State's implementation of a treaty and areas

Table 2
UN Committee Concluding Observations (2010–2022).

UN Committee	Total Number of UN Committee Concluding Observations 2010–2022	Search terms	Number containing violation(s)
CRC	316	*prison, detention, incar. (incarcerated, incarceration), jail, custod… (custody, custodial), restraint, arrest, mother, prosecu….(prosecution, prosecuted), parent… (parents, parental), infant*	24
CEDAW	246	*prison, detention, incar (incarcerated, incarceration…), prosec (prosecution, prosecutions, prosecutors, prosecuted), detain…(detained), arrest…(arrested), mother, parent…(parental, parents), young*	13
CAT	173	*prison, detention, detain…(detained), child, mother, women*	12
CCPR	170	*child, mother, detention, prison condition*	2

Table 3
UN CAT, UN CEDAW, CRC and CCPR Concluding Observations since 2010.

Country	Max. age of children in detention	CAT, CEDAW, CRC, CCPR statement (direct excerpt cited)	Year	Reference
Bahrain	2 years	*21. (c) Reports of barriers faced by children of mothers in detention in obtaining a birth certificate or national identity card.*	2019	United Nations Convention on the Rights of the Child (2019): Concluding observations on the combined fourth to sixth periodic reports of Bahrain. Committee on the Rights of the Child (Report No. CRC/C/BHR/CO/4-6). New York, UN, February 27, 2019.
Bangladesh	4 years, with permission 6 years	*50. The Committee is concerned about the situation of children in prison with their mothers, including with respect to the lack of childcare services and deficiencies in sanitation.*	2015	United Nations Convention on the Rights of the Child (2015): Concluding observations on the fifth periodic report of Bangladesh. Committee on the Rights of the Child (Report No. CRC/C/BGD/CO/5). New York, UN, October 30, 2015
Belarus	3 years	*21. […] While noting the measures to reduce juvenile confinement and close Vitebsk No. 1 re-educational camp, renovate pretrial units and prisons and improve the medical treatment of HIV/AIDS and tuberculosis patients, the Committee remains deeply concerned at the continuing reports of the deplorable conditions of places of deprivation of liberty. These include IVS (police isolators for temporary detention), notwithstanding the State party's measures to close the temporary police detention centres in Zelva, Novogrudok and Svisloch. Cells measuring 2 m^2 (in prison and penal colonies), 2.5 m^2 (in temporary detention facilities), 3.5 m^2 (in re-education camps) and at least 4 m^2 (for pregnant women and women with children) fall short of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) and other international standards. […]*	2018	United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (2018): Concluding observations on the fifth periodic report of Belarus. Committee against Torture (Report No. CAT/C/BLR/CO/5). New York, UN, June 07, 2018
Benin	5 years	*36. The Committee expresses serious concern about the conditions of detention of women detainees, including pregnant women and women detained with their children, in particular the length of pretrial detention and the lack of measures aimed at facilitating women's access to justice and the fact that women detainees are not systematically separated from men detainees.*	2013	United Nations Convention on the Elimination of All Forms of Discrimination against Women (2013): Concluding observations on the fourth periodic report of Benin. Committee on the Elimination of Discrimination against Women (Report No. CEDAW/C/BEN/CO/4). New York, UN, October 28, 2013
Bolivia	6 years	*20. […] The Committee is also concerned about the large number of children now living in prison with their families*	2013	United Nations International Covenant on Civil and Political Rights (2013): Concluding observations on the third periodic report of the Plurinational State of Bolivia. Human Rights Committee (Report No. CCPR/C/BOL/CO/3). New York, UN, December 06, 2013
Brazil	7 years	*49. The Committee takes note of Act No. 11.942 of 2009 governing minimum assistance services for incarcerated mothers and their children. However, it is concerned that this legislation has not been implemented effectively. The Committee is seriously concerned about*	2015	United Nations Convention on the Rights of the Child (2015): Concluding observations on the combined second to fourth periodic reports of Brazil. Committee on the Rights of the Child (Report No. CRC/C/BRA/CO/2-4). New York, UN, October 30, 2015

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Table 3 (*continued*)

Country	Max. age of children in detention	CAT, CEDAW, CRC, CCPR statement (direct excerpt cited)	Year	Reference
		overcrowding and poor sanitation facilities in prisons, as well as about limited access to health services, education and recreational activities for incarcerated mothers and their children.		
Burkina Faso	2 years	*21. […] It is also concerned about the conditions of detention of women who are accompanied by infants and young children and are held at the Ouagadougou short-stay prison and correctional facility. [...]*	2019	United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (2019): Concluding observations on the second periodic report of Burkina Faso. Committee against Torture (Report No. CAT/C/BFA/CO/2). New York, UN, December 18, 2019
Burundi	2 years	*48. Committee is also concerned at the number of women detained with infants and young children, as well as the lack of any social care and protection measures for the children of detained women who are separated from their mothers.*	2016	United Nations Convention on the Elimination of All Forms of Discrimination against Women (2016): Concluding observations on the combined fifth and sixth periodic reports of Burundi. Committee on the Elimination of Discrimination against Women (Report No. CEDAW/C/BDI/CO/5-6). New York, UN, November 25, 2016
Cambodia	3 years	*63. The Committee expresses serious concern about the situation of children Phnom Penh, as well as in the prisons of Takmao, Kompong Cham and Kompong Chhnang, in conditions which are detrimental to their physical, mental and emotional wellbeing. The Committee is particularly concerned that children are not provided with food and safe drinking water, mothers are being expected to share their own ration with their children, they are often placed in cells without appropriate ventilation, in conditions of extreme heat and not always separated from persons with contagious diseases, such as tuberculosis. The Committee is also concerned that children incarcerated with their mothers have limited access to health services and almost no access to any form of education and recreational activities. The Committee is further seriously concerned about cases of children being physically abused by prison guards and other prisoners*	2011	United Nations Convention on the Rights of the Child (59th sess.: 2011): Consideration of reports submitted by States parties under article 44 of the Convention. Concluding observations: Cambodia. Committee on the Rights of the Child (Report No. CRC/C/KHM/CO/2-3). New York, UN, August 03, 2011
		44. (a) Reports of insufficient consideration given by the courts to the specific situations of women when making decisions about detention, leading to unnecessary detention of women, including pregnant women and mothers, which has a devastating impact on children, as they are left without their primary caregivers or are detained with their mothers in inadequate conditions; (c)The detention of women and children in overcrowded prisons that fail to meet international standards, including access to essential health-care services, especially for pregnant women.	2019	United Nations Convention on the Elimination of All Forms of Discrimination against Women (2019): Concluding observations on the sixth periodic report of Cambodia. Committee on the Elimination of Discrimination against Women (Report No. CEDAW/C/KHM/CO/6). New York, UN, November 12, 2019

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Table 3 (*continued*)

Country	Max. age of children in detention	CAT, CEDAW, CRC, CCPR statement (direct excerpt cited)	Year	Reference
Dominican Republic	In the 22 "New Model Female Prisons" children are allowed to stay with their mothers until the age of 1.	*45. The Committee welcomes the measures taken to promote early childhood development. It is concerned, however, about the insufficient implementation of the Comprehensive Early Childhood Protection and Care Plan and regrets the lack of information on how the needs of children in vulnerable and marginalized situations, such as those living in prison with their mothers, are being addressed.*	2015	United Nations Convention on the Rights of the Child (2015): Concluding observations on the combined third to fifth periodic reports of the Dominican Republic. Committee on the Rights of the Child (Report No. CRC/C/DOM/CO/3-5). New York, UN, March 06, 2015
Eritrea	No limit	*51. The Committee is concerned that: (a) The living conditions for young children in detention facilities with their mothers are poor; (b) Lactating mothers are having difficulties in providing proper nutrition for their infants owing to the poor quality of food provided in the detention facilities*	2015	United Nations Convention on the Rights of the Child (2015e): Concluding observations on the fourth periodic report of Eritrea. Committee on the Rights of the Child (Report No. CRC/C/ERI/CO/4). New York, UN, July 02, 2015
Ethiopia	18 months	*26. However, the Committee remains seriously concerned about consistent reports of overcrowding, poor hygienic and sanitary conditions, lack of sleeping space, food and water, the absence of adequate health care, including for pregnant women and HIV/AIDS and tuberculosis patients, the absence of specialized facilities for prisoners and detainees with disabilities, co-detention of juveniles with adults, inadequate protection of juvenile prisoners and children detained with their mothers from violence in prisons and places of detention in the State party (arts. 11 and 16).*	2011	United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (45th sess.: 2011): Consideration of reports submitted by States parties under article 19 of the Convention. Concluding observations of the Committee against Torture. Ethiopia (Report No. CAT/C/ETH/CO/1). New York, UN, January 20, 2011
Guatemala	4 years	*44. The Committee is concerned, however, that 50 % of the women being held in custody are in pretrial preventive detention. It notes with concern the overcrowded and deplorable conditions in places of detention for women, as well as reported cases of gender-based violence, the depriving of lesbian and transgender women of partner visits and the use of isolation as punishment. It also notes with concern the inadequate accommodation of pregnant women and women in detention with their children.*	2017	United Nations Convention on the Elimination of All Forms of Discrimination against Women (2017): Concluding observations on the combined eighth and ninth periodic reports of Guatemala. Committee on the Elimination of Discrimination against Women (Report No. CEDAW/C/GTM/CO/8-9). New York, UN, November 22, 2017
Honduras	2 years	*46. The Committee is concerned about the large number of women in pretrial detention and the lack of measures to guarantee that women have access to justice. It is also concerned about the insufficient health and sanitary conditions of women in detention, including pregnant women and women detained with their children.*	2016	United Nations Convention on the Elimination of All Forms of Discrimination against Women (2016): Concluding observations on the combined seventh and eighth periodic reports of Honduras. Committee on the Elimination of Discrimination against Women (Report No. CEDAW/C/HND/CO/7-8). New York, UN, November 25, 2016
India	6 months	*59. The Committee notes that children under the age of 6 years can live with their mothers in prison and that the State party has recently introduced a scheme to provide financial help to children of prisoners. However, it is concerned that the best interests of the*	2014	United Nations Convention on the Rights of the Child (2014): Concluding observations on the combined third and fourth periodic reports of India. Committee on the Rights of the Child (Report No. CRC/C/IND/CO/3-4). New York, UN, July 07, 2014

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Table 3 (*continued*)

Country	Max. age of children in detention	CAT, CEDAW, CRC, CCPR statement (direct excerpt cited)	Year	Reference
		child are not always taken into account, including when sentencing parents.		
Iran	3 years	*65. The Committee is concerned that children, in particular Baha'i children, living with their mothers in prison have reportedly developed medical problems due to poor living conditions that they are subjected to in prisons.*	2016	United Nations Convention on the Rights of the Child (2016b): Concluding observations on the combined third and fourth periodic reports of the Islamic Republic of Iran. Committee on the Rights of the Child (Report No. CRC/C/IRN/CO/3-4). New York, UN, March 14, 2016
Iraq	4 years	*56. The Committee is concerned that most prisons for women lack a nursery, although many children live with their mothers in prison, and about the various cases of sickness affecting those children because of deficient sanitation and general care. The Committee is also concerned about cases of children staying in prison for several weeks after the execution of their mothers.*	2015	United Nations Convention on the Rights of the Child (2015): Concluding observations on the combined second to fourth periodic reports of Iraq. Committee on the Rights of the Child (Report No. CRC/C/IRQ/CO/2-4). New York, UN, March 03, 2015
Italy	3 years	*55. While the Committee welcomes the adoption of Act No. 62/2011 on the protection of the relationship between mothers in prison and their minor children, it is concerned at the high number of children separated from one or both parents who are imprisoned, the situation of babies who are living in prisons with their mothers, and cases where children risk being separated from their mothers if the mother does not meet the requirement for house arrest*	2011	United Nations Convention on the Rights of the Child (59th sess.: 2011): Consideration of reports submitted by States parties under article 44 of the Convention. Concluding observations: Italy. Committee on the Rights of the Child (Report No. CRC/C/ITA/CO/3-4). New York, UN, October 31, 2011
		32. […] The Committee also notes the existence of special units reserved for female detainees with children, and the establishment of specialized health-care units within existing penitentiary institutions. Furthermore, it notes that prison medical personnel have an obligation to document and report any evidence of maltreatment observed during the initial medical examination of detainees. It regrets, however, that the State party did not indicate the number of cases reported by prison medical personnel as potential cases of torture or ill-treatment, during the period under review […]	2017	United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (2017): Concluding observations on the combined fifth and sixth periodic reports of Italy. Committee against Torture (Report No. CAT/C/ITA/CO/5-6). New York, UN, December 18, 2017
Kenya	4 years	*29. (c): Some groups of children, such as refugee children, children of Nubian descent, Makonde children, indigenous Somali children in Kenya, children with mothers in custody and intersex children, face difficulty in obtaining birth registration.*	2013	United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (2013): Concluding observations on the second periodic report of Kenya, adopted by the Committee at its fiftieth session (6 to 31 May 2013). Committee against Torture (Report No. CAT/C/KEN/CO/2). New York, UN, June 19, 2013
		12. While acknowledging the steps taken by the State party to improve conditions in all places of detention, including the enactment of the Power of Mercy Act (2011), allocation of additional financial resources and measures taken to reduce overcrowding,	2016	United Nations Convention on the Rights of the Child (2016): Concluding observations on the combined third to fifth periodic reports of Kenya. Committee on the Rights of the Child (Report No.

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Table 3 (*continued*)

Country	Max. age of children in detention	CAT, CEDAW, CRC, CCPR statement (direct excerpt cited)	Year	Reference
		the Committee remains deeply concerned about detention conditions, in particular the persistent levels of overcrowding, lack of appropriate health services, prevalence of prison violence, including inter-prisoner violence and sexual abuse, and the practice of detaining children under the age of 4 with their mothers (arts. 2, 11 and 16).		CRC/C/KEN/CO/3-5). New York, UN, March 21, 2016
Kyrgyzstan	3 years	*22. […] The Committee is also concerned at the appalling conditions at women's detention facilities and the lack of adequate medical care for women detainees, including those who are pregnant and mothers with children. The Committee is further concerned at reports of very poor conditions that prevail in psychiatric hospitals, social care homes and residential institutions for children (arts. 11 and 16).*	2021	United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (2021): Concluding observations on the third periodic report of Kyrgyzstan. Committee against Torture (Report No. CAT/C/KGZ/CO/3). New York, UN, December 21, 2021
Lesotho	2 years	*39. The Committee is concerned that the best interests of children are not taken into consideration during the sentencing of caregivers, and that prisons lack appropriate facilities for nursing mothers.*	2018	United Nations Convention on the Rights of the Child (2018): Concluding observations on the second periodic report of Lesotho. Committee on the Rights of the Child (Report No. CRC/C/LSO/CO/2). New York, UN, June 28, 2018
Mali	4 years	*41. The Committee notes with concern the conditions of women in detention, including a lack of systematic separation from male detainees, abuse perpetrated by police and prison authorities and inappropriate treatment for pregnant women in detention and those accompanied by their children.*	2016	United Nations Convention on the Elimination of All Forms of Discrimination against Women (2016): Concluding observations on the combined sixth and seventh periodic reports of Mali. Committee on the Elimination of Discrimination against Women (Report No. CEDAW/C/MLI/CO/6-7). New York, UN, July 25, 2016
Mauritius	5 years	*47. The Committee notes that children under the age of 6 can live with their imprisoned mothers. However, it is concerned that the best interests of the child are not always taken into account, including when sentencing parents, that incarcerated parents are not guaranteed systematic contact with their children and the Child Development Unit, and that there is insufficient psychological treatment or social support to children of incarcerated parents who do not reside in institutional care.*	2015	United Nations Convention on the Rights of the Child (2015): Concluding observations on the combined third to fifth periodic reports of Mauritius. Committee on the Rights of the Child (Report No. CRC/C/MUS/CO/3-5). New York, UN, February 27, 2015
Mexico	6 years	*43. The Committee notes that children up to 6 years of age can remain with their mothers in prison and that the State party is currently reviewing the guidelines related to children living with their mothers so as to safeguard their rights. It is concerned, however, about those guidelines being adopted in a timely manner and about the insufficient alternatives to detention for mothers.*	2015	United Nations Convention on the Rights of the Child (2015): Concluding observations on the combined fourth and fifth periodic reports of Mexico. Committee on the Rights of the Child (Report No. CRC/C/MEX/CO/4-5). New York, UN, July 03, 2015
		36. […] The Committee also notes with concern the excessive length of time that children spend in prison with their mothers and the lack of guidelines regulating this area (arts. 6, 7, 9 and 10).	2019	United Nations International Covenant on Civil and Political Rights (2019): Concluding observations on the sixth periodic report of Mexico. Human Rights Committee (Report No. CCPR/C/

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Table 3 (*continued*)

Country	Max. age of children in detention	CAT, CEDAW, CRC, CCPR statement (direct excerpt cited)	Year	Reference
				MEX/CO/6). New York, UN, December 04, 2019
Moldova	3 years	*26. it is concerned, however, about (d) Children in prison with their mothers*	2017	United Nations Convention on the Rights of the Child (2017): Concluding observations on the combined fourth and fifth periodic reports of the Republic of Moldova. Committee on the Rights of the Child (Report No. CRC/C/MDA/CO/4–5). New York, UN, October 20, 2017
Mozambique	2 years	*41. (c) The reports of detention of women with young children and of sexual harassment and abuse against women in detention, including lesbian, bisexual and transgender women and intersex persons.*	2019	United Nations Convention on the Elimination of All Forms of Discrimination against Women (2019): Concluding observations on the combined third to fifth periodic reports of Mozambique. Committee on the Elimination of Discrimination against Women (Report No. CEDAW/C/MOZ/CO/3-5). New York, UN, July 30, 2019
Myanmar	4 years	*71. The Committee is deeply concerned that children detained in jails and prisons with their mothers are denied adequate health care and nutritious food, and their mothers are often denied assistance during childbirth. The Committee is also concerned about the absence, for these children, of everyday stimuli and educational material, which hampers their social and emotional development. The Committee is further concerned about numerous cases of lack of contact between detainees and their families, including their children.*	2012	United Nations Convention on the Rights of the Child (59th sess.: 2012): Consideration of reports submitted by States parties under article 44 of the Convention. Concluding observations: Myanmar. Committee on the Rights of the Child (Report No. CRC/C/MMR/CO/3-4). New York, UN, March 14, 2012
Nigeria	18 months	*19. [..] It is also concerned at reports of a lack of separation of juvenile inmates from adults and of convicted persons from remanded detainees, in addition to the detention of pregnant and breastfeeding women and persons with disabilities in general custodial facilities and without access to appropriate health services. [...]*	2021	United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (2021): Concluding observations in the absence of the initial report of Nigeria. Committee against Torture (Report No. CAT/C/NGA/COAR/1). New York, UN, December 21, 2021
Panama	House arrest as an alternative to (part of) a prison sentence for pregnant women and mothers until their children are 1 year old	*16. [...] The Committee is also concerned at reports that the prison administration does not sufficiently consider the special needs of persons with disabilities and women prisoners in areas such as medical care, accessibility, the maintenance of family ties, and services and facilities for pregnant women and women with children. [...]*	2017	United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (2017): Concluding observations on the fourth periodic report of Panama. Committee against Torture (Report No. CAT/C/PAN/CO/4). New York, UN, August 28, 2017
Paraguay	2 years	*26. The Committee takes note of the measures taken to prohibit corporal punishment of children living with their mothers in places of detention or in shelters [...]*	2011	United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (47th sess.: 2011): Consideration of reports submitted by States parties under article 19 of the Convention. Concluding observations of the Committee against Torture. Paraguay (Report No. CAT/C/PRY/CO/4–6). New York, UN, December 14, 2011
Peru	3 years	*24. […] The Committee takes note of the establishment in 2015 of a standing commission on gender mainstreaming*	2018	United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or

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Table 3 (*continued*)

Country	Max. age of children in detention	CAT, CEDAW, CRC, CCPR statement (direct excerpt cited)	Year	Reference
		in prison policies, but remains concerned by reports that the prison authorities do not give sufficient consideration to the special needs of women deprived of their liberty, especially in the case of pregnant women and women with children under the age of 3. […]		Punishment (2018): Concluding observations on the seventh periodic report of Peru. Committee against Torture (Report No. CAT/C/PER/CO/7). New York, UN, December 18, 2018
Qatar	2 years	*45. (c) The lack of information on the situation of migrant women, including pregnant women and women with children, who are detained in the Doha deportation detention centre; the number of complaints about violence, including sexual violence, brought by women migrant workers during the reporting period; and the number of investigations and prosecutions and the sentences imposed on perpetrators*	2019	United Nations Convention on the Elimination of All Forms of Discrimination against Women (2019): Concluding observations on the second periodic report of Qatar. Committee on the Elimination of Discrimination against Women (Report No. CEDAW/C/QAT/CO/2). New York, UN, July 30, 2019
Russian Federation	No children allowed in prison, but placed in baby homes on prison grounds.	*47. The Committee notes that children under the age of 4 who are placed in baby homes in the grounds of prisons can be visited by their mothers outside working hours, but it is concerned that no measures have been taken to adapt special wings in prisons where those children can live with their mothers. The Committee regrets that no information was provided by the State party as to whether the judiciary or prison services consider the placement of parents in institutions where children can assume their visiting rights or whether children are financially or otherwise assisted in that regard.*	2014	United Nations Convention on the Rights of the Child (2014): Concluding observations on the combined fourth and fifth periodic reports of the Russian Federation. Committee on the Rights of the Child (Report No. CRC/C/RUS/CO/4-5). New York, UN, February 25, 2014
		38. […] The Committee is concerned at reports of the equally poor conditions of detention for children who were born in prisons and the lack of access to adequate medical care and educational programmes for those children and mothers […]	2018	United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (2018): Concluding observations on the sixth periodic report of the Russian Federation. Committee against Torture (Report No. CAT/C/RUS/CO/6). New York, UN, August 28, 2018
Rwanda	5 years	*19. […] The Committee also expresses concern at reports that a high number of mothers are detained with their babies in extremely difficult conditions (arts. 2, 11 and 16).*	2012	United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (48th sess.: 2012): Consideration of reports submitted by States parties under article 19 of the Convention. Concluding observations of the Committee against Torture. Rwanda (Report No. CAT/C/RWA/CO/1). New York, UN, June 26, 2012
Samoa	1 year	*38. The Committee is concerned that detention facilities are insufficiently equipped for the needs of incarcerated mothers with babies.*	2016	United Nations Convention on the Rights of the Child (2016): Concluding observations on the combined second to fourth periodic reports of Samoa. Committee on the Rights of the Child (Report No. CRC/C/WSM/CO/2-4). New York, UN, July 12, 2016
South Sudan	2 years	*48. The Committee is alarmed that women and children continue to be sentenced to death, including by customary courts and in the absence of fair trial guarantees, in contravention of*	2021	United Nations Convention on the Elimination of All Forms of Discrimination against Women (2021b): Concluding observations on the initial report of South Sudan.

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Table 3 (*continued*)

Country	Max. age of children in detention	CAT, CEDAW, CRC, CCPR statement (direct excerpt cited)	Year	Reference
		the 2013 moratorium on the death penalty. It is further concerned about reports that many women and girls in detention are not systematically separated from male detainees, are subjected to neglect, ill-treatment and abuse, and lack adequate access to medical care, including for their young children.		Committee on the Elimination of Discrimination against Women (Report No. CEDAW/C/SSD/CO/1). New York, UN, November 23, 2021
Switzerland	3 years	*52. While welcoming the establishment in the canton of Zurich of units where an incarcerated mother and her child can be accommodated together, the Committee is concerned about the lack of data on the number and situation of children who have a parent in prison, or of information on whether the continued relationship of a child with his or her imprisoned parent is sufficiently supported.*	2015	United Nations Convention on the Rights of the Child (2015): Concluding observations on the combined second to fourth periodic reports of Switzerland. Committee on the Rights of the Child (Report No. CRC/C/CHE/CO/2-4). New York, UN, February 26, 2015
Thailand	3 years	*8. The Committee urges the State party to take all necessary measures to address those recommendations contained in the concluding observations on the second periodic report that have not yet been, or not sufficiently, implemented, including on such issues as data collection, non-discrimination, nationality, protection of privacy, corporal punishment in the home, alternative care, children in prison with their mothers, adolescent health, refugee and asylum-seeking children, children of migrant workers, child labour and juvenile justice. The Committee also urges the State party to provide adequate follow-up to the recommendations contained in the present concluding observations.*	2012	United Nations Convention on the Rights of the Child (59th sess.: 2012): Consideration of reports submitted by States parties under article 44 of the Convention. Concluding observations: Thailand. Committee on the Rights of the Child (Report No. CRC/C/THA/CO/3-4). New York, UN, February 17, 2012
		44. The Committee expresses concern that the State party has one of the highest rates of women in detention in the world. It is also concerned that, owing to the limited number of female prisons, women are often incarcerated far from their families and in overcrowded prisons with conditions that fail to meet international standards, in particular with regard to pregnant women and women detained with their children.	2017	United Nations Convention on the Elimination of All Forms of Discrimination against Women (2017): Concluding observations on the combined sixth and seventh periodic reports of Thailand. Committee on the Elimination of Discrimination against Women (Report No. CEDAW/C/THA/CO/6-7). New York, UN, July 24, 2017
Tonga	If female prisoner gives birth during imprisonment or is breast feeding	*43. The Committee is concerned about the situation of children of imprisoned parents or of mothers facing imprisonment, including with respect to the lack of childcare services.*	2019	United Nations Convention on the Rights of the Child (2019): Concluding observations on the initial report of Tonga. Committee on the Rights of the Child (Report No. CRC/C/TON/CO/1). New York, UN, July 02, 2019
United Arab Emirates	3 years	*51. The Committee notes the provisions related to children living with their mothers in detention facilities, as well as the measures taken with regard to children whose parents are imprisoned or executed. The Committee is concerned, however, about: (a) The impact on children when the death penalty is imposed on their parents and the lack of attention paid to providing*	2015	United Nations Convention on the Rights of the Child (2015): Concluding observations on the second periodic report of the United Arab Emirates. Committee on the Rights of the Child (Report No. CRC/C/ARE/CO/2). New York, UN, October 30, 2015

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Table 3 (*continued*)

Country	Max. age of children in detention	CAT, CEDAW, CRC, CCPR statement (direct excerpt cited)	Year	Reference
		psychological support for such children; (b) Instances in which parents are sentenced to prison for failing to pay a debt; (c) The lack of human resources and other support necessary for children living in prison with their mothers.		
Uruguay	4 years, max. Can be extended to 8 years	*41. The Committee is concerned about the inadequacy of prison facilities for children living in prisons with their mothers and about the non-application of article 8 of Act 17.897 on probation, which allows for women who would otherwise be in detention to be placed under house arrest during the last trimester of pregnancy and the first three months of breastfeeding.*	2015	United Nations Convention on the Rights of the Child (2015): Concluding observations on the combined third to fifth periodic reports of Uruguay. Committee on the Rights of the Child (Report No. CRC/C/URY/CO/3-5). New York, UN, March 05, 2015
		43. The Committee is concerned about the inadequate conditions for women detained with their children and the process of relocation of detained mothers to "Unit 5" of the National Rehabilitation Institute in the city of Montevideo, resulting in that group of women facing vulnerable conditions. It is also concerned about reports of women being incarcerated in facilities designed for men where the majority of penitentiary officials are also men.	2016	United Nations Convention on the Elimination of All Forms of Discrimination against Women (2016): Concluding observations on the combined eighth and ninth periodic reports of Uruguay. Committee on the Elimination of Discrimination against Women (Report No. CEDAW/C/URY/CO/8-9). New York, UN, July 25, 2016
Yemen	2 years	*45. The Committee is concerned that women detainees are deprived of their basic needs, including access to health care, food and hygiene, including for their accompanying children, and are subjected to overcrowding, ill-treatment and torture*	2021	United Nations Convention on the Elimination of All Forms of Discrimination against Women (2021): Concluding observations on the combined seventh and eighth periodic reports of Yemen. Committee on the Elimination of Discrimination against Women (Report No. CEDAW/C/YEM/CO/7-8). New York, UN, November 24, 2021
Zimbabwe	2 years	*54. The Committee is seriously concerned about reports of a serious lack of nutrition and poor sanitary conditions for infants and children sharing prison cells with their mothers who are awaiting trial or serving sentences for committing various offences*	2016	United Nations Convention on the Rights of the Child (2016): Concluding observations on the second periodic report of Zimbabwe. Committee on the Rights of the Child (Report No. CRC/C/ZWE/CO/2). New York, UN, March 07, 2016
		45. It is further concerned about reports of the detention of women with young children and of sexual harassment and abuse against women in detention.	2020	United Nations Convention on the Elimination of All Forms of Discrimination against Women (2020): Concluding observations on the sixth periodic report of Zimbabwe. Committee on the Elimination of Discrimination against Women (Report No. CEDAW/C/ZWE/CO/6). New York, UN, March 10, 2020

where the treaty body recommends that further action needs to be taken by the State. We assessed them against the UN normative minimum standards of care in prisons applicable to children with detained mothers.

3. Methodology

A comprehensive global search was conducted on the UN Human Rights treaty data base of all published treaty body (Concluding Observations) reports, confined to the Committees of the CRC, CEDAW, CAT and ICCPR since 2010. The search yielded 905 (316 CRC,

Table 4
Identified violations of the Nelson Mandela Rules and the Bangkok Rules explicit to children detained with their mothers in prison.

Nelson Mandela Rules	Violated by
Rule 28 *In women's prisons, there shall be special accommodation for all necessary prenatal and postnatal care and treatment. Arrangements shall be made wherever practicable for children to be born in a hospital outside the prison. If a child is born in prison, this fact shall not be mentioned in the birth certificate.*	Bahrain, Kenya
Rule 29: *(1) A decision to allow a child to stay with his or her parent in prison shall be based on the best interests of the child concerned. Where children are allowed to remain in prison with a parent, provision shall be made for: (a) Internal or external childcare facilities staffed by qualified persons, where the children shall be placed when they are not in the care of their parent; (b) Child-specific health-care services, including health screenings upon admission and ongoing monitoring of their development by specialists. (2) Children in prison with a parent shall never be treated as prisoners.*	Tonga; Lesotho; Samoa; Bangladesh; Iran; United Arab Emirate; Brazil; Iraq; Myanmar; Cambodia; South Sudan; Yemen; Honduras; Russian Federation; Panama, India
Rule 44 *2. The imposition of solitary confinement should be prohibited in the case of prisoners with mental or physical disabilities when their conditions would be exacerbated by such measures. The prohibition of the use of solitary confinement and similar measures in cases involving women and children, as referred to in other United Nations standards and norms in crime prevention and criminal justice, 28 continues to apply*	–
Bangkok Rule	**Violated by**
Rule 2 *1. Adequate attention shall be paid to the admission procedures for women and children, due to their particular vulnerability at this time. Newly arrived women prisoners shall be provided with facilities to contact their relatives; access to legal advice; information about prison rules and regulations, the prison regime and where to seek help when in need in a language that they understand; and, in the case of foreign nationals, access to consular representatives as well.*	
Rule 3 *1. The number and personal details of the children of a woman being admitted to prison shall be recorded at the time of admission. The records shall include, without prejudicing the rights of the mother, at least the names of the children, their ages and, if not accompanying the mother, their location and custody or guardianship status. 2. All information relating to the children's identity shall be kept confidential, and the use of such information shall always comply with the requirement to take into account the best interests of the children.*	Bahrain; Kenya
Rule 9 *If the woman prisoner is accompanied by a child, that child shall also undergo health screening, preferably by a child health specialist, to determine any treatment and medical needs. Suitable health care, at least equivalent to that in the community, shall be provided.*	Tonga; Samoa; Iran; Brazil; Myanmar; Cambodia; South Sudan; Yemen; Honduras; Russia; Panama
Rule 21 *Prison staff shall demonstrate competence, professionalism and sensitivity and shall preserve respect and dignity when searching both children in prison with their mother and children visiting prisoners*	–
Rule 28 *Visits involving children shall take place in an environment that is conducive to a positive visiting experience, including with regard to staff attitudes, and shall allow open contact between mother and child. Visits involving extended contact with children should be encouraged, where possible.*	–
Rule 33 *3. Where children are allowed to stay with their mothers in prison, awareness-raising on child development and basic training on the health care of children shall also be provided to prison staff, in order for them to respond appropriately in times of need and emergencies.*	–
Rule 48 *1. Pregnant or breastfeeding women prisoners shall receive advice on their health and diet under a programme to be drawn up and monitored by a qualified health practitioner. Adequate and timely food, a healthy environment and regular exercise opportunities shall be provided free of charge for pregnant women, babies, children and breastfeeding mothers.*	Bangladesh; Brazil; Iran; Iraq; Uruguay; Myanmar; Cambodia; Eritrea; Zimbabwe; Yemen; Guatemala; Honduras; Burkina Faso; Russian Federation
Rule 49 *Decisions to allow children to stay with their mothers in prison shall be based on the best interests of the children. Children in prison with their mothers shall never be treated as prisoners.*	Iraq; South Sudan
Rule 51 *1. Children living with their mothers in prison shall be provided with ongoing health-care services and their development shall be monitored by specialists, in collaboration with community health services. 2. The environment provided for such children's upbringing shall be as close as possible to that of a child outside prison.*	Tonga; Cambodia; Samoa; Bangladesh; Iran; Brazil; Dominican Republic; Myanmar; South Sudan; Yemen; Honduras; Russian Federation; Panama
Rule 52 *1. Decisions as to when a child is to be separated from its mother shall be based on individual assessments and the best interests of the child within the scope of relevant national laws. 2. The removal of the child from prison shall be undertaken with sensitivity, only when alternative care arrangements for the child have been identified and, in the case of foreign-national prisoners, in consultation with consular officials.*	Russian Federation; Italy; Burundi

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Table 4 (*continued*)

Nelson Mandela Rules	Violated by
Rule 53 *2. Where a child living with a non-resident foreign-national woman prisoner is to be removed from prison, consideration should be given to relocation of the child to its home country, taking into account the best interests of the child and in consultation with the mother.*	Qatar
Rule 60 *Appropriate resources shall be made available to devise suitable alternatives for women offenders in order to combine non-custodial measures with interventions to address the most common problems leading to women's contact with the criminal justice system. These may include therapeutic courses and counselling for victims of domestic violence and sexual abuse; suitable treatment for those with mental disability; and educational and training programmes to improve employment prospects. Such programmes shall take account of the need to provide care for children and women-only services.*	Lesotho; United Arab Emirate; Uruguay; Mauritius; India; Mexico; Bolivia
Rule 64 *Non-custodial sentences for pregnant women and women with dependent children shall be preferred where possible and appropriate, with custodial sentences being considered when the offence is serious or violent or the woman represents a continuing danger, and after taking into account the best interests of the child or children, while ensuring that appropriate provision has been made for the care of such children.*	Lesotho; Uruguay; Mauritius; India; Mexico; Bolivia
Rule 68 *Efforts shall be made to organize and promote research on the number of children affected by their mothers' confrontation with the criminal justice system, and imprisonment in particular, and the impact of this on the children, in order to contribute to policy formulation and programme development, taking into account the best interests of the children.*	Dominican Republic; Switzerland; Thailand; Qatar; Italy
Rule 69 *Efforts shall be made to review, evaluate and make public periodically the trends, problems and factors associated with offending behaviour in women and the effectiveness in responding to the social reintegration needs of women offenders, as well as their children, in order to reduce the stigmatization and negative impact of those women's confrontation with the criminal justice system on them.*	–
Rule 70 *Publication and dissemination of research and good practice examples shall form comprehensive elements of policies that aim to improve the outcomes and the fairness to women and their children of criminal justice responses to women offenders*	Mexico

246 CEDAW, 173 CAT and 170 CCPR) reports promulgated since 2010-mid 2022, and were subsequently carefully screened using a range of search terms as illustrated in Table 2.

Each Committee report was then examined, by focusing on scrutinising the report and extant reference to standards of detention, particularly focused on the situation of children detained with their mothers in that country. We focused on the requirement to prioritise non-custodial measures for women with children, and the explicit rights of *"living or born"* children in detention and normative standards of care, beyond the best interest of the child principle. We excluded references to pregnant women and the unborn child, juvenile detainees in conflict with the law and the children of prisoners living outside of prison. The final data set consisted of 51 reports (24 CRC, 13 CEDAW, 12 CAT, 2 CCPR) (Table 2) which contained relevant reference to children living in detention with their mothers. Excerpts were collated and tabularised. Each were subsequently benchmarked against the pertinent normative rules applicable to children living in detention settings as contained in the UN Mandela Rules (28,29,44) and Bangkok Rules (2,3,9,21,28,33,48,49,51-53,60,64,68-70). [Supplemental file of Rules uploaded]. Table 3 presents the identified country, the maximum age to which a child is permitted to stay in prison with their mother, and the direct citation of the excerpt from the UN treaty committee *Concluding Observation* report. We present the assessment in a series of themes with illustrative quotes from Committee reports.

4. Results

The final data set of 51 UN Committee reports documented direct violations of the *Mandela* and *Bangkok Rules* in 43 countries, each with a diverse range of durations of time permitting children to stay with incarcerated mothers (6 months to 8 years, with Eritrea observing no limit). A broad range of countries are represented, the majority of which are located in Africa (Benin, Burkina Faso, Burundi, Eritrea, Ethiopia, Kenya, Lesotho, Mali, Mauritius, Mozambique, Nigeria, Rwanda, South Sudan, Zimbabwe). The remainder are six countries in the Middle East (Bahrain, Iran, Iraq, Qatar, United Arab Emirates, Yemen); six in Asia (Bangladesh, India, Kyrgyzstan, Myanmar, Thailand, Cambodia); two in Oceania (Samoa, Tonga), three in Central America (Guatemala, Honduras, Panama), six in South America (Bolivia, Brazil, Dominican Republic, Peru, Paraguay, Uruguay), one in North America (Mexico), and three in the Council of Europe region (Italy, Moldova, Switzerland). Belarus and the Russian Federation are also included. All with exception of one refer to prison settings, with one report mentioning Committee concern around the situation of children with mothers in immigration detention (CEDAW, 2019a; Qatar).

5. Due process and prioritisation of "Best interest of the Child"

Table 4 reveals a broad range of failures of states parties to prioritise the best interests of the child, and in their obligation to protect and uphold the basic human rights of children detained with their mothers in the 43 countries. 16 countries are in breach of the prioritisation of the *"best interests of the child"* principle when deciding whether the child can stay with their mother in detention, the provision of child care facilities and appropriate paediatric care, and that these children shall never be treated as prisoners (Tonga, Lesotho, Samoa, Bangladesh, Iran, United Arab Emirates, Brazil, Iraq, Myanmar, Cambodia, South Sudan, Yemen, Honduras, Russian Federation, Panama and India) (contra Mandela Rule 29). Examples include the following. The 2014 CRC Committee reports on India and Mauritius in 2015 both expressed concern that *"the best interests of the child are not always taken into account, including when sentencing parents."* (CRC, 2014; CRC, 2015a). In 2018 the CRC Committee documented *"that the best interests of children are not taken into consideration during the sentencing of caregivers"* (CRC, 2018) in Lesotho*."* Several countries are in direct violation of the *Bangkok Rules* 64 to prioritise non-custodial measures when taking into consideration of the *"best interests of the child"* (Lesotho, Uruguay, Mauritius, India, Mexico and Bolivia). For example in Mexico both the CRC (2015) and the CCPR (2019) Committees are concerned about the length of time the child remains in prison, and the lack of alternatives to detention ("*the excessive length of time that children spend in prison with their mothers and the lack of guidelines regulating this area [arts. 6,7, 9 and 10])."* (CRC, 2015b; CCPR, 2019). Lengthy pre-trial detention of mothers with infants was mentioned in several, with the 2013 CEDAW Committee report on Benin *"expresses serious concern about the […]length of pretrial detention and the lack of measures aimed at facilitating women's access to justice."* (CEDAW, 2013).

6. Safe accommodation of children in detention

Many countries were observed by the UN Committees to fail in providing safe and adequate accommodation for children living with their mothers in prison and protecting them from exposure to trauma, neglect and abuse. Iraq ("*concerned about cases of children staying in prison for several weeks after the execution of their mothers"*) (CRC, 2015c) and South Sudan ("*subjected to neglect, ill-treatment and abuse, and lack adequate access to medical care, including for their young children"*) (CEDAW, 2021a) were documented as severely breaching the fundamental rights of children (contra Bangkok Rule 49). The 2011 CAT Report on Paraguay refers to *"the measures taken to prohibit corporal punishment of children living with their mothers in places of detention or in shelters […]"* (CAT, 2011). Many reports however observed the exposure of women and their children to official and interpersonal violence, and indicated concern for the lack of segregation from male inmates and predominance of male prison staff. For example in Zimbabwe in 2020, the CEDAW Committee was "*concerned about reports of the detention of women with young children and of sexual harassment and abuse against women in detention"* (CEDAW, 2020). Similar was recorded in 2016 in Uruguay also by the CEDAW Committee; "*concerned about women being incarcerated in facilities designed for men where the majority of penitentiary officials are also men"* (CEDAW, 2016a). The lack of segregation of male and female detainees and the heightened risk of physical and sexual abuse of children was also explicit in the Cambodian CRC report of 2011 ("*The Committee is further seriously concerned about cases of children being physically abused by prison guards and other prisoners"*) (CRC, 2011a) and referred to in 2016 CEDAW Committee report on Mali (CEDAW, 2016b), and 2021 CEDAW Committee report on South Sudan (CEDAW, 2021b). The 2017 CAT Committee report on Italy is concerned around the lack of ability for those affected to report and disclose prior ill-treatment, including at initial medical screening on entry "*notes that prison medical personnel have an obligation to document and report any evidence of maltreatment observed during the initial medical examination of detainees. It regrets, however, that the State party did not indicate the number of cases reported by prison medical personnel as potential cases of torture or ill-treatment, during the period under review […]"* (CAT, 2017a).

7. Prison congestion and poor detention conditions conducive to ill-health

Congested and unhygienic prison conditions ill-suited to the needs of babies and children is evident in many Committee reports. In 2013, in Bolivia, where children can stay up to 6 years with mothers in prison, the CCPR Committee was "*concerned about the large number of children now living in prison with their families"* (CCPR, 2013). Similar concerns were documented in 2016 by the CEDAW Committee in Burundi; *"concerned at the number of women detained with infants and young children"* (CEDAW, 2016c). In 2018, severe lack of space was documented by the CAT Committee in Belarus; "*at least 4 m^2 (for pregnant women and women with children) fall short of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) and other international standards […]"* (CAT, 2018a). The 2017 CEDAW Committee reported on Thailand and; "*expresses concern that the State party has one of the highest rates of women in detention in the world. It is also concerned that, owing to the limited number of female prisons, women are often incarcerated far from their families and in overcrowded prisons with conditions that fail to meet international standards, in particular with regard to pregnant women and women detained with their children"* (CEDAW, 2017a).

14 countries violated Bangkok Rule 48 with regard to provision of adequate food, hygiene and sanitation, access to exercise and a general healthy environment for breastfeeding mothers and children (Bangladesh, Brazil, Iran, Iraq, Uruguay, Myanmar, Cambodia, Eritrea, Zimbabwe, Yemen, Guatemala, Honduras, Burkina Faso and Russian Federation). For example in Iraq, the 2015 CRC Committee observed; *"most prisons for women lack a nursery, although many children live with their mothers in prison, and about the various cases of sickness affecting those children because of deficient sanitation and general care"* (CRC, 2015c). Both the CRC (2011) and the CEDAW (2019) Committees expressed substantial concern around the conditions where children were housed (insufficient food, safe drinking water, mothers sharing rations with children, physical abuse, lack of protection against communicable disease, insufficient ventilation and extreme heat) in Cambodia (CRC, 2011a; CEDAW, 2019b). The 2015 CRC Committee report on Eritrea indicated that; *"The*

Committee is concerned that: (a) The living conditions for young children in detention facilities with their mothers are poor; (b) Lactating mothers are having difficulties in providing proper nutrition for their infants owing to the poor quality of food provided in the detention facilities" (CRC, 2015e). In 2015, the CRC Committee documented its concern that Brazilian legislation governing minimum assistance to incarcerated mothers with children was not implemented sufficiently and observed; *"is seriously concerned about overcrowding and poor sanitation facilities in prisons […] for incarcerated mothers and their children"* (CRC, 2015f). Similarly the 2015 CRC Committee documented in Bangladesh; *"its concern about the situation of children in prison with their mothers, including with respect to the lack of childcare services and deficiencies in sanitation"* (CRC, 2015g). In Zimbabwe the CRC Committee (2016a) observed; "*The Committee is seriously concerned about reports of a serious lack of nutrition and poor sanitary conditions for infants and children sharing prison cells with their mothers who are awaiting trial or serving sentences for committing various offences"* (CRC, 2016a).

8. Access to child-appropriate healthcare equivalent to that in the community

Many countries were also neglectful of the developmental needs of children, and fail to uphold their right to child-appropriate health care in detention (Tonga, Cambodia, Samoa, Bangladesh, Iran, Brazil, Dominican Republic, Myanmar, Cambodia, South Sudan, Yemen, Honduras, Russian Federation and Panama) (contra Bangkok Rule 51). The 2016 CRC report on Iran illustrated the link between prison conditions and development of ill health: *"The Committee is concerned that children, in particular Baha'i children, living with their mothers in prison have reportedly developed medical problems due to poor living conditions that they are subjected to in prisons"* (CRC, 2015b). 10 countries were documented to violate Bangkok Rule 9 (paediatric health screening and equivalence of children's health care to that in the community) (Tonga, Samoa, Iran, Brazil, Myanmar, Cambodia, South Sudan, Yemen, Honduras, Russian Federation and Panama). In 2018, the CAT Committee reported on the Russian Federation; *"The Committee is concerned at reports of the equally poor conditions of detention for children who were born in prisons and the lack of access to adequate medical care and educational programmes for those children and mothers […]"* (CAT, 2018b). In 2021 conditions had not improved with the CEDAW Committee reporting on Yemen; "*concern that women detainees are deprived of their basic needs, including access to health care, food and hygiene, including for their accompanying children, and are subjected to overcrowding, ill-treatment and torture"* (CEDAW, 2021c) and the CAT Committee reporting on Kyrgyzstan; "*concerned at the appalling conditions at women's detention facilities and the lack of adequate medical care for women detainees, including those who are pregnant and mothers with children"* (CAT, 2021).

9. Transparency of data on children in prison

Several Committee reports expressed concern around the lack of routine health surveillance and lack of data availability, needs assessment and evidence informed policy on the situation of children with a mother in contact with the criminal justice system, which were deemed insufficient in the Dominican Republic; Switzerland; Thailand; Qatar, Italy and Mexico (Bangkok Rule 68 and 70). Two CRC Committee reports also mention difficulties in securing child identity documents. For example in 2019 in Bahrain; *"Reports of barriers faced by children of mothers in detention in obtaining a birth certificate or national identity card' are mentioned* (CRC, 2019) and in 2016 in Kenya reported; *"children with mothers in custody face difficulty in obtaining birth registration"*(CRC, 2016c) (contra *Bangkok Rule* 3 and *Mandela Rule* 28).

Lastly, and on a more positive note, we found no Committee concerns which would indicate a violation of the Bangkok Rules 2 (admission procedures), 21 (prison staff competence, professionality, and sensitivity toward children in prison with their mother), 28 (visitation experiences), 33 (provision of staff awareness-raising on child development and basic training on the health care of children), 53 (deportation of foreign national children) and 69 (evaluation and reinsertion supports) and Mandela Rule 44 (solitary confinement of children).

10. Discussion

This global socio legal assessment of States parties progress in upholding the rights of the child since adoption of the Bangkok Rules reveals continued difficulties for some countries to fully uphold the rights of the child, when detained with their mother. Whilst it is encouraging to see that out of 905 UN Committee Reports only 51 showed evidence of clear Committee concern and violation of the rights of the children since 2010, we suspect that further investigation by independent inspections by civil society, UN treaty body committees and national preventive mechanisms are warranted. Limitations of our results centre not on the stringent approach taken by our team to carefully scrutinise these UN reports, nor on the quality of the Concluding Observations by respective Treaty Bodies themselves. The continued invisible nature of women, babies and infants in prisons in many countries, particularly those in LMICS however contribute to a realistic likelihood of under estimation or under evaluation of the respective violations of the Mandela and Bangkok Rules. We report on the relative lack of attention toward assessing the situation of women in prison elsewhere (Van Hout et al., 2021). Great variance was observed in the 43 countries in terms of the duration of time that children are permitted to live with their mother, ranging from 6 months to 8 years, and with Eritrea observing no limit. Many UN Committee reports expressed concern around the number of children living in the *'prison nursery'* context, and the lack of due process observed in decision-making around application of non-custodial measures; and in the care of children within the prison setting itself.

We found violations of the rights of the child in 43 countries, as documented in the extant UN Committee reports, in that they fail in their obligation to uphold the best interests of the child principles as provided for in Article 3 of the CRC (UN, 1989) and in General Comment 10 by advocating that '*best interests of the child*' supersedes punishment, correction or prevention (UN CRC, 2007). In many UN Committee reports it is clear to see the lack of attention devoted to protection of the child from a broad range of physical and

psychological harms, and in many, the evidence that children are living with mothers in prison environments (and not *as **close as possible to that of a child outside prison***), and that they are treated as '*de facto*' prisoner, in direct violation of the Bangkok Rules stating that *"children should **never be treated as prisoners**"* (UN, 2010b). Difficulties in securing child identity documents are observed in Bahrain and Kenya. Many violations in the care of children centred on not providing sufficient space, safety from abuse and violence, adequate food and clean water, sanitation and hygiene and access to exercise, and access to child-health care and are in clear breach of the UN normative standards of care in prisons (Mandela and Bangkok Rules) and the UN Guidelines for the Alternative Care of Children (UN, 2010a) mandating adequate care and protection. Global and regional reviews have maintained concerns remain around exposure of detained women to interpersonal custodial violence (Van Hout et al., 2021).

There is a wealth of research which underscores concern around the complex health and support needs of pregnant women in prison (Stewart et al., 2020; Alirezaei & Latifnejad Roudsari, 2022; Kirubarajan et al., 2022) and the lack of sufficient access to health care for children in prison (Van den Bergh et al., 2011; Van Hout & Mhlanga-Gunda, 2018; Van Hout & Mhlanga-Gunda, 2019). General Comment No. 14 of the UN Committee on Economic, Social and Cultural Rights (CESCR) (UN CESCR, 2000) clearly provides States are (at the very least) required to meet a threshold of a *"core minimum"* of social and economic rights, including the right to health, and that prisoners are entitled to the same *"core minimum"* health rights as other citizens. The UN CCPR (2018) in its General Comment No 36 on the Right to Life has stated that; *"States parties may not rely on lack of financial resources or other logistical problems to reduce this responsibility."* Some reports were cognisant of the exposure of children to communicable disease and other health hazards related to sanitation and poor nutrition in prison. In May 2017, the UN Commission on Crime Prevention and Criminal Justice (CCPCJ), adopted a resolution (UNODC, 2017) requesting Member States in close cooperation with the United Nations Office on Drugs and Crime (UNODC) and other UN agencies and stakeholders, to increase their capacity to eliminate mother-to-child transmission of HIV in prisons.

Despite hailing the progressive ACRWC, the majority of countries represented are in Africa. Indeed, scholars argue that the generalised formulation of Article 30(d) of the ACRWC warrants amendment to further include the flexible and individualised dimensions regarding decision making around children in prison with mothers as outlined in the General Comment No 1 (Miamingi, 2020). Rights obligations of people in detention are contained in the African Charter on Human and Peoples' Rights (ACHPR) (OAU, 1981), particularly in Article 16 regarding State obligation to assume responsibility for the care of those in its custody, Article 5 regarding prisoner's right to dignity and freedom from cruel, inhumane or degrading treatment, and in the soft law Robben Island Guidelines (ACoHPR, 2008) and the Kampala declaration on prison conditions. Challenges navigated by ill-resources prison systems in Africa are evident and reflected in our assessment. The Special Rapporteur on Prisons, Conditions of Detention and Policing in Africa has documented the immense difficulties in achieving minimum standards of care in its prisons (ACoHPR, 2012). The Committee for the Prevention of Torture in Africa has also indicated concern with regard to the state of prisons in Africa. Hence the majority representation of African member states is unsurprising given the deplorable conditions, lack of prison resourcing allocated to children in African prisons and reliance on backfilling by faith based and non-governmental organisations to provide basic supplies of soap, clothing, paediatric medicines and baby milk (Van Hout & Mhlanga-Gunda, 2018, 2019).

Countries in the Middle East (Bahrain, Iran, Iraq, Qatar, United Arab Emirates, Yemen), Asia (Bangladesh, India, Kyrgyzstan, Myanmar, Thailand, Cambodia); Oceania (Samoa, Tonga), Central America (Guatemala, Honduras, Panama), South America (Bolivia, Brazil, Dominican Republic, Peru, Paraguay, Uruguay), North America (Mexico), the Russian Federation and Moldova however all illustrate similar violations in the best interests of the child (access to justice of the mother, lengthy pre-trial detention, overcrowded and unsanitary prison conditions, male prison staff, lack of sex-segregation, lack of access to healthcare). Of interest is that European member states (Italy, Moldova and Switzerland) show evidence for violations of the rights of the child in prison in terms of conditions of housing, lack of disclosure and of reporting, despite the European parliament mandating that *"deprivation of liberty should be regarded as a **sanction of last resort** for mothers"*(Council of Europe, 2001) and that the Charter of Fundamental Rights of the European Union (EU) (EU, 2012) explicitly refers to the rights of the child under Articles 3 and 24(1)(3).

The lack of available data on children's situation in prison is concerning, including the lack of transparent prison system monitoring and surveillance, and disclosure information. The United Nations Office on Drugs and Crime (UNODC) strategies addressing the global prison crisis also do not refer to these children, instead only referring to juveniles in conflict with the law. It is a completely neglected field. UN Treaty Committees are encouraged to include an explicit focus on children when inspecting and monitoring state prisons, and to encourage differentiation between adults and children in the national preventive mechanisms (for example under OP CAT) (Penal Reform International, 2011). The UN CRC General Comment No.10 provides that; *"Independent and qualified inspectors should be empowered to conduct inspections on a regular basis and to undertake unannounced inspections on their own initiative; they should place special emphasis on holding conversations with children in the facilities in a confidential setting."*

Lastly, we are cognisant that our global assessment included UN Committee reports promulgated during COVID-19 timeframes originating from South Sudan, Yemen, Kyrgyzstan and Nigeria in 2021, and Zimbabwe in 2020. Conditions for children as documented in these reports are deplorable. Despite UN agencies call for the release of vulnerable prisoners, including children during those years (Alliance for Child Protection in Humanitarian Action, 2020), only a quarter of COVID-19 prison release mechanisms included women in their release criteria those who were pregnant, breastfeeding or with infants, with implementation less effective and in many cases not transparent in many countries (DLA Piper, 2021). There is little information worldwide to what extent children benefited from the COVID-19 prison releases and amnesty schemes (Penal Reform International, 2021; Van Hout, 2020). Extant available data from UNICEF in December 2020, has however reported that in excess of 11,600 children were released from 17 countries *via* employment of non-custodial measures and suspension of new committals (UNICEF, 2021).

11. Conclusion

People in prison and other closed settings remain invisible in the Sustainable Development Goals (SDGs) (Ismail et al., 2021). Children, often new-borns and infants living with their mother during a custodial sentence are largely ignored in the policy. The debate around children living in *'gentler, kinder cages'* (Crewe, 2020) is not illuminated in our socio-legal assessment. Despite the plethora of human rights frameworks promising to protect and uphold the rights of children in prison settings, there is no consensus around age limits of children living in prisons with their mothers, nor is there consistency in prison system treatment of this very vulnerable often invisible group of children (Crewe, 2020). Our global assessment underscores the need for continued debate and re-thinking around the custodial sentencing of mothers in many countries, and the imperatives for continued advocacy to support the fullest possible adoption of the Mandela and Bangkok Rules by duty bearers to protect the rights of women and address the needs of children detained with their mothers. Access to prisons by national preventive mechanisms, researchers and child development specialists are to be encouraged, along with the capacity building of prison systems to conduct routine health and child development surveillance and interventions. Continued academic interest in this area of children's rights, and prison health is to be encouraged. We recognise the access to prisons by researchers, particularly in LMICs is fraught with difficulties (Mhlanga-Gunda et al., 2020). Let us however commit to the mantra *'leave no-one behind'* when considering the best interests of the child whose mother is in conflict with the law.

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References

African Commission on Human and Peoples' Rights (ACoHPR). (2008). *The Robbin Island guidelines resolution on guidelines and measures for the prohibition and prevention of torture, cruel, inhuman or degrading treatment or punishment in Africa*. The Gambia: African Commission on Human and Peoples' Rights.

African Commission on Human and Peoples' Rights (ACoHPR). (2012). *Special rapporteur on prisons, conditions of detention and policing in Africa*. The Gambia: African Commission on Human and Peoples' Rights.

African Committee of Experts on the Rights and Welfare of the Child (ACERWC). (2013). General comment no. 1 on Article 30 of the ACRWC: "Children of Incarcerated and Imprisoned Parents and Primary Caregivers", 8 November 2013. Available at https://www.refworld.org/docid/545b49844.html. (Accessed 18 April 2022).

Alirezaei, S., & Latifnejad Roudsari, R. (2022). The needs of incarcerated pregnant women: A systematic review of literature. *International Journal of Community based Nursing and Midwifery, 10*(1), 2–17. https://doi.org/10.30476/IJCBNM.2021.89508.1613

Alliance for Child Protection in Humanitarian Action. (2020). *Technical note: Protection of children during the Coronavirus Pandemic .UNODC, WHO, UNAIDS and OHCHR joint statement on COVID-19 in prisons and other closed settings*. 13 May 2020. Available at. WHO www.who.int/news/item/13-05-2020-unodc-who-unaids-andohchr-joint-statement-on-covid-19-in-prisonsand-other-closed-settings. (Accessed 17 April 2022).

Bauer, E. (2018). Infant inmates: An analysis of international policy on children accompanying parents to prison. *Michigan State International Law Review, 27*(1), 95–127.

Carlson, J. R. (2018). Prison nurseries: A way to reduce recidivism. *The Prison Journal, 98*(6), 760–775.

Cheruiyot, J. K. (2019). *An assessment of the challenges of children in prison with their mothers: A case of Langata women maximum prison*. Available at. Daystar University (School of Human & Social Sciences) and African Institute of Children Studies http://repository.daystar.ac.ke/xmlui/handle/123456789/3013. (Accessed 17 April 2022).

Council of Europe. (2001). Mothers and babies in prison—Parliamentary Assembly Recommendation 1469 (2000) Draft reply—Council of Europe—Committee of Ministers', Ministers' Deputies—Decisions 740/10.2 (7 February 2001). Available at https://rm.coe.int/09000016804e4abe. (Accessed 21 April 2020).

Crewe, H. (2020). The usefulness of therapeutic jurisprudence for re-thinking babies in prison Available. or http://dx.doi.org/10.2139/ssrn.3748405 https://ssrn.com/abstract=3748405. (Accessed 17 April 2022).

DLA Piper. (2021). A global analysis of prisoner releases in response to COVID-19, March 2021. p. 27. Available at https://www.dlapiper.com/~/media/files/insights/publications/2021/03/dla-piper-prison-population-during-covid-19.pdf?la=en&hash=F5C1EBBA0D3D86BDDA58FAC87DB9EF3CAE3815DF#:~:text=The%20study%20concluded%20that%20at,between%20March%20and%20July%202020. (Accessed 17 April 2022).

Easterling, B. A., Feldmeyer, B., & Presser, L. (2019). Narrating mother identities from prison. *Feminist Criminology, 14*(5), 519–539.

European Union (EU). (2012). Charter of fundamental rights of the European Union, 26 October 2012, 2012/C 326/02. Available at: https://www.refworld.org/docid/3ae6b3b70.html. (Accessed 19 April 2022).

Friedman, S. H., Kaempf, A., & Kauffman, S. (2020). The realities of pregnancy and mothering while incarcerated. *Journal of the American Academy of Psychiatry and the Law, 48*(3), 365–375.

Gobena, E. B., Hean, D., & Patriai, S. C. (2019). The experience of incarcerated mothers living in a correctional institution with their children in Ethiopia. *Journal of Comparative Social Work, 14*(2), 30–54.

Ismail, N., Lazaris, A., O'Moore, É., et al. (2021). Leaving no one behind in prison: Improving the health of people in prison as a key contributor to meeting the sustainable development goals 2030. *BMJ Global Health, 6*(e004252), 2.

Kirubarajan, A., Tsang, J., Dong, S., Hui, J., Sreeram, P., Mohmand, Z., Leung, S., Ceccacci, A., & Sobel, M. (2022). Pregnancy and childbirth during incarceration: A qualitative systematic review of lived experiences. *BJOG International Journal of Obstetrics and Gynaecology*. https://doi.org/10.1111/1471-0528.17137 [Epub ahead of print].

Law Library of Congress (U.S.), & Global Legal Research Directorate. (2014). Laws on children residing with parents in prison. Available at https://www.loc.gov/law/help/children-residing-withparents-in-prison/foreign.php. (Accessed 18 April 2022).
Leiter, B. (2015). Legal realism and legal doctrine. *University of Pennsylvania Law Review, 163*, 1975–1984.
Logar, S., & Leese, M. (2021). Childhood detention during COVID-19 in Italy: Building momentum for a comprehensive child protection agenda. *International Health, 13*(1), 1–2. https://doi.org/10.1093/inthealth/ihaa050
Metzler, M., Merrick, M. T., Klevens, J., Ports, K. A., & Ford, D. C. (2017). Adverse childhood experiences and life opportunities: Shifting the narrative. *Children and Youth Services Review, 72*, 141–149.
Mhlanga-Gunda, R., Motsomi-Moshoeshoe, N., Plugge, E., & Van Hout, M. C. (2020). Challenges in ensuring robust and ethical health research and the reporting of health outcomes and standards in sub-Saharan African prisons. *Lancet Global Health, 8*(1), e25–e26.
Miamingi, A. (2020). The applicability of the best interests principle to children of imprisoned mothers in contemporary Africa: Between hard and soft law. *African Human Rights Law Journal, 20*(2), 713–735.
Nair, S., McGreevy, J. E., Hutchinson-Colas, J., Turock, H., Chervenak, F., Bachmann, G., & NJ on Women's Reentry-Health Subcommittee. (2021). Pregnancy in incarcerated women: Need for national legislation to standardize care. *Journal of Perinatal Medicine, 49*(7), 830–836.
Nowak, M. (2019). *United Nations global study on children deprived of liberty, 2019*. Available at. UN Global Study on Children Deprived of Liberty - Global Campus of Human Rights (gchumanrights.org) (Accessed 17 April 2022).
Ogrizek, A., Moro, M. R., & Lachal, J. (2021a). Mother–child attachment challenged by prison. *European Child & Adolescent Psychiatry, 30*, 1315–1316.
Ogrizek, A., Moro, M. R., & Lachal, J. (2021b). Incarcerated mothers' views of their children's experience: A qualitative study in French nurseries. *Child: Care Health and Development, 47*, 851–858.
Organization of African Unity (OAU). (1981). African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982). Available at https://www.refworld.org/docid/3ae6b3630.html. (Accessed 4 April 2022).
Organization of African Unity (OAU). (1999). *African Charter on the Rights and Welfare of the Child, 29 Nov 1999, CAB/LEG/24.9/49*.
Paurus, M. (2017). International report on the conditions of children of incarcerated parents. A Survey of Prison Nurseries: University of Minnesota; 2017. Available at https://cicmn.org/wp-content/uploads/2017/03/Melanie-Report-Edited.pdf. (Accessed 18 April 2022).
Penal Reform International. (2011). Safeguarding children in detention: Independent Monitoring Mechanisms for Children in Detentioin in MENA. Available at www.cdn.penalreform.org/wp-content/uploads/2013/05/Safeguarding-Children.pdf. (Accessed 21 April 2022).
Penal Reform International. (2013). Guidance document on the Bangkok Rules. Available at https://cdn.penalreform.org/wp-content/uploads/2013/10/PRI-TIJ-Guidance-Document-on-Bangkok-Rules-October-2013.pdf. (Accessed 21 April 2022).
Penal Reform International. (2021). Global prison trends 2021. Available at www.penalreform.org/global-prison-trends-2021/. (Accessed 17 April 2022).
Penal Reform International. (2022a). Children. Available at www.penalreform.org/issues/children/. (Accessed 17 April 2022).
Penal Reform International. (2022b). Children of incarcerated parents. Available at www.penalreform.org/issues/children/what-were-doing/children-incarcerated-parents/. (Accessed 17 April 2022).
Schoeman, M., & Basson, M. (2009). The influence of imprisonment on infants and young children incarcerated with their mothers. *NICRO Cape Town*.
Stewart, C., Bourke, S. L., Green, J. A., Johnson, E., Anish, L., Muduwa, M., & Jones, L. K. (2020). Healthcare challenges of incarcerated women in Australia: An integrative review. *International Journal of Healthcare*. https://doi.org/10.5430/ijh.v7n1p10 [Epub ahead of print].
UN Committee on Economic Social and Cultural Rights (UN CESCR). (2000). *Social and Cultural Rights S.a.C.R.U.N.C.E.S.C.R., General comment no. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)(11 August 2000)E/C.12/2000/4*. Geneva, Switzerland: United Nations Committee on Economic, Social and Cultural Rights.
UN Committee on the Rights of the Child (CRC). (2007). *General comment no. 10: Children's Rights in Juvenile Justice, 25 April 2007, CRC/C/GC/10*.
UN Human Rights Committee (CCPR). (2018). *General comment no 36 (2018) on the Right to Life. on article 6 of the International Covenant on Civil and Political Rights, on the right to life. CCPR/C/GC/36*. Available at: tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1_Global/CCPR_C_GC_36_8785_E.pdf (Accessed 16 January 2022).
UNICEF. (2007). Implementation handbook for the convention on the rights of the child. 2007. Available at: https://www.unicef.org/publications/files/implementation_handbook_for_the_convention_on_the_rights_of_the_child_part_1_of_3.pdf. (Accessed 14 April 2022).
UNICEF. (2021). Access to justice COVID-19. Available at www.unicef.org/media/92251/file/Access-to-Justice-COVID-19-Field-Notes-2021.pdf. (Accessed 17 April 2022).
United Nations (UN). (1947). *Entry into force of the constitution of the World Health Organization(17 November 1947)A/RES/131*. New York, US: United Nations General Assembly.
United Nations (UN). (1948). *Universal Declaration of Human Rights(10 December 1948)217A(III),Article 25*. New York, US: United Nations General Assembly.
United Nations (UN). (1966). Available at. In *, 993. International Covenant on Economic, Social and Cultural Rights (ICESRC)(16 December 1966)United Nations, Treaty Series* (p. 3). New York, US: United Nations General Assembly.
United Nations (UN). (1966). In *International Covenant on Civil and Political Rights (ICCPR)(16 December 1966) United Nations, Treaty Series* (p. 999). New York, US: United Nations General Assembly.
United Nations (UN). (1979). *Convention on the elimination of all forms of discrimination against women (18 December 1979) A/RES/34/180*. New York, US: United Nations General Assembly.
United Nations (UN). (1984). In *, 1465. Convention against torture and other cruel, inhuman or degrading treatment or punishment. United Nations, Treaty Series* (p. 85). New York, US: United Nations General Assembly.
United Nations (UN). (1989). General assembly. In *The convention on the rights of the child. Treaty series, Vol. 1577 Resolution 44/25 of 20 November 1989*. New York: United Nations.
United Nations (UN). (1990). *Standard minimum rules for noncustodial measures (The Tokyo Rules)*. New York: United Nations.
United Nations (UN). (2003). Optional protocol to the convention against torture and other cruel, inhuman and degrading treatment or punishment, 9 January 2003, A/RES/57/199. https://www.refworld.org/docid/3de6490b9.html. (Accessed 4 April 2022).
United Nations (UN). (2010a). *Guidelines for the alternative care of children : Resolution / adopted by the General Assembly UN. (64th sess.: 2009-2010). 2010*. New York: United Nations.
United Nations (UN). (2010b). *United Nations rules for the treatment of women prisoners and non-custodial measures for women offenders (the Bangkok Rules) A/C.3/65/L.5*. New York: United Nations.
United Nations (UN). (2016). *United Nations standard minimum rules for the treatment of prisoners (the Nelson Mandela Rules): resolution / adopted by the General Assembly. 2016*. New York: United Nations.
United Nations (UN) Committee on the Rights of the Child (CRC). (2007). *General comment no. 10: Children's Rights in Juvenile Justice, 25 April 2007, CRC/C/GC/10*.
United Nations Convention Committee against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment C.A.T.I.o.D.T.o.P.C.A.T. (CAT). (2017a). *Concluding observations on the combined fifth and sixth periodic reports of Italy. Committee against Torture (Report No. CAT/C/ITA/CO/5-6)*. New York: UN. December 18, 2017.
United Nations against Torture, I.o. D. T.o. P. C. A. T. (2018b). *Concluding observations on the sixth periodic report of the Russian Federation. Committee against Torture (Report No. CAT/C/RUS/CO/6)*. New York: UN. August 28, 2018.
United Nations Committee against Torture, I.o. D. T.o. P. C. A. T. (CAT) (2018a). *Concluding observations on the fifth periodic report of Belarus. Committee against Torture (Report No. CAT/C/BLR/CO/5)*. New York: UN. June 07, 2018.
United Nations Committee against Torture, I.o. D. T.o. P. C. A. T. (CAT) (2021). *Concluding observations on the third periodic report of Kyrgyzstan. Committee against Torture (Report No. CAT/C/KGZ/CO/3)*. New York: UN. December 21, 2021.
United Nations Committe on the Elimination of Discrimination against Women (CEDAW). (2013). *Concluding observations on the fourth periodic report of Benin. Committee on the Elimination of Discrimination against Women (Report No. CEDAW/C/BEN/CO/4)*. New York: UN. October 28, 2013.

United Nations Committee on the Elimination of Discrimination against Women (CEDAW). (2016a). *Concluding observations on the combined eighth and ninth periodic reports of Uruguay. Committee on the Elimination of Discrimination against Women (Report No. CEDAW/C/URY/CO/8-9)*. New York: UN. July 25, 2016.
United Nations Convention Committee on the Elimination of All Forms of Discrimination against Women (CEDAW). (2016b). *Concluding observations on the combined sixth and seventh periodic reports of Mali. Committee on the Elimination of Discrimination against Women (Report No. CEDAW/C/MLI/CO/6-7)*. New York: UN. July 25.
United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). (2016c). *Concluding observations on the combined fifth and sixth periodic reports of Burundi. Committee on the Elimination of Discrimination against Women (Report No. CEDAW/C/BDI/CO/5-6)*. New York: UN. November 25, 2016.
United Nations Committee on the Elimination of Discrimination against Women (CEDAW). (2017a). *Concluding observations on the combined sixth and seventh periodic reports of Thailand. Committee on the Elimination of Discrimination against Women (Report No. CEDAW/C/THA/CO/6-7)*. New York: UN. July 24, 2017.
United Nations Committee on the Elimination of Discrimination against Women (CEDAW). (2019a). *Concluding observations on the second periodic report of Qatar. Committee on the Elimination of Discrimination against Women (Report No. CEDAW/C/QAT/CO/2)*. New York: UN. July 30, 2019.
United Nations Committee on the Elimination of Discrimination against Women (CEDAW). (2019b). *Concluding observations on the sixth periodic report of Cambodia. Committee on the Elimination of Discrimination against Women (Report No. CEDAW/C/KHM/CO/6)*. New York: UN. November 12, 2019.
United Nations Committee on the Elimination of Discrimination against Women (CEDAW). (2020). *Concluding observations on the sixth periodic report of Zimbabwe. Committee on the Elimination of Discrimination against Women (Report No. CEDAW/C/ZWE/CO/6)*. New York: UN. March 10, 2020.
United Nations Committee on the Elimination of Discrimination against Women (CEDAW). (2021a). *Concluding observations on the initial report of South Sudan. Committee on the Elimination of Discrimination against Women (Report No. CEDAW/C/SSD/CO/1)*. New York: UN. November 23, 2021.
United Nations Committee on the Elimination of Discrimination against Women (CEDAW). (2021b). *Concluding observations on the initial report of South Sudan. Committee on the Elimination of Discrimination against Women (Report No. CEDAW/C/SSD/CO/1)*. New York: UN. July 25.
United Nations Committee on the Elimination of Discrimination against Women (CEDAW). (2021c). *Concluding observations on the combined seventh and eighth periodic reports of Yemen. Committee on the Elimination of Discrimination against Women (Report No. CEDAW/C/YEM/CO/7-8)*. New York: UN. November 24, 2021.
United Nations Convention Committee against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment C.A.T.I.o.D.T.o.P.C.A.T. (47th sess.: 2011) (CAT). (2011). *Consideration of reports submitted by States parties under article 19 of the Convention. Concluding observations of the Committee against Torture. Paraguay (Report No. CAT/C/PRY/CO/4-6)*. New York: UN. December 14, 2011.
United Nations Committee on the Rights of the Child (CRC). (2014). *Concluding observations on the combined third and fourth periodic reports of India. Committee on the Rights of the Child (Report No. CRC/C/IND/CO/3-4)*. New York: UN. July 25, 2014.
United Nations Committee on the Rights of the Child (CRC). (2015a). *Concluding observations on the combined third to fifth periodic reports of Mauritius. Committee on the Rights of the Child (Report No. CRC/C/MUS/CO/3-5)*. New York: UN. February 27, 2015.
United Nations Committee on the Rights of the Child (CRC). (2015b). *Concluding observations on the combined fourth and fifth periodic reports of Mexico. Committee on the Rights of the Child (Report No. CRC/C/MEX/CO/4-5)*. New York: UN. July 03, 2015.
United Nations Committee on the Rights of the Child (CRC). (2015c). *Concluding observations on the combined second to fourth periodic reports of Iraq. Committee on the Rights of the Child (Report No. CRC/C/IRQ/CO/2-4)*. New York: UN. March 03, 2015.
United Nations on the Rights of the Child (CRC). (2015e). *Concluding observations on the fourth periodic report of Eritrea. Committee on the Rights of the Child (Report No. CRC/C/ERI/CO/4)*. New York: UN. July 02, 2015.
United Nations Convention on the Rights of the Child (CRC). (2015f). *Concluding observations on the combined second to fourth periodic reports of Brazil. Committee on the Rights of the Child (Report No. CRC/C/BRA/CO/2-4)*. New York: UN. October 30, 2015.
United Nations Committee on the Rights of the Child (CRC). (2015g). *Concluding observations on the fifth periodic report of Bangladesh. Committee on the Rights of the Child (Report No. CRC/C/BGD/CO/5)*. New York: UN. August 28, 2018.
United Nations Committee on the Rights of the Child (CRC). (2016a). *Concluding observations on the second periodic report of Zimbabwe. Committee on the Rights of the Child (Report No. CRC/C/ZWE/CO/2)*. New York: UN. March 07, 2016.
United Nations Committee on the Rights of the Child (CRC). (2016b). *Concluding observations on the combined third and fourth periodic reports of the Islamic Republic of Iran. Committee on the Rights of the Child (Report No. CRC/C/IRN/CO/3-4)*. New York: UN. March 14, 2016.
United Nations Committee on the Rights of the Child (CRC). (2016c). *Concluding observations on the combined third to fifth periodic reports of Kenya. Committee on the Rights of the Child (Report No. CRC/C/KEN/CO/3-5)*. New York: UN. March 21, 2016.
United Nations Committee on the Rights of the Child (CRC). (2018). *Concluding observations on the second periodic report of Lesotho. Committee on the Rights of the Child (Report No. CRC/C/LSO/CO/2)*. New York: UN. June 28, 2018.
United Nations Committee on the Rights of the Child (CRC). (2019). *Concluding observations on the combined fourth to sixth periodic reports of Bahrain. Committee on the Rights of the Child (Report No. CRC/C/BHR/CO/4-6)*. New York: UN. February 27, 2019.
United Nations Committee on the Rights of the Child (CRC). (2011). *: Consideration of reports submitted by States parties under article 44 of the Convention. Concluding observations: Cambodia. Committee on the Rights of the Child (Report No. CRC/C/KHM/CO/2-3)*. New York: UN. August 03, 2011.
United Nations International Covenant on Civil and Political Rights (CCPR). (2013). *Concluding observations on the third periodic report of the Plurinational State of Bolivia. Human Rights Committee (Report No. CCPR/C/BOL/CO/3)*. New York: UN. December 06, 2013.
United Nations International Covenant on Civil and Political Rights (CCPR). (2019). *Concluding observations on the sixth periodic report of Mexico. Human Rights Committee (Report No. CCPR/C/MEX/CO/6)*. New York: UN. December 04, 2019.
Nations Office on Drugs and Crime (UNODC). (2017). Resolutions 26 of the CCPCJ. UNODC, Vienna, 2017. www.unodc.org/unodc/en/commissions/CCPCJ/session/26_Session_2017/resolutions-26-of-the-ccpcj.html. (Accessed 24 May 2018). November 25, 2016.
Van den Bergh, B. J., Gatherer, A., Fraser, A., & Moller, L. (2011). Imprisonment and women's health: Concerns about gender sensitivity, human rights and public health. *Bulletin of the World Health Organization, 89*, 689–694.
Van Hout, M. C. (2020). Leaving no one behind': The human tragedy of children in African prisons during COVID-19. Online. Available at *Health and Human Rights Journal* https://www.hhrjournal.org/2020/05/leaving-no-one-behind-the-human-tragedy-of-children-in-african-prisons-during-covid-19/. (Accessed 17 April 2022).
Van Hout, M. C., & Mhlanga-Gunda, R. (2018). Contemporary women prisoners health experiences, unique prison health care needs and health care outcomes in Sub Saharan Africa: A scoping review of extant literature. *BMC International Health and Human Rights, 18*(1), Article p31.
Van Hout, M. C., & Mhlanga-Gunda, R. (2019). 'Mankind owes to the child the best that it has to give': Prison conditions and the health situation and rights of circumstantial children incarcerated in Sub Saharan African prisons. *BMC International Health and Human Rights, 19*(1), 13.
Van Hout, M. C., Fleißner, S., & Stöver, H. (2021). "# Me Too": Global progress in tackling continued custodial violence against women. The 10 year anniversary of the Bangkok Rules. *Trauma, Violence, & Abuse: A Review Journal*. https://doi.org/10.1177/15248380211036067 [Epub ahead of print].
Wakefield, S., & Wildeman, C. (2018). How parental incarceration harms children and what to do about it. National Council of Family Relations, 3, 1, 1-6. Available at www.ncfr.org/sites/default/files/2018-01/How%20Parental%20Incarceration%20Harms%20Children%20NCFR%20Policy_Full%20Brief_Jan.%202018_0.pdf. (Accessed 18 April 2022).
Walker, J., & Sullivan, E. A. (2021). Residential programmes for mothers and children in prison: Key themes and concepts. *Criminology & Criminal Justice, 21*(1), 21–39.
Walmsley, R. (2017). World female imprisonment list (fourth edition). World prison brief 2017. Available at www.prisonstudies.org/news/world-female-imprisonment-list-fourth-edition. (Accessed 17 April 2022).
World Health Organization. (2020). Europe—data and statistics. Available at www.euro.who.int/en/health-topics/health-determinants/prisons-and-health/data-and-statistics. (Accessed 17 April 2022).
Zhao, Q., Cepeda, A., Chouc, C. P., & Valdez, A. (2021). Maternal incarceration trajectories and the intergenerational transmission of imprisonment: A nationwide study. *Children and Youth Services Review, 122*, Article 105942.

A legal-realist assessment of human rights, right to health and standards of healthcare in the Malawian prison system during COVID-19 state disaster measures

Marie Claire Van Hout, Victor Mhango, Ruth Kaima, Charlotte Bigland and Triestino Mariniello

Abstract

Purpose – *The first case of COVID-19 in the Malawi prison system was reported in July 2020. Human rights organisations raised concerns about the possibility of significant COVID-19 outbreaks and deaths in the prison system, because of the poor infrastructure, lack of healthcare and adequate COVID-19 mitigation measures, existing co-morbidities (tuberculosis, HIV and hepatitis C), malnutrition and poor health of many prisoners.*

Design/methodology/approach – *The authors conducted a legal-realist assessment of the Malawian prison system response to COVID-19 during state disaster measures, with a specific focus on the right to health and standards of healthcare as mandated in international, African and domestic law.*

Findings – *The Malawi prison system was relatively successful in preventing serious COVID-19 outbreaks in its prisons, despite the lack of resources and the* ad hoc *reactive approach adopted. Whilst the Malawi national COVID plan was aligned to international and regional protocols, the combination of infrastructural deficits (clinical staff and medical provisions) and poor conditions of detention (congestion, lack of ventilation, hygiene and sanitation) were conducive to poor health and the spread of communicable disease. The state of disaster declared by the Malawi Government and visitation restrictions at prisons worsened prison conditions for those working and living there.*

Originality/value – *In sub-Saharan Africa, there is limited capacity of prisons to adequately respond to COVID-19. This is the first legal-realist assessment of the Malawian prison system approach to tackling COVID-19, and it contributes to a growing evidence of human rights-based investigations into COVID-19 responses in African prisons (Ethiopia, South Africa and Zimbabwe).*

Keywords *Malawi, COVID-19, Infectious disease, Human rights, Minimum standards of detention, Health in prison*

Paper type *Research paper*

(Information about the authors can be found at the end of this article.)

Background

On 11th March 2020, the World Health Organisation (WHO) declared that COVID-19 constituted a pandemic (WHO, 2020a). Prisons are high-risk environments for communicable disease and experienced a range of challenges during the pandemic (Kinner *et al.*, 2020; Barnert *et al.*, 2020). Prisoners with chronic ill-health and those living in congested prisons were especially at risk of severe COVID-19 disease (Beaudry *et al.*, 2020). Efforts to decongest prisons via presidential pardons, amnesties and emergency/early release schemes have formed the basis of the COVID-19 response in prisons and other closed settings (OHCHR, 2020; UNODC *et al.*, 2020; Simpson and Butler, 2020; Lines *et al.*, 2020; Amon, 2020). A range of technical guidance on COVID-19 mitigation measures

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and human rights assurances in prisons were promulgated by the United Nations Office on Drugs and Crime, WHO and Penal Reform International [WHO, 2020 b; WHO, 2020c; UNODC, 2020; Penal Reform International (PRI), 2020]. Collectively, these documents advised that states should take all prevention, detection and treatment measures to address the risks and threat to health presented by COVID-19, by limiting contamination, detecting ill prisoners and staff and providing medical treatment to those infected. They further mandated that detention conditions should not contribute to the development, worsening or transmission of disease, and COVID-19 measures may not result in inhumane or degrading treatment of prisoners; any restrictions may only be implemented on grounds of medical necessity and in compliance with the human rights principles of legality, proportionality, oversight, time-limitation and non-discrimination, and prison monitoring bodies' must be guaranteed access to prisons.

COVID-19 posed an enormous threat to the health and lives of those living and working in African prisons (Amon, 2020; Bulled and Singer, 2020; Kras and Fitz; 2020; Rapisarda and Byrne, 2020; Nkengasong and Mankoula, 2020; Muntingh, 2020; Van Hout, 2020a; Van Hout, 2020b; Van Hout, 2020c; Van Hout, 2020d; Badu *et al*., 2020; Chireh, and Kwaku Essien, 2020; Nweze *et al*., 2020; Amnesty International, 2020; Lucero-Prisno, 2020; Van Hout and Wessels, 2021; Katey *et al*., 2021). Over one million people are incarcerated in Africa, where prisons are characterised by high rates of pre-trial detention (on average 42%) and severe prison congestion (World Prison Brief: Africa, 2020). By the end of May 2020, prison systems in Sierra Leone, Algeria, South Africa, Kenya, Cameroon, Ghana, Morocco, Democratic Republic of Congo, Egypt and Guinea confirmed cases of COVID-19 among staff and prisoners (Prison Insider: Africa, 2020). Despite the African Commission on Human and Peoples' Rights' promulgation of effective human rights-based responses to COVID-19, including in prisons (ACoHPR, 2020a; ACoHPR, 2020 b), efforts to tackle COVID-19 were obstructed by ill-resourced prison systems, poor infrastructure and basic detention conditions, insufficient healthcare and lack of prison-based COVID-19 disease surveillance data and the continued intake of remand detainees fuelling congestion (Muntingh, 2020; Nweze *et al*., 2020; Van Hout, 2020c; Kras and Fitz, 2020; Mukwenha *et al*., 2021; Van Hout and Wessels, 2021; Katey *et al*., 2021; Mekonnen *et al*., 2021).

The limited capacity of prisons to adequately respond to COVID-19 was highlighted in open letters by human rights organisations to the Southern Africa Development Community (SADC) (SADC, 2020). We report here from Malawi, which was classified as one of the top ten most vulnerable African countries to respond to COVID-19 (Surgo Foundation, 2020). Malawi has been severely challenged by COVID-19 because of its economic and political situation and by its stretched health system (Patel *et al*., 2020; Sonenthal *et al*., 2020). The National COVID-19 Preparedness and Response Plan was launched with a budget of $28m in March 2020. The first COVID-19 cases were notified on 2nd April 2020 (Ministry of Health, 2020; Patel, 2020; United Nations Malawi, 2020; Mzumara, 2021). Despite having a population of over 18 million, the Malawi health system only had 25 intensive care beds and 7 respirators in April 2020 (Vidal, 2020). At the time of writing in early 2022, Malawi has reported 85,033 COVID active cases, 2,598 deaths and 72,867 recoveries (Worldometer COVID-19 Data, 2022).

To assess the Malawian prison system response to COVID-19 during state disaster measures, we conducted a legal-realist assessment of the situation with a specific focus on the right to health, disease mitigation and access of healthcare and the extent to which minimum state obligations complied with human rights standards (including prevention, detection and treatment of disease, right to safe working conditions, right to access of legal representation and families during visitation restrictions and equivalence of health-care provisions) under international, African and domestic law. The developed realist account is underpinned by legal realism as naturalistic theory because of its emphasis on the rule of law as derived from real world observations regarding welfare, social interest and public

policies (Leiter, 2015). We critically assess whether, and to what extent, Malawi complied with humane standards of care of prisoners and whether minimum standards of care, particularly healthcare in its broadest sense, were upheld during contagion and the application of state disaster measures. All relevant international, African and domestic protections and rights assurance mechanisms respecting the human rights of prisoners and minimum standards of care are presented and then scrutinised in light of existing and historical human and health rights assurances, policies and system operations in the Malawi prison system, together with the extant scholarship published following the first COVID-19 case notification in the Malawi prison system (media, grey and academic literature).

International and continental human rights frameworks pertinent to right to health, healthcare and mitigation of disease in prisons

A range of positive obligations exist concerning prisoner and prison staff rights, which include the right to health, protection from disease and assurance of access and provision of all required medical support and care during illness under the international treaties. These include International Covenant on Economic, Social and Cultural Rights (ICESR) Articles 12(1) and 12(2) (UN, 1966a) and the United Nations (UN) Committee on Economic, Social and Cultural Rights (CESCR) *General Comment Number 14* (UN CESCR, 2000). Article 12 ICESR provides for the comprehensive right of every individual to the "enjoyment of the highest attainable standard of physical and mental health". According to the *General Comment 14* CESRC, states are (at the very least) required to meet a threshold of a "core minimum" of social and economic rights, including the right to health. Prisoners are entitled to the same "core minimum" health rights as other citizens. Article 12(1) is applicable to the right to healthcare when deprived of liberty, including during the COVID-19 health emergency, and it obliges states to take necessary measures for "the prevention, treatment and control of epidemic, endemic, occupational and other diseases" and "the creation of conditions, which would assure to all medical service and medical attention in the event of sickness".

Further, whilst the International Covenant on Civil and Political Rights (ICCPR) (UN, 1966b) does not expressly provide for a right to health, it specifically provides the right to humane treatment of prisoners (Articles 2, 6, 7, 10 and 26) (UN, 2012). Article 6 ICCPR states that "every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life". Article 10 provides "that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person". Another layer of rights protection is provided by the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (CAT) (UN, 1984) and the CAT-Optional Protocol (UN, 2003), which create binding obligations on states not to ill-treat those deprived of their liberty. The UN Human Rights Committee (HRC) has stated that it is "incumbent on States to ensure the right of life of detainees, and not incumbent on the latter to request protection" (Lines, 2008). Concluding observations by the Committee reflect the binding state obligation to "take action to safeguard the health of prisoners". The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) recognises that "an inadequate level of health care can lead rapidly to situations falling within the scope of the term inhuman and degrading treatment" (Council of Europe, 2015). This is especially pertinent in the context of communicable disease outbreaks within prison confines.

Jurisprudence at the UN Human Rights level has referred to State failures to adopt and implement adequate disease mitigation measures in prisons (airborne tuberculosis for example) resulting in a threat to health in the violation of the ICCPR (Articles 6, 7, 9 and 10) and within the scope of inhuman or degrading treatment. The HRC recognises the right to medical care in addition to other pre-conditions of health, including sanitation, hygiene, ventilation and the provision of adequate living space. This is especially pertinent given the

severe congestion encountered in many African prisons. The HRC (2019) in its *General Comment Number 36 on the Right to Life* states that "States parties also have a heightened duty of care to take any necessary measures to protect the lives of individuals deprived of their liberty by the state, [. . .] states parties assume responsibility to care for their lives and bodily integrity, and they **may not rely on lack of financial resources** or other logistical problems to reduce this responsibility. The duty to protect the life of all detained individuals includes providing them with the necessary medical care and appropriate regular monitoring of their health".

States, however, have discretion in defining humane treatment and the adequate medical care of prisoners (Lines, 2008). Malawi ratified the ICESCR (UN, 1966a) and ICCPR (UN, 1966b) in 1993, and whilst it accepts individual complaints procedures under the Optional Protocol to the ICCPR (UN, 1966c), it does not accept individual complaints procedures under the Optional Protocol to the ICESCR (UN 2009). Whilst it ratified the CAT (UN, 1984) in 1996, it has not ratified the CAT-Optional Protocol (UN, 2003) and, therefore, does not accept individual complaints procedures under the CAT, Article 22. It does, however, accept the inquiry procedure for Malawi under the CAT, Article 20.

Medical declarations particular to the rights of prisoners regarding their health rights and medical ethics in detention settings include the WHO (WHO, 2003) and World Medical Association (WMA) [World Medical Organisation (WMA), 2011] declarations, which provide for the rights of prisoners to humane treatment and appropriate medical care, including the State duty to prevent and treat disease. There is a non-derogation clause during State declaration of emergency contained in the UN, Principles of Medical Ethics relevant to prisons (Principles 1 and 6) (UN, 1982). The UN Standard Minimum Rules for the Treatment of Prisoners (*Mandela Rules*) (UN, 2016) cover States' responsibility for the physical and mental health of prisoners. Rule 1 states that: "All prisoners shall be treated with the respect due to their inherent dignity and value as human beings and no prisoner shall be subjected to, and all prisoners shall be protected from, torture and other cruel, inhuman or degrading treatment or punishment, for which no circumstances whatsoever may be invoked as a justification". A range of *Mandela Rules* encompass aspects of the continuum of medical response to disease (prevention, detection, quarantine and care) and contain State provisions to provide prisoners with access to free, non-discriminatory and equivalent healthcare. These include the right to receive qualified, consented and confidential medical care, protocols for medical isolation and treatment when suspected of having contagious diseases and a requirement that doctors or public health bodies should make regular inspections of hygiene, screening measures, quarantine processes and the physical conditions of the prison (Rules 24, 25, 27, 30, 31, 32 and 35). Rule 13 is applicable to infectious disease and environmental determinants of health; it specifically states that: "All accommodation shall meet all requirements of health, due regard being paid to climatic conditions and particularly to cubic content of air, minimum floor space, lighting, heating and ventilation" (UN, 2016).The *Mandela Rules* are further supported by the non-discrimination provisions contained in the 2010 UN Rules for the treatment of women offenders (*The Bangkok Rules*) (UN, 2010).

With regard to the promotion and protection of human rights in the African continent, the African Charter on Human and Peoples' Rights (ACHPR) [Organization of African Unity (OAU), 1981] recognise that State obligations regarding the right to health are "heightened" when an individual is in the custody of the State (Article 16) and every individual has "the right to enjoy the best attainable state of physical and mental health" [Article 16(1)]. In addition, it instructs that "State parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick" [Article 16(2)]. It is supported by Article 4, which states that "human beings are inviolable, every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right". Two special

mechanisms on prisons exist in Africa (Special Rapporteur on Prisons, Conditions of Detention and Policing in Africa and Committee for the Prevention of Torture in Africa). The *Robben Island Guidelines* (ACHPR, 2008) are aligned to the Basic Principles for the Treatment of Prisoners (UN, 1991) and the *Mandela Rules* (UN, 2016). The *Kampala* declaration on prison conditions in Africa further protects the rights of prisoners: "prisoners should have living conditions that are compatible with human dignity, [. . .] retain all rights that are not expressly taken away by the fact that they are in detention and the detrimental effects of prisons should be minimised so that prisoners do not lose their self-respect and sense of personal responsibility".

Jurisprudence at the African Court on Human and Peoples' Rights complements the ACHPR and refers to the right to life and prohibition of cruel, inhumane or degrading treatment, including health threatening conditions of detention (overcrowding, malnutrition, lack of clean water, space, sanitation and ventilation) (Muntingh, 2020). Decisions of the African Court on Human and Peoples Rights are binding on Member States of the African Charter. State parties are responsible for ensuring execution of judgements, and where a State fails to comply, its failure is noted on the Court report to the Assembly. There is, however, no definite way of dealing with those who fail to comply. States at times only comply because of external political influence or general political will by the State itself to execute the decisions of the Court. There are several cases that refer to Malawi, which is a Member State bound by such decisions.

Several African States have been found in violation of the Charter's right to health (*Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine de l'Homme, Les Témoins de Jehovah v. Zaire* in 1996*, International PEN and Others v. Nigeria* in 1998 *and Malawi African Association and others v. Mauritania* in 2000). Denial of medical care is cited in addition to a ruling of inhumane or degrading treatment [*Krishna Achuthan* (*On behalf of Aleke Banda*), *Amnesty International On behalf of Orton and Vera Chirwa v. Malawi* in 1994 *and Constitutional Rights Project and Civil Liberties Organisation v. Nigeria* in 1999]. Recent cases before COVID-19 have referred to health-threatening conditions of detention (*Konaté v. Burkina Faso and Abubakari v. Tanzania* in 2016*; Guehi v. Tanzania* in 2018) and the rights of prisoners to adequate medical care and basic provisions to protect health (medication and appropriate nutrition for chronic ill health) (*Lohé Issa Konaté v. Burkina Faso* in 2013 *and Mugesera v. Rwanda* in 2017).

Standards of care (including healthcare) and fundamental rights assurances in the Malawi prison system

Rights relevant to the fundamental right to health of those deprived of their liberty are enshrined in the Constitution of Malawi, with Section 12(1)(d) of the Constitution of Malawi providing that "the inherent dignity and worth of each human being requires that the state and all persons shall recognize and protect human rights and afford the fullest protection to the rights and views of all individuals, groups and minorities whether or not they are entitled to vote". Section 12(1)(e) provides that all persons have equal status before the law, with the only justifiable limitations to lawful rights being those necessary to ensure peaceful human interaction in an open and democratic society. Section 19 prohibits any violation to the dignity of any person as well as any acts of torture and degrading treatment. Section 19(1) provides that every person has the right to life and no person shall be arbitrarily deprived of his or her life. Section 42(2)(1)(b) supports Section 19 and states that: "every person who is detained, including every sentenced prisoner, shall have the right-[. . .]to be detained under conditions consistent with human dignity, which shall include at least the provision of reading materials, adequate nutrition and medical treatment at the expense of the state". Section 169 provides for the constitutional rights of prisoners regarding provision of adequate nutrition, healthcare and medical treatment and the monitoring of prison

standards: “administration and general functioning of penal institutions, taking due account applicable international standards”.

The Malawi Health Sector Strategic Plan II of 2017–2022 incorporates a human rights-based approach and equity (third and fourth guiding principles) to health and access to healthcare in the country: “All people of Malawi shall have the right to good health and equitable access to health services without any form of discrimination, whether it is ethnicity, gender, age, disability, religion, economic [. . .] or other status”. The principles of national policy set out in Section 13 further aim to instil certain goals to ensure that the State shall actively promote the welfare and development of the people of Malawi. This includes: “to achieve adequate nutrition for all in order to promote good health and self-sufficiency and to provide adequate health care, commensurate with the health needs of a Malawian society and international standards of health care”. This includes prisons and other closed settings. Section 14 provides that these principles of national policy: “shall be directory in nature but courts shall be entitled to have regard to them in interpreting and applying any of the provisions of this Constitution or of any law or in determining the validity of decisions of the executive”. Such principles are relevant where rights violations require court intervention to ensure prisoners welfare. They are aligned to most international human rights instruments (the UN Charter, Article 10 ICCPR, ICESCR and Article 5 ACHPR) and the non-binding minimum rules, principles and guidelines (Rule 1 *Mandela Rules* and Principle 1 of the Body of Principles) with the right of all persons deprived of their liberty to be treated with respect for their inherent dignity and with humanity.

Part IV of the 1948 Public Health Act of Malawi provides for special provision regarding Ministerial declaration of certain formidable epidemic or endemic disease, powers for prevention and notice to local authorities (Sections 30, 31 and 32). The Public Health Act of 1948 is outdated (e.g. it still refers to smallpox) and does not reflect the contemporary needs of public health in Malawi. It warrants updating based on scientific evidence and adequate consultation and interaction with multi-disciplinary experts and stakeholders (Sambala *et al*., 2020). Part XII of the Prison Act of Malawi provides for the maintenance of prisoners. Despite these rights protections, the Malawi Prison Inspectorate reported between 2018 and 2019 that the system had reached 260% capacity with no change in the situation for prisoners (Prison Inspectorate of Malawi, 2019). Prison conditions relating to the right to reasonable accommodation and an environment free of inhumane treatment centre on cubic content of air, floor space, clean water and disinfection measures (hygiene, sanitation and ablution) continue to be inadequate in Malawi and are contra the *Mandela Rules* 13 to 18, 21, 22(1) (2), 25, 35 and 42. Conditions continue to violate the fundamental human rights to access to clean drinking water and food (Article 25(1) UDHR; Article 11(1) ICESCR, CESC *General Comment Number 12 and 15*; and Section 50(5)(d) of the Constitution). In the 2020 report submitted to the UN Committee against Torture, Malawi reported that 414 people had died in prison between January 2014 and September 2018, with no cause of death provided (UN, 2020). The prison is mandated to provide food to all prisoners daily. The Prison Act, however, allows for un-convicted prisoners to receive food supplements from their relations outside and prison officials are not allowed to take that food away from the prisoners. Of grave concern are the reports of fatalities caused directly by severe malnutrition (CHREAA,SALC,IRLI, 2021). The denial of adequate food (based on one meal per day) violates the Malawian Constitution, international and regional human rights law including State obligations under the ICESRC and a range of soft law normative minimum standards of care (Gauld, 2021).

The Prison Act of Malawi Section 13 provides for the powers of the Commissioner of Prisons to issue standing orders in relation to a matter at hand (for instance, a disease outbreak). Section 30 further recognises the right of prisoners to healthcare and medical treatment, and Section 25 outlines the responsibility of the prison medical officer for ensuring “that every prisoner is medically examined on admission to and before discharge from a prison”.

Provisions are also included regarding delivery of healthcare that is equivalent to that provided in the community (Sections 74 and 75). The medical inspection of prisons is provided in Regulation 31, medical examination and treatment of prisoners in Regulations 33 (a) and (b) and the notification of serious illness/infections or communicable disease is detailed in Regulation 33 (c). The Prison Act does not, however, provide for mandatory medical examination.

The Malawi Law Commission has criticised the Malawi prison legislation and stated that it failed to: "entrench and safeguard the right of prisoners to access health services by ensuring that the standards of services that are available to prisoners are the same as those that are available to the general public accessing public dispensaries" (Malawi Law Commission, 2018). It has reported on the failures of the prison system to adhere to the provisions contained in the Prisons Act and cited overcrowding in prisons as "leading to unacceptable and dehumanizing levels of congestion". It also reported a lack of vigilance around the health of prisoners, lack of prison monitoring inspections and lack of medical examination on entry, as well as observing that unqualified medical staff were treating prisoners and that in the event of a communicable disease, most prisons lacked the infrastructure to quarantine sick prisoners (Malawi Law Commission, 2018). The Commission recommended that a new Prisons Act would require mandatory medical examination, screening for communicable diseases upon admission and appropriate health-care responses.

With regard to pertinent domestic jurisprudence in Malawi, in the ground-breaking case of *Gable Masangano v. Attorney General* (Constitutional Case Number 15 of 2007), the Constitutional Court of Malawi found that prison overcrowding, lack of sanitation, hygiene and ventilation in prisons violated the Malawi Constitution and international and regional African human rights norms, as they were conducive to the transmission of disease. It ruled that the situation where: "[. . .] packing inmates in an overcrowded cell with poor ventilation with little or no room to sit or lie down with dignity, but to be arranged like sardines violates basic human dignity and amounts to inhuman and degrading treatment" (Gauld, 2021). The Court also ruled on the justiciability regarding the health of prisoners, including right to medical treatment and healthcare [. . .], dismissing the States contention that prisoners' right to adequate nutrition and health were non-justiciable and that "the judicial process is not equipped to deal" with questions of resource allocation of the State (Kapindu, 2013; Chilemba, 2016). The Court added that the prison population was to be reduced by half over 18 months and supported by periodic decongestion measures.

Assessing human rights, right to health and healthcare and management of disease in Malawian prisons

Malawi was similar to other sub-Saharan African countries such as South Africa and Zimbabwe (Van Hout and Wessels, 2021; Jumbe *et al.*, 2022), in that on 20th March 2020, the President of Malawi declared a state of national disaster in response to the COVID pandemic under Section 32 of the Disaster Preparedness and Relief Act, 24 of 1991 (United Nations Malawi, 2020; Muntingh, 2020). The Minister of Health and the Chairperson of a specially convened cabinet committee on COVID-19 declared COVID-19 a "formidable disease" and published the Public Health (Corona Virus Prevention, Containment and Management) Rules, 2020 (the Rules) under the Public Health Act, 12 of 1948. The Rules, whilst constituting delegated legislation, were neither brought before Parliament nor did the legislature have any role in relation to their adoption. Subsequently, on the 13th of April, a 21-day lockdown was announced by the Minister of Health to take effect days later; this was, however, challenged on 17th April 2020 in the case of *The State (on the application of Esther Kathumba and Others) v. The President* via an injunction and application for judicial review by a human rights coalition (individuals and civil society). This action was based on the argument that procedural irregularities in the lockdown declaration constituted a

derogation from the fundamental rights enshrined in the Malawi Constitution (News 24, 2020; South African Litigation Centre (SALC), 2020; Gauld, 2021). At the first hearing, the High Court granted an interlocutory injunction, and before the second hearing, the Minister of Health revoked the Rules. The Court held that the matter was not moot as the "issues [. . .] are capable of repetition" and so agreed to make a ruling on the merits of the application [Paragraph 3.6]. The matter was certified as a constitutional matter in which the Constitutional Court recommended the government to always ensure that practical and realistic social security measures are put in place before implementing a drastic action like a lockdown, thus ensuring that the fundamental rights of the citizenry are not breached (*Constitutional Referral Case Number 1 of 2020 pg. 42*).

The 2020 Public Health (Corona Virus and COVID-19) (Prevention, Containment and Management) Rules were formulated by the Minister of Health through the powers vested in her by Section 29 as read with Section 31 of the Public Health Act and included detail on disease preventive measures (wearing of face masks, social distancing and hand washing) [Section 3(1)] and COVID-19 testing and medical isolation (Section 4). In Rule 5, a person diagnosed with COVID-19 was to isolate until certified to be COVID-19 negative. Rule 8 provides for an enforcement officer to order a person certified as COVID-19 positive to mandatory treatment or further medication, onsite detention, isolation or quarantine. The Rules further state that where one has been in detention, isolation or quarantine, reasonable provision shall be made to ensure the individual has access to, or is being provided with, basic necessities to enable them to maintain an acceptable standard of nutrition and hygiene [Rule 8(3)(b) (i)]. Whilst prison wardens were recognised as essential service providers, the COVID-19 rules did not specifically consider the unique situation and vulnerabilities of prisoners themselves as a specific group. There were a series of standing orders for the Malawi Prisons Service on the Prevention and Management of COVID-19, in pursuance of Section 13 of the Prison Act 1956. Part 1 covered the medical screening of prisoners and staff on admission, with those meeting the criteria of case definition to be isolated and clinically assessed. Part 2 detailed the social distancing, respiratory etiquette, disinfection, ventilation, hygiene and personal protective equipment (PPE) measures for staff and prisoners, and Part 3 outlined the visitation restrictions.

On 30th March 2020, a press statement by Irish Rule of Law International (IRLI) and Reprieve was released, which underscored the threat to health of COVID-19 to those deprived of their liberty in Malawi, particularly those with chronic ill-health and elderly prisoners (IRLI, 2020). The statement contained recommendations to decongest the prisons, relax bail conditions, not arrest those accused of petty crimes and supply the prison system with basic hand-washing provisions (Gauld, 2021). Prisons were included in the second domestic COVID-19 response plan within the Law Enforcement cluster (National COVID-19 preparedness and response plan, July–December 2020). Despite the detailed Malawi prison system COVID-19 plan, which was aligned to international and 2020 SADC regional responses [WHO, 2020 b; WHO, 2020c; UNODC, 2020; Penal Reform International (PRI), 2020], the state of disaster declared by the Malawi Government worsened prison conditions for those working and living there. Standards of care, health-care responses and provision of basic needs in Malawi's prisons were further compromised. Lack of resourcing of the COVID-19 health and medical response in prisons and existing infrastructure and resource deficits, under-staffing of clinical personnel, severe congestion and environmental threats to health (lack of adequate ventilation, sanitation, hygiene and nutrition) (Malawi Inspectorate of Prisons, 2019; Water Supply and Sanitation Collaborative Council, 2020; Van Hout, 2020c; Gadama *et al.*, 2020; US Department of State, 2020), impacted on the ability to adhere to the normative standards of care during disease outbreaks and the non-derogated rights of prisoners to equivalence of healthcare (including testing, quarantine, testing and medical supplies) and medical treatment (*Mandela Rules* 24(1), 25, 30, 31, UN Principles of Medical Ethics, WHO and WMA declarations).

The first COVID-19 cases were notified on 14th July 2020 at Mzimba Prison where a prison officer tested positive and in Chichiri Central prison where a prisoner tested positive (Southern African Litigation Centre, 2020). By 26th September 2020, this had increased to 26 staff and 408 prisoners with two COVID-19 deaths reported (Prison Insider, 2020). Efforts to mitigate COVID-19 disease in the prison system included segregation of COVID-19 positive prisoners in isolation centres, visitation restrictions at facilities and suspension of out of prison formations to work (Masina, 2020a). In late 2020, human rights organisations reported on the lack of COVID-19 testing and isolation capacity and raised concerns around the potential for significant COVID-19 outbreaks and deaths in the Malawian prison system because of existing co-morbidities (tuberculosis, HIV and hepatitis C) and poor health of many prisoners (including malnutrition) (Pensulo, 2020a). Media and situation assessment reports highlighted the cell capacity issues inhibiting social distancing (particularly at night), inadequacy of provisions of basic sanitation, disinfection and PPE for prison officials, medical staff and prisoners, the insufficient resourcing of disease control measures and timely COVID-19 test results, continued intake of remand detainees and mixing with sentenced prisoners despite the "Justice and Accountability Chilungamo Programme" prison release schemes. It was also noted how visitation restrictions disrupted prisoner dependence on family and civil society supports of food, medicines, soap and clothing (Van Hout, 2020c, Guta, 2021; Amnesty International, 2020; Muntingh, 2020; Chireh and Kwaku Essien, 2020; Van Hout and Wessels, 2021; Katey *et al.*, 2021; Mukwenha *et al.*, 2021; Nweze *et al.*, 2020; Mhlanga-Gunda *et al.*, 2022; Jumbe *et al.*, 2022).

Of relevance to this legal realist assessment were the detailed and continued concerns provided with regard to overcrowding in the Malawi prison system in 2021, the inability of the Inspectorate of Prisons to adequately discharge its functions, inadequate medical treatment for prisoners with mental illness, food shortages and lack of adequate nutrition for prisoners [single meal per day of beans and *nsima* (*steam cornmeal*)], all of which were deemed to exacerbate risk to health and the transmission of communicable and opportunistic disease (CHREAA, SALC, IRLI, 2021). Severe congestion exacerbated by continued intake of remand detainees (12,000 prisoners in the system against the official holding capacity of 5,640 persons) was reported: "We have witnessed detainees having to sleep in a kneeling position or side by side on the ground, due to the lack of space. Inmates suffer from long-term knee problems and other ailments that are related to being placed in a confined space for prolonged periods". (CHREAA, SALC, IRLI, 2021). Malawian prison cells do not provide the bare minimum floor space set by the CAT at four square meters per person in a communal cell, which could be declared by courts as cruel or degrading (Steinberg, 2005). Pre-trial detention may only be permissible if undertaken in accordance with procedures established by law in a place of detention that has been authorised (*Robben Island Guidelines*, Paragraph 23) and such detention must not be arbitrary [UDHR, Article 9; ICCPR, Article 9(1) and ACHPR Article 6]. This provision was overlooked during COVID-19 restrictions, as the state disaster measure was regarded as a *vis major*.

Appeals to decongest the prison system occurred and the subsequent "Justice and Accountability Chilungamo Programme" resulted in the release of 1,397 prisoners, with 499 receiving a Presidential pardon (Face of Malawi, 2020; Chilundu, 2020; Phiri, 2020; Masina, 2020b). Presidential releases to decongest the prisons were permitted under Section 89(2) of the Constitution of Malawi and Sections 108 and 110 of the Prison Act. Whilst six months were deducted from those serving minor offences, the elderly and women with children leading to large numbers qualifying for release, there was a lack of formal communication and transparency around the criteria used by the Pardon Committee (law enforcement, prison officials, Ministry of Justice and Ministry of Homeland Security). Some prisons, despite operating at severe over-capacity, were omitted in the initial decongestion rounds (Chilora, 2020) and others closed their female

wings to create COVID-19 isolation centres (Zomba, Maula, Mzimba), resulting in the transfer of female remand detainees and sentenced prisoners (with children) to remote prisons (Kapalamula, 2020; Pensulo, 2020b; Van Hout, 2020c; Southern African Litigation Centre, 2020). The Centre for Human Rights Education Advice Assistance (CHREAA) started judicial proceedings before the Zomba Magistrate Court in the case of *The State (on application of) Hastings Mwinjiro and three others and The Attorney General and Two others* (Judicial Review Case Number 18 of 2020). However, at the time of writing, the Court has not decided yet whether to suspend the implementation of the amended Standing Orders of the Malawi Prisons Service on the Prevention and Management of Covid-19, which also freezes prison visits.

Of grave concern, in the broader domestic sense, were the reports of extensive mismanagement of COVID-19 funds (Kateta, 2021). The continued back filling of Government support of prisons by non-governmental organisations and the UN High Commissioner for Refugees (UNHCR) in the form of donations of basic provisions (soap, PPE, detergent and food) and in the medical and disease control response was evident (Chikoti, 2020; Gondwe *et al.*, 2021). Staff strikes and riots demanding hazard pay and further provision of PPE were reported by the media (Muheya, 2020; Masina, 2020c; Guta, 2021). Prisoners continued to experience insufficient nutrition, lack of access to clean water, were unable to distance themselves from infected peers and, ultimately, protect themselves from COVID-19 (Jumbe *et al.*, 2022). The joint submission by the human rights organisations in 2021 observes; "the denial of adequate food as specified in Malawi Prison Regulation 53 is a violation of the State's obligations under s.42(1)(b) of the Constitution to and international human rights law, to protect the lives and wellbeing of inmates". (CHREAA, SALC, IRLI, 2021). Failure to provide these basic provisions constitutes a threat to life under Sections 19(1), 19(3) and 16 of the Malawi Constitution, violate international law standards and are deemed contra to the right to dignity and the prohibition against torture, inhuman and degrading treatment (CHREAA, SALC, IRLI, 2021).

The Malawi prison system continues to suspend relational visits during every wave of the pandemic. Visitation restrictions breached prisoner rights to access legal representation and family support for basic provisions [*Mandela Rules* 61(1)(3)]. This was especially the case in prisons where contact via alternative technological means [*Mandela Rule* 58(1a)] was not facilitated and where the lack of outside contact with family was viewed as inhibiting access to timely COVID-19 public health information, PPE, food, water, clothing and medicines. The transfer of women to remote rural prisons and lack of access to family and legal support when COVID-19 isolation wings were enacted constitute observable breaches of human rights (Pensulo, 2020b; Van Hout, 2020c). This is contra the *Bangkok Rules* 4 and 28.

Conclusions

Health rights and health conditions for prisoners in Africa are by default a neglected political issue in Africa (O'Grady *et al.*, 2011) and prison health research is historically under resourced, *ad hoc* and under-developed (Mhlanga-Gunda *et al.*, 2020; Ako *et al.*, 2020). Since March 2020, there is a growing evidence base of human rights-based investigations into standards of detention, disease preparedness and health-care responses in African prisons (Ethiopia, South Africa and Zimbabwe) has emerged (Van Hout and Wessels, 2021; Kras and Fitz, 2020; Mekonnen *et al.*, 2021; Mhlanga-Gunda *et al.*, 2022; Jumbe *et al.*, 2022).

This is the first legal realist assessment of the Malawian prison system approach to tackling COVID-19. Similar to South Africa (Kras and Fitz, 2020; Van Hout and Wessels, 2021) and Zimbabwe (Netsianda, 2020; Muronzi, 2020; Mavhinga, 2020; Mhlanga-Gunda *et al.*, 2022), the Malawi prison system was relatively successful in preventing serious outbreaks in its

prisons. Its health-care approach, however, has been viewed as *ad hoc* and reactive and lacking a strategic approach capable of mitigating future outbreaks (Jumbe *et al.*, 2022). Despite the efforts to decongest during State disaster measures, severe overcrowding persists and conditions are conducive to spread of a range of communicable diseases (TB, HIV, COVID-19, malaria and typhoid) (Kapalamula, 2020; CHREAA,SALC,IRLI, 2021; Guta, 2021; Jumbe *et al.*, 2022). Malawi is not meeting its obligations under the ICSECR (Gauld, 2021). Equally, and despite State disaster measures, there is potential State liability in the violation of their obligation to provide adequate provisions to protect against disease and prevent and control disease outbreak as required by international [ICCPR Article 4(1) and national law (regarding the right to life and prohibition of torture, cruel, inhuman or degrading treatment in Section 45(1) of the Constitution)].

According to Ilze Brands Kehris, the UN Assistant Secretary-General for Human Rights, the pandemic demonstrates the "urgent need for institutional reforms and societal transformation where human rights must be front and centre" (Brandze Kehris, 2020). Malawi is now recommended to use lessons learned during the COVID-19 experience to update its Prison Act in line with contemporary normative and human rights-based standards for prisoners and staff. At the time of writing, the new Prisons Bill moving beyond the colonial focus on security and punishment, and with a greater focus on human rights, has not yet been enacted. Meaningful realisation of the right to health of prisoners needs to be promoted and implemented through the ICESCR and the work of civil society, non-governmental organisations and the Malawian criminal justice system itself (Gauld, 2021). Continued and transparent efforts to decongest prisons using relaxed bail provisions, application of non-custodial sentences, adherence to the pre-trial custody limits, the conditional release of the elderly, sick, pregnant women, those who have significantly rehabilitated and those with low risk of reoffending and the use of camp courts is warranted (Gauld, 2021). Further human rights investigations and monitoring of healthcare and detention standards in Malawi and sub-Saharan prisons is warranted.

References

African Commission on Human and Peoples' Rights (ACoHPR) (2020a), "Press statement of the African commission on human & peoples' rights on the coronavirus (COVID-19) crisis – 08 April 2020", African Commission on Human and Peoples' Rights: The Gambia, available at: https://www.achpr.org/pressrelease/detail?id=480 (accessed 11 October 2021).

African Commission on Human and Peoples' Rights (ACoHPR) (2020b), "Press statement on human rights based effective response to the novel COVID-19 virus in Africa", African Commission on Human and Peoples' Rights: The Gambia, available at: https://www.achpr.org/pressrelease/detail?id=483 (accessed 11 October 2021).

Ako, T., Plugge, E., Mhlanga-Gunda, R. and Van Hout, M.C. (2020), "Ethical guidance for health research in prisons in low and middle-income countries: a scoping review", *Public Health*, Vol. 186, pp. 217-227.

Amnesty International (2020), "Sub-Saharan Africa: protect detainees at risk of COVID-19, unclog prisons and release prisoners of conscience", available at: https://www.amnesty.org/en/latest/news/2020/04/subsaharanafrica-protect-detainees-at-risk-of-covid-unclog-prisons-and-release-prisoners/ (accessed 11 October 2021).

Amon, J. (2020), "COVID-19 and detention: respecting human rights", *Health and Human Rights Journal*, available at: https://www.hhrjournal.org/2020/03/covid-19-and-detention-respecting-human-rights/ (accessed 11 October 2021).

Badu, K., Thorn, J., Goonoo, N., Dukhi, N., Fagbamigbe, A., Kulohoma, B., Oyebola, K., Abdelsalam, S., Doorsamy, W., Awe, O., Sylverken, A., Egeru, A. and Gitaka, J. (2020), "Africa's response to the COVID-19 pandemic: a review of the nature of the virus, impacts and implications for preparedness", *AAS Open Research*, Vol. 3 No. 19, available at: https://aasopenresearch.org/articles/3-19/v1 (accessed 11 October 2021).

Barnert, E., Ahalt, C. and Williams, B. (2020), "Prisons: amplifiers of the COVID-19 pandemic hiding in plain sight", *American Journal of Public Health*, Vol. 110 No. 7, pp. 964-966.

Beaudry, G., Zhong, S., Whiting, D., Javid, B., Frater, J. and Fazel, S. (2020), "Managing outbreaks of highly contagious diseases in prisons: a systematic review", *British Medical Journal Global Health*, Vol. 5 No. 11, p. e003201, doi: 10.1136/bmjgh-2020-003201.

Brandze Kehris, I. (2020), "If anything, this virus has demonstrated the urgent need for reform", Penal Reform International [Blog], 11 May 2020, available at: www.penalreform.org/blog/if-anything-this-pandemic-has-clearly-demonstrated-the/ (accessed 11 October 2021).

Bulled, N. and Singer, M. (2020), "In the shadow of HIV & TB: a commentary on the COVID epidemic in South Africa", *Global Public Health*, Vol. 15 No. 8, pp. 1231-1243.

Chikoti, M. (2020), "UNHCR donates COVID-19 materials to Malawi prison services", *Malawi*, Vol. 24, available at: https://malawi24.com/2020/07/30/unhcr-donates-covid-19-materials-to-malawi-prison-services/ (accessed 11 October 2021).

Chilemba, E.M. (2016), "The domestic legal enforcement of the right to health in Malawi: Appraising the litigation potential", in Ebenezer Durojaye (Ed.), *Litigating the Right to Health in Africa: Challenges and Prospects*, Routledge.

Chilora, S. (2020), "Zomba prisoners miss out on Covid-19 release", *The Times* (09 May 2020), available at: https://times.mw/zomba-prisoners-miss-out-on-covid-19-release/ (accessed 4 October 2021).

Chilundu, S. (2020), "Covid-19 initiative frees 1392 prisoners", The Nation, available at: https://www.mwnation.com/covid-19-initiative-frees-1-392-prisoners/ (accessed 11 October 2021).

Chireh, B. and Kwaku Essien, S. (2020), "Leveraging best practices: protecting Sub-Saharan African prison detainees amid COVID-19", Pan African Medical Journal*, available at:* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7406457/ (accessed 11 October 2021).

CHREAA,SALC,IRLI (2021), "Reprieve, 2021Joint stakeholder submission to the UN human rights committee for the LOIPR to be considered in relation to Malawi (131st session- 1st–26th March 2021)", Centre for Human Rights, Education, Advice and Assistance (CHREAA), Southern Africa Litigation Centre (SALC) & Irish Rule of Law International (IRLI), available at: https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/MWI/INT_CCPR_ICS_MWI_43941_E.pdf (accessed 11 October 2021).

Council of Europe (2015), "European committee for the prevention of torture and inhuman or degrading treatment or punishment, CPT standards, 2015 (CPT/inf/E (2002) 1 – Rev. 2015)", *Standard on Health care services in prisons*, No. 30 p. 38, available at: http://www.cpt.coe.int/en/documents/eng-standards.pdf (accessed 11 October 2021).

Face of Malawi (2020), "CSOs appeal for release of prisoners to counter COVID-19", Face of Malawi, available at: https://www.faceofmalawi.com/2020/03/30/csos-demand-release-of-prisoners/ (accessed 11 October 2021).

Gadama, L., Thakwalakwa, C., Mula, C., Mhango, V., Banda, C., Kewley, S., Hillis, A. and Van Hout, M.C. (2020), "'Prison facilities were not built with a woman in mind': an exploratory multi-stakeholder study on women's situation when incarcerated in contemporary Malawi prisons", *International Journal of Prisoner Health*, Vol. 16 No. 3, pp. 303-318.

Gauld, K. (2021), "Prisons in a pandemic the Malawi experience", in Pádraig Carmody, Gerard McCann, Clodagh Colleran and Ciara O'Halloran (Eds), *COVID-19 in the Global South Impacts and Responses*, Bristol University Press: United Kingdom.

Gondwe, A., Amberbir, A., Singogo, E., Berman, J., Singano, V., Theu, J., Gaven, S., Mwapasa, V., Hosseinipour, M.C., Paul, M., Chiwaula, L. and van Oosterhout, J.J. (2021), "Prisoners' access to HIV services in Southern Malawi: a cross-sectional mixed methods study", *BMC Public Health*, Vol. 21 No. 1, pp. 813, doi: 10.1186/s12889-021-10870-1.

Guta, W. (2021), "Maula prison in covid-19 SOS", Zodiak, available at: https://www.zodiakmalawi.com/nw/national-news/65-news-in-central-region/3674-maula-prison-in-a-covid-19-sos (accessed 11 October 2021).

Irish Rule of Law International (IRLI) (2020), "Joint statement: Malawi must act to prevent COVID-19 in prisons", Press release, 30 March 2020, available at: http://irishruleoflaw.ie/wpcontent/uploads/2020/03/IRLI-Reprieve-Malawi-CoronavirusJoint-Press-Statement-20200327.pdf (accessed 11 October 2021).

Jumbe, V.C., Mhango, V., Muula, A., Kaima, R., Chimbwete, L., Mangwana, A., Msutu, B., Tembo, L., Bigland, C., Kewley, S. and Van Hout, M.C. (2022), "A multi-stakeholder COVID-19 disease situation assessment of prison system preparedness and mitigation measures in a large prison complex in Malawi", *International Journal of Prisoner Health*, doi: 10.1108/IJPH-10-2021-0105.

Kapalamula, A. (2020), "Covid-19 unsettles prisons", The Times, available at: https://times.mw/covid-19-unsettles-prisons/ (accessed 11 October 2021).

Kapindu, R. (2013), "Courts and enforcement of socio-economic rights in Malawi: jurisprudential trends, challenges and opportunities", *African Human Rights Law Journal*, Vol. 13 No. 1, pp. 125-115.

Kateta, M.W. (2021), "Malawi audit confirms extensive mismanagement of COVID-19 funds", Devex, available at: https://www.devex.com/news/malawi-audit-confirms-extensive-mismanagement-of-covid-19-funds-99766 (accessed 11 October 2021).

Katey, D., Morgan, A.K., Asori, M., Ampofo, S.T. and Mpobi, R. (2021), "COVID-19 and the marginalized: an opinion piece on further measures to address COVID-19 in prisons in Sub-Saharan Africa", *International Journal of Prisoner Health*, Vol. 17 No. 3.

Kinner, S., Young, J., Snow, K., Southalan, L., Lopez-Acuña, D., Ferreira-Borges, C. and O'Moore, E. (2020), "Prisons and custodial settings are part of a comprehensive response to COVID-19", *Lancet Public Health*, doi: 10.1016/S2468-2667(20)30058-X, [Epub ahead of print], (accessed 11 October 2021).

Kras, K. and Fitz, L. (2020), "The social and environmental implications of the novel coronavirus on institutional and community corrections in South Africa", *Victims & Offenders*, Vol. 15 No. 7-8, pp. 1-15.

Leiter, B. (2015), "Legal realism and legal doctrine", *University of Pennsylvania Law Review*, Vol. 163 (1975),

Lines, R. (2008), "The right to health of prisoners in international human rights law", *International Journal of Prisoner Health*, Vol. 4 No. 1, pp. 3-53.

Lines, R. Burke-Shayne, N. and Girelli, G. (2020), "Gaol fever: what COVID-19 tells us about the war on drugs", Health and Human Rights Journal Online- April 19 2020, *available at:* https://www.hhrjournal.org/2020/04/gaol-fever-what-covid-19-tells-us-about-the-war-on-drugs/ (accessed 11 October 2021).

Lucero-Prisno, D.E., Adebisi, Y.A. and Lin, X. (2020), "Current efforts and challenges facing responses to 2019-nCoV in Africa", *Global Health Research and Policy*, Vol. 5 No. 1, doi: 10.1186/s41256-020-00148-1.

Malawi Inspectorate of Prisons (2019), "The Report of the Inspection of Prisons and Police Service Cells conducted by the Malawi Inspectorate of Prisons in 2018". Malawi Inspectorate of Prisons. Zomba: Malawi.

Malawi Law Commission (2018), "Report of the Law Commission on the Review of the Prisons Act." Lilongwe: Malawi.

Masina, L. (2020a), "Malawi president pardons prisoners to reduce COVID-19 spread", VOA News, available at: https://www.voanews.com/a/covid-19-pandemic_malawi-president-pardons-prisoners-reduce-covid-19-spread/6194474.html (accessed 4 October 2021).

Masina, L. (2020b), "Malawi government under pressure to pardon COVID-19 prisoners", VOA News, available at: https://www.voanews.com/a/africa_malawi-government-under-pressure-pardon-covid-19-prisoners/6193522.html (accessed 4 October 2021).

Masina, L. (2020c), "Malawi police clash with prison guards demanding COVID-19 protection equipment", VOA News, available at: https://www.voanews.com/a/covid-19-pandemic_malawi-police-clash-prison-guards-demanding-covid-19-protection-equipment/6188157.html (accessed 11 October 2021).

Mavhinga, D. (2020), "Prisoners in Zimbabwe at grave risk of Covid-19 spread", Human Rights Watch, *available at:* https://www.hrw.org/news/2020/07/29/prisoners-zimbabwe-grave-risk-covid-19-spread (accessed 11 October 2021).

Mekonnen, B., Hailemariam, S., Ejigu, A., Shifera, N. and Simieneh, A. (2021), "Preparedness and readiness against COVID-19 pandemic in prison institutions and detention centers in southwest Ethiopia", *International Journal of General Medicine*, Vol. Volume 14, pp. 337-346.

Mhlanga-Gunda, R., Kewley, S., Chivandikwa, N. and Van Hout, M.C. (2020), "Prison conditions and standards of health care for women and their children incarcerated in Zimbabwean prisons", *International Journal of Prisoner Health*, Vol. 16 No. 3, pp. 319-336.

Mhlanga-Gunda, R., Rusakaniko, S., Chinyuku, A., Pswarayi, V., Robinson, C., Kewley, S. and Van Hout, M.C. (2022), "We sleep 10cm apart so there is no social distancing": COVID-19 preparedness in a Zimbabwean prison complex", *International Journal of Prisoner Health*, doi: 10.1108/IJPH-10-2021-0101. [Epub online]

Ministry of Health (2020), *National COVID-19 Preparedness and Response Plan*, Department of Disaster Management Affairs, Ministry of Health. Lilongwe: Government of Malawi, available at: national_covid_19_preparedness_and_response_plan_revised_28-08-2020_final_003.pdf(reliefweb.int)

Muheya, G. (2020), "Malawi prison warders go on strike demanding cash from K157bn covid-19 fund", Nyasa Times, available at: https://www.nyasatimes.com/malawi-prison-warders-go-on-strike-demanding-cash-from-k157bn-covid-19-fund/ (accessed 11 October 2021).

Mukwenha, S., Dzinamarira, T., Mapingure, M.P. and Musukaa, G. (2021), "Zimbabwe's prison facilities: preparedness for institutional COVID-19 outbreaks", *Public Health in Practice*, Vol. 2, p. 100089, doi: 10.1016/j.puhip.2021.100089.

Muntingh, L. (2020), "Africa, prisons and COVID-19", *Journal of Human Rights Practice*, Vol. 12 No. 2, pp. 284-292.

Muronzi, C. (2020), "In Zimbabwe's overcrowded prisons, fear of COVID-19 spreads", *available at:* https://www.aljazeera.com/news/2020/9/25/gg (accessed 11 October 2021).

Mzumara, G.W., Chawani, M., Sakala, M., Mwandira, L., Phiri, E., Milanzi, E., Phiri, M.D., Kazanga, I., O'Byrne, T., Zulu, E.M., Mitambo, C., Divala, T., Squire, B. and Iroh Tam, P.Y. (2021), "The health policy response to COVID-19 in Malawi", *BMJ Global Health*, Vol. 6 No. 5, p. e006035, doi: 10.1136/bmjgh-2021-006035.

Netsianda, M. (2020), "Covid-19 hits Bulawayo prison – four inmates, officer found with virus", The Chronicle Newspaper, available at: https://www.chronicle.co.zw/covid-19-hits-bulawayo-prison-four-inmates-officer-found-with-virus/ (accessed 11 October 2021).

News 24 (2020), "Malawi court indefinitely bars virus lockdown", News 24, available at: https://www.news24.com/news24/Africa/News/malawi-court-indefinitely-bars-virus-lockdown-20200428 (accessed 11 October 2021).

Nkengasong, J. and Mankoula, W. (2020), "Looming threat of COVID-19 infection in Africa: act collectively and fast", *The Lancet*, Vol. 395 No. 10227, pp. 841-842.

Nweze, V.N., Anosike, U.G., Ogunwusi, J.F., Adebisi, Y.A. and Lucero-Prisno, D.E. (2020), "Prison health during the COVID-19 era in Africa", *Public Health in Practice (Practice)*, Vol. 2, p. 100083.

Office of the High Commissioner for Human Rights (OHCHR) (2020), *Urgent Action Needed to Prevent COVID-19 'Rampaging through Places of Detention' – Michelle Bachelet (25 March 2020)*, Office of the High Commissioner for Human Rights: Geneva.

O'Grady, J., Hoelscher, M., Atun, R., Bates, M., Mwaba, P., Kapata, N., Ferrara, G., Maeurer, M. and Zumla, A. (2011), "Tuberculosis in prisons in Sub-Saharan Africa – the need for improved health services, surveillance and control", *Tuberculosis (Tuberculosis)*, Vol. 91 No. 2, pp. 173-178.

Organization of African Unity (OAU) (1981), "African charter on human and peoples' rights ('Banjul charter')", CAB/LEG/67/3 rev.5,21I.L.M.5 Article 14(1), available at: https://www.achpr.org/legalinstruments/detail?id=49 (accessed 11 October 2021).

Patel, P., Adebisi, Y.A., Steven, M. and Lucero-Prisno, D.E. (2020), "Addressing COVID-19 in Malawi", *Pan African Medical Journal*, Vol. 35 No. Suppl 2, p. 71.

Penal Reform International (PRI) (2020), *Coronavirus: Healthcare and Human Rights of People in Prison*, Penal Reform International: London, available at: https://www.penalreform.org/resource/coronavirus-healthcare-and-human-rights-of-people-in/ (accessed 11 October 2021).

Pensulo, C. (2020a), "Malawi human rights groups warn of covid deaths in packed prisons", The Guardian, available at: https://www.theguardian.com/global-development/2020/aug/06/malawi-human-rights-groups-warn-of-covid-deaths-in-packed-prisons (accessed 11 October 2021).

Pensulo, C. (2020b), "Coronavirus banishes female inmates to far-flung jails in Malawi", Reuters, available at: https://www.reuters.com/article/us-health-coronavirus-malawi-women-idUSKCN25D1LE (accessed 11 October 2021).

Prison Insider (2020), "Africa", Prison Insider, available at: https://www.prison-insider.com/en/articles?page=1&tag%5B0%5D=afrique (accessed 11 October 2021).

Prison Inspectorate of Malawi (2019), "The report of the inspection of prions and police cells", Conducted by the Malawi Inspectorate of Prisons in March 2018, September 2019. Revision of Masangano v Attorney General & Others ((15 of 2007)) [2009] MWHC 31 (8 November 2009).

Rapisarda, S. and Byrne, J.M. (2020), "An examination of COVID-19 outbreaks in African prisons and jails", *Victims & Offenders*, Vol. 15 Nos 7/8, pp. 910-920.

Sambala, E., Kayesa, N., Ali, G., Mbulaje, P., Mkutumula, E. and Wiysonge, C. (2020), "A review of the public health act in Malawi: a case for reform and consolidation", *Preprints*, p. 2020040017.

Simpson, P. and Butler, T. (2020), "Covid-19, prison crowding, and release policies", *British Medical Journal*, Vol. 369, pp. m155, doi: 10.1136/bmj.m1551.

Sonenthal, P.D., Masiye, J., Kasomekera, N., Marsh, R.H., Wroe, E.B., Scott, K.W., Li, R., Murray, M.B., Bukhman, A., Connolly, E., Minyaliwa, T., Katete, M., Banda, G., Nyirenda, M. and Rouhani, S.A. (2020), "COVID-19 preparedness in Malawi: a national facility-based critical care assessment", *The Lancet Global Health*, Vol. 8 No. 7, pp. e890-e892, doi: 10.1016/S2214-109X(20)30250-3.

Southern African Litigation Centre (2020), "Civil society calls for the urgent decongestion of prisons after COVID-19 cases registered in ChiChiri and Mzimba prisons", Southern African Litigation Centre, available at: https://www.southernafricalitigationcentre.org/2020/07/17/civil-society-calls-for-the-urgent-decongestion-of-prisons-after-covid-19-cases-registered-in-chichiri-and-mzimba-prisons/ (accessed 11 October 2021).

Surgo Foundation (2020), "Africa COVID-19 community vulnerability index", available at: https://precisionforcovid.org/africa (accessed 11 October 2021).

United Nations (UN) (1966a), *International Covenant on Economic, Social and Cultural Rights (ICESRC)*, United Nations, Treaty Series, United Nations General Assembly, New York, NY, Vol. 993 No. 3.

United Nations (UN) (1966b), *International Covenant on Civil and Political Rights (ICCPR)*, United Nations, Treaty Series, 999. United Nations General Assembly: New York, NY.

United Nations (UN) (1966c), "General Assembly- Optional protocol to the international covenant on civil and political rights", Vol. 999, p. 171. United Nations, Treaty Series, available at: https://www.refworld.org/docid/3ae6b3bf0.html (accessed 11 October 2021).

United Nations (UN) (1982), *Principles of Medical Ethics Relevant to the Role of Health Personnel, Particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, A/RES/37/194. United Nations General Assembly: New York, NY.

United Nations (UN) (1984), "Convention against torture and other cruel, inhuman or degrading treatment or punishment", *United Nations, Treaty Series*, Vol. 1465 No. 85. United Nations General Assembly: New York, NY.

United Nations (UN) (2010), *United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders(the Bangkok Rules)*, A/C.3/65/L.50. UN General Assembly: New York, NY.

United Nations (UN) (2016), *Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules)*, A/RES/70/175. UN General Assembly: New York, NY.

United Nations (UN) (1991), "Basic Principles for the Treatment of Prisoners: resolution/adopted by the General Assembly" A/RES/45/111,para 9. United Nations General Assembly: New York, NY.

United Nations (UN) (2003), *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, UN General Assembly*, A/RES/57/199. UN General Assembly: New York, NY, available at: https://www.refworld.org/docid/3de6490b9.html (accessed 11 October 2021).

United Nations (UN) Committee Against Torture (2020), "Initial report submitted by Malawi under article 19 of the convention pursuant to the simplified reporting procedure, due in 1997", Committee Against Torture, available at: https://www.ecoi.net/en/file/local/2046124/G2006094.pdf (accessed 11 October 2021).

United Nations Malawi (2020), "Malawi COVID-19 situation update no.2 as of 27th March 2020", United Nations, available at: https://malawi.un.org/en/46712-malawi-covid-19-situation-update-no2-27th-march-2020 (accessed 11 October 2021).

United Nations Office on Drugs and Crime (UNODC) (2020), *Position Paper COVID-19 Preparedness and Responses in Prisons*, United Nations Office on Drugs and Crime: Vienna.

United Nations Office on Drugs and Crime (UNODC), World Health Organization (WHO), UNAIDS, and Office of the High Commissioner for Human Rights (OHCHR) (2020), "UNODC, WHO, UNAIDS and OHCHR joint statement on COVID-19 in prisons and other closed settings 13 may 2020", *available at:* https://www.who.int/news/item/13-05-2020-unodc-who-unaids-and-ohchr-joint-statement-on-covid-19-in-prisons-and-other-closed-settings (accessed 11 October 2021).

US Department of State (2020), "2020 Country reports on human rights practices: Malawi", Bureau of Democracy, Human Rights and Labor, available at: www.state.gov/Reports/2020-Country-Reports-On-Human-Rights-Practices/malawi/ (accessed 11 October 2021).

Van Hout, M.C. (2020a), "COVID-19, health rights of prison staff and the bridge between prison and public health in Africa", *Public Health*, Vol. 185, pp. 128-129.

Van Hout, M.C. (2020b), "Prison staff exposure to pathogenic disease and occupational health research in African prisons: a neglected area", *Journal of Sustainable Development in Africa*, Vol. 22 No. 1, pp. 166-171.

Van Hout, M.C. (2020c), "COVID-19: urgent need to find alternatives to prison sentences in Malawi", *Health and Human Rights Journal, available at:* https://www.hhrjournal.org/2020/09/covid-19-urgent-need-to-release-women-from-prison-in-malawi/ (accessed 11 October 2021).

Van Hout, M.C. (2020d), "Leaving no one behind: the human tragedy of children in African prisons during COVID-19", *Health and Human Rights Journal*, available at: https://www.hhrjournal.org/2020/05/leaving-no-one-behind-the-human-tragedy-of-children-in-african-prisons-during-covid-19/ (accessed 11 October 2021).

Van Hout, M.C. and Wessels, J. (2021), "'Ubuntu' I am because we are: COVID-19 and the legal framework for addressing communicable disease in the South African prison system", *International Journal of Prisoner Health*, doi: 10.1108/IJPH-05-2021-0046. [Epub ahead of print]

Water Supply and Sanitation Collaborative Council (2020), "*WASH assessments for COVID-19* "Prevention in Malawi Prisons – August 21st 2020", Water Supply and Sanitation Collaborative Council, available at: https://www.wsscc.org/media/resources/wash-assessments-covid-19-prevention-malawi-prisons (accessed 11 October 2021).

World Health Organization (WHO) (2003), *WHO Moscow Declaration: Prison Health as Part of Public Health*, World Health Organization: Copenhagen.

World Health Organization (WHO) (2020a), *Coronavirus Disease (COVID-19) Pandemic*, World Health Organization: Geneva.

World Health Organization (WHO) (2020b), *Preparedness, Prevention and Control of COVID-19 in Prisons and Places of Detention*, World Health Organization: Geneva.

World Health Organization (WHO) (2020c), *Checklist to Evaluate Preparedness, Prevention and Control of COVID-19 in Prisons and Other Places of Detention*, World Health Organization: Copenhagen.

World Medical Organisation (WMA) (2011), *Declaration of Edinburgh on Prison Conditions and the Spread of Tuberculosis and Other Communicable Diseases*, World Medical Organisation: Geneva.

Worldometer COVID-19 Data (2022), "Malawi. Worldometer COVID-19 data", available at: https://www.worldometers.info/coronavirus/country/malawi/ (accessed 15 February 2022).

Further reading

African Commission on Human and Peoples' Rights (ACoHPR) (2008), *The Robbin Island Guidelines Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa*, African Commission on Human and Peoples' Rights: The Gambia.

Alexander, J. (2009), "Death and disease in Zimbabwe's prisons", *Lancet*, Vol. 373 No. 9668, p. e6.

United Nations Human Rights Office of the High Commissioner (OHCHR) (2012), "The human rights treaty system", available at: www.ohchr.org/Documents/Publications/FactSheet30Rev1.pdf (accessed 29 September 2021).

UN General Assembly (2009), "Optional protocol to the international covenant on economic, social and cultural rights: resolution/adopted by the general assembly", A/RES/63/117, available at: https://www.refworld.org/docid/49c226dd0.html (accessed 11 October 2021).

World Prison Brief (2020), "Africa", World Prison Brief, available at: www.prisonstudies.org./map/africa (accessed 11 October 2021).

Author affiliations
Marie Claire Van Hout is based at Public Health Institute, Liverpool John Moores University, Liverpool, UK.

Victor Mhango is based at Centre for Human Rights Education Advice Assistance (CHREAA), Blantyre, Malawi.

Ruth Kaima is based at Centre for Human Rights Education Advice Assistance (CHREAA), Blantyre, Malawi.

Charlotte Bigland is based at Public Health Institute, Liverpool John Moores University, Liverpool, UK.

Triestino Mariniello is based at School of Law, Liverpool John Moores University, Liverpool, UK.

Corresponding author
Marie Claire Van Hout can be contacted at: m.c.vanhout@ljmu.ac.uk

Human rights violations, detention conditions and the invisible nature of women in European immigration detention: a legal realist account

Marie Claire Van Hout

Abstract

Purpose – *The purpose of this paper was to conduct a legal realist assessment of women's situation in European immigration detention which focuses on relevant international and European human rights instruments applicable to conditions and health rights in detention settings, academic literature and relevant European Court of Human Rights (ECtHR) jurisprudence since 2010.*

Design/methodology/approach – *In spite of the United Nations human rights frameworks and European Union (EU) standards, conditions in European immigration detention settings continue to pose a health risk to those detained. Migrant health rights when detained are intertwined with the right not to be subjected to arbitrary detention, detention in conditions compatible for respect for human dignity and right to medical assistance. Migrant women are particularly vulnerable requiring special consideration (pregnant and lactating women; single women travelling alone or with children; adolescent girls; early-married children, including with newborn infants) in immigration detention settings.*

Findings – *The situation of women in immigration detention is patchy in EU policy, academic literature and ECtHR jurisprudence. Where referred to, they are at best confined to their positionality as pregnant women or as mothers, with their unique gendered health needs ill-resourced. ECtHR jurisprudence is largely from male applicants. Where women are applicants, cases centre on dire conditions of detention, extreme vulnerability of children accompanying their mother and arbitrary or unlawful detention of these women (with child).*

Originality/value – *Concerns have been raised by the European Parliament around immigration detention of women including those travelling with their children. There is a continued failure to maintain minimum and equivalent standards of care for women in European immigration detention settings.*

Keywords *Women's health, Women, Human rights, Immigration detention, Migrant, Bangkok Rules*

Paper type *Viewpoint*

Marie Claire Van Hout is Professor of Public Health Policy and Practice and based at the Public Health Institute, Faculty of Health of Liverpool John Moores University, Liverpool, UK.

Introduction

The flow of migrants into Europe continues, impacting severely on service capacities and standards of care in immigration detention settings. Many are detained because of lack of certainty regarding immigration status. In spite of the European Union (EU) "Return Directive" (The European Parliament and the Council of the European Union, 2008), the Global Compact on Refugees [UN High Commissioner for Refugees (UNHCR), 2018], the Global Compact for Safe, Orderly and Regular Migration (GCM) (UN General Assembly, 2018) and international guidelines mandating that detention should be the exception and not the norm [UN High Commissioner for Refugees (UNHCR), 2012], immigration detention is mostly used to facilitate deportation [European Migration Network, 2014; Association for the Prevention of Torture (APT), UN High Commissioner for Refugees (UNHCR) and International Detention Coalition (IDC), 2014; Apap, 2016]. Immigration detention is no

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longer an exceptional response to irregular entry or stay, has become routine and is increasingly "an established policy apparatus based on dedicated facilities and burgeoning institutional bureaucracies" [Apap, 2016; UN Working Group on Arbitrary Detention (WGAD), 2018; Majcher, 2019]. As the European Court of Human Rights (ECtHR) consistently refuses to apply the principle of necessity and proportionality requirements under Article 5(1f), "the right to liberty and security of person" (see *Chahal v. the United Kingdom*, ECtHR, 1966), thousands endure arbitrary detention each year (Apap, 2016). It remains impossible to obtain a true picture of immigration related detention with regard to the locations of detention settings (which include specialised facilities, airport transit zones, police stations, disused factories, etc.), statistics on numbers detained and any breakdowns of accompanied and unaccompanied minors (Global Detention Project, 2015).

The EU Fundamental Rights Agency reports on the purposes and conditions of immigration detention with respect to public order, public health and national security [European Union Agency For Fundamental Rights (EUFRA), 2010]. The UNHCR has published a range of immigration detention standards prohibiting arbitrary detention and regarding adequate conditions of detention which uphold the rights and dignity of migrants (UNHCR, 2012). Safeguards against arbitrary detention apply to those identified as having vulnerabilities (elderly, disabled, women and unaccompanied children) and who should be assessed for specific vulnerabilities and informed around due process [Council of Europe European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), 2017; ECtHR, 2020]. Children should be detained only exceptionally, as a last resort and States must first and foremost strive to place them in community alternatives to detention [Convention on the Rights of the Child (CRC, *Articles* 30, 37b)] [UN General Assembly, 1989; UN High Commissioner for Refugees (UNHCR), 2014a, 2014b; Committee on the Protection of the Rights of All Migrant Workers (CMW) and Committee on the Rights of the Child (CRC) Committee, 2017]. The GCM is silent on the special conditions of detention and care afforded to other vulnerable migrants [Special Rapporteur on the Human Rights of Migrants (SRHRM), 2002, 2012].

This *Viewpoint* firstly provides contextual detail on the complexities of migrant health, health inequalities and health risks encountered in European immigration detention. In 2017, women comprised over half of all migrants and refugees in Europe (UN, 2017), and concerns are raised by the European Parliament around immigration detention of women including those travelling with their children (Apap, 2016). Using a legal realist approach (Leiter, 2015) the subsequent focus is on assessing the situation of women in European immigration detention since 2010. In 2010, the UN "Bangkok Rules" (UN General Assembly, 2010) were created as soft-law principles laying the foundation for intensified efforts to support the rights of women in detention [Huber, 2016; Barbaret and Jackson, 2017; Penal Reform International (PRI), 2020a, 2020b]. A realist account is subsequently developed through focused analysis of international and European human rights treaties, non-binding human rights instruments, ECtHR jurisprudence, academic- and policy-based literature, cognizant of the indeterminate nature of application of human rights norms and standards to European immigration detention conditions and the health rights of women. Please note: it was beyond the scope of this *Viewpoint* to also include European Court of Justice (ECJ) jurisprudence, as the ECJ must offer at least the same level of protection as the jurisprudence of the ECtHR, and ECtHR cases regarding rights breaches of standards of medical care when repatriated to countries of origin were excluded.

General and gendered health risks in immigration detention

The Strategy and Action Plan for Refugee and Migrant Health in the World Health Organization European Region was adopted in 2016 to assist in guiding progress on the health aspects of migrancy [World Health Organization (WHO), 2018]. There is a growing European evidence base on the health of migrants, the health inequities and health-care barriers they face in the community (Lebano *et al.*, 2020) and in immigration detention

(Lungu-Byrne *et al.*, 2020; Van Hout *et al.*, 2020). Migrant health is highly complex being underpinned by the impact of the migratory process itself and social determinants of health, resulting in a range of health morbidities (Rechel *et al.*, 2013; Pavli and Maltezou, 2017; WHO, 2018). The health inequities of migrant women are well evidenced [International Organization for Migration (IOM), 2010; Keygnaert *et al.*, 2014; Fair *et al.*, 2020]. Many may be accompanied by their children or give birth in immigration detention, some may be under-age brides and considered minors, others are trafficked (Apap, 2016). They are particularly affected by the physical and psychological impact of their journey to Europe (exposure to sexual and gender-based violence or SGBV, female genital mutilation, psychological manipulation, human trafficking) and the subsequent pathogenic consequences of immigration detention (European Parliament, 2007; Apap, 2016). They have marked adverse pregnancy-related indicators and are vulnerable to mental health disorder and sexually transmitted infections (Skøtt Pedersen *et al.*, 2013; Apap, 2016; Keygnaert *et al.*, 2015; Keygnaert *et al.*, 2016; Villalonga-Olives *et al.*, 2017). Their children are disproportionately affected by trauma-related psychological disorders (Belhadj Kouider *et al.*, 2014; Curtis, 2018; Mares, 2020).

In spite of relevant non-binding resolutions of the Council of Europe and standards in the EU Reception Condition and Return Directives (The European Parliament and the Council of the European Union, 2008; EU: Council of European Union, 2013), immigration detention settings in Europe pose a health risk to those detained there (Rijks *et al.*, 2017). Migrant health rights are intertwined with "the right not to be subjected to arbitrary deprivation of liberty," right to detention "in conditions compatible with respect for human dignity, with execution of the measure not exceeding unavoidable levels of suffering inherent in detention" and right to access to medical assistance [Council of Europe and European Court of Human Rights, 2015; Council of Europe European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), 2017]. Inhumane immigration detention exacerbates general good health on intake, with those detained significantly vulnerable to environmental and communication stressors, and consequent mental health conditions (Lungu-Byrne *et al.*, 2020; Van Hout *et al.*, 2020). Gender discrimination experienced by women in immigration detention encompasses neglect and ill-treatment and includes various forms of custodial violence (SGBV, inappropriate surveillance by male staff, lack of privacy and denial of appropriate medical care) [Penal Reform International (PRI), 2020a, 2020b; United Nations Office on Drugs and Crime (UNODC), 2008; United Nations Human Rights Council (OHCHR), 2008; UN Committee Against Torture (CAT), 2015].

Right to health and international human rights frameworks applicable to immigration detention

The universal, non-discriminatory right to the highest attainable standard of health falls within the Universal Declaration of Human Rights (Article 25) (UN General Assembly, 1948) and international human rights treaties which include the International Covenant on Civil and Political Rights (Article 6) (UN General Assembly, 1996), International Covenant on Economic, Social and Cultural Rights (Article 12) (UN General Assembly, 1966), the Committee on Economic, Social and Cultural Rights (Article 10), the European Social Charter (Article 10) (Council of Europe, 1996) and the Charter of Fundamental Rights of the EU (Article 11) (European Union, 2012). General Comment 14 of the Committee on Economic, Social and Cultural Rights notes that "States are under an obligation to respect the right to healthcare by refraining from denying or limiting equal access for all persons, including prisoners or detainees, minorities, asylum seekers and irregular migrants" (Committee on Economic, Social and Cultural Rights, 2000). Access to equitable health prevention and care for migrants is further explicit in the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families (Articles 28, 43, 45) (UN General Assembly, 1990), Elimination of All Forms of Racial Discrimination (Article 5. e, 4) (UN General Assembly, 1965),

Protocols against the Smuggling of Migrants by Land, Sea and Air (UN General Assembly, 2000b); Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (UN General Assembly, 2000a); the UN High-level Dialogues on Migration and Development [UN High Commissioner for Refugees (UNHCR), 2006], UN Convention Related to the Status of Refugees (UN General Assembly, 1967); and the New York Declaration for Refugees and Migrants (UN General Assembly, 2016a).

This year marks the ten-year anniversary of the "Bangkok Rules" (UN General Assembly, 2010) intended to support and complement, where appropriate, the UN Standard Minimum Rules for the Treatment of Prisoners (United Nations, 1955), Basic Principles for the Treatment of Prisoners (UN General Assembly, 1991), Minimum Rules for the Treatment of Prisoners ("Nelson Mandela Rules") (UN General Assembly, 2016b) and Standard Minimum Rules for Non-custodial Measures ("Tokyo Rules") (UN General Assembly, 1991). As immigration detention settings are somewhat unique, the UNHCR (2012) detention guidelines and standards in detention settings and alternatives to detention reflect the spirit of the "Bangkok Rules" relating to detention conditions, and the unique health rights and right to health care of women. Rule 9.3 centres on the general rule that pregnant and nursing mothers have special needs and should not be detained, men and women are to be segregated, safeguards should be in place to prevent SGBV, women's specific hygiene needs are to be met, gender sensitive and trained female staff are to be preferred, victims of SGBV should be provided with immediate supports taking into account the risks of retaliation and women's rights to requisite medical care whilst deprived of their liberty in immigration detention. These are further supported by immigration detention guidelines set by the Council of Europe European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) (2017).

Extant evidence on women's situation in European immigration detention

The UNHCR has observed poor standards in Greece, Italy, Bulgaria, France and the former Yugoslav Republic of Macedonia, with specific concerns raised around punitive and sub-standard conditions, potentially tantamount to inhuman and degrading treatment, and especially detrimental to women and their children [Office of the United Nations High Commissioner for Human Rights (OHCHR), 2017]. Differences also exist across EU Member States in providing health services and support responses to those detained (Human Rights Council, 2010; Lungu-Byrne *et al.*, 2020). In spite of the influx of mass population movement into Europe since 2015, there is very little empirical research specific to women in immigration detention since adoption of the "Bangkok Rules." This is perhaps reflective of the difficulties in gaining researcher access, and the male dominated presence in immigration detention itself. The bulk of European academic literature in the past decade originates from the UK. Of note is that the UK opted out of the 28 day limit on detention, meaning that individuals are held indefinitely (Dexter and Katona, 2018). Notwithstanding the UK's recent withdrawal from Europe, the literature is concerning being indicative of serious failures to meet the complex needs of women, with denial of medical care and the suppression of human (and health) rights, social justice and health protection observed. Rights are breached based on inhumane living conditions and challenges in accessing maternity care, lack of staff cognisance of prior histories of SGBV/trafficking, lack of privacy when receiving medical care, disrupted supply of medicines and inadequate provision of food, with migrant women reporting deteriorating mental health conditions (including self-harm), feelings of isolation and powerlessness over their health (Medical Justice, 2013; Palloti and Forbes, 2016; Smith, 2017; Arshad *et al.*, 2018; Dexter and Katona, 2018; Hollis, 2019).

Elsewhere in Europe, and according to the European Race Audit, tragedies are many, including the deaths of pregnant women whilst in immigration detention owing to medical neglect (European Race Audit, 2010). Extant literature is male dominated, with very few studies presenting the unique gendered perspectives and experiences of detained migrant

women. One qualitative study in Sweden has three female participants, with migrant women likening immigration detention to imprisonment (Puthoopparambil *et al.*, 2015). Studies in Greece, Malta, Italy and Belgium include women reporting on sub-standard detention standards, failures to segregate men and women, inadequate medical care and disease control measures (Kotsioni, 2013; Taylor-East *et al.*, 2014; Padovese *et al.*, 2014). Of interest is the emergence of feminist and theoretical literature published on the gendered complexities of the European detention sphere, security and the upholding of rights and positionality of migrant women when detained (Bosworth, 2014). Migrant women's experiences (Italy) are increasingly viewed through a feminist lens, where "unequal relations and gendered domination" continue, where they are positioned as "excludable and deportable subjects" and which illustrate how the immigration control system underpins the "(re) production of a dominant normative order" (Esposito *et al.*, 2019). Theoretical works refer to the positionality of migrant women, underpinned by the existence of gendered modalities of migrant governance that operate within broader migration controls, where gendered constraints of medical humanitarianism in detention settings; "from practices of immobilisation to imposed practices of mothering" are grounded in racialised and gendered processes of "othering" and "deservingness" (Spain) (Sahraoui, 2020a; Sahraoui, 2020b). In Greece, a study illustrated how "particular gender techniques" differentiate those women deserving of special treatment (i.e. mothers, victims of trafficking) whilst detained, from those less deserving (i.e. illegal migrants, former prisoners) (Alberti, 2010).

Assessment of extant European Court of Human Rights jurisprudence

ECtHR jurisprudence since 2010 was scrutinised for cases where women in immigration detention were included as applicants. The bulk of cases are brought to the court by male applicants (ECtHR, 2021a, 2021b) with claims generally centring on lawfulness of detention, expulsion orders and detention conditions (see *Georgia v. Russia*, ECtHR, 2014a; *Khlaifia and Others v. Italy*, ECtHR, 2016a; *Sakir v. Greece*, ECtHR, 2016b; *C.D. and Others v. Greece*, ECtHR, 2014b). Several cases do refer to women, either in families, or as single women travelling with children. These claims (at times multiple) centre on Article 3 (prohibition of inhuman or degrading treatment), Article 5 (right to liberty and security of person) and Article 13 (right to an effective remedy) of the European Convention on Human Rights (ECHR) (Council of Europe, 1950). The rights of female immigration detainees (and their children) underpinned by their histories of rape and forced marriage and their entitlement to minimum standards of care are outlined in several cases – see *Belgium-Brussels Labour Tribunal case* (ECtHR, 2017a); *Denmark – The Refugee Appeals Board* (ECtHR, 2017b); *Switzerland – A., B., C. (Nigeria) v. State Secretariat for Migration* (ECtHR, 2019a); *Denmark – Refugee Appeals Board's decision of 17 April 2018* (ECtHR, 2018a); and *Poland – Polish Council for Refugees* (ECtHR, 2012a). The court decisions mostly appear to hinge on establishing a threshold for inhuman or degrading treatment whilst in detention and establishing if arbitrary or unlawful immigration detention has taken place. Where families that include an adult woman are applicants, the ECtHR "consistently finds that child immigration detention amounts to torture and degrading treatment" and that the principle of "best interests of the child" must prevail [Platform for International Cooperation on Undocumented Migrants (PICUM), 2019]. Whilst many identified cases involve multiple claims regarding breaches of the ECHR (Council of Europe, 1950), the jurisprudence that follows is presented in three themes: the threshold of severity of conditions of detention, extreme vulnerability of children accompanying their mother and arbitrary or unlawful detention of the female applicant (with child).

There are observed complexities involved in establishing a threshold of severity of detention conditions as per Article 3. Whilst some cases fail in proving violation of Article 3, they succeed regarding Article 5. The case of *J.R and others v. Greece* (ECtHR, 2018b) was the first judgement dealing with the implementation of the EU-Turkey Statement (European

Council-Council of the European Union, 2016), and the rise in legitimacy of poor conditions in detention settings (lack of sanitation and hygiene, poor access to medical care and legal assistance, insufficient food and water) under the agreement. One of the claimants was a woman travelling with her two children. The ECtHR ruled no violation of Article 5(1) had occurred, and "that the threshold of severity regarding detention conditions to be considered inhuman or degrading (Article 3) had not been reached." Greece had however violated Article 5(2) with regard to provision of information regarding reason for detention. The case of *Kaak and Others v. Greece* (ECtHR, 2019b) observed a complaint around conditions of detention including the reference that conditions could not ensure the safety of women and children, in spite of the ECtHR ruling no violation of Articles 3 or 5 had occurred.

In the case of *Abdi Mahamud v. Malta* (ECtHR, 2016c), the ECtHR ruled Malta had violated Articles 3 and 5. The applicant, a Somali woman, was held in prolonged detention in adverse conditions (overcrowding, limited access to open air, lack of privacy and lack of female staff) and requested release owing to her ill health and status as a vulnerable individual. The judge then partially dissented, finding insufficient evidence of violation of Article 3. He further stated that her claim for health vulnerability was not exacerbated by the severity of detention conditions and that she did not qualify for the categories of vulnerability requiring closer scrutiny (i.e. pregnant or breastfeeding). In *Mahamed Jama v. Malta* (ECtHR, 2015a), the applicant reported inadequate conditions of detention and that her detention of eight months was arbitrary and unlawful. The ECtHR ruled no violation of Article 3 or 5 (1) regarding detention pending her asylum claim had taken place. It did however rule that violation of Article 5(1) had occurred regarding her detention following the decision on her asylum claim and violation of Article 5 (4) had occurred, regarding "an adequate remedy to challenge the lawfulness of her detention."

There are several cases where the ECtHR established conditions of immigration detention concurred with inhuman and degrading treatment in breach of Article 3. In *Aden Ahmed v. Malta* (ECtHR, 2013), a Somali woman alleged that her detention was in breach of Article 5 (1, 2, 4) and complained that detention conditions represented inhuman treatment (Article 3). The lack of female staff, access to fresh air, exposure to the cold and the inadequate diet exacerbated her mental health owing to her particular vulnerability (emotional circumstances owing to miscarriage whilst in detention, and separation from her young child). The ECtHR held a violation of Article 3. In contrast, in *Moxamed Ismaaciil and Abdirahman Warsame v. Malta* (ECtHR, 2016d), two women who were detained in the same centre as in *Aden Ahmed v. Malta* (ECtHR, 2013), claimed arbitrary and unlawful detention and submitted that they had not been kept in conditions which were appropriate for young single women. The ECtHR held no violation of Articles 3 and 5(1), but ruled that there had been a violation of Article 5(4).

There are further mitigating factors regarding breaches of Article 3 where children are present. In the famous case of *Popov v. France* (ECtHR, 2012b), the ECtHR ruled that a married couple with two children had incurred a violation of Article 3 with respect to the detention conditions of the children (unsafe furniture and automatic doors) and child protection principles (insecurity and hostile atmosphere), in spite of being detained in pre removal in Rouen-Oissel administrative detention centre, authorised to accommodate families. No violation of Article 3 was held regarding the conditions of detention of the parents. Circumstances were similar in *Muskhadzhiyeva and Others v. Belgium* (ECtHR, 2010), underpinned by the impact of process and exposure to stress on the vulnerability of the child, and which had amounted to inhuman and degrading treatment. In this case, the applicants, a mother and her four children, were placed in pre removal detention near Brussels airport. The ECtHR ruled that a violation of Article 3 had occurred with respect of the detention of the four children, even though they had not been separated from their mother. This was based on the decision of the extreme vulnerability of the children taking precedence (and official obligation to protect them) over their status as illegal aliens. No violation of Article 3 was observed with regard to the children's mother.

In *G.B. and Others v. Turkey* (ECtHR, 2019c), a mother with three young children in detention pending deportation claimed unlawful detention and that conditions in Kumkapi and Gaziantep centres (overcrowding, lack of hygiene, lack of open air, lack of suitable food) were in breach of Article 3. The ECtHR held that violations of Article 3 in both centres concerning conditions of detention had occurred, including a violation of Article 13 in conjunction with Article 3, and quoted "that detention of young children in unsuitable conditions may on its own lead to a finding of a violation of Article 5 (1), regardless of whether the children were accompanied by an adult or not." In *Mahmundi and Others v. Greece* (ECtHR, 2012c), an Afghan family, including a pregnant woman with four minors, were detained in Lesbos. The ECtHR ruled that "the deplorable conditions of detention were in breach of Article 3 and observed the lack of specific supervision of the applicants as minors," and support of woman who subsequently gave birth in detention. It also ruled a violation of Article 13 had occurred owing to the impossibility for applicants to lodge a complaint regarding detention conditions, and a violation of Article 5(4).

In another example, in *Kanagaratnam and Others v. Belgium* (ECtHR, 2011a), a mother with three children were detained in immigration detention, with the ECtHR ruling that there had been a violation of Article 5 (1) regarding unlawful detention. Further the ECtHR considered that conditions were not suitable for children, with the Belgian authorities in breach of the children's right to liberty (in spite of being held with their mother). In *S.F. and Others v. Bulgaria* (ECtHR, 2017c), the applicants, an Iraqi couple and their three children, were detained at the border police's detention facility in Vidin, Bulgaria. Whilst their detention period was considerably shorter than in *Popov v. France* (ECtHR, 2012b), the ECtHR observed a violation of Article 3 owing to the conditions experienced by the children (run down cell, dirty floor, no access to toilets forcing them to urinate on the floor, no food for 24 h). In *Bistieva and Others v. Poland* (ECtHR, 2018c), the ECtHR found that the Polish authorities had failed to assess the impact of detention on the family and the children in particular. Notice was also given by the ECtHR to the Polish government regarding the detention of a woman with five children under Articles 3, 5 and 8 (see *Bilalova v. Poland*) (ECtHR, 2014c).

In *V.M. v. Belgium* (ECtHR, 2015b), the ECtHR found a violation of Article 3 regarding the grave conditions where a Roma family with five children were forced to live between their removal to detention and expulsion to Serbia (three weeks in Brussels North Railway Station). They took into account the possibility of harm owing to the vulnerability of the applicants. There is a communicated case to the ECtHR regarding *A.S. and others v. Hungary* (ECtHR, 2017d) where an Afghan family including the mother (eight months pregnant) as applicant, her husband and two children were detained at the border of Serbia and Hungary. The ECtHR gave notice to the Hungarian Government regarding breaches of Articles 3, 5 (1), 5 (4) and 13.

Lastly, only one case directly referred to access to medical care, in the case of a HIV positive woman in *YohEkale Mwanje v. Belgium* (ECtHR, 2011b) which established that deportation at advanced stage of HIV to a country of origin without certainty of appropriate medical treatment did not constitute a violation of Article 3, however delay in determining appropriate medical treatment for the detainee *whilst in* immigration detention was a violation of Article 3, with the ECtHR also ruling a violation of Articles 5(1) and 13.

Conclusion

It is beyond doubt that migrant women in immigration detention are uniquely vulnerable and face heightened risks and harms to health and life (PRI and APT, 2013). Migrant women are less visible in ECtHR jurisprudence, EU policy and academic literature on immigration detention, at best confined to their positionality as mothers and receiving *de facto* protection by virtue of the rights of their child(ren). This is reflective of them as "Other" and the inherent gendered tensions in human rights for women deprived of their liberty pertaining to "protection versus protectionism" (Berzano, 2021).

In spite of the UNHCR Guidelines on Detention (UNHCR, 2012) and in the broader sense the *European Prison Rules* (Council of Europe, 2006), the 2017 Council of Europe guidelines on immigration detention [Council of Europe European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), 2017] and the *Bangkok Rules* (UN General Assembly, 2010), oversight mechanisms clearly vary across Europe (Bhui, 2016; Nethery and Silverman, 2015). This realist account reveals the continued failure to maintain minimum, equivalent and gender-sensitive standards of care, with breaches in the human and unique health rights of women detained in European immigration detention settings. Deficits include the lack of application of special vulnerability assessments, access to gender sensitive medical care, poor detention conditions and rights to being informed regarding due process. Given their unique gendered vulnerabilities, assurances of the concept of equivalence of care for migrant women in immigration detention are lamentable. Many are especially vulnerable (e.g. trafficking victims, pregnant women).

Achieving substantive equality is entrenched in the sustainable development agenda and global efforts to ensure that these women are "not being left behind." Protection of *all* migrant women from inter-sectional and immigration detention discrimination and harm is warranted in future EU policy and practice and should include regular health surveillance, gender-sensitive health programming and independent immigration detention inspections by the authorities. Future research on these hidden women also warrants careful consideration, deployment and sensitivity in its approach (Zion, 2013; Newman, 2013; Kronick, 2018; Ziersch, 2017).

References

Alberti, G. (2010), "Across the borders of Lesvos: the gendering of migrants' detention in the Aegean", *Feminist Review*, Vol. 94 No. 1, pp. 138-147.

Apap, J. (2016), *'Arbitrary Detention of Women and Children for Immigration-Related Purposes'*, European Parliamentary Research Service, Brussels.

Arshad, F., Haith-Cooper, M. and Palloti, P. (2018), "The experiences of pregnant migrant women in detention: a qualitative study", *British Journal of Midwifery*, Vol. 26 No. 9, pp. 591-596.

Association for the Prevention of Torture (APT), UN High Commissioner for Refugees (UNHCR), and International Detention Coalition (IDC) (2014), 'Monitoring immigration detention: practical manual' available at: https://idcoalition.org/wp-content/uploads/2015/06/Monitoring-Immigration-Detention-Practical-Manual.pdf (accessed 12 March 2021).

Barbaret, R. and Jackson, C. (2017), "UN rules for the treatment of women prisoners and non-custodial sanctions for women offenders (the Bangkok rules):a gendered critique", available at: https://ddd.uab.cat/pub/papers/papers_a2017v102n2/papers_a2017v102n2p215.pdf (accessed 12 March 2021).

Belhadj Kouider, E., Koglin, U. and Petermann, F. (2014), "Emotional and behavioral problems in migrant children and adolescents in Europe: a systematic review", *European Child & Adolescent Psychiatry*, Vol. 23 No. 6, pp. 373-391.

Berzano, P. (2021), "The Bangkok rules: an international response to the needs of women offenders", available at www.unafei.or.jp/publications/pdf/RS_No90/No90_11VE_Barzano.pdf (accessed 12 March 2021).

Bhui, H.S. (2016), "Can inspection produce meaningful change in immigration detention?", *Global Detention Project Paper No. 12*, Global Detention Project, Geneva.

Bosworth, M. (2014), *Inside Immigration Detention*, Oxford University Press, Oxford.

Committee on Economic, Social and Cultural Rights (2000), "General comment no.14 on the highest attainable standard of health E/C.12/2000/4", available at: www.refworld.org/pdfid/4538838d0.pdf (accessed 12 March 2021).

Committee on the Protection of the Rights of All Migrant Workers (CMW) and Committee on the Rights of the Child (CRC) Committee (2017), "Joint general comment no. 4 (2017) of the committee on the protection of the rights of all migrant workers and members of their families and no. 23 (2017) of the committee on the rights of the child on state obligations regarding the human rights of children in the

context of international migration in countries of origin, transit, destination and return CMW/C/GC/4-CRC/C/GC/23", available at: www.refworld.org/docid/5a12942a2b.html (accessed 12 March 2021).

Council of Europe (1950), "European convention for the protection of human rights and fundamental freedoms, as amended by protocols nos. 11 and 14, 4 November 1950, ETS 5", available at: www.refworld.org/docid/3ae6b3b04.html (accessed 12 March 2021).

Council of Europe (1996), "European social charter (revised),3 May 1996 ETS 163", available at: www.refworld.org/docid/3ae6b3678.html (accessed 12 March 2021).

Council of Europe (2006), "Committee of ministers, recommendation rec (2006)2 of the committee of ministers to member states on the European prison rules, 11 January 2006", available at: www.refworld.org/docid/43f3134810.html (accessed 12 March 2021).

Council of Europe and European Court of Human Rights (2015), "Thematic report. Health related issues in the case law of the European court of human rights", available at: www.echr.coe.int/Documents/Research_report_health.pdf

Council of Europe European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) (2017), "Council of Europe", 09000016806fbf12 (coe.int) (accessed 12 March 2021).

Curtis, P., *et al.* (2018), "Migrant children within Europe: a systematic review of children's perspectives on their health experiences", *Public Health*, Vol. 158, pp. 71-85.

Dexter, E. and Katona, C. (2018), "Hunger strike renews concerns over health in UK detention centres", *British Medical Journal*, Vol. 360 No. 1446, doi: 10.1136/bmj.k1446.

ECtHR (2010), "*Muskhadzhiyeva and others v. Belgium*, application no. 41442/07, 19 January 2010".

ECtHR (2011a), "*Kanagaratnam and others v. Belgium*, application no. 15297/09, 13 December 2011".

ECtHR (2011b), "*YohEkale Mwanje v. Belgium*, application no.10486/10, 20 December 2011".

ECtHR (2012a), "Poland - Polish Council for Refugees, application no. RdU-82/8/S/10, 23 August 2012".

ECtHR (2012b), "*Popov v. France*, application no. 39472/07 and 39474/07, 19 January 2012".

ECtHR (2012c), "*Mahmundi and others v. Greece*, application no. 14902/10, 24 October 2012".

ECtHR (2013), "*Aden Ahmed v. Malta*, application no. 55352/12, 9 December 2013".

ECtHR (2014a), "*Georgia v. Russia*, application no. 13255/07, 3 July 2014 regarding lawfulness of detention and expulsion orders".

ECtHR (2014b), "*C.D. and others v. Greece*, application no. 33441/10, 33468/10 and 33476/10 regarding pre removal detention and conditions of detention regarding lack of hygiene, insufficient living space and no access to outdoor exercise, 19 March 2014".

ECtHR (2014c), "*Bilalova v. Poland*, application no. 23685/14".

ECtHR (2015a), "*Mahamed Jama v. Malta*, application no. 10290/13, 26 November 2015".

ECtHR (2015b), "*V.M. and others v. Belgium*, application no. 60125/11, 7 July 2015".

ECtHR (2016a), "*Khlaifia and others v. Italy*, application no. 16483/12, 15 December 2016 regarding arbitrary detention and expulsion".

ECtHR (2016b), "*Sakir v. Greece*, application no. 48475/09, 24 Mar 2016 regarding racism against undocumented migrants, conditions and lack of medical attention during detention by police".

ECtHR (2016c), "*Abdi Mahamud v. Malta*, application no. 56796/13, 03 August 2016".

ECtHR (2016d), "*Moxamed Ismaaciil and Abdirahman Warsame v. Malta*, application no. 52160/13 and 52165/13, 12 January 2016".

ECtHR (2017a), "Belgium – Brussels Labour Tribunal, application no. 17/5651/A, 13 December 2017".

ECtHR (2017b), "Denmark - the refugee appeals board's decision of 30 November 2017".

ECtHR (2017c), "*S.F. and others v. Bulgaria*. Application no. 8138/16, 7 December 2017".

ECtHR (2017d), "A.S. and others against Hungary. Application no. 34883/17, communicated on 10 July 2017".

ECtHR (2018a), "Denmark - Refugee appeals board's decision of 17 April 2018".

ECtHR (2018b), "*J.R. and others v. Greece*, application no. 22696/16, 25 January 2018".

ECtHR (2018c), "*Bistieva and others v. Poland*, application no. 75157/14, 10 April 2018".

ECtHR (2019a), "*Switzerland - a., B., C. (Nigeria) v. State Secretariat for Migration*, application no. E-962/2019, 17 December 2019".

ECtHR (2019b), "*Kaak and others v. Greece*, application no. 34215/16, 03 October 2019".

ECtHR (2019c), "*G.B. and others v. Turkey*, application no. 4633/15, 17 October 2019".

ECtHR (2020), "Guide on the case-law of the European convention on human rights. Immigration", available at: www.echr.coe.int/Documents/Guide_Immigration_ENG.pdf (accessed 12 March 2021).

ECtHR (2021a), "Migrants in detention", available at: www.echr.coe.int/Documents/Fs_Migrants_detention_ENG.pdf (accessed 12 March 2021).

ECtHR (2021b), "Accompanied migrant minors in detention", available at: www.echr.coe.int/Documents/FS_Accompanied_migrant_minors_detention_ENG.pdf (accessed 12 March 2021).

Esposito, F., Ornelas, J. and Scirocchi, A.C. (2019), "Voices from the inside: lived experiences of women confined in a detention center", *Signs: Journal of Women in Culture and Society*, Vol. 44 No. 2, pp. 403-431.

European Council-Council of the European Union (2016), "Press release-EU-Turkey statement, 18 March 2016", available at: www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/ (accessed 12 March 2021).

European Migration Network (2014), "Synthesis report–the use of detention and alternatives to detention in the context of immigration policies", available at: http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/emn-studies/emn_study_detention_alternatives_to_detention_synthesis_report_en.pdf (accessed 12 March 2021).

European Parliament (2007), "The conditions in centres for third country national (detention camps, open centres as well as transit centres and transit zones) with a particular focus on provisions and facilities for persons with special needs in the 25 EU member states, December 2007, PE 393.275", available at: www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL-LIBE_ET(2007)393275 (accessed 12 March 2021).

European Race Audit (2010), "Accelerated removals: a study of the human cost of EU deportation policies, 2009–2010", Institute of Race Relations, London, available at: www.bl.uk/collection-items/accelerated-removals-a-study-of-the-human-cost-of-eu-deportation-policies-20092010#

European Union (2012), "Charter of fundamental rights of the European Union, 26 October 2012, 2012/C 326/02", available at: www.refworld.org/docid/3ae6b3b70.html (accessed 12 March 2021).

European Union Agency for Fundamental Rights (EUFRA) (2010), "Detention of third country nationals in return procedures", available at: https://fra.europa.eu/en/publication/2010/detention-third-country-nationals-return-procedures (accessed 12 March 2021).

European Union Council of the European Union (2013), "Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)", 29 June 2013, OJ L. 180/96 -105/32; 29.6.2013, 2013/33/EU, available at: www.refworld.org/docid/51d29db54.html (accessed 21 June 2021).

Fair, F., Raben, L., Watson, H., Vivilaki, V., van den Muijsenbergh, M. and Soltani, H., T O. T. (2020), "Migrant women's experiences of pregnancy, childbirth and maternity care in European countries: a systematic review", *PLoS One*, Vol. 15 No. 2.

Global Detention Project (2015), "The uncounted: detention of migrants and asylum seekers in Europe", available at: www.access-info.org/wp-content/uploads/DetentionReport_AIE_GDP_HighRes_17Dec15.pdf (accessed 12 March 2021).

Hollis, J. (2019), "The psychosocial experience of UK immigration detention", *International Journal of Migration, Health and Social Care*, Vol. 15 No. 1, pp. 76-89.

Huber, A. (2016), "Women in criminal justice systems and the added value of the UN Bangkok rules", available at: https://cdn.penalreform.org/wp-content/uploads/2015/04/Added-value-of-the-Bangkok-Rules-briefing-paper_final.pdf (accessed 12 March 2021).

Human Rights Council (2010), "Report of the working group on arbitrary detention, a/HRC/13/30, 15 January 2010", Human Rights Council, Geneva, available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G10/102/94/PDF/G1010294.pdf?OpenElement (accessed 12 March 2021).

International Organization for Migration (IOM) (2010), "Guidelines for border management and detention procedures involving migrants: a public health perspective", International Organization for Migration, Brussels, available at: www.iom.int/jahia/webdav/shared/shared/mainsite/activities/health/Guidelines-Border-Management-and-Detention-Procedures-Public-Health-Perspective.pdf (accessed 12 March 2021).

Keygnaert, I., Dias, S., Degomme, O., Devillé, W., Kennedy, P., Kovats, A., De Meyer, S., Vettenburg, N., Roelens, K. and Temmerman, A. (2015), "Sexual and gender-based violence in the European asylum and reception sector: a perpetuum mobile?", *The European Journal of Public Health*, Vol. 25 No. 1, pp. 90-96.

Keygnaert, I., Guieu, A., Ooms, G., Vettenburg, N., Temmerman, M. and Roelens, K. (2014), "Sexual and reproductive health of migrants: does the EU care?", *Health Policy*, Vol. 114 Nos 2/3, pp. 215-225.

Keygnaert, I., Ivanova, O., Guieu, A., Van Parys, A., Leye, E., and Roelens, K. (2016), *What is the evidence on the reduction of inequalities in accessibility and quality of maternal health care delivery for migrants? A review of the existing evidence in the WHO European Region*, WHO Regional Office for Europe, Copenhagen.

Kotsioni, I., Egidi, S. and Ponthieu, A. (2013), "Health at risk in immigration detention facilities' detention", *Alternatives to Detention and Deportation*, Vol. 44, pp. 11-13.

Kronick, R., Cleveland, J. and Rousseau, C. (2018), "Do you want to help or go to war? Ethical challenges of critical research in immigration detention in Canada", *Journal of Social and Political Psychology*, Vol. 6 No. 2, pp. 644-660.

Lebano, A., Hamed, S., Bradby, H., Gil-Salmerón, A., Durá-Ferrandis, E., Garcés-Ferrer, J., Azzedine, F., Riza, E., Karnaki, P., Zota, D. and Linos, A. (2020), "Migrants' and refugees' health status and healthcare in Europe: a scoping literature review", *BMC Public Health*, Vol. 20 No. 1, p. 1039.

Leiter, B. (2015), "Legal realism and legal doctrine, University of Pennsylvania law review,163 1975-1984".

Lungu-Byrne, C., Germain, J., Plugge, E. and Van Hout, M.C. (2020), "Contemporary migrant health experience and unique health care needs in European prisons and immigration detention settings", *International Journal of Forensic Mental Health*, Vol. 20 No. 1, pp. 80-99.

Majcher, I. (2019), "Immigration detention under the global compacts in the light of refugee and human rights law standards", *International Migration*, Vol. 57 No. 6, pp. 91-114, 11 (accessed 12 March 2021).

Mares, S. (2020), "Mental health consequences of detaining children and families who seek asylum: a scoping review", *European Child & Adolescent Psychiatry*, doi: 10.1007/s00787-020-01629-x.

Medical Justice (2013), "Expecting change: the case for ending the detention of pregnant women' medical justice", available at: www.medicaljustice.org.uk/wp-content/uploads/2016/03/expectingchange.pdf (accessed 12 March 2021).

Nethery, A. and Silverman, S.J. (2015), *Immigration Detention: The Migration of a Policy and Its Human Impact*, Routledge, London.

Newman, L., *et al.* (2013), '"Researching immigration detention: documenting damage and ethical dilemmas", Block K, (Ed.) *Values and Vulnerabilities: The Ethics of Research with Refugees and Asylum Seekers*, Australian Academic Press, Bowen Hills, pp. 173-190.

Office of the United Nations High Commissioner for Human Rights (OHCHR) (2017), "In search of dignity: report on the human rights of migrants at Europe's borders", available at: www.ohchr.org/Documents/Issues/Migration/InSearchofDignity-OHCHR_Report_HR_Migrants_at_Europes_Borders.pdf (accessed 12 March 2021).

Padovese, V., Maristella Egidi, A., Melillo Fenech, T., Podda Connor, M., Didero, D., Costanzo, G. and Mirisola, C. (2014), "Migration and determinants of health: clinical epidemiological characteristics of migrants in Malta (2010–11)", *Journal of Public Health*, Vol. 36 No. 3, pp. 368-374.

Palloti, P. and Forbes, M. (2016), "Mothers in immigration detention: the most vulnerable and the hardest to reach", *Pract Midwife*, Vol. 19 No. 11, pp. 8-13.

Pavli, A. and Maltezou, H. (2017), "Health problems of newly arrived migrants and refugees in Europe", *Journal of Travel Medicine*, Vol. 24 No. 4, pp. 1-8.

Pedersen, G., Grøntved, A., Mortensen, L., Andersen, A. and Edwards, J. (2013), "Maternal mortality among migrants in Western Europe: a meta-analysis", *Maternal and Child Health Journal*, Vol. 18 No. 7, pp. 1628-1638.

Penal Reform International (PRI) (2020a), "Alternatives to imprisonment in global prison trends 2020", Penal Reform International, London, available at: https://cdn.penalreform.org/wp-content/uploads/2020/05/Global-Prison-Trends-2020-Penal-Reform-International-Second-Edition.pdf (accessed 12 March 2021).

Penal Reform International (PRI) (2020b), "Women in prison: mental health and well-being a guide for prison staff", Penal Reform International, London, available at: www.penalreform.org/resource/women-in-prison-mental-health-and-well-being/ (accessed 12 March 2021).

Platform for International Cooperation on Undocumented Migrants (PICUM) (2019), "Child immigration detention in the EU", available at: https://picum.org/wp-content/uploads/2019/06/Child-Immigration-Detention-in-the-EU-ENG.pdf

Puthoopparambil, S., Ahlberg, B. and Bjerneld, M. (2015), "A prison with extra flavours: experiences of immigrants in Swedish immigration detention centres", *International Journal of Migration, Health and Social Care*, Vol. 11 No. 2, pp. 73-85.

Rechel, B., Mladovsky, P., Ingleby, D., Mackenbach, J. and McKee, M. (2013), "Migration and health in an increasingly diverse Europe", *The Lancet* , Vol. 381 No. 9873, pp. 1235-1245.

Rijks, B., Schult, C., Petrova, B.R., Samuilova, M., *et al.* (2017), "Immigration detention and health in Europe", Elger, B. (Ed.), *Emerging Issues in Prison Health*, Springer, Dordrecht, pp. 217-236, doi: 10.1007/978-94-017-7558-8_14

Sahraoui, N. (2020a), "Integration into liminality: women's lives in an open centre for migrants at Europe's Southern antechamber", *Journal of Ethnic and Migration Studies*, Vol. 46 No. 9, pp. 1809-1827.

Sahraoui, N. (2020b), "Gendering the care/control nexus of the humanitarian border: women's bodies and gendered control of mobility in a European borderland", *Environment and Planning D: Society and Space*, Vol. 38 No. 5, pp. 905-922.

Smith, J. (2017), "Death, disease and indignity: serious health and human rights concerns persist in UK immigration detention facilities", *Journal of Public Health*, Vol. 40 No. 1, pp. 212-213.

Special Rapporteur on the Human Rights of Migrants (SRHRM) (2002), "Report of the special rapporteur on the human rights of migrants, Gabriela Rodrıguez Pizarro submitted pursuant to commission on human rights resolution 2002/62", available at: https://digitallibrary.un.org/record/485997?ln=en (accessed 12 March 2021).

Special Rapporteur on the Human Rights of Migrants (SRHRM) (2012), "Report of the special rapporteur on the human rights of migrants, François Crépeau: detention of migrants in an irregular situation. A/HRC/20/24", available at: www.undocs.org/A/HRC/20/24 (accessed 12 March 2021).

Taylor-East, R., Rossi, A., Caruana, J. and Grech, A. (2014), "The mental health services for detained asylum seekers in Malta", *BJPsych Int*, Vol. 13 No. 2, pp. 32-35.

The European Parliament and the Council of the European Union (2008), "Directive 2008/115/EC of the European Parliament and of the council of 16 December 2008 on common standards and procedures in member states for returning illegally staying third-country nationals, 16 December 2008, OJ L. 348/98-348/107; 16.12.2008, 2008/115/EC", available at: www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/LIBE/DV/2020/07-02/EPRS_STU2020642840_EN.pdf (accessed 12 March 2021).

UN Committee Against Torture (CAT) (2015), "Eighth annual report of the subcommittee on prevention of torture and other cruel, inhuman or degrading treatment or punishment, 26 March 2015,CAT/C/54/2, Para.63", available at: https://digitallibrary.un.org/record/790899?ln=en (accessed 12 March 2021).

UN Department of Economic and Social Affairs (UN DESA) (2017), "Population division. Trends in international migrant stock: the 2017 revision", United Nations. New York, NY, available at: www.un.org/en/development/desa/population/migration/data/estimates2/docs/MigrationStockDocumentation_2017.pdf (accessed 12 March 2021).

UN General Assembly (1948), "Universal declaration of human rights, 10 December 1948, 217 A (III)", available at: www.refworld.org/docid/3ae6b3712c.html, (accessed 12 March 2021).

UN General Assembly (1965), "International convention on the elimination of all forms of racial discrimination, 21 December 1965", *United Nations Treaty Series*, Vol. 660, p. 195, available at: www.refworld.org/docid/3ae6b3940.html, (accessed 12 March 2021).

UN General Assembly (1966), "International covenant on economic, social and cultural rights, 16 December 1966", *United Nations Treaty Series*, Vol. 993, p. 3, available at: www.refworld.org/docid/3ae6b36c0.html (accessed 12 March 2021).

UN General Assembly (1967), "Protocol relating to the status of refugees, 31 January 1967", *United Nations Treaty Series*, Vol. 606, p. 267, available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-5&chapter=5&clang=_en (accessed 12 March 2021).

UN General Assembly (1989), "Convention on the rights of the child, 20 November 1989, United Nations", *Treaty Series*, vol. 1577, p. 3, available at: www.refworld.org/docid/3ae6b38f0.html (accessed 12 March 2021).

UN General Assembly (1990), "International convention on the protection of the rights of all migrant workers and members of their families, 18 December 1990, a/RES/45/158", available at: www.ohchr.org/en/professionalinterest/pages/cmw.aspx (accessed 12 March 2021).

UN General Assembly (1991), "Basic principles for the treatment of prisoners: resolution/adopted by the general assembly, 28 March 1991, a/RES/45/111", available at: www.refworld.org/docid/48abd5740.html (accessed 12 March 2021).

UN General Assembly (1991a), "United Nations standard minimum rules for non-custodial measures (the Tokyo rules): resolution/adopted by the general assembly, 2 April 1991, a/RES/45/110", available at: https://digitallibrary.un.org/record/105347?ln=en (accessed 12 March 2021).

UN General Assembly (1996), "International covenant on civil and political rights, 16 December 1966", *United Nations, Treaty Series*, Vol. 999, p. 171, available at: www.refworld.org/docid/3ae6b3aa0.html (accessed 12 March 2021).

UN General Assembly (2000a), "Protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the United Nations convention against transnational organized crime, 15 November 2000", available at: www.ohchr.org/en/professionalinterest/pages/protocoltraffickinginpersons.aspx (accessed 12 March 2021).

UN General Assembly (2000b), "Protocol against the smuggling of migrants by land, sea and air, supplementing the United Nations convention against transnational organized crime, 15 November 2000", available at: www.ohchr.org/EN/ProfessionalInterest/Pages/TransnationalOrganizedCrime.aspx (accessed 12 March 2021).

UN General Assembly (2010), "United Nations rules for the treatment of women prisoners and non-custodial measures for women offenders (the Bangkok rules) 6 October 2010.A/RES/65/229", available at: www.unodc.org/documents/hiv-aids/publications/Prisons_and_other_closed_settings/P_BangkokRules_2010_EN.pdf (accessed 12 March 2021).

UN General Assembly (2016a), "New York declaration for refugees and migrants: resolution/adopted by the General Assembly, 3 October 2016, a/RES/71/1", available at: www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_71_1.pdf (accessed 12 March 2021).

UN General Assembly (2016b), "United Nations standard minimum rules for the treatment of prisoners (the Nelson Mandela rules): resolution/adopted by the General Assembly, 8 January 2016, a/RES/70/175", available at: www.ohchr.org/Documents/ProfessionalInterest/NelsonMandelaRules.pdf (accessed 12 March 2021).

UN General Assembly (2018), "Global compact for safe, orderly and regular migration. A/RES/73/195", United Nations General Assembly, New York, NY.

UN High Commissioner for Refugees (UNHCR), (2006), "The high-level dialogue on international migration and development: UNHCR's observations and recommendations, 28 June 2006", available at: www.unhcr.org/news/060630migration.pdf (accessed 12 March 2021).

UN High Commissioner for Refugees (UNHCR) (2014a), "Safe & sound: what states can do to ensure respect for the best interests of unaccompanied and separated children in Europe", available at: www.refworld.org/docid/5423da264.html (accessed 12 March 2021).

UN High Commissioner for Refugees (UNHCR) (2014b), "Beyond detention: a global strategy to support governments to end the detention of asylum-seeker and refugees, 2014-2019", available at: www.refworld.org/docid/536b564d4.html (accessed 12 March 2021).

UN High Commissioner for Refugees (UNHCR) (2018), "Report of the United Nations High Commissioner for Refugees Part II Global Compact on Refugees, A/73/12", United Nations, New York, NY.

UN Working Group on Arbitrary Detention (WGAD) (2018), "Revised deliberation no. 5 on deprivation of liberty of migrants, A/HRC/39/45", United Nations General Assembly, New York, NY.

United Nations (1955), "Standard minimum rules for the treatment of prisoners, 30 august 1955", available at: www.refworld.org/docid/3ae6b36e8.html (accessed 12 March 2021).

United Nations High Commissioner for Refugees (UNHCR) (2012), "Detention guidelines: guidelines on the applicable criteria and standards relating to the detention of asylum-seekers and alternatives to detention", available at: www.unhcr.org/publications/legal/505b10ee9/unhcr-detention-guidelines.html (accessed 12 March 2021).

United Nations Human Rights Council (OHCHR) (2008), "Seventh session, report of the special rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, a/HRC/7/3, 15 January 2008, Para.34", available at: https://digitallibrary.un.org/record/623649?ln=en (accessed 12 March 2021).

United Nations Office on Drugs and Crime (UNODC) (2008), "Handbook for prison managers and policymakers on women and imprisonment: women and imprisonment", United Nations Office on Drugs and Crime, Vienna, available at: www.unodc.org/documents/justice-and-prison-reform/women-and-imprisonment.pdf (accessed 12 March 2021).

Van Hout, M.C., Lungu Byrne, C. and Germain, J. (2020), "Migrant health situation when detained in European immigration detention centres: a qualitative synthesis", *International Journal of Prisoner Health*, Vol. 16 No. 3, pp. 221-236.

Villalonga-Olives, E., Kawachi, I. and von Steinbüchel, N. (2017), "Pregnancy and birth outcomes among immigrant women in the US and Europe: a systematic review", *Journal of Immigrant and Minority Health*, Vol. 19 No. 6, pp. 1469-1487.

World Health Organization (WHO) (2018), *Report on the Health of Refugees and Migrants in the WHO European Region: No Public Health without Refugee and Migrant Health*, World Health Organization Regional Office for Europe, Copenhagen.

Ziersch, A., Due, C., Arthurson, K., and Loehr, N. (2017), "Conducting ethical research with people from asylum seeker and refugee backgrounds", Liamputtong, P. (Ed.) *Handbook of Research Methods in Health Social Sciences*, Springer, Singapore, pp. 1-19.

Zion, D. (2013), "On secrets and lies: dangerous information, stigma and asylum seeker research", Block K. (Ed.), *Values and Vulnerabilities: The Ethics of Research with Refugees and Asylum Seekers*, Australian Academic Press, Bowen Hills, pp. 191-206.

Further reading

British Medical Association (2017), "Locked up, locked out: health and human rights in immigration detention", available at: www.bma.org.uk/media/1862/bma-locked-up-locked-out-immigration-detention-report-2017.pdf (accessed 12 March 2021).

ECtHR (1996), "Chahal v. The United Kingdom, application no.22414/93, 15 November 1996".

European Union: Council of the European Union (2013), "Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)", available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0033 (accessed 12 March 2021).

Penal Reform International and Association for Prevention of Torture (2013), "Women in detention: a guide to gender-sensitive monitoring", Penal Reform International, London, available at: www.penalreform.org/resource/women-detention-guide-gendersensitive-monitoring/ (accessed 12 March 2021).

About the author

Marie Claire Van Hout, PhD, is Professor of Public Health Policy and Practice at Liverpool John Moores University in the UK. She has 20 years of clinical practice, research and evaluation experience in the area of public health, human rights law and vulnerable key populations (prisoners, drug users, sex workers) in Europe, Africa and the Middle East. Marie Claire Van Hout can be contacted at: m.c.vanhout@ljmu.ac.uk

The "double punishment" of transgender prisoners: a human rights-based commentary on placement and conditions of detention

Marie-Claire Van Hout and Des Crowley

Abstract

Purpose – *The incarceration of transgender people is described as a ''double punishment'' based on lack of gender recognition and ability to gender affirm, and with their experiences and conditions in prison tantamount to torture. The purpose of this study is to illustrate the continued ''double punishment'' of incarcerated transgender people (in particular trans-women) and identify and describe breaches in human and gender rights and minimum standards of care.*

Design/methodology/approach – *There is limited global data on the numbers of incarcerated transgender people, an identified vulnerable prison group. There are inherent difficulties for prison authorities regarding placement, security aspects and management of transgender persons. While the concerns apply to all transgender prisoners, the current literature focusses mainly on transgender women and this commentary reflects this present bias. A socio-legal approach describes and evaluates international human rights' conventions and human rights' law, soft law instruments mandating non-discriminatory provisions in the prison setting and relevant European and domestic case law.*

Findings – *Transgender prisoners experience an amplification of trauma underpinned by lack of legal gender recognition, inability to gender-affirm, discrimination, transphobia, gender maltreatment and violence by other prisoners and prison staff. Despite obligations and recommendations in international human rights' instruments and standard operating procedures at the prison level, very few countries are able to fully uphold the human rights of and meet the needs of transgender people in prison.*

Originality/value – *This study is important as it highlights the dearth of knowledge exploring human rights discourses and concerns related to the phenomenon of incarcerated transgender persons. It uniquely focusses on European and domestic law and illustrates the inherent tensions between human rights, sexual orientation and gender identity rights and security considerations regarding transgender issues in prisons. Rights assurances centre on the principles of equality, dignity, freedom of expression, dignified detention and the prohibition of inhumane treatment or punishment.*

Keywords *Europe, Human rights, Placement, Transgender, Prison*

Paper type *Viewpoint*

Marie-Claire Van Hout is based at the Public Health Institute, Faculty of Health, Liverpool John Moores University, Liverpool, UK. Des Crowley is based at the School of Medicine, University College Dublin, Dublin, Ireland.

Introduction

"*On December 30th 2016, Jenny Swift a transgender prisoner in the UK was found dead in her cell, whilst on remand in a male prison. Her requests to be assigned to a female prison were rejected by authorities because she did not have a Gender Recognition Certificate ("GRC") and was therefore legally male. She refused to wear the male prison uniform and was reported to have entered the prison naked. She was called "Mr" by prison staff, and harassed by other prisoners. Despite the fact that she had been living as a women and had been taking oestrogen treatment sourced online for over three years, she was denied continued hormone treatment because her treatment had not been prescribed by a medical practitioner. She was unwell, experiencing withdrawal symptoms, and depressed* (Halliday, 2017)."

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Incarceration and transgender people

On any given day, almost 11 million people globally are detained in prisons or other closed settings (Penal Reform International, 2020). The prison population is heterogenous and contains specific vulnerable prisoner groups (United Nations Office on Drugs and Crime [UNODC], 2009; 2016). Sexual minorities and transgender prisoners are particularly vulnerable in the prison environment (Rodgers *et al.*, 2017; Brömdal *et al.*, 2019; Van Hout *et al.*, 2020). There is limited global data on numbers of incarcerated transgender people due to prison systems capturing committal data pertaining to legal sex status, not gender identity and under-reporting of transgenderism due to stigma and disclosure concerns (Penal Reform International, 2020; United Nations Development Programme [UNDP], 2020).

According to the World Health Organization in 2020, the umbrella term transgender "*describes a diverse group of people whose internal sense of gender is different than that which they were assigned at birth* and *whose gender identity and expression does not conform to the norms and expectations traditionally associated with their sex at birth*". It is not a diagnostic term, does not imply sexual orientation or a medical condition and includes those living in accordance with their gender identity in the absence of medical treatment and those undergoing medical treatment to support the transitioning process of their physical state to conform to their internal sense of gender identity (WHO, 2020). Complexities are also present with many transgender people identifying as non-binary (neither male nor female) (European Union Fundamental Rights Agency [FRA], 2014). This creates difficulties for transgender prisoners as decisions by prison authorities on placement and security and safety considerations are based on inflexible binary classifications, which fail to protect their health and uphold their rights in a gender affirming fashion while incarcerated (Brömdal *et al.*, 2019; Van Hout *et al.*, 2020).

Prison systems are underpinned by cis-normative (the assumption that all human beings have a gender identity, which matches their sex assigned at birth) frameworks of sex and gender (Rodgers *et al.*, 2017). Placement decisions by prison authorities are commonly based on pre-operative/non-operative state or on legal gender recognition (UNDP, 2020). Placement of transgender prisoners occurs in multiple ways; using binary classification, general population housing, segregation or protective custody, shared or single occupancy cells, specialist pods/wings or case by case where gender identity and safety are considered prior to allocation (Lamble, 2012; Brömdal *et al.*, 2019; Van Hout *et al.*, 2020). These decisions are highly complex, balanced between security and safety, the prevention of harm to transgender prisoners (e.g. sexual coercion and rape) and the potential threat to fellow prisoners (e.g. the placement of trans-women (particularly sex offenders) in female wings) (Lamble, 2012). Further, where specialist wings are used, they generally house all prisoners deemed vulnerable, with many transgender people reporting continued distress (McCauley *et al.*, 2018). Progressive prison systems view gender on the basis of self-identification (i.e. parts of Australia (New South Wales and Victoria), Canada, Malta, Scotland), with the UK, Italy and Thailand having dedicated transgender prisons (UNDP, 2020).

Prison settings amplify vulnerability, trauma and transphobic abuse. Maltreatment includes misgendering (intentional use of the wrong name and gender/pronoun), violence by other prisoners and prison staff (sexual coercion, rape), restricted access to gender appropriate clothing and other items and restricted or denial by prison authorities of access to gender affirming medical care (e.g. hormone therapy and surgery) (World Professional Association for Transgender Healthcare [WPATH], 2012; Van Hout *et al.*, 2020; UNDP, 2020). Psychological trauma is also caused by long periods of detention and solitary confinement, which contributes to self-harm (including attempted auto-castration and suicide) (UNAIDS, 2014; Van Hout *et al.*, 2020; UNDP, 2020). In some countries (Australia, Canada, Italy, New-Zealand, Malta and UK) and

some states in the US, transgender prisoners are permitted to wear clothing appropriate to their gender identity, regardless of placement and prison policies advocate for gender neutral and respectful language (for example, preferred names and pronouns, regardless of gender, surgical status and official documents (UNDP, 2020). This is not the case in many countries worldwide. Prison healthcare providers generally lack transgender specific health knowledge and have limited clinical competency in caring for transgender prisoners (Brömdal *et al.*, 2019; Van Hout *et al.*, 2020). The World Professional Association for Transgender Healthcare (WPATH, 2012) continues to advocate for the provision of adequate access to medical care and counselling for incarcerated transgender people, which recognise their special health needs on the basis of their gender identity. Countries differ; some initiate treatment in prison, some adopt a *freeze frame approach*, determining continued access to hormone treatment at the same level as prior to committal or a continuation approach with adjusted dosage based on medical consultations (e.g. Australia, Malta, New Zealand and Thailand) (UNDP, 2020). Very few permit access to gender reassignment surgery (GRS) equal to that in the community (Australia, UK and the US). Problems also exist where transgender people have accessed hormone treatment via online or illicit sourcing, thus complicating medical care delivery when detained, and prisons may also be unable to access necessary specialist input.

Human rights obligations and recommendations

Despite obligations and recommendations in international human rights instruments and international standard operational procedures at the prison level, very few countries fully uphold the human rights of or meet the needs of incarcerated transgender people (WHO, 2014; UNDP, 2020). Their incarceration is described as a "*double punishment; the pervasive discrimination in the judicial system that continues to fail to give due legal recognition of transgender people's right to dignity and self-identity* and *the often cruel and unusual [. . .] mistreatment of them in the prison*" (Erni, 2013; 139).

This *viewpoint* uses a socio-legal approach (Hart, 1961) to describe and evaluate international human rights conventions and human rights law, soft law instruments mandating non-discriminatory provisions in the prison setting. This approach was chosen to probe the relationship between law, medical ethics and prison systems' lack of recognition of gender identity as central to upholding of medical care needs in prison, and spotlight why unmet gender-affirmation needs and restrictions in accessing gender-affirming medical care while incarcerated continue, despite the strong evidence base for significant trauma, morbidity and mortality of these vulnerable prisoners; and the increasing (albeit) small number of legal challenges worldwide. It uses relevant European and domestic case law as examples, to illustrate how this continued "*double punishment*" of incarcerated transgender people continues. Finally, it illustrates the range of human rights breaches and inadequate standards of care. While the concerns apply to all transgender prisoners, the current literature focusses mainly on transgender women and this *viewpoint* reflects this present bias.

International human rights' treaties are supported by non-binding or soft law principles mandating prisoner human rights while detained, and that suffering, inherent in detention, shall not be worsened by the prison regime itself. The UN Basic Principles for the Treatment of Prisoners (Principle 5) states that "*except for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights, and [. . .] United Nations covenants*" (United Nations [UN] General Assembly, 1990). The updated UN Standard Minimum Rules for the Treatment of Prisoners (*Nelson Mandela Rules*) (Rule 1) states that "*all prisoners shall be treated with respect because of their inherent dignity*

and value as human beings. No prisoner shall be subjected to, and all prisoners shall be protected from, torture and other cruel, inhumane or degrading treatment or punishment, for which no circumstances whatsoever may be invoked as a justification" (UN, 2015).

At regional levels, the Kampala Declaration on Prison Conditions in Africa declares that "*prisoners should retain all rights, which are not expressly taken away by the fact of their detention*" (African Commission on Human and Peoples' Rights [ACHPR], 1996)*;* and the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas (Principle 8) states that "*persons deprived of liberty shall enjoy the same rights recognised to every other person by domestic law and international human rights law, except for those rights, which exercise is temporarily limited or restricted by law and for reasons inherent to their condition as persons deprived of liberty*" (IACHR, 2008). The European Prison Rules (EPR) (Rule 2) states that "*persons deprived of their liberty retain all rights that are not lawfully taken away by the decision sentencing them or remanding them in custody* and Rule 5 specifies that *life in prison shall approximate as closely as possible the positive aspects of life in the community*" (Council of Europe, 2020).

These treaties adopt a universalistic approach to human rights, and according to critics are not gender neutral where prisons are concerned (Ciuffoletti, 2020). The provision of non-discrimination, however, within the *Nelson Mandela Rules* states "*([…] apply to all prisoners without discrimination […] the specific needs and realities of all prisoners)*" and is further emphasised in rule 2(2), which mandates prison administrations to "*take account of the individual needs of prisoners, in particular the most vulnerable categories*" (UN, 2015). While the spotlight is increasingly shone on the gendered and health rights of (heteronormative) women in prisons in the UN Rules for the Treatment of Women Prisoners and Noncustodial Measures for Women Offenders (*Bangkok Rules*) (United Nations [UN] General Assembly, 2010; Van Hout and Mhlanga-Gunda, 2018), however transgender prisoners are not referred to in the *Bangkok Rules*. The *Mandela Rules* also do not specifically refer to women, however Rule 7 recommends that authorities facilitate determination of gender identity and notate during committal "*precise information enabling determination of his or her unique identity, respecting his or her self-perceived gender*" (UN, 2015). The updated 2017 Yogyakarta Principles given their central focus on sexual orientation and gender identity (SOGI) are, however, applicable to prisons. These principles mandate the right to treatment with humanity while in detention (Principle 9), along with the right to bodily and mental integrity (Principle 32), whereby one's gender identity is integral to "*dignity and humanity and must not be the basis of discrimination or abuse* and that, as far as possible, prisoners should be involved in decisions *regarding the place of detention appropriate to their SOGI*" (Yogyakarta Principles, 2017).

Recognition of and ability to affirm gender identity is central to the health and well-being of transgender people both in prison and in the community. While international human rights treaties do not explicitly refer to SOGI, discrimination grounds can be interpreted to include *other status*. Confusion arises when the terms *gender* (a social construct) and *sex* (individual anatomy) are used interchangeably in the prison setting (Barnes, 1998; Mann, 2006). All Council of Europe (CoE) member states are required to legally recognise the gender affirmation of trans-persons with the European Court of Human Rights (ECtHR) ruling that the failure of a State to alter the birth certificate of a person to the preferred gender constitutes a violation of ECHR Article 8 [(right to private and family life) International Bar Association LGBTI Law Committee, 2009; see *B v France,* ECtHR, 1992; *Goodwin v. UK,* ECtHR, 2002]. The ECtHR applies a literal interpretation of Article 14 (prohibition of discrimination) European Convention of Human Rights (ECHR, 2020), and has ruled that *gender identity* is a protected characteristic (*Abdulaziz, Cabales and Balkandali v. The UK,* ECtHR, 1985*; Identoba and others v Georgia,* ECtHR, 2015). Where prisons are concerned European case law tends to adopt gender blind and biologically-oriented interpretations, with a dearth of case law on transgender people in prison. The CoE Steering Committee for

Human Rights outlines measures to eliminate discrimination on grounds of SOGI, with Recommendation 4 stating "*measures should be taken so as to adequately protect and respect the gender identity of transgender persons*" (CoE, 2017).

The balance of security and safety with gender recognition is, therefore, crucial. Both the *Mandela Rules* (Rule 11) and EPR (Rule 18.9) contains some exceptions (based on consent or best interest) and state women prisoners must be detained in separate accommodation to men. This separation is underpinned by normative binarism and conditions of perceived vulnerabilities of the sexes (Dias-Vieira and Ciuffoletti, 2014). This has implications for rights assurance of a range of (trans) gendered placement needs and rights in prison (cisgender, pre-operative, non-operative and post-operative transgender women and men, gender non-conforming, intersex). The Special Rapporteur on Torture has been at the forefront in drawing attention to human rights abuses, with concern centring on "*the absence of appropriate means of identification, registration and detention that leads in some cases to transgender women being placed in male-only prisons, where they are exposed to a high risk of rape, often with the complicity of prison personnel*" UN Human Rights Council (2015), UN Human Rights Office of the High Commissioner (2016), Report of the Special Rapporteur on Torture (2016). The UN Committee on Torture (2016) specifically states that prison authorities must identify risks and those who are vulnerable, protect them by not leaving them isolated and operationalise necessary measures.

Although segregation may be necessary for safety, transgender status does not justify limitations on access to recreation, legal or medical assistance (Special Rapporteur on Torture, 2011). Rule 57 of the Mandela Rules (2015) states that "*the prison system shall not, except as incidental to justifiable segregation or the maintenance of discipline, aggravate the suffering inherent in such a situation.*" The *Mandela Rules* contain further specific limitations (Rules 37, 44–45), with Rule 45.2, stating "*the imposition of solitary confinement should be prohibited in the case of prisoners with mental or physical disabilities when their conditions would be exacerbated by such measures*". This is further reflected in the *Yogyakarta Principles* (5, 7, 10, 18 and 27), and particularly Principle 9, which states that protective measures "*involve no greater restriction of their rights than is experienced by the general prison population.*" In Europe, lawful authorisation and reasonableness of segregation are outlined in Article 6.1 ECHR, with an analogy drawn between segregation based on gender identity and segregation based on sexual identity, whereby segregation based on sexual identity has been ruled as unlawful and in breach of Article 3 (prohibition of inhuman and degrading treatment) and 14 ECHR (prohibition of discrimination) (*X v Turkey*, ECtHR, 2012). In 2009, a UK court ruled that the refusal to move a pre-operative transgender prisoner from a men's prison to a women's prison was a violation of her human rights under the ECHR Article 8 (*X v Turkey,* ECtHR, 2012; *R Bourgass v Secretary of State for Justice,* UKSC, 2015).

International human rights instruments mandate States to protect all prisoners, irrespective of SOGI and facilitate social reintegration (United Nations Office on Drugs and Crime [UNODC], 2009). Prison staff failures to uphold the rights of transgender prisoners have been deemed by US courts to violate the 8th Amendment, constituting "*cruel and unusual punishment*" Alexander and Meshelemiah (2010). Protection from gender maltreatment and abuse by prison staff and other prisoners is mandated in ECHR (Articles 3, 14) (*Sizarev v Ukraine,* ECtHR, 2013; *G.G. v. Turkey,* ECtHR, 2013). While the deliberate disclosure of transgender status breaches ECHR Article 8 (right to respect for private and family life), in the prison where there is a risk of violence, this may also breach ECHR Article 3 (*Bogdanova v Russia,* ECtHR, 2015).

Transgender prisoners are frequently denied access to gender affirming clothes and commodities, indicative of the struggle between discrimination and lack of acknowledgement, security and equality rights (UNDP, 2020). The *Mandela Rules* Rule 19 specifically requires that "*such clothing shall in no manner be degrading or humiliating*"

(UN, 2015). Of note is while the EPR, Rule 81.3 recognises the need for staff training to support vulnerable prisoners such as women or refugees, it does not refer to transgender prisoners. In 2013, a UK court found no discrimination in refusing gender-affirming items such as a wig, tights and a prosthetic vagina to a transgender prisoner (*R (Green) v Secretary of State for Justice*, EWHC, 2013). In South Africa, however, a transgender woman won her constitutional right to express her gender identity by wearing women's clothes, makeup and wearing her hair long in a male prison (*September v Subramoney NO and Others*, ZAEQC, 2019). In the US, there have been positive developments in recent years. In 2018, a District Court in Florida ruled that a transgender prisoner was permitted to gender affirm by wearing female clothing and accessing female items (*Keohane v. Jones*, ND Fla, 2018). This is also evidenced in the recent case in December 2020 in a US District Court (*Campbell v Kallas*, W.D. Wisc, 2020), which described that the prison in question facilitated an inmate access to continued hormone treatments, counselling and the wearing of some women's clothing, but with the judge denying additional requests for breast augmentation, voice therapy and electrolysis, as legal representation of the transgender inmate failed to provide evidence that these medical interventions were specifically required to treat the inmate's gender dysphoria.

The right to the highest attainable standard of health of transgender prisoners falls within international human rights treaties treaties [International Covenant on Economic, Social and Cultural Rights (ICESCR), Article 12, International Covenant on Civil and Political Rights (ICCPR) Article 6 right to life, Article 10 right to human treatment, European Social Charter, Article 11, Charter of Fundamental Rights of the European Union, Article 11; CESC Article 10; American Convention on Human Rights, Article 16). It is universal and non-discriminatory. This right also spans environmental determinants of health in prisons, standards of healthcare and rights to privacy and medical confidentiality. The ICCPR and ICESCR both state that prisoners have rights, even when they are deprived of liberty in custody. The ICCPR specifically provides that "*all persons deprived of their liberty should be treated with humanity and with respect for the inherent dignity of the human person*". It spans the underlying determinants of health, as well as access to adequate healthcare and information. It is also defined within soft law instruments from international organisations and the jurisprudence of international human rights bodies (Lines, 2008). The principle of equal treatment enshrined in these instruments states that all positive steps be taken to eliminate discrimination and risks faced by transgender persons. Guiding principles impacting on the prisoners include the right to health, where like all persons, prisoners are entitled to enjoy the highest attainable standard of health and human treatment with equal right to services and medicines. Examples include all provisions included in the Universal Declaration of Human Rights (*right to conditions adequate for the health and well-being*), ICESCR (*right to the highest attainable standard of physical and mental health*) and several others ICCPR (Articles 5, 9, 10 and 26), United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment of Punishment, Convention on the Elimination of All Forms of Discrimination against Women (Article 3); United Nations Basic Principles for the Treatment of Prisoners (Principle 5), the *Nelson Mandela Rules* (Rules 2, 5, 7, 19, 37, 38 and 43–45) and that the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, EPR (Rules 2, 5) (UNDP, 2020). These are further supported by the *Yogyakarta Principles* mandating the right to treatment with gender identity integral to dignity and humanity, and must not be the basis of discrimination or abuse while in detention (Principles 5, 7, 9, 10, 18, 27 and 32) and the ECHR (Articles 3, 6 and 14). The UN Principles of Medical Ethics state that all health personnel working with prisoners "*have a duty to provide them with [. . .] treatment of disease of the same quality and standard as is afforded to those who are not imprisoned or detained*". The "*Mandela Rules* and the *Bangkok Rules*" enshrine principles of confidentiality of medical and gender-related personal

information for prisoners. The *Nelson Mandela Rules* further stipulates *prisoners shall have access to the health services available in the country without discrimination on the grounds of their legal situation*. Both the *Nelson Mandela Rules* and the *Bangkok Rules* enshrine principles of confidentiality of medical and gender-related personal information for prisoners. According to the Yogyakarta Principles Principle 17 specifically recommends States to "*facilitate access by those seeking body modifications related to gender reassignment to competent, non-discriminatory treatment, care and support.*"

There is international consensus that prisoners are entitled to an equivalent standard of health-care to that available in their community. In Europe, the ECHR contains no explicit right to health, with the right to medical care in prisons guaranteed under the right to life. Most ECrtHR case law on prison health issues falls under Art 3 (prohibition of inhuman and degrading treatment) of the ECHR, which is an important tool for advocating for the rights of transgender prisoners. It clearly lays out the obligations of states to take proactive measures to prevent inhumane or degrading treatment to those deprived of their liberty (Lines, 2007 who has discussed such positive obligations to "*ensure that a person is detained under conditions, which are compatible with respect for his human dignity*" and to argue the case for States to provide needle exchange in prisons). According to the case of *Kudla v. Poland* (ECtHR, 2000), which concerned a prisoner's need for urgent psychiatric treatment, Article 3 obligates the state to ensure a prisoner's "*health and well-being are adequately secured by, amongst other things, providing him with the requisite medical assistance*". However, the ECtHR has also stated that "*lack of medical assistance in circumstances where such assistance was not needed cannot, of itself, amount to a violation of Article 3*" (prohibition of inhumane or degrading treatment). Of note is that the 2020 CoE Guide on ECHR case-law regarding prisoner rights does not refer to transgender people (ECtHR, 2020). Council of Europe Anti-Torture Committee [CoE] (2015) has made recommendations regarding a case in Austria that "*authorities take the necessary steps to ensure that transgender persons in prisons (and, where appropriate, in other closed institutions) have access to assessment and treatment of their gender identity issue and, if they so wish, to the existing legal procedures of gender reassignment. Further, policies to combat discrimination and exclusion faced by transgender persons in closed institutions should be drawn up and implemented.*" In terms of the right to adequate treatment (including continued hormone treatment), referral to treatment and denial of treatment posing threat to prisoner health, there have been several cases in Europe exploring right to GRS (*D. v Turkey*, ECtHR, 2012; *Bogdanova v Russia*, ECtHR, 2015). Further complications, however, exist in the form of the right to medical treatment in determining whether treatment is medically necessary or falls under the right to private life, dignity and gender self-identification and the subsequent state funding of such treatment (*Van Kück v Germany,* ECtHR, 2003).

Failure to provide transgender healthcare in prisons puts transgender prisoners at risk, causes significant mental anguish and raises serious human rights concerns. Elsewhere, the right to access treatment has been upheld in Canada (Canadian Human Rights Tribunal, 2001). There have been interesting developments in US case law around rights to medical care of transgender prisoners. Some US courts have ruled that hormone therapy is a necessity for transgender prisoners (*Kosilek v. Maloney, 221F. Supp. 2d 156* (D. Mass. 2002), have permitted GRS for transgender prisoners (Quine v. Beard *et al.*, ND Cal. 2017) and in 2020 have ruled that court decisions "*elevate innovative and evolving medical standards to be the constitutional threshold for prison medical care*" (*Edmo v. Corizon Inc.*, 9th Circuit Court, 2020*).* As previously referred to, the case of *Campbell v Kallas* (December 2020) in the US has ruled that (despite the prison facilitating an inmate access to continued hormone treatments, counselling and the wearing of some women's clothing), the denial of the opportunity to have GRS, was deemed to violate her constitutional rights (8th Amendment rights against *cruel and unusual punishment*).

Conclusion

This *viewpoint* highlights the dearth of knowledge exploring human rights discourses and concerns related to the phenomenon of incarcerated transgender persons. It uniquely focusses on European and domestic law and illustrates the inherent tensions between human rights, SOGI rights and security considerations regarding transgender issues in prisons. It underscores the relationship between rule of law, recognition of gender identity and medical ethics as central to upholding of gender affirmation itself, and the imperatives for related medical care needs in prison. Court discretion continues regarding such rights assurance in prisons; for sexual minorities, and particularly for transgender people. Rights assurances in this sense centre on the principles of equality, dignity, freedom of expression, dignified detention and the prohibition of inhumane treatment or punishment, and the equivalence of and right to appropriate medical care (both hormone and surgical).

In 2019, the UN underscored the need for further evidence-based prison reform, tackling, via judicial and penal measures, the invisible nature of transgender prisoners (UN Human Rights Council, 2017). Data on the issue of and experience of transgender prisoners and related case law remains scant. The UN Independent Expert on protection against violence and discrimination based on SOGI, *Victor-Madrigal-Borloz* has stated that "*information about the lived realities of lesbian, gay, bisexual, trans and gender-diverse persons around the world is, at best, incomplete and fragmented; in some areas it is non-existent [. . .] It means that in most contexts policymakers are taking decisions in the dark, left only with personal preconceptions and prejudices or the prejudices of the people around them.''*

Globally, the UNDP has published a series of good practices in the management of transgender prisoners, which centre on self-identification without the need for medical or psychological examination or confirmation, irrespective of legal recognition, legal documents and surgical status, gender neutral access to clothes and commodities and access to a full range of appropriate medical care while detained (United Nations Development Programme [UNDP], 2020). Whole prison approaches to tackling discrimination and supporting transgender people are further warranted to consider the complexities of non-binary classification and capacity build prison staff, alongside continued lobbying to ensure States human rights assurances of incarcerated transgender people are upheld (Brömdal *et al.*, 2019; Van Hout *et al.*, 2020).

References

African Commission on Human and Peoples' Rights (ACHPR) (1996), "The Kampala declaration on prison conditions in Africa", ACHPR, Kampala, available at: www.penalreform.org/resource/kampala-declaration-prison-conditionsafrica/

Alexander, R. and Meshelemiah, J.C.A. (2010), "Gender identity disorders in prisons: what are the legal implications for prison mental health professionals and administrators?", *The Prison Journal*, Vol. 90 No. 3, pp. 269-287.

Barnes, A. (1998), "The sexual continuum: transsexual prisoners", *New England Journal of Criminal and Civil Confinement*, Vol. 599, pp. 600-602.

Brömdal, A., Clark, K.A., Hughto, J.M.W., Debattista, J., Phillips, T.M., Mullens, A.B., Gow, J. and Daken, K. (2019), "Whole-incarceration-setting approaches to supporting and upholding the rights and health of incarcerated transgender people", *International Journal of Transgenderism*, Vol. 20 No. 4, pp. 341-350.

Ciuffoletti, S. (2020), "'Regardless of their sex' or 'biological differences'. An analysis of the European court of human rights' case law on women in prison", *Revista Direito e Práxis*, Vol. 11 No. 2, pp. 1275-1311.

Council of Europe (2017), *Steering Committee for Human Rights CDDH, Combating discrimination on Grounds of Sexual Orientation or Gender Identity Follow-up to Recommendation CM/Rec(2010)5 of the*

Committee of Ministers CDDH(2017), available at: www.coe.int/en/web/human-rights-rule-of-law/european-prison-rules (accessed 1 December 2017).

Council of Europe (CoE) (2020), "Revised European prison rules: new guidance to prison services on humane treatment of inmates CoE", Strasbourg, available at: www.coe.int/en/web/human-rights-rule-of-law/european-prison-rules

Council of Europe Anti-Torture Committee (CoE) (2015). "Anti-torture committee scolds Austria over treatment of trans inmates", available at: Anti-TorturecommitteescoldsAustriaovertreatmentoftransinmates-TGEU

Dias-Vieira, A. and Ciuffoletti, S. (2014), "Section D: a tertium genus of incarceration? Case-study on the transgender inmates of sollicciano prison", *Journal of Law and Criminal Justice*, Vol. 2 No. 2, pp. 209-249.

ECtHR. (1985) Abdulaziz, C. and Balkandali, V. "The United Kingdom" *15/1983/71/107-109, Council of Europe: European Court of Human Rights*, available at: www.refworld.org/cases,ECHR,3ae6b6fc18.html (accessed 20 October 2020).

ECtHR. (1992). B.V. France "Application no. 13343/87 council of Europe: European court of human rights" available at: https://hudoc.echr.coe.int/rus#{%22itemid%22:[%22001-57770%22]} (accessed 20 October 2020).

ECtHR (2000), "Kudla v. Poland. Application No. 30210/96, 35", *Council of Europe: European Court of Human Rights*, available at: https://hudoc.echr.coe.int/tur#{%22itemid%22:[%22001-58920%22]} (accessed 20 October 2020).

ECtHR. (2002). Goodwin, V "United Kingdom", *Application no. 28957/95, Council of Europe: European Court of Human Rights*, available at: www.refworld.org/cases,ECHR,4dad9f762.html (accessed 20 October 2020).

ECtHR (2003) "Van Kuck v Germany, Application No. 35968/97", *Council of Europe: European Court of Human Rights*, available at: https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=002-4824&filename=002-4824.pdf&TID=ihgdqbxnfi (accessed 20 October 2020).

ECtHR (2015), "Identoba and others v Georgia Application no. 73235/12", *Council of Europe: European Court of Human Rights*, available at: https://hudoc.echr.coe.int/eng?i=001-140163 (accessed 20 October 2020).

ECtHR (2015), "Bogdanova v Russia application no. 63378/13", *Council of Europe: European Court of Human Rights*, available at: https://tgeu.org/wp-content/uploads/2015/07/Bogdanova-v-Russia_third-partyintervention-FINAL.pdf (accessed 20 October 2020).

ECtHR (2012), "Turkey, X.V. Application no. 24626/09", *Council of Europe: European Court of Human Rights*, available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-113876%22]} (accessed 20 October 2020).

ECtHR (2013), "Ukraine, S.V. Application no. 17116/04", *Council of Europe: European Court of Human Rights*, available at: https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-115883&filename=001-115883.pdf (accessed 20 October 2020).

ECtHR (2015), "G.G. v. Turkey Application No. 10684/13", *Council of Europe: European Court of Human Rights*, available at: https://tgeu.org/wp-content/uploads/2015/07/GG-v-Turkey_third-party-intervention.pdf (accessed 20 October 2020).

Erni, J.N. (2013), "Legitimating transphobia: the legal disavowal of transgender rights in prison", *Cultural Studies*, Vol. 27 No. 1, pp. 136-159.

European Convention of Human Rights (ECHR) (2020), "Guide on article 14 of the European convention on human rights – prohibition of discrimination", available at: www.echr.coe.int/Documents/Guide_Art_14_Art_1_Protocol_12_ENG.pdf

European Court of Human Rights (2020), "Guide on the case-law of the European convention on human rights: prisoners rights", available at: Guideonthecase-law-Prisoners'rights(coe.int)

European Union Fundamental Rights Agency (FRA) (2014), "LGBT survey on victimization and discrimination", FRA, Vienna, available at: https://fra.europa.eu/en/publication/2014/eu-lgbt-survey-european-union-lesbian-gay-bisexual-and-transgender-survey-main

EWHC (2013) R (Green) v, Secretary of State for Justice "England and Wales high court (administrative court) 3491", available at: www.casemine.com/judgement/uk/5a8ff7bb60d03e7f57eb1a1f (accessed 20 October 2020).

Halliday, J. (2017), "Transgender woman found dead in cell at doncaster prison", The Guardian, available at: www.theguardian.com/society/2017/jan/05/transgender-woman-jenny-swift-found-dead-at-doncaster-prison> (accessed 20 October 2020).

Hart, H.L.A. (1961), *The Concept of Law, Clarendon Law Series*, 2nd ed., Oxford University Press, Oxford.

Inter-American Commission on Human Rights (IACHR) (2008), "Resolution 1/08, principles and best practices on the protection of persons deprived of liberty in the Americas", Nos 1/8, available at: www.refworld.org/docid/48732afa2.html (accessed 20 October 2020).

International Bar Association LGBTI Law Committee (2009), "Mr & Ms X: the rights of transgender persons globally", available at: https://ibanet.org

Lamble, S. (2012), "Rethinking gendered prison policies: impacts on transgender prisoners", *ECAN Bulletin*, No. 16, pp. 7-12.

Lines, R. (2008), "The right to health of prisoners in international human rights law", *International Journal of Prisoner Health*, Vol. 4 No. 1, p. 53.

Lines, R. (2007), "Injecting reason: prison syringe exchange and article 3 of the European convention on human rights", *European Human Rights Law Review*, Vol. 1, pp. 66-80.

McCauley, E., Eckstrand, K., Desta, B., Bouvier, B., Brockmann, B. and Brinkley-Rubinstein, L. (2018), "Exploring healthcare experiences for incarcerated individuals who identify as transgender in a Southern jail", *Transgender Health*, Vol. 3 No. 1, pp. 34-41.

Mann, R. (2006), "A comparative analysis of American, Australian, and Canadian prison policies concerning the treatment of transgender prisoners and a 'universal' recommendation to improve treatment", *Law and Sexuality*, Vol. 15, pp. 92-133.

ND Cal (2017), "Quine v. Beard et al, No. 3:2014cv02726 - Document 116", available at: https://law.justia.com/cases/federal/district-courts/california/candce/3:2014cv02726/278295/116/ (accessed 20 October 2020).

ND Fla (2018), "Keohane v. Jones, 328 F. Supp. 3d 1288", available at: https://casetext.com/case/keohane-v-jones

Penal Reform International (2020), "Global prison trends", PRI, London, available at: www.penalreform.org/resource/global-prison-trends-2020/#:~:text=PRI%20advocates%20for%20an%20increase,Crime%2C%20justice%20and%20imprisonment

Report of the Special Rapporteur on Torture (2016), *Report of the Special Rapporteur on torture A/HRC/31/57*, pp. 34-35.

Rodgers, J., Asquith, N.L. and Dwyer, A. (2017), *Cisnormativity, Criminalisation, Vulnerability: Transgender People in Prisons*, University of Tasmania, Hobart.

Report of the Special Rapporteur on Torture (2016), "Report of the Special Rapporteur on torture A/HRC/31/57", (accessed 5 January 2016).

UKSC . R (Bourgass) v (2016), "Secretary of state for justice", *UKSC 54*, available at: www.supremecourt.uk/cases/uksc-2013-0230.html (accessed 20 October 2020).

UN Committee Against Torture (CAT) (2015), *Ninth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.

UN Human Rights Office of the High Commissioner (2016), "Targeted and tortured: UN experts urge greater protection for LGBTI people in detention", OHCHR, Geneva, available at: www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20165&LangID=E

UNAIDS (2014), *Transgender People'' in the GAP Report*, UNAIDS, Geneva.

United Nations (UN) General Assembly (1990), "Basic principles for the treatment of prisoners", Res. 45/111 UN Doc. No. A/RES/45/111., available at: https://digitallibrary.un.org/record/105348?ln=en

United Nations (2015), (UN) "United nations standard minimum rules for the treatment of prisoners (the Nelson Mandela rules)", A/RES/70/175. United Nations: New York, NY, available at: www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/70/175&referer=/english/&Lang=E

United Nations (UN) General Assembly (2010), "United nations rules for the treatment of women prisoners and non-custodial measures for women offenders (the Bangkok rules)", A/C.3/65/L.5. UN: New York, NY,

available at: www.unodc.org/documents/hivaids/publications/Prisons_and_other_closed_settings/P_BangkokRules_2010_EN.pdf

UN Human Rights Council (2015), "UN human rights office of the high commissioner", *Discrimination and violence against individuals based on their sexual orientation and gender identity: Report of the Office of the United Nations High Commissioner for Human Rights (4 May 2015)*, UN Human Rights Council Doc A/HRC/29/23, paras, 34-36.

United Nations Development Programme (UNDP) (2020), *Mapping of Good Practices for the Management of Transgender Prisoners*, UNDP, Bangkok, available at: www.th.undp.org/content/thailand/en/home/library/democratic_governance/mapping-of-good-practices-for-the-management-of-transgender-pris.html

United Nations Office on Drugs and Crime (UNODC) (2009), *Handbook on Prisoners with Special Needs*, United Nations Office on Drugs and Crime, Vienna, available at: www.unodc.org/pdf/criminal_justice/Handbook_on_Prisoners_with_Special_Needs.pdf

United Nations Office on Drugs and Crime (UNODC) (2016), *Handbook on the Management of High Risk Prisoners*, UNODC, Vienna, available at: www.unodc.org/documents/justiceand-prison-reform/HB_on_High_Risk_Prisoners_Ebook_appr.pdf

Van Hout, M.C. and Mhlanga-Gunda, R. (2018), "Contemporary women prisoners health experiences, unique prison health care needs and health care outcomes in Sub Saharan Africa: a scoping review of extant literature", *BMC International Health and Human Rights*, Vol. 18 No. 1, p. 31.

Van Hout, M.C., Hillis, A. and Kewley, S. (2020), "Contemporary transgender health experience and health situation in prisons: a scoping review of extent published literature (2000-2019)", *International Journal of Transgender Health*, Vol. 21 No. 3, pp. 258-306.

WHO (2014), "Prisons and health", *World Health Organization (WHO) Regional Office for Europe, WHO, Copenhagen*, available at: www.unodc.org/documents/hiv-aids/publications/Prisons_and_other_closed_settings/2014_WHO_UNODC_Prisons_and_Health_eng.pdf.pdf (accessed 20 October 2020).

Wisc, W.D. (2020), "Campbell v. Kallas US District Court for the Western District of Wisconsin. 16-cv-261-jdp", *Campbell v. Kallas, 16-cv-261-jdp j Casetext Search*.

World Health Organization (WHO) Regional Office for Europe, *Prisons and Health*, WHO, Copenhagen, available at: www.unodc.org/documents/hiv-aids/publications/Prisons_and_other_closed_settings/2014_WHO_UNODC_Prisons_and_Health_eng.pdf.pdf

World Health Organization (WHO) (2020), *Transgender Health in the Context of ICD-11*, WHO, Geneva, available at: http://www.euro.who.int/en/health-topics/health-determinants/gender/gender-definitions/whoeurope-brief-transgenderhealth-in-the-context-of-icd-11

World Professional Association for Transgender Healthcare (WPATH) (2012), *Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People*, 7th ed., available at: www.wpath.org

Yogyakarta Principles (2017), "The Yogyakarta principles: principles on the application of international human rights law in relation to sexual orientation and gender identity", available at: https://yogyakartaprinciples.org/

ZAEQC (2019), "September v Subramoney NO and Others (EC10/2016)", *4 All SA 927 (WCC)*.

Council of Europe (2013), "Steering committee for human rights", Recommendation 4, CoE, Strasbourg, available at: https://rm.coe.int/168045fdfb

Human Right Council (2019), "Report of the independent expert on protection against violence and discrimination based on sexual orientation and gender identity (a/HRC/41/45)", United Nations General Assembly, 14 May 2019, available at: www.ohchr.org/EN/Issues/SexualOrientationGender/Pages/AnnualReports.aspx

United Nations (UN) (1979), "Convention on the elimination of all forms of discrimination against women article 3", UN: New York, NY, available at: www.ohchr.org/en/professionalinterest/pages/cedaw.aspx

Case law

Goodwin, V. "United Kingdom", Application no. 28957/95, Council of Europe: European Court of Human Rights, 11 July 2002, available at: www.refworld.org/cases,ECHR,4dad9f762.html (accessed 20 October 2020).

B.V. France "Application no. 13343/87 council of Europe: European court of human rights", 25 March 1992, available at: https://hudoc.echr.coe.int/rus#{%22itemid%22:[%22001-57770%22]} (accessed 20 October 2020).

Abdulaziz, C. and Balkandali, V. "The United Kingdom", 15/1983/71/107-109, Council of Europe: European Court of Human Rights, 24 April 1985, available at: www.refworld.org/cases,ECHR,3ae6b6fc18.html (accessed 20 October 2020).

Identoba and others v Georgia Application no. 73235/12, Council of Europe: European Court of Human Rights, 12 May 2015, available at: https://hudoc.echr.coe.int/eng?i=001-140163 (accessed 20 October 2020).

Turkey, X.V. Application no. 24626/09, Council of Europe: European Court of Human Rights, 9 October 2012, available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-113876%22]} (accessed 20 October 2020).

R (Bourgass) v "Secretary of state for justice", [29 July 2015] UKSC 54, available at: www.supremecourt.uk/cases/uksc-2013-0230.html (accessed 20 October 2020).

AB, R v Secretary of State for Justice & Anor (2009), "England and Wales high court (administrative court) decisions 2220", 4 September 2009, available at: www.bailii.org/ew/cases/EWHC/Admin/2009/2220.html (accessed 20 October 2020).

Ukraine, S.V. Application no. 17116/04, "Council of Europe: European court of human rights", 17 January 2013, para 112; 9, available at: https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-115883&filename=001-115883.pdf (accessed 20 October 2020).

G.G. v. Turkey Application No. 10684/13, "Council of Europe: European court of human rights", 31 March 2013, available at: https://tgeu.org/wp-content/uploads/2015/07/GG-v-Turkey_third-party-intervention.pdf (accessed 20 October 2020).

Bogdanova v Russia Application No. 63378/13. "Council of Europe: European court of human rights", 10 June 2015, available at: https://tgeu.org/wp-content/uploads/2015/07/Bogdanova-v-Russia_third-party-intervention-FINAL.pdf (accessed 20 October 2020).

R (Green) v, Secretary of State for Justice (2013), "England and Wales high court (administrative court) 3491", 4 December 2013, available at: www.casemine.com/judgement/uk/5a8ff7bb60d03e7f57eb1a1f (accessed 20 October 2020).

Keohane v. Jones, 328 F. Supp. 3d 1288 (N.D. Fla. 2018), available at: https://casetext.com/case/keohane-v-jones (accessed 20 October 2020).

September v Subramoney NO and Others (EC10/2016) [2019] ZAEQC 4; [2019] 4 All SA 927 (WCC) (23 September 2019)

Kudla v. Poland. Application No. 30210/96, 35 Council of Europe: European Court of Human Rights, 26 October 2000, available at: https://hudoc.echr.coe.int/tur#{%22itemid%22:[%22001-58920%22]} (accessed 20 October 2020).

D.v Turkey, Application No. 10684/13, "Council of Europe: European court of human rights", 24 November 20122012, available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-139133%22]} (accessed 20 October 2020).

Van Kück v Germany, Application No. 35968/97 Council of Europe: European Court of Human Rights, 12 June 2003, available at: https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=002-4824&filename=002-4824.pdf&TID=ihgdqbxnfi (accessed 20 October 2020).

Canadian Human Rights Tribunal (2001), Kavanagh v. Canada (Attorney-General), 2001 Can LII 8496 (CHRT), available at: www.tesaonline.org/legal-cases.html (accessed 20 October 2020).

Kosilek v. Maloney, 221 F. Supp. 2d 156 (D. Mass. 2002). "US district court for the district of Massachusetts", available at: www.courtlistener.com/opinion/2486110/kosilek-v-maloney/ (accessed 20 October 2020).

Quine v. Beard et al, No. 3:2014cv02726 - Document 116 (N.D. Cal. 2017, available at: https://law.justia.com/cases/federal/district-courts/california/candce/3:2014cv02726/278295/116/ (accessed 20 October 2020).

Edmo v. Corizon Inc., 9th Cir., No. 19-cv-35017, 2/10/20, available at: http://cdn.ca9.uscourts.gov/datastore/opinions/2020/02/10/19-35017.pdf (accessed 20 October 2020).

Campbell v. Kallas US District Court for the Western District of Wisconsin. 16-cv-261-jdp (W.D. Wis. Dec. 8, 2020). Campbell v. Kallas, 16-cv-261-jdp | Casetext Search + Citator Accessed 10 January 2021.

Legislation [database]

UN General Assembly "Basic principles for the treatment of prisoners: resolution/adopted by the general assembly", 28 March 1991, A/RES/45/111, available at: www.refworld.org/docid/48abd5740.html (accessed 20 October 2020).

UN General Assembly "United Nations standard minimum rules for the treatment of prisoners (the Nelson Mandela rules): resolution/adopted by the general assembly", 8 January 2016, A/RES/70/175, available at: www.refworld.org/docid/5698a3a44.html (accessed 20 October 2020).

African Commission on Human and Peoples' Rights "The Kampala declaration on prison conditions in Africa", 19-21 September 1996, available at: www.achpr.org/legalinstruments/detail?id=42 (accessed 20 October 2020).

Council of Europe: Committee of Ministers "Recommendation rec(2006)2 of the committee of ministers to member states on the European prison rules", 11 January 2006, Rec(2006)2, available at: www.refworld.org/docid/43f3134810.html (accessed 20 October 2020).

UN General Assembly "Convention on the elimination of all forms of discrimination against women", 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13, available at: www.refworld.org/docid/3ae6b3970.html (accessed 20 October 2020).

UN General Assembly "United Nations rules for the treatment of women prisoners and Non-Custodial measures for women offenders (the Bangkok rules): note/by the secretariat", 6 October 2010, A/C.3/65/L.5, available at: www.refworld.org/docid/4dcbb0ae2.html (accessed 20 October 2020).

International Commission of Jurists (ICJ) "Yogyakarta Principles - principles on the application of international human rights law in relation to sexual orientation and gender identity", March 2007, available at: www.refworld.org/docid/48244e602.html (accessed 20 October 2020).

Council of Europe: Steering Committee for Human Rights CDDH "Combating discrimination on grounds of sexual orientation or gender identity examination of the issue of follow-up to recommendation CM/rec (2010)5 of the committee of ministers CDDH(2017) 1 december 2017", available at: https://rm.coe.int/combating-discrimination-on-grounds-of-sexual-orientation-or-gender-id/168076d446 (accessed 20 October 2020).

Inter-American Commission on Human Rights (IACHR) "Resolution 1/08, principles and best practices on the protection of persons deprived of liberty in the Americas", 13 March 2008, No. 1/08, available at: www.refworld.org/docid/48732afa2.html (accessed 20 October 2020).

About the authors

Marie-Claire Van Hout, PhD is Professor of Public Health Policy and Practice at Liverpool John Moores University in the UK. She has 20 years clinical practice, research and evaluation experience in the area of public health, human rights law and vulnerable key populations (prisoners, drug users and sex workers) in Europe, Africa and the Middle East. Marie-Claire Van Hout is the corresponding author and can be contacted at: m.c.vanhout@ljmu.ac.uk

Des Crowley, PhD, MD is an Associate Professor at University College Dublin, School of Medicine in Ireland. He is also Assistant Director of Substance Misuse at the Irish College of General Practitioners, a GP, addiction specialist and medical officer in charge of the drug treatment programme in Mountjoy Prison in Dublin.

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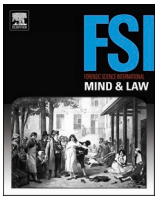

Corrigendum to "Navigating the complexities of the mentally ill and mentally incapacitated in the criminal justice system in South Africa" [Forensic Science International: Mind and Law 2 (2021) 100068]

Marie Claire Van Hout [a,*], Jakkie Wessels [b]

[a] Public Health Institute, Faculty of Health, Liverpool John Moores University, 3rd Floor, Exchange Station, Tithebarn Street, Liverpool, L2 2QP, United Kingdom
[b] Limpopo Regional Division, Magistrate Court, Office of the Regional Court President, corner Bodenstein and Landdros Marais street, Polokwane, Limpopo, South Africa

The authors regret to advise of two missing sentences in the second paragraph.

Bold is the missing text.

A host of ethical, clinical and political issues are associated with judiciarisation of people with mental illness and mental incapacity further exacerbating existing marginalisation and stigma (Chaimowitz, 2012; Rogers and Pilgrim, 2014; Paradis-Gagné and Holmes, 2020; Paradis-Gagné and Jacob, 2021). **There are increasing implications for the United Nations Convention on the Rights of Persons with Disabilities (CRPD) (*Article 1* Convention on the Rights of Persons with Disabilities CRPD) (United Nations, 2007) regarding attributions of criminal responsibility. This occurs within a broader global call for wider recognition of the legal capacity both as duty bearer, and as rights holder of people with mental illness and disabilities relating to personal decisions and criminal activity (Craigie, 2015). *Articles* 2, 5 and 12 to 13 of the CRPD** are most applicable with regard to the rights of persons with disabilities in the criminal justice system.

The authors would like to apologise for any inconvenience caused.

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* Corresponding author. Public Health Policy and Practice, Public Health Institute, Faculty of Health, Liverpool John Moores University, 3rd Floor, Exchange Station, Tithebarn Street, Liverpool, L2 2QP, United Kingdom.

E-mail address: m.c.vanhout@ljmu.ac.uk (M.C. Van Hout).

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Navigating the complexities of the mentally ill and mentally incapacitated in the criminal justice system in South Africa

Marie Claire Van Hout [a,*], Jakkie Wessels [b]

[a] Public Health Institute, Faculty of Health, Liverpool John Moores University, 3rd Floor, Exchange Station, Tithebarn Street, Liverpool, L2 2QP, United Kingdom
[b] Limpopo Regional Division, Magistrate Court, Office of the Regional Court President, Corner Bodenstein and Landdros Marais Street, Polokwane, Limpopo, South Africa

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ABSTRACT

Those with mental illness, learning disabilities, and speech and language difficulties continue to be over represented in the global criminal justice system, create immense difficulties for these individuals in navigating the system itself, and the prison environment, and contribute to the revolving door of incarceration. Very little is known with regard to the situation of the mentally ill and mentally incapacitated in African criminal justice systems. In this *Commentary* we discuss how the Criminal Procedure Act in South Africa still does not fully comply with the or the Protocol to the African Charter on the Rights of Person with Disabilities in criminal proceedings. An urgent review of due process is warranted where the existence of capacity based defense needs are to be considered. It is vital to distinguish between intellectual and psycho-social disability, regarding assessment and issuance of appropriate court orders to the specific needs of the person, the identified disability and the interest of justice. Consistency in mental capacity or illness assessment using validated screening tools and specialist expert reports provided to the court should comply with the general requirements of expert evidence.

1. Background

On any given day, almost 11 million people globally are detained in prisons or other closed settings (Penal Reform International, 2020). The prison population is heterogenous and contains specific vulnerable prisoner groups, including those who are mentally ill and mentally incapacitated (United Nations Office on Drugs and Crime, 2009; United Nations Office on Drugs and Crime, 2016). Those with mental illness, learning disabilities, and speech and language difficulties continue to be over represented in the global criminal justice system, create immense difficulties for these individuals in navigating the system itself, and the prison environment, and contribute to the revolving door of incarceration (Barnett et al., 2014; Houston & Butler, 2019; Mallett, 2014; Mundt & Baranyi, 2020; Ogloff et al., 2015; Wetterborg et al., 2015; Zhang et al., 2011). There is a growing literature base on the concept of judiciarisation of the mentally ill (MacDonald & Dumais-Michaud, 2015; Sugie & Turney, 2017) and critique of the judicial-psychiatric interface (Paradis-Gagné & Jacob, 2021). The principle of imprisonment as the last resort for all offenders, cognisant of the offence itself, risk to society and social rehabilitation needs is fundamental when dealing with the mentally ill and mentally incapacitated. Detention potentially constitutes a disproportionately severe punishment and with their unique special needs are better addressed in the context of non-custodial measures (United Nations Office on Drugs and Crime, 2009).

A host of ethical, clinical and political issues are associated with judiciarisation of people with mental illness and mental incapacity further exacerbating existing marginalisation and stigma (Chaimowitz, 2012; Paradis-Gagné & Holmes, 2020; Paradis-Gagné & Jacob, 2021; Rogers & Pilgrim, 2014). (*Article 1*) (United Nations, 2007) (are most applicable with regard to the rights of persons with disabilities in the criminal justice system. The Protocol provides for the right to access to justice in *Article 13* in that State Parties need to take measures to ensure that persons with disabilities are dealt with equally, including through the provision of procedural, age and gender-appropriate accommodations, in order to facilitate their effective roles as participants in legal proceedings, as well as legal assistance including legal aid to persons with disabilities. *Article 17,* dealing with the protection of the integrity of the person, states that *"[E]very person with disabilities has a right to respect for his or her physical and mental integrity on an equal basis with others"* (United Nations, 2007).

Recent developments in international human rights law have however questioned the legitimacy of the link between mental and legal

* Corresponding author.
E-mail address: m.c.vanhout@ljmu.ac.uk (M.C. Van Hout).

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capacity (Craigie, 2015) with the Committee on the Rights of Persons with Disabilities stating in their General Comment on *Article* 12 of the CRPD that; *"Legal capacity is the ability to hold rights and duties (legal standing) and to exercise these rights and duties (legal agency)"*(United Nations, 2014). There are implications of the CRPD on criminal defences based on mental incapacity (Bach, 2009; Loughnan, 2011, 2012; Peay, 2015), underpinned by *Article 12* which requires "*that legal capacity should not be limited on the basis of mental disability: persons with mental disabilities, including mental disorders, must be recognized as persons before the law on an equal basis to others and must be* supported in the *exercise of their legal capacity"*(United Nations, 2014). It also generally mandates States to recognise the legal capacity of those with mental disabilities more broadly than is currently the case, and leaves very little room for the restriction of legal capacity on the basis of mental incapacity. The Committee further state in their General Comment on *Article* 12 that; *"The Convention affirms that all persons with disabilities have full legal capacity"* and that *"perceived or actual deficits in mental capacity must not be used as justification for denying legal capacity"*(United Nations, 2014).

The United Nations High Commissioner reported in 2009 that the CRPD requires replacing criminal defences based on "*mental or intellectual disability*" with "*disability-neutral*" doctrines (*para 47*), and meaning that defences based on diminished responsibility and insanity could be in violation of the Convention (Bartlett, 2012; Flynn & Arstein-Kerslake, 2014; Peay, 2015; Slobogin, 2015). The criminal defences based on *"mental or intellectual disability"* refers to the capacity to stand trial and criminal responsibility. Legal capacity is a requirement for criminal responsibility and all persons are presumed to have legal capacity. A defence based on the inability of person to appreciate the wrongfulness of their actions or to act in accordance with such appreciation due to mental illness or intellectual disability, is regarded as a substantive law defence, with the burden of proof on the person raising the defence (Schwikkard & Van Der Merwe, 2016, p. 604). The inability to understand court proceedings "*concerns mental fitness to stand trial and raises the fundamental procedural issue of "triability". It is not a substantive law defence and does not give rise to issues pertaining to criminal responsibility …"* (Schwikkard & Van Der Merwe, 2016, p. 606) and the burden of proof is on the prosecution.

Furthermore, the human and health rights assurances of vulnerable prisoners form the basis of prison management, with minimum standards of care applying to all without discrimination. The principle of non-discrimination recognises the special needs of some prisoners and provides for them to ensure they are dealt with in a manner that does not discriminate against their human rights entitlements (United Nations, 1948, 1966a, 1966b, 1988, 2016). For many, however incarceration is characterised by unjust deprivation of liberty and indicative of a range of neglect and human rights abuses (Fazel et al., 2016). *Article 14* of the CRPD states clearly that; *"States Parties shall ensure that persons with disabilities, on an equal basis with others enjoy the right to liberty and security of person; are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty. States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of this Convention, including by provision of reasonable accommodation."* (United Nations, 2007).

The incarceration of the mentally ill and mentally incapacitated however continues globally, with their situation in prison neglected, and efforts to divert them from the penal system underpinned by resource and systemic challenges (Okasha, 2004). The criminalisation and incarceration of the mentally ill and mentally incapacitated often occurs where lack of suitable facilities exist in the community or are still detained in prisons despite acquittal on the basis of their mental disability at the time of the criminal offence (Boyd-Caine & Chappell, 2005). This incurs significant pressure on the correctional system, often lacking in requisite healthcare capacity to meet their care mandate (Lamb et al., 2004). This is in violation of the United Nations Standard Minimum Rules for the Treatment of Prisoners (United Nations, 2016) (*Rules* 2(2), 27) which recommends specialized treatment rather than imprisonment in such cases.

2. Human rights in the African penal context

Recent global commentaries in *Lancet* have called for operationalisation of a harm reduction model with enhanced governance, development of robust clear national policies awarding greater responsibility to health services; and context-specific clinical tools and interventions in low-income and middle-income countries (LMICs) (Jack et al., 2018). Data on the extent of mental illness and mentally incapacity in the criminal justice system in prisons in LMICs is not well established but speculated to be greater than in high income countries due to the lack of psychiatric care (Fazel et al., 2016; Fazel & Seewald, 2012). Forensic health monitoring and clinical intervention for many at the intersection of the criminal justice and mental health care systems in LMICs also remains under developed, with few interventions adapted or evaluated in LMIC prison settings (Jack et al., 2018). The window of opportunity to intervene and support within the penal system is under-utilised in such low resource settings, and warrant continuous care modalities spanning community and prison (Mundt & Baranyi, 2020).

A review by Lovett et al. (2019) has reported on the high pooled prevalence of mental illness in African prisons, consistent with global trends, and with many detained without charge in non-prison settings (forensic hospitals, youth institutions). Whilst the included studies were heterogeneous, their meta-analysis reveals high pooled prevalence of mental disorders and substance use among people detained within the justice system in Africa. Efforts have been made at international and regional levels to enable, encourage and support prison and criminal justice reform in Africa, in order to tackle poor conditions of detention and criminal justice system structural problems. Historically, the Commission adopted several regional instruments to extend the rights and protections of people deprived of their liberty, based on the Standard Minimum Rules (United Nations, 1955), Basic Principles for the Treatment of Prisoners (United Nations, 1991a) and Standard Minimum Rules for Non-custodial Measures ("*Tokyo Rules"*) (United Nations, 1991b). Early regional African instruments included the 1995 Resolution on Prisons in Africa; the 1997 Resolution on the Right to Recourse Procedure and Fair Trial and the 1996 Kampala Declaration on Prison Conditions in Africa. Current protocols are generally based on the 2016 *Mandela Rules* (United Nations, 2016) which outline 122 rules setting out the minimum standards of care, and the adjunct UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders ("*Bangkok Rules"*) (United Nations, 2010) containing 70 rules regarding gender sensitive international standards for the treatment of women in detention. The Commission has appointed two special mechanisms (the Special Rapporteur and the Committee for the Prevention of Torture in Africa) in prisons, and a range of soft law instruments to support criminal justice and penal reform in addition to the Guidelines and Measures for the Prohibition and Prevention of Torture and Cruel, Inhuman or Degrading Treatment or Punishment in Africa ("*Robben Island Guidelines"*) were adopted by the Commission in 2002; *"to complement the provisions of Article 5 of the African Charter on Human and Peoples' Rights, further provide for the absolute prohibition against torture and other cruel, inhuman or degrading treatment or punishment, and declare that: all "options such as "necessity", "national emergency", "public order" … shall not be invoked as a justification of torture or cruel, inhuman or degrading treatment or punishment"* (African Commission on Human and Peoples' Rights, 2008).

The pan-African Conference on Prison and Penal Reform in Africa in 2002 generated the Ouagadougou Declaration and Plan of Action on Accelerating Prisons and Penal Reforms in Africa which contained recommendations to reduce prison populations, make African prisons more

self-sufficient, promote offender reintegration into society, apply rule of law to prison administration, encourage best practice and promote the (draft) African Charter on Prisoner Rights (Muntingh, 2020). Other pan African meetings yielded the 2004 Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa which promotes the right to fair trial and access to justice. Subsequently, the African Commission on Human and Peoples' Rights 2014 Luanda Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa were created to advocate for a rights-based approach to pre-trial detention, and their 2017 Principles on the Decriminalisation of Petty Offences in Africa represent the most recent development within the broader regional effort to articulate standards regarding rule of law and access to justice (Muntingh, 2020). The African Charter on Human and Peoples' Rights *Article* 16(1) affirms *"the individual's right to enjoy the best attainable state of physical and mental health"* with *Article* 16 (2) imposing "*a duty upon State parties to take all necessary steps for the ensuring that the individual's right in Article 19 (1) is realized"*(Organisation of African Unity, 1981). Similar is provided in the African Charter on Human and People's Rights On the Rights of Women in Africa (African Union, 2003) and African Charter on the Rights and Welfare of the Child (Organisation of African Unity, 1990). The Commission notes that the obligation regarding right to health is "*heightened"* when an individual is in State custody, with their integrity and well-being wholly dependent on the State. The 2003 Principles and Guidelines on the Rights to a Fair Trial and Legal Assistance in Africa provides in Article 2(b) for the *"equality of all persons before any judicial body without any distinction whatsoever as regards race, colour, ethnic origin, sex, gender, age, religion, creed, language, political or other convictions, national or social origin, means, disability, birth, status or other circumstances"*.

3. Navigating the complexities of the mentally ill and mentally incapacitated in the South African criminal justice system

The denial of legal capacity of persons with mental disabilities (including mental illness and intellectual disability) occurs disproportionately worldwide, and South Africa is no different. In this *Commentary* we report on the South African justice systems in play, which faces several of the key challenges of many governments in Africa and many LMICs, including the division of responsibility between Ministry of Justice, Social Development and Health. There is a dearth of literature in South Africa on the issue of mental illness and mental incapacity in its justice and penal systems, limited to several small studies indicating a high prevalence of mental disorders among prisoners (Naidoo & Mkize, 2012; Prinsloo, 2014; Sukeri et al., 2016).

South Africa signed and ratified the CRPD and its Optional Protocol in 2007, and is obligated under this convention to fulfil its commitments in terms of implementation and reporting. Further it has ratified the 2018 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa. Currently despite the ratification of the CRPD, it has not yet been formally '*incorporated'* into South African law as required in terms of *Section* 231 of the South African Constitution. *Section* 12 of the Mental Health Care Act 17 of 2002 provides that any determination concerning the mental health status of any person must be based on factors exclusively relevant to that person's mental health status, or to give effect to the Criminal Procedure Act 51 of 1977.

The Criminal Procedure Act differentiates between the capacity of the accused to understand the proceedings in court so as to make a proper defence due to mental illness or intellectual disability (*Section* 77) and where the accused at the time of the commission of the offence suffered from a mental illness or intellectual disability which made the accused either incapable of appreciating the wrongfulness of his or her act or omission or of acting in accordance with an appreciation of the wrongfulness of his or her act or omission (*Section* 78). The relevant sections do not differentiate between mental illness or intellectual disability and the assessment procedure in respect of both sections are ***the same*** in terms of *Section* 79 of the Criminal Procedure Act. There is also no distinction in respect of the determination of criminal responsibility between persons with a mental illness or those with an intellectual disability. The only difference for assessment purposes is that less serious offences only require examination by one psychiatrist, while those accused of serious violent crimes such as murder and rape, must be examined by a panel of either two or three psychiatrists, with the option of including a clinical psychologist as part of the panel. The option to refer to or include a psychologist is not available for less serious offences in terms of *Section* 79(1) (a) so the court must use *Section* 79(1) (b) for a panel assessment in a less serious offence if the court wants a report from a psychologist. The composition of these panels has been questioned and criticised by the courts, which led to amendments to *Section* 79. However, the amendments to *Section* 79 are still regarded as problematic, as it is not clear whether the second psychiatrist to be appointed by the court, should be a state or private psychiatrist (Pienaar, 2017). Also, there are no guidelines for the requirement that the accused has to show good cause for the appointment of a third psychiatrist nor is the appointment of a psychologist mandatory (Pienaar, 2017). Though the Act refers to observation for a period not exceeding 30 days, in most instances persons are taken to the psychiatrist for an assessment session of an hour, while being kept in custody. There is further no consistency between the procedure for evaluation followed by different psychiatrists for evaluation nor is the reporting method consistent, as in some instances it will be a short report with conclusion and recommendation, while others will provide detailed reports. In terms of *Section* 79(3) the report must be in writing and must include in terms of *Section* 79(4) a description of the nature of the enquiry, a diagnosis of the mental condition of the accused and if the enquiry is made under *Section* 77 (1), a finding as to whether the accused is capable of understanding the proceedings in question so as to make a proper defence. In *Chauke v The State* the Supreme Court of Appeal in analysing the report held that the report did not comply with the requirements in terms of *Section* 79(3) and (4), as it was not a holistic assessment of all the relevant facts and circumstances, nor did it include the previous psychiatric reports of the accused. No interviews with any person other the accused were done either. The psychiatrists and psychologist if appointed, have to provide the court with reports and can be called to testify, in which case they will have to testify as expert witnesses. To qualify as an expert witness, the court in general must be satisfied that the witness has specialist knowledge, training, skill or experience and can on account of these attributes or qualities, assist the court in deciding the issues; that the witness is indeed an expert for the purpose for which he is called upon to express an opinion; and that the witness does not express an opinion on hypothetical facts, that is, facts which have no bearing on the case or which cannot be reconciled with all the other evidence in the case. Expert witnesses are in principle required to support their opinions with valid reasons (Schwikkard & Van Der Merwe, 2016).

Of further concern is that whilst in custody persons with mental illness or intellectual disability are generally detained with all other awaiting trial detainees where they are particularly vulnerable to abuse, where those with mental illness are generally not provided with the necessary medication, including those who have not previously been diagnosed and treated. At proceedings in terms of Sections 77(1) and 78 (2) the court may, to prevent substantial injustice, order that the accused be provided with the services of a legal practitioner in terms of Section 22 of the Legal Aid South Africa Act 39 of 2014 (see also *Section* 77(1A), inserted by *Section* 3 of Act 68/98 and amended by *Section* 25 of Act 39/2014). Though the legal practitioners in some cases will insist that the psychiatrists present and testify regarding the evaluation and its finding, especially in regard to reports without any details, more often than not such reports will just be accepted by them.

The constitutionality of *Section* 77(6) of the Criminal Procedure Act was challenged by two accused persons who were incapable of understanding trial proceedings as both were found to suffer from permanent intellectual disabilities, which rendered them unfit to stand trial. The

section was found to infringe the right to freedom and security of such an accused person in the Constitutional Court decision of the 2015(a) *De Vos NO v Minister of Justice and Constitutional Development* which resulted in legislative amendments of *Section* 77(6) (Act 4 of 2017). In this case, the Constitutional Court also found that *"[T]he distinction made between the options provided for under* Section 77*(6) (a) (i) of the Criminal Procedure Act on the one hand, and* Section 78*(6) on the other, is not irrational. They deal with different enquiries and different possible outcomes.*" The Constitutional Court observed that accused persons are more readily institutionalised under the Criminal Procedure Act without the ordinary safeguards prescribed by the Mental Health Care Act (*para* 54), and stated; " …..*the objective of treatment cannot alone justify institutionalisation as this fails to appreciate that mental illness is complex. There are varying types and degrees of mental disability such that institutionalisation and treatment are not always required or appropriate. For example, an intellectual disability such as Down syndrome cannot be treated and institutionalisation or treatment will never improve such a cognitive condition.*"

The complexities lie in that *Section* 77 only applies to persons who are thought to have a mental illness or *"mental defect"*. Mental illness as defined in *Section* 1 of the Mental Health Care Act encompasses; *"a positive diagnosis of a mental health related illness in terms of accepted diagnosis criteria made by a mental health care practitioner authorised to make such diagnosis"*. The lack of international and indeed African consensus on what types of psychiatric disorders constitute mental illness (Kaliski, 2012) is evident and are further complicated by the fact that is not clear from the Mental Health Care Act what is meant by persons with a *"mental defect"* as it is undefined. The difference between *"mental defect"* and mental illness is uncertain but psychiatrists seem to be in general agreement that the former refers to a *"disorder characterised by cognitive impairment"* (intellectual disabilities or impairment of general mental abilities in the social, conceptual and/or practical domains), while the latter refers to *"psychotic or severe mood disorders"* (Du Toit, 2019). The term *"mental defect"* was repealed and substituted with *"intellectual disability"* in the subsequent amendments to *Sections* 77 and 78. Du Toit (2019) underscores the impact of the amendment in that "*[I]f the triggering criterion is a disability of the intellectual capacities, then a disability of emotional or conative type would not qualify.*" (Du Toit, 2019, p. 38). *Down Syndrome South Africa* as first *amicus curiae* before the High Court submits that the best option for an accused with an intellectual disability is to be placed in a rehabilitation centre and not in a psychiatric centre (see the 2015b *De Vos NO v Minister of Justice and Constitutional Development*). Hence amendments to *Section* 77(6) of the Criminal Procedure Act now gives the court the discretion to refer the person to a designated health establishment, which includes a rehabilitation centre (*para* 55). For serious offences such as charges of murder, culpable homicide, rape, compelled rape or a charge involving serious violence or if found to be necessary in the public interest, after the court has found that the accused has committed either the offence in question, or any other offence involving serious violence, *Section* 77(6) of the CPA provides that the person be detained in a psychiatric hospital, or temporarily detained in correctional health facility should a bed not be available. *Section* 77 further provides that if this finding is made after the accused has pleaded to the charge, the accused shall not be entitled to be acquitted or to be convicted in respect of the charge in question. If the finding is made after conviction, the conviction will be set aside and the accused may at any time thereafter, when he or she is capable of understanding the proceedings so as to make a proper defence, be prosecuted and tried for the offence in question.

Section 78 of the Criminal Procedure Act further provides that a person who commits an act or makes an omission which constitutes an offence and who at the time of such commission or omission suffers from a mental illness or intellectual disability which makes him or her incapable (a) of appreciating the wrongfulness of his or her act or the omission; or (b) of acting in accordance with an appreciation of the wrongfulness of his or her act or the omission, will not be regarded criminally responsible for such act or the omission. *Section* 78 further provides that the court must, in a case where the accused is charged with murder, culpable homicide, rape, compelled rape or another charge involving serious violence, or if in the public interest, after hearing evidence and finding that the accused did commit the act in question, bring out a not guilty verdict due to not being criminally responsible and direct that the accused be detained in a psychiatric hospital (or temporarily detained in a correctional health facility of a prison should a bed not be available) under *Section* 47 of the Mental Health Care Act, 2002. The Constitution Court in this regard stated that "[*T]he accused is properly and extensively evaluated in terms of* Section 79 *of the Criminal Procedure Act. Once an accused is found not to understand court proceedings due to a mental illness or an intellectual disability, and a prosecutor requests that the accused be dealt with in terms of* Section 77*(6) (a), and a court so directs, then a trial into the facts is undertaken. Only once the accused person is found to have committed a serious offence is he admitted to a psychiatric hospital* (or para [55] in the case of intellectual disability a rehabilitation centre). [It] further states that; *"This precautionary measure is constitutionally permissible and any admission into a hospital will subsist no longer than is necessary."* This can however amount to ***indefinite*** incarceration. There are also options for admittance and detention in a designated health establishment where the person is treated as if he or she were in involuntary mental health care under *Section* 37 of the Mental Health Care Act, 2002 (subject to unconditional release or release where the court deems it appropriate).

We speculate that the amendments to *Section* 77(6) still do not remedy aspects of non-compliance with the CRDP. *Section* 78(1A) provides that "*every person is presumed not to suffer from a mental illness or intellectual disability so as not to be criminally responsible in terms of* Section 78*(1), until the contrary is proved on a balance of probabilities*". *Section* 79 also does not distinguish between the manner in which persons with mental illness and intellectual disability are dealt with in their assessment. According to Combrinck (2018), "*the assessment of criminal incapacity arising from mental illness under* Section 78 *of the CPA in essence is a functional test (resting on proof of incapacity to appreciate the wrongfulness of an act or to act in accordance with such an appreciation). It also amounts to the conflation between legal capacity and mental capacity cautioned against by the CRPD Committee in that the accused person's legal capacity is 'removed' because of a finding that her decision making was impaired at the time of the offence. These considerations further complicate the insanity defence in its current form.*" Once a person is referred for observation, there are often inordinate delays (Houidi et al., 2018) due to the lack of registered psychiatrists willing to do these observations. It should be noted that there are a limited number of psychiatrists on the notice with the list of psychiatrists to whom the courts can do the referrals for assessment.

While it is pragmatic to consider greater involvement of psychologists in mental health assessments in forensic cases, their areas of expertise are confined to assessment of intellectual disability and personality disorder. Pienaar (2017) advocates for this, and has motivated that; *"Even though the law has developed to allow for the appointment of clinical psychologists to* Section 79*-assessment panels, such appointment is not mandatory. In view of the enormous shortage of psychiatrists in the South African forensic setting and the delays associated with this shortage, it might be fitting to revisit the role of clinical psychologists in forensic assessments, with a view to intensifying their involvement."* In this instance however, the determination of intellectual disability and whether it impairs legal capacity, for example, can be done by a clinical psychologist, making it unnecessary for them to be evaluated by a psychiatrist due to the fact that the requirement has been limited to intellectual disabilities only. In South Africa there are more clinical psychologists available on the published notice of psychologists competent to undertake such assessments for the court. However, the question should be answered as to whether the court is expecting a "medical expert" in which case only a psychiatrist would suffice.

4. Conclusions

It is therefore argued that despite the amendment to *Section* 77(6) of the Criminal Procedure Act, the current provisions in the Criminal Procedure Act in South Africa still do not comply adequately with the CRPD nor the Protocol to the African Charter on the Rights of Person with Disabilities in criminal proceedings and that an urgent review of due process is warranted. In such a review the existence of the capacity based defense needs to be considered, and it is also necessary to delineate intellectual disability within the broader context of psycho-social disability, especially in respect of the procedure for assessment, as well as ensuring that court orders are appropriate for the specific needs of the person, the identified disability and the interest of justice. Further recommendations applicable to South Africa centre on the imperatives of consistency in mental capacity or illness assessment using validated screening tools and that specialist expert reports provided to the court comply with the general requirements of expert evidence (Schwikkard & Van Der Merwe, 2016). Utilizing skilled and trained clinical psychologists to assess the accused offers a potential avenue for further consideration to address existing backlogs for forensic mental observations, and ultimately to assist in upholding of the human rights of the accused. These individuals are likely vulnerable to a host of abuses during pre-trial detention and when incarcerated. There are also currently no formal diversion or rehabilitative options for adult offenders in the Criminal Procedure Act, nor is it included as an option for adults in terms of *Sections* 77 or 78 of the Criminal Procedure Act. Similarly for juveniles *Section* 64 of the Child Justice Act of 2008 constitutes referral to the Children's Court as a child in need of care. This in essence represents options such as placement in foster care while the various diversion and rehabilitation options otherwise available to children in conflict with the law as provided for in the Child Justice Act not being available as an option in terms of *Sections* 77 and 78.

An inter-departmental government response (Health, Justice and Correctional Services) has been recommended to address the increased criminalisation of the mentally ill, and the lack of comprehensive forensic psychiatric services and a centralised data base on mentally ill prisoners (Sukeri et al., 2016). In 2020 Swanepoel argued that in South Africa; *"institutional care settings for the mentally disabled are often where human rights abuses occur. This is particularly true in segregated services including residential psychiatric institutions and psychiatric wings of prisons. Persons with mental disabilities are often inappropriately institutionalised on a long term basis in psychiatric hospitals and other institutions"*(Swanepoel, 2020). Further multi-stakeholder research is warranted to document the experiences and needs of those incarcerated in South African prisons and psychiatric institutions. Such research plays a significant role in advocacy, and ultimately criminal and penal reforms.

Lastly, our *Commentary* comes during a time where critiques postulate that the CRDP itself potentially requires a reconsideration of existing capacity-based criminal defences such as insanity, diminished responsibility and fitness to plead and that the "[*T]he existence of such capacity-based defences contradicts the very objective of Article 12 and the ethos of Convention to ensure full equality of all persons with disabilities"*(McNamara, 2018). McNamara has argued that *"States Parties may need to consider introducing a disability neutral approach, which does not seek to distinguish between persons based on the existence of a disability. Equally, if a person with a psychosocial disability has been found to have committed the crime (actus reus) and had formed the necessary intention to commit the crime (mens rea), then they can be found culpable on an equal basis with others"* though it must be noted that the debate continues with respect of *Article* 12 of CRPD and its impact on criminal law (Bach, 2009; Bartlett, 2012; Combrinck, 2018; Craigie, 2015; Paradis-Gagné & Jacob, 2021; Pienaar, 2017; Slobogin, 2012).

Case law

De Vos NO v Minister of Justice and Constitutional Development 2015 (1) SACR 18 (WCC) and (CCT 150/14) [2015a] ZACC 21.

De Vos NO v Minister of Justice and Constitutional Development 2015b (1) SACR 18 (WCC).

Chauke v The State (578/2015) [2015] ZASCA 181 (November 30, 2015).

Declaration of competing interest

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References

African Commission on Human and Peoples' Rights (ACHPR). (2008). The robbin Island guidelines resolution on guidelines and measures for the prohibition and prevention of torture, cruel, inhuman or degrading treatment or punishment in Africa. *The African Commission on Human and Peoples' Rights*. Retrieved from https://www.achpr.org/public/Document/file/Any/rig_practical_use_book.pdf.

African Union (AU). (2003). Protocol to the African charter on human and people's rights on the rights of women in Africa (11 July 2003) Article 14. Retrieved from http://www.peacewomen.org/assets/file/Resources/NGO/hr_protocoltotheafricancharteronhumanandpeoplesrightsontherightsofwomeninafrica_2003.pdf.

Bach, M. (2009). *The right to legal capacity under the UN Convention on the Rights of Persons with Disabilities: Key concepts and directions from law reform*. Toronto: Institute for Research and Development on Inclusion and Society.

Barnett, D. E., Katsiyannis, A., Zhang, D., & Zhang, D. (2014). Delinquency and recidivism: A multicohort, matched-control study of the role of early adverse experiences, mental health problems, and disabilities. *Journal of Emotional and Behavioral Disorders, 22*(1), 3–15.

Bartlett, P. (2012). The united Nations convention of the rights of persons with disabilities and mental health law. *The Modern Law Review, 75*, 752–778.

Boyd-Caine, T., & Chappell, D. (2005). The forensic patient population in new South wales. *Current Issues in Criminal Justice, 17*(1), 5–29.

Chaimowitz, G. (2012). The criminalization of people with mental illness. *Canadian Journal of Psychiatry, 57*(2), 1–6.

Combrinck, H. (2018). Rather bad than mad? A reconsideration of criminal incapacity and psychosocial disability in South African law in light of the convention on the rights of persons with disabilities. *African Disability Rights Yearbook, 6*, 3–26.

Craigie, J. (2015). Against a singular understanding of legal capacity: Criminal responsibility and the Convention on the Rights of Persons with Disabilities. *International Journal of Law and Psychiatry, 40*, 6–14.

Du Toit, E. (2019). *Commentary on the criminal procedure act Jutastat e-publications*. ISSN 1819–7655 Internet: ISSN 1819-8775 2019.

Fazel, S., Hayes, A. J., Bartellas, K., Clerici, M., & Trestman, R. (2016). Mental health of prisoners: Prevalence, adverse outcomes, and interventions. *Lancet Psychiatry, 3*, 871–881.

Fazel, S., & Seewald, K. (2012). Severe mental illness in 33,588 prisoners worldwide: Systematic review and meta-regression analysis. *The British Journal of Psychiatry, 200*(5), 364–373.

Flynn, E., & Arstein-Kerslake, A. (2014). Legislating personhood: Realising the right to support in exercising legal capacity. *International Journal of Law in Context, 10*, 81–104.

Houidi, A., Paruk, S., & Sartorius, B. (2018). Forensic psychiatric assessment process and outcome in state patients in KwaZulu-Natal, South Africa. *South African Journal of Psychiatry, 24*, 1142.

Houston, S., & Butler, M. (2019). More than just a number': Meeting the needs of those with mental illness, learning difficulties and speech and language difficulties in the criminal justice system. *Irish Probation Journal, 16*(1), 22–41.

Jack, H., Fricchione, G., Chibanda, D., Thornicroft, G., Machando, D., & Kidia, K. (2018). Mental health of incarcerated people: A global call to action. *Lancet Psychiatry, 5*(5), 391–392.

Kaliski, S. (2012). Does the insanity defence lead to an abuse of human rights? *African Journal of Psychiatry, 15*(2), 83, 85, 87.

Lamb, H. R., Weinberger, L. E., & Gross, B. H. (2004). Mentally ill persons in the criminal justice system: Some perspectives. *Psychiatric Quarterly, 75*(2), 107–126.

Loughnan, A. (2011). In a kind of mad way': A historical perspective on evidence and proof of mental incapacity. *Melbourne University Law Review, 35*, 1049–1070.

Loughnan, A. (2012). *Manifest madness: Mental incapacity in criminal law*. Oxford: Oxford University Press.

Lovett, A., Rim Kwon, H., Kidia, K., Machando, D., Crooks, M., Fricchione, G., Thornicroft, G., & Jack, H. (2019). Mental health of people detained within the justice system in Africa: Systematic review and meta-analysis. *International Journal of Mental Health Systems, 13*, 31.

MacDonald, S. A., & Dumais-Michaud, A. A. (2015). Social exclusion in a mental health court? *Intersectionalities: A Global Journal of Social Work Analysis, Research, Polity, and Practice, 4*(2), 51–75.

Mallett, C. A. (2014). The "learning disabilities to juvenile detention" pipeline: A case study. *Children and Schools, 36*(3), 147–154.

McNamara, D. (2018). The insanity defence, indefinite detention and the UN convention on the rights of persons with disabilities. *Dublin University Law Journal, 40*, 143.

Mundt, A. P., & Baranyi, G. (2020). The unhappy mental health triad: Comorbid severe mental illnesses, personality disorders, and substance use disorders in prison populations. *Frontiers in Psychiatry, 11*, 804.
Muntingh, L. (2020). Africa, prisons and COVID-19. *Journal of Human Rights Practice, 12* (2), 284–292.
Naidoo, S., & Mkize, D. (2012). Prevalence of mental disorders in a prison population in Durban, South Africa. *African Journal of Psychiatry, 15*, 30–35.
Ogloff, J. R., Talevski, D., Lemphers, A., Wood, M., & Simmons, M. (2015). Co-occurring mental illness, substance use disorders, and antisocial personality disorder among clients of forensic mental health services. *Psychiatric Rehabilitation Journal, 38*, 16–23.
Okasha, A. (2004). Mental patients in prisons: Punishment versus treatment? *World Psychiatry, 3*(1), 1–2.
Organization of African Unity (OAU). (1981). *African charter on human and peoples' rights* ("Banjul Charter")(27 June 1981)CAB/LEG/67/3 rev.5,21 I.L.M. 58 (1982).
Organization of African Unity (OAU). (1990). African charter on the rights and Welfare of the child (11 July 1990) CAB/LEG/24.9/49 Article 14. Retrieved from http://hrlibrary.umn.edu/africa/afchild.htm.
Paradis-Gagné, É., & Holmes, D. (2020). Poststructuralisme, gouvernementalité et perspectives de genre: La prise en charge d'un proche atteint de troubles mentaux par la famille. [Poststructuralism, governmentality, and gender perspectives: Caring for a relative with a severe mental illness within the family]. *Sociétés, 147*(1), 69–84.
Paradis-Gagné, E., & Jacob, J. D. (2021). Judiciarization of people suffering from mental illness: A critical analysis of the psychiatric–judicial interface. *Journal of Psychiatric and Mental Health Nursing, 28*, 291–298.
Peay, J. (2015). Mental incapacity and criminal liability: Redrawing the fault lines? *International Journal of Law and Psychiatry, 40*, 25–35.
Penal Reform International. (2020). *Global prison trends*. London: Penal Reform International. Retrieved from www. penalreform.org/resource/global-prison-trends-2020/#::text=PRI%20advocates%20for%20an%20increase,Crime %2C%20justice%20and%20imprisonment.
Pienaar, L. (2017). Deciphering the composition of section 79-assessment panels in the criminal procedure amendment act 4 of 2017. *Potchefstroom Electronic Law Journal, 20*, 1–25.
Prinsloo, J. (2014). Offenders with mental disorders in a South African prison population: Profiling the behavioural characteristics on mental illness. *Journal of Psychology in Africa, 23*(1), 133–138.
Rogers, A., & Pilgrim, D. (2014). *A sociology of mental health and illness*. Maidenhead, England: Open University Press.
Schwikkard, P., & Van Der Merwe, S. E. (2016). *Principles of evidence* (Cape Town, Juta).
Slobogin, C. (2015). Eliminating mental disability as a legal criterion in deprivation of liberty cases: The impact of the Convention on the Rights of Persons with Disability on the insanity defense, civil commitment, and competency law. *International Journal of Law and Psychiatry, 40*, 36–42.
Sugie, N. F., & Turney, K. (2017). Beyond incarceration: Criminal justice contact and mental health. *American Sociological Review, 82*(4), 719–743.
Sukeri, K., Betancourt, O., Emsley, R., Nagdee, M., & Erlacher, H. (2016). Forensic mental health services: Current service provision and planning for a prison mental health service in the Eastern Cape. *African Journal of Psychiatry, 22*(1), a787.
Swanepoel, M. (2020). Aspects of the impact of the united Nations convention on the rights of persons with disabilities on South African health law: Section 1, 2020 *Forensic Science International: Mind and Law, 1*, Article 100014.
United Nations Office on Drugs and Crime (UNODC). (2009). *Handbook on prisoners with special needs*. United Nations Office on Drugs and Crime. Retrieved from www.unodc.org/pdf/criminal_justice/Handbook_on_Prisoners_with_Special_Needs.pdf.
United Nations Office on Drugs and Crime (UNODC). (2016). *Handbook on the management of high risk prisoners*. United Nations Office on Drugs and Crime. Retrieved from www.unodc.org/documents/justiceand-prison-reform/HB_on_High_Risk_Prisoners_Ebook_appr.pdf.
United Nations (UN). (1948). Universal declaration of human rights (10 December 1948, 217 A (III), Article 2)Retrieved from https://www.refworld.org/docid/3ae6b3712c.html.
United Nations (UN). (1955). Standard minimum rules for the treatment of prisoners, 30 August 1955, RulesRetrieved from https://www.refworld.org/docid/3ae6b36e8.html, 22-26.
United Nations (UN). (1966a), 16 December 1966. *International covenant on economic, social and cultural rights* (Vol. 993, p. 3). United Nations, Treaty Series. Article 12 (1) https://www.refworld.org/docid/3ae6b36c0.html.
United Nations (UN). (1966b), 16 December 1966. *International covenant on civil and political rights* (Vol. 999, p. 171). United Nations, Treaty Series. Article 26 https://www.refworld.org/docid/3ae6b3aa0.html.
United Nations (UN). (1988). Body of principles for the protection of all persons under any form of detention or imprisonment (9 December 1988, Principle 5(1))Retrieved from https://www.refworld.org/docid/3ae6b38b34.html.
United Nations (UN). (1991a). Basic principles for the treatment of prisoners. resolution/adopted by the General Assembly (28 March 1991, A/RES/45/111)Retrieved from https://www.refworld.org/docid/48abd5740.html.
United Nations (UN). (1991b). United Nations standard minimum rules for non-custodial measures (the tokyo rules). resolution/adopted by the General Assembly (2 April 1991, A/RES/45/110)Retrieved from https://www.refworld.org/docid/3b00f22117.html.
United Nations (UN). (2007). Convention on the rights of persons with disabilities. resolution/adopted by the General Assembly (24 January 2007, A/RES/61/106, Articles 1, 14)Retrieved from https://www.refworld.org/docid/45f973632.html.
United Nations (UN). (2010). United Nations rules for the treatment of women prisoners and non-custodial measures for women offenders (the bangkok rules). note/by the Secretariat, (6 October 2010, A/C.3/65/L.5)Retrieved from https://www.refworld.org/docid/4dcbb0ae2.html.
United Nations (UN). (2014). Committee on the rights of persons with disabilities. General comment No 1, Article 12: Equal recognition before the law. Retrieved from https://www.ohchr.org/en/hrbodies/crpd/pages/gc.aspx.
United Nations (UN). (2016). United Nations standard minimum rules for the treatment of prisoners (the nelson Mandela rules). resolution/adopted by the General Assembly (8 January 2016, A/RES/70/175, Rules 2 (1), 2(2), 27)Retrieved from https://www.refworld.org/docid/5698a3a44.html.
Wetterborg, D., Langstrom, N., Andersson, G., & Enebrink, P. (2015). Borderline personality disorder: Prevalence and psychiatric comorbidity among male offenders on probation in Sweden. *Comprehensive Psychiatry, 62*, 63–70.
Zhang, D., Hsu, H. Y., Katsiyannis, A., Barret, D. E., & Ju, S. (2011). Adolescents with disabilities in the juvenile justice system patterns of recidivism. *Exceptional Children, 77*(3), 283–29.

Marie Claire Van Hout is Professor of Public Health Policy and Practice at Liverpool John Moores University, United Kingdom. She has 20 years research and evaluation experience in public health, human rights and vulnerable populations in Europe, Africa and the Middle East.

Jakkie Wessels is the Regional Court President of the Limpopo Regional Division in Limpopo, South Africa. She has 20 years' experience as a judicial officer in the Regional Court and has 25 years' experience in training and development of training material, for justice stakeholders in Southern Africa, including as gender expert for the United Nations Office on Drugs and Crime.

Human rights and the invisible nature of incarcerated women in post-apartheid South Africa: prison system progress in adopting the Bangkok Rules

Marie Claire Van Hout and Jakkie Wessels

Abstract

Purpose – *The global spotlight is increasingly shone on the situation of women in the male-dominated prison environment. Africa has observed a 24% increase in its female prison population in the past decade. This year is the 10-year anniversary of the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules) adopted by the General Assembly on 21 December 2010.*

Design/methodology/approach – *Using a legal realist approach, this paper examines South Africa's progress in adopting the Bangkok Rules. This paper documents the historical evolution of the penal system since colonial times, focused on the development of recognition, protection and promotion of human rights of prisoners and an assessment of incarcerated women's situation over time.*

Findings – *The analysis of the human rights treaties, the non-binding international and regional human rights instruments, African court and domestic jurisprudence and extant academic and policy-based literature is cognizant of the evolutionary nature of racial socio-political dimensions in South Africa, and the indeterminate nature of application of historical/existing domestic laws, policies and standards of care when evaluated against the rule of law.*

Originality/value – *To date, there has been no legal realist assessment of the situation of women in South Africa's prisons. This paper incorporates race and gendered intersectionality and move beyond hetero-normative ideologies of incarcerated women and the prohibition of discrimination in South African rights assurance. The authors acknowledge State policy-making processes, and they argue for substantive equality of all women deprived of their liberty in South Africa.*

Keywords *Criminal justice system, Women prisoners, Human rights, South Africa, Bangkok Rules, Mandela rules*

Paper type *Literature review*

Marie Claire Van Hout is based at the Public Health Institute, Liverpool John Moores University, Liverpool, UK.
Jakkie Wessels is based at the Regional Court, Office of the Regional Court President, Polokwane, South Africa.

> It is said that no one truly knows a nation until one has been inside its jails. A nation should not be judged by how it treats its highest citizens, but its lowest ones. *Nelson Mandela*

Introduction

On any given day, almost 11 million people globally are detained in prisons or other closed settings (PRI, 2020). Women deprived of their liberty are a minority even though globally the female prison population is growing more rapidly than the male prison population (Penal Reform International [PRI], 2020). Compared with men, women have distinct gendered pathways into crime and are generally imprisoned for crimes of survival heavily underpinned by poverty (Penal Reform International [PRI], 2017, 2020). Most have a lower socioeconomic status, many are from

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racial or ethnic minority backgrounds, and have suffered disproportionally from sexual, domestic, physical and emotional violence (Atabay, 2008; Penal Reform International [PRI], 2017). The global spotlight is increasingly shone on gender mainstreaming in prisons resulting in international non-binding instruments, United Nations (UN) guidance documents on standards of gender appropriate care for women in the male dominated prison environment, and situation assessments on conditions in female prisons.

Global prison data indicates that Africa has observed a 24% increase in its female prison population in the past decade (Penal Reform International [PRI], 2020). This year is also the 10 year anniversary of the United Nations (UN) Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the "Bangkok Rules") (UN, 2010) adopted by the General Assembly on 21 December 2010. The Bangkok Rules are soft law principles which lay the foundation for intensified efforts to support women deprived of their liberty (Barberet and Jackson, 2017), and complement the Standard Minimum Rules for the Treatment of Prisoners (UN, 1955), the Standard Minimum Rules for Non-custodial Measures (the "Tokyo Rules") (UN, 1991a), the Basic Principles for the Treatment of Prisoners) (UN General Assembly, 1991 b), and the revised Standard Minimum Rules for the Treatment of Prisoners (the "Mandela Rules") (UN, 2016).

We document the historical evolution of the South African penal system since colonial times, in terms of the development of the recognition, protection and promotion of human rights of prisoners in general and provide a focused assessment of women's situation over time. Using a legal realist approach (Leiter, 2015), the focus is on scrutinising South Africa's progress in adopting the "Bangkok Rules". The analysis of the human rights treaties, the non-binding international and regional human rights instruments, African court and domestic jurisprudence, and extant academic and policy-based literature is cognizant of the evolutionary nature of racial socio-political dimensions in South Africa, and the indeterminate nature of application of historical/existing domestic laws, policies and standards of care when evaluated against the rule of law.

A realist account is developed with an eye on determining whether the changing South African prison system had/has a culture of respect for the rule of law regarding human rights assurance for women in prison (overwhelmingly black African), cognisant of their engendered and racial vulnerability, the dominant masculinisation of incarceration, and prison system operations in upholding their unique rights. By recognising the inherent tensions of protection versus protectionism of women in the "Bangkok Rules" (Dias-Vieira and Ciuffoletti, 2014), the analysis incorporates race and gendered intersectionality and moves beyond the hetero-normative ideology of incarcerated women, their fragility and their biological functions, and the prohibition of discrimination in contemporary South African rights assurance. We acknowledge State policy making processes, and how such process and outcomes operate within the prison system itself and by moving beyond this, we argue for greater substantive equality of all women deprived of their liberty in South Africa.

South Africa's prisons: colonialism and the legacies of apartheid

South Africa's prison system was established in the 19th century during the expansion of colonial rule (Van Zyl Smit, 1992). Prisons are not an institution indigenous to South Africa (Sarkin, 2008). Prisons were used to exert political control and colonial rule (Bunting, 1960; Steinberg, 2005). Punishment as an institution was used by white law makers to legitimise racial superiority and embed a form of social jurisdiction (Gillespie, 2011). Following the 1910 Union of South Africa, the consolidated Prisons and Reformatories Act was enacted in 1911 (Human Rights Watch, 1994). The South African criminal justice system and its subsequent development was underpinned by progressive institutionalization of racial and gender discrimination (Human Rights Watch, 1994; Filippi, 2011; Gillespie, 2011). Apartheid was enforced by legislation by the National Party from 1948 to 1994 (Dissel and Ellise, 2002). Examples include the Population Registration Act (1950); the Natives Abolition of Passes

and Coordination of Documents Act (1952) and the Promotion of Bantu Self Government Act (1959) (South African History Online, 2021). Prison conditions, especially for African prisoners, of both genders were harsh, with the prevailing official attitude that the African prisoner was expendable and unredeemable (Bunting, 1960; Human Rights Watch, 1994). Strict racial, gender and conduct-based segregation was used within prisons, as codified under the 1911 Prisons and Reformatories Act (and the later 1959 Act) (Department of Correctional Services [DCS], 2004; Filippi, 2011). The conditions (i.e. diet, sanitation), treatment (i.e. work) and punishment were contingent on skin colour and gender, with punishment for transgressions and the complete inability for African prisoners to lodge any official complaints (Bunting, 1960; Filippi, 2011). All non-white prisoners received harsh treatment (i.e. incessant beatings and verbal abuse), experienced enforced work and torture (Bunting, 1960), sexual violations and lengthy solitary confinement, whilst living in atrocious conditions with primitive sanitation (Filippi, 2011). The 1945 Lansdowne Commission on Penal and Prison Reform was of the view that the Prisons Act had not encouraged reform, but instead was liable for the inequitable harsh prison system. It was critical of its militarised approach and recommended a renewed focus on rehabilitation, particularly for indigent Africans (Department of Correctional Services [DCS], 2008). In 1955, a commission inspection reported all was satisfactory (Bunting, 1960).

Although the later Prisons Act of 1959 was cognisant of the UN Standard Minimum Rules for the Treatment of Prisoners (UN, 1955), in terms of incorporating rehabilitation, it omitted critical features regarding punishment, torture and inhumane treatment. Alex Le Guma illustrated the dire conditions in prisons, and coined the term *colour bar* in 1956 (Bunting, 1960):

> Non-Europeans get different types of work under different conditions from Europeans, different food, and different sleeping facilities, all of them inferior of course. Cells are packed tight with 40 to 50 convicts—where the weak are condemned to an existence of terror and depravity, young and defenceless men are forced to submit to abnormal relations and are threatened with death or torture if they refuse [. . .].

Sonia Bunting documented the dire conditions and ill treatment of African women incarcerated in 1960, far removed from white prisoners (Bunting, 1960). These women (and their children) suffered severely (i.e. beatings, lack of food, sexual violence, denial of menstrual products), with white female prisoners observing:

> I saw a wardress whip a pregnant African woman, Miss Troup stated. Miss du Toit said similar incidents were frequent. She also saw a wardress hit a woman in an advanced state of pregnancy and with a baby of about sixteen months on her back.

Troup and du Toit observed a prison warden saying; *Kaffirs [derogatory term for Black South Africans] are nothing better than animals* (Bunting, 1960). In 1989, the Federation of South African Women (FSAW) reported on continued human rights breaches in female prisons, included beatings, torture, rape, sexual harassment, use of chains as restraints and the solitary confinement of women (FSAW, 1989).

Prison system developments post 1994

In 1990, apartheid within the prison system was formally abolished, with transition toward exclusion of all references to race, and the repeal of regulations regarding the outranking of all *non-white* staff members by white staff (Dissel and Ellise, 2002; African Criminal Justice Reform, 2005). Subsequent prison legislative amendments included the entitlement of prisoner human rights and reversal of racial segregation of the prison population. The government reconsidered its positionality regarding crime and punishment as well as the treatment of prisoners and conditions of detention (Human Rights Watch, 1994). Prison services became part of the new Department of Correctional Services. The Prisons Act of 1959

was amended to change its name to Correctional Services Act but then the 1959 Act was repealed and replaced by the 1998 Act. The Act was enshrined in the new Constitution of the Republic of South Africa 108 (1996), with Section 35(2) (e) aligned to the 1948 Universal Declaration of Human Rights (UN, 1948) and contained guarantees for the human dignity of prisoners (Dissel and Ellise, 2002). The South African Human Rights Commission observed the intention to develop a new prison system aligned to the new Constitution and with international norms and standards (South African Human Rights Commission, 1998). The death penalty was abolished in 1995 (*The State v Makwanyane and Another*), with the court announcing its role to protect the marginalised including those in conflict with the law or deprived of their liberty (Cameron, 2020).

The African Commission on Human and Peoples' Rights (ACHPR) adopted several regional instruments to extend the rights and protections of people deprived of their liberty, based on the Standard Minimum Rules for the Treatment of Prisoners (UN, 1955), Standard Minimum Rules for Non-custodial Measures (UN, 1991a) and the Basic Principles for the Treatment of Prisoners (UN, 1991b). These were the 1995 Resolution on Prisons in Africa; the 1997 Resolution on the Right to Recourse Procedure and Fair Trial and the 1996 Kampala Declaration on Prison Conditions in Africa. With regard to gender equality, South Africa had ratified the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) (UN, 1979) in 1995 without reservations, and was committed to promotion of the human rights of women via the 1995 Beijing Platform of Action (UN, 1995). Also during that timeframe, South Africa ratified the Convention on the Rights of the Child (CRC) (UN, 1989) in 1995, the African Charter on Human and Peoples' Rights (OAU, 1981) in 1996, the International Convention on the Elimination of all forms of Racial Discrimination (CERD) in 1998 and the African Charter on the Rights and Welfare of the Child (OAU, 1999).

Prisons however continued to operate at severe over-capacity (Steinberg, 2005), despite optimism at the time that high crime rates were caused by apartheid and that in the democratic South Africa, crime rates would fall and crime would be addressed by a fair criminal justice system, imposing more lenient sentences (Van Zyl Smit, 2004). A harsh punitive approach however was adopted with a range of sentence jurisdictions at court levels. The then Commissioner of Correctional Services stated in 1997: *[t]hey are animals. They must never see the sunlight again* (Van Zyl Smit, 2004). Legislative changes indicative of this approach included the Criminal Law Amendment Act 105 (1997), Criminal Procedure Amendment Acts (1995, 1997), Correctional Services Act 111 (1998) and the Prevention of Organised Crime Act 121 (1998).

South Africa ratified the International Convention on Civil and Political Rights (ICCPR) (General Assembly UN, 1966a) and the Convention against Torture and other cruel or degrading treatment or punishment (CAT) (UN Commission on Human Rights, 1998) in 1998. In the same year, the Judiciary Inspectorate of Prisons was established. In 2001 the *Jali* Commission was set up in response to fears that the DCS had lost control over the prison system and commenced an investigation into corruption, violence, mal-administration and intimidation in the DCS (van der Berg, 2007). It reported on official corruption, malpractice, the impact of the minimum sentencing regime and high pre-trial rates causing congestion and rights breaches, abuse of staff and prisoners and other offences (Muntingh, 2016). Women's rights were rather ignored in this investigation, with the exception of three instances; prison warden complicity in facilitating illicit sexual activities at the Johannesburg female prison; the sexual harassment of female staff and the violation of rights of a transexual prisoner (van der Berg, 2007).

Evolution of human and gendered rights in South African prisons: a gendered critique

South Africa ratified the Second Optional Protocol for ICCPR (aiming at abolition of the death penalty) in 2002. During the Aughts at the regional levels, a range of additional

human rights instruments regarding detention settings were created, with the 2002 Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhumane or Degrading Treatment or Punishment in Africa, the 2002 Ouagadougou Declaration on Accelerating Prison and Penal Reform in Africa and the 2003 Principles and Guidelines on the Rights to a Fair Trial and Legal Assistance in Africa. Gender equality also become increasingly visible; the 2003 African Charter on the Rights of Women in Africa recognising the situation of incarcerated women in Article XXIV (*Special protection of Women in Distress*) mandated States to provide women including pregnant or nursing women in detention with an environment suitable for their condition, and the right to be treated with dignity (African Union, 2003). South Africa ratified the CEDAW Optional Protocol in 2005, which underpinned the 2008 Southern African Development Community (SADC) Protocol on Gender and Development (SADC, 2008). In 2015, it ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR) (UN, 1966b), followed by the Optional Protocol of the Convention on Torture (OPT-CAT) (UN, 2003).

Increased consideration of the situation of incarcerated women was observed internationally post 2010, after the adoption of the "Bangkok Rules" by the UN General Assembly. The non-binding normative "Mandela Rules" were subsequently updated in 2016 (UN, 2016). However, whilst international norms and standards exist, and the regional African frameworks identify women as a vulnerable prison group, they offered scant practical features on how minimum standards at the prison level should be achieved. The "Mandela Rules" only refer to women in several instances; regarding cis-normative segregation (*Rule* 11); requirement for special accommodations for pre and post-natal care and treatment of women (*Rule* 28); prohibition of solitary confinement of women (*Rule* 45) and of use of restraints (*Rule* 48); right to conjugal visits (Rule 58); gender regarding prison personnel (*Rule* 74) and the supervision of women only by female staff (*Rule* 81). The non-binding "Bangkok Rules" provide a range of standards particular to women deprived of their liberty and their unique gender specific needs (particularly *Rules* 4, 40–41, 67–70). Whilst they advocate for greater attention to women's rights whilst detained, they are attenuated in focus by their narrow patriarchal view of women as mothers, omit women who do not confirm to cis-normative values (transwomen, lesbian women) and fail to consider aspects of intersectionality (Barberet and Jackson, 2017; Van Hout and Crowley, 2021).

This blinkered lens has filtered into the regional adoption of standards. The 1995 Kampala Declaration is limited in its focus on women; although the Declaration calls for an improvement in the situation of women prisoners, by identifying them as vulnerable (along with the old, disabled, those mentally, physically or terminally ill, foreign nationals, juvenile), it only refers to them requiring particular attention and appropriate treatment of the special needs of women (but omitting any detail on pregnant women) (Sarkin, 2008). The 2008 Robben Island Guidelines mention women twice; with regard to engaging with the Special Rapporteur on the rights of women in Africa, and with regard to conditions of detention in holding women in appropriate and separate facilities (African Commission on Human and Peoples' Rights [ACHPR], 2008). In 2004, the South African Government extended an invitation to the ACHPR's Special Rapporteur on Prisons and Conditions of Detention in Africa to visit the country and inspect its detention facilities. The Special Rapporteur completed her inspection, putting forward a range of recommendations that strengthened the requirement to identify women, including the pregnant and nursing as vulnerable in the detention setting (African Commission on Human and Peoples' Rights [ACHPR], 2012).

The nexus of gender, race and incarceration

Despite progress in recognising the rights of prisoners in Africa, critique of the South African bail system, its minimum sentencing regime and continued high pre-trial detention continues today [de Ruiter and Hardy, 2018; Cameron, 2020; Van Hout and Chimbga, 2020). In 2021,

238 functioning prisons are operating at 137% capacity. Whilst some prisons have female wings, there are nine female prisons (Table 1).

Despite prison reforms, the prison population remains racially stratified, and continues to be reflective of the indigent majority (with less than 2% classed as white) (Department of Correctional Services [DCS], 2020). Women are a relatively stable minority prison population in the male dominated South African prison system. 7% are white South African females (Department of Correctional Services [DCS], 2020) (Table 2).

Conditions are indicative of dated colonial infrastructure, are severely overcrowded and conducive to spread of disease (HIV, TB, COVID-19, leptospirosis) (Sloth-Neilsen and Ehlers, 2005; Dissel, 2016; Nevin and Nagisa-Keehn, 2018; Van Hout and Mhlanga Gunda, 2018). Extreme physical and sexual violence, drugs and gangsterism continues (Steinberg, 2004). Congestion and ill-resourced healthcare for prisoners have underpinned calls for increased use of both parole, and medical parole (Mujuzi, 2011; Maseko, 2017a, 2017b). In 2016, civil society lobbying resulted in a court ruling against the State with a historic order to reduce occupancy of Pollsmoor Correctional Centre from 252% to 150% over a six-month period (*Sonke Gender Justice v Government of South Africa*). The effect was short-lived as occupancy was reduced by redistributing to other detention facilities (Nevin and Nagisa-Keehn, 2018).

There is a dearth of academic literature on the situation of women in African (and South African) prisons (Van Hout and Mhlanga Gunda, 2018; Mhlanga-Gunda *et al.*, 2019). Their experiences and challenges still do not feature in contemporary South African feminist discourses, let alone in the mainstream societal debates (Hopkins, 2016). There are some small-scale studies on South African women in the criminal justice systems, but very little is known about the legacies of apartheid still felt in female prisons, despite evidence for continued structural and economic disadvantages experienced by indigent women (Haffejee *et al.*, 2005; du Preez, 2008; Luyt and du Preez, 2010; Artz *et al.*, 2012; Africa, 2015; Artz and Hoffman-Wanderer, 2017). The intersectionality of systemic gender inequality, poverty stratified along gender lines, trauma, gender based violence against

Table 1 South African Prison population 2019/2020 (DCS, 2020)

	Sentenced offenders			*Unsentenced inmates*			
Region	*Males*	*Females*	*Total no. of sentenced offenders*	*Males*	*Females*	*Total no. of unsentenced offenders*	*Total number of inmates region*
Eastern Cape	13,981	238	14,219	6,221	119	6,340	20, 559
Gauteng	21,412	661	22,073	13,661	477	14,138	36,211
Free State & Northern Cape	15,382	349	15,731	5,221	91	5,312	21,043
KwaZulu-Natal	17,779	400	18,179	6,784	157	6,941	25,120
Western Cape	14,464	512	14,976	11,394	474	11, 868	26, 844
Limpopo, Mpumalanga and North West	17, 289	374	17,663	6,879	130	7,009	24,672
TOTAL	*100,307*	*2, 534*	*108,841*	*50,160*	*1, 448*	*51,608*	*154,449*

Table 2 Pre-trial and sentenced female prison population trend from 2014/2015 to 2019/20 (DCS, 2020)

Period	*2014/2015*	*2015/2016*	*2016/2017*	*2017/2018*	*2018/2019*	*2019/2020*
Sentenced	3,029	3,036	2,979	2,956	2,957	2,354
Unsentenced	1,089	1,157	1,195	1,370	1,359	1,448
Total Inmate population	*4,118*	*4,193*	*4, 174*	*4,326*	*4,316*	*3,982*

women (GBVAW), mental health issues and marginalisation, prior to incarceration continue to be reflective of their wider positionality in South African society (Haffejee *et al.*, 2005; Community Law Centre, 2007; Artz *et al.*, 2012; Steyn and Booyens, 2018; UNODC, 2019; AIDS and Rights Alliance for Southern Africa (ARASA), 2019). They have distinct gendered pathways into crime, often heavily underpinned by crimes of survival, with continued gender and race discrimination in prison (du Preez, 2006; Van Hout and Chimbga, 2020; Parry, 2020; Lauwereys, 2021). Many academic critiques of the South African penal system and rights-based commentaries on prisoner human rights since 1994 either ignore women in their entirety, or simply refer to women in the sense of separation of sexes (Bukurura, 2002; de Vos, 2005; Muntingh, 2006). There is one record, where women are omitted, but with one solitary reference to a trans-women placed in a male prison (van der Berg, 2007). They are equally invisible in UN reporting at the country level, despite prisoners as a whole being mentioned in available universal periodic reviews, special procedures (violence against women) and concluding observations (CAT, CESC, CERD, CEDAW, UNHRC) by the UN. These records reflect continued UN concern around GBVAW in the community and the practice of *Ukuthwala [traditional cultural practice by which older men abduct young women for purposes of marriage]*, and the "so called" corrective rape of sexual minority women. They ignore the unique vulnerabilities of women in detention settings and exposure to custodial violence (Office of the United Nations High Commissioner for Human Rights [OHCHR), 2019; CESCR, 2017; United Nations Human Rights Council [UNHRC), 2017).

At the policy levels, whilst the White Paper on Corrections in South Africa (African Criminal Justice Reform, 2005) recognised the impact of GBVAW, gender inequality and the inherent power relations between men and women in South Africa, little has changed for indigent South African women in the criminal justice system (Van Hout and Mhlanga Gunda, 2018). The Commission on Gender Equality, established in 1997, reveals no detail on women in detention settings. The current DCS (Department of Correctional Services [DCS], 2020) reporting still conveys a dogmatic cis-normative perspective of woman (and the care of women) by only referring to female prisoners regarding segregation by sex (S7 (2) b) and as mothers to be admitted with their infants (S20). Whilst the Correctional Services Act of 1998 does prescribe the obligation to create a gender-sensitive environment in prisons, and South Africa endorses the Bangkok Rules, it falls short in providing concrete guidelines on how to achieve this and implementation is not reflected well on the ground. There are observed gaps in government oversight. Unacceptable overcrowding levels and standards of care (*Sonke Gender Justice v Government of South Africa*) and the level of independence of the JICS have been challenged successfully by Sonke Gender Justice (*Sonke Gender Justice NPC v President of the Republic of South Africa and Others*). The Just Detention Guide (Kleijn *et al.*, 2017), whilst providing detailed assessment criteria for visiting judges regarding the housing and standards of care, does not refer to either the "Bangkok" or "Tokyo Rules". In 2018, the Judicial Inspectorate for Correctional Services reported that Pollsmoor Correctional Centre was still in violation of the Overcrowding Court Order of 2016 (JICS, 2018) and stated:

> What is most alarming, and has not been taken cognisance of, is the large amount of females (732) incarcerated which includes eight infants. The majority of cases that have been reported in the media have focused on the male population, but in this instance the female centre is almost 200% over capacity.

The only right that prisoners should be deprived of is their liberty (Safer Spaces, 2021). On the ground, observable breaches in the human rights of women in South African prisons centre on failure to meet minimum standards of care. Whilst they are segregated from men (*Rule* 8a "Mandela Rules"), they live in overcrowded prisons, potentially breaching the right to reasonable accommodation (Steinberg, 2005). The 2005 White Paper stated that whilst women do not experience the extent of congestion as men, they are often incarcerated some distance from their families, despite the Departments obligation to incarcerate close to family, particularly if they are mothers. In practice however, this results in pre-trial

detention mixed with sentenced women, and whilst cognisant of the importance of the relationship between mother and child, this is contra *Rule* 26 of the "Bangkok Rules". The average South African prisoner in a communal cell does not have the bare minimum floor space (set by the Committee for the Prevention of Torture at four square meters per person), which could be declared by courts as cruel or degrading (Steinberg, 2005). The 2015 report by Justice Edwin Cameron when visiting Pollsmoor Women's Centre observed an occupancy rate of 300%, with an estimated 65 prisoners per cell (sharing one toilet and one shower). He illustrated the abhorrent conditions for women:

> The extent of overcrowding, unsanitary conditions sickness, emaciated physical appearance of the detainees, and overall deplorable living conditions was profoundly disturbing. The remand cell visited was in as poor a condition as the male remand cells. 94 women were crowded into a poorly aerated room. The women shared beds or slept on the floor on thin mattresses. The mattresses were stinking. There was no working toilet, a clogged sink drain and only cold water. They showed us tattered and torn sheets and blankets, which were infested with lice. The cell was also infested with cockroaches (Cameron, 2015).

Little appeared to change in subsequent years, with minimal progress in addressing the basic rights of the living conditions of these women. Academic studies reported on continued overcrowding (including the mixing of juveniles with adults; lack of sufficient floor space; insufficient bathrooms) and poor conditions (inadequate provision of toilet paper, soap, clothing, bedding, healthcare, sanitation, nutrition, availability of menstrual products, access to exercise, education and reading materials) (Gordin and Cloete, 2013; Agaboola, 2016; Maseko, 2017a, 2017b) contra Section 35 (3)of the Constitution and Section 8 (1 and 2) of the Correctional Services Act (adequate provisions regarding the nutritional requirements of all prisoners, and of pregnant women) (see *Bapoo v Minister of Justice and Correctional Services and Others*). Most recently the JICS reported:

> The legal mandate is to guard over the human dignity of inmates, which is inextricably linked to the dignity of all in our country. Whereas overcrowding is a huge general problem in South African correctional centres, the situation of women and infants – especially in Pollsmoor – is unacceptable, sad, and indeed inhumane. (JICS, 2018).

Exposure to custodial violence is concerning. Investigative reporting underscores the traumatic and violent conditions experienced by women in South African prisons, underpinned by congestion, and including reference to violence, sexual exploitation, mental illness underpinned by prior and custodial violence, gang activity and disease, solitary confinement as punishment under the guise of segregation and the lack of provision of basic hygiene and adequate nutrition (Hopkins, 2016; Mahlati and Nare, 2019; Khumalo, 2021). Hence, there are some observable breaches in the right to an environment free from torture and inhumane treatment ("Mandela Rule" 1; "Bangkok Rule" 32). Studies report on women's vulnerability to sexual abuse, women to women rape, transactional same-sex relationships to survive and sexual exploitation by both prisoners and guards in South African prisons (Haffejee, 2005; Agboola, 2015; Kang'ethe *et al*., 2020). Artz and colleagues posit how the correctional system develops into a *de facto* extension of violent domestic relations (Artz *et al*., 2012). This is particularly concerning given the histories of GBVAW experienced by incarcerated women, and the lasting repercussions on successful reintegration on release (Van Hout and Chimbga, 2020). Further, and rather alarming, even though the risk of sexual assault is high in female prisons, women are not explicitly referred to in the DCS/Sonke Policy to Address Sexual Assault (Sonke Gender Justice, 2013). Two studies report on dehumanisation and humiliating treatment, and punitive attitudes of staff against women prisoners who use drugs, with invasive searches by staff and the denial of opiate substitution treatment in South African prisons, despite the Special Rapporteur taking note that punitive denial causing drug withdrawal (known as "arosto") constitutes inhumane and degrading punishment (Hopkins, 2016; SANPUD, 2019). This is contra "Bangkok Rule" 15, which states that prisons should facilitate gender sensitive treatment programmes for women, cognisant

of their special histories, cultural backgrounds and vulnerabilities. The "Bangkok Rules" also call on authorities to develop alternative screening methods and that personal searches of women should only be conducted by trained female staff. Our analysis reveals in this sense, a glaring need for further gender sensitive training and capacity building of staff in female prisons in alignment with the "Bangkok Rules" (*Rules* 32, 33).

It should be noted that whilst there are historical and recent challenges regarding prison conditions under right to life and the prohibition of cruel, inhuman or degrading treatment at the ACHPR and the African Court of Human and People's Rights (ACtHPR), there are none from female applicants and none emanate from South Africa. See ***African Regional Level Jurisprudence:***

- *Krishna Achuthan and Amnesty International v.Malawi* (1994) ACHPR Comm Nos.64/92,68/92,78/92.
- *Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine de l'Homme, Les Témoins de Jehovah v. Zaire* (1996) ACHPR Comm Nos.25/89,47/90,56/91,100/93 para 47.
- *International PEN and Others v. Nigeria* (1998) ACHPR Comm Nos.137/94,139/94,154/86,161/97.
- *Constitutional Rights Project and Civil Liberties Organisation v. Nigeria* (1999) ACHPR Comm Nos 143/95,150/96.
- *Malawi African Association and others v. Mauritania* (2000) ACHPR Comm Nos.54/91,61/91,98/93,164/97 à196/97 and 210/98.
- *Lohé Issa Konaté v Burkina Faso* (provisional measures) (2013) 1AfCLR310.
- *African Commission on Human and Peoples' Rights v Libya* (provisional measures) (2013) 1AfCLR145.
- *African Commission on Human and Peoples' Rights v Libya* (merits) (2016) 1AfCLR 153
- *Konaté v Burkina Faso* (reparations) (2016) 1AfCLR346.
- *Abubakari v Tanzania* (merits) (2016) 1AfCLR599.
- *Mugesera v Rwanda* (provisional measures) (2017) 2AfCLR 149.
- *Guehi v Tanzania* (merits and reparations) (2018) 2AfCLR477.

Further, there is little domestic jurisprudence on behalf of women in prison, with the vast bulk of litigation against the State taken by male claimants. There are a series of domestic landmark cases generally centred on the rights to life (abolition of the death penalty), protection from inhumane treatment, right to health and health care (particularly regarding DCS liability regarding contraction of HIV and TB during incarceration, rights and access to free medical treatment including antiretroviral (ARV) treatment; informed consent around HIV testing, medical parole) and protection from sexual abuse (Nagisa-Keehn and Nevin, 2018). See ***Domestic Jurisprudence***. In 2010, the UN Human Rights Committee, ruled that South Africa had violated *Articles* 10 (*para* 1), and 7 ICCPR in conjunction with Article 2 (*para* 3) in a prison case, because prison officials had not investigated a prisoner's ill-treatment and sexual abuse in prison, and they had denied him access to medical care (including HIV testing), legal assistance and his family for one month (see *McCallum v. South Africa*). Very few claimants however are women, with the two we located centred on the impact of poor prison conditions and the contraction of infectious diseases (HIV, TB) during incarceration, and awareness of rights regarding State liability around disease acquisition in prison in 2005 and 2015 (see *James v Minister of Correctional Services; S v Magida).* Of note is a third case where a court ruled on the constitutional right to express

gender identity as transwoman (albeit anatomically male) in a male prison (see *September v Subramoney NO and Others*). See ***Domestic Jurisprudence***:

- *S v Makwanyane* [1995] ZACC 3 at 151, 1995 (3) S.A. 391.
- *Van Biljon and Others v Minister of Correctional Services and Others* [1997] (4) SA 441 (C).
- *B and Others v. Minister of Correctional Services and Others* [1997] (4) SA 441 (C); 1997 (6) BCLR 789 (C).
- *Stanfield v Minister of Correctional Services* [2003] ZAWCHC 46.
- *Du Plooy v. Minister of Correctional Services* [2004] 3 All SA 613 (T).
- *Mazibuko v. Minister of Correctional Services, et al* Case No: 38151/05 [2007] JOL 18957 (T).
- *EN and Others v Government of RSA and Others* 006 (6) SA 575 (D); [2007] (1) BCLR 84 (SAHC Durban 2006).
- *Lee v Minister of Correctional Services* 2012[2012] ZACC 30.
- *Sonke Gender Justice v Government of South Africa* 24087/15 (unreported).
- *Sonke Gender Justice NPC v President of the Republic of South Africa and Others* [2020] ZACC para 38-40.

UN level

- *McCallum v. South Africa* [2010] UN Doc CCPR/C/100/D/1818/2008 (2 November 2010).

Female Applicants

- *James v Minister of Correctional Services* (795/2014) [2015] ZAWCHC 181 (1 December 2015).
- *S v Magida* 2005 (2) SACR 591 (SCA).

Transgender Applicant

- *September v Subramoney NO and Others (EC10/2016) [2019] ZAEQC 4; [2019] 4 All SA 927 (WCC) (23 September 2019).*

There is however progress in the right to equivalence of health care. Non-discriminatory and adequate health services for women in prisons equivalent to that available in the community remain mandated by the "Mandela Rules" (*Rules* 2, 24, 26, 32) and "Bangkok Rules" (*Rules* 6–18, 48) and must not be limited to pre- and post-natal care. South Africa is a flagship for the SADC region (Parliamentary Monitoring Group, 2014), as it has taken some concerted measures to ensure women (and their children) are treated with dignity and care, with significant improvements since 2012 in the establishment of Mother and Baby Units in several female prisons (Durban, Pollsmoor) (African Commission on Human and Peoples' Rights (ACHPR), 2004; Gowland, 2011; Office of the United Nations High Commissioner for Human Rights [(OHCHR], 2015; Van Hout and Mhlanga Gunda, 2018) One study however, has reported on the insufficient provision of sanitation for mothers and children at the Pretoria Correctional Centre (Hesselink and Dastile, 2010).

There are additional engendered inadequacies in the South African criminal justice system beyond the scope of the paper, and reported elsewhere. They refer to insufficient use of non-custodial sentencing for women, and requisite rehabilitation and reintegration elements enshrined in the "Tokyo Rules) (Van Hout and Chimbga, 2020), and bringing South Africa, in line with "Bangkok Rules" 26 and 29 (special social reintegration requirements of women),

which recognize that women need particular assistance due to their lower educational and socio-economic status in many countries. We reiterate this is crucial given the complexities of race and gender discrimination, GBVAW, poverty related crime and the revolving door of incarceration in South Africa. Further, we recommend a similar investigation regarding rights of the child in South African detention settings.

Conclusion

Despite international (and regional African) norms and standards upholding the rights of prisoners, the UN continues to voice global concern regarding human rights breaches and the precarious situation of women in detention settings (UN Committee against Torture, 2015). The situation in South Africa is no different. Whilst it is encouraging to see the improvement in healthcare for women and their children in South African prisons in recent times, conditions still remain poor and unacceptable when benchmarked against normative minimum standards of care, particularly as they relate to living conditions, reasonable and safe accommodation and protection from custodial violence. It is imperative that the visibility of women (including those with infants) is enhanced in correctional legislation, penal policies and criminal justice practice in South Africa. Racial discrimination in South Africa in this sense has aggravated gender discrimination.

It is questionable if a truly effective complaints mechanism that incarcerated women may turn to for assistance is indeed in place in South Africa. Strategic public interest litigation is warranted to stimulate prison reforms. Civil society organisations to a great extent, contribute to holding government accountable. There are possible routes regarding individual complaints under the CCPR-OPT1 *Articles* 2, 10 and 26 with regard to rights of prisoners to humane treatment, non-discriminatory protection of the law and equality before the law of a State and the right to an effective remedy for violations. South Africa has also ratified the CAT and OPT-CAT, and has accepted the inquiry procedures under CAT *Article* 20 and individual complaints under CAT *Article* 22. Equally important however is that whilst South Africa has ratified both the CEDAW and CRC, and accepts inquiries under CEDAW-OPT *Articles* 8–9 and CERD *Article* 14, it does not accept individual complaints or inquiry mechanisms under the CRC-OP *Article* 13.

We speculate that full adoption of the "Bangkok Rules" is hindered in South Africa due to the historical legacies which underpin the structural inequalities experienced by African women in society, and the continued invisible nature of these women in the prison system. Incarcerated women are omitted from UN reporting on South Africa, yet they constitute a (very vulnerable) minority warranting attention due to their engendered and racial inequalities both in the community and prison and their exposure to multiple levels of discrimination and stigma as Black Africans, as women, as offenders and, where applicable, as members of the LGBTQ minority community. It is imperative they are included in future CEDAW and UN country periodic reporting. They deserve substantive equality. South Africa has extended a standing invitation to all thematic special procedures since 17 July 2003.

South Africa's commitment to the sustainable development agenda will be called into question; particularly regarding gender equality and empowerment in women and girls (SDG 5) and regarding peace, justice and strong institution (SDG 16), and their efforts to ensure that women, particularly those facing intersectional discrimination in the criminal justice system are not left behind in future prison and criminal justice reforms. In 2019, the SADC Secretariat hosted the SADC symbolic launch of the Corrections/Prisons Women's Network as a formal arm of the SADC Corrections/prisons sub-Committee. This is an encouraging step toward supporting women who work in prisons and raises awareness of the need to improve standards of care for women deprived of their liberty in Africa.

References

Africa, A. (2015), "Bad girls to good women–women offenders' narratives of redemption", *Agenda*, Vol. 196, pp. 120-128, doi: 10.1080/10130950.2015.1124501.

African Commission on Human and Peoples' Rights (ACHPR) (2004), *South Africa: Prisons and Detention Conditions*, African Commission on Human and Peoples' Rights, The Gambia.

African Commission on Human and Peoples' Rights (ACHPR) (2008), *The Robbin Island Guidelines Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa*, African Commission on Human and Peoples' Rights, The Gambia.

African Commission on Human and Peoples' Rights (ACHPR) (2012), *Special Rapporteur on Prisons, Conditions of Detention and Policing in Africa*, African Commission on Human and Peoples' Rights, The Gambia.

African Criminal Justice Reform (2005), *White Paper on Corrections in South Africa*, Africa Criminal Justice Reform, South Africa.

African Union (2003), *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (11 July 2003)*, African Union, Addis Ababa.

Agboola, C. (2015), "Consensual same-sex sexual relationships in South African female prisons", *Gender and Behaviour*, Vol. 13 No. 2, pp. 6658-6667, SSN: 1596-9231.

AIDS and Rights Alliance for Southern Africa (ARASA) (2019), *Don't Treat us as Outsiders, Drug Policy and the Lived Experiences of People Who Use Drugs in Southern Africa*, AIDS and Rights Alliance for Southern Africa, Namibia.

Artz, L. and Hoffman-Wanderer, Y. (2017), "Word on the inside: epistemological considerations on women, crime and imprisonment", *Acta Criminologica: Southern African Journal of Criminology*, Vol. 30 No. 4, pp. 1-15, available at: https://hdl.handle.net/10520/EJC-c3712f920

Artz, L., Hoffman-Wanderer, Y. and Moult, K. (2012), *Hard Times: Women's Pathways to Crime and Incarceration*, University of Cape Town, South Africa, SBN: 978-0-7992-2488-7.

Atabay, T. (2008), *Handbook for Prison Managers and Policymakers on Women and Imprisonment: women and Imprisonment*, United Nations Publications, United States.

Barberet, R. and Jackson, C. (2017), "UN rules for the treatment of women prisoners and non-custodial sanctions for women offenders (the Bangkok rules): a gendered critique' papers", *Papers. Revista de Sociologia*, Vol. 102 No. 2, pp. 215-230, doi: 10.5565/rev/papers.2336.

Bukurura, S. (2002), *Protecting Prisoners' Rights in Southern Africa:An Emerging Pattern*, Penal Reform International.

Bunting, S. (1960), "The prisons of apartheid' South", *Africa in Exile*, Vol. 4 No. 4, pp. 42-48, available at: asjul60.7.pdf(ukzn.ac.za)

Cameron, E. (2015), *Pollsmoor Correctional Centre – Remand Centre and Women's Centre*, Constitutional Court, South Africa.

Cameron, E. (2020), "The crisis of criminal justice in South Africa' 69", *South African Crime Quarterly*, Vol. 137 No. 69, doi: 10.17159/2413-3108/2020/vn69a9253.

Committee on Economic, Social and Cultural Rights (CESCR) (2017), *Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights Initial Reports of States Parties Due in 2017 South Africa*, Committee on Economic, Social and Cultural, Geneva.

Community Law Centre (2007), *A Submission to the Office of the United Nations High Commissioner for Human Rights*, Universal Periodic Review, Community Law Centre, South Africa.

de Ruiter, N. and Hardy, K. (2018), *Study on the Use of Bail in South Africa*, African Policing Civilian Oversight Forum Series 23, South Africa.

De Vos, P. (2005), "Prisoners' rights litigation in South Africa since 1994: a critical evaluation' law", *Democracy and Development*, Vol. 9, pp. 89-112.

Department of Correctional Services (DCS) (2004), *White Paper on Corrections in South Africa*, Department of Correctional Services, South Africa.

Department of Correctional Services (DCS) (2008) *History of Transformation of the Correctional System in South Africa*, Department of Correctional Services, South Africa, available at: https://web.archive.org/web/20080521220209/http:/www.dcs.gov.za/Organisation/History.htm?path=D:%5CInetpub%5CDCSInternetSite%5COrganisation%5CHistory

Department of Correctional Services (DCS) (2020), *Annual Report 2019/2020*, Department of Correctional Services, South Africa.

Dias-Vieira, A. and Ciuffoletti, S. (2014), "Case-study on the transgender inmates of sollicciano prison", *Journal of Law and Criminal Justice*, Vol. 2 No. 2, pp. 209-249, doi: 10.15640/jlcj.v2n2a13.

Dissel, A. (2016), *'By the Grace of God': Staffing Correctional Facilities*, Sonke Gender Justice, South Africa, pp.1-82, available at: https://genderjustice.org.za/

Dissel, A. and Ellise, S. (2002), "Reform and stasis: transformation in South African prisons", *Critique Internationale*, Available at Reform and Stasis: Transformation in South African Prisons (ethz.ch), No. 16.

Du Preez, N. (2006), "Comparative analysis of imprisoned mothers' perceptions regarding separation from their children", *Child Abuse Research in South Africa*, pp. 26-35.

Du Preez, N. (2008), "Imprisonment of black women with babies and young children: a South African case study", *Child Abuse Research in South Africa*, Vol. 9 No. 1, pp. 1-10, available at: https://hdl.handle.net/10520/EJC24330

Federation of South African Women (1989), *Women in Prison*, Federation of South African Women, South Africa, DOI: AL2457_I5.6.

Filippi, N. (2011), "Deviance, punishment and logics of subjectification during apartheid: insane, political and common-law prisoners in a South African gaol", *Journal of Southern African Studies*, Vol. 37 No. 3, pp. 627-643, doi: 10.1080/03057070.2011.602898.

Gillespie, K. (2011), "Containing the 'wandering native': racial jurisdiction and the liberal politics of prison reform in 1940s South Africa", *Journal of Southern African Studies*, Vol. 37 No. 3, pp. 499-515, doi: 10.1080/03057070.2011.602889.

Gordin, J. and Cloete, I. (2013), "Imprisoned before being found guilty: remand detainees in South Africa", *University of Cincinnati Law Review*, University of Cincinnati, Cincinnati. Vol. 80 No. 4, pp. 1167-1177.

Gowland, I. (2011), *'Moms behind Bars: motherhood in Eshowe Correctional Center' Independent Study Project Collection 115*, Malchester College.

Haffejee, S., Vetten, L. and Greyling, M. (2005), "Exploring violence in the lives of women and girls incarcerated at three prisons in Gauteng province", *South Africa' Agenda*, Vol. 9 No. 66, pp. 40-47, doi: 10.1080/10130950.2005.9674646.

Hesselink, A. and Dastile, P. (2010), "The reality of babies and toddlers behind bars", *South African Journal of Criminology*, pp. 65-69, available at: https://hdl.handle.net/10520/EJC28572

Hopkins, R. (2016), "Filth, disease, sex and violence for Pollsmoor's female inmates", available at: https://mg.co.za/article/2016-03-03-filth-disease-sex-and-violence-for-pollsmoors-female-inmates/ (accessed 24 May 2021).

Human Rights Watch (1994), *Prison Conditions in South Africa*, Human Rights Watch, United States.

Judicial Inspectorate for Correctional Services (2018), *Pollsmoor Correctional Centre Still in Violation of the Overcrowding Court Order of 2016*, Judicial Inspectorate for Correctional Services, South Africa, 4 May.

Kang'ethe, S., Agboola, C. and Mohapi, B. (2020), "Unpacking women to women rape within correctional centres in South Africa", *Acta Criminologica: African Journal of Criminology and Victimology*, Vol. 33 No. 2, pp. 92-109, available at: https://hdl.handle.net/10520/ejc-crim-v33-n2-a6

Khumalo, V. (2021), "List of female prisons in South Africa (South Africa lists 2021)", available at: https://southafricalists.com/female-prisons-in-south-africa/ (accessed 24 May 2021).

Kleijn, A., Nevin, A. and Wasserman, Z. (2017), *The One Judge One Jail. A Guide for Inspecting and Reporting on Places of Detention in South Africa*, Sonke Gender Justice, South Africa.

Lauwereys, H. (2021), "Sentencing primary caregivers in South Africa: the role of the child's best interests", *South African Journal on Human Rights*, Vol. 36 Nos 2/3, doi: 10.1080/02587203.2020.1865113.

Leiter, B. (2015), "Legal realism and legal doctrine", *University of Pennsylvania Law Review*, Vol. 163 No. 7, pp. 1975-1984. available at: https://scholarship.law.upenn.edu/penn_law_review/vol163/iss7/6

Luyt, W. and Du Preez, N. (2010), "A case study of female incarceration in South Africa", *Southern African Journal of Criminology*, Vol. 23 No. 3, pp. 88-114, available at: https://hdl.handle.net/10520/EJC29047

Mahlati, U. and Nare, P. (2019), "Incarcerated women tell NGO they are desperate for help (ground up 2019)", available at: www.groundup.org.za/article/incarcerated-women-tell-ngo-they-are-desperate-help/ (accessed 24 May 2021).

Maseko, T.W. (2017a), "An assessment of the realisation of inmates' right to adequate medical treatment since the adoption of the South African constitution in 1996", *De Jure Law Jure*, Vol. 50 No. 2, pp. 263-280, doi: 10.17159/2225-7160/2017/v50n2a4.

Maseko, T.W. (2017b), "Inmates right to adequate nutrition in South Africa: is the enforcement of this right constitutional?", *Southern African Public Law*, Vol. 31 No. 1, pp. 178-188.

Mhlanga-Gunda, R., Motsomi, N., Plugge, E. and Van Hout, M.C. (2019), "Challenges in ensuring robust and ethical health research and the reporting of health outcomes and standards in Sub-Saharan African prisons", *Lancet Global Health*, Vol. 8 No. 1, pp. 25-26, doi: 10.1016/S2214-109X(19)30455-3.

Mujuzi, J. (2011), "Unpacking the law and practice relating to parole in South Africa' (2011)", *Potchefstroomse Elektroniese Regsblad*, Vol. 14 No. 5, pp. 205-240, doi: 10.4314/pelj.v14i5.5.

Muntingh, L. (2006), *Prisons in a Democratic South Africa*, Civil Society Prison Reform Initiative, South Africa, available at: www.acjr.org.za

Muntingh, L. (2016), "Ten years after the jail commission assessing the state of South Africa's prisons' South", *SA Crime Quarterly*, Vol. 58 No. 58, pp. 35-44, doi: 10.17159/2413-3108/2016/v0n58a1380.

Nagisa-Keehn, E. and Nevin, A. (2018), "Health, human rights, and the transformation of punishment: South African litigation to address HIV and tuberculosis in prisons", *Health and Human Rights Journal*, Vol. 20 No. 1, pp. 231-224, PMID: 30008564; PMCID: PMC6039737.

Nevin, A. and Nagisa-Keehn, E. (2018), *Reducing Overcrowding in a South African Remand Detention Facility*, Sonke Gender Justice, South Africa, available at: www.saferspaces.org.za

Office of the United Nations High Commissioner for Human Rights (OHCHR) (2015), *Republic of South Africa Combined Second Periodic Report under the African Charter on Human and People's Rights/ African Charter on the Rights of Women*, Office of the United Nations High Commissioner for Human Rights, Gevena.

Office of the United Nations High Commissioner for Human Rights (OHCHR) (2019), *Committee against Torture Examines the Situation in South Africa*, Office of the United Nations High Commissioner for Human Rights, Geneva.

Organisation of African Unity (OAU) (1999), *The African Charter on the Rights and Welfare of the Child (29 November 1999) CAB/LEG/24.9/49*, Organization of African Unity, Addis Ababa.

Organization of African Unity (1981), *African Charter on Human and Peoples' Rights (27 June 1981)CAB/ LEG/67/3 Rev. 5,21I.L.M.5*, Organization of African Unity, Addis Ababa.

Parliamentary Monitoring Group (2014), *Women with Children in Correctional Centres: Gauteng Department of Correctional Services Briefing*, Parliamentary Monitoring Group, South Africa.

Parry, B.R. (2020), "Pathways and penalties: exploring experiences of agency among incarcerated women in South Africa", *Feminism and Psychology*, Vol. 18 No. 2, pp. 183-206, doi: 10.1177/0959353520945857.

Penal Reform International (PRI) (2017), *Women in Detention. Putting the UN Bankok Rules on Women Prisoners into Practice*, Penal Reform International, United Kingdom.

Penal Reform International (PRI) (2020), *Global Prison Trends*, Penal Reform International, UK.

Safer Spaces (2021), "Prison violence in South Africa: context, prevention and response", available at: www.saferspaces.org.za/understand/entry/prison-violence-in-south-africa-context-prevention-and-response (accessed 24 May 2021).

Sarkin, J. (2008), "Prisons in Africa: an evaluation from a human rights perspective' sur", *International Human Rights Journal*, Vol. 5 No. 9, pp. 22-51, doi: 10.1590/S1806-64452008000200003.

Sloth-Neilsen, J. and Ehlers, L. (2005), "Assessing the impact: mandatory minimum sentences in South Africa", *South African Crime Quarterly*, Vol. 14, pp. 15-22, doi: 10.17159/2413-3108/2005/v0i14a1005.

Sonke Gender Justice (2013), *Policy to Address Sexual Abuse of Inmates*, Sonke Gender Justice, South Africa.

South African Development Community (SADC) (2008), *Protocol on Gender and Development*, South African Development Community, Johannesburg.

South African History Online (2021), "Pass laws in South Africa.1800-1994", available at: www.sahistory.org.za/article/pass-laws-south-africa-1800-1994 (accessed 24 May 2021).

South African Human Rights Commission (1998), *Report of the National Prisons Project*, South African Human Rights Commission, South Africa, Available at: Report (sahrc.org.za).

South African Network for People who Use Drugs (SANPUD) (2019), *Harm Reduction for Women in Prison*, South African Network for People who Use Drugs, South Africa.

Steinberg, J. (2004), *Nongoloza's Children: Western Cape Prison Gangs during and after Apartheid*, Centre for the Study of Violence and Reconciliation, South Africa.

Steinberg, J. (2005), *Prison Overcrowding and the Constitutional Right to Adequate Accommodation in South Africa*, Centre for the Study of Violence and Reconciliation, South Africa, available at: csvr.org.za

Steyn, F. and Booyens, K. (2018), *A Profile of Incarcerated Female Offenders: implications for Rehabilitation Policy and Practice*, University of Pretoria, South Africa.

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

UN (1955), *Standard Minimum Rules for the Treatment of Prisoners (30 August 1955)*, United Nations, Geneva.

UN (1966a), *International Covenant on Civil and Political Rights (16 December 1966),United Nations Treaty Series*, United Nations General Assembly, New York, NY, Vol. 999, p. 171.

UN (1966b), *International Covenant on Economic, Social and Cultural Rights (16 December 1966), United Nations, Treaty Series*, United Nations General Assembly, New York, NY, Vol. 993, p. 3.

UN (1979), *Convention on the Elimination of All Forms of Discrimination against Women (18 December 1979) a/RES/34/180*, United Nations General Assembly, New York, NY.

UN (1989), *Convention on the Rights of the Child (20 November 1989) Res 44/25.1577,3*, United Nations General Assembly, New York, NY.

UN (1991a), *United Nations Standard Minimum Rules for Non-Custodial Measures (Tokyo Rules) (2 April 1991) a/RES/45/110*, United Nations General Assembly, New York, NY.

UN (1991b), *Basic Principles for the Treatment of Prisoners (28 March 1991)a/RES/45/111*, United Nations General Assembly, New York, NY.

UN (1995), *Beijing Declaration and Platform of Action (15 September 1995)a/CONF.177/20*, United Nations, New York, NY.

UN (2003), *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (9 January 2003) a/RES/57/199*, United Nations General Assembly, New York, NY.

UN (2010), *United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders(the Bangkok Rules) (6 October 2010) a/C.3/65/L.50*, UN General Assembly, New York, NY.

UN (2016), *Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)(8 January 2016) a/RES/70/175*, United Nations General Assembly, New York, NY.

United Nations Human Rights Council (UNHRC) (2017), *Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences on Her Mission to South Africa*, United Nations Human Rights Council, Geneva.

United Nations Office on Drugs and Crime (UNODC) (2019), *Were You Really Raped, or Did You Just Not Get Paid? A Needs Assessment of Women Who Use Drugs in Four Cities in South Africa*, United Nations Office on Drugs and Crime, South Africa.

van der Berg, A. (2007), *Summary and Comment on the Final Report of the Judicial Commission of Inquiry into Allegations of Corruption, Maladministration and Violence in the Department of Correctional Services-the Jail Commission*, Civil Society Prison Reform Initiative, South Africa, available at: www.acjr.org.za

Van Hout, M.C. and Chimbga, D. (2020), "Tackling the intersectionality of drug offences, gender based violence and victimisation in the South African criminal justice system", *Journal of Sustainable Development in Africa*, Vol. 22, pp. 157-165, ISSN: 1520-5509.

Van Hout, M.C. and Crowley, D. (2021), "The 'double punishment' of transgender prisoners: a human rights based commentary on placement and conditions of detention", *International Journal of Prisoner Health*, Vol. ahead-of-print No. ahead-of-print, doi: 10.1108/IJPH-10-2020-0083.

Van Hout, M.C. and Mhlanga Gunda, R. (2018), "Contemporary women prisoners health experiences, unique prison health care needs and health care outcomes in Sub-Saharan Africa' BMC", *BMC International Health and Human Rights*, Vol. 18 No. 1, pp. 1-17, doi: 10.1186/s12914-018-0170-6.

Van Zyl Smit, D. (1992), *South African Prison Law and Practice*, Butterworths, South Africa.

Van Zyl Smit, D. (2004), "Swimming against the tide: controlling the prison population in the new South Africa", in Dixon, W. and van der Spuy, E. (Eds), *Justice Gained? Crime and Crime Control in South Africa's Transition*, pp. 227-258.

Further reading

Agboola, C. (2016), "Memories of the 'inside': conditions in South African women's prisons", *South African Crime Quarterly*, Vol. 56 No. 19, pp. 9-26.

Dixon, W. and van der Spuy, E. (Ed.), *Justice Gained? Crime and Crime Control in South Africa's Transition*, Juta, South Africa, pp. 227-258, ISBN: 9781919713717.

Lines, R. (2008), "The right to health of prisoners in international human rights law", *International Journal of Prisoner Health*, Vol. 4 No. 1, pp. 3-53, doi: 10.1080/17449200701862145.

UN Commission on Human Rights (UNCHR) (1998), *Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (17 April 1998) E/CN.4/RES/1998/38*, UN Commission on Human Rights, Geneva,

UN Committee against Torture (UN CAT) (2015), *Eighth Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (26 March 2015) CAT/C/54/2,Para.63*, UN Committee against Torture, Geneva.

UN (1965), *International Convention on the Elimination of All Forms of Racial Discrimination (21 December 1965) RES/2106, vol. 660*, 195. United Nations General Assembly, New York, NY.

About the authors

Marie Claire Van Hout is Professor of Public Health Policy and Practice at Liverpool John Moores University, UK. She has 20 years research and evaluation experience in public health, human rights law and vulnerable populations in Europe, Africa and the Middle East. Marie Claire Van Hout is the corresponding author and can be contacted at: m.c.vanhout@ljmu.ac.uk

Jakkie Wessels is Regional Court President of the Limpopo Regional Division in Limpopo, South Africa. She has 20 years of experience as a judicial officer in the Regional Court and has 25 years of experience in training and development of training material, for justice stakeholders in Southern Africa, including as gender expert for the United Nations Office on Drugs and Crime.

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Me Too: Global Progress in Tackling Continued Custodial Violence Against Women: The 10-Year Anniversary of the Bangkok Rules

Marie Claire Van Hout[1], Simon Fleißner[2], and Heino Stöver[2]

Abstract

On any given day, almost 11 million people globally are deprived of their liberty. In 2020, the global female population was estimated to be 741,000, an increase of 105,000 since 2010. In order to investigate progress in the adoption of the Bangkok Rules since 2010, we conducted a legal realist assessment based on a global scoping exercise of empirical research and United Nations (UN) reporting, using detailed MESH terms across university and UN databases. We found evidences in 91 documents which directly relate to violations of the Bangkok Rules in 55 countries. By developing a realist account, we document the precarious situation of incarcerated women and continued evidence of systemic failures to protect them from custodial violence and other gender-sensitive human rights breaches worldwide. Despite prison violence constituting a complex and multifaceted phenomenon, very little research (from the United States, Canada, Brazil, Mexico, and Australia) has been conducted on custodial violence against women since 2010. Although standards of detention itself is a focus of UN universal periodic review, special procedures (violence against women) and concluding observations by the UN committees, very few explicitly mentioned women, and the implications of violence against them while incarcerated. We highlight three central aspects that hinder the full implementation of the Bangkok Rules; the past decade of a continued invisible nature of women as prisoners in the system; the continued legitimization, normalization, and trivialization of violence under the pretext of security within their daily lives; and the unawareness and disregard of international (Bangkok and others) rules.

Keywords

gender-based violence against women, GBVAW, prisons, Bangkok Rules, custodial violence

Background

On any given day, almost 11 million people globally are detained in prisons or other closed settings (Penal Reform International, 2020a). In 2020, the global female population was estimated to be 741,000 and increasing (Penal Reform International, 2020a) with a growth of 105,000 observed in the past decade, particularly evident in Asia (an increase of 50%), Central and South America (an increase of 19%), and Africa (an increase of 24%) (Lenihan, 2020; Penal Reform International, 2020a). Women in custodial settings are a minority and generally imprisoned for less severe, nonviolent crimes, often heavily underpinned by poverty ("crimes of survival"; Penal Reform International, 2020a, 2021a). Their profiles, histories, and pathways into crime and the criminal justice system are distinct from that of men. Many are from racial or ethnic minority backgrounds; they are disproportionately affected by lower socioeconomic status, trauma, histories of interpersonal violence (child, sexual, intimate partner, physical, and emotional), mental illness; and suffer continued exposure to custodial violence from staff or fellow prisoners (Ervin et al., 2020; Jones, 2020; Karlsson & Zielinski, 2020; Lenihan, 2020; Lynch et al., 2012; Penal Reform International, 2017a, 2020a, 2021a; Tripodi & Pettus-Davis, 2013; United Nations [UN] Office on Drugs and Crime, 2008; Wolff et al., 2007). Identified vulnerable groups include those affected by trauma, trafficking and sexual abuse victims, women who use drugs, sexual minorities, young girls, and those with complex comorbid psychiatric and learning disabilities (Bronson et al., 2017; Meyer et al., 2017; Penal Reform International, 2020a; Tripodi & Pettus-Davis, 2013; UN Office of Drug and Crime, 2008).

[1] Public Health Institute, Liverpool John Moores University, United Kingdom
[2] Faculty of Health and Social Work, Frankfurt University of Applied Sciences, Frankfurt am Main, Germany

Corresponding Author:
Marie Claire Van Hout, Public Health Institute, Liverpool John Moores University, United Kingdom.
Email: m.c.vanhout@ljmu.ac.uk

Within the male dominated criminal justice system, women's gendered and unique health needs are often neglected and ill-resourced, particularly regarding their sexual and reproductive health, mental health, and the treatment of drug dependence (Gadama et al., 2020; Nakitanda et al., 2020; Penal Reform International, 2020a; UN Office on Drugs and Crime, 2008).

The UN Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (*Bangkok Rules*; UN Secretariat, 2010) were adopted by the UN General Assembly on 21 December, 2010. They were developed to support and complement, as appropriate, the 1955 Standard Minimum Rules for the Treatment of Prisoners (UN, 1955), the 1991 UN Basic Principles for the Treatment of Prisoners (UN General Assembly, 1991a), the 1991 UN Standard Minimum Rules for Non-Custodial Measures (*Tokyo Rules;* UN General Assembly, 1991b), and the updated 2016 UN Standard Minimum Rules for the Treatment of Prisoners (*Nelson Mandela Rules*; UN General Assembly, 2016). While the *Mandela Rules* do not specifically refer to women (with Rule 7 referring to self-perceived gender identity), the *Bangkok Rules* as soft law principles lay the foundation for intensified efforts to support women deprived of their liberty (Barbaret et al., 2017; Huber, 2016; Penal Reform International, 2020b). Although essentially underpinned by inherent tensions in human rights for women, "protection versus protectionism" (Berzano, n.d.), they are insufficiently broad regarding gender diversity by adopting a cis-normative stance and excluding transwomen who are at high risk of exposure to sexual violence when detained with males and potential perpetrators of violence against women when placed alongside females (UN Human Rights Office of the High Commissioner, 2016; Van Hout & Crowley, 2021).

Since adoption of the *Bangkok Rules* in 2010, the criminal justice system and its institutions remain largely designed for the dominant male population, and the *Bangkok Rules* are largely implemented in a piecemeal manner, despite observed global increase of women in prison (Lenihan, 2020; Penal Reform International, 2020a). The UN Committee on the Elimination of Discrimination Against Women (CEDAW) has established that discrimination against women encompasses ill treatment that affects women disproportionately, including detention conditions that do not respond to the specific needs of women (referring to the *Bangkok Rules*). The 2015 UN Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (2015) has described concern regarding the situation of women in detention:

> the use of sexual violence as torture, including against transgender persons; lack of adequate attention to their right to health care, including sexual and reproductive health rights; the precarious situation of pregnant women and their children living with them; non-compliance with the rule of separation of women and men; shortage of women custody staff; the practice of invasive searches, including in intimate parts of the body, and the use of public nudity; discrimination in access to work, education, and recreational activities; limitations on contact with relatives, including visits by intimates and contact with their children, as a form of punishment.

In addition, although great attention has been focused globally on tackling gender-based violence against women (GBVAW) in the community, and the spotlight has been shone on torture and inhumane treatment in detention itself, very little has been dedicated to gender-specific aspects of countering interpersonal custodial violence against women deprived of their liberty (Penal Reform International, 2017a, 2017b).

The prison system and its authorities have a general obligation to protect prisoners against any type of violence, including excessive use of force (Penal Reform International, 2020c). GBVAW is defined by the UN Declaration on the Elimination of Violence Against Women as:

> violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental, or sexual harm or suffering, threats of such acts, coercion, and other deprivations of liberty. (Office of the UN High Commissioner for Human Rights [OHCHR], n.d.)

GBVAW represents a human rights breach with states obligations to exercise due diligence to prevent, investigate, and punish these acts, including if perpetrated by officials (see *Article 2 Universal Declaration of Human Rights; Article 1 and 4 c UN Declaration on the Elimination of Violence Against Women*; *Article 7 International Covenant on Civil and Political Rights; Article 1 CEDAW*), most particularly so when experienced as torture or cruel, inhuman or degrading treatment, or punishment within the power-imbalanced custodial setting. Under international law, rape constitutes torture when it is carried out by or at the instigation of or with the consent or acquiescence of public officials, with other forms of sexual abuse violating the prohibition on cruel, inhumane, or degrading treatment or punishment. Other identified forms of custodial GBVAW include strip searches conducted by men or in the presence of men, virginity testing, verbal sexual harassment, use of restraints (including during labor), psychotropic drugs and solitary confinement to control prisoners, inappropriate surveillance by guards during undressing or showers, and the denial of access to medical care by nonmedically trained officials (Amnesty International USA, 2011; McCulloch & George, 2009; Nowak, 2008; Penal Reform International, 2020c; UN Secretary-General, 2006).

The identified threat of ongoing exposure to physical and sexual violence of women by fellow inmates and/or prison staff in custodial settings has continued since 2010 (Penal Reform International, 2021b). Hence, in order to investigate global progress in the adoption of the *Bangkok Rules* since 2010, with view on documenting and assessing the situation of women in prison, the elimination of custodial violence itself and responses to support those women affected, we conducted a legal realist assessment (Leiter, 2015) based on a global scoping review of extant published literature (empirical, humanitarian, and UN Committee reporting). First, we identified all rules of the Bangkok Rules which are directly related to violence. See Table 1.

Table 1. Bangkok Rules Relevant to Gender-Based Violence Against Women.

Rule 6

The health screening of women prisoners shall include comprehensive screening to determine primary health care needs and also shall determine:

The presence of sexually transmitted diseases or blood-borne diseases, and depending on risk factors, women prisoners may also be offered testing for HIV, with pre and posttest counselling;

Mental health care needs, including post-traumatic stress disorder and risk of suicide and self-harm;

The reproductive health history of the woman prisoner, including current or recent pregnancies, childbirth, and any related reproductive health issues;

The existence of drug dependency;

Sexual abuse and other forms of violence that may have been suffered prior to admission.

Rule 7

If the existence of sexual abuse or other forms of violence before or during detention is diagnosed, the woman prisoner shall be informed of her right to seek recourse from judicial authorities. The woman prisoner should be fully informed of the procedures and steps involved. If the woman prisoner agrees to take legal action, appropriate staff shall be informed and immediately refer the case to the competent authority for investigation. Prison authorities shall help such women to access legal assistance.

Whether or not the woman chooses to take legal action, prison authorities shall endeavor to ensure that she has immediate access to specialized psychological support or counseling.

Specific measures shall be developed to avoid any form of retaliation against those making such reports or taking legal action.

Rule 8

The right of women prisoners to medical confidentiality, including specifically the right not to share information and not to undergo screening in relation to their reproductive health history, shall be respected at all times.

Rule 10

Gender-specific health care services at least equivalent to those available in the community shall be provided to women prisoners.

If a woman prisoner requests that she be examined or treated by a woman physician or nurse, a woman physician or nurse shall be made available, to the extent possible, except for situations requiring urgent medical intervention. If a male medical practitioner undertakes the examination contrary to the wishes of the woman prisoner, a woman staff member shall be present during the examination.

Rule 11

Only medical staff shall be present during medical examinations unless the doctor is of the view that exceptional circumstances exist or the doctor requests a member of the prison staff to be present for security reasons or the woman prisoner specifically requests the presence of a member of staff as indicated in Rule 10, paragraph 2, above.

If it is necessary for nonmedical prison staff to be present during medical examinations, such staff should be women and examinations shall be carried out in a manner that safeguards privacy, dignity, and confidentiality.

Rule 12

Individualized, gender-sensitive, trauma-informed, and comprehensive mental health care and rehabilitation programs shall be made available for women prisoners with mental health care needs in prison or in noncustodial settings.

Rule 13

Prison staff shall be made aware of times when women may feel particular distress, so as to be sensitive to their situation and ensure that the women are provided appropriate support.

Rule 19

Effective measures shall be taken to ensure that women prisoners' dignity and respect are protected during personal searches, which shall only be carried out by women staff who have been properly trained in appropriate searching methods and in accordance with established procedures.

Rule 20

Alternative screening methods, such as scans, shall be developed to replace strip searches and invasive body searches, in order to avoid the harmful psychological and possible physical impact of invasive body searches.

Rule 22

Punishment by close confinement or disciplinary segregation shall not be applied to pregnant women, women with infants, and breastfeeding mothers in prison.

Rule 23

Disciplinary sanctions for women prisoners shall not include a prohibition of family contact, especially with children.

Rule 24

Instruments of restraint shall never be used on women during labor, during birth, and immediately after birth.

Rule 25

Women prisoners who report abuse shall be provided immediate protection, support, and counselling, and their claims shall be investigated by competent and independent authorities, with full respect for the principle of confidentiality. Protection measures shall take into account specifically the risks of retaliation.

Women prisoners who have been subjected to sexual abuse, and especially those who have become pregnant as a result, shall receive appropriate medical advice and counselling and shall be provided with the requisite physical and mental health care, support and legal aid.

In order to monitor the conditions of detention and treatment of women prisoners, inspectorates, visiting or monitoring boards or supervisory bodies shall include women members.

Rule 31

Clear policies and regulations on the conduct of prison staff aimed at providing maximum protection for women prisoners from any gender-based physical or verbal violence, abuse and sexual harassment shall be developed and implemented.

Rule 35

Prison staff shall be trained to detect mental health care needs and risk of self-harm and suicide among women prisoners and to offer assistance by providing support and referring such cases to specialists.

Rule 38

Juvenile female prisoners shall have access to age- and gender-specific programs and services, such as counseling for sexual abuse or violence. They shall receive education on women's health care and have regular access to gynecologists, similar to adult female prisoners.

Rule 41

The gender-sensitive risk assessment and classification of prisoners shall:

Take into account the generally lower risk posed by women prisoners to others, as well as the particularly harmful effects that high security measures and increased levels of isolation can have on women prisoners;

Enable essential information about women's backgrounds, such as violence that they may have experienced, history of mental disability, and substance abuse, as well as parental and other caretaking responsibilities, to be taken into account in the allocation and sentence planning process;

Ensure that women's sentence plans include rehabilitative programs and services that match their gender-specific needs;

Ensure that those with mental health care needs are housed in accommodation which is not restrictive, and at the lowest possible security level, and receive appropriate treatment, rather than being placed in higher security level facilities solely due to their mental health problems.

Rule 44

In view of women prisoners' disproportionate experience of domestic violence, they shall be properly consulted as to who, including which family members, is allowed to visit them.

Rule 56

The particular risk of abuse that women face in pretrial detention shall be recognized by relevant authorities, which shall adopt appropriate measures in policies and practice to guarantee such women's safety at this time. (See also Rule 58 below, with regard to alternatives to pretrial detention.)

Rule 60

Appropriate resources shall be made available to devise suitable alternatives for women offenders in order to combine noncustodial measures with interventions to address the most common problems leading to women's contact with the criminal justice system. These may include therapeutic courses and counseling for victims of domestic violence and sexual abuse; suitable treatment for those with mental disability; and educational and training programs to improve employment prospects. Such programs shall take account of the need to provide care for children- and women-only services.

We subsequently searched for literature using university databases and scrutinized the OHCHR system for all published domestic reporting to the UN and the UN Committee Against Torture (CAT) and CEDAW observations at the global level since 2010. 101 UN CAT reports and 158 CEDAW reports were scrutinized, with human rights violations pertinent to the identified Bangkok Rules found in 15 UN CAT, 32 UN CEDAW, and 21 other domestic and UN Human Rights Council reports. Third, the academic literature was examined, and we found 23 relevant records where breaches of the Bangkok Rules were evident. In total, 91 documents related directly to violations of the Bangkok Rules in 55 countries. Despite prison violence constituting a complex and multifaceted phenomenon, very little academic research (mostly from the United States, Canada, Brazil, Mexico, and Australia) has been conducted on GBVAW in custodial settings since 2010, with the bulk of the evidence centering on Special Rapporteur and UN (CAT; Human Rights Council, and CEDAW) country-level reporting. Although standards of detention itself is a focus of UN periodic reports, very few explicitly mentioned women, and the implications of violence against them while incarcerated. See Table 2.

Adopting the Bangkok Rules and Progress in Tackling GBVAW in Prisons

Empirical studies from the United Kingdom (UK) and the United States reveal that the female prison environment continues to be as emotionally suppressive, conflict-laden, and violent as in male settings, particularly relating to fighting and physical assaults, with inmate-on-inmate violence comparable across male and female facilities, including sexual assaults, transactional sex in return for protection, privilege or basic necessities, and intimate partner violence between prisoners (Ervin et al., 2020; Kottler et al., 2018; Laws, 2019; Thomson et al., 2019). At the global level, women from sexual minorities (included transwomen) continue to be particularly at risk of sexual abuse including rape (Amnesty International USA, 2011; Human Rights Watch, 2018; Van Hout & Crowley, 2021).

In North America, in 2014, the UN CAT reports on violence against LGBTI people which included transwomen in US prisons (CAT, 2014a). Despite the 2003 Prison Rape Elimination Act and the National Standards to Prevent, Detect and Respond to Prison Rape which came into effect in the United States in 2012, academic literature since 2010 highlights systemic failures to protect women and provides continued evidence for official and inmate-perpetrated violence against women (often abusive sexual context but including rape) in prisons (Bureau of Justice Statistics, 2014; Fuentes, 2014; Kelly et al., 2014; Perez et al., 2014; Seddiqui, 2015; Wolff & Shi, 2011). Three US sources report on violence of constitutional proportions and violation of women prisoners' (including transwomen) rights against cruel and unusual punishment, including a deluge of rape cases, the majority perpetrated by male guards since 2010 (Harrison, 2020; Kubiak et al., 2017; Stern, 2018). In other closed settings in the United States, recent media outputs report on mass hysterectomies carried out on migrants in immigration detention centers and with those women pleading for help on social media being detained in solitary confinement for several days (Andrews & Hackman, 2020; Bryant, 2020; Ghandakly & Fabi, 2021; Lenzer, 2020). Penal Reform International reports on arbitrary detention and illegal detention methods in 2020, including compulsory drug treatment centers where women are detained in Mexico (Giacomello, 2020). Elsewhere, in Canada, one article reports that violent aspects of prison life continue to affect women, in the form of strip searches, administrative segregation, often for long periods, overreliance on the use of force and control measures, restraints with devices such as with "the wrap" or duct tape, and forcible and illegal injection with tranquilizers, denial of medical care and support services (Chartrand, 2015). The 2016 CEDAW report on Canada criticizes the presence of male guards in female prisons in Canada (CEDAW, 2016a).

In Central and South America, the CEDAW report of Brazil in 2012 reports limited access to justice and sexual violence against women in detention (CEDAW, 2012a). Three empirical studies in Brazil observe the presence of continued power dynamics in female prisons, viewed as sites of exclusion characterized by a multiplicity of hostile and violence acts (Batista et al., 2020; Gama-Araujo et al., 2020; Scherer & Scherer, 2011). The UN CAT reports on femicide and GBVAW in detention in Argentina in 2017 (CAT, 2017a), and the CEDAW reports on ill treatments and invasive body searches of women in detention in 2016 (CEDAW, 2016b). There are reports by the Inter-American Commission on Human Rights and the UN Human Rights Committee of prison policies in Argentina which group the "worst" behaved women together in prisons, with reports of violence, vexatious body searches, solitary confinement, and denial of food (Cornell Law School, Defensoría General de la Nación University of Chicago Law School, 2013; UN Human Rights Committee, 2016). The UN CAT 2013 refers to non(sex)-segregated prisons and the sexual victimization of women in Bolivian detention settings (CAT, 2013a), and the high risk of sexual violence facing trans-people in male prisons in Guatemala in 2018 (CAT, 2018). In Panama, the CEDAW (2010) reports on overcrowding and violence in female prisons. The 2017 report on Paraguay documents GBVAW and especially the sexual abuse of transsexual people in detention settings (CEDAW, 2017a). The CEDAW is concerned about the conditions experienced by women in prison, particularly regarding behavior of male staff in Uruguay in 2016 (CEDAW, 2016c). In Venezuela, the 2014 CEDAW reports on GBVAW in female prisons (CEDAW, 2014a).

In Africa, the African Commission's Special Rapporteur on Prisons and Conditions of Detention in Africa in 2012 notes no special reference to women's issues are made and documents the unmet needs of women in the prison setting, risks of exposure to sexual abuse by prison guards, and that the Kampala Declaration ignores the plight of pregnant women (Special Rapporteur on Prisons and Conditions of Detention in Africa, 2012). A 2019 sub Saharan regional assessment highlights the

Table 2. Critical Findings.

Country	Evidence	Number of Documents
North America		
Canada	Strip searches, administrative segregation, overreliance on the use of force and control measures, illegal tranquillizers, denial medical care and support services (Chartrand, 2015), presence of male guards (CEDAW, 2016a)	2
Mexico	Arbitrary detention and illegal detention (Giacomello, 2020)	1
United States	Violence against LGBTI (CAT, 2014a)	10
	Violence against women and systemic failure (Bureau of Justice Statistics, 2014; Fuentes, 2014; Kelly et al., 2014; Perez et al., 2014; Seddiqui, 2015; Wolff & Shi, 2011)	
	Violence of constitutional proportions and violation of women prisoners' rights against cruel and unusual punishment (Harrison, 2020; Kubiak et al., 2017; Stern, 2018)	
South America		
Argentina	Ill-treatment and invasive body searches (CAT, 2017a; CEDAW, 2016b)	4
	Violence, vexatious body searches, solitary confinement, denial of food (Cornell Law School's Avon Global Center for Women and Justice and International Human Rights Clinic Defensoría General de la Nación Argentina The University of Chicago Law School International Human Rights Clinic, 2013)	
Bolivia	Non(sex)-segregated prisons, sexual victimization (CAT, 2013a)	1
Brazil	Limited access to justice, sexual violence (CEDAW, 2012a)	4
	Multiplicity of hostile and violence acts (Batista et al., 2020; Gama-Araujo et al., 2020; Scherer & Scherer, 2011)	
Guatemala	High risk of sexual violence facing transgender people (CAT, 2018)	1
Panama	Overcrowding (CEDAW, 2010)	1
Paraguay	GBVAW, especially against transsexual people (CEDAW, 2017a)	1
Uruguay	Conditions in prison, male staff behavior (CEDAW, 2016c)	1
Venezuela	GBVAW (CEDAW, 2014a)	1
Africa		
Benin	Non(sex)-segregated prisons, lack of access to justice (CEDAW, 2013a)	1
Burundi	Overcrowding, poor rations, nonsex separation (CEDAW, 2016d)	1
Equatorial Guinea	GBVAW perpetrated by inmates and guards (CEDAW, 2012b)	1
Eritrea	Sexual violence (CEDAW, 2020)	1
Ethiopia	Horrific conditions, including rapes, ill treatment, torture (CEDAW, 2019a)	1
Gambia	Violence and rape perpetrated by male prisoners and guards (CEDAW, 2015a)	1
Guinea	Nonsex segregation (CAT, 2014b)	1
Mali	Nonsex segregation, GBVAW by police and prison staff (CEDAW, 2016e)	1
Mozambique	Sexual abuse against women and LSBTI people (CEDAW, 2019b)	1
South Africa	Punitive denial of opiate substitution treatment (Hopkins & Marie, 2017; SANPUD, Metzineres & Harm Reduction International, 2019)	1
	Consensual sex practices between incarcerated women (Agboola, 2015)	
	Women to women rape (Agboola et al., 2020)	
Zambia	GBVAW, including rape (CEDAW, 2011)	1
Zimbabwe	Sexual violence and abuse (Zimbabwe & CEDAW, 2020)	1
Europe		
Norway	Risk of sexual violence, lack of health care, lack of drug treatment programs (CEDAW, 2017b)	1
Denmark	Excessive use of solitary confinement, abuse allegations, ill treatment, nonsex segregation (Nowak, 2009)	2
	Nonsex segregation and missing protecting measures (Denmark, 2011)	
Swiss	Lack of guaranteed segregation (Friedrich-Ebert-Stiftung (Bonn), 2015a)	1
France	Overcrowding, inadequate health care access, high risks of suicide, forced psychiatric hospitalization (CEDAW, 2016f)	1
Ireland	inter prisoner violence, including sexual violence, violence perpetrated by staff (CAT, 2017b)	1
UK	GBVAW in police detention (Children's Rights Alliance for England, 2013)	1
Italy	Lack of health care services, sexual harassment by male guards (CEDAW, 2017c)	1
Montenegro	Lack of health care services, sexual harassment by male guards (CEDAW, 2017d)	1
Bulgaria	Excessive use of force and arrest when in pretrial detention (CAT, 2017c)	2
	Inadequate access to health care (Šimonović, 2019)	
Cyprus	Overcrowding, lack of privacy/health care (CAT, 2019)	1
Turkey	GBVAW in form of sexual violence and torture (CEDAW, 2016g)	1
Ukraine	Use of restraints during medical examination (European Court of Human Rights, 2020)	1
Greek	Risk of violence against refugee, migrant, and asylum-seeking women (CEDAW, 2013b)	1

(continued)

Table 2. (continued)

Country	Evidence	Number of Documents
Spain	Concern for the general situation (UN Human Rights Council. Working Group on Discrimination Against Women in Law and in Practice, 2015) Invasive body searches, excessive prescription of psychotropic drugs (SANPUD, Metzineers & Harm Reduction International, 2019)	2
Asia & Pacific Region		
Australia	Sexual violence, strip searches, insufficient access to health care (CEDAW, 2018)	1
Armenia	Concern about proportionality of sentences for women (UN Human Rights Council. Working Group on Arbitrary Detention, 2010)	1
Cambodia	Violent abuses by prison management, nonsex segregation, male prison guards (CAT, 2011) Poor conditions in pretrial detention (CEDAW, 2019c)	2
China	Overcrowding, risk of violence, concerns regarding extra-legal detention facilities (CEDAW, 2014b)	1
India	Lack of adequate protection measures, lack of medical care (Manjoo & UN Human Rights Council. Special Rapporteur on Violence Against Women, 2014)	1
Indonesia	Sexual abuse in police detention, abuse (CEDAW, 2012c)	1
Japan	Overcrowding, use of restraint (CAT, 2013b)	1
Korea	Vulnerable to sexual violence, no adequate complaint mechanism, death detention, forced abortion, deprived of a fair trial (CEDAW, 2017f)	1
Papua New Guinea	Nonsex segregation in police custody, risk of collective rapes, sexual and other abuses in exchange for favors, forced to perform domestic work, lack of medical care, and basic needs (UN Human Rights Council. Special Rapporteur in Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 2011)	1
Tajikistan	Poor conditions (UN Human Rights Committee, 2019)	1
Thailand	Overcrowding, ill-resourced prison settings, invasive body searches (CEDAW, 2017e)	1
Turkmenistan	Violence, physical and psychological pressure, abuse (including rape) (CAT, 2017d)	1
Uzbekistan	Lack of conducive environment lodging complaints, sexual humiliation, sexual violence by public officials, forced sterilization, ill treatment, abuse (CEDAW, 2015b)	1
Middle East		
Afghanistan	Poor conditions, solitary confinement for long periods (CAT, 2017e)	1
Iraq	Allegations of gender-based violence, including torture, ill-treatment, and rape (Friedrich-Ebert-Stiftung (Bonn), 2015b)	1
Israel	Limited access to justice for Palestinian women (CEDAW, 2017g)	1
Libya	Sexual violence from non-state actors and guards (UN Office of the High Commissioner for Human Rights, 2016)	1
Syria	Rape, sexual violence, GBVAW (CEDAW, 2014c)	1
Yemen	Rape, sexual violence, GBVAW (CAT, 2010)	1

Note. CAT = UN Committee Against Torture; GBVAW = gender-based violence against women; CEDAW = UN Committee on the Elimination of Discrimination Against Women.

continued vulnerabilities of women prisoners and their experiences of GBVAW, including rape by guards and fellow prisoners (South Africa, Malawi, Zambia, and Nigeria; Van Hout & Mhlanga-Gunda, 2018). Two studies report on invasive searches and the denial of opiate substitution treatment (OST) for incarcerated women who use drugs in South Africa, despite the Special Rapporteur taking note that punitive denial of OST causing withdrawal (known as "arosto" in South Africa) constitutes inhumane and degrading punishment (Hopkins & Marie, 2017; SANPUD, Metzineres & Harm Reduction International, 2019). Studies by Agboola (and colleagues) report on consensual sex practices between incarcerated women (Agboola, 2015) and continued women to women rape in South African prisons (Agboola et al., 2020). The CEDAW 2013 report on Benin documents non(sex)-segregated prisons and the lack of access to justice for female prisoners (CEDAW, 2013a). In Burundi, the 2016 UN CEDAW reported on overcrowding, poor rations, and no sex separation in prisons (CEDAW, 2016d). The CEDAW also reports women being victims of GBVAW by other inmates and guards in Equatorial Guinea in 2012 (CEDAW, 2012b) and exposure of women prisoners to sexual violence in Eritrea in 2020 (CEDAW, 2020). In Ethiopia, the 2019 CEDAW documents on conditions for women in detention settings which include ill treatment, rape, and torture (CEDAW, 2019a). The 2015 CEDAW report on Gambia documents violence and rape perpetrated against women by male prisoners and guards (CEDAW, 2015a). The 2014 UN CAT reports that male and female prisoners are not segregated in prisons in Guinea (CAT, 2014b). The CEDAW also reports on this lack of segregation of the sexes in Mali, and on GBVAW by police and prison staff in Mali in 2016 (CEDAW, 2016e). The 2019 CEDAW report on Mozambique documents sexual abuse against women and LGBTI people in detention (CEDAW, 2019b). In Zambia, the 2011 CEDAW

reports on GBVAW, including rape against imprisoned women (CEDAW, 2011), and in Zimbabwe in 2020, the CEDAW documents sexual violence and abuse against women prisoners (Zimbabwe & CEDAW, 2020).

In Europe, the 2017 UN CCEDAW report on Norway takes note of the continued risk of exposure of women in prison to sexual violence and the lack of health care and drug treatment programs for women (CEDAW, 2017b). Building on a report in 2009, by the Special Rapporteur noting excessive use of solitary confinement in Denmark, allegations of women on women abuses, ill treatment of women in custody by males, and the approach not to segregate men and women in prisons (Nowak, 2009), a later investigation concludes in 2011 that given the mixed gender approach in Danish prisons there are continued needs for adequate protection measures (Denmark, 2011). The UN CAT documents the lack of guarantees of segregation in Swiss prisons (Friedrich-Ebert-Stiftung (Bonn), 2015a). In France, the UN CEDAW 2016 reports that female prisons are overcrowded, with inadequate access to health care and with high risk of suicide and forced psychiatric hospitalization (CEDAW, 2016f) The 2017 UN CAT report documents increased interprisoner violence, including sexual violence among female prisoners, and violent assault of staff in Ireland (CAT, 2017b). GBVAW in police detention was also observed in the UK (Children's Rights Alliance for England, 2013). In Italy (CEDAW, 2017c) and in Montenegro (CEDAW, 2017d) in 2017, CEDAW comments on the lack of access to health services (including OST) and reports of sexual harassment by male guards for women in detention. The 2017 UN CAT reports on the excessive use of force by police against women on arrest and when in pre-trial detention in Bulgaria (CAT, 2017c). Further, in 2019 the Special Rapporteur on Violence against Women reports on inadequate access to gender-specific medical care for women in Bulgarian prisons (Šimonović, 2019). The 2019 UN CAT report on Cyprus describes overcrowding and lack of privacy/health concerns in women's prisons (CAT, 2019). The UN CEDAW in 2016 documents GBVAW in the form of sexual violence and torture in Turkish prisons (CEDAW, 2016g). In 2016, there was one case against the Ukraine at the European Court of Human Rights regarding the use of restraints of women during medical examination in 2016 (see *Korneykova and Korneykov v. Ukraine*; European Court of Human Rights, 2020). The UN CEDAW reports on conditions and potential risks for exposure to violence experienced by refugee, migrant and asylum seeking women held in Greek reception centers (CEDAW, 2013b). Two 2020 regional European reviews reveal GBVAW in immigration detention settings (Lungu Byrne et al., 2020; Van Hout et al., 2020), with sources from Spanish prisons and Swedish/UK pre-removal settings referring to the denial of medical and mental health care; verbal abuse, random checks by male guards and lack of privacy reported by women (Arshad et al., 2018; Puthoopparambil et al., 2015; Ruiz-Garcia & Castillo-Algarra, 2014; Smith, 2017). The 2015 Report of the Working Group on the issue of discrimination against women in law and in practice on Spain refers to the situation of women in prison (UN Human Rights Council Working Group on Discrimination Against Women in Law and in Practice, 2015). Invasive searches are reported in female prisons in Spain alongside excessive prescription of psychotropic drugs as control measure by authorities (SANPUD, Metzineres & Harm Reduction International, 2019). In Central Asia, the 2010 Working Group on Arbitrary Detention documents its concern on proportionality of sentences for women in Armenia (UN Human Rights Council Working Group on Arbitrary Detention, 2010). Poor conditions are reported in Tajikistan female prisons (UN Human Rights Committee, 2019). In 2017, the UN CAT documents violence, physical and psychological pressures, and abuse (including rape) against women in prison in Turkmenistan (CAT, 2017d). The UN CEDAW reports in 2015 on concerning conditions for women in detention in Uzbekistan and the lack of conducive environment for lodging complaints about their treatment, underpinned by the intersectionality of discrimination, sexual humiliation, threats of sexual violence by public officials when in custody, forced sterilization, ill treatment and abuse of women human rights defenders in detention (CEDAW, 2015b).

Australia reports comparable rates of violence against male and female prisoners (Schneider et al., 2011) but with a continued process to adapt male policies and programs in prisons (Easteal et al., 2015) and a significant reduction in strip searching of women since 2014 (Wachirs et al., 2014). However, the UN CAT reports on sexual violence perpetrated by male prison officers and practices of strip searches, as well as high rates of mental health disorders and insufficient access to care in Australian prisons in 2018 (CEDAW, 2018). In 2017, in Thailand, the CEDAW committee documents the overcrowded and ill-resourced prison settings for women and the practice of invasive body searches conducted on women in prison (CEDAW, 2017e). The UN CAT report on Cambodia, in 2011, reports on violent abuses by prison management committees, the housing of male and female detainees together, and the use of male prison guards to guard female detainees due to limited staff (CAT, 2011) and in 2019 documents very poor congested conditions for women, including the detention of women in pre-trial detention mixed with convicted offenders (CEDAW, 2019c). The 2012 CEDAW report on Indonesia notes a concerning lack of protection to women in custody, reports of sexual abuse of women in police detention, and challenges in the disclosure by women of such abuses (CEDAW, 2012c). The Special Rapporteur on torture reports substandard conditions and abuses against detained women in Papua New Guinea in 2011. The report describes how women are often not separated from men in police custody, not protected from male inmates (at risk of collective rapes); are in danger of sexual and other abuses in exchange for favors or release from police custody, forced to perform domestic work for officers, including the collecting of male detainees bags and bottles filled with urine and excrement; and with severe lack of access to medical care and basic needs (UN Human Rights Council Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 2011). In South Asia, the 2014

Special Rapporteur on Violence Against Women notes a significant lack of adequate protection measures to ensure safety of female inmates, including from gender-related killings, and lack of access to essential medical care in India (Manjoo & UN Human Rights Council Special Rapporteur on Violence Against Women, 2014). In East Asia, the 2014 CEDAW report on China documents the increase of women in detention, overcrowding contributing to risk of violence, and presence of extra-legal detention facilities ("black jails"; CEDAW, 2014b). In Korea, the 2017 CEDAW report documents the grave situation of women in detention, who are particularly vulnerable to sexual violence, including rape by State officials; the absence of adequate, independent, and confidential complaint mechanisms; the detention of repatriated women on the criminal charge of "illegal border crossing" and who are "in addition to suffering sexual violence, are at risk of death in detention, subjected to forced abortions and deprived of their right to a fair trial" (CEDAW, 2017f) . In 2013, the UN CAT reports on overcrowding in Japanese women's prisons and the use of restraints (*Type II* handcuffs and strait jackets) (CAT, 2013b).

With regard to the Middle East, the UN CAT documents allegations of gender-based violence, including torture, ill treatment and rape, against women in detention in Iraq in 2015 (Friedrich-Ebert-Stiftung (Bonn), 2015b). There are reports about rape, sexual abuse, and GBVAW in female prisons in Yemen in 2010 (CAT, 2010) and in Syria from non-state-armed groups as well as from forces of the government in 2014 (CEDAW, 2014c). In Libya, the OHCHR reports about sexual violence against women in detention from guards as well as from non-state actors in 2016 (UN OHCHR, 2016). In 2017, the CEDAW reports on the limited access to justice for Palestinian women in detention in Israel (CEDAW, 2017g). The UN CAT documents poor conditions in female prisons and the use of solitary confinement for long periods in prisons in Afghanistan in 2017 (CAT, 2017e).

Conclusive Remarks

Although it is beyond the scope of this global legal realist assessment to engage in a very detailed country-level review, we wish to highlight the continued breaches of the *Bangkok Rules* at the global level as they pertain to the conditions of women in detention since adoption, particularly the prevention of and protection from custodial violence when deprived of their liberty. Gender inequity and inequality is pervasive. Although custodial violence in essence violates the internationally recognized prohibition on cruel, inhuman or degrading treatment or punishment, it remains a largely hidden and sensitive topic for both genders when deprived of liberty, with insufficient surveillance of the issue, coercion threatening disclosure (particularly for women), very low rates of perpetrator accountability, and scant prevalence data available at the global level (Amnesty International USA, 2011).

We document the precarious situation of women in prisons, and continued evidence of systemic failures to protect them from custodial GBVAW and other gender-sensitive human rights breaches worldwide, and take note of the dearth of information in many countries worldwide. We highlight three central aspects that hinder the full implementation of the Bangkok Rules: the past decade of continued invisible nature of women as prisoners in the system; the continued legitimization, normalization, trivialization of violence under the pretext of security within their daily lives; the unawareness and disregard of international (Bangkok) rules; and the task to organize different modes of incarceration environment for (female) prisoners who committed nonviolent crimes. Human rights violations encountered by women in the criminal justice and penal systems continue worldwide. Many countries have not fully adopted the Bangkok and Tokyo Rules, leading to congestion and overcrowding in female prisons, lack of protection against violence, particularly when housed in nonsegregated prisons, either perpetrated by officials or by fellow inmates (of both genders), use of psychotropic and physical restraints, arbitrary detention and solitary confinement, and the lack of full access to gender specific medical care, trauma-informed and trauma-responsive mental health supports, and drug treatment (for instance, OST). Inadvertently, our realist account highlights the continued lack of resourcing of female prisons, lack of implementation of noncustodial sentencing for minor and nonviolent offenses, lack of consideration of GBVAW, exploitation and trauma-related pathways into crime (largely poverty or drug-related), and overall lack of oversight in disclosure and penal complaint mechanisms where GBVAW is perpetrated in the closed setting.

These insights give a well-founded basis for relevant UN agencies (UN Women, UN Office of Drug and Crime, UN Development Program, UNAIDS, and others) and the World Health Organization to provide technical assistance and promote further improvements and penal reforms worldwide. Moreover, this gives a substantiated starting point for human rights organizations such as Amnesty International, the Howard League for Penal Reform, Penal Reform International, and Harm Reduction International to appoint targeted and fitting actions to reduce GBVAW in custodial settings. See Table 3.

Further, we wish to underscore how this neglect not only constitutes grave human rights abuses but also fuels self-harm, suicide, psychiatric disorders and deaths, and the spread of disease (HIV, Hepatitis C) bridging between prisons and communities. Addressing disease hinges on prison system approached and parameters to address physical and sexual violence in prisons, trauma-related mental health issues, and unsafe injecting of drugs. UN reporting continues to highlight such issues globally where women are discriminated and treated in an unequal manner, alongside the dearth of academic research and access of research teams into prisons (Mhlanga-Gunda et al., 2019). It is further lamentable that despite global prison release schemes during COVID-19 that women including those convicted on minor, nonviolent or drug offenses have been largely overlooked, thereby exposing them to continued

Table 3. Global Implications for Penal Reform and Monitoring of Standards.

Penal policy
Address the invisible nature of women in prison and correctional policies at the government and regional levels.
Enhance visibility of the Bangkok Rules and the rights assurances of women in policy and regional reports.
Strive to ensure sex segregation, minimum standards of care and reasonable safe accommodation are provided.
Strive to eliminate all forms of custodial violence.
Technical assistance for enhanced prison systems
Address the invisible nature of women in prison and correctional procedures through staff training and awareness raising.
Support vigilance against all forms of custodial violence in practice and facilitate disclosure for those affected.
Ensure all who work in the custodial setting are aware of women's exposure to GBVAW, exploitation, and trauma-related pathways into crime (largely poverty or drug-related)
Ensure that incarcerated women have access to gender-specific medical care, trauma- informed, and trauma-responsive mental health supports.
Ensure that noncustodial sentences are applied where possible for minor or nonviolent offenses, alongside other prison decongestion measures.
Research, surveillance, and monitoring
Encourage continued research activity in the field of prison health worldwide.
Encourage continued independent inspections, monitoring, and surveillance of prison standards worldwide.

violence, trauma, and harm (Penal Reform International, 2020d; Van Hout, 2020).

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ORCID iD

Marie Claire Van Hout https://orcid.org/0000-0002-0018-4060

References

Agboola, C. (2015). Consensual same-sex sexual relationships in South African female prisons. *Gender and Behaviour*, *13*(2), 6658–6667.

Agboola, C., Kang'ethe, S., & Mohapi, B. J. (2020). Unpacking women to women rape within correctional centres in South Africa. *Acta Criminologica: African Journal of Criminology & Victimology*, *33*(2), 75.

Amnesty International USA. (2011). *Not part of her sentence: Violations of the human rights of women in custody*. Retrieved February 9, 2021, from https://www.amnestyusa.org/reports/usa-not-part-of-my-sentence-violations-of-the-human-rights-of-women-in-custody/

Andrews, N., & Hackman, M. (2020, September 16). U.S. opens investigation into claim of forced hysterectomies on detained immigrants. *Wall Street Journal*. Retrieved June 18, 2021, from https://www.wsj.com/articles/lawmakers-seek-investigation-into-allegations-of-mass-hysterectomies-on-detained-migrants-11600291610

Arshad, F., Haith Cooper, M., & Palloti, P. (2018). The experiences of pregnant migrant women in detention: A qualitative study. *British Journal of Midwifery*, *26*(9), 591–596.

Barbaret, R., Jackson, C., & Jay, J. (2017). UN rules for the treatment of women prisoners and non-custodial sanctions for women offenders (the Bangkok Rules): A gendered critique. *Papers*. *102/2*, 215–230.

Batista, V., Marcon, S., Peruzzo, H., Ruiz, A., Reis, P., Nunes da Silva, A., & Mandú, E. (2020). Prisoners of suffering: Perception of women on violence practiced by intimate partners. *Revista Brasileira de Enfermagem*, *73*(suppl.1), e20190219. https://doi.org/10.1590/0034-7167-2019-0219

Berzano, P. (n.d.). *The Bangkok rules: An international response to the needs of women offenders*. Retrieved February 9, 2021, from https://www.unafei.or.jp/publications/pdf/RS_No90/No90_11VE_Barzano.pdf

Bryant, M. (2020, September 21). Allegations of unwanted Ice hysterectomies recall grim time in US history. *Guardian*. Retrieved June 18, 2021, from https://www.theguardian.com/us-news/2020/sep/21/unwanted-hysterectomy-allegations-ice-georgia-immigration

Bronson, J., Stroop, J., Zimmer, S., & Berzofsky, M. (2017). *Drug use, dependence, and abuse among state prisoners and jail inmates, 2007-2009*. US Department of Justice. Retrieved February 9, 2021, from https://www.ncjrs.gov/App/Publications/abstract.aspx?ID=272712

Bureau of Justice Statistics. (2014). *Sexual victimization reported by adult correctional authorities. 2009–11*. Retrieved February 2, 2021, from https://www.bjs.gov/content/pub/pdf/svraca0911.pdf

Chartrand, V. (2015). Landscapes of violence. Women and Canadian prisons. *Champ pénal/Penal field* [En ligne], Vol. XII | 2015, mis en ligne le 13 février 2019, consulté le 11 février 2021. Retrieved February 9, 2021, from http://journals.openedition.org/champpenal/9158 https://doi.org/10.4000/champpenal.9158

Children's Rights Alliance for England. (2013). *Speaking freely, children and young people in Europe talk about ending violence against children in custody*, 2013. Retrieved February 2, 2021, from https://resourcecentre.savethechildren.net/library/speaking-freely-children-and-young-people-europe-speak-about-ending-violence-against

Cornell Law School's Avon Global Center for Women and Justice and International Human Rights Clinic; Defensoría General de la Nación Argentina & The University of Chicago Law School International Human Rights Clinic. (2013). *Women in prison in Argentina: Causes, conditions and consequences*. Retrieved February 9, 2021, from http://fileserver.idpc.net/library/Women_in_prison_in_Argentina.pdf

Denmark. (2011). *Consideration of reports submitted by states parties under article 19 of the convention pursuant to the optional reporting procedure, sixth and seventh periodic reports of states parties due in 2011*. Denmark (Report No. CAT/C/DNK/6-7). Geneva: UN, January 6, 2015.

Easteal, P., Bartels, L., Fitch, E., & Watchirs, H. (2015). Females in custody in the act: Gendered issues and solutions. *Alternative Law Journal*, *40*(1), 18–22. https://doi.org/10.1177/1037969X1504000105

Ervin, S., Jagannath, J., Zweig, J., Willison, J., Jones, K., & Maskolunas, K. (2020). *Addressing trauma and victimization in women's prisons*. Retrieved February 9, 2021, from https://cdpsdocs.state.co.us/ccjj/Resources/Ref/2020-10_Addressing-Trauma-Victimization-Womens-Prisons_ExecSumm.pdf

European Court of Human Rights. (2020). *Guide on the case-law of the European Convention on human rights: Prisoner rights*. Retrieved February 9, 2021, from https://www.echr.coe.int/Documents/Guide_Prisoners_rights_ENG.pdf

Friedrich-Ebert-Stiftung (Bonn). (2015a). *Concluding observations on the seventh periodic report of Switzerland: Committee against torture* (Report No. CAT/C/CHE/CO/7). Geneva: UN, September 7, 2015.

Friedrich-Ebert-Stiftung (Bonn). (2015b). *Concluding observations on the initial report of Iraq: Committee against torture* (Report No. CAT/C/IRQ/CO/1). Geneva: UN, September 7, 2015.

Fuentes, C. M. (2014). Nobody's child: The role of trauma and interpersonal violence in women's pathways to incarceration and resultant service needs. *Medical Anthropology Quarterly*, *28*(1), 85–104.

Gadama, L., Thakwalaka, C., Mula, C., Mhango, V., Banda, C., Kewley, S., Hillis, A., & Van Hout, M. C. (2020). 'Prison facilities were not built with a woman in mind': An exploratory multi-stakeholder study on women's situation in Malawi prisons. *International Journal of Prisoner Health*, *16*(3), 303–318. 10.1108/IJPH-12-2019-0069

Gama-Araujo, I., Bezarra Filho, J., Kerr, L., Kendall, C., Macena, R., Mota, R., Ferreira, M., & Neto, M. (2020). Physical violence inside female prisons in Brazil: Prevalence and related factors. *Ciência & Saúde Coletiva*, *25*(2), 623–632. 10.1590/1413-81232020252.10842018

Ghandakly, E. C., & Fabi, R. (2021). Sterilization in US immigration and customs enforcement's (ICE's) detention: Ethical failures and systemic injustice. *American Journal of Public Health*, *111*(5), 832–834.

Giacomello, C. (2020). Arbitrary detention and compulsory drug treatment in Mexico: A forsaken face of female incarceration. Retrieved February 9, 2021, from https://www.penalreform.org/blog/arbitrary-detention-and-compulsory-drug-treatment-in-mexico/

Harrison, V. (2020). CEDAW disapproves: The United States' treatment of transgender women in prisons. *DePaul Journal for Social Justice*. Retrieved February 2, 2021, from https://via.library.depaul.edu/jsj/vol13/iss2/2

Hopkins, R, & Marie, Claire. (2017). '*This is what life in prison is really like for women in South Africa*' *Wits justice project*. University of the Witwatersrand. Retrieved February 10, 2021, from https://www.witsjusticeproject.co.za/investigative-journalism/this-is-what-life-in-prison-is-really-like-for-women-in-south-africa

Huber, A. (2016). *Women in criminal justice systems and the added value of the UN Bangkok rules. Briefing Paper*. Penal Reform International. Retrieved February 9, 2021, from https://cdn.penalreform.org/wp-content/uploads/2015/04/Added-value-of-the-Bangkok-Rules-briefing-paper_final.pdf

Human Rights Watch. (2018). *Submission to the UN working group on discrimination against women in law and practice*. Retrieved February 9, 2021. https://www.hrw.org/news/2018/10/01/human-rights-watch-submission-un-working-group-discrimination-against-women-law-and

Jones, M. S. (2020). Exploring coercive control, PTSD, and the use of physical violence in the pre-prison heterosexual relationships of incarcerated women. *Criminal Justice and Behavior*, *47*(10), 1299–1318, https://doi.org/10.1177/0093854820920661

Karlsson, M. E., & Zielinski, M. J. (2020). Sexual victimization and mental illness prevalence rates among incarcerated women: A literature review. *Trauma Violence & Abuse*, *21*(2), 326–349.

Kelly, P. J., Cheng, A. L., Spencer-Carver, E., & Ramaswamy, M. (2014). A syndemic model of women incarcerated in community jails. *Public Health Nursing*, *31*(2), 118–125.

Kottler, C., Smith, J., & Bartlett, A. (2018). Patterns of violence and self-harm in women prisoners: Characteristics, co-incidence and clinical significance. *Journal of Forensic Psychiatry & Psychology*, *29*(4), 617–634.

Kubiak, S. P., Brenner, H. J., Bybee, D., Campbell, R., Cummings, C., Darcy, K., Fedock, G., & Goodman-Williams, R. (2017). Sexual misconduct in prison: What factors affect whether incarcerated women will report abuses committed by prison staff? *Law and Human Behavior*, *41*(4), 361–374. 10.1037/lhb0000239

Laws, B. (2019). The return of the suppressed: Exploring how emotional suppression reappears as violence and pain among male and female prisoners. *Punishment & Society-International Journal of Penology*, *21*(5), 560–577.

Leiter, B. (2015). Legal realism and legal doctrine. *University of Pennsylvania Law Review*, *163*, 1975–1984.

Lenihan, T. (2020). *Addressing the 105,000 increase in the global female prison population, ten years after the Bangkok rules were adopted*. Retrieved February 17, 2021, from https://www.penalre

form.org/blog/addressing-the-105000-increase-in-the-global-female/

Lenzer, J. (2020). "Mass hysterectomies" were carried out on migrants in US Detention Centre, claims whistleblower. *BMJ*, *370*, m3615. 10.1136/bmj.m3615

Lungu Byrne, C., Germain, J., Plugge, E., & Van Hout, M. C. (2020). Contemporary migrant prisoners' health experiences, unique prison healthcare needs and health outcomes in European prisons and detention settings. *International Journal of Forensic Mental Health*, *20*(1), 80–99. 10.1080/14999013.2020.1821129

Lynch, S. M., Fritch, A., & Heath, N. (2012). Looking beneath the surface: The nature of incarcerated women's experiences of interpersonal violence, treatment needs, and mental health. *Feminist Criminology*, *7*(4), 381–400.

Manjoo, R. & UN Human Rights Council Special Rapporteur on Violence Against Women. (2014). *Report of the special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo: Addendum* (Report No. A/HRC/26/38/Add.1). Geneva: UN, April 1, 2014.

McCulloch, J., & George, A. (2009). Naked power. Strip searching in womens' prisons. In P. Scraton & J. McCulloch (Eds.), *The violence of incarceration* (pp. 107–123). Routledge.

Meyer, I. H., Flores, A., Stemple, L., Romero, A., Wilson, B., & Herman, J. (2017). Incarceration rates and traits of sexual minorities in the United States: National Inmate Survey, 2011–2012. *American Journal of Public Health*, *107*(2), 267–273.

Mhlanga-Gunda, R., Motsomi, N., Plugge, E., & Van Hout, MC. (2019). Challenges in ensuring robust and ethical health research and the reporting of health outcomes and standards in sub-Saharan African prisons. *Lancet Global Health*, *8*(1), e25–e26.

Nakitanda, A., Montanari, L., Tavoschi, L., Mozalevskis, A., & Duffel, E. (2020). Hepatitis C virus infection in EU/EEA and United Kingdom prisons: Opportunities and challenges for action. *BMC Public Health*, *20*, 1670. 10.1186/s12889-020-09515-6

Nowak, M.,United Nations Human Rights Council. Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. (2008). *Report of the special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak* (Report No. A/HRC/7/3). Geneva: UN, January 15, 2008.

Nowak, M.,United Nations Human Rights Council. Special Rapporteur on Torture and other Cruel, inhuman or degrading treatment or punishment. (2009). *Report of the special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, on his mission to Denmark* (Report No. A/HRC/10/44/Add.2). Geneva: UN, February 18, 2009.

Penal Reform International. (2017a). *Women in detention. Putting the UN Bangkok rules on women prisoners into practice*. Retrieved February 9, 2021, from https://www.penalreform.org/resource/women-detention-putting-bangkok-rules-practice/

Penal Reform International. (2017b). *Women in detention. A guide to gender sensitive monitoring*. Retrieved February 9, 2021, from https://cdn.penalreform.org/wp-content/uploads/2016/01/women-in-detention-2nd-ed-v7.pdf

Penal Reform International. (2020a). *Global prison trends*. Retrieved February 9, 2021, from https://www.penalreform.org/resource/global-prison-trends-2020/#:~:text=PRI%20advocates%20for%20an%20increase,Crime%2C%20justice%20and%20imprisonment

Penal Reform International. (2020b). Alternatives to imprisonment. In: *Global prison trends 2020*. Retrieved February 9, 2021, from https://cdn.penalreform.org/wp-content/uploads/2020/05/Global-Prison-Trends-2020-Penal-Reform-International-Second-Edition.pdf

Penal Reform International. (2020c). *Women in prison: Mental health and well-being: A guide for prison staff*. Retrieved February 9, 2021, from https://cdn.penalreform.org/wp-content/uploads/2020/02/PRI-Women-in-prison-and-mental-well-being.pdf

Penal Reform International. (2020d). *Coronavirus preventing harm and human rights violations in criminal justice systems recommendations for urgent and systemic reform to prevent and address human rights violations of people in detention and serving sentences in the community, in the context of COVID-19. COVID*. Retrieved February 2, 2021, from https://cdn.penalreform.org/wp-content/uploads/2020/07/Coronavirus-briefing-July-2020.pdf

Penal Reform International. (2021a). *Women in the criminal justice system: Key facts*. Retrieved February 9, 2021, from https://www.penalreform.org/issues/women/key-facts/

Penal Reform International. (2021b). *The issue*. Retrieved February 9, 2021, from https://www.penalreform.org/issues/women/issue/

Perez, D. M., Gover, A. R., Tennyson, K. M., & Santos, S. D. (2014). Individual and institutional characteristics related to inmate victimization. *International Journal of Offender Therapy and Comparative Criminology*, *54*(3), 378–394.

Puthoopparambil, S. J., Ahlberg, B. M., & Bjerneld, M. (2015). A prison with extra flavours: Experiences of immigrants in Swedish immigration detention centres. *International Journal of Migration, Health and Social Care*, *11*(2), 73–85.

Ruiz-Garcıa, M., & Castillo-Algarra, J. (2014). Experiences of foreign women in Spanish prisons. *Journal of Offender Rehabilitation*, *53*(8), 587–599.

SANPUD, Metzineres & Harm Reduction International. (2019). *Harm reduction for women in prison*. Retrieved February 9, 2021, from https://www.hri.global/files/2020/06/10/Harm_Reduction_for_Women_in_Prison_2.pdf

Scherer, Z. A. P., & Scherer, E. A. (2011). P03-514—Female prisoners: Experiences and perceptions on violence in the world behind bars. *European Psychiatry*, *26*, 1648.

Schneider, K., Richters, J., Butler, T., Yap, L., Richards, A., Grant, L., Smith, A., & Donovan, B. (2011). Psychological distress and experience of sexual and physical assault among Australian prisoners. *Criminal Behaviour and Mental Health*, *21*(5), 333–349. https://doi.org/10.1002/cbm.816

Seddiqui, K. (2015). Graham V. Sheriff of Logan county: Coercion in rape and the plight of women prisoners. *Denver University Law Review*, *92*(3), 671–696.

Šimonović, D. (2019). *Official visit to Bulgaria, 14-21 October 2019 by United Nations Special Rapporteur on violence against women, its causes and consequences, Dubravka Šimonović end of mission statement*. Retrieved February 16, 2021, from https://www.oh

chr.org/FR/NewsEvents/Pages/DisplayNews.aspx?NewsID=25173&LangID=E

Smith, J. (2017). Death, disease and indignity: Serious health and human rights concerns persist in UK immigration detention facilities. *Journal of Public Health*, *40*(1), 212–221.

Special Rapporteur on Prisons and Conditions of Detention in Africa. (2012, October 9–22). *Report of the rapporteur on prisons and conditions of detention in Africa*. Presented by Hon. Commissioner Med S.K Kaggwa, At the 52nd Ordinary Session of the African Commission on Human and Peoples' Rights, Yamoussoukro, Côte d'Ivoire. Retrieved February 2, 2021, from https://www.achpr.org/sessions/intersession?id=144

Stern, E. (2018). Accessing accountability: Exploring criminal prosecution of male guards for sexually assaulting female inmates in US prisons. *University of Pennsylvania Law Review*, *167*, 733.

Tripodi, S. J., & Pettus-Davis, C. (2013). Histories of childhood victimization and subsequent mental health problems, substance use, and sexual victimization for a sample of incarcerated women in the US. *International Journal of Law and Psychiatry*, *36*(1), S30–40.

Thomson, N. D., Vassileva, J., Kiehl, K., Reidy, D., Aboutanos, M., McDougle, R., & DeLisi, M. (2019). Which features of psychopathy and impulsivity matter most for prison violence? New evidence among female prisoners. *International Journal of Law and Psychiatry*, *64*, S26–33.

United Nations (1955) Standard Minimum Rules for the Treatment of Prisoners (30 August 1955), United Nations, Geneva.

United Nations Committee Against Torture (44th sess.: 2010: Geneva). (2010). *Concluding observations of the committee against torture: Yemen* (Report No. CAT/C/YEM/CO/2/Rev.1). Geneva: UN, May 25, 2010.

United Nations Committee Against Torture (45th sess.: 2010: Geneva). (2011). *Concluding observations of the committee against torture: Cambodia* (Report No. CAT/C/KHM/CO/2). Geneva: UN, January 20, 2011.

United Nations Committee Against Torture (50th sess.: 2013: Geneva). (2013a). *Concluding observations on the 2nd periodic report of the Plurinational State of Bolivia as approved by the Committee at its 50th session, 6-31 May 2013: Committee against torture* (Report No. CAT/C/BOL/CO/2). Geneva: UN, June 14, 201.

United Nations Committee Against Torture (50th sess.: 2013: Geneva). (2013b). *Concluding observations on the 2nd periodic report of Japan, adopted by the committee at its 50th session, 6-31 May 2013: Committee against torture* (Report No. CAT/C/JPN/CO/2). Geneva: UN, June 28, 2013.

United Nations Committee Against Torture (53rd sess.: 2014: Geneva). (2014a). *Concluding observations on the combined 3rd to 5th periodic reports of the United States of America: Committee against torture* (Report No. CAT/C/USA/CO/3-5). Geneva: UN, December 19, 2014

United Nations Committee Against Torture (52nd sess.: 2014: Geneva). (2014b). *Concluding observations on Guinea in the absence of its initial report: Committee against torture* (Report No. CAT/C/GIN/CO/1) Geneva: UN, June 20, 2014.

United Nations Committee Against Torture (60th sess.: 2017: Geneva). (2017a). *Concluding observations on the combined 5th and 6th periodic reports of Argentina: Committee against torture* (Report No. CAT/C/ARG/CO/5-6). Geneva: UN, May 24, 2017.

United Nations Committee Against Torture (61st sess.: 2017: Geneva). (2017b). *Concluding observations on the second periodic report of Ireland: Committee against torture* (Report No. CAT/C/IRL/CO/2). Geneva: UN, August 31, 2017.

United Nations Committee Against Torture (62nd sess.: 2017: Geneva). (2017c). *Concluding observations on the sixth periodic report of Bulgaria* (Report No. CAT/C/BGR/CO/6). Geneva: UN, December 15, 2017.

United Nations Committee Against Torture (59th sess.: 2016: Geneva). (2017d). *Concluding observations on the second periodic report of Turkmenistan: Committee against torture* (Report No. CAT/C/TKM/CO/2). Geneva: UN, January 23, 2017.

United Nations Committee Against Torture (60th sess.: 2017: Geneva). (2017e). *Concluding observations on the second periodic report of Afghanistan* (Report No. CAT/C/AFG/CO/2). Geneva: UN, June 12, 2017.

United Nations Committee Against Torture (65th sess.: 2018: Geneva). (2018). *Concluding observations on the 7th periodic report of Guatemala: Committee against torture* (Report No. CAT/C/GTM/CO/7). Geneva: UN, December 26, 2018.

United Nations Committee Against Torture (68th sess.: 2019: Geneva). (2019). *Concluding observations on the fifth periodic report of Cyprus* (Report No. CAT/C/CYP/CO/5). Geneva: UN, December 23, 2019.

United Nations Committee on the Elimination of Discrimination Against Women (45th sess.: 2010: Geneva). (2010). *Concluding observations of the committee on the elimination of discrimination against women: Panama* (Report No. CEDAW/C/PAN/CO/7). New York: UN, February 5, 2010.

United Nations Committee on the Elimination of Discrimination Against Women (49th sess.: 2011: New York). (2011). *Concluding observations of the committee on the elimination of discrimination against women: Zambia* (Report No. CEDAW/C/ZMB/CO/5-6). Geneva: UN, September 19, 2011.

United Nations Committee on the Elimination of Discrimination Against Women (51st sess.: 2012: Geneva). (2012a). *Concluding observations of the committee on the elimination of discrimination against women: Brazil* (Report No. CEDAW/C/BRA/CO/7). Geneva: UN, March 23, 2012.

United Nations Committee on the Elimination of Discrimination Against Women (53 rd sess.: 2012: Geneva). (2012b). *Concluding observations on the 6th periodic report of Equatorial Guinea, adopted by the committee at its 53 rd session (1-19 October 2012): Committee on the elimination of discrimination against women* (Report No. CEDAW/C/GNQ/CO/6). Geneva: UN, November 9, 2012.

United Nations Committee on the Elimination of Discrimination Against Women (52nd sess.: 2012: New York). (2012c). *Concluding observations of the committee on the elimination of discrimination against women: Indonesia* (Report No. CEDAW/C/IDN/CO/6-7). New York: UN, August 7, 2012.

United Nations Committee on the Elimination of Discrimination Against Women (56th sess.: 2013: Geneva). (2013a). *Concluding observations on the 4th periodic report of Benin: Committee on the*

elimination of discrimination against women (Report No. CEDAW/C/BEN/CO/4). New York: UN, October 28, 2013.

United Nations Committee on the Elimination of Discrimination Against Women (54th sess.: 2013: New York). (2013b). *Concluding observations on the 7th periodic of Greece* (Report No. CEDAW/C/GRC/CO/7). Geneva: UN, March 26, 2013.

United Nations Committee on the Elimination of Discrimination Against Women (59th sess.: 2014: New York). (2014a). *Concluding observations on the combined 7th and 8th periodic reports of the Bolivarian Republic of Venezuela: Committee on the elimination of discrimination against women* (Report No. CEDAW/C/VEN/CO/7-8). New York: UN, November 14, 2014.

United Nations Committee on the Elimination of Discrimination Against Women (59th sess.: 2014: Geneva). (2014b). *Concluding observations on the combined seventh and eighth periodic reports of China: Committee on the elimination of discrimination against women* (Report No. CEDAW/C/CHN/CO/7-8). New York: UN, November 14, 2014.

United Nations Committee on the Elimination of Discrimination Against Women (58th sess.:2014: Geneva). (2014c). *Concluding observations on the 2nd periodic report of the Syrian Arab Republic: Committee on the elimination of discrimination against women* (Report No. CEDAW/C/SYR/CO/2). New York: UN, July 24, 2014.

United Nations Committee on the Elimination of Discrimination Against Women (61st sess.: 2015: Geneva). (2015a). *Concluding observations on the combined 4th and 5th periodic reports of Gambia: Committee on the elimination of discrimination against women* (Report No. CEDAW/C/GMB/CO/4-5). New York: UN, July 28, 2014.

United Nations Committee on the Elimination of Discrimination Against Women (62nd sess.: 2015: Geneva). (2015b). *Concluding observations on the fifth periodic report of Uzbekistan: Committee on the elimination of discrimination against women* (Report No. CEDAW/C/UZB/Q/5). New York: UN, March 17, 2015.

United Nations Committee on the Elimination of Discrimination Against Women (65th sess.: 2016: Geneva). (2016a). *Concluding observations on the combined 8th and 9th periodic reports of Canada: Committee on the elimination of discrimination against women* (Report No. CEDAW/C/CAN/CO/8-9). New York: UN, November 25, 2016.

United Nations Committee on the Elimination of Discrimination Against Women (65th sess.: 2016: Geneva). (2016b). *Concluding observations on the 7th periodic report of Argentina: Committee on the elimination of discrimination against women* (Report No. CEDAW/C/ARG/CO/7). New York: UN, 25 Nov, 2016.

United Nations Committee on the Elimination of Discrimination Against Women (64th sess.: 2016: Geneva). (2016c). *Concluding observations on the combined 8th and 9th periodic reports of Uruguay: Committee on the elimination of discrimination against women* (Report No. CEDAW/C/URY/CO/8-9) New York: UN, July 25, 2016.

United Nations Committee on the Elimination of Discrimination Against Women (65th sess.: 2016: Geneva). (2016d). *Concluding observations on the combined 5th and 6th periodic reports of Burundi: Committee on the elimination of discrimination against women* (Report No. CEDAW/C/BDI/CO/5-6). New York: UN, November 25, 2016.

United Nations Committee on the Elimination of Discrimination Against Women (64th sess.: 2016: Geneva). (2016e). *Concluding observations on the combined 6th and 7th periodic reports of Mali: Committee on the elimination of discrimination against women* (Report No. CEDAW/C/MLI/CO/6-7). New York: UN, July 25, 2016.

United Nations Committee on the Elimination of Discrimination Against Women (64th sess.: 2016: Geneva). (2016f). *Concluding observations on the combined seventh and eighth periodic reports of France: Committee on the elimination of discrimination against women* (Report No. CEDAW/C/FRA/CO/7-8). New York: UN, July 25, 2016.

United Nations Committee on the Elimination of Discrimination Against Women (64th sess.: 2016: Geneva). (2016g). *Concluding observations on the 7th periodic report of Turkey: Committee on the elimination of discrimination against women* (Report No. CEDAW/C/TUR/CO/7) New York: UN, July 25, 2016.

United Nations Committee on the Elimination of Discrimination Against Women (68th sess.: 2017: Geneva). (2017a). *Concluding observations on the 7th periodic report of Paraguay: Convention on the elimination of all forms of discrimination against women* (Report No. CEDAW/C/PRY/CO/7). New York: UN, November 22, 2017.

United Nations Committee on the Elimination of Discrimination Against Women (68th sess.: 2017: Geneva). (2017b). *Concluding observations on the ninth periodic report of Norway:* Convention on the *elimination of all forms of discrimination against women* (Report No. CEDAW/C/NOR/CO/9). New York: UN, November 22, 2017.

United Nations Committee on the Elimination of Discrimination against Women (67th sess.: 2017: Geneva). (2017c). *Concluding observations on the seventh periodic report of Italy:* Committee on the *elimination of discrimination against women* (Report No. CEDAW/C/ITA/CO/7). New York: UN, July 24, 2017.

United Nations Committee on the Elimination of Discrimination Against Women (67th sess.: 2017: Geneva). (2017d). *Concluding observations on the 2nd periodic report of Montenegro:* Committee on the *elimination of discrimination against women* (Report No. CEDAW/C/MNE/CO/2). New York: UN, July 24, 2017.

United Nations Committee on the Elimination of Discrimination Against Women (67th sess.: 2017: Geneva). (2017e). *Concluding observations on the combined sixth and seventh periodic reports of Thailand:* Committee on the *elimination of discrimination against women* (Report No. CEDAW/C/THA/CO/6-7). New York: UN, July 24, 2017.

United Nations Committee on the Elimination of Discrimination Against Women (68th sess.: 2017: Geneva). (2017f). *Concluding observations on the combined 2nd to 4th periodic reports of the Democratic People's Republic of Korea: Convention on the elimination of all forms of discrimination against women* (Report No. CEDAW/C/PRK/CO/2-4). New York: UN, November 22, 2017.

United Nations Committee on the Elimination of Discrimination Against Women (68th sess.: 2017: Geneva). (2017g). *Concluding observations of the 6th periodic report of Israel: Committee on the*

elimination of discrimination against women (Report No. CEDAW/C/ISR/CO/6). New York: UN, 17 Nov, 2017.

United Nations Committee on the Elimination of Discrimination Against Women (70th sess.: 2018: Geneva). (2018). *Concluding observations on the 8th periodic report of Australia: Committee on the elimination of discrimination against women* (Report No. CEDAW/C/AUS/CO/8). New York: UN, July 25, 2018.

United Nations Committee on the Elimination of Discrimination Against Women (72nd sess.: 2019: Geneva). (2019a). *Concluding observations on the 8th periodic report of Ethiopia: Committee on the elimination of discrimination against women* (Report No. CEDAW/C/ETH/CO/8). New York: UN, March 14, 2019.

United Nations Committee on the Elimination of Discrimination Against Women (73 rd sess.: 2019: Geneva). (2019b). *Concluding observations on the combined 3rd to 5th periodic report of Mozambique: Committee on the elimination of discrimination against women* (Report No. CEDAW/C/MOZ/CO/3-5). Geneva: UN, July 30, 2019.

United Nations Committee on the Elimination of Discrimination Against Women (74th sess.: 2019: Geneva). (2019c). *Concluding observations on the 6th periodic report of Cambodia: Committee on the elimination of discrimination against women* (Report No. CEDAW/C/KHM/CO/6). New York: UN, November 12, 2019.

United Nations Committee on the Elimination of Discrimination Against Women (75th sess.: 2020: Geneva). (2020). *Concluding observations on the 6th periodic report of Eritrea: Committee on the elimination of discrimination against women* (Report No. CEDAW/C/ERI/CO/6). New York: UN, March 10, 2020.

United Nations General Assembly. (1991a). *Basic principles for the treatment of prisoners: Resolution/adopted by the general assembly* (A/RES/45/111). New York: UN, March 28, 1991.

United Nations General Assembly. (1991b). *United Nations standard minimum rules for non-custodial measures (The Tokyo Rules): Resolution/adopted by the general assembly* (A/RES/45/110). New York: UN, April 2, 1991.

United Nations General Assembly. (2016). *United Nations standard minimum rules for the treatment of prisoners (the Nelson Mandela Rules): Resolution/adopted by the general assembly* (A/RES/70/175). New York: UN, January 8, 2016.

United Nations Human Rights Committee. (2016). *Concluding observations on the fifth periodic report of Argentina: Human Rights Committee: Draft/prepared by the committee*. 117th session, from 20 June to 15 July 2016 (Report No. CCPR/C/ARG/CO/R.5). Geneva: UN, July 5, 2016.

United Nations Human Rights Committee (126th sess.: 2019: Geneva). (2019). *Concluding observations on the third periodic report of Tajikistan: Human Rights Committee* (Report No. CCPR/C/TJK/CO/3). Geneva: UN, August 22, 2019.

United Nations Human Rights Council. Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. (2011). *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Addendum: Mission to Papua New Guinea* (Report No. A/HRC/16/52/Add.5). Geneva: UN, February 7, 2011.

United Nations Human Rights Council. Working Group on Arbitrary Detention. (2010). *Report of the working group on arbitrary detention: Addendum* (Report No. A/HRC/16/47/Add.3). Geneva: UN, February 17, 2011.

United Nations Human Rights Council. Working Group on Discrimination Against Women in Law and in Practice. (2015). *Report of the working group on the issue of discrimination against women in law and in practice: Mission to Spain* (Report No. A/HRC/29/40/Add.3). Geneva: UN, June 17, 2015.

United Nations Human Rights Office of the High Commissioner. (2016). *Targeted and tortured: UN experts urge greater protection for LGBTI people in detention* OHCHR: Geneva. Retrieved 9 February, 2021, from https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20165&LangID=E

United Nations Office on Drugs and Crime. (2008). *Handbook for prison managers and policymakers on women and imprisonment: Women and imprisonment*. Retrieved February 9, 2021, from https://www.unodc.org/documents/justice-and-prison-reform/women-and-imprisonment.pdf

United Nations Office of the High Commissioner for Human Rights. (2016). *Investigation by the office of the United Nations high commissioner for human rights on Libya: Detailed findings* (Report No. A/HRC/31/CRP.3). Geneva: UN, February 23, 2016.

United Nations Office of the High Commissioner for Human Rights. (n.d.). *Violence against women*. Retrieved February 20, 2021. https://www.ohchr.org/EN/Issues/Women/Pages/VaW.aspx

United Nations Secretariat. (2010). *United Nations rules for the treatment of women prisoners and non-custodial measures for women offenders (the Bangkok Rules): Note/by the secretariat* (A/C.3/65/L.5). New York: UN October 6, 2010.

United Nations Secretary-General. (2006). *In-depth study on all forms of violence against women: Report of the secretary-general* (A/61/122/Add.1). New York: UN July 6, 2006.

United Nations Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. (2015). *Eighth annual report of the subcommittee on prevention of torture and other cruel, inhuman or degrading treatment or punishment* (Report No. CAT/C/54/2). Geneva: UN, 5 July, 2016.

Van Hout, M. C. (2020). Women's situation in Malawi prisons and the urgency of alternatives to imprisonment during COVID-19. *Health and Human Rights*. Retrieved February 2, 2021, from https://www.hhrjournal.org/2020/09/covid-19-urgent-need-to-release-women-from-prison-in-malawi/

Van Hout, M. C., & Crowley, D. (2021). The 'double punishment' of transgender prisoners: A human rights based commentary on placement and conditions of detention. *International Journal of Prisoner Health*. Epub ahead of print 24 March 2021. doi:10.1108/IJPH-10-2020-0083

Van Hout, M. C., & Mhlanga-Gunda, R. (2018). Contemporary women prisoners health experiences, unique prison health care needs and health care outcomes in Sub Saharan Africa: A scoping review of extant literature. *BMC International Health and Human Rights*, *18*(1), 31. https://doi.org/10.1186/s12914-018-0170-6

Van Hout, M. C., Lungu Byrne, C., & Germain, J. (2020). Migrant health situation when detained in European immigration detention centres: A qualitative synthesis. *International Journal of Prisoner Health*, *16*(3), 221–236.

Wachirs, H., McKinnon, G., Costello, S., & Thomson, J. (2014). *Human rights audit on the conditions of detention of women at the Alexander Maconochie Centre*. ACT Human Rights Commission. Retrieved February 2, 2021, from https://hrc.act.gov.au/wp-content/uploads/2015/02/HRC-Womens-Audit-2014.pdf

Wolff, N., Blitz, C. L., & Shi, J. (2007). Rates of sexual victimization in prison for inmates with and without mental disorders. *Psychiatric Services*, *58*(8), 1087–1094.

Wolff, N., & Shi, J. (2011). Patterns of victimization and feelings of safety inside prison: The experience of male and female inmates. *Crime & Delinquency*, *57*(1), 29–55.

Zimbabwe & UN Committee on the Elimination of Discrimination Against Women. (2020). *Concluding observations on the sixth periodic report of Zimbabwe Committee on Elimination of Discrimination Against Women* (Report No. CEDAW/C/ZWE/CO/6). New York: UN, March 10, 2020.

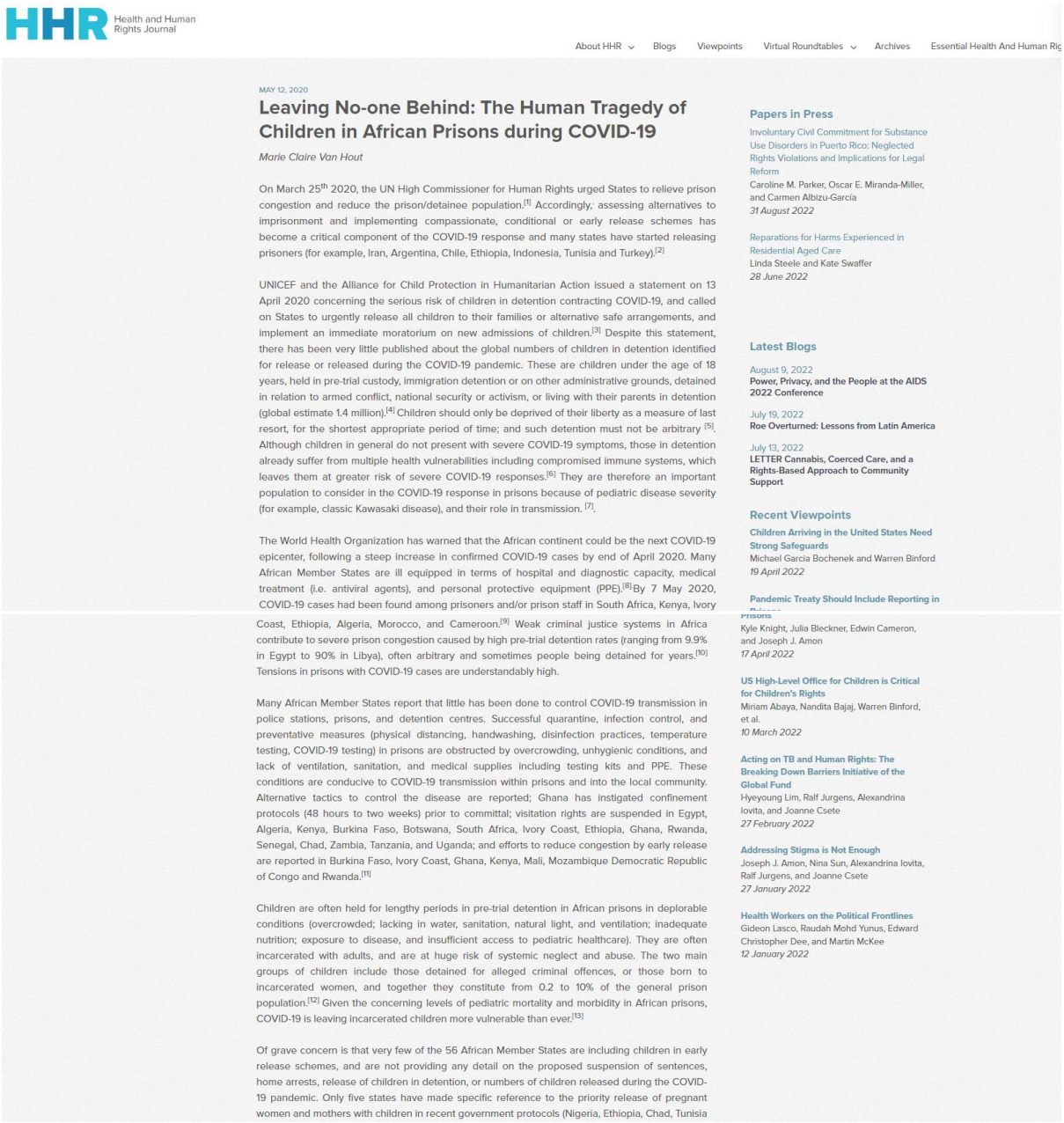
Author Biographies

Marie Claire Van Hout is a human rights specialist, PhD and a professor of Public Health Policy and Practice at Liverpool John Moores University, United Kingdom. She has 20 years' research and evaluation experience in public health, human rights, and vulnerable populations in Europe, Africa, and the Middle East.

Simon Fleißner is a master's student on research in social work. He did his Bachelor of Arts in social work at the HS Coburg. He is currently working on his master thesis about gender-based violence in prisons in Germany.

Heino Stöver is a social scientist, PhD and a professor of Social Scientific Addiction Research at the Frankfurt University of Applied Sciences in Germany, Faculty of Health and Social Work.

Van Hout, MC (2020). "Leaving no one behind": The human tragedy of children in African prisons during COVID-19. *Health and Human Rights Journal.* Online. [Epub ahead of print] https://www.hhrjournal.org/2020/05/leaving-no-one-behind-the-human-tragedy-of-children-in-african-prisons-during-covid-19/



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MAY 12, 2020

Leaving No-one Behind: The Human Tragedy of Children in African Prisons during COVID-19

Marie Claire Van Hout

On March 25th 2020, the UN High Commissioner for Human Rights urged States to relieve prison congestion and reduce the prison/detainee population.[1] Accordingly, assessing alternatives to imprisonment and implementing compassionate, conditional or early release schemes has become a critical component of the COVID-19 response and many states have started releasing prisoners (for example, Iran, Argentina, Chile, Ethiopia, Indonesia, Tunisia and Turkey).[2]

UNICEF and the Alliance for Child Protection in Humanitarian Action issued a statement on 13 April 2020 concerning the serious risk of children in detention contracting COVID-19, and called on States to urgently release all children to their families or alternative safe arrangements, and implement an immediate moratorium on new admissions of children.[3] Despite this statement, there has been very little published about the global numbers of children in detention identified for release or released during the COVID-19 pandemic. These are children under the age of 18 years, held in pre-trial custody, immigration detention or on other administrative grounds, detained in relation to armed conflict, national security or activism, or living with their parents in detention (global estimate 1.4 million).[4] Children should only be deprived of their liberty as a measure of last resort, for the shortest appropriate period of time; and such detention must not be arbitrary [5]. Although children in general do not present with severe COVID-19 symptoms, those in detention already suffer from multiple health vulnerabilities including compromised immune systems, which leaves them at greater risk of severe COVID-19 responses.[6] They are therefore an important population to consider in the COVID-19 response in prisons because of pediatric disease severity (for example, classic Kawasaki disease), and their role in transmission. [7].

The World Health Organization has warned that the African continent could be the next COVID-19 epicenter, following a steep increase in confirmed COVID-19 cases by end of April 2020. Many African Member States are ill equipped in terms of hospital and diagnostic capacity, medical treatment (i.e. antiviral agents), and personal protective equipment (PPE).[8] By 7 May 2020, COVID-19 cases had been found among prisoners and/or prison staff in South Africa, Kenya, Ivory Coast, Ethiopia, Algeria, Morocco, and Cameroon.[9] Weak criminal justice systems in Africa contribute to severe prison congestion caused by high pre-trial detention rates (ranging from 9.9% in Egypt to 90% in Libya), often arbitrary and sometimes people being detained for years.[10] Tensions in prisons with COVID-19 cases are understandably high.

Many African Member States report that little has been done to control COVID-19 transmission in police stations, prisons, and detention centres. Successful quarantine, infection control, and preventative measures (physical distancing, handwashing, disinfection practices, temperature testing, COVID-19 testing) in prisons are obstructed by overcrowding, unhygienic conditions, and lack of ventilation, sanitation, and medical supplies including testing kits and PPE. These conditions are conducive to COVID-19 transmission within prisons and into the local community. Alternative tactics to control the disease are reported; Ghana has instigated confinement protocols (48 hours to two weeks) prior to committal; visitation rights are suspended in Egypt, Algeria, Kenya, Burkina Faso, Botswana, South Africa, Ivory Coast, Ethiopia, Ghana, Rwanda, Senegal, Chad, Zambia, Tanzania, and Uganda; and efforts to reduce congestion by early release are reported in Burkina Faso, Ivory Coast, Ghana, Kenya, Mali, Mozambique Democratic Republic of Congo and Rwanda.[11]

Children are often held for lengthy periods in pre-trial detention in African prisons in deplorable conditions (overcrowded; lacking in water, sanitation, natural light, and ventilation; inadequate nutrition; exposure to disease, and insufficient access to pediatric healthcare). They are often incarcerated with adults, and are at huge risk of systemic neglect and abuse. The two main groups of children include those detained for alleged criminal offences, or those born to incarcerated women, and together they constitute from 0.2 to 10% of the general prison population.[12] Given the concerning levels of pediatric mortality and morbidity in African prisons, COVID-19 is leaving incarcerated children more vulnerable than ever.[13]

Of grave concern is that very few of the 56 African Member States are including children in early release schemes, and are not providing any detail on the proposed suspension of sentences, home arrests, release of children in detention, or numbers of children released during the COVID-19 pandemic. Only five states have made specific reference to the priority release of pregnant women and mothers with children in recent government protocols (Nigeria, Ethiopia, Chad, Tunisia

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Most African Member States are appearing to ignore the international call for urgent release of all children deprived of their liberty. Despite government and regional monitoring of the COVID-19 situation, detained children are essentially a forgotten prison population in the African race to tackle the virus. Children's rights to non-discrimination, protection, health, safety, to be heard, to access to healthcare whilst detained are not being upheld.

It is an imperative that all children are prioritized and released safely during the COVID-19 crisis. African Member State responses must ensure urgently the best interests of the child and adhere to international and regional human rights law, standards and safeguards for children (i.e UN Convention on the Rights of the Child; Standard Minimum Rules for the Treatment of Prisoners; UN Rules on the Treatment of Women Prisoners and Non-Custodial Sanctions for Women Offenders; African Charters for Human and Peoples' Rights; and Rights and Welfare of the Child). COVID-19 emergency measures cannot be used unlawfully to restrict or ignore children's rights, and at a minimum must not result in the continued detention of children who would otherwise be released, or increase the number of children detained.[15]

International human rights accountability mechanisms need to direct their attention to the human rights failings being experienced by children in African prisons.[16]

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1. Office of the High Commissioner for Human Rights. *Urgent action needed to prevent COVID-19"rampaging through places of detention" – Bachelet.* 25th March, 2020. Available at Available at https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25745&LangID=E
2. United Nations Office on Drugs and Crime (UNODC). *Position paper COVID-19 preparedness and responses in prisons*. 31st March 2020. Vienna: United Nations Office on Drugs and Crime, 2020. Available at https://www.unodc.org/documents/hiv-aids/publications/UNODC_position_paper_COVID-19_in_prisons_-_FINAL.pdf
3. UNICEF and Alliance for Child Protection in Humanitarian Action. *Technical Note: COVID-19 and Children Deprived of their Liberty.* April 14th 2020. Available at https://www.unicef.org/albania/reports/covid-19-and-children-deprived-their-liberty
4. Penal Reform International. *Global Prison Trends 2020.* London: Penal Reform International, 2020. Available at https://cdn.penalreform.org/wp-content/uploads/2020/04/Global-Prison-Trends-2020-Penal-Reform-International.pdf
5. United Nations (UN) General Assembly (1989). *The Convention on the Rights of the Child*. Treaty Series, vol. 1577, p. 3, General Assembly resolution 44/25 of 20 November 1989. United Nations, New York.
6. Ong, J., Tosoni, A., Kim, Y., et al Coronavirus Disease 2019 in Critically Ill Children: A Narrative Review of the Literature. *Pediatric Critical Care Medicine.* Apr 21st 2020 DOI: 10.1097/PCC.0000000000002376.
7. Jones VG, Mills M, Suarez D, et al. COVID-19 and Kawasaki disease: novel virus and novel case. *Hospital Pediatrics.* 2020; DOI: 10.1542/hpeds.2020-0123; Zimmermann., P., Curtis, N. Coronavirus Infections in Children Including COVID-19. *The Pediatric Infectious Disease Journal*. March 12th 2020. 39(**5**): 355–368. DOI: 10.1097/INF.0000000000002660
8. Nkengasong, J.N Mankoula, W (2020). Looming threat of COVID-19 infection in Africa: act collectively, and fast. *Lancet* February 27th 2020. Available at https://doi.org/10.1016/S0140-6736(20)30464-5
9. Prison Insider. *Africa: coronavirus, prison fever. What are the consequences of the pandemic on the living conditions in African prisons?* April 28th 2020. Available at https://www.prison-insider.com/en/articles/afrique-coronavirus-la-fievre-des-prisons
10. World Prison Brief. *Africa.* Available at www.prisonstudies.org
11. See note 9.
12. Van Hout MC, Mhlanga-Gunda R. Contemporary women prisoners health experiences, unique prison health care needs and health care outcomes in sub Saharan Africa: a scoping review of extant literature. *BMC International Health and Human Rights,* 2018, **18**(1), 31; Van Hout, M.C., & Mhlanga-Gunda, R. '*Mankind owes to the child the best that it has to give*': Prison conditions and the health situation and rights of circumstantial children incarcerated in Sub Saharan African prisons. *BMC International Health and Human Rights*, 2019b, **19**: 13:
13. Van Hout, MC., Mhlanga-Gunda, R. Prison health situation and rights of juveniles incarcerated in Sub Saharan African prisons. *BMC International Health and Human Rights.* 2019a. **19**:17; See also note 12.
14. See note 9.
15. United Nations Office on Drugs and Crime (UNODC). *Protecting children deprived of liberty during the COVID-19 outbreak,* Vienna; UNODC 2020. Available at https://www.unodc.org/documents/Advocacy-Section/MoS_Children_in_detention_COVID-19.pdf.
16. Mhlanga-Gunda R., Motsomi, N., Plugge, E., & Van Hout, MC., (2019). Challenges in ensuring robust and ethical health research and the reporting of health outcomes and standards in sub-Saharan African prisons. *Lancet Global Health* 2020; 8. See also notes 12 and 13.

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1. Office of the High Commissioner for Human Rights. *Urgent action needed to prevent COVID-19"rampaging through places of detention" – Bachelet.* 25th March, 2020. Available at Available at https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25745&LangID=E
2. United Nations Office on Drugs and Crime (UNODC). *Position paper COVID-19 preparedness and responses in prisons*. 31st March 2020. Vienna: United Nations Office on Drugs and Crime, 2020. Available at https://www.unodc.org/documents/hiv-aids/publications/UNODC_position_paper_COVID-19_in_prisons_-_FINAL.pdf
3. UNICEF and Alliance for Child Protection in Humanitarian Action. *Technical Note: COVID-19 and Children Deprived of their Liberty.* April 14th 2020. Available at https://www.unicef.org/albania/reports/covid-19-and-children-deprived-their-liberty
4. Penal Reform International. *Global Prison Trends 2020.* London: Penal Reform International, 2020. Available at https://cdn.penalreform.org/wp-content/uploads/2020/04/Global-Prison-Trends-2020-Penal-Reform-International.pdf
5. United Nations (UN) General Assembly (1989). *The Convention on the Rights of the Child*. Treaty Series, vol. 1577, p. 3, General Assembly resolution 44/25 of 20 November 1989. United Nations, New York.
6. Ong, J., Tosoni, A., Kim, Y., et al Coronavirus Disease 2019 in Critically Ill Children: A Narrative Review of the Literature. *Pediatric Critical Care Medicine.* Apr 21st 2020 DOI: 10.1097/PCC.0000000000002376.
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8. Nkengasong, J.N Mankoula, W (2020). Looming threat of COVID-19 infection in Africa: act collectively, and fast. *Lancet* February 27th 2020. Available at https://doi.org/10.1016/S0140-6736(20)30464-5
9. Prison Insider. *Africa: coronavirus, prison fever. What are the consequences of the pandemic on the living conditions in African prisons?* April 28th 2020. Available at https://www.prison-insider.com/en/articles/afrique-coronavirus-la-fievre-des-prisons
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14. See note 9.
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16. Mhlanga-Gunda R., Motsomi, N., Plugge, E., & Van Hout, MC., (2019). Challenges in ensuring robust and ethical health research and the reporting of health outcomes and standards in sub-Saharan African prisons. *Lancet Global Health* 2020; 8. See also notes 12 and 13.

Van Hout, MC (2020). COVID-19: Urgent Need to Find Alternatives to Prison Sentences in Malawi. *Health and Human Rights.* [Epub ahead of print] https://www.hhrjournal.org/2020/09/covid-19-urgent-need-to-release-women-from-prison-in-malawi/

SEPTEMBER 13, 2020

COVID-19: Urgent Need to Find Alternatives to Prison Sentences in Malawi

Marie Claire Van Hout

In May 2020, the World Health Organization joined with other UN agencies in a call for governments to recognise the heightened vulnerability of prisoners to COVID-19 and to act urgently to reduce the risks.[1] Human rights organisations submitted letters to the Southern Africa Development Community and its Member States highlighting the severe deficits in the prison system during COVID-19, and they drew special attention to pregnant women or women detained with infants.[2]

Despite these calls, the situation remains dire in many countries, including Malawi. Notwithstanding the Nelson Mandela Rules, the Bangkok Rules, and the presence of various African charters confirming the rights of the child, the right to health, and equivalence of care and humane treatment of women and children in detention, breaches in minimum standards of health continue for women (and their infants) in Malawian prisons.[3]

Although there are reports of recent improvements in prison healthcare services, the conditions in the prisons continue to be very poor with severe overcrowding, inadequate ventilation, poor nutrition, and substandard water, sanitation, and hygiene facilities.[4] These dire conditions and low resourcing of women's health needs has a severe impact on the minority prison population of women and children.[5] In December 2019 – the latest data available – there were 14,060 people in prisons that were designed for a capacity of 5000, with women making up 1.1% (154 female prisoners).[6] The overcrowding prevents social distancing, promotes the spread of infectious diseases, including COVID-19, impacting on the health of prisoners and staff, and especially those already vulnerable with chronic ill health (HIV/AIDS, and TB).[7]

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By early September 2020 Malawi had reported 5,655 COVID-19 cases and 176 deaths. The first cases of COVID-19 in prison were reported in July and by September 26 staff and 408 prisoners had tested positive (with two deaths). Only 124 staff and 2,656 prisoners had been tested because there is insufficient capacity to test all people in prisons.[8] There is also insufficient personal protective equipment (PPE), and a lack of soap, disinfectant, and water. The prison service is reliant on external donor support from non-governmental and faith-based organisations for these supplies.

Lockdown measures with prisoners confined to cells has been implemented at most prisons and to further limit transmission between people inside the prison and the community, all family visits have been stopped. But this is severely impacting prisoners who depend on food donations from their families.

The government has not upheld the WHO requirement that prisons must be part of national COVID-19 plans, and they were not included in the K157 billion (USD 210 million) COVID-19 fund. Prison staff took strike action to force government allocation from this fund for hazard pay and PPE, which was partially successful, but PPE is still inadequate.[9]

There has been no transparency relating to action taken to reduce overcrowding. At the start of the pandemic, five civil society organisations asked the government to reduce prison intake. They recommended decreasing reliance on cash bail, detention for minor offences, upholding custodial limits, considering non-custodial sentences wherever possible, and instigating release schemes for those over the age 55, children, women with children, and prisoners with pre-existing medical conditions.[10] In April the President announced the release of imprisoned minors, those convicted for minor offences, those nearing the end of their sentence, and pledged to reduce all sentences by six months. The criteria did not cover the elderly, vulnerable and chronically ill prisoners, nor did it consider women and their infants. Sentencing adjustments via the 'Justice and Accountability Chilungamo Programme' resulted in the release of 1,397 prisoners, with 499 receiving a Presidential pardon.[11] By September only five women had been released.

There is no data available on the number of people sentenced to prison throughout the same time, and nor is it clear what criteria were imposed in sentence adjustments or pardons. Media reports in May 2020 described prisoner shock in Zomba prison on learning that none had been considered for release, despite the facility holding 2000 prisoners – 1200 over its capacity.[12] Since then 141 prisoners have been released.

The Malawi government instigated measures that undermine fundamental rights of women (and their infants) detained in their prison system. Maula prison in Lilongwe closed the female section in order to free space for a COVID isolation centre.[13] As a result, 71 women, many with infants (including those in pre-trial detention) were transferred to rural prisons, distant from their families.[14] Women prisoners depend on family and donors to provide their basic needs, including food, clothing, and menstruation needs. This forced relocation is restrictive and arbitrary, denies women access to legal and other support, and constitutes a breach of human rights.

Immediate action is warranted to release women in prisons, particularly those in pre-trial detention, and those with infants, and to use alternatives to custodial sentences. Encouragingly, in a recent case in Malawi, Judge Ntaba stated, 'incarcerating a woman with her child should always be the last resort for any court.'[15]

Malawian state commitment to respond to the pandemic and ultimately improve its judicial and penal systems will be measured against the 2030 Agenda for Sustainable Development's commitment: 'No one left behind'. Ensuring health, safety, and human dignity for those deprived of liberty and those working in closed settings is paramount, regardless of any state of emergency.[16] Resources must be allocated to enable COVID-19 testing for all inmates and staff, and for adequate PPE and WASH facilities to be made available. Human rights investigations into the conditions of all prisoners, including women and their infants, are needed urgently.

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References

1. World Health Organization. UNODC, WHO, UNAIDS and OHCHR joint statement on COVID-19 in prisons and other closed settings. May 13th 2020. https://www.who.int/news-room/detail/13-05-2020-unodc-who-unaids-and-ohchr-joint-statement-on-covid-19-in-prisons-and-other-closed-settings
2. Southern Africa. Open Letter to the SADC. Restrictive COVID-19 Regulations Presenting Concerning Ramifications for Enjoyment of Human Rights, Including Livelihoods. May 25th 2020. https://www.amnesty.org/en/documents/afr03/2392/2020/en/
3.M. C. Van Hout and R. Mhlanga-Gunda. "Contemporary women prisoners health experiences, unique prison health care needs and health care outcomes in sub Saharan Africa: a scoping review of extant literature". BMC International Health and Human Rights, 2018, 18(1), 31.
4. L. Gadama, C. Thakwalakwa, C. Mula, et al. "Prison facilities were not built with a woman in mind: an exploratory multi-stakeholder study on women's situation in Malawi prisons". International Journal of Prisoner Health, 2020, 16 (3), 303-318.
5. Water Supply and Sanitation Collaborative Council. WASH assessments for COVID-19 prevention in Malawi Prisons. August 21st 2020. https://www.wsscc.org/media/resources/wash-assessments-covid-19-prevention-malawi-prisons
6. World Prison Brief. Malawi. August 31st 2020. https://www.prisonstudies.org/country/malawi
7. M. C. Van Hout. "Prison staff exposure to pathogenic disease and occupational health research in African prisons: A neglected area." Journal of Sustainable Development: Africa, 2020, 22(1), 166-171.
8. Prison Insider. Africa: coronavirus, prison fever. What are the consequences of the pandemic on the living conditions in African prisons? August 31st 2020. https://www.prison-insider.com/en/articles/afrique-coronavirus-la-fievre-des-prisons#malawi-5e90a03609d2e
9. G. Muheya. Malawi prison warders go on strike demanding cash from the K157bn COVID-19 fund. Nyasa Times. April 23rd 2020. Available at https://www.nyasatimes.com/malawi-prison-warders-go-on-strike-demanding-cash-from-k157bn-covid-19-fund/
10. Face of Malawi. CSOs Appeal for Release of Prisoners to Counter COVID-19. Face of Malawi. March 30th 2020. Available at https://www.faceofmalawi.com/2020/03/30/csos-demand-release-of-prisoners/
11. S. Chilundu. Covid-19 initiative frees 1,392 prisoners. The Nation. April 27th 2020. Available at https://www.mwnation.com/covid-19-initiative-frees-1-392-prisoners/
12. S. Chilora. Zomba prisoners miss out on Covid-19 release. The Times. May 9th 2020. https://times.mw/zomba-prisoners-miss-out-on-covid-19-release/
13. A. Kapalamula. Covid-19 unsettles prisons. The Times. July 17th 2020. Available at https://times.mw/covid-19-unsettles-prisons/
14. C. Pensulo. Coronavirus banishes female inmates to far-flung jails in Malawi. Thomson Reuters Foundation. August 17th 2020. Available at https://www.reuters.com/article/us-health-coronavirus-malawi-women-idUSKCN25D1LE.
15. C. Rickard. Sentencing pregnant women in Malawi, Judge lays down the law. April 2nd 2020. Available at http://carmelrickard.co.za/sentencing-pregnant-women-in-malawi-judge-laws-down-the-law/.
16. See note 1.

Categories: viewpoints

COVID-19: Urgent Need to Find Alternatives to Prison Sentences in Malawi

Marie Claire Van Hout

In May 2020, the World Health Organization joined with other UN agencies in a call for governments to recognise the heightened vulnerability of prisoners to COVID-19 and to act urgently to reduce the risks.[1] Human rights organisations submitted letters to the Southern Africa Development Community and its Member States highlighting the severe deficits in the prison system during COVID-19, and they drew special attention to pregnant women or women detained with infants.[2]

Despite these calls, the situation remains dire in many countries, including Malawi. Notwithstanding the Nelson Mandela Rules, the Bangkok Rules, and the presence of various African charters confirming the rights of the child, the right to health, and equivalence of care and humane treatment of women and children in detention, breaches in minimum standards of health continue for women (and their infants) in Malawian prisons.[3]

Although there are reports of recent improvements in prison healthcare services, the conditions in the prisons continue to be very poor with severe overcrowding, inadequate ventilation, poor nutrition, and substandard water, sanitation, and hygiene facilities.[4] These dire conditions and low resourcing of women's health needs has a severe impact on the minority prison population of women and children.[5] In December 2019 – the latest data available – there were 14,060 people in prisons that were designed for a capacity of 5000, with women making up 1.1% (154 female prisoners).[6] The overcrowding prevents social distancing, promotes the spread of infectious diseases, including COVID-19, impacting on the health of prisoners and staff, and especially those already vulnerable with chronic ill health (HIV/AIDS, and TB).[7]

By early September 2020 Malawi had reported 5,655 COVID-19 cases and 176 deaths. The first cases of COVID-19 in prison were reported in July and by September 26 staff and 408 prisoners had tested positive (with two deaths). Only 124 staff and 2,656 prisoners had been tested because there is insufficient capacity to test all people in prisons.[8] There is also insufficient personal protective equipment (PPE), and a lack of soap, disinfectant, and water. The prison service is reliant on external donor support from non-governmental and faith-based organisations for these supplies.

Lockdown measures with prisoners confined to cells has been implemented at most prisons and to further limit transmission between people inside the prison and the community, all family visits have been stopped. But this is severely impacting prisoners who depend on food donations from their families.

The government has not upheld the WHO requirement that prisons must be part of national COVID-19 plans, and they were not included in the K157 billion (USD 210 million) COVID-19 fund. Prison staff took strike action to force government allocation

from this fund for hazard pay and PPE, which was partially successful, but PPE is still inadequate.[9]

There has been no transparency relating to action taken to reduce overcrowding. At the start of the pandemic, five civil society organisations asked the government to reduce prison intake. They recommended decreasing reliance on cash bail, detention for minor offences, upholding custodial limits, considering non-custodial sentences wherever possible, and instigating release schemes for those over the age 55, children, women with children, and prisoners with pre-existing medical conditions.[10] In April the President announced the release of imprisoned minors, those convicted for minor offences, those nearing the end of their sentence, and pledged to reduce all sentences by six months. The criteria did not cover the elderly, vulnerable and chronically ill prisoners, nor did it consider women and their infants. Sentencing adjustments via the 'Justice and Accountability Chilungamo Programme' resulted in the release of 1,397 prisoners, with 499 receiving a Presidential pardon.[11] By September only five women had been released.

There is no data available on the number of people sentenced to prison throughout the same time, and nor is it clear what criteria were imposed in sentence adjustments or pardons. Media reports in May 2020 described prisoner shock in Zomba prison on learning that none had been considered for release, despite the facility holding 2000 prisoners – 1200 over its capacity.[12] Since then 141 prisoners have been released.

The Malawi government instigated measures that undermine fundamental rights of women (and their infants) detained in their prison system. Maula prison in Lilongwe closed the female section in order to free space for a COVID isolation centre.[13] As a result, 71 women, many with infants (including those in pre-trial detention) were transferred to rural prisons, distant from their families.[14] Women prisoners depend on family and donors to provide their basic needs, including food, clothing, and menstruation needs. This forced relocation is restrictive and arbitrary, denies women access to legal and other support, and constitutes a breach of human rights.

Immediate action is warranted to release women in prisons, particularly those in pre-trial detention, and those with infants, and to use alternatives to custodial sentences. Encouragingly, in a recent case in Malawi, Judge Ntaba stated, 'incarcerating a woman with her child should always be the last resort for any court.'[15]

Malawian state commitment to respond to the pandemic and ultimately improve its judicial and penal systems will be measured against the 2030 Agenda for Sustainable Development's commitment: 'No one left behind'. Ensuring health, safety, and human dignity for those deprived of liberty and those working in closed settings is paramount, regardless of any state of emergency.[16] Resources must be allocated to enable COVID-19 testing for all inmates and staff, and for adequate PPE and WASH facilities to be made available. Human rights investigations into the conditions of all prisoners, including women and their infants, are needed urgently.

Marie Claire Van Hout, is Professor of Public Health Policy and Practice at the Public Health Institute, Liverpool John Moore's University, Liverpool L32ET, United Kingdom. Email: m.c.vanhout@ljmu.ac.uk

References

1. World Health Organization. UNODC, WHO, UNAIDS and OHCHR joint statement on COVID-19 in prisons and other closed settings. May 13th 2020. https://www.who.int/news-room/detail/13-05-2020-unodc-who-unaids-and-ohchr-joint-statement-on-covid-19-in-prisons-and-other-closed-settings
2. Southern Africa. Open Letter to the SADC. Restrictive COVID-19 Regulations Presenting Concerning Ramifications for Enjoyment of Human Rights, Including Livelihoods. May 25th 2020. https://www.amnesty.org/en/documents/afr03/2392/2020/en/
3.M. C. Van Hout and R. Mhlanga-Gunda. "Contemporary women prisoners health experiences, unique prison health care needs and health care outcomes in sub Saharan Africa: a scoping review of extant literature". BMC International Health and Human Rights, 2018, 18(1), 31.
4. L. Gadama, C. Thakwalakwa, C. Mula, et al. "Prison facilities were not built with a woman in mind: an exploratory multi-stakeholder study on women's situation in Malawi prisons". International Journal of Prisoner Health, 2020, 16 (3), 303-318.
5. Water Supply and Sanitation Collaborative Council. WASH assessments for COVID-19 prevention in Malawi Prisons. August 21st 2020. https://www.wsscc.org/media/resources/wash-assessments-covid-19-prevention-malawi-prisons
6. World Prison Brief. Malawi. August 31st 2020. https://www.prisonstudies.org/country/malawi
7. M. C. Van Hout. "Prison staff exposure to pathogenic disease and occupational health research in African prisons: A neglected area." Journal of Sustainable Development: Africa, 2020, 22(1), 166-171.
8. Prison Insider. Africa: coronavirus, prison fever. What are the consequences of the pandemic on the living conditions in African prisons? August 31st 2020. https://www.prison-insider.com/en/articles/afrique-coronavirus-la-fievre-des-prisons#malawi-5e90a03609d2e
9. G. Muheya. Malawi prison warders go on strike demanding cash from the K157bn COVID-19 fund. Nyasa Times. April 23rd 2020. Available at https://www.nyasatimes.com/malawi-prison-warders-go-on-strike-demanding-cash-from-k157bn-covid-19-fund/
10. Face of Malawi. CSOs Appeal for Release of Prisoners to Counter COVID-19. Face of Malawi. March 30th 2020. Available at https://www.faceofmalawi.com/2020/03/30/csos-demand-release-of-prisoners/
11. S. Chilundu. Covid-19 initiative frees 1,392 prisoners. The Nation. April 27th 2020. Available at https://www.mwnation.com/covid-19-initiative-frees-1-392-prisoners/
12. S. Chilora. Zomba prisoners miss out on Covid-19 release. The Times. May 9th 2020. https://times.mw/zomba-prisoners-miss-out-on-covid-19-release/
13. A. Kapalamula. Covid-19 unsettles prisons. The Times. July 17th 2020. Available at https://times.mw/covid-19-unsettles-prisons/
14. C. Pensulo. Coronavirus banishes female inmates to far-flung jails in Malawi. Thomson Reuters Foundation. August 17th 2020. Available at

https://www.reuters.com/article/us-health-coronavirus-malawi-women-idUSKCN25D1LE.
15. C. Rickard. Sentencing pregnant women in Malawi, Judge lays down the law. April 2nd 2020. Available at http://carmelrickard.co.za/sentencing-pregnant-women-in-malawi-judge-laws-down-the-law/.
16. See note 1.

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PRISON STAFF EXPOSURE TO PATHOGENIC DISEASE AND OCCUPATIONAL HEALTH RESEARCH IN AFRICAN PRISONS: A NEGLECTED AREA

Marie Claire Van Hout, Liverpool John Moore's University

Like all persons, prisoners are entitled to enjoy the highest attainable standard of health and humane treatment. Specifically, Rule 2 of the Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules) states that in applying the principle of non-discrimination, prison authorities shall consider the individual needs of prisoners, particularly the most vulnerable. Rule 24 of the Nelson Mandela Rules further mandates that provision of health care for prisoners is a state responsibility, ensuring that prisoners should enjoy the same standards of health care as those available in the community. The Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (Bangkok Rules) specifically stipulate required standards for equivalence of healthcare programming and recognition of women's (and their children's) specific health care needs during incarceration. Despite these international mandates (and the presence of various African charters), there is severe health disparity of men, women and children deprived of their liberty in African prisons (Telisinghe, Charalambous, Topp, Herce, Hoffmann, Barron, Schouten, Jahn, Zacheriah, Harries, Beyrer and Amon, 2016). Human rights violations, systemic abuse and deplorable environmental determinants of health in these prisons (overcrowding, lack of space, malnutrition, inadequate sanitation, ventilation and hygiene) continue. African prison authorities are hindered by their weak prison health and public health systems, dated physical infrastructure, and severe congestion caused by high pre-trial detention rates (for example as high as 90% in Libya) (World Prison Brief, 2020). Many State facilities continue to breach the minimum conditions and standards of care. Some are deemed life threatening when investigated by international human rights monitors.

Prison settings in Africa are particularly conducive to spread of disease (for example HIV, TB, viral hepatitis, influenza, COVID-19) (Todrys and Amon, 2012; Telisinghe et al., 2016). For example, HIV prevalence among prisoners in the sub-Saharan African region has been estimated at two to 50 times the prevalence in general populations, and with TB prevalence estimated to be six to 30 times that of national rates (United Nations Office on Drugs and Crime, UNODC, 2008; Telisinghe et al., 2016). This is due in part due to the State prioritisation of prison security rather than to basic health rights (for example adequate ventilation, space, sanitation, safe drinking water, hygiene, nutrition), the lack of prison based medical care and sufficient measures to prevent disease, high rates of HIV and TB co-infection amongst prisoners, and the presence of multidrug-resistant (MDR) and extensively drug-resistant (XDR) TB (Habeenzu, Mitarai, Lubasi, Mudenda, Kantenga, Mwansa and Maslow, 2007; Telisinghe et al., 2016). Particularly vulnerable prisoners include those who are immuno-compromised, malnourished, juveniles, and women and their circumstantial children, whose basic medical, gender and age sensitive health needs are often ill-resourced by African correctional authorities (Van Hout and Mhlanga-Gunda, 2018; 2019a:b).

Research into prison health in Africa continues to be of low priority and is underdeveloped (Mhlanga-Gunda et al., 2020). The complexities and bureaucracies around researcher access into prisons, and the requirements for robust ethical

governance and academic transparency in reporting compound this issue. A series of three extensive scoping reviews on prison health standards and situation in the sub-Saharan African region have compiled extant literature from all 49 Member States since 2000 (Van Hout and Mhlanga-Gunda, 2018; 2019a:b). These reviews illustrate an evident lack of academic interest, attention and monitoring of prison health situation in many sub-Saharan African countries, where in some, no academic literature has been published, and where government health and infections related data, and inspectorate reports are embargoed (Van Hout and Mhlanga-Gunda, 2018; 2019a:b). There is a concerning lack of visibility of strategic health information and academic activity in the field of prison health. Information where available is largely confined to rapid assessment of infectious diseases (HIV, TB), post graduate theses, prison case studies and international human rights monitors. For example, there are various African Commission on Human and Peoples' Rights reports on conditions of detention in the sub-Saharan African region in the past twenty years (for example Côte d'Ivoire , Gambia, Malawi, Namibia, Uganda, Mozambique, Ethiopia, Cameroon, South Africa), Human Rights Watch (Zambia), Penal Reform International (Uganda); and Amnesty international (Chad). There are also some very encouraging empirical multi-stakeholder research studies conducted by Stephanie Topp and colleagues since 2016. These are a flagship for positive research activity used to inform the Zambian prison health system reform, the use of Prison Health Committees (PrHCs) to improve social accountability, and the upscaling of prison health provision in the country.

Of note for this *Commentary* is that whilst these three reviews which showcase extant published literature in the past 20 years on prison health in sub-Saharan Africa (Van Hout and Mhlanga-Gunda, 2018; 2019a:b) and indicate low level interest in the field of prison health; multi-stakeholder studies (for example in Zambia, Cameroon, Zimbabwe, Malawi; Kenya and Uganda) who do consult with prison staff, focus their attention on staff perspectives on conditions for prisoners (adult men, women, children born in prison, juveniles). The reviews further highlight a startling lack of focused empirical research activity on the occupational health experience of prison staff. This aspect of prison health or correctional services research is notably absent. There is no information on their health needs, perceptions of risk, or their well-being. Prison staff from ground level up to management operate in extremely challenging environments in sub-Saharan prisons, and appear neglected and ignored by researchers, human rights monitors and sub-Saharan African governments. It is notable that in the wider justice literature, prison and custodial staff are generally represented as targets of reform or objects/subjects of critique (Jefferson, 2007; Trounson and Pfeifer, 2017). They do not appear to warrant attention in terms of their human or indeed occupational health rights within the confines of the prison working environment.

Understanding the social determinants of health and cultures which shape prison and custodial staff responsiveness to contagion, impact of environmental conditions, risk navigation, health protection awareness, and work-related stress is vital to improve their health and well-being, and their working conditions in sub-Saharan Africa (Gadama, Thakwalakwa, Mula, Mhango, Banda, Kewley, Hillis and Van Hout, 2020; Mhlanga- Gunda, Kewley, Chivandikwa and Van Hout, 2020). These studies have illustrated an increased staff awareness of prisoner right to health in line with international norms, and staff concern for the lack of basic necessities (safe drinking water, soap, food, clothes, medicines) for those deprived of their liberty. This is a positive outcome in terms of slowly stimulating a shift toward improved environmental health conditions for prisoners, alongside a greater appreciation of their human and health rights. However, it is tempered by the documentation of the deep concerns by prison staff for their personal health and that of their families, and their anxiety around bio-hazard risks (particularly airborne disease) linked to the working conditions of the prison environment itself (congestion and lack of ventilation in cells, lack of soap, clean water, unsanitary toilets), and the physical and psychological stressors related to their job.

It is vital that greater academic and policy level attention is now devoted to addressing the risks encountered by prison staff with regard to the prison environment, and particularly in terms of prevention of infectious and contagious disease. The *"bridge"* between prison and community cannot be under estimated in Africa, with risks of disease transmission not limited to those deprived of their liberty but extending to visitors to the prisons, prison staff and clinicians who work there, and their families living in surrounding communities (Kachisi, Harries, and Salaniponi, 2002; Mhlanga-Gunda, Motsomi-Moshoeshoe, Plugge and Van Hout, 2020). Disease is spread via the prison eco-system of *structural deficits* causing congestion, poor sanitation and ventilation, and the *resource deficits* compounding efforts to control disease and outbreaks. There is great risk of outbreaks and disease amplification (HIV, TB, hepatitis, influenza, and now COVID-19) (Telisinghe et al., 2016; Van Hout and Aaraj, 2020; Van Hout, 2020). As mentioned earlier, HIV and TB rates are higher than in the general population, there is a concerning presence of drug resistant TB, co-infection rates, and most recently, a steep increase in COVID-19 cases in African prisons (prisoners and staff) (for example in South Africa, Kenya, Ivory Coast, Ethiopia, Algeria, Morocco, and Cameroon) (Prison Insider, 2020). Prison staff cannot be "*left behind"* in the government focus in tackling disease. They are exposed to the same environmental pathogens, they generally share the same congested space; air for breathing; toilets and water for washing, drinking and cooking. They are also further marginalised by low wages, significant stressors associated with their role, and experience significant risk to their health (and their families). The often poor continuum of health care of prisoners into the community, and scarce human and civic resources for health of both prisoners and staff in the prison compounds the issue.

In 2000, the Human Rights Committee of the Economic and Social Council published the Committee on Economic, Social and Cultural Rights (CESCR) General Comment No. 14 (Article 12) on the "*Right to the Highest Attainable Standard of Health"* underscored that the right to health transcends provision of /access to services and is grounded in health determinants such as access to adequate food, nutrition, housing and water. These health determinants directly relate to poverty levels, and are closely tied to state responsibility to tackle poverty. This also applies to the prison situation. Prison authorities and management have an important role to play in ensuring that both prison staff and prisoners feel safe and have the opportunity to maintain and improve their heath (World Health Organization: WHO, 2007; 2014). It is a human rights breach to continue to ignore prison staff in research and human rights monitoring on the state of African prisons, and it is now urgent that authorities uphold and respect their rights to a supportive and safe working environment. Much more needs to be done to recognise their unique occupational health risks in African prisons. Sadly they represent a neglected and unique prison population.

Ultimately the prioritisation of security in African prisons must not eliminate the public health issues at hand (Keehn and Nevin, 2018). Tackling disease in prisons is a human rights and public health issue, and requires a strategic approach to prevent transmission and improve health for all, including as an occupational and community health issue. The basis of safer working conditions for custodial staff pertaining to disease in African prisons is underpinned by packages of HIV, TB and now COVID-19 health interventions (UNODC, 2010; 2013; 2020; WHO, 2016). These are generally not sufficiently implemented in Africa due to a host of resource, policy and systems related barriers (for example, fragile health systems, low health system preparedness, lack of political will, laws criminalising sexual acts between men, prison congestion and high pre-trial detention caused by weak justice systems, low resource allocation to prison health, and lack of routine disease surveillance and prevention protocols) (Van Hout, 2020; Van Hout and Aaraj, 2020). Protection of prison staff from biohazards is mandated by the United Nations (UN) comprehensive packages (UNODC, 2013;2020). Principles of equality and non-discrimination, right to safe working conditions for custodial staff, and training requirements and assurances are additionally mandated in international and regional human rights law, standards and safeguards (UNODC,

2010). Gaps in implementation will have severe consequences for prison populations of prisoners and staff, local communities, and domestic public health.

The UN Declaration on the Right to Development (*Articles, 2,3 and 4*) underscores the need for equitable development polices which improve health and well-being, the realisation of the right to development, promotion of participation of vulnerable societal groups and state cooperation. Hence, a focused attention on the health and well-being of prison staff in Africa could contribute to strengthened collaboration and their right to be heard, alongside enhanced transparency, greater social accountability in tackling prison and occupational health, buy-in from government and prison officials, and the future upscaling of holistic prison health initiatives. Despite recognising that prisons exert significant influence on the social determinants of health, there are yet to be sustainable health promoting and protecting interventions which address health impact on prison staff in Africa. Such a concerted and strategic effort must be underpinned by collaborative policy-academic research and the support and encouragement of interested researchers wishing to study prison health and well-being of both prisoners and staff. Such an informed policy can support a positive shift to reforming African prison health and occupation health operations and systems in a sustainable manner. Important components include identifying occupational health deficits; including rights assurances of prison staff, occupational health rights training, and health protection support initiatives (routine health checks, active case finding of disease) to improve prison health standards and outbreak preparedness in African prisons, alongside efforts to alleviate congestion through prisoner release schemes, restorative justice for minors and alternatives to incarceration.

REFERENCES

Gadama, L., Thakwalakwa, C., Mula, C., Mhango, V., Banda, C., Kewley, S., Hillis, A., & Van Hout, M C (2020). '*Prison facilities were not built with a woman in mind':* An exploratory multi-stakeholder study on women's situation when incarcerated in contemporary Malawi prisons. *International Journal of Prisoner Health.* [Epub ahead of print]. Available at: https://www.emerald.com/insight/content/doi/10.1108/IJPH-12-2019-0069/full/html

Habeenzu C , Mitarai S, Lubasi D, Mudenda V, Kantenga T, Mwansa J, & Maslow, J.N. (2007). Tuberculosis and multidrug resistance in Zambian prisons, 2000–2001. *International Journal of Tuberculosis and Lung Disease* 11: 1216–20.

Jefferson, A (2007). Prison officer training and practice in Nigeria: Contention, contradiction and re-imagining reform strategies. *Punishment & Society,* 9 (3): 253-269.

Kachisi, G., Harries, A, Kemp, J.R., & Salaniponi, F (2002). High incidence of tuberculosis in prison officers in Zomba, Malawi. *Malawi Medical Journal,* 14 (1): 17–18.

Keehn, E., & Nevin, A (2018). Health, Human Rights, and the Transformation of Punishment. *Health Human Rights*. 20(1): 213–224.

Mhlanga- Gunda, R., Kewley, S., Chivandikwa, N., & Van Hout, MC (2020). Prison conditions and standards of health care for women and their children incarcerated in Zimbabwean prisons. *International Journal of Prison Health.* [Epub ahead of print]. Available at: https://www.emerald.com/insight/content/doi/10.1108/IJPH-11-2019-0063/full/html

Mhlanga-Gunda, R., Motsomi-Moshoeshoe, N., Plugge,E., & Van Hout, MC (2020). Challenges in ensuring robust and ethical health research and the reporting of health outcomes and standards in sub-Saharan African prisons. *The Lancet Global Health* 2020; 8.

Prison Insider (2020). *Africa: coronavirus, prison fever. What are the consequences of the pandemic on the living conditions in African prisons?* May 25th 2020. Available at https://www.prison-insider.com/en/articles/afrique-coronavirus-la-fievre-des-prisons

Telisinghe L, Charalambous S, Topp SM, Herce ME, Hoffmann CJ, Barron P, Schouten, E.J., Jahn, A., Zacheriah, R., Harries, A.D., Beyrer, C., & Amon, J.J. (2016). HIV and tuberculosis in prisons in sub-Saharan Africa. *The Lancet*. 388(10050):1215–1227.

Todrys, K., & Amon, J.L (2012). Criminal Justice Reform as HIV and TB Prevention in African Prisons *PLoS Medicine*. 9(5): e1001215.

Trounson, J.S., & Pfeifer, J.E (2017). Corrections officer wellbeing: Training challenges and opportunities. *The New Zealand Corrections Journal.* 5(1).

United Nations Office on Drugs and Crime (UNODC) (2008). *HIV and Prisons in sub-Saharan Africa: Opportunity for action*. Vienna: United Nations Office on Drugs and Crime.

United Nations Office on Drugs and Crime (UNODC) (2010). *Handbook for prison leaders: A basic training tool and curriculum for prison managers based on international standards and norms.* Criminal Justice Handbook, 2010. Vienna: United Nations Office on Drugs and Crime.

United Nations Office on Drugs and Crime (UNODC) (2013). *HIV prevention, treatment and care in prisons and other closed settings: a comprehensive package of interventions.* Vienna: United Nations Office on Drugs and Crime.

United Nations Office on Drugs and Crime (UNODC) (2020). *Position paper COVID-19 preparedness and responses in prisons*. 31st March 2020. Vienna: United Nations Office on Drugs and Crime.

Van Hout, M.C., & Mhlanga-Gunda, R (2018). Contemporary female prisoners health experiences, unique prison health care needs and health care outcomes in Sub Saharan Africa: A scoping review of extant literature. *BMC International Health and Human Rights,*18 (1); 31.

Van Hout, M.C., Mhlanga-Gunda, R (2019a). "'*Mankind owes to the child the best that it has to give*': Prison conditions and the health situation and rights of circumstantial children incarcerated in Sub Saharan African prisons", *BMC International Health and Human Rights*, 19 (1):13.

Van Hout, M.C., Mhlanga-Gunda, R. (2019b) Prison health situation and rights of juveniles incarcerated in Sub Saharan African prisons, *BMC International Health and Human Rights,* 19,17.

Van Hout, MC (2020). Leaving No-one Behind: The Human Tragedy of Children in African Prisons during COVID-19. *Health and Human Rights Journal.* 2020. [Epub ahead of print]. Available at https://www.hhrjournal.org/2020/05/leaving-no-one-behind-the-human-tragedy-of-children-in-african-prisons-during-covid-19

Van Hout, MC., & Aaraj, E. Pandemic Stresses the Human Rights Imperatives of Tackling HIV and Hepatitis in Middle East and North African Prisons. *Health and Human Rights Journal.* 2020 [Epub ahead of print]. Available at https://www.hhrjournal.org/2020/05/pandemic-stresses-the-human-rights-imperatives-of-tackling-hiv-and-hepatitis-in-middle-east-and-north-african-prisons/

World Health Organization (WHO). *Consolidated Guidelines on HIV prevention, diagnosis, treatment and care for key populations 2016. Update.* 2016. Geneva: World Health Organization.

World Health Organization (WHO). *Health in prisons: A WHO guide to the essentials in prison health*. 2007. Geneva: World Health Organization.

World Health Organization (WHO). *Prisons and Health.* 2014. Geneva: World Health Organization.

World Prison Brief. *Africa.* Available at www.prisonstudies.org

ABOUT THE AUTHOR

Marie Claire Van Hout is Professor of Public Health Policy and Practice, Liverpool John Moore's University, United Kingdom.

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Van Hout, MC., Aaraj, E (2020). Pandemic Stresses the Human Rights Imperatives of Tackling HIV and Hepatitis in Middle East and North African Prisons. *Health and Human Rights Journal.* Online[Epub ahead of print]. https://www.hhrjournal.org/2020/05/pandemic-stresses-the-human-rights-imperatives-of-tackling-hiv-and-hepatitis-in-middle-east-and-north-african-prisons/

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Pandemic Stresses the Human Rights Imperatives of Tackling HIV and Hepatitis in Middle East and North African Prisons

Marie Claire Van Hout and Elie Aaraj

It is imperative that governments and prison authorities in the Middle East and North African (MENA) region accept the presence of sexual and drug related virus transmission in prisons and use evidence-based approaches of harm reduction (HR) to tackle the spread of disease among prisoners and on their return to communities.[1] This imperative coincides with the COVID-19 pandemic, and the instigation by many MENA states of early release schemes to tackle prison congestion and rapid spread of COVID-19 (for example Iran has released over 80,000 prisoners and other MENA countries are following suit). It underpins the need for MENA states to consider decriminalization of the use of drugs, alongside HR approaches in prisons and communities. Provision of good-quality and accessible HR within and outside prisons is a legally binding human rights obligation and cannot be dismissed by government as an unwanted policy option.[2]

Our *Viewpoint* comments specifically on the interplay between the rise in injecting use of drugs, spread of blood borne viruses (HIV, hepatitis), and prison responses in the MENA region. Intravenous drug using and risky sexual behaviors are important transmission routes for HIV and hepatitis C in this region.[3] It has one of the two fastest growing HIV epidemics in the world, and also has the highest hepatitis C prevalence globally (20% of all chronically infected individuals reside here).[4] Egypt and Pakistan are currently facing hepatitis C epidemics of historic proportions.[5] Estimates in the region indicate that half the people who inject drugs (estimated at 630,000) have been infected with hepatitis C, but with great variation in antibody prevalence across specific MENA countries.[6] There is no community level data on people who no longer inject drugs, but who have contracted hepatitis C.

Knowledge around transmission routes and related sexual and drug injecting risk behaviors is worryingly low in key vulnerable and overlapping groups (men who have sex with men, female sex workers, people who inject drugs, people in prison).[7] These highly stigmatized groups are over-represented in prisons. Over 600,000 people are deprived of their liberty in the MENA region, the vast majority of whom are male and detained on drug related charges.[8] The proximity of many MENA countries to opium production regions and trafficking routes contributes to this profile. Intravenous drug use is the primary mode of blood borne virus transmission in prisons located in the region.[9]

In Iran, HIV prevalence in prisons varies but is higher than in most MENA countries.[10] About half all prisoners are drug dependent with many introduced to intravenous injecting during incarceration.[11] In 1990, a serious HIV outbreak in Iranian prisons resulted from unsafe drug injecting which stimulated a progressive and rapid shift towards HR measures and government endorsement of HR. These measures included promotion of de-stigmatisation and legalisation, research into virus transmission in prisons and communities, establishment of addiction centres, HIV testing and counselling, sexually transmitted infection services, and provision of opioid substitution treatment (OST) and needle and syringe programs in prisons.[12] Iran was seen as the forerunner of a scaled up *'top down'* HR programming approach in prisons in the MENA region.[13] Unfortunately the approach was restrained by budget cuts during the term of President Ahmadinejad (2005-2013), resulting in a rise in HIV and hepatitis C prevalence in prisons and communities. Morocco follows close behind in HR implementation, with a *'bottom up'* civil society led response underpinned by the 2011 national drug policy which spans public health and human rights (*Rabat Declaration*).[14]

Despite the evident success of the Iranian model supported by political commitment and financial investment, the links between prison and public health relating to HIV and hepatitis C rates have not led to policy reform in other MENA governments.[15] Prison data is insufficient in the region to estimate the size of the key risk groups. Given the increasing evidence of significant virus transmission in MENA prisons, hidden HIV and hepatitis C clusters cannot be ruled out.

The spread of diseases between prisons and communities is a significant threat to regional and national public health.[16] Centralized political power, and 'top down' health systems in the MENA region do not normally support HR as a public health priority. Few countries in the region make explicit mention of HR in their national strategies (the present exceptions being Afghanistan, Pakistan, Iran, Morocco, Tunisia, Lebanon, Palestine, and Egypt). Restrictive laws, rejection of HR strategies at the policy level, lack of political commitment, and restrictions on access of civil society into prisons all compound the threat of disease in prisons and communities.[17] As a consequence, the current HR response in MENA prisons has been very low (with exception of Iran, Lebanon, and more recently some capacity building initiatives have taken place in Egypt, Tunisia and Morocco). Unfortunately there is also a global reduction in donor funding for HR interventions.[18]

Evidence shows that neglecting HR fuels the emergence and re-emergence of viral epidemics in prisons in this region.[19] The current lack of commitment and consideration of robust measures to reduce harm constitutes an infringement of the human rights of prisoners throughout the MENA region which, compounded by COVID-19, will result in further suffering and mortality.

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References

1. M. Heijnen et al. Status of HIV and hepatitis C virus infections among prisoners in the Middle East and North Africa: review and synthesis. *Journal of the International AIDS Society,* 2016, 19: 20873.
2. *G. Sander* et al. *The Global State of Harm Reduction in Prisons Journal of Correctional Health Care, 2019, 25(2): 105-120.*
3. R. Golrokhi et al. HIV prevalence and correlations in prisons in different regions of the world: a review article. *Open AIDS Journal,* 2018, 12: 81–92.
4. H. Setayesh et al. HIV in MENA: Low prevalence, growing risk. In *HIV and AIDS in the Middle East and North Africa*. 2014, Washington: PRB; See note 1.

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6. S. Mahmud et al. The status of hepatitis C virus infection among people who inject drugs in the Middle East and North Africa. *Addiction.* 2019. doi:10.1111/add.14944
7. G. Mumtaz et al. Characterising HIV/AIDS knowledge and attitudes in the Middle East and North Africa: Systematic review and data synthesis *Global Public Health* , 2020, 15, 2.
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9. G. Mumtaz et al. HIV among People Who Inject Drugs in the Middle East and North Africa: Systematic Review and Data Synthesis. *PLoS Med,* 2014, 11(**6**): e1001663; See notes 1,3, 6.
10. **10**. M. Akbari et al. Prevalence of HIV/AIDS among Iranian Prisoners: A Review Article. *Addictiom Health* , 2016; 8(**3**): 195-206.
11. Iran Drug Control Headquarters. Iran Drug Control Headquarters, 2010; Available from: URL: http:// dchq.ir/ html/ index.php? Module=htmlpages&func=displ ay&PID=37
12. See note 10.
13. H. Ekhtiari et al. The evolution of addiction treatment and harm reduction programs in Iran: a chaotic response or a synergistic diversity? *Addiction*. 2019, doi:10.1111/add.14905.
14. See note 8.
15. E. Aaraj, et al. A Drug policy and harm reduction in the Middle East and North Africa: The role of civil society. *International Journal of Drug Policy,* 2016, 31:168-171; See notes 1 and 3.
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17. See note 15.
18. Harm Reduction International. *The lost decade: Neglect for harm reduction funding and the health crisis among people who use drugs,* 2018, London: Harm Reduction International.
19. See note 1.

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References

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2. *G. Sander* et al. *The Global State of Harm Reduction in Prisons Journal of Correctional Health Care, 2019, 25(**2**): 105-120.*
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5. H. Chemaitelly et al. Hepatitis C Virus in the Middle East and North Africa Its Epidemiology and the Way Forward. In I. Laher (ed*.), Handbook of Healthcare in the Arab World.* 2019, Switzerland: Springer Nature.
6. S. Mahmud et al. The status of hepatitis C virus infection among people who inject drugs in the Middle East and North Africa. *Addiction.* 2019. doi:10.1111/add.14944
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9. G. Mumtaz et al. HIV among People Who Inject Drugs in the Middle East and North Africa: Systematic Review and Data Synthesis. *PLoS Med,* 2014, 11(**6**): e1001663; See notes 1,3, 6.
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11. Iran Drug Control Headquarters. Iran Drug Control Headquarters, 2010; Available from: URL: http:// dchq.ir/ html/ index.php? Module=htmlpages&func=displ ay&PID=37
12. See note 10.
13. H. Ekhtiari et al. The evolution of addiction treatment and harm reduction programs in Iran: a chaotic response or a synergistic diversity? *Addiction*. 2019, doi:10.1111/add.14905.
14. See note 8.
15. E. Aaraj, et al. A Drug policy and harm reduction in the Middle East and North Africa: The role of civil society. *International Journal of Drug Policy,* 2016, 31:168-171; See notes 1 and 3.
16. See note 9.
17. See note 15.
18. Harm Reduction International. *The lost decade: Neglect for harm reduction funding and the health crisis among people who use drugs,* 2018, London: Harm Reduction International.
19. See note 1.

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TACKLING THE INTERSECTIONALITY OF DRUG OFFENCES, GENDER BASED VIOLENCE AND VICTIMISATION IN THE SOUTH AFRICAN CRIMINAL JUSTICE SYSTEM: LEVERAGING FOR GREATER IMPLEMENTATION OF THE TOKYO RULES WITHIN A SUSTAINABLE DEVELOPMENT AGENDA.

Marie Claire Van Hout, Liverpool John Moore's University

Dzimbabwe Chimbga, Open Society Initiative for Southern Africa

This year is the 10th anniversary of the United Nations (UN) Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders ('*Bangkok Rules'*) (United Nations (UN) General Assembly, 2010). The female prison population of women and girls continues to increase globally (Penal Reform International, 2020a). Of these, a higher proportion are deprived of their liberty due to drugs offences which include punitive responses to women who use drugs (WWUD), those involved in minor offences or commercial sex work (Penal Reform International, 2020b). Most have not committed serious or violent offences, nor do they pose a risk to the community (Ginn, 2013). Intersectionality of drug related offences by women with a history of trauma, victimisation and gender based violence (GBV) is often ill explored by criminal justice systems. There is a need for careful consideration of the underlying social determinants causing these women to come into contact with the law. Detention coupled with stigma, seriously hinders these women's' recovery, reintegration and rehabilitation pathways (UNODC, 2009). Gender sensitive and trauma informed responses cognisant of the distinctive needs of women prisoners, particularly those held on drug related offences warrants continued global attention (Penal Reform International, 2020b).

Further it is 30 years since the UN Standard Minimum Rules for Non-Custodial Measures ('*Tokyo Rules'*) was adopted by the UN General Assembly (GA) (UNGA, 1991). In addition to the '*Bangkok Rules'* and *Tokyo Rules*, the UN Standard Minimum Rules for the Treatment of Prisoners ('*Nelson Mandela Rules*') and the International Covenant on Civil and Political Rights contain provisions on alternatives to sentencing, vocational training, rehabilitation and social reintegration of those deprived of their liberty (UNGA, 1966; UNGA, 2016). Provision of such measures are further expressly permitted to support drug treatment and rehabilitation as diversion or alternative to pre-trial detention or incarceration. This is particularly the case for minor drug or other offences, and can include a range of alternative sentencing measures such as fines, house arrest, suspended or community sentencing, diversion, parole, correctional supervision, conditions such as attending drug treatment and rehabilitation programmes and case dismissal. These measures can apply across every stage of the criminal justice process, redirect State investment towards community based solutions, reduce costs of incarceration, reduce recidivism rates, and ultimately support a focus on rehabilitation and reintegration of the female offender herself.

Despite the potential of non-custodial sentencing for women contributing strongly to the achievement of global sustainable development goals, by *'leaving no one behind'* (particularly the sustainable development goals SDG 5 *'Achieve gender equality and empower all women and girls'* and SDG 16 *'peace, justice and strong institutions'*, States particularly in the Global South encounter a myriad of challenges in their implementation; underpinned by legislative and policy gaps,

insufficient capacity and sensitisation in the criminal justice system, lack of acceptance of its restorative approach and public favouring of retribution, justice and security. The United Nations Office on Drugs and Crime (UNODC, 2020) has recently published a Toolkit on Gender-Responsive Non-Custodial Measures to assist States in integrating non-custodial measures into domestic legal and policy frameworks, support the upscaling of gender sensitive legal aid services and design of capacity building efforts to train criminal justice staff, support detailed victim assessments and in community rehabilitation planning.

WOMEN AND WWUD IN PRISON IN SOUTH AFRICA

Sustained action is needed in Africa to address the disproportionate increase in the imprisonment of women, and the lack of gender-specific health care and social reintegration programmes in communities, prisons and on prison release (Van Hout & Mhlanga-Gunda, 2018). In South Africa, as elsewhere in Africa, prison systems are primarily designed for men, with continued need for sensitisation and development of gender-responsive approaches to address women's situation in prison (Van Hout & Mhlanga-Gunda, 2019). Prisons in South Africa continue to suffer from overcrowding and are conducive to violence and spread of disease, often with many women placed far away from family support systems (Mail & Guardian, 2016; Judicial Inspectorate for Correctional Services, 2018). They also operate over capacity, and by end of 2019, there were 162,875 inmates against the approved bedspace of 118,572 of the inmate population (Department of Correctional Services, 2020). Women however are a very small minority of the total South African prison population (both in pre-trial detention and incarcerated) at 3% (Department of Correctional Services, 2020). Pre-trial incarceration rates appear to still be used as default by the South African Police (SAPS) (about 30% of the total female inmate population), despite the *Tokyo Rules* requiring States to implement alternatives to pre-trial detention as early a stage as possible (see case *S v Walters and Another*, 2002). This is also contrary to the unequivocal language in the South African Constitution, and the provisions outlined in the *Bangkok Rules*.

The impact of gross economic and gender inequalities in South Africa contribute to women's engagement in petty crime, commercial sex work and drug related activity in efforts to fend for themselves and their children (The World Bank Report, 2018). South African studies have shown that WWUD are over represented in those incarcerated, and that the links between substance abuse, drug use, exploitation and crime are inter-woven, with women frequently engaging in drug distribution and commercial sex work (or are trafficked) as a way of supporting their families (Artz et al., 2012; Steyn & Booyens, 2018). Extant literature suggests that women in prison in South Africa have unique pathways, which if considered with a nuanced gendered lens, reveal a pathway of trauma and victimisation leading to committal of non-violent crimes (for example carrying of drugs as *'mules'*, commercial sex work) making them ill-suited for incarceration. This is especially the case for victims of GBV, human and sex trafficking and other forms of trauma, making custodial sentencing inappropriate and unproportionate. Common determinants in South Africa include exposure to intimate partner violence (IPV), exploitation and coercion to commit crimes by gangs, mental health conditions, unemployment, poverty and caregiving responsibilities as single parent. Criminal sanctions on drug use and commercial sex work in South Africa in this sense merely serve to exacerbate stigmatisation of these women; and obstruct their re-integration into the wider social and economic fabric of the community (AIDS and Rights Alliance for Southern Africa, 2019). Studies in South Africa highlight the extreme exposure of WWUD and those involved in commercial sex work to violence including rape by police, close intimate partners, people around them, and those they would expect to protect them (African Sex Worker Alliance, 2011; Manoek, 2012; UNODC, 2019).

With the current COVID-19 pandemic and challenges of controlling outbreaks in African prisons in general, promoting non-custodial measures is more relevant now than ever before, especially for certain categories such as pregnant women with dependent children (Van Hout, 2020a). Arrest and placement of people in pre-trial detention and incarceration increases the risk of transmission, and further COVID-19 outbreaks (Van Hout, 2020b). At the time of writing, COVID-19 case numbers and fatalities in South Africa are 860,964 and 23,276 respectively and rising in a second wave of the epidemic (South Africa COVID-19 tracker, 2020). Prisons in South Africa have not escaped with 7,409 COVID-19 cases reported to date (4627 officials, 2782 inmates) and with 74 deaths of officials and 57 inmates respectively (South Africa COVID-19 tracker, 2020). In May 2020, President Cyril Ramaphosa authorised the release of nearly 19,000 qualifying inmates, in terms of Section 82(1)(a) of the Correctional Services Act (CSA) of 1998. To date no official figures are available with regard to operationalisation of these de-congestion measures, nor of the follow up of these prisoners. The conditions for the parole release excluded inmates sentenced to life imprisonment or serving terms for specified other serious crimes, including sexual offences, murder and attempted murder, gender-based violence and child abuse. Of note however was the likelihood that these qualifying criteria (set at low risk offenders with low risk of re-offending, low risk to the community; and those with minor children) set for prison release should see, to some extent, the release of women, including WWUD.

The purposes of our *Commentary* is to present an evaluative framework based on transitional justice to explore South Africa's alignment with relevant international standards and norms on alternatives to imprisonment, accountability and application of a victim centred approach spanning all relevant moral, gender, health, legal, policy and medical issues regarding WWUD and women in contact with the law on drug related offences.

GENDER NUANCES, DRUG RELATED OFFENCES, AND THE ALIGNMENT WITH THE TOKYO AND BANGKOK RULES

South Africa, like many other countries, retains a comprehensive and somewhat harsh legal framework to arrest, prosecute and sentence offenders on a range of drug-related offences; with a possibility of penalties up to life imprisonment depending on the nature of offense involved. The primary legislation creating criminal sanctions for drug-related offences is the Drugs and Drug Trafficking Act No. 140 of 1992. According to SAPS crime statistics, there were 232,657 drug related cases in 2018 and 170,510 in 2019 (SAPS Crime Statistics 2018; 2019). There have been harsh penalties regardless of their gender where persons are convicted of dealing in dangerous dependence-producing drugs as provided for by section 5(b) of the Drugs and Drug Trafficking Act. Official data however is not disaggregated on gender and the data does not also reflect the specific nature of the drug offences. There is further no published gender disaggregated data with regard to police arrests, those in police custody, those sentenced from court or from custody; number detained for drug offence with children in prison; non-custodial sentences awarded for drug related offences; type of non-custodial sentence; number of foreign non-national women detained on drug offences in immigration detention/holding prior to deportation, or in South African prisons; or the number of South African women detained on drug trafficking offences in foreign countries. A personal communication with the Central Drug Authority revealed in late 2020, that 298 women were registered in the criminal justice system (11 with children) on drug related offences, 89 were on parole, 50 on probation, 88 sentenced, and 70 unsentenced (pre-trial and those with trials ongoing and awaiting sentence).

South Africa's approach towards trial proceedings, sentencing and punishment is, in the main, gender-neutral in nature, whereby courts do not consider gender as a factor in determining guilt or otherwise of those accused. The South

African courts, in certain narrow circumstances, do however reflect the spirit of the *Tokyo Rules* (*Rules* 2 and 3) and *Bangkok Rules* (*Rules* 57, 58 and 59) that prescribe an approach that intentionally takes into account gender nuances and prioritises applying non-custodial sentences to women offenders, wherever possible. Gender does come into consideration at mitigatory stage before sentencing (see case *S v Kgabo and Others*, 2005). The approach of courts in South Africa is that certain factors which, on their own, do not necessarily constitute full defenses at law, can be relied on as mitigatory factors that can reduce the sentence. The factors include physical and mental abuse of the offender. Courts have applied the so called "*battered woman syndrome*" doctrine to reduce the sentence where it is shown that GBV or other form of abuses contributed to the commission of a crime by women (see cases *S v Potgieter*, 1994; *S v Ferreira and Others*, 2004; *S v Engelbrecht*, 2005; *S v Kgabo and Others*, 2005). Hence, there is wide discretion towards determination of most appropriate sentencing by trial judges only subject to limited specified legislated parameters. For example, legislation provides for minimum mandatory sentences for specific offences. However courts still retain considerable discretion to depart from the prescribed minimum sentences whenever they find a *"substantial and compelling circumstance"* warranting such a departure (see cases *S v Maglas*, 2001; *Mxolisi and Another v S*, 2018). Decisions are guided by the well-established, broad sentencing principles which require that, when making sentencing determinations, judges consider four things: the victim must be heard and impact on the victim considered, the personal circumstances of the offender, the nature of the crimes including the gravity and extent thereof and the interests of the community (see cases *S v. Zinn*, 1969; *Mhlongo v S*, 2016).

COMBATTING EXPLOITATION OF VULNERABLE PERSONS BY TRAFFICKERS

Further and of relevance is that South Africa has adopted progressive legislation in 2013 by enacting the Prevention and Combating of Trafficking in Persons Act, Act 7 of 2013 which was supplemented by the Regulations Under Section 43(3) of the Prevention and Combating of Trafficking In Persons Act, in 2015, to address the pervasive problem of trafficking of persons, (particularly women and young girls) for exploitative sex work and coercion into the drug trade. This legislation criminalises the act of trafficking another person by means of, *"abuse of the vulnerability*." Section 22 acknowledges the existence of special circumstances, whereby the prosecutor is obliged to give due consideration as to whether the offence was committed as a direct result of the person's position as a victim of trafficking. If the authorities establish that the individual is a victim of trafficking, criminal prosecution may be quashed. In this way, the rights of victims are considered, and strengthen possibilities of protecting rights of WWUD and those who survive on sex work, if such crimes are committed in the context of human trafficking.

Potentially a similar approach and fundamental principles should apply, *a fortiori*, in cases where women get into contact with the law for drug offences. The commission of crime by these women is distinct to that of men in South Africa, and is inextricably linked to a combination of socio-economic factors that disproportionately affect them and which should be taken into consideration when they come into contact with the law (Steyn & Booyens, 2018). There is potential for reform here, whereby in late 2020, South Africa had gazetted a number of Bills, that may fundamentally impact and address some of the aforementioned social determinants around womens' exposure to GBV and pathways toward involuntary involvement in drug related crime. These Bills include the Domestic Violence Bill, the Criminal Matters Bill, Sexual Offences Bill, Cannabis for Private Purposes Bill, and the Correctional Services Amendment Bill).

The *Tokyo Rules* (*Rules* 3 and 8) require States to adopt laws, guidelines and policies that encourage non-custodial approaches wherever possible and appropriate, when sentencing or deciding on pre-trial measures for women. This is

further reinforced by the *Bangkok Rules* (*Rules* 57-62) that also direct States to consider gender-specific options for diversionary measures and pretrial and sentencing alternatives within Member States' legal systems. South Africa has a fairly permissive and progressive framework for application of a diverse range of non-custodial sentencing reflecting the letter and spirit of the *Tokyo Rules.* Depending on a court's evaluation of these considerations, South African courts have wide scope, to order custodial or non-custodial sentences from quite a generous menu provided for by legislature in the Criminal Procedures Act (CPA) of 1977. South African courts consider and order the most suitable of non-custodial sentences informed by the individual circumstances, and based on a pre-sentence report by an expert on suitability of a community correction sentence (see case *S. v Vetter*, 2012). The application of correctional supervision was introduced via an amendment to the law in 1991. At the time of writing a Correctional Services Amendment Bill is being considered, following subjection to public hearings and is currently being debated in parliament. It seeks to introduce amendments and strengthened provisions regarding parole and placement to the principal Act. In practice however, the formulation of community corrections provisions tend to be gender-neutral and courts seem to generally approach sentencing in the same manner. This reliance on court discretion however potentially represents a blind spot which can result in injustices, given its gender neutral approach. The domestic laws in South Africa generally fail to reflect gendered nuances either in the legislation or via judge-made law, as dictated by the *Bangkok Rules*, and do not specifically provide for such nuanced approaches that take into consideration the peculiar gendered pathways of women into the criminal justice system. Non-custodial sentences are however preferred for women with children or those with caregiving responsibilities, and whilst there are no explicit rules obliging judicial officers to adopt a gendered lens when sentencing female offenders, there have been some precedent-setting judgments (see case *M v. The State*, 2007) which have applied purposive interpretation of the best interests of the child, and with a net effect to encourage the diversion of women offenders who are mothers or caregivers from incarceration.

Essentially, South African judicial laws and policies are not especially nuanced to address specific needs of WWUD, nor indeed those manipulated and exposed to GBV to commit drug related crimes. The Prevention of and Treatment for Substance Abuse Act of 2009 is generally gender-neutral with only a single mention of women in the whole text; *'Section 4 provides that all services rendered to service users and to persons affected by substance abuse must be provided in an environment that, (h) ensures that services are available and accessible to all service users, **including women**, children, older persons and persons with disabilities without any preference or discrimination'*. However, it can be argued however that there is enough scope within the South African legal framework to ensure that women who are charged and convicted for drug-related offences are not incarcerated, and are supported by consideration of rehabilitative sentences that focus on the treatment of a drug user (see case *S v. Williams*, 1995). This resonates well with the *Tokyo Rules* which advocate for specialized treatment of various categories of offenders, and whereby South African courts are permitted to commit an offender to a treatment centre *in lieu* of imprisonment in terms of the Prevention of and Treatment for Substance Abuse Act. There is ample jurisprudence that shows that courts endeavor to give effect to these provisions, in order to balance the interests of the society to ensure justice (see cases *S v. Williams*, 1995; *S v Masike*, 1992; *S v Ramone*, 2013; *S v Vetter*, 2012; *Jonga v S*, 2020), while remaining in conformity with rule 12 and 13 of the *Tokyo Rules*.

In the practical sense, it has been reported however that despite such law and policies supporting the establishment of mechanisms to cater for WWUD, in practice there is a dearth of specialist welfare support for affected women, and the vast geographic nature of South Africa has contributed to sub-optimal application of correctional supervisions due to lack of supervisors in more remote areas (Department of Correctional Services, 2019). Resource constraints across line ministries

impact on effective operationalisation and effective reintegration of these women into their communities, and centre on the lack of adequate infrastructure and human resources for pre-sentence reports, monitoring and provision of community correction services; and the lack of evidence-based treatment options for drug users requiring rehabilitative services (not limited detoxification, but including substitution, psychosocial interventions, and trauma informed supports).

Lastly, this raises a key tension, if not a paradox, on the framing of the current domestic legal and policy framework in South Africa grounded in harsh criminal sanctions and penal provisions on drug-related offences, and the adoption of laws and policies that seek to provide for holistic socio-oriented solutions (albeit gender neutral) to the problem of substance abuse in a manner that is suggestive of a shift away from the penal approach (for example as in the Prevention of and Treatment for Substance Abuse Act; the National Drug Master Plan, 2019 to 2024). This is aptly showcased by the pro-active approach to decriminalize private possession of cannabis, and the current consideration of the Cannabis for Private Purposes Bill which proposes to expunge criminal records of those previously convicted of possession of cannabis.

CONCLUSIVE REMARKS

Women affected by drug use and/or involvement in drug related criminal activity in South Africa experience a myriad of structural inequalities, and vulnerabilities based on discrimination, stigmatisation, social exclusion, GBV, poverty, and difficulties in accessing justice, health care and economic advancement. Research in South Africa highlights criminalisation of drug offences does not serve as a deterrent, but rather fuels increased exposure to violence and exploitation by partners, communities and police (Vanwesenbeeck, 2017). There is an imperative for greater commitment to the *Tokyo Rules*, in the understanding and consideration of a woman's situation and sensitized criminal justice responses which fully consider the aggravating factors contain in the pathways from victim of GBV or trafficking, to that of perpetrator of drug or trafficking related crimes. Neglecting this gender nuanced approach to tackling drug use as a public health issue, and drug related crime by women, will undermine other State-led interventions to tackle public health issues such as HIV and socio-economic challenges linked to drug use and sex work. South Africa's state commitment to reform and improve its criminal justice and penal systems will be measured against the 2030 Agenda for Sustainable Development's commitment: *'No one will be left behind'* and particularly SDG 5*"Achieve gender equality and empower all women and girls"*, and 16*("peace, justice and strong institutions."*). The reform of South African justice and penal policies using a gendered lens, and cognisant of trauma dictated pathways toward involvement in drug related crime is further a pre requisite for the achievement of several other SDGs, namely SDG 1 on poverty; SDG 3 on health and wellbeing, and SDG 10 on reducing inequality and discrimination. Further to this, and given the 30 year anniversary of the *Tokyo Rules*, it will shine the spotlight on the government commitment to operationalise alternatives to sentencing for WWUD. The link between the *Tokyo Rules* and ever increasing prison populations and overcrowding in South Africa, inherently affect implementation of the Nelson *Mandela Rules*.

Policy and legislative reform, sensitization, training and capacity building of all criminal justice system stakeholders in South Africa should refer to the UNODC Toolkit on Gender-Responsive Non-Custodial Measures which provides an overview of international & regional standards and recommends that policy makers incorporate provisions of the *Bangkok Rules* and *Tokyo Rules* into domestic law & practice.The redirection of resources by the State towards scale up of holistic, gender sensitive and trauma informed programmes using rights-based, psychosocial and medical approaches could raise awareness and target the multi-layered aspects of victimisation, GBV, sex work and drug use by women not limited to those in South Africa, but also with a focus on South African women exploited and detained in foreign countries

on drug offences. For those with substance dependencies, further development of voluntary gender sensitive and trauma informed drug treatment and rehabilitation in South Africa is warranted. Compulsory drug treatment or rehabilitation in detention should never be enforced. This societal and judicial shift will require public and law enforcement sensitization, resources, policy and practice reform, and a cohesive multi-agency response spanning all stakeholders across the social, health, criminal justice system and community continuum.

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REFERENCES

African Sex Worker Alliance (2011). *I expect to be abused and I have fear': Sex workers' experiences of human rights violations and barriers to accessing healthcare in four African countries".* ASWA, Nairobi. Available from: I expect to be abused and I have fear: Sex workers' experiences of human rights violations and barriers to accessing healthcare in four African countries | UNESCO HIV and Health Education Clearinghouse

Artz, L., Hoffman-Wanderer, Y., Moult, K (2012). *Hard Times: Women's Pathways to Crime and Incarceration,* University of Cape Town, Cape Town. Available from: http://detentionjusticeforum.org.za/wp-content/uploads/2013/09/GHJRU-Hard-Times-Report-on-Women-in-SA-Prisons.pdf

Department of Correctional Services (2020), Annual Report, 2019 Pg. 47 available at http://www.dcs.gov.za/wp-content/uploads/2019/12/DCS-Annual-Report-_web-version.pdf

Ginn S (2013). Women prisoners. *British Medical Journal*, 346, e8318.

Judicial Inspectorate for Correctional Services (2018). *Pollsmoor Correctional Centre still in violation of the Overcrowding Court Order of 2016, 4 May 2018,* Available from: http://jics.dcs.gov.za/jics/wp-content/uploads/2019/04/Pollsmoor-Press-Release_May2018.pdf

Mail & Guardian (2016). *Filth, disease, sex and violence for Pollsmoor's female inmates,3 Mar.2016,* Available from: https://mg.co.za/article/2016-03-03-filth-disease-sex-and-violence-for-pollsmoors-female-inmates/

Manoek, S. (2012). *'Stop Harassing Us! Tackle Real Crime!': A Report on Human Rights Violations by Police Against Sex Workers In South Africa.* Women's Legal Centre, Cape Town. Available from: 210812-FINAL-WEB-version.pdf (wlce.co.za)

Penal Reform International (2020a). *Global Prison Trends 2020.* Penal Reform International, London.

Penal Reform International (2020b). *Global Prison Trends 2020. Special Focus Alternatives to Imprisonment.* Penal Reform International, London.

South Africa COVID-19 tracker (2020). *South Africa COVID-19 tracker*. Available from: COVID-19 South African coronavirus news and information. (sacoronavirus.co.za)

South African Police Service (SAPS) (2019) *SAPS Crime Statistics 2019*. Available from: https://www.saps.gov.za/services/crimestats.php

South African Police Service (SAPS) (2018) *SAPS Crime Statistics 2018*. Available from: https://www.saps.gov.za/services/crimestats.php

Steyn, F., & Booyens, K (2018). *A profile of incarcerated female offenders: implications for rehabilitation policy and practice* University of Pretoria, Pretoria. Available from: A profile of incarcerated female offenders : implications for rehabilitation policy and practice (up.ac.za)

The AIDS and Rights Alliance for Southern Africa (2019). *Don't treat us as outsiders, Drug Policy and the Lived Experiences of People Who Use Drugs in Southern Africa*, ARASA, Windhoek. Available from: "Don't treat us as outsiders" - Drug policy and the lived experiences of people who use drugs in Southern Africa (idpc.net)

The Department of Correctional Services (2019). *Annual Report, 2018/2019*. Available from: http://www.dcs.gov.za/wp-content/uploads/2019/12/DCS-Annual-Report-_web-version.pdf

The World Bank Report (2018). *South African Economic update.* Available from: http://pubdocs.worldbank.org/en/798731523331698204/South-Africa-Economic-Update-April-2018.pdf

UN General Assembly (1966). *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, 999, 171.

United Nations (UN) General Assembly (1991). *United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules) : resolution / adopted by the General Assembly*, 2 April 1991, A/RES/45/110

United Nations (UN) General Assembly (2010). *United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (the Bangkok Rules)*. 6 October 2010, A/C.3/65/L.50.

United Nations (UN) General Assembly (2016). *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)* (8 January 2016), A/RES/70/175.

United Nations Office on Drugs and Crime (UNDOC) (2009) *Women in prisons*. UNODC, Vienna. Available from: FINAL Declaration and background paper Women's health in Prison for in-house approval _2_ (unodc.org)

United Nations Office on Drugs and Crime (UNDOC) (2019). *Were you really raped, or did you just not get paid? A Needs Assessment of Women Who Use Drugs In Four Cities In South Africa,* UNODC, Pretoria. Available from: https://www.unodc.org/documents/southernafrica/Publications/Health/UNODC_WWUD_506_web.pdf

United Nations Office on Drugs and Crime (UNODC) (2020). *Toolkit on Gender-Responsive Non-Custodial Measures.* UNODC, Vienna. Available from: Toolkit on Gender-Responsive Non-Custodial Measures (unodc.org)

Van Hout, MC (2020a). *Leaving no one behind'*: The human tragedy of children in African prisons during COVID-19. *Health and Human Rights Journal*. Available from: https://www.hhrjournal.org/2020/05/leaving-no-one-behind-the-human-tragedy-of-children-in-african-prisons-during-covid-19/

Van Hout, MC. (2020b). Prison staff exposure to pathogenic disease and occupational health research in African prisons: A neglected area. *Journal of Sustainable Development: Africa.* 22(1), 166-171.

Van Hout, M-C., & Mhlanga-Gunda, R. (2018). Contemporary female prisoners health experiences, unique prison health care needs and health care outcomes in Sub Saharan Africa: A scoping review of extant literature. *BMC International Health and Human Rights, 18*(1), 1-31.

Van Hout, M-C., & Mhlanga-Gunda, R. (2019). 'Mankind owes to the child the best that it has to give': Prison conditions and the health situation and rights of circumstantial children incarcerated in Sub Saharan African prisons. *BMC International Health and Human Rights, 19*(1), 1-13.

Vanwesenbeeck, I (2017). *Sex Work Criminalization Is Barking Up the Wrong Tree.* Archives of Sexual Behavior, 46, 1631–1640. Available from: https://doi.org/10.1007/s10508-017-1008-3

Cases

S v Walters and Another (2002) (4) SA 613 (CC), 640 H- 641 A (para. 50).

S v Kgabo and Others (2005) (CC 11/1994) ZANWHC 63 (13 September 2005).

S v Ferreira and Others (2004), 4 All SA 373 (SCA) (1 April 2004).

S v Engelbrecht (2005) (2) SACR 41.

S v Potgieter (1994) (1) SACR 61.

Mxolisi and Another v S (2018) (A74/2017) ZAGPJHC 65 (29 March 2018).

S v Maglas (2001) 3 All SA 220 (A) (19 March 2001).

S v. Zinn (1969) (2) SA 537, 540.

Mhlongo v S (2016) (2) SACR 611 (SCA) (3 October 2016).

S v Vetter (2012) (AR 264/11) ZAKZPHC.

M v. S (2007) ZACC 18.

S v. Williams (1995) (2) SACR 251 (CC).

S v Masike (1992) (1) SACR 667 (A)

S v Ramone (2013) (2) SACR 596 (FB)

Jonga v S (CA&R295/2019) [2020] ZAECGHC 23; 2020 (1) SACR 550 (ECG) (3 March 2020)

ABOUT THE AUTHORS

Marie Claire Van Hout is Professor of Public Health Policy and Practice, Liverpool John Moore's University, United Kingdom. Email: m.c.vanhout@ljmu.ac.uk

Dzimbabwe Chimbga is a human rights lawyer at the Open Society Initiative for Southern Africa Email dziechimbga@gmail.com

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RESEARCH ARTICLE Open Access

Prison health situation and health rights of young people incarcerated in sub-Saharan African prisons and detention centres: a scoping review of extant literature

Marie-Claire Van Hout[1*] and Rosemary Mhlanga-Gunda[2]

Abstract

Background: Treatment and special protection of the rights of incarcerated young people in prisons are mandated under the Sustainable Development Goals (SDG), as well as under United Nations (UN) human rights instruments.

Methods: A scoping review mapped what is currently known about prison conditions and health situation of detained and incarcerated young people in sub- Saharan African (SSA) prisons. A systematic search collected and reviewed all available and relevant published and grey literature. Following application of exclusion measures, 54 records remained, which represented 37 of the 49 SSA countries. These records were charted and thematically analysed.

Results: The ages of children and adolescents held in SSA prisons ranged from 12 to 18 years. Three main themes were generated during the charting exercise; the prison environment for young people; availability and accessibility of basic necessities and navigating the prison system for health care and outside continuum of care.

Conclusions: The review highlights the grave and continuing deplorable situation of young people held in SSA prisons. The violation of international human rights norms is observed in the systemic abuse and detention of young people with adults. Basic needs are not met in relation to sanitation, ventilation, safe spaces, protection from physical and sexual violence, clothing, food and access to HIV and medical care.

Keywords: Sub Saharan Africa, Human rights, Prisons, Children, Juveniles, Adolescents, Availability and accessibility of health services, Availability of basic necessities, Human immunodeficiency virus infection (HIV)

Background

The global prison population continues to rise, with an increase in almost 20% observed between 2000 and 2015, despite the reduction in global crime trends [1]. Prison overcrowding, human rights abuses and growing numbers of vulnerable prisoner groups represent contemporary challenges for prison administration, and are underpinned by disproportionate use of pre-trial detention and imprisonment for non-violent or minor offences [1, 2]. The 2017 Global Prison Trends report [1] observed over 714,000 women and girls in prisons, and that the number of women in prisons globally had risen by 50% since 2000. This represents a significant rise in comparison to male prison populations which rose 20% in the same timeframe. Within this one third are on remand, and almost 20% of those convicted are in prison for drug-related crimes [2].

Available global data with regard to children in detention has estimated this cohort to be about 1 million in 2010, with an upcoming report by the UN Global Study on Children Deprived of Liberty intended in 2019. Most recently, Penal Reform International reported on regressive moves where some countries are reducing or reduced the minimum age of criminal responsibility in 2016, despite the unequivocal recommendation of the United Nations (UN) Committee on the Rights of the

* Correspondence: m.c.vanhout@ljmu.ac.uk
[1]Public Health Institute, Exchange Station, Liverpool John Moore's University, Liverpool L32ET, UK
Full list of author information is available at the end of the article

Child that this cut off should be no lower than 12 years, and the recommendation in 2016 that it be raised progressively to 18. For young people who are in conflict with the law, imprisonment should only be "a measure of last resort and for the shortest appropriate period of time" [3]. Key vulnerable populations of detained or incarcerated young people include; incarcerated girls; lesbian, gay, bisexual, or transgender (LGBT) youth; commercially sexually exploited youth; and 'cross over' youth involved in both the juvenile justice and child welfare systems [4]. The rate of conviction among girls has been greater than among adult women. In late 2015, the Special Representative of the UN Secretary-General on Violence against Children published the first report of its kind outlining the unique vulnerabilities of girls in the criminal justice system including histories of violence and abuse, poverty, unstable family environments, discrimination and presence of physical and psychological health conditions [2]. The report also suggested that some countries in effect use criminal justice systems as a substitute for weak or non-existent child protection systems [2].

Treatment and special protection of the rights of incarcerated young people in prisons are advocated for under the Sustainable Development Goals (SDG) (3,4,5,6, 8,10 and 16) which stress we will "leave no one behind". They are also mandated under United Nations instruments presented in Table 1 [5–13].

Despite the SDGs and these international guidelines, conditions pertaining to the ill treatment of young people in criminal justice systems across the world continue to warrant attention, with systemic abuse of detained young people, detention of young people with adults, and deplorable conditions continuing to be observed [1, 2].

Table 1 Treatment and special protection of the rights of incarcerated young people in prisons

Standard Minimum Rules for the Treatment of Prisoners ('Mandela Rules') (A/RES/70/175) (2016)[5]
Standard Rules for Non-Custodial Measures ('Tokyo Rules, 1990')[6]
Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders ('Bangkok Rules, 2016') (A/RES/65/229) [7]
UN Convention on the Rights of the Child (1989) [8]
UN Standard Minimum Rules for the Administration of Juvenile Justice ('Beijing Rules', 1985) [9]
UN Guidelines for the Prevention of Juvenile Delinquency ('Riyadh Guidelines', 1990) [10]
UN Guidelines for Action on Children in the Criminal Justice System ('Vienna Guidelines', 1997) [11]
UN Rules for the Protection of Juveniles Deprived of their Liberty ('Havana Rules', 1990) [12]
UN Guidelines for the Appropriate Use and Conditions of Alternative Care for Children (2009) [13].

In terms of health, young people in detention have unique and unmet medical needs (dental, reproductive, mental health, infectious illnesses), and may be disproportionately affected by learning disabilities, poorer mental health, risky health behaviours, self-harm, victimisation and suicide [4, 14–16]. They are medically vulnerable and face a disproportionately high morbidity and mortality rate compared to the general population [4, 14]. Being placed in prison environments and other closed settings exacerbates their existing mental health problems, learning difficulties and behavioural conditions. Incarceration exposes them to infectious diseases, trauma, violence and injury [4, 16], impairs positive child and adolescent development, and impairs transition to adulthood, and hinders successful re-integration into the community on discharge [6, 7, 15].

In the sub-Saharan African (SSA) region, basic rights for incarcerated or detained young people, as enshrined in the UN Convention on the Rights of the Child, are mandated in (amongst others) the African Charter on Human and Peoples' Rights (1981) [17] and the African Charter on the Rights and Welfare of the Child (1999) [18]. Other statutes and conventions addressing rights of young people incarcerated and detained in Africa include: the African Youth Charter (2006) [19]; Declaration and Plan of Action for an Africa Fit for Children (2001) [20]; Kampala Declaration on Prison Conditions in Africa (1996) [21]; Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (1999) [22]; Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa (2004) [23]; Lilongwe Commitment on Justice for Children (2009) [24] and OAU Convention Governing the Specific aspects of Refugee Problems in Africa (1969) [25]. Available data is limited regarding numbers of detained and incarcerated young people, who in 2008 were estimated to be approximately 0.5–5% of the total SSA prison population [26]. Of concern is that HIV prevalence in SSA prisons has been estimated at two to 50 times that of non-prison populations [27, 28]. In SSA prisons, a 2016 estimate reported that over 668,000 people are incarcerated, with women and girls overall having a higher prevalence of HIV than their male counterparts [29]. Adolescent girls in SSA are identified by the World Health Organization (WHO) in 2016 as a key population particularly vulnerable to HIV infection [30]. In 2016, new infections among girls and young women aged (15–24) were 44% higher than their male counterparts.

Research activity on SSA prison populations, HIV prevalence and their health situation remains fragmented in the region [31]. Telisinghe et al. [29] in their 2016 Lancet article underscore that most countries in the SSA region do not collect strategic information on incidence, prevalence, or clinical outcomes of HIV and TB infection

in prisoners, despite the African continental epidemic spanning a host of key populations at risk of HIV acquisition. We build here on a larger scoping exercise undertaken [31] within the support of a Medical Research Council (MRC) grant investigating prison health in the SSA region, and present a unique and extensive mapping exercise of extant information on juvenile prison conditions, health needs and rights in SSA prison settings.

Methods

Scoping reviews are a research synthesis which maps literature on a particular topic or research area, and provides an opportunity to identify key concepts; gaps in the research; and types and sources of evidence to inform practice, policymaking, and research [32]. For insufficiently researched topics such as this, scoping reviews are particularly useful as they include a wide range of data across identified sources and designs, and are used to raise awareness, and inform policy and practice [32–34].

The review process commenced with the establishment of the joint author team, who have relevant expertise in public health, prison health, and community medicine in Africa. We adhered to a previous similar scoping methodology [please see 31]. The underpinning research question was; 'What is known in the literature about the prison conditions, health situation and unique health rights of young people in contemporary sub-Saharan African prisons?' The term "prison" was adopted as representing facilities housing both on-remand young people and convicted juvenile prisoners. These settings included regular prisons, police holding cells, pre-trial detention, closed youth institutions, and camps where people who use drugs are forced into mandatory labour as means of rehabilitation. We restricted the scoping exercise to all records reporting on the situation for young people detained when in conflict with the law and under the age of 18 years [15]. We excluded literature on infants and babies incarcerated with their mothers, which are presented in a specific scoping review elsewhere not yet published.

The six-stage iterative process [34] was closely followed by the team, and consisted of (1) identifying the research question, (2) identifying relevant studies, (3) study selection, (4) charting the data, (5) collating, summarizing and reporting the results, and (6) an international expert advisory review exercise. Search terms were generated, and combined with SSA region. The general search strategy is illustrated in Table 2.

The search was conducted by author two between October and December 2018 using university databases at the University of Zimbabwe and Liverpool John Moore's University, PubMed Clinical Queries, and Scopus (exploratory search with selected references downloaded for the purpose of clarifying search terms), and with support from a university librarian. Comprehensive searches were subsequently conducted in the Cochrane Library, PubMed, Science Direct, EMBASE, EBSCO, Medline, PsycINFO and CINAHL, and restricted to the time period 2000 to 2017. No limitations on language were applied.

In order to ensure full coverage of current knowledge and perspectives relating to juvenile health situation in SSA prisons, we included international and national policy briefs, documents and reports, country situational assessment reports, conference proceedings, news reports, commentary pieces and editorials, in addition to empirical peer-reviewed scholarly literature. Records included had either young people detention or prison centres in SSA or the papers would report on adults incarceration conditions but with a young offenders section included. Where possible we included studies, which observed or described prison staff experiences and perspectives on young people incarcerated in SSA prisons. Follow-up search strategies included hand searching of reference listings. Hand searches were conducted on international aid and development organisational websites, health, medical and human rights related databases, and websites of country governments and non-governmental bodies.

All records were managed using EndNote. Screening was undertaken by author two, and cross checked by author one. The title and abstract of each record were initially screened by the author two, with both authors independently reviewing included and excluded records to determine inclusion status. All records warranting inclusion by the team were then procured for full text review. Where required records were translated into English. A second screen of the full-text of each record was conducted by the team. Studies were excluded at this stage if found not to meet the eligibility criteria. Figure 1 reflects inclusion and exclusion criteria used to chart the studies.

Following application of exclusion measures, 54 records were charted and thematically analysed, as per scoping review protocols. This involved the creation of a spreadsheet used to chart relevant data (data collection categories were the year of publication, author, location, method and aim, key findings and conclusion to enable the identification of commonalities, themes, and gaps in the literature). Charting involved collecting and sorting key pieces of information from each record. The team conducted a trial charting exercise of five records as recommended by [33], followed by a joint consultation to ensure alignment with the scoping question and its purpose. The charting exercise generated specific themes pertaining to juvenile health situation and health rights in prisons

Table 2 Search Terms and Strategy

Key Word	Alternative
Juveniles in Prisons	Juveniles in prisons*, OR Juvenile inmates *, OR juvenile prisoners *, OR incarcerated juveniles *, OR Children in Conflict with the Law *, Adolescents in prisons*
Research evidence	AND physical environment*OR availability of basic necessities*OR availability of adequate and quality nutrition* OR availability and accessibility of healthcare*OR availability of health education and promotion services and sexual reproductive health* OR availability of HIV/AIDS prevention* OR availability and accessibility of counselling services * OR availability of psychosocial services *
African Countries	Sub Saharan Africa*OR Africa*OR and the names of all the individual countries in Sub Saharan Africa

1 Juveniles in prisons

2. Juvenile inmates OR Juvenile inmates OR Juvenile prisoners OR incarcerated Juveniles OR children in conflict with the law OR Adolescents in prisons

3. OR physical environment, OR availability of basic necessities OR availability of adequate and quality nutrition, OR health services availability and accessibility, OR availability and accessibility of health care, OR availability of health education and promotion services and sexual and reproductive health, OR availability of HIV/IDS prevention, OR availability and accessibility of counselling services, OR availability and accessibility of psychosocial services) AND

4. Africa
Databases were searched using the appropriate subject headings and/or keywords or text words for the above search groups:

Sample Search (Pubmed Central) searched on 15-10-2018
Searches Results

1. Juvenile inmates OR Juvenile inmates OR Juvenile prisoners OR incarcerated Juveniles OR children in conflict with the law OR Adolescents in prisons

2. OR physical environment, OR availability of basic necessities OR availability of adequate and quality nutrition, OR health services availability and accessibility, OR availability and accessibility of health care, OR availability of health education and promotion services and sexual and reproductive health, OR availability of HIV/IDS prevention, OR availability and accessibility of counselling services, OR availability and accessibility of psychosocial services) AND Africa 1504

in the SSA region. Disagreements around theme allocation were resolved through team discussion.

Results

The scoping exercise revealed a limited evidence base within SSA pertaining to incarcerated or detained young people and health situation. Most included records originated from human rights organizations and annual reports from United States Department of State Bureau of Democracy, Human Rights and Labor and the African Commission on Human and Peoples' Rights. There is a dearth of empirical peer-reviewed scholarly literature. The ages of young people incarcerated or detained in the region ranged from 12 to under 18 years. Evidence was found in 37 of the 49 SSA countries highlighted in Tables 3 and 4, and with 11 of those referring to juvenile detention centres.

Summaries and characterisation of the chartered results are found in the Additional file 1: Table S1. Table 4 presents a summary of number of records per country. * Three charted results not included in Table 4 are located in Sarkin in 2008 [38], the African Union 52nd session meeting in Côte d'Ivoire in 2012 [39] and Telisinghe et al. in 2016 [29] where the authors give a commentary on the literature review results on the status of penal institutions in Africa as a whole with some reference to certain countries within Sub-Saharan Africa.

Three main themes were generated during the charting exercise, namely the prison environment for young people; availability and accessibility of basic necessities, and navigating the prison system for health care and outside continuum of care. Where possible in this paper, we present illustrative narratives from the three qualitative studies with extended quotes [35–37].

Theme one: the prison environment for young people

Overcrowding, unhygienic conditions and poor sanitation

Most penal institutions in SSA were reportedly built in the pre-colonial era and are still failing to meet even the most basic minimum standards for adults, with young people equally disadvantaged, and a significant shortfall in meeting international standards for juvenile detention. [38–42]. Incarceration conditions within countries were reported by the 2017 United States Department of State Bureau of Democracy, Human Rights and Labor to vary significantly [43–45]. Annual reports in 16 SSA countries (Central African Republic, Mali, Guinea Bissau, Comoros, Democratic Republic of Congo, Côte d'Ivoire, Equatorial Guinea, Gabon, Madagascar, Mauritania, Rwanda, Sao Tome and Principe, Senegal, Sierra Leon; Tanzania, Togo and Cape Verde) by the Department of State from 2012 to 2017 reported on harsh penal conditions described as potentially life threatening for young people [40–42, 44–57]. Official missions by the Special Rapporteur on Prisons, Conditions of Detention in Africa (referred to hereinafter as the Special Rapporteur) of the African Commission on Human and Peoples' Rights (ACHPR) in Namibia, Uganda, Mozambique, Malawi, Cameroon and Ethiopia in the years 2001, 2002 and 2004 reported on poor penal conditions for detained and incarcerated young people, and underscored concern that young people endure the same inhuman and

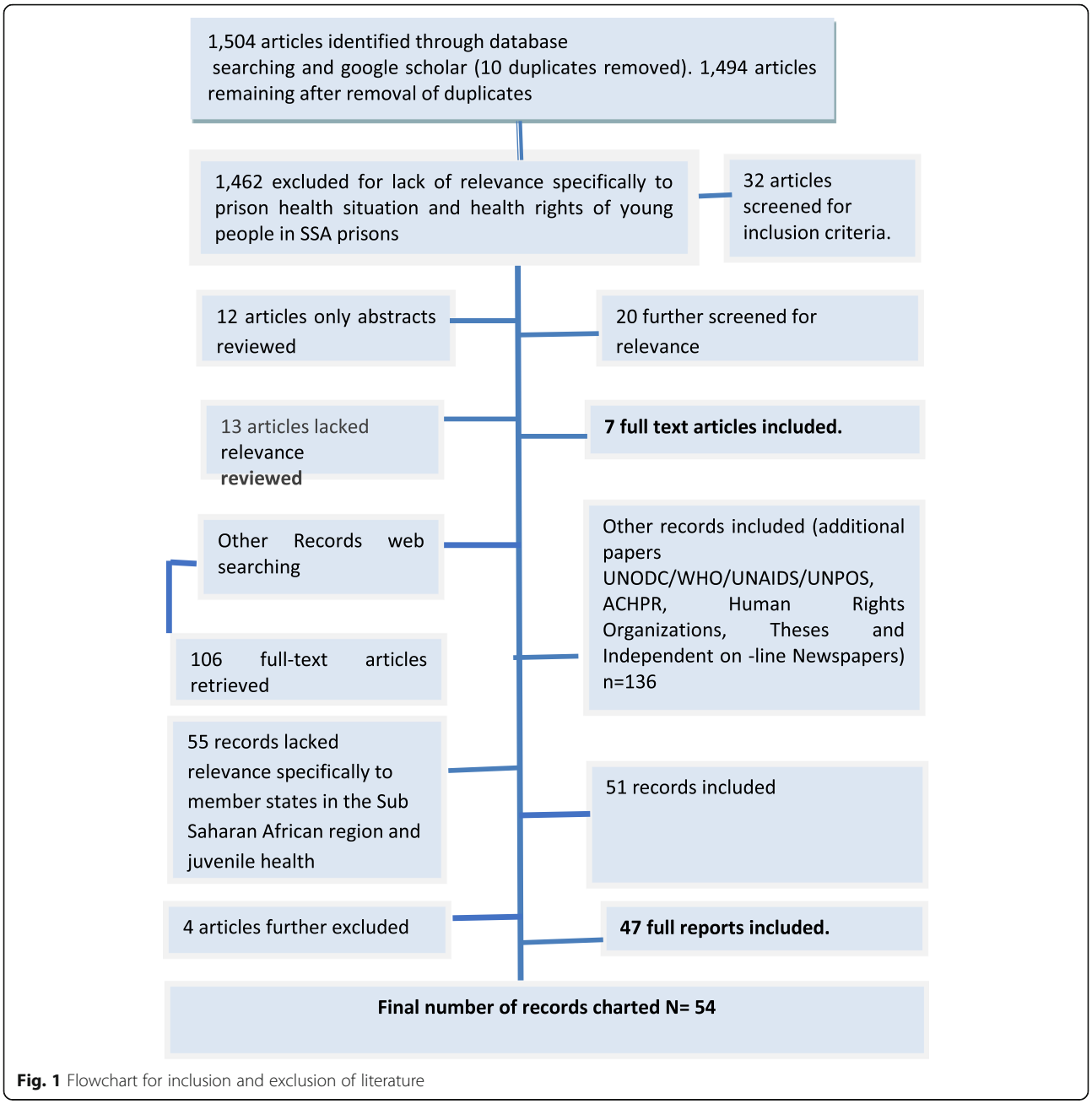

Fig. 1 Flowchart for inclusion and exclusion of literature

overcrowding conditions as their adult counterpart prisoners [58–63].

Eleven countries reported on juvenile detention centre conditions from 2001 to 2017 (Cape Verde, Lesotho, South Africa, Eritrea, Ghana, Mauritania, Nigeria, Swaziland, Togo, Rwanda and Zambia) [37, 44, 45, 56, 57, 64–73]. In 2004, some juvenile detention centres in South Africa were not overcrowded, but this was not uniform across all prisons holding young people as reported by the Special Rapporteur on Prisons, Conditions of Detention in Africa [64]. The Special Rapporteur on its mission to South Africa in 2004 reported that young people were held three at a time in single cells designed to accommodate only one person (in single cells measuring 3 m × 7 m) [64]. It was reported in 2004 by another investigation that young males at a Gauteng Correctional Centre were staying in communal cells and with no overcrowding observed [71]. In 2006, Liberian young people were reported to be held in tiny overcrowded cellblocks with between two and five other youth, and it was impossible for multiple prisoners to sleep lying down at once [65]. In Togo in 2014 overcrowding was reported in tiny cellblocks, which rarely exceeded 6 m × 5 m [56, 74].

Table 3 Sub-Saharan African (SSA) countries

Angola	**Côte d'Ivoire**	**Madagascar**	**Seychelles**
Benin	Djibouti	**Malawi**	**Sierra Leone**
Botswana	**Equatorial Guinea**	**Mali**	
Burkina Faso	**Eritrea**	**Mauritania**	**Somalia**
Burundi	**Ethiopia**	Mauritius	**South Africa**
Cameroon	**Gabon**	**Mozambique**	Sudan
Cape Verde	The Gambia	**Namibia**	**Swaziland**
Central African Republic	**Ghana**	Niger	**Tanzania**
Chad	Guinea	**Nigeria**	**Togo**
Comoros	**Guinea-Bissau**	Réunion	**Uganda**
Congo (Brazzaville)	Kenya	**Rwanda**	Western Sahara
Congo (DemocraticRepublic)	**Lesotho**	**Sao Tome and Principe**	**Zambia**
	Liberia	**Senegal**	Zimbabwe

Countries in **bold** present records included in the review

A Zambian study by Topp et al. in 2016 [65] reported on similar overcrowded conditions in a youth detention centre. The process of transfer of young people to the facility was observed to be lengthy and protracted. In 2013 in Nigeria, Atilola reported overcrowding at the youth detention centres (known as 'borstal homes' [66]. This was also observed by Stout in 2001 in Lesotho youth detention centres [67]. In comparison to boys, in 2001 girls in Burundi were housed in adult women's wings, an arrangement that reportedly helped ensure a degree of protection for them [75]. In 2011, girls in Ghana were held in the Girl's Remand Home that was located on the same compound as that of the boys [68].

In 14 SSA countries (Zambia, Sierra Leone, Liberia, Togo, Burundi, Ghana, Lesotho, Côte d'Ivoire, Chad, Nigeria, Malawi, Somalia, Benin and Mozambique), evidence from studies, human rights organizations and investigative journalism reports in the timeframe 2000 to 2017observe that young people in conflict with the law are detained and incarcerated in dilapidated, substandard and inhumane physical environments, with poor ventilation, inadequate or non-existent lighting and severe overcrowding [29, 35–37, 66–68, 74, 76–84]. In 2012, commenting on the state of prison infrastructure described as old and dilapidated, a Mozambican boy said "*… As paredes estâo cansadas'* [The walls are tired]…" [84].

Detention of young people in prisons and detention centres beyond maximum capacity results in severe overcrowding, a known public health factor conducive to the spread of infectious conditions via risk environments and risk behaviours. This is duly acknowledged in a 2011 Zambian study:

> " … Prison confinement can increase vulnerability to HIV due to frequent unprotected sex in the form of rape, non-availability and non-use of condoms, as well as high prevalence of STIs … " [85].

In Zambia in 2010, young people incarcerated at one of the prisons were reported to be sharing living quarters with those in the TB isolation cell [35]. Commenting on the fear of contracting TB, a 17-year-old boy said;

> " … I am worried I will catch TB. There is no window, just a small opening with wire over it—not much ventilation, there were … 23 TB patients in my living area. There are no vents, no air. I'm worried … ." [35].

Non-observance and non-implementation of infection prevention and control measures were also reported in Zambia in both 2011 and 2016 [29, 85], in the Central African Republic in 2012 and Equatorial Guinea in 2017 [41, 46] where isolation of patients with infectious diseases such as typhoid and TB was not practiced.

Poor sanitation and hygiene were consistently reported across all records. Conditions were characterized by insufficient, overflowing, non-functional toilets and bathing facilities with some water points close to sanitation outflows, and bathing buckets sometimes used as toilet facilities in the night. This was reported from 2001 to 2017 in Zambia, Sierra Leone, Mauritania, Central African Republic, Mali, Guinea-Bissau, Comoros, Democratic Republic of Congo, Gabon, Sao Tome and Principe, Senegal, Tanzania, Madagascar, Swaziland, Cape Verde, Malawi, Mozambique, Uganda, Cameroon, Ethiopia, Burundi, Lesotho, Côte d'Ivoire, Chad, Benin, Togo, Somalia and Eritrea [35, 39–41, 43, 46–53, 56, 57, 59–62, 65, 66, 68, 69, 71, 75, 79–81]. Such poor sanitation and hygiene was reported to exacerbate the spread and prevalence of body lice, scabies or other skin

Table 4 Summary table of records per country

Country	Number of Records chartered
Zambia	6
Mozambique	2
South Africa	2
Lesotho	1
Nigeria	3
Côte d'Ivoire	2
Somalia	1
Ghana	2
Eritrea	1
Benin	1
Malawi	2
Burundi	1
Liberia	1
Chad	1
Namibia	1
Uganda	1
Cameroon	1
Cabo Verde	1
Ethiopia	1
Central African Republic	1
Mali	1
Guinea Bissau	1
Comoros	1
Republic of the Congo	1
Gabon	1
Mauritania	1
Sao Tome and Principe	1
Senegal	1
Sierra Leone	2
Tanzania	1
Togo	2
Madagascar	1
Equatorial Guinea	1
Rwanda	1
Swaziland	1
Seychelles	1
Botswana	1
Total	51*

infections, respiratory complaints, diseases, diarrhoea and other preventable diseases [37, 46, 69, 77]. In Togo for example, it was reported that the Togo Brigadier Facility for minors had poor sanitation facilities and lacked portable water [56].

Lack of cleaning detergents and soap were reported to compound unsanitary and unhygienic conditions in Zambia, Sierra Leone, Central African Republic, Mali, Guinea-Bissau, Comoros, Gabon, Madagascar, Côte d'Ivoire, Swaziland, Malawi, Mozambique, Uganda, Cameroon, Ethiopia, Somalia, Togo and Chad [35, 40–42, 47, 48, 50, 51, 55, 56, 58, 60–63, 70, 74, 77, 82, 85] across the years 2001 to 2017. Lack of and/or erratic supplies of potable water affected prisoners' hygiene in prisons in Zambia, Sierra Leone, Central African Republic, Mali, Guinea Bissau, Comoros, Madagascar, Senegal, Côte d'Ivoire, Swaziland, Mozambique, Uganda, Cameroon, Chad, Togo, Somalia, Malawi, Ethiopia and Eritrea [35, 40, 41, 47, 48, 51, 53, 55, 56, 58, 60–63, 70, 74, 77–79, 81, 82, 85] was reported in the same time period. Basic items like soap, and detergents for washing clothes were reported to be provided to incarcerated children in Cape Verde and Durban, South Africa [57, 64].

Mixing of young people and adults in same prisons

Holding conditions of incarcerated or detained young people varied within and among SSA countries. These ranged from the separation of young people from the adult population, to partial or no separation at all. Based on the annual human rights reports by the Department of State, 17 countries (Sierra Leone, Mauritania, Rwanda, Central African Republic, Mali, Guinea-Bissau, Comoros, Democratic Republic of Congo, Gabon, Sao Tome and Principe, Senegal, Tanzania, Madagascar, Swaziland, Côte d'Ivoire, Seychelles and Cape Verde) [40–42, 44, 45, 47–55, 70, 87] across the years 2012 to 2017 were observed to incarcerate young people with the adult population in their penal institutions. The mixing of young people with adults was reported in Burundi, Ghana, Zambia, Sierra Leone, Somalia, Chad, Nigeria and Côte d'Ivoire [29, 36, 68, 75, 77–80, 82] across the years 2002 to 2015. In 2017, young people in Tanzania and Botswana were mixed with adults during the day and while being transported to court [43, 54]. In the same year, young people in Equatorial Guinea were observed to have separate sleeping quarters and bathrooms to adult inmates, but with a shared common area for meals [46]. Some disturbing practices were observed in Ethiopia, Democratic Republic of Congo and Senegal in the years 2004 and 2017 respectively where some prisons facilitated easy access to juvenile quarters by adults, unlocked entryways and poor supervision by prison staff [49, 53, 63]. Young people were not housed with the adult population in only two SSA countries, South Africa, and Lesotho [64, 67, 71].

The practice of mixing young people with the adult population in penal institutions in most SSA countries was attributed to lack of resources to house minors

separately [38]. In the years 2001, 2002 and 2004, this lack of prison resources to cater for minors was emphasised by the Rapporteur on Prisons, Conditions of Detention in Africa in Namibia, Mozambique, Malawi, Cameroon and Ethiopia [58, 59, 61–63]. In 2010, an officer in charge of a Zambian prison gave his opinion:

> … "As a father it pains me that children do not have their own facilities … —we need to build a separate area for juvenile offenders … " [35].

In 2011, a different Zambian study reported on the intimidation of young people, if they revealed the combined sleeping arrangements to formal investigators. A boy said:

> " … We sleep with the adults, but they told us to say we sleep in a juvenile cell. If we don't say we sleep in a separate cell, they will beat us. We are given punishment when we start talking. But we are scared we might die here … " [36]

Sexual abuse

The continuous threat of physical and sexual violence against young people was reported to be prevalent in SSA prisons. In 2016, Topp et al. [65] reported on the vulnerability of youth in SSA prisons due to lack of personal or family support, meaning they have a lack of food and other basic necessities, leaving them vulnerable to manipulation by wealthier and more powerful adult inmates who may prey on them sexually. From 2001 to 2012, physical and sexual abuse perpetrated by police, prison officers and adult prisoners on detained young people is evident in reports from Zambia, Mozambique, Uganda, Burundi, Côte d'Ivoire, Nigeria, Malawi and South Africa [29, 36, 58, 60, 61, 71, 75, 79–81, 85]. In 2017, in Swaziland in spite of young people being accommodated at youth correctional facilities, there were reports of inhuman and degrading treatment which included physical assault and strip searches of female young prisoners [70]. The mixing of young people with adult prisoners was observed to heighten exposure of young people to extreme physical and sexual abuse [38, 39]. Across the years 2001 to 2011, this abuse was observed to be present in police detention at the hands of the police or other detainees, during remand and after conviction by prison officers, adult prisoners or other young people [36, 37, 58, 64, 71, 85]. In 2004, South African staff at a juvenile correctional facility reported the prevalence of "male rape" in the juvenile section, with a frequency of about two to three reports a week [64]. In 2001, the Rapporteur on Prisons, Conditions of Detention in Africa in Uganda documented complaints that young people were victims of sexual assaults by other prisoners, but that prison authorities were ignoring the victims' reports, with similar reports were made in Zambia and Malawi [36, 58, 60].

In 2001, it was observed that young prisoners in Namibia would agree to pair with adult prisoners in the secret hope that they would see their living conditions improve [59]. A Zambian detainee in 2010 described how adults would seek to establish relationships with young people, with failure by prison authorities to protect them;

> " … Mainly the juveniles are very vulnerable. As young people coming into prison, we are full of fear. The convicts take advantage of us by providing us with food and security. We enter their dragnet, but by the time we discover this it is too late … " [35].

Across the years 2004 to 2017 adults in Benin, Ethiopia, the Democratic Republic of Congo and Senegal were observed in juvenile quarters with permission granted by the head of the prison [49, 53, 63, 86]. In 2001, a disturbing observation was reported by young people to the same Special Rapporteur in Zomba, Malawi [58]. They complained that prison officers themselves were engaged in trafficking them in exchange for money through transfers to the adult units where they would be abused by adult prisoners. The Special Rapporteur recommended that Malawi authorities should take up the issues of sexual abuse raised by the young people and in particular ensure that separation of adults and young people was strictly enforced, with punishment to all prison officers guilty of transferring young people into adult sections or the trafficking of young people [58]. Commenting on these sexual activities, a boy in Zambia shared his experience:

> " … Forced sexual activity is very common. The way we sleep, we are in one another's lap. " [36].

This is concerning given the risk of HIV infection. Data on HIV infection in SSA countries among detained young people is limited, and often dated. In 2001, a Zambian study reported an overall HIV prevalence of 27% among prisoners, with those under 20 years of age having a prevalence rate of 14.5% [88]. A 2017 Zambian study by Kumwenda et al. [37] reported that the prevalence of sexually transmitted infections (STI) among young people was attributed to sexual violence by adults during remand and in prison.

Theme two: availability and accessibility of basic necessities

Inadequate bedding, linen and mosquito nets

Lack of adequate bedding, linen and uniforms, with young people sleeping on bare floors in their own clothes or using cartons as bedding was reported in

Zambia, Sierra Leone, Central African Republic, Democratic Republic of Congo, Côte d'Ivoire, Swaziland, Equatorial Guinea, South Africa, Liberia, Ghana, Lesotho, Nigeria, Eritrea, Ethiopia and Cape Verde [35–37, 41, 46, 49, 55, 64, 68–71, 77, 79–81, 84] across the years 2001 to 2017. In contrast, at a Durban youth detention centre in South Africa in 2004, the girls section had beds [64]. Detainees in Zambia in 2010 were observed to be sleeping up to five young people on a mattress, covered with dirty unwashed blankets and with mattresses full of lice and dust [35]. In 2001 young people in Lesotho prisons slept on torn mattresses [67] and a similar observation was made at youth correctional facilities. In malaria endemic countries such as Zambia and Sierra Leone, no mosquito nets were provided to young people, while in Côte d'Ivoire only a handful of torn mosquito nets were available but not adequate enough to go around [35, 78, 79].

In 2010, in Zambia it was reported that remanded prisoners were not provided with uniforms, while convicted prisoners' uniforms for young people were reportedly grossly inadequate [35]. Similarly, young people in Liberia in 2006 reported that they had no change of uniforms and were still wearing the same clothes since admission many months ago [76] while in the Central African Republic in 2012, the International Committee of the Red Cross (ICRC) and other religious groups supplied clothes to the prisoners [41]. In 2001, young people in Lesotho described the blankets and jerseys that they were provided with as "dilapidated", and complained of suffering from ailments such as coughing, fever and stomach ache which they attributed to inappropriate clothing and cold baths in the winter [67]. In 2017, a boy in a Zambian prison said;

> " … As for me when I came here, after three days, I was surprised to find that I had a lot of rashes over my neck and body. I think even exchanging bathing items, when your friends use it and then you also use it also causes rashes … " [37].

Poor quantity and quality of food

Food provided to young people was generally reported to be nutritionally insufficient in terms of quantity and quality, and described as barely edible and monotonous [39]. Lack of sufficient food rations coupled with poor quality food was reported in Zambia, Malawi, Mozambique, Namibia, Cameroon, Liberia, Burundi, Lesotho, Chad, Nigeria and Eritrea [29, 35, 36, 58, 59, 61, 62, 67, 75–77, 80] across the years 2001 to 2013. Similarly, the Department of State in its annual reports from 2012 to 2017 reported insufficient and poor quality food in some SSA penal institutions housing minors in Sierra Leone, Mauritania, Central African Republic, Mali, Democratic Republic of Congo, Gabon, Sao Tome and Principe, Senegal, Tanzania, Swaziland, Equatorial Guinea and Togo, with reliance on philanthropic organizations or relatives of incarcerated young people to supplement food allocations [40–42, 44, 46, 49, 50, 52–54, 56, 70]. In 2010, young people in a Zambian prison study [35] described the health consequences of food insecurity, describing symptoms such as irritability, sleep disturbance, burning pain, muscle atrophy and muscle cramps that are consistent with thiamine deficiency (vitamin B1). In 2011, officers in Zambian prisons reported cases of malnutrition related illnesses and deaths due to inadequate food [85]. In contrast in Ghana, the Rapporteur on Prisons, Conditions of Detention in Africa mission in 2014 observed that food provided to young people was of better quality than that provided to the adult prisoners [72].

Sarkin [38] and ACHPR [39] have underscored that in the face of a shortage of resources such as food, young people resort to competing with the general adult prison population for survival. Records dating from 2001 to 2011 in Zambia, Namibia and Malawi reported that young people were engaging in sexual transactions for food and other basic necessities not provided by the prison [36, 58, 59, 85]. Todrys and Amon's 2011 study [36] reported that a 17-year-old Zambian male described how adult inmates seek to establish relationships with young boys and how prison authorities were failing to protect them, with a lack of follow up by staff on duty common. In one case the cell captain intervened by removing the man from the cell. A Zambian boy in this study said;

> " … We have had experiences where the older inmates become physical and abuse us, even sexually … I haven't physically been abused, because I know the system, and avoid enticements. But my more vulnerable friends fall prey. Once you eat the food, they reprimand you, say you have no choice. I have seen it happen … " [36].

The ACHPR [59] Mission to Namibia in 2001 also noted prison guards regarded these instances with indifference. Similarly, in Malawi adult prisoners were reported to help young boys with food and a place to sleep, before abusing them and using them as their "wives" [56].

Theme three: navigating the prison system for health care and outside continuum of care

Prison healthcare provision and access to prison health care

Standards of health care provision for young people as for adults were inadequate and described as alarmingly poor in some SSA countries [56, 78]. Under-funding of

prisons by governments has impacted negatively on provision and access to health care in penal institutions [37–39, 42, 62, 73, 80, 85]. In fifteen SSA countries (Sierra Leone, Mauritania, Central African Republic, Mali, Comoros, Democratic Republic of Congo, Gabon, Sao Tome and Principe, Senegal, Madagascar, Côte d'Ivoire, Equatorial Guinea, Swaziland and Togo), the Department of State in its annual reports from 2012 to 2017 observed that health care facilities in prisons when available, were characterized by inadequate resources such as shortage of staff, essential medicines, medical equipment, and poor health education and promotion (HEP) services [40–42, 44, 46, 48, 50–53, 55, 70]. Annual reports from the Department of State from 2012 to 2017 indicate that conditions had not improved in the majority of countries. In Benin and Guinea-Bissau in 2004 and 2017 (respectively), prison-based health care was described as virtually non-existent [47, 86]. While the majority of prisons lacked primary health care facilities and provision of services for the treatment of minor ailments, these were available on site in Lesotho, South Africa, Côte d'Ivoire, Zambia, and Ghana in reports dating from 2001 to 2017 [29, 36, 55, 64, 67, 68, 73]. Whilst in 2016 South Africa had on-site clinics, it was observed that staff were not adequately trained in primary care or preventive medicine [29]. Similarly, medical care in Ghana in 2014 was being provided by prison aides and not medically trained professionals [72], while in Chad other prisoners provided care to their ill peers [77]. In Zambia and Mozambique (in 2010, 2011 and 2012) the shortage of essential medicines resulted in young people not being cared for according to standard recommended treatment protocols, but with whatever medicine was available at the time the young person presented at the prison health facility (for example, use of paracetamol in treating all conditions) [35, 37, 84, 85].

Young people were reported to face the same challenges in accessing of health care as their adult counterparts [38, 39]. In 14 SSA countries (Zambia, Malawi, Mozambique Namibia, Uganda, Cameroon, Ethiopia, Burundi, Benin, Chad, Somalia, Nigeria, Ghana and Togo) poor access for young people to on-site medical clinics in prisons were reported [29, 36, 37, 58–63, 73–75, 77, 81, 82, 85, 86] across the years 2001 to 2016. Dependence on prison officers not medically trained to give permission for accessibility to healthcare staff was observed. Young people incarcerated in Zambia in 2011 said;

> " … Sometimes it is difficult getting to the clinic, sometimes you may not get to go. We ask the cell leader – [and even if they agree] the guards might say no … " [36].

> " … If you are sick, then you can't go to the clinic … " [36].

In 2017, the Zambian Nakambala Approved Correctional School did not have a screening facility, or health care service and all young people were referred to the nearby clinic irrespective of the severity of the presenting condition [37]. This was observed to compromise their privacy and confidentiality during consultations. In 2017 in Côte d'Ivoire prisoners had to rely on guards to allow them to see medical staff at night within the prisons [55]. In Nigeria, Bella et al. in their 2010 study [73] of young people in the Ibadan remand home reported on the lack of adequate health facilities, and the prescence of anxiety, suicidal and depressive symptoms among participants.

Accessibility to continuum of care outside prisons

Across all records, delays and barriers to accessing outside medical care were observed. Delays of up to several days in accessing higher levels of medical care for severely ill young people were reported in Zambia, Central African Republic, Mozambique, Cameroon, Côte d'Ivoire and Eritrea across the years 2001 to 2017 and attributed to administrative barriers, lack of transport, fuel and security fears [35, 41, 55, 61, 62, 69, 85]. In 2002 in Cameroon, mandatory payment to community-based health care centres negatively affected access to medical services for referred sick inmates, despite access to treatment being supposedly free [62]. The same observation was made in Côte d'Ivoire in 2017 where philanthropic organizations paid for the medical care of referred inmates [55]. In Zambia in 2011 negative attitudes of medically unqualified and untrained prison officers controlled and evaluated the necessity for referral for onward management [36, 85]. In 2011 a 17-year-old Zambian boy said

> " … I asked for help at the clinic and they said they would take me to the hospital – that was seven months ago. They gave me some medicine but it only makes me sleep, it doesn't help me breathe … " [36].

Health education and promotion, sexual and reproductive health, psycho-social and HIV counselling services

Despite the enhanced risk of STI, TB and HIV acquisition in prisons, there was no evidence from the majority of countries in SSA that they provided key psycho-social services underpinned by health education and promotion (HEP), sexual and reproductive health (SRH), psycho-social and HIV counselling services to detained or incarcerated young people. Zambian prison policy in 2011 was reported to acknowledge the fact that penal

environments exacerbate vulnerability to HIV infection due to prevalence of frequent unprotected sex, rape, laws that prohibit condom availability and distribution, and the high prevalence of STI in the adult prison population. As young people are detained in the same overcrowded prisons and mixed with adults, their exposure to disease is heightened [85]. Commenting on the lack of youth-friendly services at a primary health clinic and how this affected service uptake and health seeking behaviour by adolescents, a key informant shared her experience in 2017 as follows;

> " … At the clinic where juveniles are referred, there are no adolescent health services. This is a big challenge as some adolescents are shy to openly talk about their sexual related challenges. Such fears worsen their health … " [37].

Information, Education and Communication (IEC) materials on HIV/AIDS and HEP on SRH and counselling services were documented as provided to young people in prisons located in Namibia, Cameroon, Nigeria and South Africa [59, 62, 71, 80] in 2001, 2002, 2004 and 2013 respectively. In 2004 and 2011 (respectively) psychologists and social welfare officers were reported to be available to incarcerated young people in South Africa and Ghana [64, 66, 72]. Counselling services that included SRH and HIV prevention, treatment and care were reportedly available to detained or incarcerated young people in South Africa, Uganda, Ghana and Zambia [37, 60, 66, 72] in reports dating across 2001 to 2017. Quality was compromised by the lack of trained staff for information provision, lack of available evidence-based HEP materials, and dissemination strategies [37]. Despite HIV counselling services being available in Zambia, low uptake of HIV testing among young people was reported [85]. Psychological services were not available in Democratic Republic of Congo, Namibia, Somalia, Ghana and Nigeria [49, 59, 73, 80, 82] across the years 2001 to 2017. Within the majority of countries, observations on the availability and accessibility of mental health and psychiatric services for incarcerated young people were not made. In 2014 the Office of the High Commissioner for Human Rights United Nations Rapporteur observed the lack of capacity by the Ghanan correctional facilities to deal with mental illness and the critical shortage of community based mental health services [86]. In contrast, in 2017 two countries were reported to be close to meeting international norms for detention of young people in Rwanda and Mauritania [44, 45].

Discussion

The scoping review represents a unique and first step toward mapping available literature on the situation of incarcerated or detained young people in the SSA penal institutions. It focuses on an important topic, namely a vulnerable prison population which is at high risk for experiencing violation of their rights. We have presented a broad overview for experts and authorities in the field. Its contribution to the field is twofold, one it summarises and highlights the extraordinarily poor conditions of young people in detention in SSA and second, it draws attention to what is still a clear lack of specific evidence and attention being paid to this issue. We recognise the limitations of this review centring on the relative lack of data sources with only 37 countries represented. Strengths centre on the thoroughness of the review approach in terms of its multi layered strategies to locate all forms of information.

The review highlights that incarcerated or detained young people are a hidden population in SSA prisons who continue to be ignored compared to the adult population in terms of basic conditions such as space, ventilation, sanitation, clothing and nutrition, their personal safety, protection from infectious disease exposure and sexual violence, and their distinct developmental and medical needs. Whilst, they endure the same inhuman, overcrowded and unhygienic conditions as their adult counterparts, the exposure to adult environments and related risk compounds their vulnerabilities to violence and adverse health outcomes [39–41, 43–50, 52–61]. Despite legal mandates that young people should only be detained as a last resort, for the shortest appropriate time and separate from adults, studies found in this review indicate the widespread routine juvenile incarceration with adults, and for lengthy pre-trial periods [29, 35–37, 41, 42, 45, 47–50, 52–55, 67, 68, 74–77, 79, 80, 82, 84, 86, 87]. Young people were not housed with the adult population in only three SSA countries namely; South Africa, Mali and Equatorial Guinea [38, 46, 57, 64, 72].

Emerging from this review is that young people in SSA are incarcerated or detained in situations which do not comply with a host of international UN mandates [38] and specifically the African mandates and agreements such as the African Charter on Human and People's Rights (1981) [17]; the African Charter on the Rights and Welfare of the Child (1999) [18], and the Southern African Development Community (SADC) Minimum Standards for HIV in Prisons. SSA prison systems are almost universally under resourced leading to deplorable environmental conditions, sanitation and supplies for youth inmates and all inmates A lack of basic sanitation, hygiene and ventilation, inadequate nutrition, clothing, bedding, sheets, blankets and mosquito nets was reported with young people who at times slept on bare floors [28, 34, 35, 40, 41, 45, 48, 63, 65, 67, 68, 70, 71, 73, 74, 78–80]. The situation as for adult

prisoners is driven by high rates of pre-trial detention, poor prison infrastructure and a lack of governmental resource allocation. Such factors exacerbate the spread of diseases such as HIV and TB, STIs, body lice, scabies or other skin infections, respiratory, gastro-intestinal and malnutrition related illnesses and deaths [29, 31, 37, 38, 69, 77, 89].

Youth are particularly affected by under resourcing when it means that they are co-housed with adults. Vulnerability of youth in SSA prisons was observed due to lack of personal or family support resulting in a lack of food and basic necessities. This renders vulnerable to exploitation by wealthier and more powerful adult inmates who may prey on them sexually. Hence, the mixing of young people with the adult population increases juvenile risk vulnerability to extreme physical and sexual violence and manipulation, and with that, heightened exposure to HIV and other STIs [37–39, 88]. HIV in SSA prisons is underpinned by a high rate of HIV prevalence on committal, and with certain risk behaviours such as unprotected sex (due to lack of condom provision), injecting drug use and tattooing contributing to HIV spread. This remains a serious public health and human rights issue [31, 36, 38, 90]. This occurs against the backdrop that the SSA region continues to experience a HIV epidemic, with two-thirds $(^{2}/_{3})$ of all people infected with HIV living in this region, and with prisoners and young people indicated as particular risk populations for HIV acquisition and transmission, and co-infection with TB [29, 91, 92]. Young people are at high risk of being put in situations where they feel the need to trade sex for basic necessities as evidenced by this scoping review, as well as being exposed to physical and sexual abuse perpetrated by police, prison officers and adult prisoners [29, 36, 38, 39, 58, 60, 61, 71, 75, 79–81, 85].

Like all persons, prisoners are entitled to enjoy the highest attainable standard of health and humane treatment. This right is guaranteed under international law [93–96]. Juvenile health needs and health rights when incarcerated or detained in the SSA prison system and particularly relating to HIV and TB (co) infection have received minimal attention [26, 27, 97]. At present the lack of attention to, and lack of evidence about young peoples' conditions in SSA prisons contributes to their hidden vulnerabilities. The potential calls for enhanced prison conditions for young people are liable to be integrated into general calls for greater prison resourcing, rather than their unique stand alone needs. Despite agreed international norms in the Standard Minimum Rules for the Treatment of Prisoners ('Nelson Mandela Rules') (A/RES/70/175) [8], basic minimum package of health care, or indeed the United Nations Office on Drugs and Crime comprehensive package of HIV prevention, treatment and care in prisons [98–102], the provisions in most penal institutions in SSA are inadequate and in some SSA countries described as alarmingly poor [74]. Access to HIV testing and counselling and to HIV prevention, testing and care (PTC) programmes is often poor in SSA prisons and other closed settings [29]. Of concern is the low resource allocation by government to prison health systems, characterised by shortages of qualified and trained staff, required medical supplies and equipment, and essential medicines [31]. In terms of tackling spread of HIV within prisons, structural barriers which include laws criminalizing "sodomy," policies or practices limiting bail, and justice system problems resulting in long delays in accessing courts, impede HIV prevention efforts and compound the provision of adequate healthcare for at-risk young people [36, 89, 103, 104]. Despite availability and in some instance low quality availability of counselling services that included SRH, and HIV testing and care, the situation is particularly adverse for young people with low HIV literacy, low uptake of HIV testing services, and who are competing against adult inmates for medical access and care whilst in prison [85]. This has severe public health repercussions for the community upon their return to their homes and families.

Conclusion

Children and young people should be detained only as a last resort, for as short a period as possible, and separate from adults. Basic rights for incarcerated or detained young people, as enshrined in the UN Convention on the Rights of the Child continue to remain neglected or abused in the SSA region. Children and young peoples international human rights norms are violated in the various forms of abuse illustrated by this scoping review on SSA prisons and youth detention centres. This review highlights the need for enhanced resource allocation to protect young people's health rights when incarcerated or detained in SSA prisons, alongside the gathering of strategic information and investment in research and gathering of strategic information to inform policy and practice in SSA prisons at country level [29, 31]. Prison authorities have a duty of care to all prisoners in ensuring equivalence of HIV PTC and SRH services for young people detained in prisons, and consistent with international, regional and national human rights standards. The 2016 WHO guiding HIV PTC principles [30] is underpinned by human rights, access to quality healthcare without discrimination, access to justice, acceptability of services, health and HIV literacy and integrated service provision to address multiple (co) infections and co-morbidities. All interventions should be offered voluntarily within an enabling prison environment supported by legislation, policies and strategies, without discrimination based on age, gender, sexual orientation,

sexual behaviour, citizenship, country of origin, race/ethnicity, asylum seeking status, religion and substance use status [105–107]. This review highlights the need for continued international technical assistance to countries in the SSA region to support policy reform, infrastructural improvement, and dedicated juvenile and health polices to support those incarcerated or detained as children or young people.

Additional file

Additional file 1: Supplemental Table. (DOCX 120 kb)

Abbreviations

ACHPR: African Commission on Human and Peoples Rights; ACRWC: African Charter on the Rights and Welfare of the Child; CCPCJ: Commission on Crime Prevention and Criminal Justice; HEP: Health education and promotion; HIV: Human immunodeficiency virus; HPTC: Prevention, testing and care; IEC: Information, communication and education; MRC: Medical Research Council; NGO: Non-governmental organizations; OHCHR: Office of the High Commissioner for Human Rights (United Nations); SADC: Southern African Development Community; SDG: Sustainable Development Goals; SRH : Sexual and reproductive health; SSA: sub-Saharan African; STI: Sexually transmitted infection; TB: Tuberculosis; UN: United Nations; UNICEF : United Nations Children's Fund; US: United States; WHO: World Health Organization

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Availability of data and materials

The datasets used and/or analysed during the current study are available from the corresponding author on reasonable request.

Authors' contributions

Both authors were involved in the study design, had full access to the data and analyses, and interpreted the data, critically reviewed the manuscript and had full control, including final responsibility for the decision to submit the paper for publication. Specifically; MCVH designed the scoping review methodology and protocol, assisted in screening of records, drafted the literature review, the methods, discussion and conclusion, reviewed and submitted the manuscript. RMG designed the scoping review methodology and protocol, conducted the search, assisted in screening of records, drafted the results, and reviewed the manuscript. All authors have read and approved the final manuscript.

Ethics approval and consent to participate

Not applicable

Consent for publication

Not applicable.

Competing interests

The authors declare that they have no competing interests.

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Author details

[1]Public Health Institute, Exchange Station, Liverpool John Moore's University, Liverpool L32ET, UK. [2]College of Health Sciences, Centre for Evaluation of Public Health Interventions, Department of Community Medicine, University of Zimbabwe, Harare, Zimbabwe.

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References

1. Penal reform international. Global prison trends 2018. Penal reform international. London, 2018. https://www.penalreform.org/resource/global-prison-trends-2018/. Accessed 20 Nov 2018.
2. Penal reform international. Global prison trends 2017. Penal Reform International. London, 2017. https://www.penalreform.org/resource/global-prison-trends-2017/. Accessed 26 Jan 2018.
3. United Nations (UN) general assembly. Convention on the rights of the child general comment no 24. CRC/C/GC/24. New York, 1989. https://www.ohchr.org/en/professionalinterest/pages/crc.aspx. Accessed 28 Nov 2018.
4. Barnert ES, Perry R, Morris RE. Juvenile incarceration and health. Acad Pediatr. 2016;16:99–109.
5. United nations (UN) general assembly. The convention on the rights of the child. Treaty series, vol. 1577, p. 3, general assembly resolution 44/25 of 20 November 1989. United Nations, New York 1989. https://www.ohchr.org/Documents/ProfessionalInterest/crc.pdf. Accessed 20 Nov 2018.
6. United Nations (UN) General Assembly. United Nations Rules for the Protection of Juveniles Deprived of their Liberty. A/RES/45/113. United Nations, New York 1991. http://www.un.org/documents/ga/res/45/a45r113.htm. Accessed 20 Nov 2018.
7. United Nations (UN) general assembly. UN guidelines for the appropriate use and conditions of alternative Care for Children 2009. https://www.unicef.org/protection/alternative_care_Guidelines-English.pdf. Accessed 20 Nov 2018.
8. United Nations (UN) General Assembly. United Nations Standard Minimum Rules for the Treatment of Prisoners. (the Nelson Mandela Rules) : Resolution / adopted by the general assembly. United Nations, New York. 2016. https://www.refworld.org/docid/5698a3a44.html. Accessed 19 Nov 2018.
9. United Nations (UN) General Assembly. Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules). United Nations and the rule of law. United Nations, New York. 1990. https://www.un.org/ruleoflaw/blog/document/united-nations-standard-minimum-rules-for-non-custodial-measures-the-tokyo-rules/. Accessed 19 Nov 2018.
10. United Nations (UN) General Assembly. United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules) New York, 2016. https://www.penalreform.org/wp-content/uploads/2016/07/BangkokRules-Updated-2016-with-renumbering-SMR.pdf. Accessed 14 Mar 2019.
11. United Nations (UN). UN Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules, 1985). United Nations, New York, 1985. https://www.ohchr.org/Documents/ProfessionalInterest/beijingrules.pdf. Accessed 20 Nov 2018.
12. United Nations (UN). United Nations Guidelines for the Prevention of Juvenile Delinquency. A/RES/45/112. (The Riyadh Guidelines) 1990. United Nations, New York. 1990. http://www.un.org/documents/ga/res/45/a45r112.htm. Accessed 20 Nov 2018.
13. United Nations (UN). UN guidelines for action on children in the criminal justice system (the Vienna guidelines) 1997. New York, 1997. https://www.ohchr.org/EN/Professionalinterest/Pages/CriminalJusticeSystem.aspx. Accessed 20 Nov 2018.
14. Lennox C. The health needs of young people in prison. Br Med Bull. 2014;112:17–25.
15. Lambie I, Randell I. The impact of incarceration on juvenile offenders. Clin Psychol Rev. 2013;33:448–59.
16. Teplin LA, Elkington KS, McClelland GM, Abram KM, Mericle AA, Washburn JJ. Major mental disorders, substance use disorders, comorbidity, and HIV-AIDS risk behaviors in juvenile detainees. Psychiatr Serv Wash DC. 2005;56:823–8.
17. Organization of African Union (OAU). African charter on human and peoples rights 1981. Nairobi, 1981. http://www.achpr.org/instruments/achpr/. Accessed 26 Nov 2018.

18. Organization of African Union (OAU). The African Charter on the Rights and Welfare of the Child (1999). Monrovia, 1999. http://www.achpr.org/files/instruments/child/achpr_instr_charterchild_eng.pdf. Accessed 26 Nov 2018.
19. African Union (AU). The African Youth Charter (2006). Banjul, 2006. http://www.un.org/en/africa/osaa/pdf/au/african_youth_charter_2006.pdf. Accessed 26 Nov 2018.
20. African Union (AU). Africa's agenda for children 2040. Fostering an Africa fit for children. The 2001 declaration and plan of action of Africa fit for children. Addis Ababa, 2001. https://au.int/sites/default/files/newsevents/agendas/africas_agenda_for_children-english.pdf. Accessed 26 Nov 2018.
21. African Commission on Human and Peoples' Rights (ACHPR). The Kampala Declaration on Prison Conditions in Africa (1996) Kampala, 1996 https://www.penalreform.org/resource/kampala-declaration-prison-conditions-africa/. Accessed 26 Nov 2018.
22. African Union (AU). The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa 1999 Banjul, 2003 http://www.achpr.org/instruments/principles-guidelines-right-fair-trial/. Accessed 26 Nov 2018.
23. Penal Reform International. Lilongwe declaration on accessing legal aid in the criminal justice system in Africa 2004. Penal Reform International Lilongwe, 2004. https://www.penalreform.org/resource/lilongwe-declaration-accessing-legal-aid-criminal-justice-system/. Accessed 26 Nov 2018.
24. Child Rights International Network. Guidelines on Action for Children in the Justice System in Africa. (The Lilongwe Commitment on Justice for Children (2009). Lilongwe, 2009. https://archive.crin.org/en/guides/legal/child-friendly-justice-and-childrens-rights/regional-standards.html.
25. The OAU Convention Governing the Specific aspects of Refugee Problems in Africa (1969). OAU. Addis Ababa, 1969. http://www.achpr.org/files/instruments/refugee-convention/achpr_instr_conv_refug_eng.pdf. Accessed 26 Nov 2018.
26. Sloth-Nielsen J. Children in African prisons. Human rights in African Prisons. Cape Town, 2008. In: Children in prison in Africa' in J Sarkin (ed) human rights in African prisons. Cape Town: HSRC Press, p. pp117–133.
27. UNODC. UNAIDS, World Bank. HIV and Prisons in sub-Saharan Africa. UNODC, UNAIDS, World Bank. Geneva, 2007. http://data.unaids.org/pub/report/2007/hiv_prison_paper_en.pdf. Accessed 29 Jan 2018.
28. United Nations (UN). Political Declaration on Ending AIDS sets world on the Fast-Track to end the epidemic by 2030. United Nations, New York. 2016. http://www.unaids.org/en/resources/presscentre/pressreleaseandstatementarchive/2016/june/20160608_PS_HLM_PoliticalDeclaration. Accessed 23 Apr 2018.
29. Telisinghe L, Charalambous S, Topp SM, Herce ME, Hoffmann CJ, Barron P, et al. HIV and tuberculosis in prisons in sub-Saharan Africa. Lancet. 2016;388:1215–27.
30. WHO. Consolidated guidelines on HIV prevention, diagnosis, treatment and care for key populations 2016. WHO Geneva, 2016. https://www.who.int/hiv/pub/guidelines/keypopulations/en/. Accessed 23 Nov 2018.
31. Van Hout MC, Mhlanga-Gunda R. Contemporary women prisoners health experiences, unique prison health care needs and health care outcomes in sub Saharan Africa: a scoping review of extant literature. BMC Int Health Hum Rights. 2018;18:31.
32. Daudt HM, van Mossel C, Scott SJ. Enhancing the scoping study methodology: a large, inter-professional team's experience with Arksey and O'Malley's framework. BMC Med Res Methodol. 2013;13:48.
33. Levac D, Colquhoun H, O'Brien KK. Scoping studies: advancing the methodology. Implement Sci IS. 2010;5:69.
34. Arksey H, O'Malley L. Scoping studies: towards a methodological framework. Int J Soc Res Methodol. 2005;8:19–32.
35. Human Rights Watch (HRW). Unjust and unhealthy HIV, TB, and abuse in Zambian prisons 2010. New York, 2010. https://www.hrw.org/report/2010/04/27/unjust-and-unhealthy/hiv-tb-and-abuse-zambian-prisons. Accessed 24 Nov 2018.
36. Todrys KW, Amon JJ. Human rights and health among juvenile prisoners in Zambia. Int J Prison Health. 2011;7(1):10–7.
37. Kumwenda M, Nzala S, Zulu JM. Health care needs assessment among adolescents in correctional institutions in Zambia: an ethical analysis. BMC Health Serv Res. 2017;17. https://doi.org/10.1186/s12913-017-2532-5.
38. Sarkin J. Prisons in Africa: an evaluation from a human rights perspective. Sur Rev Int Direitos Hum. 2008;5:22–51.
39. African Commission on Human and Peoples' Rights. African Commission on Human and Peoples' Rights (ACHPR). Report of the Special Rapporteur on Prisons and Conditions of Detention in Africa. 52nd Ordinary Session, African Commission on Human and Peoples' Rights. Yamoussoukro, Côte d'Ivoire. 2012. http://www.achpr.org/sessions/52nd/. Accessed 24 Jan 2018.
40. United States Department of State Bureau of Democracy, Human Rights and Labor. Mali 2014 human rights report. Washington, D.C. 2014. https://www.state.gov/documents/organization/236592.pdf. Accessed 19 Nov 2018.
41. United States Department of State Bureau of Democracy, Human Rights and Labor. Central African Republic 2012 human rights report. Washington, D.C. 2012. https://www.state.gov/documents/organization/204312.pdf. Accessed 19 Nov 2018.
42. United States Department of State Bureau of Democracy, Human Rights and Labor. Sierra Leone 2017 Human Rights Report. Washington, D.C. 2017. https://www.state.gov/documents/organization/277287.pdf. Accessed 19 Nov 2018.
43. United States Department of State Bureau of Democracy, Human Rights and Labor. Botswana human rights report. Washington, 20`17. https://www.state.gov/documents/organization/277215.pdf. Accessed 24 Nov 2018.
44. United States Department of State Bureau of Democracy, Human Rights and Labor. Mauritania 2017 Human Rights Report. Washington, D.C. 2017. https://www.state.gov/documents/organization/277267.pdf. Accessed 19 Nov 2018.
45. United States Department of State Bureau of Democracy, Human Rights and Labor. Rwanda 2017 Human Rights Report. Washington, D.C. 2017. https://www.state.gov/documents/organization/277279.pdf. Accessed 19 Nov 2018.
46. United States Department of State Bureau of Democracy, Human Rights and Labor. Equatorial Guinea Human Rights report 2017. Washington, D.C. 2017. https://www.state.gov/documents/organization/277239.pdf. Accessed 24 Nov 2018.
47. United States Department of State Bureau of Democracy, Human Rights and Labor. Guinea-Bissau 2017 Human Rights Report. Washington, D.C. 2017. https://www.state.gov/documents/organization/277253.pdf. Accessed 19 Nov 2018.
48. United States Department of State Bureau of Democracy, Human Rights and Labor. Comoros 2016 Human Rights Report. Washington, D.C. 2016. https://www.state.gov/documents/organization/265452.pdf. Accessed 19 Nov 2018.
49. United States Department of State Bureau of Democracy, Human Rights and Labor. Democratic Republic of Congo 2017 Human Rights Report. Washington, D.C. 2017. https://www.state.gov/documents/organization/277233.pdf. Accessed 19 Nov 2018.
50. United States Department of State Bureau of Democracy, Human Rights and Labor. Gabon 2017 Human Rights Report. Washington, D.C. 2017. https://www.state.gov/documents/organization/277245.pdf. Accessed 19 Nov 2018.
51. United States Department of State Bureau of Democracy, Human Rights and Labor. Madagascar 2017 Human Rights Report. Washington, D.C. 2017. https://www.state.gov/documents/organization/277261.pdf. Accessed 19 Apr 2018.
52. United States Department of State Bureau of Democracy, Human Rights and Labor. Sao Tome and Principe 2017 Human Rights Report. Washington, D.C. 2017. https://www.state.gov/documents/organization/277281.pdf. Accessed 19 Nov 2018.
53. United States Department of State. Bureau of Democracy, human rights and labor. Senegal 2017 human rights report. Washington, D.C. 2017. https://www.state.gov/documents/organization/277283.pdf. Accessed 19 Apr 2018.
54. United States Department of State Bureau of Democracy, Human Rights and Labor. Tanzania 2017 Human Rights Report. Washington, D.C. 2017. https://www.state.gov/documents/organization/277299.pdf. Accessed 19 Nov 2018.
55. United States Department of State Bureau of Democracy, Human Rights and Labor. Cote D'ivoire 2017 Human Rights Report. Washington, D.C. 2017. https://www.state.gov/documents/organization/277235.pdf. Accessed 19 Apr 2018.
56. United States Department of State Bureau of Democracy, Human Rights and Labor. Togo 2017 Human Rights Report. Washington, D.C. 2017. https://www.state.gov/documents/organization/277301.pdf. Accessed 24 Nov 2018.
57. United States Department of State Bureau of Democracy, Human Rights and Labor. Cape Verde 2017 Human Rights Report. Washington, D.C. 2017. https://www.state.gov/documents/organization/277221.pdf. Accessed 19 Nov 2018.
58. African commission on human and peoples' rights (ACHPR). Malawi: Mission on prisons and conditions of detention - 2001/Malawi/states/ACHPR. L'Exprimeur, Paris, 2002. http://www.achpr.org/states/malawi/missions/prisons-2001/. Accessed 20 Aug 2018.

59. African Commission on Human and Peoples' Rights (ACHPR). Namibia: Mission on Prisons and Conditions of Detention - 2001/Namibia/States/ ACHPR. Niger, 2001. http://www.achpr.org/states/namibia/missions/prisons-2001/. Accessed 26 Jan 2018.
60. African Commission on Human and Peoples' Rights (ACHPR). Uganda: Mission on prisons and conditions of detention - 2001/Uganda/states/ ACHPR. Niger, 2003. http://www.achpr.org/states/uganda/missions/prisons-2001/. Accessed 26 Jan 2018.
61. African Commission on Human and Peoples' Rights (ACHPR). Mozambique: Mission on Prisons and Conditions of Detention - 2001/ Mozambique/ States/ACHPR. Gambia, 2001. http://www.achpr.org/states/mozambique/missions/prisons-2001/. Accessed 26 Jan 2018.
62. African Commission on Human and Peoples' Rights (ACHPR). Cameroon: Prisons and Detention Conditions - 2002/Cameroon/States/ACHPR. Gambia, 2002. http://www.achpr.org/states/cameroon/missions/prisons-2002/. Accessed 26 Jan 2018.
63. African Commission on Human and Peoples' Rights (ACHPR). Ethiopia: Mission on Prisons and Conditions of Detention - 2004/Ethiopia/States/ ACHPR. Gambia, 2004. http://www.achpr.org/states/ethiopia/missions/prisons-2004/. Accessed 26 Jan 2018.
64. African Commission on Human and Peoples' Rights (ACHPR). South Africa: Prisons and Detention Conditions - 2004/South Africa/States/ACHPR. Gambia, 2004. http://www.achpr.org/states/south-africa/missions/prisons-2004/. Accessed 26 Jan 2018.
65. Topp S, Moonga C, Luo N, Kaingu M, Chileshe C, Magwende G, et al. Exploring the drivers of health and healthcare access in Zambian prisons: a health systems approach. HPP. 2016;31:1250–61.
66. Atilola O. Juvenile/youth justice Management in Nigeria: making a case for diversion Programmes. Youth Justice. 2013;13:3–16.
67. Stout B. The treatment of children in custody in Lesotho. Article 40. The dynamics of youth justice and the convention of the rights of the child in South Africa. https://www.cyc-net.org/cyc-online/cycol-0603-lesotho.html. Accessed 29 Oct 2018.
68. Commonwealth Human Rights Initiative (CHRI), Africa Office. Juvenile Justice in Ghana. A Study to Assess the Status of Juvenile Justice in Ghana 2011. Commonwealth Human Rights Initiative (CHRI), Africa Office, Accra, 2011. www.humanrightsinitiative.org/publications/ghana/JuvenileJusticeinGhana.pdf. Accessed 20 Nov 2018.
69. Office of the High Commissioner for Human Rights (OHCHR) Special Rapporteur on Eritrea OHCHR Geneva, 2014. https://www.ohchr.org/en/hrbodies/sp/countriesmandates/er/pages/sreritrea.aspx. Accessed 29 Nov 2018.
70. United States Department of State Bureau of Democracy, Human Rights and Labor. Swaziland 2017 Human Rights Report. Washington, D.C. 2017. https://www.state.gov/documents/organization/277297.pdf. Accessed 24 Nov 2018.
71. Centre for the Study of Violence and Reconciliation (CSVR). Doing time in a Gauteng Juvenile Correctional Centre for Males. CSVR, Gauteng, 2004. https://www.csvr.org.za/docs/gender/doingtime.pdf. Accessed 20 Nov 2018.
72. United Nations (UN) general assembly. Report of the special rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Mission to Ghana. United Nations, New York. 2014. https://www.ohchr.org/EN/HRBodies/HRC/.../Session25/.../A-HRC-25-60-Add-1_en.doc. Accessed 28 Apr 2018.
73. Bella TT, Atilola O, Omigbodun OO. Children within the juvenile justice system in Nigeria: psychopathology and psychosocial needs. Ann Ib Postgrad Med. 2010;8:34–9.
74. Y Care International. Young people in conflict with the law in Togo, West Africa 2014. Y care international. London, 2014. http://www.ycareinternational.org/wp-content/uploads/2015/06/YCI_Young-people-in-conflict-with-the-law-in-Togo_3.pdf. Accessed 9 Nov 2018.
75. Amnesty International. Poverty, isolation and ill-treatment. Juvenile justice in Burundi, AFR 16/011/2002. New York, 2002. https://www.amnesty.org/en/documents/afr16/011/2002/en/. Accessed 20 Nov 2018.
76. American Bar Association, Africa law initiative and UNICEF. Assessment of the Liberian juvenile justice system. American Bar Association Africa Bar Initiative. Monrovia, 2006. https://www.oijj.org/en/docs/general/assessment-of-the-liberian-juvenile-justice-system. Accessed 9 Nov 2018.
77. Amnesty international. Chad: 'We are all dying here"; human rights violations in prisons. © Amnesty international. London, 2012.' https://www.amnesty.org/download/Documents/16000/afr200072012en.pdf. Accessed 20 Nov 2018.
78. United Nations Integrated Peace Building Office (UNIPSIL), Office of the High Commissioner for Human Rights (OHCHR). Opening minds to rights behind bars. The situation of detention in Sierra Leone. Freetown, 2012. https://unipsil.unmissions.org/sites/default/files/behind_bars.pdf. Accessed 29 Nov 2018.
79. IRIN News. Prisons ignoring the rights of Ivorian youth. Abidjan, 2015. http://www.thenewhumanitarian.org/analysis/2015/05/21/prisons-ignoring-rights-ivorian-youth. Accessed 24 Nov 2018.
80. James G. Assessment of the administration and practice of juvenile justice system in Abuja. Nigeria MJSS. 2013;4:331–8.
81. International Child and Youth Network (CYC-Net). The state of juvenile justice in Malawi. Western Cape, 2000. http://www.cyc-net.org/cyc-online/cycol-0400-malawi.html. Accessed 30 Oct 2018.
82. United Nations Political Office for Somalia (UNPOS). UNPOS/ UNICEF/ UNODC. Assessment of the Prison System in Mogadishu South, 2012. Mogadishu, 2012. https://unpos.unmissions.org/sites/default/files/old_dnn/Assessment%20of%20the%20Prison%20System%20in%20Mogadishu_South_9_2012.pdf.
83. World Organisation Against Torture (OMCT). Human rights violations in Benin.Geneva,2004. www.omct.org/files/2004/10/2574/report_benin_eng_10_2004.pdf. Accessed 19 Nov 2018.
84. Lorizzo T. Prison reforms in Mozambique fail to touch the ground: assessing the experience of pre-trial detainees in Maputo. SA Crime Q. 2012;2012:29–38.
85. Todrys KW, Amon JJ, Malembeka G, Clayton M. Imprisoned and imperiled: access to HIV and TB prevention and treatment, and denial of human rights, in Zambian prisons. J Int AIDS Soc. 2011;14:8.
86. World Organisation Against Torture (OMCT). Benin Alternative Report to the United Nations Committee Against Torture 2004. https://www.refworld.org/topic,50ffbce582,50ffbce5e8,46c190c80,0,OMCT,,BEN.html. Accessed 24 Nov 2018.
87. United States Department of State Bureau of Democracy, Human Rights and Labor. Seychelles 2017 Human Rights Report. Washington, D.C. 2017. https://www.state.gov/documents/organization/277285.pdf. Accessed 19 Nov 2018.
88. Simooya O, Sanjobo N, Kaetano L, Sijumbila G, Munkonze F, Tailoka F, et al. Behind walls': a study of HIV risk behaviours and seroprevalence in prisons in Zambia. AIDS. 15:1741–4.
89. Todrys KW, Amon JJ. Criminal justice reform as HIV and TB prevention in African prisons. PLoS Med. 2012;9:e1001215.
90. Kyomya M, Todyrs KW, Amon JJ. Laws against sodomy and the HIV epidemic in African prisons. Lancet. 2012;380:310–2.
91. UNAIDS. Report on the global AIDS epidemic. Geneva; 2008. www.unaids.org/sites/default/files/media_asset/jc1510_2008globalreport_en_0.pdf. Accessed 23 Nov 2018
92. UNAIDS. Gap report; Beginning of the end of the AIDS epidemic. Geneva, 2014. http://files.unaids.org/en/media/unaids/contentassets/documents/unaidspublication/2014/UNAIDS_Gap_report_en.pdf. Accessed 23 Nov 2018.
93. United Nations (UN). Universal declaration of human rights. Paris, 1948. 2015. http://www.un.org/en/universal-declaration-human-rights/. Accessed 4 Dec 2018.
94. Committee UHR. United Nations (UN). Views: Communication No. 1020/ 2001, (CCPR/C/78/D/1020/2001). New York, 2003. CCPR/C/78/D/1020/2001. www.worldcourts.com/hrc/eng/decisions/2003.08.07_Cabal_v_Australia.htm.
95. Grover A. UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Expert consultation on access to medicines as a fundamental component of the right to health, UN Doc. No. A/HRC/17/43, 16 March 2011, paragraph 44. Available at: https://www.right-docs.org/doc/a-hrc-17-43/. Accessed 30 Nov 2018
96. UN Economic and Social Council. UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant), 11 August 2000, E/C.12/2000/4, United Nations, New York and Geneva 2001. https://www.refworld.org/docid/4538838d0.html. Accessed 5 Dec 2018.
97. Carelse M. HIV prevention and high-risk behaviour in juvenile correctional institutions. AIDS Health Promot Exch. 1994:14–6.
98. World Health Organization (WHO). Effectiveness of interventions to address HIV in prisons. Geneva, 2007. https://www.who.int/hiv/idu/OMS_E4Acomprehensive_WEB.pdf. Accessed 26 Nov 2018.
99. World Health Organization (WHO). Serving the needs of key populations: case examples of innovation and good practice in HIV prevention,

diagnosis, treatment and care. Geneva, 2017. http://apps.who.int/iris/bitstream/handle/10665/255610/9789241512534-eng.pdf. Accessed 30 Nov 2018.
100. UNAIDS. Blind spot - reaching out to men and boys 2017. Ottawa/Geneva, 2017. http://www.unaids.org/en/resources/campaigns/blind_spot. Accessed 30 Nov 2018.
101. UNODC. United Nations Office on Drugs and Crime (UNODC), International Labour Organization (ILO), United Nations Development Programme (UNDP), World Health Organization, (WHO) and UNAIDS (2013). HIV prevention, treatment and care in prisons and other closed settings: a comprehensive package of interventions. Vienna, 2012. Available at: http://www.unodc.org/documents/hiv-aids/HIV_comprehensive_package_prison_2013_eBook.pdf. Accessed 26 Nov 2018.
102. United Nations Office on Drugs and Crime (UNODC) (2013). HIV prevention, treatment and care in prisons and other closed settings: a comprehensive package of interventions. Vienna, UNODC. https://www.unodc.org/documents/hiv-aids/HIV_comprehensive_package_prison_2013_eBook.pdf. Accessed 26 Nov 2018.
103. Human Rights Watch. World report 2007. New York, 2007. https://www.hrw.org/legacy/wr2k7/wr2007master.pdf. Accessed 23 Nov 2018.
104. Nkematabong M. Cameroon: Juvenile justice - judges judge their acts. Cameroon tribune (Yaoundé). 2010. https://allafrica.com/stories/201001070852.html. Accessed 28 Nov 2018.
105. Penal Reform International. Women in prison: incarcerated in a man's world 2007. Penal reform international. London, 2007. https://cdn.penalreform.org/wp-content/uploads/2013/06/brf-03-2008-women-in-prison-en.pdf. Accessed 23 Nov 2018.
106. World Health Organization (WHO). Regional Office for Europe. Women's health in prison. Correcting gender inequity in prison health Copenhagen. 2009. http://www.euro.who.int/en/health-topics/health-determinants/prisons-and-health/publications/2009/womens-health-in-prison.-correcting-gender-inequity-in-prison-health. Accessed 23 Nov 2018.
107. Palmer, J. (2007) Special health requirements for female prisoners. In: Health in prisons. A WHO guide to the essentials in prison health, pp. 157–170. Copenhagen: WHO Regional Office for Europe. Available at http://www.euro.who.int/__data/assets/pdf_file/0009/99018/E90174.pdf. Accessed 4 Dec 2018.

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'Mankind owes to the child the best that it has to give': prison conditions and the health situation and rights of children incarcerated with their mothers in sub-Saharan African prisons

Marie-Claire Van Hout[1,3*] and Rosemary Mhlanga-Gunda[2]

Abstract

Background: In recent times, sub-Saharan African (SSA) prisons have seen a substantial increase in women prisoners, including those incarcerated with children.

Methods: A scoping review mapped what is currently known about the health situation and unique rights violations of children incarcerated with their mothers in SSA prisons. A systematic search collected and reviewed all available and relevant published and grey literature (2000–2018). Following application of exclusion measures, 64 records remained, which represented 27 of the 49 SSA countries. These records were charted and thematically analysed.

Results: Four main themes were generated as follows: 1) the prison physical environment; 2) food availability, adequacy and quality; 3) provision of basic necessities and 4) availability and accessibility of health services for incarcerated children.

Conclusions: The review highlights the grave situation of children incarcerated with their mothers in SSA prisons, underpinned by the lack of basic necessities, inadequate hygiene, sanitation and safe drinking water, exposure to diseases in overcrowded cells, inadequate nutrition, lack of provision of clothing and bedding, and difficulties accessing paediatric care. Reported paediatric morbidity and mortality associated with such prison conditions is deeply concerning and contrary to international mandates for the rights of the child, right to health and standards of care.

Keywords: Sub Saharan Africa, Prisons, Women, Infants, Children, availability and accessibility of health services, availability of basic necessities, human immunodeficiency virus infection, (HIV)

Background

Approximately 6.5% of the world's prisoners are women [1]. Whilst a minority, more than 500,000 women and girls are held in prisons and other closed settings, both as sentenced prisoners or as pre-trial detainees [2]. This number has increased by about 50% since 2000 in comparison to an 18% increase in the male population, and is rising in all regions of the world where statistics are available [1]. The dramatic increase in imprisoned women is important from a public health perspective. Women's special health needs relating to specific health approaches, sexual and reproductive health (SRH) care needs, the treatment of infectious diseases, nutrition and female hygiene requirements are often neglected in prisons and other closed settings [3, 4]. Incarcerated women generally experience gender-specific health-related challenges, which include menstruation, pregnancy and childbirth, care of their children within and outside of prison, development of certain forms of cancer, and are often exposed to gender-based violence in the form of physical/sexual abuse by prison officers and male prisoners [5–8]. Concerns around equitable

* Correspondence: m.c.vanhout@ljmu.ac.uk
[1]Public Health Institute, Liverpool John Moore's University, Liverpool L32ET, UK
[3]Public Health Institute, Exchange Station, Liverpool John Moore's University, Liverpool L32ET, UK
Full list of author information is available at the end of the article

quality and access to adequate health care for incarcerated women and their children are evident [9] .

Humane treatment of incarcerated women, and provision of adequate health services for women (and their infants and children) in prisons are mandated under the Sustainable Development Goals (SDG's) 3, 5, and 16, as well as under United Nations instruments; Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules) (A/RES/70/175) [10] Standard Rules for Non-Custodial Measures (Tokyo Rules) [11] and Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (Bangkok Rules) (A/RES/65/229) [12] The Bangkok Rules in particular stipulate the standards for healthcare programming equivalent to that in the community and recognition of women's specific health needs during incarceration, and also in relation to their children who reside in prisons with their mothers. Overarching these rules is the United Nations (UN) Convention on the Rights of the Child [13]. The 2010 UN Guidelines for the Alternative Care of Children mandate that: "best efforts should be made to ensure that children remaining in custody with their parent benefit from adequate care and protection, while guaranteeing their own status as free individuals and access to activities in the community" [14].

The sub-Saharan African (SSA) region continues to be the epicentre of the HIV epidemic, with two-thirds of all people infected with the human immunodeficiency virus (HIV) living in this region, and with high rates of HIV reported in prisons [15, 16]. Female sex is correlated with prevalent HIV infection in SSA prisons [15]. According to a recent evaluation by the United Nations Office on Drugs and Crime (UNODC), the overwhelming majority of prisoners in SSA, regardless of age and gender are detained under conditions that do not meet or only partially meet accepted standards of care [17]. Prison environments in the SSA region are compromised by weak prison and public health systems, failing prison infrastructure and ineffective criminal justice systems with high rates of pre-trial detention [18]. Investment in prison infrastructure is generally low across the SSA region [18]. In many SSA countries, pre-trial detainees can remain awaiting trial for lengthy periods (sometimes years) and this exacerbates the impact of such poor conditions of detention. As a consequence, overcrowding is pervasive. It is therefore not only imprisoned mothers with their children that are suffering such poor conditions, but the entire prison population in SSA [17, 18]. Weak prevention and treatment interventions for HIV, tuberculosis (TB), cholera, and malaria in prisons exacerbate the spread of disease [18, 19].

Children incarcerated with their mothers in the SSA region are a particularly under-researched and vulnerable group [5] often described as "hidden victims", with "their reality and circumstances related to incarceration seldom recognised" [20]. The children of particular concern to policy-makers and researchers are those born in prison and those under the age of eight years [21–25]. Potential factors supporting the incarceration of children with their mothers include optimal duration of breastfeeding, strengthening of mother-to-child bonds in early development and the inability of the mother to arrange alternative care for her child [5, 26]. With regard to children incarcerated with their mothers in SSA, the African Charter on the Rights and Welfare of the Child (ACRWC) [27] affirms the principle of the best interests of the child, with Article (19) stating that "the child shall be entitled to the enjoyment of parental care and protection and shall, whenever possible, have the right to reside with his or her parents. No child shall be separated from his parents against his will, except when a judicial authority determines in accordance with the appropriate law that such separation is in the best interest of the child." Of note however is that SSA prisons generally do not budget for the cost of looking after children born in prison and/or incarcerated with their mothers [18].

Research activity on prison populations and their health needs remains scant in the SSA region, and remains largely restricted to the gathering of strategic information on infectious diseases such as HIV and TB, and generally conducted in adult male prisons [15, 18]. Very little work has been done on women and their children incarcerated in the SSA region. A 2018 review has highlighted the abhorrent prison conditions for incarcerated women, and neglect of their specific health rights and needs in this region [18]. To date, there has not been an extensive review of published material on the conditions of children incarcerated with their mothers in SSA. The present review seeks to fill that gap.

Methods

Scoping reviews are defined as a form of research synthesis that aims to map the literature on a particular topic or research area and are used to identify key concepts; gaps in research, and types and sources of evidence to inform practice, policymaking and research [28–31]. The scoping review process was conducted by two authors with relevant expertise in community medicine, prison and public health, gender and African health systems [28]. The underpinning research question was; "What is known in the literature about the health situation and rights violations specific to children incarcerated with their mothers in contemporary SSA prisons?" The term "prison" was adopted as representing facilities housing both on-remand female prisoners (including jails, police holding cells, and other closed settings) and convicted female prisoners [18]. We restricted the

scoping exercise to all records reporting on the situation of children incarcerated with their mothers and including those born in prison and those below the age of eight years permitted by prison services in SSA to be housed with their mothers. The six-stage iterative process guiding the scoping review consisted of (1) identifying the research question, (2) identifying relevant studies, (3) study selection, (4) charting the data, (5) collating, summarizing and reporting the results, and (6) an international expert advisory review exercise [28] . Search terms were generated in English, and combined with SSA country names. The search strategy is illustrated in Table 1.

The search was implemented in April and May 2018 in the University of Zimbabwe and Liverpool John Moore's University Library catalogues, PubMed Clinical Queries, and Scopus (exploratory search with selected references downloaded for the purpose of clarifying search terms). Comprehensive searches restricted to the time period 2000 to 2018 were conducted in the Cochrane Library, Science Direct, PubMed, EBSCO, Host, Embase, Medline, Embase, Medline in Process, PsycINFO and CINAHL.

To enable the broadest picture of current knowledge and perceptions relating to the issue of infants' and childrens' health in SSA prisons, we included international and national policy documents and reports, academic theses, online reports, country situational assessment reports conducted by national, international and human rights organisations, conference proceedings, commentary pieces and editorials, in addition to articles in scholarly peer- reviewed journals. We included reports by the Special Rapporteur on Prisons and Conditions of Detention in Africa (hereinafter Special Rapporteur) who assess whether conditions in prisons and other closed settings are compliant with the African Union (AU) Member States' international obligations toward persons deprived of liberty. Where possible, we also included studies providing information about prison staff members' experiences and perspectives on the conditions and rights of infants and children' in SSA prisons. Follow-up search strategies included website searches of international aid, human rights and development organisations, health, medical and human rights-related data bases, websites of SSA government and non-governmental organisational (NGO) bodies and investigative news reports. Reference lists in reports, investigative news articles, journal papers and academic theses were also manually searched by the team to identify any additional relevant literature not captured.

Records were managed using EndNote. The title and abstract of each record were screened by the second author, and cross-checked by the first author [28]. All records warranting inclusion were procured for review of the full text version. A second screen of the full text of each record was conducted by both authors. Studies were excluded at this stage if found not to meet the eligibility criteria. Figure 1 reflects inclusion and exclusion criteria used to chart the studies.

Following application of exclusion measures, 64 records were charted and thematically analysed, as per Levac et al. [28]. This process of documentation and analysis of information generated specific themes pertaining to incarcerated children and infant experiences, health outcomes and unique prison health care needs in the SSA region. A spreadsheet was created to chart relevant data (data collection categories, year of publication, author, location, method and aim, key findings and conclusion) and identify commonalities, themes, and gaps in the literature. We conducted a trial charting exercise of

Table 1 *'Search Terms and Strategy'*

Key Word	Alternative
Children in Prisons	Circumstantial children in prisons, OR children accompanying their mothers in prison, OR children imprisoned with their mothers , OR children incarcerated with their mothers
Research evidence	AND availability and accessibility of healthcare OR availability of nutrition OR availability of basic necessities OR availability of HIV/AIDS treatment OR physical environment structure
African Countries	Sub Saharan Africa OR Africa OR and the names of all the individual countries in Sub Saharan Africa

1. Children in prisons
2. Circumstantial children in prisons OR children accompanying their mothers in prison OR children imprisoned with their mothers OR children incarcerated with their mothers
3. OR health services availability and accessibility, OR availability of basic necessities OR availability of nutrition, OR availability of HIV/IDS treatment, OR physical environment) AND
4 Africa

Databases were searched using the appropriate subject headings and/or keywords or text words for the above search groups:

Sample Search (Pubmed Central) searched on 29-03-2018

#	Searches	Results
1.	Circumstantial children in prisons OR children accompanying their mothers in prisons OR Children imprisoned with their mothers OR children incarcerated with their mothers	
2.	Health services availability and accessibility OR availability of basic necessities OR availability of nutrition OR availability of HIV/IDS treatment, OR physical environment) AND Africa	197

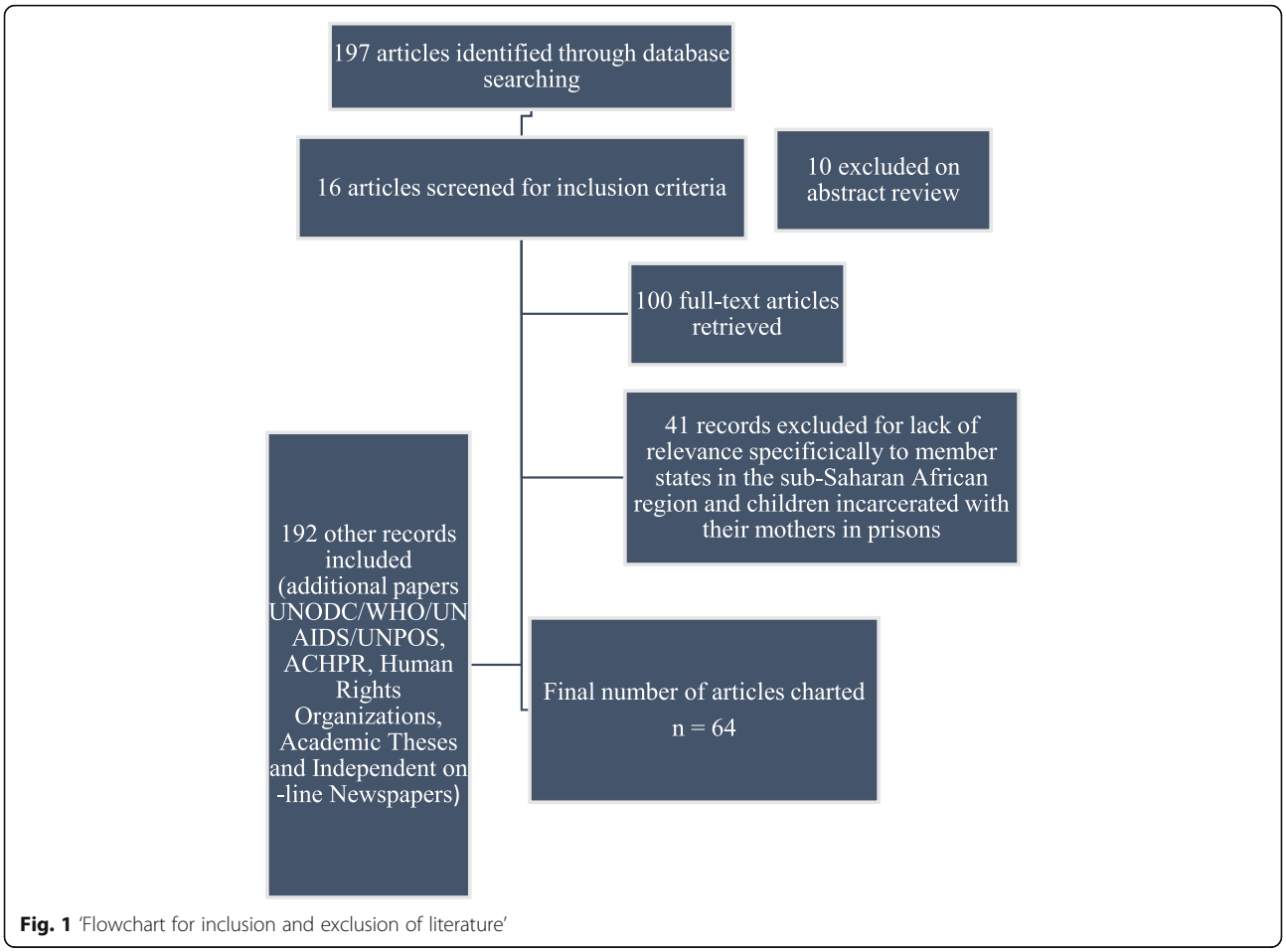

Fig. 1 'Flowchart for inclusion and exclusion of literature'

several records as recommended by Daudt et al. [30], followed by a joint consultation to ensure consistency with the research question and the purpose of the scoping review. Based on this preliminary exercise, we developed prior categories which guided the subsequent extraction and charting of the data from the records. All records were charted and analysed by the two reviewers in consultation, with disagreements around theme allocation resolved through discussion. Where additional data extraction categories emerged, consultation guided decisions around allocation and reporting. Identified themes were further presented and discussed with key experts from the SSA region [28] with expertise in prison health, health rights, SRH programming and international aid, to ensure no useful records were missed and to elicit varied perspectives on incarcerated children living with their mothers in SSA prisons.

Results

Literature was found representing 27 of the 49 SSA countries. These were Benin, Botswana, Burundi, Cameroon, Chad, Côte d'Ivoire, Djibouti, Ethiopia, Ghana, Kenya, Madagascar, Malawi, Mali, Mozambique, Namibia, Nigeria, Rwanda, Senegal, Sierra Leone, Somalia, South Africa, South Sudan, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe. We present the countries with corresponding type of record (for example journal paper, report, etc) in Table 2. For illustrative purposes where possible, we present quotes from included qualitative studies.

Theme one: the prison physical environment

Overcrowding in female prisons

The review highlights variation of degrees of overcrowding and standards of sanitation in prisons located in SSA countries. In a literature review by Reid et al. in 2012 [8] on tuberculosis and HIV Control in SSA prisons, the authors documented outdated physical infrastructure of prisons and severe overcrowding with associated severe health harms. The 52nd ordinary Session of the African Commission on Human and People's Rights in 2012 also emphasised, given the levels of overcrowding, that SSA prisons were generally not a safe place for pregnant women, babies and young children [32]. In 2013, Matsika et al. [33] reported that in Zimbabwe, up to 15 women were crammed in one tiny cell with their

Table 2 *'Summary table of country records'*

Country	Number of results per category								
	Journal Articles	United Nations Reports	African Union Reports	Human Rights reports	Chapter in a book	Government reports/ Minutes	Academic Thesis	Independent on-line Newspapers	Total all categories per country
Benin						1			1
Botswana						1			1
Burundi						1			1
Cameroon	2		1						3
Chad				1					1
Côte d'Ivoire						2			2
Djibouti						1			1
Ethiopia			1			1			2
Ghana	1	1							2
Kenya	2					1	1		4
Madagascar						1			1
Malawi			1				1		2
Mali						1			1
Mozambique	1		1						2
Namibia			1			1			2
Nigeria	1					1			2
Rwanda		1							1
Senegal						1			1
Sierra Leone				1		1			2
Somalia		1							1
South Africa	1	1	1			1	1		5
Swaziland						1			1
Sudan		1				1			2
Tanzania						1			1
Uganda		1	1			1		1	4
Zambia	3			1		1	1	1	7
Zimbabwe	1				1	1		3	6
Total									59 *

*Five charted results not included in Table 2 are Agomoh (2003), Vetten in Sarkin (2008), the African Union 52nd session (2012), the UNODC (2017) independent evaluation report in 10 SSA countries, and the review of literature conducted by Reid (2016) where there is a commentary on the status of penal institutions in Africa as a whole, with some SSA countries referred to. With these five, the total of records is 64. Further extensive detail on all records are documented in the Additional file 1: Table S1

children. Zambian news reporting in 2014 also reported that conditions for pregnant women, mothers and children in prisons were not safe [34]. In 2011, Todrys and Amon [35] conducted in-depth interviews with 46 key informants (government and NGO), 38 adult female prisoners and 21 prison officers in four Zambian prisons (Lusaka Central, Kamfinsa State, Mumbwa, and Choma State), in order to assess perspectives on the health and human rights concerns of female prisoners. Their general conclusion was that: *"women in Zambian prisons live in conditions of severe overcrowding. Zambian prisons are over 300 percent of capacity, and female inmates reported sleeping four to a mattress, packed together in unventilated cells with young children and the sick"* [35]. A later qualitative study by Topp et al. in 2016 in four Zambian prisons (23 female prisoners and 21 prison officers) reported some improvement but with variations in levels of overcrowding in cells across sampled prisons [36]. This was corroborated by findings reported by Malambo in 2016 [37]. In Djibouti, overcrowding was less of an issue for incarcerated women and their children, although conditions remained harsh with poor lighting and heating observed [38].

Lack of separate accommodation

The provision of separate accommodation for women with their children where they are housed separately from the main prison population has generally not improved in SSA prisons. In 2017, the United States (U.S) Department of State reported that in Côte d'Ivoire, Madagascar and Senegal, harsh prison and detention centre conditions were described as potentially life threatening due to absence of separate cells for mothers and their children, and with provided accommodation overcrowded, poorly ventilated and without sufficient natural light [22, 39, 40]. The U.S Department of State reported in 2014 that in Benin, Burundi, Côte d'Ivoire, Botswana, Nigeria and Tanzania, while children were permitted to stay with mothers in prison, no separate accommodation was provided for them [23]. In the Ugandan context (Masindi prison) as early as 2001, the AU Special Rapporteur reported on the lack of availability of separate space for mothers with children [41]. In the years 2001, both the Special Rapporteur [42] and Twea in 2013 [43] described Malawian nursing mothers and their children housed in mixed, overcrowded, poorly ventilated and dark holding cells. Little improvement was observed in Malawi or Côte d'Ivoire over time. A study by Baker and the Danish Institute Against Torture (DIGNITY) in 2015 [44] reported that that there was no separate accommodation provided for mothers with children in two large Zambian prisons. Makeshift detention facilities holding many women and their children have been described in Rwanda [45] . Women prisoners in Zambia described concern for their children's health when sharing accommodation with other prisoners;

> *"…I am worried about the children who are here. There was a baby who died. They don't pay any particular attention to the children. They are mixed in with everyone, they don't have their own cell or better food…"* [46].

In 2014, the Zambia Times reported that sleeping conditions at Lusaka Central Prison for children were not safe or secure. An officer commanding one of the Central Prisons in Zambia commented;

> *"…sleeping conditions at Lusaka Central Prison do not provide incarcerated children with space that is safe and secure… We have people with different kinds of ailments in prisons and children are supposed to be protected at all times… Yet now we can't find that environment in the prison at the moment…"* [34].

The overcrowded, poorly ventilated and unsanitary conditions in the majority of SSA prisons that mixed the sick and the healthy was reported to exacerbate risk of poor health, and increase risk of infection for mothers and their children [8, 15]. In Cameroon, Kenya, Nigeria and Zimbabwe, prevalence of such ailments as colds, coughs, acute respiratory tract infections, constipation, and rashes among children were attributed to poor environmental health conditions in prisons [21, 33, 47–49]. A Zimbabwean female prisoner described the grave conditions in the remand prison where she was being held before sentencing;

> *"… Raising a child in this situation is like living in hell…"* [50].

Poor sanitation

There were many reports of the accommodation of women with their children in inhumane, poorly sanitised, ventilated, and in unhygienic conditions across the SSA region [21, 33, 35, 36, 44, 47, 48, 50–57]. More than half of the 27 SSA countries where literature was available, reported poor sanitation in prisons, with little change since 2001. These countries were Chad, Cameroon, Côte d'Ivoire Djibouti, Ethiopia, Kenya, Madagascar, Malawi, Mozambique, Namibia, Senegal, Sierra Leone, Somalia, Uganda, Zimbabwe and Zambia [33, 34, 36, 41–43, 48–53, 58–63]. Reports mentioned insufficient or broken-down toilets or lack of access to toilets especially at night, failure to keep toilets clean through overuse, lack of water or erratic water supplies, and location of the toilet or container in the room accommodating mothers and their infants. In Zambia, a mother shared her experience of such conditions;

> *"…You should smell the stench. All the kids are sick, with diarrhoea, and you've got this stench coming from the toilet, and someone sleeping with a baby next to it…"* [44].

In Cameroon, Nigeria, Sierra Leone and Zimbabwe, shared buckets in cell corners, often overflowing, were used as toilets, with reports of women prisoners having to use their hands and buckets to dispose of its contents when the drain overflowed and having to remove faeces from the drain [47, 49, 51, 53, 64]. In Zimbabwe in 2003, women prisoners used 25 litre plastic containers especially at night;

> *"..By morning the bucket will be a total mess and mothers with babies had to restrain them from crawling on the floor in such a mess… "* [53].

General hygiene for women and their children across all records was poor. Poor sanitary conditions worsened by the inadequate supply of cleaning detergents and

soap were reported in Cameroon, Chad, Côte d'Ivoire, Djibouti, Ethiopia, Ghana, Kenya, Madagascar, Malawi, Mozambique, Namibia, Nigeria, Senegal, Sierra Leone, Somalia, Uganda, Zambia, and Zimbabwe [33, 41–43, 46, 48, 51–53, 55, 56, 59, 60, 62, 64–66]. In 2010, in South Africa, Hesselink and Dastile [67] reported that only one bath, a shower and a toilet were available for all mothers and their children at the Pretoria Correctional Centre. A mother at the Pretoria Correctional Centre commented:

> *"…Have to wake up at midnight or early hours in the morning for hot / warm water…"* [67].

One woman shared her experience on the lack of hygienic bathrooms and of safe clean tap water in a Zimbabwean women's prison:

> *"…Toilet sanitisers*[1] *are scarce. Sinks are not working and there is no running water …"* [63].

In contrast, the United Nations Office on Drugs and Crime (UNODC) in 2014 reported that in South Sudan, basic cleaning products, disinfectants and sanitary napkins were provided by the Juba State prison to female prisoners [68]. Since 2008, NGO and religious organizations were described as providing toiletries to women prisoners in Burundi, Côte d'Ivoire, Sierra Leone, Uganda, Zambia and Zimbabwe [23, 36, 37, 39, 41, 51, 52, 57, 69, 70].

The unhealthy environment exposed children (and their mothers) to gastro-intestinal pathogens. A female prisoner incarcerated in Uganda in 2017 expressed her concern;

> *"…The shortage of stable state supply of basic services…such as water makes it more difficult for those who have children in prison … this affects the care given to the children, who have increased risk of diarrheal diseases…"* [62].

In 2017, Makau et al. [48] conducted a cross-sectional study with 202 children and 193 mothers in eight Kenyan prisons. They reported that diarrhoeal diseases and vomiting were common among children in prison. The mothers attributed these illnesses to inappropriate sanitary habits and to the fact that only a small proportion of children had access to treated/boiled drinking water.

Mother and baby units

The review highlights where reporting is available, that there is great variation between countries, and even between prisons within a given country. There have been some encouraging improvements, albeit modest and at times temporary. Since 2014, in Ethiopia, Ghana, Kenya and Uganda, a minority of prisons are reported to have separate mother and baby units [41, 61, 62, 71]. South Africa is also a unique case in point. In 2010, a qualitative study using in-depth interviews with a sample of 14 women conducted by Hesselink and Dastile [67] in Pretoria and Johannesburg, described variations in accommodation arrangements for mothers. All mothers and their babies at the Pretoria correctional centre, were accommodated in one communal cell, with only three cots available for infants, while at the Johannesburg female correctional centre women awaiting trial and those already sentenced were housed in single cells (where the mother and the baby share a bed). The Special Rapporteur in 2004 reported on the provision of a mother and baby unit in Durban [72], with the first model Mother and Child Unit attached to the Pollsmoor prison opening in 2011 [73]. The provision of a greater number of mother and baby units in South Africa has been observed, particularly in the Gauteng province. As of December 2014, 16 female correctional facilities out of a total of 22 located in Gauteng have been designed to accommodate both children and their mothers [74].

Theme two: food availability, adequacy and quality

Inadequate food allocation and poor nutrition for children

Nutrition standards in SSA prisons are generally reported to be poor, and thus not only for children imprisoned with their mothers. Generally, this involves the provision of one primarily vegetarian meal per day [18]. Prisons systems generally do not allocate food to children incarcerated with their mothers. Governments in Côte d'Ivoire, Zambia, Uganda and Tanzania were specifically reported to not have an allocation for the care of children [23, 39, 44, 69]. In 2017, Muhangi et al. [62] reported that in Kenyan and Ugandan prison systems, some allocations of financial resources for children were recorded.

Poor quality nutrition and inadequate provision of food for children incarcerated with their mothers was reported in Benin, Cameroon, Chad, Ghana, Kenya, Malawi, Mali, Mozambique, Nigeria, Sierra Leone, Tanzania, Uganda, Zambia and Zimbabwe [33–35, 41–43, 49–51, 57, 58, 71, 75]. In 2011, Todrys and Amon [35] underscored how inadequate nutrition is a serious problem for pregnant women and women with children in Zambian prisons. A Zambian prison officer commented;

> "…I get no budget for the children's food, they must eat their mothers' food. They are hungry a lot…"[35].

Incarcerated mothers were documented as sharing their allocation of food with their children in prisons

located in Cameroon, Chad, Côte d'Ivoire, Ghana, Malawi, Mozambique, Senegal, Sierra Leone, Uganda, Zambia and Zimbabwe [9, 32–34, 41, 42, 44, 46, 47, 49–51, 57, 58, 60, 71]. A Zambian mother commented;

> *"…My child is not considered for food—I give my share to the baby (beans and kapenta [sardine]) we eat once a day. The baby has started losing weight and has resorted to breast milk because the maize meal is not appetizing…"* [46].

A prison officer corroborated this statement during an interview;

> *"…Yes, we do not provide food for children but the mother shares her portion with the child…"* [37].

Conflicting reports between prison officers and women prisoners were also documented by Malambo in 2016 [37] where Zambian prison officers reported extra provision of rice to breastfeeding mothers and children. Female prisoners in this study denied this. With regard to the provision of adequate protein in the diet, one mother in a Zimbabwean prison commented;

> *"…Meat is only part of the diet on important occasions such as the Prisons Day Commemoration..."* [33].

Contrary to the World Health Organization (WHO)/ UNICEF guidelines [76] on exclusive breastfeeding for the first six months, in Zimbabwe it was reported that regardless of age, all incarcerated children were required to consume non-breast milk foods as early as possible, to compensate for infrequent and inadequate breastfeeding resulting from their mother's prison work routine [33]. A 2013 newspaper account in Uganda reported that at Moroto prison, whilst NGOs provided food for children, the majority of incarcerated children were still dependent on their mothers' milk [70]. A mother expressed the inadequacy of food as follows:

> *"…Sometimes our babies go without food. They suckle from morning to evening…"* [70].

For incarcerated mothers unable to breastfeed in Zambia, no baby formula was available [57]. A prison officer in Zimbabwe commented;

> *"…The prison tries as much as possible to provide baby food to the children living with their mothers, and some well-wishers have stepped in to supply the food, but it quickly runs out and there is a general shortage. In some cases, the mothers feed on their babies' food because they are also starving…"* [50].

In contrast, and indicating some improvement in nutrition provision and standards, Ethiopian, Kenyan, Namibian and South African prisons were reported to provide additional food for nursing mothers and their children [59, 61, 62, 72]. In Malawi, in 2013 it was reported that on rare occasions soya flour was provided to children [43]. Children at the Luzira prison in Uganda were provided with cow's milk and vegetables from the prison farm [41, 62]. Variations in provision of special diets for nursing mothers and their children, and the provision of food items such as bananas, fruits and baked goodies like biscuits and banana bread to infants were also noted in South Africa [67]. Most encouraging was that in 2017, Makau et al. [48] reported that out of all 35 female prisons in Kenya, eight prisons provided children with three meals and at least two snacks per day.

Theme three: provision of basic necessities

Inadequate bedding, linen and mosquito nets

Provision of mosquito nets, sheets, cot beds and blankets for infants and children was observed to be inadequate in Cameroon, Ethiopia, Kenya, Somalia, South Africa, Zambia, and Zimbabwe [44, 48, 49, 51, 52, 56, 67]. In Kenya in 2016, incarcerated mothers were reported to be sleeping on dusty and cold floors with their children [48]. In Sierra Leone in 2008, the lack of basic infection prevention and control practices for bedding was observed by AdvocAid [51], which reported that mattresses and blankets were recycled among prisoners, and were filthy and old. A mother incarcerated in Zimbabwe in 2015 described the scarcity of warm blankets for infants;

> *" …You are forced to return to jail within 48 hours after giving birth at public health facilities together with the newly born baby and that is when you get an extra blanket for the baby…"* [52].

Inadequate baby clothing, diapers, and baby toiletries

The lack of provision of adequate clean and warm baby clothes, diapers and baby toiletries (for example, baby wipes) was documented in Cameroon, Ethiopia, Kenya, Malawi, Mozambique, Namibia, Sierra Leone, Somalia, South Africa, Tanzania, Zambia and Zimbabwe [23, 36, 42, 44, 48, 51, 56, 58–61, 67, 72]. Reliance on donations by NGOs and faith-based organisations was reported in Burundi, Côte d'Ivoire, Sierra Leone, South Africa, Uganda, Zambia and Zimbabwe [22, 23, 36, 37, 51, 57, 67, 70]. Access was controlled by prison staff, with limited supplies not equitably distributed to mothers per their identified need, and with prison staff taking some supplies for their own families. In Zambia, although NGOs and faith-based organisations provided basins,

soap, baby clothes and milk powder, there was no policy or systematic practice to ensure regular or equitable access to such essentials [44]. Similarly in 2008, mothers in Sierra Leone indicated that receiving of these supplies were at the discretion and "good-will" of prison officers [51]. In 2017, mothers incarcerated in Cameroon complained that the supplied clothing for infants was of such poor quality that it was often coarse, unhygienic and unsuitable [49]. Topp et al. in 2016 also described how the lack of clean clothing was a daily struggle for the mothers and their children in Zambian prisons [36]. In 2010, incarcerated mothers at the Pretoria Correctional Centre in South Africa were documented as complaining of inadequate provision of baby clothing given the harshness of winter temperatures, particularly at night [67]. The lack of warm clothing for infants in Kenyan prisons was also documented in 2016 [48].

Theme four: availability and accessibility of health services for incarcerated children

Inadequate prison health care for incarcerated children

Statistics on doctor-to-prisoner ratio or nurse-to-prisoner ratio are not readily available in the SSA region. Within the general population similar statistics pertaining to doctor-to-prisoner ratios are also not easily obtainable. Availability and accessibility to paediatric health care in prison were generally reported to be inadequate in the SSA region, and failing to meet minimum human rights standards regionally and internationally [36, 47, 52, 53, 57, 66]. In Zambia, for example, availability and accessibility of ante-natal care (ANC) was reported as a challenge in 2011 [35], with pregnant prisoners commenting on the lack of medical examination on entry to prison;

> *"…I had no initial exam when I came to the facility, even though I am pregnant. There is no special treatment for pregnant women, I take whatever I can…"* [35].

> *"…I have not been to the clinic yet, no antenatal care. I went to the clinic once but was told the nurses were not working. Since then I have not asked. I do not feel well, lots of ups and downs…"* [35].

In some countries (for example, South Africa and Kenya), however, encouraging findings were reported [48, 67, 73, 74]. In South Africa, the doctor-to-prisoner ratio was documented as better than in free society. In 2010, Hesselink and Dastile [67] reported on sufficient standards of medical care for incarcerated women and their children in South Africa supported by prison clinics with qualified medical staff. Despite small samples of prisoners interviewed in their study, the majority of incarcerated mothers indicated satisfaction with the quality of prison health care. In South Africa, prison services collaborated with community health care providers in the provision of health care services for the prevention of communicable and non-communicable disease, pregnancy and post-partum care, immunisations, and general health education and promotion for women and their babies. Access to and uptake of immunisation programmes were favourably reported in Zambia, albeit with some restrictions where mothers were not permitted to stay with their infants for health education and promotion after immunization [44]. However, in Malawi in 2013, and in Sierra Leone in 2008, incarcerated children were described as not taking advantage of key under-five services such as immunizations against polio, TB, diphtheria and measles [43, 51].

Based on the data sources available, paediatric health care provision in prison in most SSA countries was reported to be unavailable or lacking key critical resources such as essential medicines, trained medical staff, and specialised care, and overwhelmingly affected by barriers for women to access if available. These countries included Burundi, Cameroon, Chad, Djibouti, Côte d'Ivoire, Ghana, Kenya, Madagascar, Malawi, Mozambique, Senegal, Sierra Leone, Somalia, Uganda, Zambia and Zimbabwe [23, 36, 42–44, 47, 50–52, 54–58, 60, 62, 72]. In Côte d'Ivoire, NGOs sometimes financed prisoners' medical care [39]. A mother in Zimbabwe said;

> *"…Children suffered the most. They did not get good medical care in time. If you asked for help for your child they would tell you hurtful things like 'Prison has no free medicine…"* [53]

Medicine stock-outs were described by prisoners in Zambia;

> *"…my child had a high temperature and cough. She was taken to the clinic by prison officers but there was no medicine for my baby…"* [57].

Access to health care provision in prisons in SSA was further worsened by restricted opening hours for mothers and their children, controlled access by prison guards and negative staff attitudes toward incarcerated children who were acutely or chronically ill in Chad, Cameroon, Kenya, Senegal, Zambia and Zimbabwe [22, 36, 44, 47, 53, 54, 65]. In 2015, distressed mothers in Zambian and Cameroon prisons complained of lengthy delays by prison staff to respond to their children's acute medical needs and how they were denied access to the prison clinic, even in the event of medical emergencies [44, 47]. Delays in medical intervention for ill children and the consequent high risk of child mortality were

reported in Zimbabwe by Samakaya-Makarati [53] in 2003. In an interview with IRIN News [50], a prison officer in Zimbabwe said;

> *"...I have a feeling that most of the children who die here could have survived if they enjoyed better health facilities... "* [50].

Paediatric deaths caused by delay in access to medical care and general medical neglect were reported in Zambia and Zimbabwe in the years 2003, 2010 and 2015 [44, 53, 57]. A mother in Zimbabwe said;

> *"...When you ask, you are sometimes told... 'This is not home. 'You knew that you wanted to look after your baby very well. Why did you commit a crime? After two weeks my baby started to show deteriorating health, she couldn't eat anything. She cried most of the time. I asked to see a doctor, they couldn't let me see the doctor. So when my family came I asked them to take her...After about a month the baby passed away..."* [53].

HIV prevention, treatment and care for incarcerated children

In June 2016, the United Nations General Assembly agreed that ending AIDS by 2030 requires a fast–track response (*Political Declaration on HIV and AIDS: On the Fast Track to Accelerating the Fight against HIV and to Ending the AIDS epidemic by 2030*) [77]. Despite this, HIV testing, TB screening and treatment coverage in SSA prisons were generally reported to be weak, with limited or no provision of services for prevention of mother-to-child transmission (PMTCT) of HIV in prisons in Angola, Ethiopia, Lesotho, Malawi, Mozambique, Namibia, Swaziland, Tanzania (including Zanzibar), Zambia and Zimbabwe [18, 32, 35]. This lack of sufficient PMTCT facilities was documented as contributing to increased rates of mother-to-child transmission of HIV within prisons located in SSA countries [32]. This is concerning given that these countries are among the most HIV-affected countries globally. In Zimbabwe, the Network for People Living with AIDS (ZNNP+) in 2010 described how children already diagnosed with HIV would accompany their mothers into prison [50]. The report stated;

> *"...Many HIV positive children are dying in prison because they are failing to access treatment, and it is the responsibility of the government to make anti-retroviral therapy accessible to them..."* [50].

South Africa represents a positive example where PMTCT services are scaled up and available in prisons. Social work services and psychological services were also documented to be available upon request or referrals after proper assessments [74].

Discussion

This scoping review represents a first step toward mapping available literature on the health situation and unique rights violations of children incarcerated with their mothers in SSA prisons. There is a paucity of published evidence on this vulnerable population. The information found in this scoping review underscores the grave circumstances for infants and young children incarcerated with their mothers. Incarcerated children are a hidden population in SSA prisons who continue to be ignored in terms of prison resource allocation for basic needs such as safe and clean sleeping and living areas, basic nutrition, ventilation and light, adequate clothing, sanitary products, and pediatric medical care. The review highlights that similar to adult prisoners in SSA, they are incarcerated in situations which do not comply with international mandates in treaties ratified in nearly all SSA countries.

Prison conditions in the SSA region are harsh for all prisoners. Children like the general prison population are adversely affected by lack of separate accommodation and individual sleeping space, overcrowded cells, inadequate bedding, hygiene and sanitation, and lack of clean and warm clothing, food and safe drinking water. Harsh prison environmental conditions serve to exacerbate the spread of common respiratory and gastro-intestinal conditions, as well as diseases such as TB and malaria. This review, which focused on the past 18 years, underscores little improvement over time, with exception of South Africa.

Prison health for mothers and incarcerated children is generally dismissed or allocated a low priority by SSA government policy makers and prison health programmers perhaps due to their low numbers in comparison to the large male prison population [18]. International decrees as previously mentioned mandate equivalence of care in prison, to that provided in the community, and access to equitable health services for people in prisons free of charge (the Mandela Rules, Rule 24.1 [10]. Most encouraging however, is that South Africa as key forerunner in the region has significantly improved its prison conditions for women and their children, alongside upscaling maternal and child health (MCH) care services in prisons [74]. Of note in other SSA countries, is the lack of recording of incarcerated babies and children, including the rates of pregnancies in prisons, and poor provision of key SRH services for women and their children. There is a reported lack of pediatric health care services in prisons, and if services are available, barriers to access exist and result in low uptake. Medical care

provisions (with exception of those in South Africa) for women and their children were documented as poor, and characterized by lack of essential medicines, frequent medicine stockouts, negative staff attitudes toward the incarcerated children and their medical needs, prison officers who are not health professionals controlling access to medical care, and restricted uptake of incarcerated children to immunization programmes. The reported poor provision of pediatric medical services and lack of access, often dictated by prison officials, not medically trained, contributes to very poor child health and risk of child mortality whilst incarcerated with their mothers in SSA. Infant deaths were reported in some countries (for example Zambia, Zimbabwe), as consequence of medical neglect and denial of medical care.

Prisons in the SSA with exception of South Africa are however generally failing to address PMTCT of HIV in prisons [18]. This is despite the fact that AIDS and TB are among the main causes of death in prisons, with prisoners five times more likely to be living with HIV than adults in the general population [19]. Incarcerated women are at higher risk of acquiring HIV, TB and other infections in prisons, than men, and also have a higher prevalence of HIV, and an even higher prevalence than women living in the community [78]. This may result in a higher proportion of children born in prisons being at risk of HIV infection compared to children born in the community. The limited access for women (and their children) to ANC, labour and delivery services and anti-retroviral treatment (ART) whilst incarcerated in SSA poses a serious challenge to PMTCT of HIV. The inadequacy of PMTCT services in prisons contributes to infants being at high risk of contracting HIV during pregnancy, delivery or breastfeeding. Restricted access of infants to their mothers for feeding in some prisons (for example Zimbabwe) and the lack of adherence to good infant feeding practices heightens risk of transmission [33]. In resource-poor settings, when formula feeding is not a viable option, women living with HIV are advised to exclusively breastfeed (rather than mixed feeding) in the first six months [79, 80]. This was not the case in certain countries such as Zimbabwe where mothers are required to work in prisons during the day, thus interrupting their infants' access to breastmilk. In May 2017, the UN Commission on Crime Prevention and Criminal Justice (CCPCJ), adopted a resolution [81] requesting Member States in close cooperation with UNODC and other relevant United Nations entities and other relevant stakeholders, to increase their capacity to eliminate mother-to-child transmission of HIV, and support HIV prevention and treatment programming in prisons, particularly in countries with a high-burden TB/HIV coinfection in the SSA region.

We recognise the limitations of this review centring on the relative lack of data sources with only 27 countries represented. Strengths centre on the thoroughness of the review approach in terms of its multi-layered strategies to locate all forms of information. The wide timespan of the mapping exercise (18 years) with sporadic documentation of prison conditions makes it difficult to establish whether the situation has improved or deteriorated. The gathering of strategic information through surveillance, country situational assessments and routine monitoring and evaluation, and investment in academic research in SSA prisons at country level warrants improvement.

Conclusions and recommendations

This review highlights the grave situation of infants and children incarcerated with their mothers in SSA prisons. While all prisoners in the region suffer from poor prison conditions, children are particularly vulnerable to the health impact of these conditions. The reported paediatric morbidity and mortality associated with such sub-standard prison conditions is deeply concerning and in contravention of all international mandates for the rights of the child and the right to health and standards of care. Imprisonment of women, particularly pregnant women and women with children, should always be a last resort, and suitable non-custodial alternatives should be made available whenever possible (Bangkok Rules) [13]. The review further highlights the need for enhanced monitoring and evaluation of children's situation in prisons, along with increased donor and governmental resources allocation for services to meet basic needs of incarcerated children and paediatric health care. In particular, the documentation of children in prisons should be mandated for all countries so that their presence is recorded and therefore the conditions of their incarceration could be reviewed.

Endnotes

[1]Toilet sanitisers are disinfectants or detergents used to disinfect toilets against such infectious bacteria as *E. coli*, Shigella, Streptococcus, and Staphylococcus.

Additional file

Additional file 1: Summary of Records. The scoping review charting of records. (DOCX 93 kb)

Abbreviations

ACRWC: African Charter on the Rights and Welfare of the Child; ART: Anti-retroviral treatment; AU: African Union; CCPCJ: Commission on Crime Prevention and Criminal Justice; DIGNITY: Danish Institute Against Torture; HIV: Human immunodeficiency virus; MCH: Maternal and child health;

NGO: Non-governmental organizations; PMTCT: Prevention of mother-to-child transmission; SADC: Southern African Development Community; SSA: Sub-Saharan African; TB: Tuberculosis; UN: United Nations; UNICEF: United Nations Children's Fund; US: United States; WHO: World Health Organization

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Author details
[1]Public Health Institute, Liverpool John Moore's University, Liverpool L32ET, UK. [2]College of Health Sciences, Centre for Evaluation of Public Health Interventions, Department of Community Medicine, University of Zimbabwe, Harare, Zimbabwe. [3]Public Health Institute, Exchange Station, Liverpool John Moore's University, Liverpool L32ET, UK.

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References

1. Penal Reform International. Global Prison Trends 2015. Penal Reform International. London; 2015. https://www.penalreform.org/resource/global-prison-trends-2015/. Accessed 19 April 2018.
2. Walmsley R. World female imprisonment list (fourth edition) | world prison brief 2017. http://www.prisonstudies.org/news/world-female-imprisonment-list-fourth-edition. Accessed 24 April 2018.
3. Dolan K, Wirtz AL, Moazen B, Ndeffo-mbah M, Galvani A, Kinner SA, et al. Global burden of HIV, viral hepatitis, and tuberculosis in prisoners and detainees. Lancet. 2016;388:1089–102.
4. World Organization (WHO)/Public Health England (PHE). Gender Specific Standards to Improve Health and Wellbeing for Women in Prison in England. London; 2018. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/687146/Gender_specific_standards_for_women_in_prison_to_improve_health_and_wellbeing.pdf. Accessed 19 May 2018.
5. Ackermann M. Women in pre-trial detention in Africa, a review of the literature. Community Law Centre: University of the Western Cape; 2014. https://acjr.org.za/resource-centre/WomenInPreTrialDetention_V2.pdf. Accessed 19 May 2018
6. Dixey R, Nyambe S, Foster S, Woodall J, Baybutt M. Health promoting prisons–an impossibility for women prisoners in Africa? Agenda. 2015;29:95–102.
7. Ginn S. Women prisoners. BMJ. 2013;346:e8318.
8. Reid SE, Topp SM, Turnbull ER, Hatwiinda S, Harris JB, Maggard KR, et al. Tuberculosis and HIV control in sub-Saharan African prisons: "thinking outside the prison cell". J Infect Dis. 2012;205(Suppl 2):S265–73.
9. Van den Bergh BJ, Gatherer A, Fraser A, Moller L. Imprisonment and women's health: concerns about gender sensitivity, human rights and public health. Bull World Health Organ. 2011;89:689–94.
10. United Nations (UN) General Assembly. United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) : resolution / adopted by the General Assembly. United Nations, New York. 2016. https://www.refworld.org/docid/5698a3a44.html. Accessed 11 May 2018.
11. United Nations (UN) General Assembly. Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules). United Nations, New York: United Nations and the Rule of Law; 1990. http://hrlibrary.umn.edu/instree/i6unsmr.htm. Accessed 11 May 2018.
12. United Nations (UN) General Assembly. United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (the Bangkok Rules) A/C.3/65/L.5. United Nations, New York. 2010. https://www.refworld.org/docid/4dcbb0ae2.html. Accessed 11 May 2018.
13. United nations (UN) general assembly. The convention on the rights of the child. Treaty series, vol. 1577, p. 3, general assembly resolution 44/25 of 20 November 1989. United Nations, New York. 1989. https://www.refworld.org/docid/3ae6b38f0.html. Accessed 11 May 2018.
14. United Nations (UN). General Assembly. Guidelines for the Alternative Care of Children : resolution / adopted by the General Assembly UN. (64th sess.: 2009-2010). United Nations, New York 2010. https://digitallibrary.un.org/record/673583. Accessed 23 April 2018.
15. Telisinghe L, Charalambous S, Topp SM, Herce ME, Hoffmann CJ, Barron P, et al. HIV and tuberculosis in prisons in sub-Saharan Africa. Lancet. 2016;388:1215–27.
16. UNAIDS. Gap report; Beginning of the end of the AIDS epidemic. Geneva; 2014. http://www.unaids.org/en/resources/campaigns/2014/2014gapreport/gapreport. Accessed 19 Jul 2018.
17. United Nations Office on Drugs and Crime (UNODC). Final Independent Evaluation of Project XSS V02 HIV Prevention, Treatment, Care and Support in Prison Settings in Sub Saharan Africa. UNODC Vienna; 2017. https://www.unodc.org/documents/evaluation/Independent_Project_Evaluations/2017/XSSV02_independent_project_evaluation_report_2017.pdf. Accessed 24 May 2018.
18. Van Hout MC, Mhlanga-Gunda R. Contemporary women prisoners health experiences, unique prison health care needs and health care outcomes in sub Saharan Africa: a scoping review of extant literature. BMC Int Health Hum Rights. 2018;18:31.
19. United Nations Office on Drugs and Crime (UNODC). Fast track to end AIDS by 2030: for people in prisons. UNODC Vienna (nd). https://www.unodc.org/documents/hiv-aids/2017/Factsheet_-_HIV_in_Prisons.pdf. Accessed 20 May 2018.
20. Schoeman M, Basson M. The influence of imprisonment on infants and young children incarcerated with their mothers. Natl Inst Crime Prev Reintegration Offenders NICRO Cape Town. 2009.
21. Solomon OJ, Nwankwoala R, Ushi V. The plight of female prisoners in Nigeria and the dilemma of health rights violations. Asian J Soc Sci Humanit. 2014;3:152–61.
22. United States Department of State. Bureau of Democracy, Human Rights and Labor. Senegal 2016. Human Rights Report. Washington, D.C. 2017. https://www.state.gov/documents/organization/277283.pdf. Accessed 19 April 2018.
23. Global Research Directorate. Library of Congress. Laws on Children Residing with Parents in Prison. Washington, DC. 2014. https://www.loc.gov/law/help/children-residing-with-parents-in-prison/foreign.php. Accessed 19 April 2018.
24. Townhead L. Women in prison and children of imprisoned mothers: recent developments in the United Nations human rights system. Geneva: The Quaker United Nations Office; 2004. https://ec.europa.eu/justice/grants/results/daphne-toolkit/sites/daphne-toolkit/files/projects/documents/int_women_in_prison_un_developments_2006.pdf. Accessed 14 May 2018
25. United Nations (UN) General Assembly. Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment,

Mission to Ghana: United Nations, New York; 2014. https://www.ohchr.org/en/issues/torture/srtorture/pages/srtortureindex.aspx. Accessed 28 April 2018
26. Mazoue N. Children Incarcerated with Their Mothers: A Critique of the Current Age-based Approach to the Separation of Children from Their Mothers. PhD Thesis. University of KwaZulu-Natal, Durban; 2012.
27. The African Charter on the Rights and Welfare of the Child (1999). www.achpr.org/files/instruments/child/achpr_instr_charterchild_eng.pdf. Accessed 26 May 2018.
28. Levac D, Colquhoun H, O'Brien KK. Scoping studies: advancing the methodology. Implement Sci IS. 2010;5:69.
29. Arksey H, O'Malley L. Scoping studies: towards a methodological framework. Int J Soc Res Methodol. 2005;8:19–32.
30. Daudt HM, van Mossel C, Scott SJ. Enhancing the scoping study methodology: a large, inter-professional team's experience with Arksey and O'Malley's framework. BMC Med Res Methodol. 2013;13:48.
31. Landa AH, Szabo I, Le Brun L, Owen I, Fletcher G. Evidence based scoping reviews. In: European Conference on Information Management and Evaluation: Academic Conferences International Limited; 2010. p. 126.
32. African Commission on Human and Peoples' Rights (ACHPR). Report of the Special Rapporteur on Prisons and Conditions of Detention in Africa. 52nd Ordinary Session, African Commission on Human and Peoples' Rights. Yamoussoukro, Côte d'Ivoire. 2012. http://www.achpr.org/sessions/52nd/. Accessed 23 May 2018.
33. Matsika AB, Muridzo NG, Nyanguru AC, Dzingirai V. Innocent inmates: the case of children living with incarcerated mothers in Zimbabwe's Chikurubi prison. J Soc Dev Afr. 2013;28:73–92.
34. Times of Zambia. Protecting rights of female prisoners, circumstantial children important. Times of Zambia. 2014. http://www.times.co.zm/?p=7357. Accessed 14 May 2018.
35. Todrys KW, Amon JJ. Health and human rights of women imprisoned in Zambia. BMC Int Health Hum Rights. 2011;11:8.
36. Topp SM, Moonga CN, Mudenda C, Luo N, Kaingu M, Chileshe C, et al. Health and healthcare access among Zambia's female prisoners: a health systems analysis. Int J Equity Health. 2016;15:157.
37. Malambo O. The welfare of children living with incarcerated mothers in selected prisons in Zambia. Master Thesis: The University of Zambia; 2016. http://dspace.unza.zm:8080/xmlui/handle/123456789/4874. Accessed 14 May 2018.
38. United States Department of State Bureau of Democracy, Human Rights and Labor. Djibouti 2017 human rights report. Washington, D.C; 2017. https://www.state.gov/documents/organization/277237.pdf. Accessed 16 April 2018
39. United States Department of State Bureau of Democracy, Human Rights and Labor. Cote D'ivoire 2017 Human Rights Report. Washington, D.C; 2017. https://www.state.gov/documents/organization/277235.pdf. Accessed 19 April 2018
40. United States Department of State Bureau of Democracy, Human Rights and Labor. Madagascar 2017 Human Rights Report. Washington, D.C; 2017. https://www.state.gov/documents/organization/277261.pdf. Accessed 19 April 2018
41. African Commission on Human and Peoples' Rights (ACHPR). Uganda: Mission on Prisons and Conditions of Detention - 2001/Uganda/States/ACHPR. Niger. 2003. http://www.achpr.org/states/uganda/missions/prisons-2001/. Accessed 26 May 2018.
42. African Commission on Human and Peoples' Rights (ACHPR). Malawi: Mission on Prisons and Conditions of Detention - 2001/Malawi/States/ACHPR. L'Exprimeur, Paris. 2002 http://www.achpr.org/states/malawi/missions/prisons-2001/. Accessed 20 April 2018.
43. Twea S. Women as offenders – the social and legal circumstances of women who commit crimes: a case study of selected prisons in Malawi. Master Degree in Law: University of Zimbabwe; 2013. http://ir.uz.ac.zw/handle/10646/1048. Accessed 20 Apr 2018.
44. Baker J. Danish Institute Against Torture (DIGNITY). Conditions for women in Detention in Zambia Needs, vulnerabilities and good practices. No 12. 2015. DIGNITY Publication Series on Torture and Organised Violence No. 12, Copenhagen, 2015. http://www.jobakeronline.com/wp-content/uploads/2015/12/Women-in-Detention-Zambia-J-Baker-DIGNITY.pdf. Accessed 9 April 2018.
45. Paurus M. International report on the conditions of children of incarcerated parents. A Survey of Prison Nurseries: University of Minnesota; 2017. https://cicmn.org/wp-content/uploads/2017/03/Melanie-Report-Edited.pdf. Accessed 26 May 2018
46. Todrys KW, Amon JJ, Malembeka G, Clayton M. Imprisoned and imperiled: access to HIV and TB prevention and treatment, and denial of human rights, in Zambian prisons. J Int AIDS Soc. 2011;14:8.
47. Linonga-Fontebo HN, Rabe M. Mothers in Cameroonian prisons: pregnancy, childbearing and caring for young children. Afri Stud. 2015;74:290–309.
48. Makau MN, Ochola S, Mbithe D. Feeding Practices of Children Aged 0–59 Months Accompanying Incarcerated Mothers in Selected Women's Prisons in Kenya. Open Nutr J. 2016;11:1–10.
49. Nangia EN, Fontebo HN. Treatment of female offenders in prison: the case of Cameroon. Int J Humanit Soc Stud. 2017;5:318–24.
50. IRIN News. Children doing time with their mothers. Harare 2010. http://www.irinnews.org/report/90137/zimbabwe-children-doing-time-their-mothers. Accessed 14 May 2018.
51. Thompson A. Children living in prison: Insights from Sierra Leone. Geneva: The Quaker United Nations Office; 2008. http://advocaidsl.org/wp-content/uploads/2018/12/AdvocAid-Children-Living-in-Prison-Sierra-Leone.pdf. Accessed 9 Apr 2018.
52. Shout Africa. Zimbabwe: the untold stories of pregnant inmates. Shout Africa, 2015. http://www.shout-africa.com/news/zimbabwe-the-untold-stories-of-pregnant-inmates/. Accessed 26 May 2018.
53. Samakaya-Makarati J. Female prisoners in "male "prisons. In: Musengezi C, Staunton I, editors. A tragedy of lives women in prison in Zimbabwe. Harare: Weaver Press; 2003. p. 11–22.
54. "Chad: 'We Are All Dying Here:' Human Rights Violations in Prisons," details inhumane conditions prevalent in six of Chad's prisons. New York; 2012. https://www.amnestyusa.org/press-releases/harsh-new-report-by-amnesty-international-exposes-appalling-prison-conditions-in-chad/. Accessed 27 May 2018.
55. Sarpong AA, Otupiri E, Yeboah-Awudzi K, Osei-Yeboah J, Berchie GO, Ephraim RKD. An assessment of female prisoners' perception of the accessibility of quality healthcare: a survey in the Kumasi central prisons. Ghana Ann Med Health Sci Res. 2015;5:179–84.
56. United Nations Political Office for Somalia (UNPOS). Assessment of the Prison System in Mogadishu South. UNPOS/ UNICEF/ UNODC. 2012. https://unpos.unmissions.org/unpos-and-human-rights. Accessed 24 May 2018.
57. Human Rights Watch (HRW). The HIV and TB Prison Crisis in Southern Africa. Gambia, 2010. https://www.hrw.org/report/2010/04/27/unjust-and-unhealthy/hiv-tb-and-abuse-zambian-prisons. Accessed 31 May 2018.
58. African Commission on Human and Peoples' Rights (ACHPR). Mozambique: Mission on Prisons and Conditions of Detention - 2001/ Mozambique/States/ACHPR. Gambia, 2001.http://www.achpr.org/states/mozambique/missions/prisons-2001/. Accessed 26 May 2018.
59. African Commission on Human and Peoples' Rights (ACHPR). Namibia: Mission on Prisons and Conditions of Detention - 2001/Namibia/States/ACHPR. Niger, 2001. http://www.achpr.org/states/namibia/missions/prisons-2001/. Accessed 26 May 2018.
60. African Commission on Human and Peoples' Rights (ACHPR). Cameroon: Prisons and Detention Conditions - 2002/Cameroon/States/ACHPR. Gambia, 2002. http://www.achpr.org/states/cameroon/missions/prisons-2002/. Accessed 26 April 2018.
61. African Commission on Human and Peoples' Rights (ACHPR). Ethiopia: Mission on Prisons and Conditions of Detention - 2004/Ethiopia/States/ACHPR. Gambia, 2004. http://www.achpr.org/states/ethiopia/missions/prisons-2004/. Accessed 26 April 2018.
62. Muhangi, A., Munene, A., Ssibetya B N. Childhood in Africa Ohio University 2017; 4:11–22.
63. Newsday. Chikurubi Female Prison sitting on health bomb. NewsDay Zimbabwe. 2017. https://www.newsday.co.zw/2017/03/chikurubi-female-prison-sitting-health-bomb/. Accessed 26 May 2018.
64. Fontebo HN. Prison conditions in Cameroon: the narratives of female inmates. PhD Thesis, University of South Africa. 2014. uir.unisa.ac.za/bitstream/handle/10500/13069/thesis_fontebo_hn.pdf. Accessed 26 April 2018.
65. Kamau N. Access to health care by inmates in Kenya: a study of Lang' at a women's prison and Nairobi remand/allocation. Master Degree Medical Sociology Thesis: University of Nairobi; 2006. http://erepository.uonbi.ac.ke:8080/xmlui/handle/11295/17516. Accessed 24 May 2018
66. Vetten L. The imprisonment of women in Africa. In: Sarkin J, editor. The imprisonment of women in Africa. Cape Town: HSRC. Wall Street; 2008. p. 134–54.
67. Hesselink A, Dastile NP. The reality of babies and toddlers behind bars. Acta Criminol South Afr J Criminol. 2010:65–79.

68. United Nations Office on Drugs and Crime (UNODC). SDNX06. Assisting the Process of Prison Reform in South Sudan. UNODC, Vienna, 2014. https://www.unodc.org/middleeastandnorthafrica/en/project-profiles/sdnx06.html. Accessed 14 May 2018.
69. Sheehan F, Mukisa D. A shared sentence Children of imprisoned parents in Uganda. A report on the implementation of General Comment No.1 (Article 30 of the African Charter on the Rights and Welfare of the Child. Penal Reform International, London. 2015. https://cdn.penalreform.org/wp-content/uploads/2015/11/PRI_FHRI-Report_-Implementation-of-GC-No1-WEB.pdf. Accessed 14 Apr 2018.
70. Daily Monitor News. Prison babies: When children are forced to live in jail. Daily Monitor. https://www.monitor.co.ug/artsculture/Reviews/Prison-babies--When-children-are-forced-to-live-in-jail/691232-2012308-12sar09/index.html. Accessed 14 May 2018.
71. Human Rights Commission (HRC). Preliminary Findings of the Human Rights Commission During Visits Undertaken to Prisons and other Places of Detention in 2013 (May 14, 2014). https://www.ohchr.org/en/hrbodies/hrc/regularsessions/session25/documents/a-hrc-25-60-add-1_en.doc. Accessed 14 May 2018.
72. African Commission on Human and Peoples' Rights (ACHPR). South Africa: Prisons and Detention Conditions - 2004/South Africa/States/ACHPR. Gambia, 2004. http://www.achpr.org/states/south-africa/missions/prisons-2004/. Accessed 26 May 2018.
73. Gowland I. Moms behind bars: motherhood in Eshowe correctional center. Independent Study Project (ISP) Collection. 2011; https://digitalcollections.sit.edu/isp_collection/1115/. Accessed 26 May 2018.
74. Parliamentary Monitoring Group (PMG). Women with children in correctional centres: Gauteng Department of Correctional Services briefing. Cape Town, 2014. https://pmg.org.za/committee-meeting/16961/. Accessed 12 May 2018.
75. Agomoh U. Assessment and treatment of female prisoners in Africa. United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offender (UNAFEI), 2003. https://www.unafei.or.jp/publications/pdf/RS_No94/No94_VE_Agomoh1.pdf. Accessed 24 April 2018.
76. World Health Organization (WHO), Department of Child and Adolescent Health and Development, World Health Organization, Department of HIV/AIDS, Joint United Nations Programme on HIV/AIDS, United Nations Fund for Population Activities, et al. Guidelines on HIV and infant feeding 2010: principles and recommendations for infant feeding in the context of HIV and a summary of evidence. World Health Organization, Geneva, 2010. http://www.ncbi.nlm.nih.gov/books/NBK180149/pdf. Accessed 23 May 2018.
77. United Nations (UN). Political Declaration on Ending AIDS sets world on the Fast-Track to end the epidemic by 2030. United Nations, New York, 2016. http://www.unaids.org/en/resources/presscentre/pressreleaseandstatementarchive/2016/june/20160608_PS_HLM_PoliticalDeclaration. Accessed 23 April 2018.
78. Joint United Nations Programme on HIV/AIDS (UNAIDS) (2014). The gap report 2014: children and pregnant women living with HIV. UNAIDS, Geneva, 2014. http://www.unaids.org/sites/default/files/media_asset/09_ChildrenandpregnantwomenlivingwithHIV.pdf. Accessed 11 Apr 2019.
79. Ngoma-Hazemba A, Ncama BP. Analysis of experiences with exclusive breastfeeding among HIV-positive mothers in Lusaka. Zambia Glob Health Action. 2016;9:32362.
80. Tsague L, Abrams EJ. Antiretroviral treatment for pregnant and breastfeeding women–the shifting paradigm. Aids. 2014;28:S119–21.
81. United Nations Office on Drugs and Crime. Resolutions 26 of the CCPCJ. UNODC, Vienna, 2017 https://www.unodc.org/unodc/en/commissions/CCPCJ/session/26_Session_2017/resolutions-26-of-the-ccpcj.html. Accessed 24 May 2018.

Annex Two Signed Co-Author Statements on the following pages

Legal interpretation:

Provided access to domestic jurisprudence/case law databases in South Africa, Malawi and Zimbabwe, checked my legal interpretations when citing cases and Law (Wessels, Chimbga, Mhango, Kaima)

Clinical care:

Provided extant clinical expertise with regard to menopause management in prison (Srisuwan; Plugge) and with regard to transgender care in prison (Crowley)

Data search and screening:

Screened the global UN treaty bodies Concluding Observations for records in global reviews which I then cross checked for inclusion against the Bangkok Rules (Fleißner; Klankwarth; Stöver); and literature for inclusion in regional sub-Saharan African scoping reviews (Mhlanga-Gunda)

Formatting:

Supported journal paper formatting of references in text when time was tight (Bigland).

Statement of Co-Authorship

I wish to confirm that Marie Claire Van Hout was the lead academic for the below journal publications; she designed and drafted the entire manuscript, conducted the socio legal analysis of various academic and legal materials, and organised the final submission and resubmission to the journal following review.

My role was to check, provide minimal comments and approve the final submissions to the journals, based on my knowledge of human rights law in South Africa and my legal expertise as Regional Court Magistrate in South Africa.

Van Hout, MC., Wessels, J (2022). *#ForeignersMustGo versus 'in favorem libertatis':* Human rights violations and procedural irregularities in South African immigration detention law. *Journal of Human Rights.*

I, the undersigned, endorse the above stated contribution of work undertaken for both published peer-reviewed manuscripts contributing to this thesis:

Signed: Date: 23 August 2022

Signed: 

RCP J Wessels.

Regional Court President

Limpopo Regional Division

Statement of Co-Authorship

We wish to confirm that Marie Claire Van Hout was the lead academic for the below journal publication; she designed and drafted the entire manuscript, conducted the socio legal analysis, and organised the final submission and resubmission to the journal following review.

Van Hout, M.C., Fleißner, S., Stöver, H (2021). "# Me Too": Global progress in tackling continued custodial violence against women. The 10 year anniversary of the Bangkok Rules. *Trauma, Violence, & Abuse: A Review Journal* Early Online https://doi.org/10.1177/15248380211036067.

Van Hout, M.C., Fleißner, S., Klankwarth, U., Stöver, H (2022). "Children in the prison nursery": Global progress in adopting the Convention on the Rights of the Child in alignment with United Nations minimum standards of care in prisons. *Child Abuse and Neglect. Accepted 08-08-2022.*

Van Hout, M.C., Fleißner, S., Stöver, H (2022). "Women's right to health in detention": UN Committee observations since the adoption of the UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (Bangkok Rules). Oxford Journal of Human Rights Practice.

Our role was to conduct the searches for literature and chart the tables (Fleißner; Klankwarth), and as a team provide minimal comments and approve the final submission to the journal, based on our expertise in the field of prison health (Fleißner; Stöver).

We, the undersigned, endorse the above stated contribution of work undertaken for the published peer-reviewed manuscript contributing to this thesis:

Signed: U. Klankwarth Date: **29-08-2022**

Mr Simon Fleißner Simon Fleißner 31.08.2022

Professor Heino Stöver Heino Stöver

Ms Ulla Klankwarth

Statement of Co-Authorship

We wish to confirm that Marie Claire Van Hout was the lead academic for the below journal publication; she designed and drafted the entire manuscript, conducted the socio legal analysis, and organised the final submission and resubmission to the journal following review.

Van Hout, MC., Srisuwan, L., Plugge, E. (2022). A human rights assessment of menopausal women's access to age and gender sensitive non-discriminatory healthcare in prison. Menopause Accepted 11-07-2022.

Our role was to conduct the searches for literature and chart the table for Professor Van Hout (Srisuwan), and provide minimal comments and approve the final submission to the journal, based on our expertise as clinicians (Plugge; Srisuwan) and in the field of prison health (Plugge).

We, the undersigned, endorse the above stated contribution of work undertaken for the published peer-reviewed manuscript contributing to this thesis:

Signed:  Date: August 22, 2022

Dr Lizz Srisuwan

Dr Emma Plugge

Statement of Co-Authorship

We wish to confirm that Marie Claire Van Hout was the lead academic for the below journal publication; she designed and drafted the entire manuscript, conducted the socio legal analysis of various investigative reporting, UN and government reports, academic and legal materials, and organised the final submission and resubmission to the journal following review.

Van Hout, MC., Kaima R., Mhango, V., Mariniello, T (2022). Moving beyond the politization of same-sex sexuality and leveraging right to health to counter inter-personal sexual violence and HIV in Malawi's prisons. Forensic Science International Mind and Law. 3 (100103) Accepted 12-08-2022.

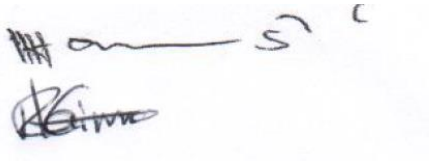
Our role was to check, provide minimal comments and approve the final submission to the journal, based on our expertise in the field of human rights litigation in Malawi (Victor Mhango, Ruth Kaima) and international and African human rights (Mariniello).

We, the undersigned, endorse the above stated contribution of work undertaken for the published peer-reviewed manuscript contributing to this thesis:

Signed: Date: 29.08.2022

Mr Victor Mhango

Ms Ruth Kaima



Dr Triestino Mariniello

Statement of Co-Authorship

We wish to confirm that Marie Claire Van Hout was the lead academic for the below journal publication; she designed and drafted the entire manuscript, conducted the socio legal analysis of various investigative reporting, UN and government reports, academic and legal materials, and organised the final submission and resubmission to the journal following review.

Van Hout, MC., Bigland, C., Mariniello, T (2022). A legal-realist assessment of the Zimbabwean correctional system response to COVID-19 during state disaster measures. International Journal of Prisoner Health . *Accepted 26-03-2022.*

Our role was to check, provide minimal comments and approve the final submission to the journal, based on our expertise in the field of international and African human rights (Mariniello). Charlotte Bigland was in charge of journal formatting for the submission.

We, the undersigned, endorse the above stated contribution of work undertaken for the published peer-reviewed manuscript contributing to this thesis:

Signed: Date: 26-03-2022

Dr Triestino Mariniello

Ms Charlotte Bigland

CENTER FOR HUMAN RIGHTS EDUCATION, ADVICE AND ASSISTANCE

Kenyatta Drive, Chitawira Location,
Roots Complex
P.O Box 30250, Chichiri,
BLANTYRE.
Email: info@chreaa.org
Telephone: 265 1878322, Fax: 265 1880 770

Statement of Co-Authorship

We wish to confirm that Marie Claire Van Hout was the lead academic for the below journal publication; she designed and drafted the entire manuscript, conducted the socio legal analysis of various investigative reporting, UN and government reports, academic and legal materials, and organised the final submission and resubmission to the journal following review.

Van Hout, MC., Mhango, V., Kaima, R., Bigland, C., Mariniello, T (2022). A legal-realist assessment of human rights, right to health and standards of healthcare in the Malawian prison system during COVID-19 state disaster measures. *International Journal of Prisoner Health. Accepted 18-02-2022.*

Our role was to check, provide minimal comments and approve the final submission to the journal, based on our expertise in the field of human rights litigation in Malawi (Victor Mhango, Ruth Kaima) and international and African human rights (Mariniello). Charlotte Bigland was in charge of journal formatting for the submission.

We, the undersigned, endorse the above stated contribution of work undertaken for the published peer-reviewed manuscript contributing to this thesis:

Signed: Date:

Mr Victor Mhango 

Ms Ruth Kaima 

Dr Triestino Mariniello

Ms Charlotte Bigland

Statement of Co-Authorship

We wish to confirm that Marie Claire Van Hout was the lead academic for the below journal publication; she designed and drafted the entire manuscript, conducted the socio legal analysis of various investigative reporting, UN and government reports, academic and legal materials, and organised the final submission and resubmission to the journal following review.

Van Hout, MC., Mhango, V., Kaima, R., Bigland, C., Mariniello, T (2022). A legal-realist assessment of human rights, right to health and standards of healthcare in the Malawian prison system during COVID-19 state disaster measures. *International Journal of Prisoner Health. Accepted 18-02-2022.*

Our role was to check, provide minimal comments and approve the final submission to the journal, based on our expertise in the field of human rights litigation in Malawi (Victor Mhango, Ruth Kaima) and international and African human rights (Mariniello). Charlotte Bigland was in charge of journal formatting for the submission.

We, the undersigned, endorse the above stated contribution of work undertaken for the published peer-reviewed manuscript contributing to this thesis:

Signed:  Date: Berlin, 20.02.22

Mr Victor Mhango

Ms Ruth Kaima

Dr Triestino Mariniello

Ms Charlotte Bigland

Statement of Co-Authorship

We wish to confirm that Marie Claire Van Hout was the lead academic for the below journal publication; she designed and drafted the entire manuscript, conducted the socio legal analysis of various investigative reporting, UN and government reports, academic and legal materials, and organised the final submission and resubmission to the journal following review.

Van Hout, MC., Mhango, V., Kaima, R., Bigland, C., Mariniello, T (2022). A legal-realist assessment of human rights, right to health and standards of healthcare in the Malawian prison system during COVID-19 state disaster measures. *International Journal of Prisoner Health. Accepted 18-02-2022.*

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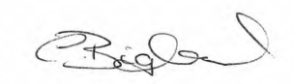
We, the undersigned, endorse the above stated contribution of work undertaken for the published peer-reviewed manuscript contributing to this thesis:

Signed:  Date: 24/02/2022

Mr Victor Mhango

Ms Ruth Kaima

Dr Triestino Mariniello

Ms Charlotte Bigland

OFFICE OF THE REGIONAL COURT PRESIDENT

LIMPOPO DIVISION

Private Bag X9320 Polokwane 0700 34 Landros Mare' Street – Polokwane - Tel: (015) 294 6055 Fax: 086 679 7083- www.justice.gov.za

Statement of Co-Authorship

I wish to confirm that Marie Claire Van Hout was the lead academic for the below journal publications; she designed and drafted the entire manuscript, conducted the socio legal analysis of various academic and legal materials, and organised the final submission and resubmission to the journal following review.

My role was to check, provide minimal comments and approve the final submissions to the journals, based on my knowledge of human rights law in South Africa and my legal expertise as Regional Court President in South Africa.

Van Hout, MC., Wessels, J (2021). Human rights and the invisible nature of incarcerated women in post-apartheid South Africa: Prison system progress in adopting the Bangkok Rules. *International Journal of Prisoner Health.* [Epub ahead of print]. DOI: 10.1108/IJPH-05-2021-0045

Van Hout, MC., Wessels, J (2021). Navigating the complexities of the mentally ill and mentally incapacitated in the criminal justice system in South Africa. *Forensic Science International: Mind and Law.* 2, p100068.

I, the undersigned, endorse the above stated contribution of work undertaken for both published peer-reviewed manuscripts contributing to this thesis:

Signed: _____ Date: 23/2/2022

RCP J Wessels.

Regional Court President

Limpopo Regional Division

LIMPOPO REGIONAL DIVISION

2022 -02- 23

MRS J. H. WESSELS

REGIONAL COURT PRESIDENT

Statement of Co-Authorship

I wish to confirm that Marie Claire Van Hout was the lead academic for the below journal publication; she designed and drafted the entire manuscript, conducted the socio legal analysis of various academic and legal materials, and organised the final submission and resubmission to the journal following review.

My role was to check, provide minimal comments and approve the final submission to the journal, based on my knowledge of transgender medical care in prisons, in my capacity as prison health professional, and my special interest in the treatment and care of transgender people.

Van Hout, MC., Crowley, D (2021). The 'double punishment' of transgender prisoners: a human rights based commentary on placement and conditions of detention. *International Journal of Prisoner Health*. [Epub ahead of print]. doi: 10.1108/IJPH-10-2020-0083.

I, the undersigned, endorse the above stated contribution of work undertaken for the published peer-reviewed manuscript contributing to this thesis:

Signed:  Date 15/08/21

Dr Des Crowley, PhD, MD.

Dr Des Crow
8 Gardiner Pl
Dublin 1.
GMS No: 65
Med Council No

TOWARDS HARM REDUCTION IN THE MENA REGION A STEP FORWARD

MENAHRA

Statement of Co-Authorship

I wish to confirm that Marie Claire Van Hout was the lead academic for the below journal publication; she designed and drafted the entire manuscript, and organised the final submission and resubmission to the journal following review.

My role was to check, provide minimal comments and approve the final submission to the journal, based on my knowledge of the situation around the rights of people deprived of their liberty, particularly injecting drug users and harm reduction in the Middle East and North Africa, in my capacity as the Director of the Middle East and North African Harm Reduction Association.

Van Hout, MC., Aaraj, E (2020). Pandemic Stresses the Human Rights Imperatives of Tackling HIV and Hepatitis in Middle East and North African Prisons. *Health and Human Rights Journal.* Online. https://www.hhrjournal.org/2020/05/pandemic-stresses-the-human-rights-imperatives-of-tackling-hiv-and-hepatitis-in-middle-east-and-north-african-prisons/

I, the undersigned, endorse the above stated contribution of work undertaken for the published peer-reviewed manuscript contributing to this thesis:

Signed: Aaraj

Date 25/01/2022

Elias Aaraj

MENAHRA

Middle East North Africa Harm Reduction Association
Hayek Roundabout BBAC Building Second Floor Sin El Fil - Lebanon Tel: +961 1 493 211
Email:info@menahra.org Website:www.menahra.org

Dzimbabwe Chimbga

LLM (Notre Dame, LLBS(UZ).

65 Second Avenue, Fontainbleau, Randburg 2194

+27780902038

dziechimbga@gmail.com

Date: February 18 , 2022

Statement of Co-Authorship

I wish to confirm that Marie Claire Van Hout was the lead academic for the below journal publication; she designed and drafted the entire manuscript, conducted the socio legal analysis of various academic and legal materials, and organised the final submission and resubmission to the journal following review. My role was to check, provide minimal comments and approve the final submission to the journal, based on my knowledge of human rights law and my legal expertise as human rights lawyer in South Africa.

Van Hout, MC., Chimbga, D (2020). Tackling the intersectionality of drug offences, gender-based violence and victimisation in the South African Criminal Justice System: Leveraging for greater implementation of the Tokyo Rules within a sustainable development agenda. *Journal of Sustainable Development -Africa.* 22(3), pp157-165.

I, the undersigned, endorse the above stated contribution of work undertaken for the published peer-reviewed manuscript contributing to this thesis:

Signed:

Date: 18 February 2022

DZIMBABWE CHIMBGA
LLBS (Hons) UZ
Conveyancer, Notary Public,
Commissioner of Oaths
Zimbabwe

ZAPP-UZ

Zimbabwe AIDS Prevention Project-
University of Zimbabwe
Department Of Community Medicine
P.O. Box A1679 Avondale
11 Kenney Road, Kensington, Harare.

Tel. No. 707289 Tel/Fax 707291

Statement of Co-Authorship

I wish to confirm that Marie Claire Van Hout was the lead academic for the below journal publications; she designed the scoping review methodology, drafted the background, methodology and discussion sections, assisted in the refining of the thematic analysis and organised the final submission and resubmission to the journal following review. My role was to conduct the detailed sub-Saharan African searches for literature, collate and chart the tables and analyse the included records into themes, and approve the final submissions to the journal, based on my expertise as prison health researcher in Zimbabwe.

Van Hout, MC., Mhlanga-Gunda, R.(2019).Prison health situation and health rights of young people incarcerated in sub-Saharan African prisons and detention centres: a scoping review of extant literature. *BMC International Health and Human Rights*. 19: 17. https://doi.org/10.1186/s12914-019-0200-z

Van Hout, M.C., Mhlanga-Gunda, R (2019). "Mankind owes to the child the best that it has to give": prison conditions and the health situation and rights of children incarcerated with their mothers in sub-Saharan African prisons. *BMC International Health and Human Rights* 19 (1): 13. https://doi.org/10.1186/s12914-019-0194-6

I, the undersigned, endorse the above stated contribution of work undertaken for both published peer-reviewed manuscripts contributing to this thesis:

Signed:  Date: 17-02-2022

Dr Rosemary Mhlanga-Gunda, PhD.

Annex Three United Nations Normative Standards pertinent to right to health and access to free non-discriminatory healthcare in prison

Nelson Mandela Rules

Rule 1 All prisoners shall be treated with the respect due to their inherent dignity and value as human beings. No prisoner shall be subjected to, and all prisoners shall be protected from, torture and other cruel, inhuman or degrading treatment or punishment, for which no circumstances whatsoever may be invoked as a justification. The safety and security of prisoners, staff, service providers and visitors shall be ensured at all times.

Rule 2 (1) The present rules shall be applied impartially. There shall be no discrimination on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or any other status. The religious beliefs and moral precepts of prisoners shall be respected. (2) In order for the principle of non-discrimination to be put into practice, prison administrations shall take account of the individual needs of prisoners, in particular the most vulnerable categories in prison settings. Measures to protect and promote the rights of prisoners with special needs are required and shall not be regarded as discriminatory.

Rule 3 Imprisonment and other measures that result in cutting off persons from the outside world are afflictive by the very fact of taking from these persons the right of self-determination by depriving them of their liberty. Therefore the prison system shall not, except as incidental to justifiable separation or the maintenance of discipline, aggravate the suffering inherent in such a situation.

Rule 4(2) To this end, prison administrations and other competent authorities should offer education, vocational training and work, as well as other forms of assistance that are appropriate and available, including those of a remedial, moral, spiritual, social and health- and sports-based nature. All such programmes, activities and services should be delivered in line with the individual treatment needs of prisoners.

Rule 5 (1) The prison regime should seek to minimize any differences between prison life and life at liberty that tend to lessen the responsibility of the prisoners or the respect due to their dignity as human beings. (2) Prison administrations shall make all reasonable accommodation and adjustments to ensure that prisoners with physical, mental or other disabilities have full and effective access to prison life on an equitable basis.

Rule 11 The different categories of prisoners shall be kept in separate institutions or parts of institutions, taking account of their sex, age, criminal record, the legal reason for their detention and the necessities of their treatment; thus:(a)Men and women shall so far as possible be detained in separate institutions; in an institution which receives both men and women, the whole of the premises allocated to women shall be entirely separate;(b)Untried prisoners shall be kept separate from convicted prisoners; (c)Persons imprisoned for debt and other civil prisoners shall be kept separate from persons imprisoned by reason of a criminal offence;(d)Young prisoners shall be kept separate from adults

Rule 12 (1) Where sleeping accommodation is in individual cells or rooms, each prisoner shall occupy by night a cell or room by himself or herself. If for special reasons, such as temporary overcrowding, it becomes necessary for the central prison administration to make an exception to this rule, it is not desirable to have two prisoners in a cell or room. (2) Where dormitories are used, they shall be occupied by prisoners carefully selected as being suitable to associate with one another in those conditions. There shall be regular supervision by night, in keeping with the nature of the prison.

Rule 13 All accommodation provided for the use of prisoners and in particular all sleeping accommodation shall meet all requirements of health, due regard being paid to climatic conditions and particularly to cubic content of air, minimum floor space, lighting, heating and ventilation.

Rule 14 In all places where prisoners are required to live or work: (a) The windows shall be large enough to enable the prisoners to read or work by natural light and shall be so constructed that they can allow the entrance of fresh air whether or not there is artificial ventilation; (b) Artificial light shall be provided sufficient for the prisoners to read or work without injury to eyesight.
Rule 15 The sanitary installations shall be adequate to enable every prisoner to comply with the needs of nature when necessary and in a clean and decent manner.
Rule 16 Adequate bathing and shower installations shall be provided so that every prisoner can, and may be required to, have a bath or shower, at a temperature suitable to the climate, as frequently as necessary for general hygiene according to season and geographical region, but at least once a week in a temperate climate.
Rule 17 All parts of a prison regularly used by prisoners shall be properly maintained and kept scrupulously clean at all times.
Rule 18 (1) Prisoners shall be required to keep their persons clean, and to this end they shall be provided with water and with such toilet articles as are necessary for health and cleanliness. (2) In order that prisoners may maintain a good appearance compatible with their self-respect, facilities shall be provided for the proper care of the hair and beard, and men shall be able to shave regularly.
Rule 19 (1) Every prisoner who is not allowed to wear his or her own clothing shall be provided with an outfit of clothing suitable for the climate and adequate to keep him or her in good health. Such clothing shall in no manner be degrading or humiliating. (2) All clothing shall be clean and kept in proper condition. Underclothing shall be changed and washed as often as necessary for the maintenance of hygiene. (3) In exceptional circumstances, whenever a prisoner is removed outside the prison for an authorized purpose, he or she shall be allowed to wear his or her own clothing or other inconspicuous clothing.
Rule 20 If prisoners are allowed to wear their own clothing, arrangements shall be made on their admission to the prison to ensure that it shall be clean and fit for use.
Rule 21 Every prisoner shall, in accordance with local or national standards, be provided with a separate bed and with separate and sufficient bedding which shall be clean when issued, kept in good order and changed often enough to ensure its cleanliness.
Rule 22 (1) Every prisoner shall be provided by the prison administration at the usual hours with food of nutritional value adequate for health and strength, of wholesome quality and well prepared and served. (2) Drinking water shall be available to every prisoner whenever he or she needs it.
Rule 23 (1) Every prisoner who is not employed in outdoor work shall have at least one hour of suitable exercise in the open air daily if the weather permits. (2). Young prisoners, and others of suitable age and physique, shall receive physical and recreational training during the period of exercise. To this end, space, installations and equipment should be provided.
Rule 24 (1) The provision of health care for prisoners is a State responsibility. Prisoners should enjoy the same standards of health care that are available in the community, and should have access to necessary health-care services free of charge without discrimination on the grounds of their legal status. (2) Health-care services should be organized in close relationship to the general public health administration and in a way that ensures continuity of treatment and care, including for HIV, tuberculosis and other infectious diseases, as well as for drug dependence.
Rule 25 (1) Every prison shall have in place a health-care service tasked with evaluating, promoting, protecting and improving the physical and mental health of prisoners, paying particular attention to prisoners with special health-care needs or with health issues that hamper their

rehabilitation. (2) The health-care service shall consist of an interdisciplinary team with sufficient qualified personnel acting in full clinical independence and shall encompass sufficient expertise in psychology and psychiatry. The services of a qualified dentist shall be available to every prisoner.

Rule 26 (1) The health-care service shall prepare and maintain accurate, up-to date and confidential individual medical files on all prisoners, and all prisoners should be granted access to their files upon request. A prisoner may appoint a third party to access his or her medical file. (2) Medical files shall be transferred to the health-care service of the receiving institution upon transfer of a prisoner and shall be subject to medical confidentiality.

Rule 27 (1) All prisons shall ensure prompt access to medical attention in urgent cases. Prisoners who require specialized treatment or surgery shall be transferred to specialized institutions or to civil hospitals. Where a prison service has its own hospital facilities, they shall be adequately staffed and equipped to provide prisoners referred to them with appropriate treatment and care. (2) Clinical decisions may only be taken by the responsible health-care professionals and may not be overruled or ignored by non-medical prison staff.

Rule 28 In women's prisons, there shall be special accommodation for all necessary prenatal and postnatal care and treatment. Arrangements shall be made wherever practicable for children to be born in a hospital outside the prison. If a child is born in prison, this fact shall not be mentioned in the birth certificate.

Rule 29 (1) A decision to allow a child to stay with his or her parent in prison shall be based on the best interests of the child concerned. Where children are allowed to remain in prison with a parent, provision shall be made for: (a) Internal or external childcare facilities staffed by qualified persons, where the children shall be placed when they are not in the care of their parent; (b) Child-specific health-care services, including health screenings upon admission and ongoing monitoring of their development by specialists. 2. Children in prison with a parent shall never be treated as prisoners.

Rule 30 A physician or other qualified health-care professionals, whether or not they are required to report to the physician, shall see, talk with and examine every prisoner as soon as possible following his or her admission and thereafter as necessary. Particular attention shall be paid to: (a) Identifying health-care needs and taking all necessary measures for treatment; (b) Identifying any ill-treatment that arriving prisoners may have been subjected to prior to admission; (c) Identifying any signs of psychological or other stress brought on by the fact of imprisonment, including, but not limited to, the risk of suicide or self-harm and withdrawal symptoms resulting from the use of drugs, medication or alcohol; and undertaking all appropriate individualized measures or treatment; (d) In cases where prisoners are suspected of having contagious diseases, providing for the clinical isolation and adequate treatment of those prisoners during the infectious period; (e) Determining the fitness of prisoners to work, to exercise and to participate in other activities, as appropriate.

Rule 31 The physician or, where applicable, other qualified health-care professionals shall have daily access to all sick prisoners, all prisoners who complain of physical or mental health issues or injury and any prisoner to whom their attention is specially directed. All medical examinations shall be undertaken in full confidentiality.

Rule 32 (1) The relationship between the physician or other health-care professionals and the prisoners shall be governed by the same ethical and professional standards as those applicable to patients in the community, in particular: (a) The duty of protecting prisoners' physical and mental

health and the prevention and treatment of disease on the basis of clinical grounds only; (b) Adherence to prisoners' autonomy with regard to their own health and informed consent in the doctor-patient relationship; (c) The confidentiality of medical information, unless maintaining such confidentiality would result in a real and imminent threat to the patient or to others; (d) An absolute prohibition on engaging, actively or passively, in acts that may constitute torture or other cruel, inhuman or degrading treatment or punishment, including medical or scientific experimentation that may be detrimental to a prisoner's health, such as the removal of a prisoner's cells, body tissues or organs. (2) Without prejudice to paragraph 1 (d) of this rule, prisoners may be allowed, upon their free and informed consent and in accordance with applicable law, to participate in clinical trials and other health research accessible in the community if these are expected to produce a direct and significant benefit to their health, and to donate cells, body tissues or organs to a relative.

Rule 33 The physician shall report to the prison director whenever he or she considers that a prisoner's physical or mental health has been or will be injuriously affected by continued imprisonment or by any condition of imprisonment.

Rule 34 If, in the course of examining a prisoner upon admission or providing medical care to the prisoner thereafter, health-care professionals become aware of any signs of torture or other cruel, inhuman or degrading treatment or punishment, they shall document and report such cases to the competent medical, administrative or judicial authority. Proper procedural safeguards shall be followed in order not to expose the prisoner or associated persons to foreseeable risk of harm.

Rule 35 (1) The physician or competent public health body shall regularly inspect and advise the prison director on: (a) The quantity, quality, preparation and service of food; (b) The hygiene and cleanliness of the institution and the prisoners; (c) The sanitation, temperature, lighting and ventilation of the prison; (d) The suitability and cleanliness of the prisoners' clothing and bedding; (e) The observance of the rules concerning physical education and sports, in cases where there is no technical personnel in charge of these activities. (2) The prison director shall take into consideration the advice and reports provided in accordance with paragraph 1 of this rule and rule 33 and shall take immediate steps to give effect to the advice and the recommendations in the reports. If the advice or recommendations do not fall within the prison director's competence or if he or she does not concur with them, the director shall immediately submit to a higher authority his or her own report and the advice or recommendations of the physician or competent public health body.

Rule 42 General living conditions addressed in these rules, including those related to light, ventilation, temperature, sanitation, nutrition, drinking water, access to open air and physical exercise, personal hygiene, health care and adequate personal space, shall apply to all prisoners without exception.

Rule 43 (1) In no circumstances may restrictions or disciplinary sanctions amount to torture or other cruel, inhuman or degrading treatment or punishment. The following practices, in particular, shall be prohibited: (a) Indefinite solitary confinement; (b) Prolonged solitary confinement; (c) Placement of a prisoner in a dark or constantly lit cell; (d) Corporal punishment or the reduction of a prisoner's diet or drinking water; (e) Collective punishment. (2) Instruments of restraint shall never be applied as a sanction for disciplinary offences. 3. Disciplinary sanctions or restrictive measures shall not include the prohibition of family contact. The means of family contact may only be restricted for a limited time period and as strictly required for the maintenance of security and order.

Rule 44 For the purpose of these rules, solitary confinement shall refer to the confinement of prisoners for 22 hours or more a day without meaningful human contact. Prolonged solitary confinement shall refer to solitary confinement for a time period in excess of 15 consecutive days.
Rule 45 (1) Solitary confinement shall be used only in exceptional cases as a last resort, for as short a time as possible and subject to independent review, and only pursuant to the authorization by a competent authority. It shall not be imposed by virtue of a prisoner's sentence. (2) The imposition of solitary confinement should be prohibited in the case of prisoners with mental or physical disabilities when their conditions would be exacerbated by such measures. The prohibition of the use of solitary confinement and similar measures in cases involving women and children, as referred to in other United Nations standards and norms in crime prevention and criminal justice, continues to apply.
Rule 46 (1) Health-care personnel shall not have any role in the imposition of disciplinary sanctions or other restrictive measures. They shall, however, pay particular attention to the health of prisoners held under any form of involuntary separation, including by visiting such prisoners on a daily basis and providing prompt medical assistance and treatment at the request of such prisoners or prison staff. (2) Health-care personnel shall report to the prison director, without delay, any adverse effect of disciplinary sanctions or other restrictive measures on the physical or mental health of a prisoner subjected to such sanctions or measures and shall advise the director if they consider it necessary to terminate or alter them for physical or mental health reasons. (3) Health-care personnel shall have the authority to review and recommend changes to the involuntary separation of a prisoner in order to ensure that such separation does not exacerbate the medical condition or mental or physical disability of the prisoner.
Rule 109 (1) Persons who are found to be not criminally responsible, or who are later diagnosed with severe mental disabilities and/or health conditions, for whom staying in prison would mean an exacerbation of their condition, shall not be detained in prisons, and arrangements shall be made to transfer them to mental health facilities as soon as possible. (2) If necessary, other prisoners with mental disabilities and/or health conditions can be observed and treated in specialized facilities under the supervision of qualified health-care professionals. (3) The health-care service shall provide for the psychiatric treatment of all other prisoners who are in need of such treatment.
Rule 110 It is desirable that steps should be taken, by arrangement with the appropriate agencies, to ensure if necessary the continuation of psychiatric treatment after release and the provision of social-psychiatric aftercare.

Bangkok Rules

Rule 5 The accommodation of women prisoners shall have facilities and materials required to meet women's specific hygiene needs, including sanitary towels provided free of charge and a regular supply of water to be made available for the personal care of children and women, in particular women involved in cooking and those who are pregnant, breastfeeding or menstruating.
Rule 6 The health screening of women prisoners shall include comprehensive screening to determine primary health-care needs, and also shall determine: (a) The presence of sexually transmitted diseases or blood-borne diseases; and, depending on risk factors, women prisoners may also be offered testing for HIV, with pre- and post-test counselling; (b) Mental health-care needs, including post-traumatic stress disorder and risk of suicide and Self-Harm;(c) The reproductive health history of the woman prisoner, including current or recent pregnancies, childbirth and any

related reproductive health issues;(d) The existence of drug dependency;(e) Sexual abuse and other forms of violence that may have been suffered prior to admission.

Rule 7 (2) Whether or not the woman chooses to take legal action, prison authorities shall endeavour to ensure that she has immediate access to specialized psychological support or counselling

Rule 8 The right of women prisoners to medical confidentiality, including specifically the right not to share information and not to undergo screening in relation to their reproductive health history, shall be respected at all times

Rule 9 If the woman prisoner is accompanied by a child, that child shall also undergo health screening, preferably by a child health specialist, to determine any treatment and medical needs. Suitable health care, at least equivalent to that in the community, shall be provided

Rule 10 (1) Gender-specific health-care services at least equivalent to those available in the community shall be provided to women prisoners. (2). If a woman prisoner requests that she be examined or treated by a woman physician or nurse, a woman physician or nurse shall be made available, to the extent possible, except for situations requiring urgent medical intervention. If a male medical practitioner undertakes the examination contrary to the wishes of the woman prisoner, a woman staff member shall be present during the examination.

Rule 11 (1) Only medical staff shall be present during medical examinations unless the doctor is of the view that exceptional circumstances exist or the doctor requests a member of the prison staff to be present for security reasons or the woman prisoner specifically requests the presence of a member of staff as indicated in rule 10, paragraph 2, above. (2). If it is necessary for non-medical prison staff to be present during medical examinations, such staff should be women and examinations shall be carried out in a manner that safeguards privacy, dignity and confidentiality.

Rule 12 Individualized, gender-sensitive, trauma-informed and comprehensive mental health care and rehabilitation programmes shall be made available for women prisoners with mental health-care needs in prison or in non-custodial settings

Rule 13 Prison staff shall be made aware of times when women may feel particular distress, so as to be sensitive to their situation and ensure that the women are provided appropriate support.

Rule 14 In developing responses to HIV/AIDS in penal institutions, programmes and services shall be responsive to the specific needs of women, including prevention of mother-to-child transmission. In this context, prison authorities shall encourage and support the development of initiatives on HIV prevention, treatment and care, such as peer-based education.

Rule 15 Prison health services shall provide or facilitate specialized treatment programmes designed for women substance abusers, taking into account prior victimization, the special needs of pregnant women and women with children, as well as their diverse cultural backgrounds.

Rule 16 Developing and implementing strategies, in consultation with mental health-care and social welfare services, to prevent suicide and self-harm among women prisoners and providing appropriate, gender-specific and specialized support to those at risk shall be part of a comprehensive policy of mental health care in women’s prisons.

Rule 17 Women prisoners shall receive education and information about preventive health-care measures, including on HIV, sexually transmitted diseases and other blood-borne diseases, as well as gender-specific health conditions.

Rule 18 Preventive health-care measures of particular relevance to women, such as Papanicolaou tests and screening for breast and gynaecological cancer, shall be offered to women prisoners on an equal basis with women of the same age in the community

Rule 25 (1) Women prisoners who report abuse shall be provided immediate protection, support and counselling, and their claims shall be investigated by competent and independent authorities, with full respect for the principle of confidentiality. Protection measures shall take into account specifically the risks of retaliation (2). Women prisoners who have been subjected to sexual abuse, and especially those who have become pregnant as a result, shall receive appropriate medical advice and counselling and shall be provided with the requisite physical and mental health care, support and legal aid.

Rule 33 (1) All staff assigned to work with women prisoners shall receive training relating to the gender-specific needs and human rights of women prisoners. (2). Basic training shall be provided for prison staff working in women's prisons on the main issues relating to women's health, in addition to first aid and basic medicine. (3). Where children are allowed to stay with their mothers in prison, awareness-raising on child development and basic training on the health care of children shall also be provided to prison staff, in order for them to respond appropriately in times of need and emergencies.

Rule 34 Capacity-building programmes on HIV shall be included as part of the regular training curricula of prison staff. In addition to HIV/AIDS prevention, treatment, care and support, issues such as gender and human rights, with a particular focus on their link to HIV, stigma and discrimination, shall also be part of the curriculum.

Rule 35: Prison staff shall be trained to detect mental health-care needs and risk of self-harm and suicide among women prisoners and to offer assistance by providing support and referring such cases to specialists

Rule 38 Juvenile female prisoners shall have access to age- and gender-specific programmes and services, such as counselling for sexual abuse or violence. They shall receive education on women's health care and have regular access to gynaecologists, similar to adult female prisoners.

Rule 39 Pregnant juvenile female prisoners shall receive support and medical care equivalent to that provided for adult female prisoners. Their health shall be monitored by a medical specialist, taking account of the fact that they may be at greater risk of health complications during pregnancy due to their age.

Rule 41 The gender-sensitive risk assessment and classification of prisoners shall: (a) Take into account the generally lower risk posed by women prisoners to others, as well as the particularly harmful effects that high security measures and increased levels of isolation can have on women prisoners; (b) Enable essential information about women's backgrounds, such as violence they may have experienced, history of mental disability and substance abuse, as well as parental and other caretaking responsibilities, to be taken into account in the allocation and sentence planning process; (c) Ensure that women's sentence plans include rehabilitative programmes and services that match their gender-specific needs; (d) Ensure that those with mental health-care needs are housed in accommodation which is not restrictive, and at the lowest possible security level, and receive appropriate treatment, rather than being placed in higher security level facilities solely due to their mental health problems

Rule 48 (1) Pregnant or breastfeeding women prisoners shall receive advice on their health and diet under a programme to be drawn up and monitored by a qualified health practitioner. Adequate and timely food, a healthy environment and regular exercise opportunities shall be provided free of charge for pregnant women, babies, children and breastfeeding mothers.

World Medical Organisation Declaration of Edinburgh on Prison Conditions and the Spread of Tuberculosis and Other Communicable Diseases

The World Medical Association considers it essential both for public health and humanitarian reasons that careful attention is paid to:

1. Protecting the rights of prisoners according to the various UN instruments relating to conditions of imprisonment. Prisoners should enjoy the same rights as other patients, as outlined in the WMA Declaration of Lisbon;
2. Not allowing the rights of prisoners to be ignored or invalidated because they have an infectious illness;
3. Ensuring that the conditions in which detainees and prisoners are kept, whether they are held during the investigation of a crime, whilst waiting for trial, or as punishment once sentenced, do not contribute to the development, worsening or transmission of disease.
4. Ensuring that persons being held while going through immigration procedures, are kept in conditions which do not encourage the spread of disease, although prisons should not normally be used to house such persons;
5. Ensuring the coordination of health services within and outside prisons to facilitate continuity of care and epidemiological monitoring of inmate patients when they are released;
6. Ensuring that prisoners are not isolated, or placed in solitary confinement, as a response to their infected status without adequate access to health care and the appropriate medical treatment of their infected status;
7. Ensuring that, upon admission to or transfer to a different prison, inmates' health status is reviewed within 24 hours of arrival to assure continuity of care;
8. Ensuring the provision of follow-up treatment for prisoners who, on their release, are still ill, particularly with TB or any other infectious disease. Because erratic treatments or interruptions of treatment may be particularly hazardous epidemiologically and to the individual, planning for and providing continuing care are essential elements of prison health care provision;
9. Recognising that the public health mechanisms, which may in the rarest and most exceptional cases involve the compulsory detention of individuals who pose a serious risk of infection to the wider community must be efficacious, necessary and justified, and proportional to the risks posed. Such steps should be exceptional and must follow careful and critical questioning of the need for such constraints and the absence of any effective alternative. In such circumstances detention should be for as short a time as possible and be as limited in restrictions as feasible. There must also be a system of independent appraisal and periodic review of any such measures, including a mechanism for appeal by the patients themselves. Wherever possible alternatives to such detention should be used;
10. This model should be used in considering all steps to prevent cross infection and to treat existing infected persons within the prison environment.
11. Physicians working in prisons have a duty to report to the health authorities and professional organisations of their country any deficiency in health care provided to the inmates and any situation involving high epidemiological risk. NMAs are obliged to attempt to protect those physicians against any possible reprisals.
12. Physicians working in prisons have a duty to follow national public health guidelines, where these are ethically appropriate, particularly concerning the mandatory reporting of infectious and communicable diseases.

United Nations Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Principle 1

Health personnel, particularly physicians, charged with the medical care of prisoners and detainees have a duty to provide them with protection of their physical and mental health and treatment of disease of the same quality and standard as is afforded to those who are not imprisoned or detained.

Principle 2

It is a gross contravention of medical ethics, as well as an offence under applicable international instruments, for health personnel, particularly physicians, to engage, actively or passively, in acts which constitute participation in, complicity in, incitement to or attempts to commit torture or other cruel, inhuman or degrading treatment or punishment.[1]

Principle 3

It is a contravention of medical ethics for health personnel, particularly physicians, to be involved in any professional relationship with prisoners or detainees the purpose of which is not solely to evaluate, protect or improve their physical and mental health.

Principle 4

It is a contravention of medical ethics for health personnel, particularly physicians:

(*a*)

To apply their knowledge and skills in order to assist in the interrogation of prisoners and detainees in a manner that may adversely affect the physical or mental health or condition of such prisoners or detainees and which is not in accordance with the relevant international instruments;[2]

(*b*)

To certify, or to participate in the certification of, the fitness of prisoners or detainees for any form of treatment or punishment that may adversely affect their physical or mental health and which is not in accordance with the relevant international instruments, or to participate in any way in the infliction of any such treatment or punishment which is not in accordance with the relevant international instruments.

Principle 5

It is a contravention of medical ethics for health personnel, particularly physicians, to participate in any procedure for restraining a prisoner or detainee unless such a procedure is determined in accordance with purely medical criteria as being necessary for the protection of the physical or mental health or the safety of the prisoner or detainee himself, of his fellow prisoners or detainees, or of his guardians, and presents no hazard to his physical or mental health.

Principle 6

There may be no derogation from the foregoing principles on any ground whatsoever, including public emergency.