



Africa Criminal Justice Reform
Organisation pour la Réforme de la Justice Pénale en Afrique
Organização para a Reforma da Justiça Criminal em África



Solitary Confinement -

A review of the legal framework and practice in five African countries

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October 2018

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Acronyms and abbreviations

| | |
|-------|---|
| ICCPR | International Covenant on Civil and Political Rights |
| OPCAT | Optional Protocol to the Convention Against Torture |
| UNCAT | United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment |
| UNCRC | United Nations Convention on the Rights of the Child |
| UNHRC | United Nations Human Rights Committee |
| UNSMR | United Nations Standard Minimum Rules for the Treatment of Prisoners as adopted in 2015 |

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1. Introduction

The effect of long periods of solitary confinement have been shown to have severe impacts on a prisoner's mental and physical well-being.¹ The UN Human Rights Committee (UNHRC) has noted that the use of prolonged solitary confinement may amount to torture or to cruel, inhuman or degrading treatment or punishment, in breach of Article 7 of the International Covenant on Civil and Political Rights (ICCPR).² In December 2015, the UN General Assembly adopted the revised United Nations Standard Minimum Rules for the Treatment of Prisoners,³ also known as the Nelson Mandela Rules ('2015 UNSMR'). The 2015 UNSMR addresses a key shortcoming in the protection and treatment of people in places of detention, as it, for the first time, sets down norms and limitations on the use of solitary confinement.⁴ It has been remarked that 'The Rules are reflective of an international community engaging with the many challenges faced by those deprived of their liberty.'⁵

Despite various binding and non-binding international human rights law instruments on the protection of all persons, including people deprived of their liberty, there was no human rights instrument substantially addressing acceptable norms and limitations on the use of solitary confinement.⁶ The 1955 version of the UNSMR was silent on such provisions.⁷ The Istanbul Statement on the Use and Effects of Solitary Confinement addressed the issue briefly and the United Nations Basic Principles for the Treatment of Prisoners only encourages States to make efforts to abolish the use of solitary confinement as a punishment, or to restrict its use.⁸

¹ Istanbul statement on the use and effects of solitary confinement. Adopted on 9 December 2007 Available at: <http://www.solitaryconfinement.org/istanbul>. Peter Scharff Smith "The Effects of Solitary Confinement on Prison Inmates. A Brief History and Review of the Literature" in *Crime and Justice* Vol. 34, 2006 (pp. 441-528); Craig Haney "Mental Health Issues in Long-Term Solitary and 'Supermax' Confinement" in *Crime & Delinquency* 49(1), 2003 (pp. 124-56); Stuart Grassian "Psychopathological Effects of Solitary Confinement" in *American Journal of Psychiatry* 140, 1983 (pp. 1450-4).

² E/CN.4/RES/1992/25

³ A/RES/70/175.

⁴ Rule 44, USMR 2015.

⁵ Muntingh, L. 'The Mandela Rules: A diplomatic success but will they lead to better care of SA prisoners?' *Thoughtleader* <http://thoughtleader.co.za/lukasmuntingh/2016/01/13/mandela-rules-a-diplomatic-success-but-will-they-lead-to-better-care-of-sa-prisoners/> 13 January 2016.

⁶ United Nations, Treaty Series, vol. 999, p. 171; United Nations, Treaty Series, vol. 1465, p. 85; United Nations, Treaty Series, vol. 1577, p. 3; A/RES/45/111.

⁷ UN Economic and Social Council (ECOSOC), *Standard Minimum Rules for the Treatment of Prisoners*, 13 May 1977.

⁸ A/RES/45/111; [Istanbul statement on the use and effects of solitary confinement](#). Adopted on 9 December. The statement highlighted concerns about the increase in the use of strict and often prolonged solitary confinement practices in prison systems in various jurisdictions across the world based upon a model of strict isolation of prisoners. The Istanbul Statement called on States as a general principle to use solitary confinement only in exceptional cases, for as short a time as possible and only as a measure of last resort. Furthermore, it called on the absolute prohibition on the use of solitary confinement in the following circumstances: for death row and life-sentenced prisoners by virtue of their sentence, for mentally ill prisoners and for children under the age of 18 years.

The 2015 UNSMR provide rules limiting the period of detention in solitary confinement and provide safeguards on the restriction of fundamental basic conditions of detention whilst prisoners are in confinement. This includes, but is not limited to, the prohibition of the practice of indefinite and prolonged solitary confinement; preventing the restriction of basic rights, such as the provision of light, water, nutrition, health-care and the effective monitoring of persons placed in solitary confinement.

Similar to the 1955 UNSMR, the 2015 version does, however, suffer from two structural weaknesses: it is regarded as soft law or a non-binding instrument (even though some parts of the 1955 UNSMR have become part of customary international law), and it is not subjected to mandatory State reporting to a treaty monitoring body.⁹ Compliance with the 2015 UNSMR is highly reliant on states showing the political will to comply without structured monitoring the requirements agreed upon.¹⁰ Despite these structural flaws, the 2015 UNSMR provides a good opportunity for States to measure their legislative compliance against the Rules on solitary confinement. Moreover, the Rules provide guidance to States to make the necessary legislative reforms to meet the acceptable standards set in the 2015 UNSMR.

Objective of the review

This report reviews the legislation on the use of solitary confinement of prisoners in prison facilities in Malawi, Kenya, Zambia, Mozambique and South Africa and measures it against the safeguards on solitary confinement in the 2015 UNSMR. The review determines whether or not solitary confinement legislative periods in the five countries comply with time limits set in the 2015 UNSMR, and explores whether or not solitary confinement is imposed on prisoners, restricting their access to basic human rights. The main objective of the review is to determine the legislative areas of non-compliance with the 2015 UNSMR, in order to promote legislative reform of areas of non-compliance with the Rules in order to ensure that the well-being of prisoners is safeguarded. The review relied on examining the legislation of the five countries on solitary confinement, accessible via desktop research. It appears to be the case that in some countries solitary confinement is referred to in legislation as confinement in a separate cell and this has been confirmed as being distinct from segregation. In South Africa, the term solitary confinement was removed from the legislation and replaced with the term 'segregation'. Despite this, the review examines South Africa's legislation on segregation and

⁹ Muntingh, L. 'The Mandela Rules: A diplomatic success but will they lead to better care of SA prisoners?' *Thoughtleader* <http://thoughtleader.co.za/lukasmuntingh/2016/01/13/mandela-rules-a-diplomatic-success-but-will-they-lead-to-better-care-of-sa-prisoners/> 13 January 2016.

⁹ Muntingh, L. 'The Mandela Rules: A diplomatic success but will they lead to better care of SA prisoners?' *Thoughtleader* <http://thoughtleader.co.za/lukasmuntingh/2016/01/13/mandela-rules-a-diplomatic-success-but-will-they-lead-to-better-care-of-sa-prisoners/> 13 January 2016.

¹⁰ Muntingh, L. 'The Mandela Rules: A diplomatic success but will they lead to better care of SA prisoners?' *Thoughtleader* <http://thoughtleader.co.za/lukasmuntingh/2016/01/13/mandela-rules-a-diplomatic-success-but-will-they-lead-to-better-care-of-sa-prisoners/> 13 January 2016.

measures it against the 2015 UNSMR. The report addresses a series of questions and the countries information supplied could be related as repetitive.

The 2015 UNSMR provide the following Rules

Solitary confinement is referred to in the 2015 UNSMR as the confinement of prisoners for 22 hours or more a day without meaningful human contact, and prolonged solitary confinement is referred to as confinement for a period in excess of 15 consecutive days.¹¹

The 2015 UNSMR defines any form of 'involuntary separation' from the general prison population as solitary confinement, isolation, segregation, special care units or restricted housing whether as a disciplinary sanction or for the maintenance of order and security, including promulgating policies and procedures governing the use and review of, admission to and release from any form of involuntary separation.¹²

In terms of the Rules, disciplinary sanctions or restrictive measures shall not include the prohibition of family contact.¹³ Moreover, family contact may only be restricted for a limited time period and as strictly required for the maintenance of security and order.¹⁴

The Rules emphasise that solitary confinement should only be used in exceptional cases as a last resort, for as short a time as possible.¹⁵ It also requires that the imposition of solitary confinement must be subjected to independent review and that it should only be implemented pursuant to the authorisation by a competent authority.¹⁶ Moreover, solitary confinement must not be imposed by virtue of a prisoner's sentence.¹⁷

The imposition of solitary confinement should be prohibited in the case of prisoners with mental or physical disabilities when their condition would be exacerbated by such measures.¹⁸ The Rules re-affirm the prohibition of solitary confinement of juveniles, pregnant women, women with infants and breastfeeding mothers in prison as stipulated in other United Nations standards and norms.¹⁹

Rule 46 of the 2015 UNSMR emphasises the following fundamental role health-care officials must play in the monitoring and protection of prisoners placed in solitary confinement:

¹¹ Rule 44 UNSMR (2015).

¹² Rule 37 UNSMR (2015).

¹³ Rule 43 (2), UNSMR (2015).

¹⁴ Rule 43 (2), UNSMR (2015).

¹⁵ Rule 45 (1), UNSMR (2015).

¹⁶ Rule 45 (1), UNSMR (2015).

¹⁷ Rule 45 (1), UNSMR (2015).

¹⁸ Rule 45 (2), UNSMR (2015).

¹⁹ Rule 67 of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (resolution 45/113); Rule 22 of the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules) (resolution 65/229).

- 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.
- Health-care personnel shall report to the 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.
- 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.

This report concludes that, after examining the prison legislation in the five countries, it seems to be the case that solitary confinement is still provided for in law without guaranteeing prisoners the basic fundamental rights and safeguards in violation of the 2015 UNSMR.

There is evidence that the legislated periods of solitary confinement in all the countries under review exceed that which is permissible under the 2015 UNSMR and that prisoners could be (or are) subjected to prolonged, and in some cases indefinite solitary confinement. Such practices may amount to torture or at least to cruel, inhuman or degrading treatment or punishment. Furthermore, the report highlights that legislative reform is urgently needed in order to address the lack of oversight and monitoring provisions by health-care personnel to prisoners placed in solitary confinement, as the lack thereof may have devastating consequences for their mental and physical well-being.

2. General legal framework

2.1. Introduction

This section of the report explores the basic legal framework on the use of solitary confinement in the five countries under review. It sets out the limits of solitary confinement and identifies the relevant authority responsible for imposing solitary confinement.

Table 1: UNSMR (2015) basic provisions on conditions of solitary confinement, segregation or confinement in a separate cell

| UN Standard Minimum Rules for the Treatment of Prisoners (2015) | |
|--|---|
| Rule 37 (d) | The following shall always be subject to authorization by law or by the regulation of the competent administrative authority: Any form of involuntary separation from the general prison population, such as solitary confinement, isolation, segregation, special care units or restricted housing, whether as a disciplinary sanction or for the maintenance of order and security, including promulgating policies and procedures governing the use and review of, admission to and release from any form of involuntary separation. |
| 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. |

2.2. Is solitary confinement provided for in law and regulations? When can solitary confinement be imposed?

Rule 37 of the 2015 UNSMR states that any form of involuntary separation from the general prison population shall always be subject to authorization by law or by the regulation of the competent administrative authority. Table 2 below provides an overview of the legislation and relevant provisions governing solitary confinement, segregation or confinement in the five countries under review. As can be seen from Table 2, South Africa has the most recent legislation (1998) whereas Mozambique's legislation dates back to 1936 with the rest dating back to mid-1960.

Table 2: Overview of legislation on solitary confinement/ segregation/ confinement in a separate cell

| Country | Statute | Provisions |
|----------------|---------------------------------------|--------------------|
| Kenya | Kenyan Prisons Act 49 of 1962 | Sections 51, 52 |
| Malawi | Malawi Prisons Act of 1966 | Section 91 (b) |
| Mozambique | Law Decree 26.643 of 1936 | Chapters IX and X |
| South Africa | Correctional Services Act 111 of 1998 | Section 30 |
| Zambia | Zambian Prisons Act 56 of 1965 | Section 95, 97, 98 |

In South Africa, the disciplinary punishment of 'solitary confinement' was removed from the Correctional Services Act in 2008 and replaced with 'segregation.' The law provides that segregation of an inmate, in a single cell, is allowed under the following circumstances: (a) if a prisoner requests to be placed in segregation; (b) to give effect to the penalty of the restriction of amenities; (c) if prescribed by a medical practitioner on medical grounds; (d) when an inmate displays violence or is threatened with violence; and if the inmate escaped and is recaptured after the escape and there is reason to believe that he will attempt to escape again;

and at the request of the police in the interests of justice.²⁰ In terms of the Correctional Services Act, “amenities” is defined as recreational and other activities, diversions or privileges which are granted to inmates in addition to what they are entitled to as of right and in terms of this Act, and includes—exercise; contact with the community; reading material; recreation; and incentive schemes.²¹ Despite the law being clear in terms of when segregation is permitted, it appears that even though the disciplinary punishment of solitary confinement was removed from the legislation, there is reason to conclude that it still occurs under the guise of segregation.²² It is the case that super-maximum security correctional facilities are being used to host ‘violent’, or ‘dangerous’, or problematic inmates. The security and control measures at these facilities are problematic as prisoners are placed in solitary confinement-like conditions. These facilities have no communal cells and offenders are locked up in single cells for 23 hours a day. When initially admitted to these facilities, prisoners will have no contact with other prisoners for a minimum of six months and bare minimum privileges. Depending on their behaviour they may be granted more privileges or the solitary confinement may be extended. More problematic is the fact that the Department of Correctional Services has no clear policy criteria to decide who should be transferred to these facilities.²³

In Mozambique, the outdated Decree- Law no. 26: 643 of 28 May 1936 (*Lei da Organização Prisional* or Law of Prison Organisation) provides for the imposition of solitary confinement. Article 357 of the Law of Prisons states: ‘prisoners who commit any infraction against the rules of the prison to which they are subject or disobey the orders received will be disciplined’²⁴ and solitary confinement can be imposed as a disciplinary sanction. It is also imposed for the first 30 days of imprisonment.²⁵ Solitary confinement can also be applied when there is a danger to the order of the prison or a risk of escape.²⁶ Article 360 of the Law of Prisons states that disciplinary sanctions ((solitary confinement as provided by Article 359 (7), 359 (8) and 359 (9)) can be applied to special categories only in the cases provided for in law, as referred to in Article 352. This Article

²⁰ Section 30 (1) (a)-(f), Correctional Services Act 111 of 1998.

²¹ Definition section, Correctional Services Act 111 of 1998.

²² Solitary confinement and Segregation, CSPRI 2015 Factsheet Issue No 1. Available at: <https://acjr.org.za/resource-centre/CSPRI%20factsheet%20%20Solitary%20confinement%20and%20segregation%20-1.pdf> ; Gwen Dereymaeker, ‘Op-Ed: Is Ebongweni C-Max prison living up to its promises?’ *Daily Maverick South Africa*, 18 September 2017, Available at: <https://www.dailymaverick.co.za/article/2017-09-18-op-ed-is-ebongweni-c-max-prison-living-up-to-its-promises/>; ‘Ebongweni C-Max Prison, where hardened criminals get softened up,’ *Business Day*, 25 August 2017, Available at <https://www.businesslive.co.za/bd/national/2017-08-25-ebongweni-c-max-prison-where-hardened-criminals-get-softened-up/>

²³ Gwen Dereymaeker, ‘Op-Ed: Is Ebongweni C-Max prison living up to its promises?’ *Daily Maverick South Africa*, 18 September 2017, Available at: <https://www.dailymaverick.co.za/article/2017-09-18-op-ed-is-ebongweni-c-max-prison-living-up-to-its-promises/>

²⁴ Unofficial translation by authors from “Os reclusos que praticarem qualquer infração contra as normas do regime a que estão sujeitos ou desobedecerem às ordens recebidas serao disciplinarmente punidos.”

²⁵ Article 21, Law of Prison Organisation. Unofficial translation by authors from “A detenção será com isolamento contínuo, pelo menos nos primeiros trinta dias e sempre com isolamento nocturno.”

²⁶ Article 351, Law of Prison Organisation. Unofficial translation by authors from “Quando houver perigo de perturbação da ordem ou de fuga de reclusos, poderão ser tomadas as medidas que o director julgar necessárias e particularmente as seguintes: 2. Internar os reclusos em celas de isolamento contínuo ou em celas disciplinares.”

states that ‘the prison doctor or the director of the psychiatric section shall be notified in advance, or as soon as possible thereafter, when solitary confinement is used in the following cases: (a) prisoner under medical treatment; (b) or suspected of having a serious illness or mental disorder; (c) pregnant women or those who had just given birth and (d) children younger than 18 years.’²⁷

The provisions on solitary confinement are similar in Malawi, Kenya and Zambia as these countries were all under the British colonial administration. The prison legislation in these countries make provision for the imposition of solitary confinement (as referred to in Malawi) or confinement in a separate cell or punishment of separate confinement (as referred to in Kenya and Zambia) in cases where prisoners are found guilty of prison offences.²⁸ See prison legislation in Table 2 above. The legislation in all three countries provide extensive lists of prison offences (see Annexure 1 and 2 attached). In Kenya and Zambia a distinction is made between minor and major, or aggravated prison offences.²⁹ The prison legislation in all three countries do not specify certain prison offences for the imposition of such punishment. The law affords discretion to the disciplinary official (and in some cases a magistrate) to impose solitary confinement. Such punishment may also be imposed on prisoners suffering from leprosy in Kenya and Zambia.³⁰

Zambia also has legislation on the segregation of prisoners.³¹ The provision on segregation is distinct from the provisions on separation of prisoners.³² The law on segregation states: ‘whenever it appears to the officer in charge that it is desirable for the good order and discipline of the prison for a prisoner to be segregated and not to work nor to be associated with other prisoners, it shall be lawful for such officer to order the segregation of such prisoner for such period as may be considered necessary.’³³ This provision is particularly worrisome as there are no further rules on segregation which guarantees the protection of prisoners placed in solitary confinement under this provision, and is thus open to abuse by prison officials.

²⁷ Unofficial translation by authors from “...qualquer reclusos em tratamento médico ou suspeito de doença grave ou anomalia mental e as mulheres grávidas ou de parto recente, e ainda menores de 18 anos ...será sempre ouvido o medico da prisão ou o director do anexo psiquiatrico, previamente ou logo que for possivel.”

²⁸ Section 89, Malawi Prisons Act of 1966; Section 41 Kenya Prisons Act 49 of 1962; Section 90 -91 Zambia Prisons Act 56 of 1965

²⁹ Sections 90-91, Zambia Prisons Act 56 of 1965; Section 89, Malawi Prisons Act of 1966; Regulation 66- 67 Discipline of Prisoners, Prisons Council Rules, 1963.

³⁰ Section 72 (1)-(2), Zambia Prisons Act 56 of 1965; Section 41 Kenya Prisons Act 49 of 1962.

³¹ Article 56, Zambia Prisons Act 56 of 1965.

³² Article 92 (1), Zambia Prisons Act 56 of 1965.

³³ Article 56, Zambia Prisons Act 56 of 1965.

2.3. Is there an age restriction, or any other restriction on the use of solitary confinement? Can sentenced and unsentenced prisoners undergo solitary confinement?

In South Africa, the legislation provides that segregation may never be ordered as a form of punishment or disciplinary measure, except in so far as it may be necessary to give effect to the penalty of the restriction of amenities.³⁴ The legislative provisions governing segregation speaks to the segregation of all inmates, sentenced and unsentenced, irrespective of their age.³⁵

In Malawi, anyone of 16 years and older can be subjected to solitary confinement.³⁶

In Kenya and Zambia, there is no age restriction for the imposition of solitary confinement. In both instances, it does refer to 'prisoner' in the Act and the definition of 'prisoner' in the prison legislation refers to any person, whether convicted or not, under detention in any prison.³⁷ Zambia's prison regulations, however, note that in the case of youth, (in youth correctional centres) no room or cell can be used for separate confinement unless the Commissioner certifies it to be suitable for the purpose.³⁸

The legal provisions in Mozambique set no restriction on the imposition of solitary confinement on sentenced or un-sentenced categories of prisoners and there is no age restriction. The age of criminal responsibility in Mozambique is 16 years.³⁹ The law, however, limits the use of solitary confinement as a disciplinary sanction based on the medical condition of the inmate, gender and age of the prisoner in certain instances. The Law of Prison Organisation states that disciplinary sanctions (e.g. solitary confinement)⁴⁰ can be applied to special categories only in the cases provided for in law⁴¹ stating that 'the prison doctor or the director of the psychiatric section shall be notified in advance or as soon as possible in the following cases: prisoners under medical treatment, or prisoners suspected of having a serious illness or mental disorder; pregnant women or those who had just given birth and children younger than 18 years old.'⁴²

³⁴ Section 30 (9), Correctional Services Act 111 of 1998.

³⁵ Definition section, Correctional Services Act 111 of 1998: The term "inmate" means any person, whether convicted or not, who is detained in custody in any correctional centre or remand detention facility. Thus, segregation is applicable to sentence or unsentenced inmates at any age.

³⁶ Section 91(1) (b), Malawi Prisons Act of 1966.

³⁷ Definition section, Kenya Prisons Act 49 of 1962. Definition section, Zambia Prisons Act 56 of 1965.

³⁸ Section 223, Zambia Prisons Act 56 of 1965. "No room or cell shall be used for the separate confinement of an inmate in pursuance of a disciplinary award under Part XIII of the Act, or for the confinement of a refractory or violent inmate, unless it is certified by the Commissioner to be suitable for the purpose and to be furnished with the means of enabling the inmate so confined to communicate at any time with a prison officer."

³⁹ Article 46 Penal Code.

⁴⁰ Article 359 (7) – (9), Law of Prison Organisation.

⁴¹ Article 352 and 360, Law of Prison Organisation.

⁴² Unofficial translation by authors from "...qualquer reclusos em tratamento médico ou suspeito de doença grave ou anomalia mental e as mulheres grávidas ou de parto recente, e ainda menores de 18 anos ...será sempre ouvido o medico da prisão ou o director do anexo psiquiátrico, previamente ou logo que for possível."

2.4. Who makes the decision to impose solitary confinement?

In South Africa, the Head of Correctional Centre can instruct the segregation of inmates.⁴³ However, there is an obligation on the Head of Correctional Centre to report cases of segregation immediately to the National Commissioner of Correctional Services and to the Inspecting Judge for Correctional Services.⁴⁴ The Inspecting Judge heads up the Judicial Inspectorate for Correctional Services, the designated oversight structure for the prison system. In Kenya, the law makes provision for the confinement in a separate cell on the prescribed punishment diet for minor offences by an 'officer in charge' and the Commissioner.⁴⁵ In these instances, the officer in charge can be a senior prison officer or an administrative officer⁴⁶ or a subordinate prison officer.⁴⁷ In cases of aggravated prison offences, an officer in charge, being a senior prison officer or an administrative officer, may punish any prisoner to confinement in a separate cell.

In Mozambique, the prison director may impose solitary confinement,⁴⁸ and the prison director can consult the Technical Council of the prison (*Conselho Tecnico*) when enforcing the disciplinary sanction for serious cases.⁴⁹

In Zambia, if 'an officer in charge,' who is a junior officer, subordinate officer,⁵⁰ a senior officer, or a visiting justice, finds a prisoner guilty of a minor prison offence, he or she may impose the punishment of confinement in a separate cell.⁵¹ In cases of major prison offences, a Commissioner, senior officer or visiting justice may impose punishment of confinement to a separate cell.⁵²

The law in Malawi makes provision for the imposition of solitary confinement within a prison, by the Commissioner or, at the request of the Commissioner or the officer in charge, by a visiting justice and by a magistrate.⁵³

⁴³ Section 30 (6), Correctional Services Act 111 of 1998.

⁴⁴ Section 30 (6), Correctional Services Act 111 of 1998.

⁴⁵ Sections 51 (1) (a), 51 (2) (a), 51 (3) (b) and 52 (1) (a), Kenya Prisons Act 49 of 1962.

⁴⁶ Sections 51 (1) (a), 51 (2) (a), Kenya Prisons Act 49 of 1962.

⁴⁷ Section 51 (3) (b), Kenya Prisons Act 49 of 1962.

⁴⁸ Article 359 §3, Law of Prison Organisation. Solitary confinement is provided in article 359 (7- 9).

⁴⁹ Article 364 Law of Prisons Organization.

⁵⁰ Section 95 (1) (a) - (c), Zambia Prisons Act 56 of 1965.

⁵¹ Section 97 (1) (a) - (c), Zambia Prisons Act 56 of 1965.

⁵² Section 98 (a) - (c), Zambia Prisons Act 56 of 1965.

⁵³ Sections 91 (1) and 92 (1), Malawi Prisons Act of 1966.

2.5. For how long can solitary confinement be imposed and can it be extended?

In terms of the 2015 UNSMR, prolonged solitary confinement is referred to as the confinement for a period in excess of 15 consecutive days.⁵⁴

In South Africa, segregation may only be enforced for the minimum period that is necessary and this period may not exceed seven days.⁵⁵ However, there are two exceptions where this period can be diverted from namely: (a) a prisoner requests to be placed in segregation and (b) to give effect to a disciplinary penalty of the restriction of amenities.⁵⁶ In the latter case, the legislation provides that in the event of serious and repeated transgressions by a prisoner, such a prisoner may be placed in segregation in order to undergo specific programmes aimed at correcting his or her behaviour, with a loss of gratuity⁵⁷ up to two months and a restriction of amenities, for up to 42 days.⁵⁸ In terms of section 30 (5) of the Correctional Services Act, if the Head of the Correctional Centre believes that it is necessary to extend the period of segregation and if the correctional medical practitioner or psychologist certifies that such an extension would not be harmful to the health of the inmate, he or she may, with the permission of the National Commissioner, extend the period of segregation for a period not exceeding 30 days. The permission of the National Commissioner has been delegated to the Area Commissioner in the Regulations.⁵⁹

In Malawi, a prisoner found guilty of a prison offence determined before a magistrate, may receive one of the following punishments: (a) solitary confinement for a period not exceeding 25 days; (b) solitary confinement with penal diet; or (c) a reduced diet with or without solitary confinement. In terms of the imposition of solitary confinement for a period not exceeding 25 days, the law is not clear if this is 25 days at a time or in one year. In respect of the punishment of solitary confinement with penal diet, the law states that the punishment of solitary confinement shall not exceed 15 days and when solitary confinement is imposed for a period exceeding three days, the punishment of penal diet shall be imposed, at three-day intervals, for a period of not more than three consecutive days at a time.⁶⁰ Moreover, the punishment of reduced diet with or without solitary confinement cannot be imposed on a prisoner found guilty of a prison offence for a period exceeding 25 days and, when imposed for a period exceeding eight days, the punishment of reduced diet shall apply , at

⁵⁴ Rule 44, UNSMR (2015).

⁵⁵ Section 30 (4), Correctional Services Act 111 of 1998.

⁵⁶ If prescribed by a medical practitioner on medical grounds; when an inmate displays violence or is threatened with violence; if recaptured after escape and there is reason to believe that he will attempt to escape again; and at the request of the police in the interests of justice

⁵⁷ A gratuity is a small payment awarded to sentenced inmates who perform work inside a correctional centre. This does not constitute an employer –employee relationship.

⁵⁸ Section 24(5), Correctional Services Act 111 of 1998.

⁵⁹ Delegations of Authority GN R915 in *GG* 26626 of 30 July 2014 as amended by GN R182 in *GG* 27350 of March 2005.

⁶⁰ Section 93 (1), Malawi Prisons Act of 1966.

three-day intervals, for periods of not more than eight consecutive days at a time.⁶¹ The Prisons Act does not address the extension of solitary confinement. However, it does not prevent it either, based on the provision that states ‘the Commissioner may review any punishment imposed upon a prisoner and may vary or remit such punishment.’⁶²

In Kenya, the imposition of solitary confinement can range from a period of three to 30 days, depending on the offence and who administers the punishment, and may not be more than 90 days in one year.⁶³ This means that it is possible to impose the full 90 period of solitary confinement in one go but that a further extension is not permitted. Moreover, any officer in charge, if he or she is a senior prison officer or an administrative officer, may punish any prisoner and confine him or her. In Kenya, the Commissioner has the overall authority over prison officers, however, it is the responsibility of the prison officers who have general powers and responsibility over prisoners. In Mozambique, prisoners can be placed in solitary confinement for a period between one and 30 days, a period that can be doubled in the case of repeated disciplinary offences.⁶⁴ Furthermore, solitary confinement can be extended outside the legal frame for the following four reasons: (a) the authority needs to do so in the public interest reasons; (b) when the prisoner asks for it; (c) for disciplinary reasons and (d) where the prisoner poses a threat to other prisoners.⁶⁵

In Zambia there are three scenarios. Firstly, where an officer in charge, who is a junior officer or subordinate officer, finds a prisoner guilty of a minor prison offence, he or she may impose one or more of the following punishments: (a) confinement in a separate cell for a period not exceeding three days; (b) confinement in a separate cell with penal diet for a period not exceeding three days; and (c) reduced diet with or without confinement in a separate cell for a period not exceeding seven days.⁶⁶ Secondly, where an officer in charge, who is a senior officer, or a visiting justice, finds a prisoner guilty of a minor prison offence, he or she may impose one or more of the following punishments: (a) confinement in a separate cell for a period not exceeding fourteen days; (b) confinement in a separate cell with penal diet for a period not exceeding seven days; and (c) reduced diet, with or without confinement in a separate cell, for a period not exceeding fourteen days.⁶⁷ Thirdly, where a Commissioner, a senior officer, or a visiting justice finds a prisoner guilty of a major prison offence, he or she may impose one or more of the following punishments: (a) confinement in a separate cell for a period not exceeding 25 days; (b) confinement in a separate cell with penal diet for a period not

⁶¹ Section 93 (2), Malawi Prisons Act of 1966.

⁶² Section 106, Malawi Prisons Act of 1966.

⁶³ Section 76, Kenya Prisons Rules 1963.

⁶⁴ Article 359 (7), Law of Prison Organisation.

⁶⁵ Article 22, Law of Prison Organisation.

⁶⁶ Section 95 (1) (a)-(c), Zambia Prisons Act 56 of 1965.

⁶⁷ Section 97 (1) (a)-(c), Zambia Prisons Act 56 of 1965.

exceeding 15 days; (c) reduced diet, with or without confinement in a separate cell, for a period not exceeding 25 days.⁶⁸ Zambian law states that ‘no prisoner shall be sentenced to be confined in a separate cell for an aggregate of more than 90 days in one year.’⁶⁹ Thus confirming that an extension is possible as long as it does not exceed 90 days in confinement in a full year. It is important to note that in the latter instance, the law states that ‘where a prisoner is sentenced to two periods of confinement in a separate cell, the two sentences must be separated by a period not less than the longer of the two periods.’⁷⁰

Table 3 below summarises the periods stipulated in the five countries and assesses it against Rule 44 of the 2015 UNSMR. It is clear that there is substantial non-compliance with Rule 44 amongst all five countries legislative provisions allows (in most cases, by virtue of extension) for the confinement of persons beyond a period of 15 days.

Table 3: Legislative periods of solitary confinement/segregation/confinement in a separate cell

| Country | Initial confinement period | Extension allowed? | Compliance with Rule 44 |
|--------------|--|---|-------------------------|
| South Africa | 7 days | Not more than 30 days | Non-compliance |
| Zambia | Minor prison offence imposed by junior or subordinate officer: <ul style="list-style-type: none"> - confinement not exceeding 3 days; - confinement not exceeding 7 days Minor prison offence imposed by senior officer or visiting justice: <ul style="list-style-type: none"> - confinement not exceeding 14 days; - confinement not exceeding 7 days Major offence: <ul style="list-style-type: none"> - confinement not exceeding 25 days; - confinement not exceeding 15 days | Not more than 90 days in one year | Non-compliance |
| Kenya | 3-30 days | Not more than 90 days in one year. | Non-compliance |
| Malawi | 25 days | The law does not speak to extension, however, ‘the Commissioner may review any punishment imposed upon a prisoner and may vary or remit such punishment.’ | Non-compliance |

⁶⁸ Section 98 (a)-(c), Zambia Prisons Act 56 of 1965.

⁶⁹ Section 107 (1), Zambia Prisons Act 56 of 1965.

⁷⁰ Section 107 (2), Zambia Prisons Act 56 of 1965.

| | | | |
|-------------------|-----------|----------|----------------|
| Mozambique | 1-30 days | 30 days. | Non-compliance |
|-------------------|-----------|----------|----------------|

2.6. Can solitary confinement be terminated prior to the fully imposed term being served, and if so, by whom and for what reasons?

Prison legislation in Malawi, Zambia and Kenya do not specifically address the termination of solitary confinement or confinement in a separate cell prior to the fully imposed term being served. However, in all three countries the Commissioner of Prisons has discretion to review, vary, remit or reverse any punishment imposed upon a prisoner.⁷¹ Thus, one can conclude that this general discretionary provision allows for the termination of solitary confinement prior to the fully imposed period being served by the prisoner. In South Africa, in cases where an inmate requested segregation, it may be withdrawn at any time on the request of the inmate.⁷² Segregation must also be discontinued if a registered nurse, psychologist or correctional medical practitioner determines that it poses a threat to the health of the inmate.⁷³ There appears to be no other specific discretionary provision provided to a head of correctional centre indicating that the segregation may or may not be terminated prior to the fully imposed term being served. However, it can be inferred that in terms of prison law, the National Commissioner has an overall discretion to instruct the termination of segregation.⁷⁴ Furthermore, the Correctional Services Act states that where segregation was imposed as a penalty, such penalty may be suspended for such period and on such conditions as the presiding official deems fit.⁷⁵ In Mozambique, the law does not address the termination of solitary confinement prior to the fully imposed term served.

2.7. Can solitary confinement be combined with other penalties?

In Malawi, Kenya, Mozambique and Zambia, the punishment of solitary confinement automatically comes with a restriction of amenities such as visitation rights, access to religious care or services, physical exercise and the restriction of inmates' diet. (More is discussed under basic conditions and amenities.) In South Africa, the law allows for the imposition of combined disciplinary penalties in cases of serious or repeated infringements.⁷⁶ In

⁷¹ Section 106, Malawi Prisons Act of 1966 states: "the Commissioner may review any punishment imposed upon a prisoner and may vary or remit such punishment." Section 179 of the Zambia Prisons Act 56 of 1965 makes provision for the Commissioner to review, vary or remit any punishment imposed on a prisoner where such disciplinary decision was taken by an internal disciplinary process (and not made by a court). In terms of section 52 (4) (b) of the Kenya Prisons Act 49 of 1962, the Commissioner has the discretion to reverse any punishment imposed by an officer in charge.

⁷² Section 30 (3), Correctional Services Act 111 of 1998.

⁷³ Section 30 (2) (b), Correctional Services Act 111 of 1998.

⁷⁴ Section 4 (c), Correctional Services Act 111 of 1998: 'The minimum rights of inmates entrenched in this Act must not be violated or restricted for disciplinary or any other purpose, but the National Commissioner may restrict, suspend or revise amenities for inmates of different categories.'

⁷⁵ Section 24 (6), Correctional Services Act 111 of 1998.

⁷⁶ Section 24 (5), Correctional Services Act 111 of 1998.

such cases, the law allows for segregation in order for the inmate to undergo specific programmes aimed at correcting the inmate's behaviour, with a loss of gratuity⁷⁷ and restriction of amenities.⁷⁸ The law and regulations do, however, not expand on the content, purpose and duration of such programmes.

2.8. If the prison sentence expires during solitary confinement, will the prisoner be released?

It is not clear from the legal provisions in Mozambique if a prisoner will be released if his or her sentence expires during solitary confinement. The law in Kenya, Malawi and Zambia does not address whether prisoners can be released during solitary confinement or confinement in a separate cell, however, forfeiture of remission can be used as a punishment for prison offences in conjunction with such punishment.⁷⁹ In South Africa and Mozambique, a sentenced offender must be released when the term of imprisonment imposed has expired.⁸⁰ It would thus imply release even when in segregation.

2.9. Are death row prisoners kept in solitary confinement and if so, is this with the same restrictions?

South Africa and Mozambique abolished the death penalty and therefore do not have death row prisoners.⁸¹ The law in Kenya, Zambia and Malawi is unclear as to the exact nature of restrictions whilst such prisoners are awaiting their execution. The law in Malawi and Zambia states that every prisoner sentenced to death must be detained apart from other prisoners and must be under constant observation.⁸² In Kenya, it is unclear whether or not prisoners sentenced to death are detained apart from other prisoners.

The Malawi Prisons Act further provides that prisoners under a death sentence may be issued with cigarettes, tobacco, snuff and such other luxuries as the Commissioner may in Standing Orders or otherwise authorize in writing.⁸³ Prisoners under sentence of death are also given a special diet and such privileges the Commissioner may authorise.⁸⁴ The exact nature of the special diet or such privileges are not provided for in the legislation.

Zambia's Prison Act states that prisoners under a death sentence shall be provided with the same kind of clothing, food and bedding as convicted prisoners undergoing imprisonment and may be provided with such

⁷⁷ A loss of gratuity for a period not exceeding two months.

⁷⁸ Restriction of amenities not exceeding 42 days. Section 24 (5), Correctional Services Act 111 of 1998.

⁷⁹ Sections 51 (1) (b), 51(3) (c) and 51(5) (c), Kenya Prisons Act 49 of 1962; Section 91 (1) (ii), Malawi Prisons Act of 1966; Section 109 (4) (b), Zambia Prisons Act 56 of 1965; Section 185, Zambia Prisons Act 56 of 1965.

⁸⁰ Section 73 (2), Correctional Services Act 111 of 1998.

⁸¹ *S v Makwanyane and Another* [1995] ZACC 3 at 151, 1995 (3) S.A. 391. Mozambique abolished death penalty for all crimes in 1990.

⁸² Section 120, Zambia Prisons Act 56 of 1965; Section 104, Malawi Prisons Act of 1966.

⁸³ Section 124, Malawi Prisons Act of 1966.

⁸⁴ Section 125 (2), Malawi Prisons Act of 1966.

other articles as may be approved by the officer in charge.⁸⁵ Zambian legislation do not indicate how long prisoners are kept on death row before execution. However, Zambia's last execution was carried out in 1997, and as of May 2018 there were 160 people sentenced to death in Zambia.⁸⁶ An official moratorium has been in place since at least 2002.⁸⁷ Kenya also has not executed any death-row prisoners since 1987.⁸⁸ In Malawi, prisoners under sentence of death are given three days' notice of their impending execution and the last execution took place in 1992 and as of May 2014 there were at least 29 people on death row.⁸⁹

2.10. Is solitary confinement sometimes used without discretion e.g. because it is a long sentence or the first part of a sentence?

In Mozambique, the law provides for compulsory solitary confinement for the first 30 days of imprisonment.⁹⁰ It is unlikely that this provision is being implemented due to the high levels of overcrowding.⁹¹

2.11. Conclusion

The 2015 UNSMR state that solitary confinement should only be used in exceptional cases as a last resort, for as short a time as possible.⁹² However, it seems to be the case that this is not being complied with. Firstly, in some countries such punishment can be imposed in minor cases and the imposition of solitary confinement is dependent on the discretion of a disciplinary official and not based on the severity of the particular prison offence. Secondly, it seems to be the case that there is substantial non-compliance with the 2015 UNSMR in terms of the prescribed acceptable duration of solitary confinement. Prisoners may only be confined for no more than 22 hours a day without meaningful human contact and for a time period not exceeding 15 consecutive days. Any period exceeding these provisions, amounts to prolonged confinement in violation of the 2015 UNSMR. In the assessment above the maximum duration of confinement in some cases is 90 days in solitary confinement (Zambia). Furthermore, in other instances, broad discretionary extension periods provided in law (Mozambique and Malawi), allow for confinement of prisoners indefinitely. It is clear that substantive legislative amendments are needed to ensure that solitary confinement is only imposed for the

⁸⁵ Section 201, Zambia Prisons Act 56 of 1965.

⁸⁶ Cornell Centre on the Death Penalty Worldwide, Zambia, <http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Zambia> Accessed September 2018.

⁸⁷ Cornell Centre on the Death Penalty Worldwide, Zambia, <http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Zambia> Accessed September 2018.

⁸⁸ Cornell Centre on the Death Penalty Worldwide, Kenya, <http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Kenya> Accessed September 2018. <https://www.nation.co.ke/news/Abolish-death-penalty-Amnesty-International-urges-Kenya/1056-4389104-1s8cl6/index.html>;

⁸⁹ Section 125, Malawi Prisons Act of 1966; Cornell Centre on the Death Penalty Worldwide, Malawi, <http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Malawi> Accessed September 2018.

⁹⁰ Chapter II, Article 21 Law of Prison Organisation.

⁹¹ The current prison population is estimated to be around 20 000 people, while the official capacity of the prisons is around 8 000 beds. The occupancy rate is approximately 220%.

⁹² Rule 45 (1), UNSMR (2015).

most serious cases and that there is strict compliance with the time period set out in the Rules. It should be noted that prison overcrowding is a widespread problem on the continent and the extent to which solitary confinement can be implemented, even when in line with the 2015 UNSMR, may be severely curtailed as a result thereof.

3. Restriction of amenities and basic conditions

3.1. Introduction

This section deals with the basic living conditions and amenities that are restricted to prisoners during solitary confinement. It highlights restrictions placed on the following areas: contact, communication, access to reading material or religious material and services, exercise, access to shower facilities and health care services. The requisite standards are set out in Rule 42, 43 and 46 of the 2015 UNSMR in Table 4 below. Rule 42 provides an over-arching provision for the provision of basic conditions and amenities to persons in solitary confinement as the Rules require that these basic conditions and amenities should apply to all prisoners without exception. Rules 43 and 46 apply specifically to prisoners in solitary confinement.

Table 4: 2015 UNSMR on access to basic amenities during solitary confinement

| UN Standard Minimum Rules for the Treatment of Prisoners (2015) | |
|--|--|
| 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) (d) | 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:corporal punishment or the reduction of a prisoner’s diet or drinking water. |
| Rule 43 (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 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. |
| Rule 46 (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. |

| | |
|-------------|--|
| Rule 46 (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. |
|-------------|--|

3.2. Which amenities are restricted during solitary confinement?

In Malawi, when a prisoner is undergoing solitary confinement, the bedding, accessories and clothing which he or she is not wearing and all the cell equipment, other than the bed and the chamber pot, shall be removed from his cell.⁹³ Moreover prisoners' contact, communication and visiting rights may be restricted as described below.

In South Africa, the law provides that segregation must be for the minimum period, and place the minimum restrictions on the inmate, compatible with the purpose for which the inmate is being segregated.⁹⁴ The general principle is that prisoners placed in segregation can access all amenities unless placed in segregation.⁹⁵ This section provides that 'in the event of serious and repeated transgressions by the prisoner, the prisoner may be placed in segregation 'in order to undergo specific programmes aimed at correcting his or her behaviour', with a loss of gratuity up to two months and a restriction of amenities, for up to 42 days.'⁹⁶ Recreational activities, incentive schemes, diversions or privileges may be restricted depending on the findings of the disciplinary hearing in terms of the procedure set out in section 24 of the Correctional Services Act. A prisoner's right to exercise (or outside exercise, weather permitting) for one hour per day, reading material and visits (a minimum one visit per month of one hour) may not be restricted because of constitutional guarantees.⁹⁷

Kenyan law is vague regarding amenities allowed during solitary confinement as it states 'a prisoner undergoing punishment in a separate cell shall be supplied with such clothing and bedding as the Commissioner shall from time to time direct.'⁹⁸ Access to outside exercise is restricted and the privilege of receiving visitors may be deferred to when the prisoner is released from solitary confinement.⁹⁹

⁹³ Section 103 (1), Malawi Prisons Act of 1966.

⁹⁴ Section 30 (8), Correctional Services Act 111 of 1998.

⁹⁵ Section 30 (1) (b), Correctional Services Act 111 of 1998.

⁹⁶ Section 30 (1) (b), Correctional Services Act 111 of 1998.

⁹⁷ Section 35 (2) (e) and (f) of the Constitution; Sections 11, 13, 14 (2) and 18, Correctional Services Act 111 of 1998.

⁹⁸ Section 75, Kenya Prisons Rules 1963.

⁹⁹ Sections 55 (2) and 76 (4) Kenya Prisons Rules 1963.

In Mozambique, the following amenities are restricted: communication with other prisoners and outside exercise.¹⁰⁰

The Zambian Prisons Act states that when a prisoner is placed in separate confinement as a punishment for a prison offence and when a prisoner is awaiting the hearing of a charge against him or her for a prison offence, the bedding, accessories and clothing which he or she is not wearing at the time and all the cell equipment, other than the latrine equipment, may be removed from his cell.¹⁰¹ Moreover, as discussed below, visits and 'open air' exercise will be restricted to prisoners in solitary confinement.¹⁰²

3.3. What contact is permitted during solitary confinement?

Rule 58 (1) (b) of the 2015 USMR states that 'prisoners shall be allowed, under necessary supervision, to communicate with their family and friends at regular intervals: (a) by corresponding in writing and using, where available, telecommunication, electronic, digital and other means; and (b) by receiving visits'.

In Malawi, if a prisoner becomes eligible to receive a visitor or a letter whilst undergoing solitary confinement, an officer in charge may order that the visit or the delivery of the letter, be deferred until the prisoner is no longer in solitary confinement.¹⁰³ A medical officer is also expected to examine such prisoners every day on which the medical officer visits the prison.¹⁰⁴ This implies that when the doctor does not visit the prison, the prisoners in solitary confinement will not be examined. In Malawi, prisoners in solitary confinement must be visited not less than twice a day by a prison officer.¹⁰⁵

In Kenya, the privilege of writing and receiving letters and receiving visits may, at the discretion of the officer in charge, be postponed at any time in case of misconduct, but shall not be subject to forfeiture and when a prisoner who becomes entitled to a letter or visit is at the time undergoing punishment, the officer in charge shall defer the privilege to a suitable time.¹⁰⁶ A prisoner sentenced to confinement in a separate cell shall see only prison officers, the medical officer, ministers of religion and visiting justices and be visited once a day by the officer in charge and a medical officer.¹⁰⁷

¹⁰⁰ Article 359 §1, Law of Prison Organisation.

¹⁰¹ Section 177 (1), Zambia Prisons Act 56 of 1965.

¹⁰² Section 171 (1), Zambia Prisons Act 56 of 1965.

¹⁰³ Section 144 (3), Malawi Prisons Act of 1966.

¹⁰⁴ Section 29, Malawi Prisons Act of 1966.

¹⁰⁵ Section 104, Malawi Prisons Act of 1966.

¹⁰⁶ Section 55 (2), Kenya Prisons Rules 1963.

¹⁰⁷ Section 76 (4) (a) and (c), Kenya Prisons Rules 1963; Section 26 (b), Kenya Prisons Act 49 of 1962: the medical officers shall see every prisoner held on a capital charge or sentenced to death or in close confinement every day.

Section 128 (4) of Zambia's Prison Act states that when a prisoner becomes entitled to a letter or a visit is, at the time of such entitlement, undergoing punishment in separate confinement, such letter or visit shall be deferred at the discretion of the officer in charge.¹⁰⁸ Section 171 (1) of the same Act contradicts section 128 in respect of visits and removes the discretion of the officer in charge, stating 'a prisoner sentenced to separate confinement shall not be entitled to receive visits other than visits by prison officers on duty, a minister of religion or the medical officer.'¹⁰⁹ In Zambia, provision is made for the prison head to visit prisoners in confinement not less than twice a day.¹¹⁰ Prison officers are required to visit prisoners in solitary confinement at intervals of not less than thirty minutes.¹¹¹ Visiting justices or judicial officials may see prisoners in solitary confinement.¹¹²

In Mozambique, communication with other prisoners and contact with the outside world shall be limited.¹¹³ Furthermore, the legislation in Mozambique speaks to compulsory observation of special categories of prisoners (pregnant women, children, and people with mental disorder or ill people) placed in solitary confinement to take place by doctors as soon as solitary confinement is implemented.¹¹⁴

In South Africa, the law states that in all circumstances, prisoners must be allowed visits or contact with their family or community at a minimum of one hour each month.¹¹⁵ There is a statutory duty on a prison official and head of prison to visit the segregated inmate at least once every four hours and at least once a day respectively.¹¹⁶ The law also requires that the prisoner must have his or her health assessed by a registered nurse, psychologist or a correctional medical practitioner at least once a day.¹¹⁷ Prisoners may also be visited by an Independent Correctional Centre Visitor.¹¹⁸

¹⁰⁸ Section 128 (4), Zambia Prisons Act 56 of 1965.

¹⁰⁹ Section 171 (1), Zambia Prisons Act 56 of 1965.

¹¹⁰ Section 178 (a), Zambia Prisons Act 56 of 1965.

¹¹¹ Section 178 (b), Zambia Prisons Act 56 of 1965.

¹¹² Section 126 (b), Zambia Prisons Act 56 of 1965; Section 129 (b), Zambia Prisons Act 56 of 1965.

¹¹³ The compulsory solitary confinement for the first 30 days of imprisonment (article 21 Law of Prison Organisation) provides also for the prolonged confinement, at night and day (article 21 §1). This solitary confinement does not provide for any contact with the outside world and other inmates as well as the solitary confinement applied as a disciplinary sanction (359 §1, Law of Prison Organisation).

¹¹⁴ Article 352, Law of Prison Organisation.

¹¹⁵ Section 13 (3), Correctional Services Act 111 of 1998.

¹¹⁶ Section 30 (2) (a) (i), Correctional Services Act 111 of 1998.

¹¹⁷ Section 30 (2) (a) (ii), Correctional Services Act 111 of 1998.

¹¹⁸ Sections 21 (5), 90 (2) and 93, Correctional Services Act 111 of 1998. Prisoners may refer their complaints to Independent Correctional Centre Visitors (ICCV), whose mandate is to assist with the resolution of complaints at correctional centre level. ICCV's are independent prisoner visitors under control of the Inspecting Judge for Correctional Services.

3.4. Is access to reading material permitted during solitary confinement?

Rule 63 of the 2015 UNSMR states that ‘prisoners shall be kept informed regularly of the more important items of news by the reading of newspapers, periodicals or special institutional publications, by hearing wireless transmissions, by lectures or by any similar means as authorized or controlled by the prison administration.’ Prisoners in Zambia and Malawi may be supplied with a book of a religious nature during solitary confinement.¹¹⁹ Reading material is permitted during segregation in South Africa.¹²⁰ Legal provisions in Mozambique and Kenya do not address whether or not prisoners in confinement are permitted access to reading material. It is not clear whether or not prisoners are able to access the radio during such period.

3.5. Is access to religious material and services permitted during solitary confinement?

Rule 66 of the 2015 UNSMR states that ‘every prisoner should be allowed to satisfy the needs of his or her religious life by attending the services provided in the prison and having in his or her possession the books of religious observance and instruction of his or her denomination.’ Prisoners in Zambia and Malawi may be supplied with a book of a religious nature during separate confinement as a punishment for a prison offence.¹²¹ In Zambia and Kenya, prisoners in solitary confinement have access to ministers of religion.¹²² In South Africa, access to religious material and services may not be restricted.¹²³ In Mozambique, Article 287 on the Law of Prisons states that ‘the prison director may, for internal or security discipline, prohibit certain prisoners from attending ceremonial religious ceremonies.’¹²⁴

3.6. Is access to outside exercise permitted during solitary confinement? If so, for how long at a time?

Rule 23 (1) of the 2015 UNSMR guarantees every prisoner who is not employed in outdoor work the right to have at least one hour of suitable exercise in the open air daily if the weather permits. In South Africa, all prisoners must be given the opportunity to exercise sufficiently in order to remain healthy and is entitled to at least one hour of exercise daily. If the weather permits, this exercise must take place in the open air.¹²⁵ This

¹¹⁹ Section 177 (2), Zambia Prisons Act 56 of 1965; Section 103 (2), Malawi Prisons Act of 1966.

¹²⁰ Section 18 (1), Correctional Services Act 111 of 1998; Section 35 (2) (e), Constitution of the Republic of South Africa.

¹²¹ Section 177 (2), Zambia Prisons Act 56 of 1965; Section 103 (2), Malawi Prisons Act of 1966.

¹²² Section 171 (1), Zambia Prisons Act 56 of 1965; Section 76 (4), Kenya Prisons Rules 1963.

¹²³ Sections 13 (2) and 14(2), Correctional Services Act 111 of 1998.

¹²⁴ Unofficial translation by authors from “O director da prisão poderá, por motivo de disciplina interna ou de segurança, proibir” a certos reclusos que assistam a cerimónias religiosas colectivas.”

¹²⁵ Section 11, Correctional Services Act 111 of 1998.

includes prisoners placed in segregation. In Malawi and Zambia, the legislation provides prisoners the right to exercise for one hour each day, however, it does not specify ‘outside’ exercise.¹²⁶ It can, however, be assumed that this is what the legislature intended. In Kenya, outdoor and physical exercise is not permitted unless the medical officer certifies it to be absolutely necessary for his or her health.¹²⁷ In Mozambique, open air exercise during solitary confinement is prohibited.¹²⁸

3.7. Is access to shower or bathing facilities allowed during solitary confinement?

Rule 16 of the 2015 UNSMR requires States to make provision for ‘adequate bathing and shower facilities, to prisoners, as frequently as necessary for general hygiene according to season and geographical region, but at least once a week in a temperate climate.’ In South Africa, Zambia and Malawi prisoners undergoing segregation or solitary confinement have a right to access shower or bathing facilities.¹²⁹ In Mozambique and Kenya, this is unclear as the law does not specifically address access to bathing or shower facilities during solitary confinement, nor does it restrict such access. Moreover, in Kenya, the law generally provides that access to bathing and shower facilities is at the discretion of the officer in charge.¹³⁰

3.8. Do prisoners in solitary confinement have full access to health care services?

Table 5 provides an overview of the 2015 UNSMR on access to health care:

Table 5: UNSMR on access to health care services

| UN Standard Minimum Rules for the Treatment of Prisoners (2015) | |
|--|--|
| 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. |
| 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. |
| Rule 46 (2) | Health-care personnel shall report to the prison director, without delay, any adverse effect of disciplinary sanctions or other restrictive measures on the |

¹²⁶ Section 103 (3), Malawi Prisons Act of 1966; Section 171 (1), Zambia Prisons Act 56 of 1965.

¹²⁷ Section 76 (4), Kenya Prisons Rules 1963.

¹²⁸ Article 359 §1, Law of Prison Organisation.

¹²⁹ Section 177 (3), Zambia Prisons Act 56 of 1965; Section 103 (4), Malawi Prisons Act of 1966.

¹³⁰ Section 41, Kenya Prisons Rules of 1963.

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| | 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. |
| Rule 46 (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. |

It is not clear whether or not prisoners are able to access full health care in solitary confinement in Zambia. However, every medical officer or his or her subordinate must examine every prisoner ordered to undergo punishment for a prison offence if such punishment involves confinement in a separate cell, and such practitioners must certify in writing whether in his or her opinion such punishment may be inflicted without the probability of serious injury being caused thereby.¹³¹ In South Africa, prisoners in segregation have full access to adequate health care services, within available resources, based on the principles of primary health care, in order to allow every inmate to lead a healthy life.¹³² There is a statutory duty on prison officials to ensure that prisoners have their health assessed by a registered nurse, psychologist or a correctional medical practitioner at least once a day. Segregation must also be discontinued if the registered nurse, psychologist or correctional medical practitioner determines that it poses a threat to the health of the inmate.¹³³

In Malawi, an officer in charge shall notify the medical officer of the name of any prisoner who is in solitary confinement.¹³⁴ There is a statutory duty on the medical officer to ensure that every prisoner in solitary confinement is medically examined every day on the medical officer visits the prison.¹³⁵ This provision indicates that medical officers are not available permanently at prison facilities in Malawi and that prisoners will only be medically assessed on the days when medical officers visit the prison facility. In Kenya, medical officers are under an obligation to see every prisoner held in closed confinement every day.¹³⁶ Moreover, a medical officer must certify whether prisoners placed in confinement is fit to undergo the punishment.¹³⁷

In Mozambique, Article 352 of the Law of Prisons states that when solitary confinement is applied to any inmate under medical treatment or suspected of a serious illness or mental disorder, or pregnant or recently given birth, and even those under 18 years of age, the prison doctor must always be consulted as soon as

¹³¹ Section 40 (1) (b), Zambia Prisons Act 56 of 1965.

¹³² Section 12, Correctional Services Act 111 of 1998.

¹³³ Section 30 (2) (a) (ii), Correctional Services Act 111 of 1998.

¹³⁴ Section 18 (1), Malawi Prisons Act of 1966.

¹³⁵ Section 29, Malawi Prisons Act of 1966.

¹³⁶ Section 26 (b), Kenya Prisons Rules of 1963.

¹³⁷ Section 25 (c), Kenya Prisons Rules of 1963.

possible.¹³⁸ Furthermore, Article 361 of the Law of Prisons states that ‘disciplinary sanctions will never be applied in a manner that would compromise the health of prisoners.’¹³⁹ Article 361 of the Law of Prisons further places the obligation on doctors that if there is a risk that the disciplinary sanction will compromise the health of the inmate, the doctor must report it to the director in writing or as requested.¹⁴⁰

3.9. Is the diet of prisoners restricted during solitary confinement?

Rule 46 (1) (d) of the 2015 UNSMR states that in no circumstances may restrictions or disciplinary sanctions amount to torture or other cruel, inhuman or degrading treatment or punishment and that the practice of the reduction of a prisoner’s diet shall be prohibited. In South Africa, the restriction of all prisoners’ diet is not permissible during segregation, or at any other time. However, there appears to be non-compliance with this Rule in Malawi, Kenya, Zambia and Mozambique as the respective prison laws place restrictions on the diet of prisoners in solitary confinement. In Malawi prisoners are provided with either a penal¹⁴¹ or reduced¹⁴² diet when placed in solitary confinement in certain instances.¹⁴³ In Kenya, a prisoner placed in closed confinement in a separate cell for a period exceeding three days will be placed on a penal diet and they shall be given a full diet on every fourth day.¹⁴⁴ In Zambia, every prisoner who is in separate confinement or who is subjected to a penal¹⁴⁵ or reduced¹⁴⁶ diet as a punishment for a prison offence shall be visited at least once a day by the officer in charge.¹⁴⁷ A prisoner undergoing a punishment of confinement in a separate cell with penal diet shall receive full diet every fourth day.¹⁴⁸ In Mozambique, diet restriction during solitary confinement can be applied through the omission of one of the meals provided by the authority¹⁴⁹ and with bread and water.¹⁵⁰

3.10. Conclusion

From the above it is clear that prisoners’ rights to general living conditions and amenities are being restricted despite the Rules providing that certain rights may not be restricted. The Rules prohibit the reduction of a

¹³⁸ Unofficial translation by authors from “quando ser aplicada a qualquer recluso em tratamento medico ou suspeito de doenca grave ou anomalia menta, e as mulheres grávidas ou de parto recente, e ainda a menores de 18 anos, será sempre ouvido o medico da prisao ...previamente ou logo que for possível.”

¹³⁹ Unofficial translation by authors from “as sanções disciplinares nunca serão aplicadas por forma que comprometam a saúde dos reclusos.”

¹⁴⁰ Unofficial translation by authors from “quando houver risco de as sanções disciplinares comprometerem a saúde do recluso, o medico visitá-lo-á, propondo o que julgar conveniente ao director, em relatório fundamentado, se ele o pedir.”

¹⁴¹ Third Schedule, Malawi Prisons Act of 1966.

¹⁴² Third Schedule, Malawi Prisons Act of 1966.

¹⁴³ Section 91 (b) (ii), Malawi Prisons Act of 1966.

¹⁴⁴ Section 76 (3), Kenya Prisons Rules of 1963.

¹⁴⁵ Prison Rations The Prison Rules First Schedule, Zambia Prisons Act 56 of 1965.

¹⁴⁶ Prison Rations The Prison Rules First Schedule, Zambia Prisons Act 56 of 1965.

¹⁴⁷ Section 171 (2), Zambia Prisons Act 56 of 1965.

¹⁴⁸ Section 106 (1), Zambia Prisons Act 56 of 1965.

¹⁴⁹ Article 359 (8), Law of Prison Organisation.

¹⁵⁰ Article 359 (9), Law of Prison Organisation.

prisoner’s diet, but there is non-compliance with these basic provisions (Malawi, Kenya, Zambia and Mozambique).¹⁵¹ A prisoner’s right to ‘open air’ or ‘outside’ or ‘outdoor’ exercise is also restricted (Mozambique, Malawi and Zambia) and in some cases the provision of physical exercise during confinement is not allowed (Kenya). Furthermore, it is unclear in some instances whether or not prisoners in solitary confinement can have a shower or bath during confinement (Kenya and Mozambique), and the provisions relating health care during such confinement seems to be restricted to some prisoners (Malawi), giving rise for concern.

4. Oversight and monitoring of solitary confinement

4.1. Introduction

The 2015 UNSMR requires countries to make provision for the independent review of solitary confinement decisions by competent authorities and for the extensive monitoring of persons placed in confined spaces by authorised and experienced health-care personnel. This section addresses the following key issues: monitoring of solitary confinement; legislative provisions available on the independent review of solitary confinement; and external complaints mechanisms available to prisoners in solitary confinement.

Table 6 below provides an overview of the rules pertaining to oversight and monitoring of prisoners placed in solitary confinement.

Table 6: UNMSR (2015) on oversight and monitoring required during periods of solitary confinement

| UN Standard Minimum Rules for the Treatment of Prisoners (2015) | |
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| Rule 45 | 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. |
| 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. |
| Rule 46 (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. |

¹⁵¹ Rule 43 (1), UNSMR (2015).

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| Rule 46 (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. |
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4.2. How is solitary confinement monitored and by whom?

The 2015 UNSMR provides for the extensive monitoring of persons placed in a confined space, by health-care personnel. Health care personnel are required to visit such prisoners at least daily and provide medical assistance and treatment;¹⁵² report on the adverse effect of confinement on the physical or mental health of such prisoner and review and recommend changes to the confinement of such prisoner, in order to ensure that his or her separation does not exacerbate the medical condition, mental or physical disability of the prisoner.¹⁵³

In South Africa, there is an obligation on the Head of Correctional Centre to report all cases of prisoner segregation immediately to the National Commissioner and to the Inspecting Judge for Correctional Services.¹⁵⁴ The law requires the Head of Correctional Centre to visit the segregated prisoner at least once a day and a prison official must visit at least once every four hours.¹⁵⁵ There is a statutory obligation to have the segregated prisoner's health assessed by a registered nurse, psychologist or a correctional medical practitioner at least once a day.¹⁵⁶ The law also prescribes that segregation must be discontinued if the registered nurse, psychologist or correctional medical practitioner determines that it poses a threat to the health of the inmate.¹⁵⁷

Kenya's legislation requires that confined prisoners are visited by the prison official on duty at intervals of not more than three hours during the day and night¹⁵⁸ and once a day by the prison official in charge and a medical officer.¹⁵⁹

In Zambia, provision is made for the prison head to visit prisoners in confinement not less than twice a day, and prison officers are required to visit prisoners in confinement at intervals of not less than thirty minutes.¹⁶⁰ Every medical officer or his or her subordinate must examine every prisoner ordered to undergo confinement

¹⁵² Rule 45, UNSMR (2015).

¹⁵³ Rule 46 (1) - (3), UNSMR (2015).

¹⁵⁴ Section 30 (6), Correctional Services Act 111 of 1998.

¹⁵⁵ Section 30 (2) (a) (i), Correctional Services Act 111 of 1998.

¹⁵⁶ Section 30 (2) (a) (ii), Correctional Services Act 111 of 1998.

¹⁵⁷ Section 30 (2) (b), Correctional Services Act 111 of 1998.

¹⁵⁸ Sections 20(1) (c) and 76 (4) Kenya Prisons Rules 1963.

¹⁵⁹ Sections 20(1) (c) and 76 (4) Kenya Prisons Rules 1963.

¹⁶⁰ Section 178 (a)-(b), Zambia Prisons Act 56 of 1965.

in a separate cell, and such practitioners must certify in writing whether in his or her opinion, such punishment may be inflicted without the probability of serious injury being caused.¹⁶¹

In Malawi, prisoners under solitary confinement must be visited not less than twice a day by a prison officer.¹⁶² Moreover, statutory provisions require a medical officer to ensure that prisoners under solitary confinement are medically examined. However, as noted earlier, this only happens when the medical officer visits the prison.¹⁶³

Mozambican legislation requires the doctor to visit a prisoner under Articles 352 and 361 of the Law of Prisons. In the first case, the doctor shall visit the pregnant women, children, people with mental disorder or ill people before the application of the sanction or as soon as possible. In the second case 'when there is a risk that the disciplinary sanctions will compromise the health of the inmate the doctor will propose to the director of the prison what is necessary.' For this case, no timeframe is specified.

It appears South Africa fully complies with the 2015 UNSMR insofar as it relates to the oversight and monitoring, reporting and reviewing of the health position of persons placed in segregation. At least Kenya's legislation makes provision for visits by a health care official at least once a day but Malawi and Zambia fall short of this requirement. Malawi's law only provides for the medical examination of prisoners in confinement every day subject to the medical official visiting the prison. Moreover, Zambia's legislation only addresses the certification of the medical officer in writing whether solitary confinement may be inflicted without the probability of serious injury being caused to the prisoner, but doesn't address whether the head of prison must accept the advice of such medical officer.

4.3. Can a prisoner appeal the decision of solitary confinement?

The 2015 UNSMR makes provision for the independent review of solitary confinement, pursuant to the authorization by a competent authority.¹⁶⁴ All countries fall short of compliance with this rule, with South Africa being the only country making provision for an independent review of solitary confinement.

In South Africa, a prisoner can appeal against the decision of segregation. The law states that 'a prisoner who is subjected to segregation may refer the matter to the Inspecting Judge for Correctional Services, who must

¹⁶¹ Section 40, Zambia Prisons Act 56 of 1965. (1) Every medical officer or his subordinate shall:(b) Examine every prisoner ordered to undergo punishment for a prison offence if such punishment involves confinement in a separate cell or a reduction of the prisoner's normal diet and shall certify in writing whether in his opinion such punishment may be inflicted without the probability of serious injury being caused thereby 72. The chief officer shall (b) deliver to the medical officer daily- (ii) a list of prisoners detained in separate confinement

¹⁶² Section 104, Malawi Prisons Act of 1966.

¹⁶³ Section 29, Malawi Prisons Act of 1966.

¹⁶⁴ Rule 45, UNSMR (2015).

decide thereon within 72 hours after receipt thereof.¹⁶⁵ However, it is unclear whether or not in all cases the segregation of the inmate is suspended pending the appeal to the Inspecting Judge. This independent review of segregation has been critiqued because it is not automatic, as it is dependent on the prisoner to refer the matter for review. Muntingh argues that ‘prior to the amendment of the laws on solitary confinement, the Inspecting Judge had either to confirm or set aside the penalty of solitary confinement before it could be implemented, but this mechanism has been weakened.’¹⁶⁶ Instead of the mandatory review of solitary confinement, there is now a voluntary review mechanism which relies on the prisoner having knowledge of this review mechanism, being able to lodge such an application (e.g. by having access to writing materials or telephone), and being permitted to do so (e.g. by having access to writing materials or telephone), and being permitted to do so.¹⁶⁷

In Malawi, Kenya, Zambia and Mozambique prison legislation does not provide for the right to appeal the decision of solitary confinement. However, there are legal provisions which allow for all prisoners to lodge complaints and requests through the various prison processes.¹⁶⁸

4.4. Can solitary confinement prisoners complain to external bodies?

Prisoners in South Africa may refer their complaints to the Judicial Inspectorate for Correctional Services’ Independent Correctional Centre Visitors.¹⁶⁹ Furthermore, prisoners may lodge complaints to all external bodies such as the South African Human Rights Commission and the Public Protector of South Africa.

Prisoners in Malawi may complain to the Inspectorate of Prisons (an internal body), and/or their appointed official visitors.¹⁷⁰ The Inspectorate of Prisons in Malawi has an oversight role over prisons and prison

¹⁶⁵ Section 30 (7), Correctional Services Act 111 of 1998.

¹⁶⁶ Civil Society Prison Reform Initiative (2015) ‘Solitary confinement and segregation’, Factsheet No. 1. Available at: <https://acjr.org.za/resource-centre/CSPRI%20factsheet%20-%20Solitary%20confinement%20and%20segregation%20-1.pdf>

¹⁶⁷ Civil Society Prison Reform Initiative (2015) ‘Solitary confinement and segregation’, Factsheet No. 1. Available at: <https://acjr.org.za/resource-centre/CSPRI%20factsheet%20-%20Solitary%20confinement%20and%20segregation%20-1.pdf>

¹⁶⁸ See sections 36 (1) (b) (e), 39 (b) (e), Malawi Prisons Act of 1966: For example, prisoners in Malawi undergoing confinement may make a request or submit a complaint to the visiting judge or official visitor, if they are visited by a visiting justice or official visitor. The visiting justice or official visitor will thus deal with the complaint or request in terms of their mandated processes. See section 72 (3)-(4), Kenya Prisons Act 49 of 1963: In Kenya, prisoners have a right to request the Commissioner or the officer in charge, or any visiting justice to deal with the prisoner’s complaint or request. Prisoners may complain to a visiting justice, who must ascertain whether the prison legislation and regulations are adhered to, and the visiting Justice must call the attention of the officer in charge to any irregularity that may be observed in the operations of the prison or the treatment of prisoners. See Section 141(1), Chapter 97 Zambia Prisons Act 56 of 1965: In Zambia, ‘a prisoner may make any complaint or application to a visiting justice, an official visitor, the Commissioner, the officer in charge or the chief officer, and, in the case of a female prisoner, to the senior woman prison officer.’

¹⁶⁹ Sections 21 (5), 90 (2) and 93, Correctional Services Act 111 of 1998.

¹⁷⁰ Section 39, Malawi Prisons Act of 1966.

authorities, monitor the conditions of detention, and investigate complaints against prison officials.¹⁷¹ The Inspectorate may inquire into any complaint or request made by a prisoner in confinement, and may forward the complaint to the Commissioner.¹⁷² Prisoners may also complain to the Human Rights Commission, but this may not be possible as communication is restricted when placed in solitary confinement in Malawi.¹⁷³

In Kenya, Mozambique and Zambia there are no statutory provisions allowing or preventing prisoners from complaining to external bodies. However, in Kenya all prisoners retain their constitutional right to lodge complaints to oversight bodies such as the Kenya National Human Rights Commission and the Independent Policing Oversight Authority and their rights to access courts to review administrative decisions of prison authorities.¹⁷⁴ Nothing prevents prisoners from lodging complaints to the Zambia Human Rights Commission, who is mandated to investigate any human rights abuses, visit prisons and receive complaints from aggrieved persons, as well as persons acting on behalf of aggrieved persons or in the interest of a group or class of persons.¹⁷⁵ In Mozambique, prisoners can lodge complaints to the newly established National Human Rights Commission,¹⁷⁶ but also to the Attorney General's Office and Members of Parliament. The fundamental problem with these provisions is that prisoners might not be able to lodge a complaint whilst they are in isolation and communication is restricted.

4.5. Conclusion

The 2015 UNSMR attempts to safeguard the physical and mental well-being of prisoners placed in solitary confinement by ensuring that they have access to full medical assistance and treatment and that their physical and mental health is assessed and monitored on a regular basis. It is clear that in many cases, most countries

¹⁷¹ Section 169 (1), Constitution of the Republic of Malawi of 1994.

¹⁷² Section 106, Malawi Prisons Act of 1966.

¹⁷³ Sections (36) (1) (b) and (e), (39) (b) and (e), Malawi Prisons Act of 1966; Human Rights Commission Act, CAP 3:08 of the Laws of Malawi.

¹⁷⁴ Wahiu writes 'the 2010 Constitution mandates the courts (High Court to Supreme Court) to protect constitutional rights by providing effective remedies in cases of unjustifiable infringements. It also creates a human rights commission to independently oversee rights and investigate individual complaints. The Constitution requires parliament to create a legislative framework to give effect to certain rights (for example, rights of children or humane treatment of prisoners) or to operationalise human rights oversight mechanisms (such as courts, the human rights commission, and civilian oversight over police). Arrested and accused persons can animate courts to vindicate their rights. They may also file complaints before the human rights commission. Sentenced prisoners may move to court for judicial review of administrative decisions of prison authorities.' Wahiu, W. (2016) Constitutionality of Criminal Procedure and Prison Laws in Africa Kenya. <https://acjr.org.za/resource-centre/Constitutionality%20project%20-%20Kenya%20template%20FINAL.pdf>

¹⁷⁵ Sections 9, 10 (1), Human Rights Commission Act of 1996. The functions of the Zambian Human Rights Commission are to: investigate human rights violations and maladministration of justice, as well as propose effective measures to prevent human rights abuses and visit prisons and places of detention with a view of assessing and inspecting conditions of the persons held in such places and make recommendations to redress existing problems; establish a continuing programme of research, education, information and rehabilitation of victims of human rights abuse to enhance the respect for and protection of human rights.

¹⁷⁶ The Mozambique National Human Rights Commission was created by Law 33/2009 and became operational in 2014. The Commission has already conducted inspections and monitoring of prisons.

do not comply with the Rules and thus substantial efforts must be made to address areas of non-compliance in order to ensure that prisoners' well-being is protected. Whilst attempts are made to ensure that the laws enable consistent monitoring by prison officials, this is insufficient, as prison officials are not health professionals. Moreover, countries need to make substantial efforts to address the lack of independent review mechanisms of solitary confinement in their legislation. All, except South Africa, fall short of having an independent review mechanism. This is particularly important as the 2015 UNSMR were adopted to protect prisoners, amongst others, against the arbitrary imposition of solitary confinement and judicial or similar review would be an important safeguard. On the positive side, Mozambique has ratified OPCAT and South Africa has signed it.

5. Conclusion

It is clear, after reviewing the legislation on solitary confinement in the five countries, that there are several inconsistencies in the respective legal frameworks requiring harmonisation with the 2015 UNSMR. One of the major reasons for the lack of compliance with the 2015 UNSMR is that the prison legislation dealing with solitary confinement is outdated in four of the five countries, with Mozambique's legislation dating back to 1936. A proposal for revising the outdated law has been under review with the Mozambican Parliament and is awaiting approval. The rest date back to mid-1960 and in these countries the legislation had not been amended to address changing circumstances and requirements in prison reform and human rights over the years.

It is of concern that in all countries, the legislation makes it permissible to exceed the solitary confinement restriction period as prescribed in the 2015 UNSMR. The discretion afforded to officials to extend periods of confinement beyond the restriction period may result in prolonged solitary confinement. Also, evident from the review is that legislation is crafted in a manner that may allow the imposition of indefinite solitary confinement. Furthermore, the discretion to impose solitary confinement in Malawi, Kenya and Zambia for minor offences indicate that such cases are not exceptional.

The 2015 UNSMR requires that the general safeguards applicable to the living conditions of prisoners shall apply to all prisoners without exception. Thus, prisoners' rights in terms of living conditions, as set out in the 2015 UNSMR, apply to prisoners in solitary confinement. Despite this, the legislation of the countries under review fail to address access of such prisoners to adequate bathing or shower facilities, health care and access to open air and physical exercise. The restriction of prisoner's diet in Kenya, Malawi, Mozambique and Zambia is also not in line with Rule 43 (1) (d) prohibiting the restriction of prisoners' diet. Moreover, in Mozambique, such prisoners' contact with their families is forbidden for the duration of solitary confinement.

The above areas of non-compliance are particularly dangerous to people placed under solitary confinement, as the restriction in meaningful social interaction and environmental stimulation could adversely impact their health and welfare, and persons with mental illness are particularly more vulnerable to the harms of such confinement.¹⁷⁷

Urgent reform is needed with regard to access to healthcare whilst in solitary confinement in Malawi, Kenya, Mozambique and Zambia. The provision of, and access to medical treatment and services, and regular assessment of prisoners in solitary confinement is fundamental to their well-being. The 2015 UNSMR make it clear that health-care officials must visit a prisoner every day and not only on the day a medical officer visits the prison. It is important to protect prisoners from the arbitrary enforcement of solitary confinement, and therefore an independent appeal process prior to the imposition is fundamental to their protection. Such a mechanism could also ensure that solitary confinement is only imposed in exceptional cases. Unfortunately, the lack of such an independent review process in Malawi, Kenya, Mozambique and Zambia (and partly South Africa) may result in the arbitrary enforcement of solitary confinement.

There are two further problems. Firstly, Zambia has a separate law on the segregation of prisoners, distinct from the normal provisions on separation of prisoners, which allows prison officials the discretion to segregate a prisoner for such period as may be considered necessary, for the good order and discipline of the prison.¹⁷⁸ This provision provides prison officials the unfettered discretion to place prisoners in solitary confinement, with no further fundamental guarantees to the rights of such prisoners. This provision can easily be abused and arbitrarily enforced.

Secondly, the two South African super maximum-security prisons and the reported long-term solitary confinement is in direct contravention of the 2015 UNSMR. The UNHRC in its concluding observations to South Africa's Initial State Party Report on the ICCPR noted with concern 'the conditions of detention in two super-maximum security prisons and the segregation measures imposed, for instance in Ebongweni super-maximum prison, where prisoners are locked up 23 hours a day for a minimum period of six months.'¹⁷⁹ The UNHRC recommended that the South African government strengthen its efforts to improve conditions of detention by taking practical measures to ensure that solitary confinement measures, including segregation, are used only in the most exceptional circumstances and for strictly limited short periods of time.¹⁸⁰ South Africa

¹⁷⁷ Scharff Smith, P. (2006). The effects of solitary confinement on prison inmates: A brief history and review of the literature. *Crime and Justice*, 34(1), pp. 441-528; Haney, C. (2003) Mental health issues in long-term solitary and "supermax" confinement, *Crime & Delinquency*, (49)1, pp. 124-156; Grassian, S. (1983) Psychopathological effects of solitary confinement. *American Journal of Psychiatry*, 140, pp. 1450-1454; Grassian, S. (2006). Psychiatric effects of solitary confinement. *Washington University Journal of Law & Policy*, 22, pp. 325-383; Kaba, F., et al. (2014). Solitary confinement and risk of self-harm among jail inmates. *American Journal of Public Health*, 104(3), pp. 442-447; 1.

¹⁷⁸ Section 56, Zambia Prisons Act 56 of 1965.

¹⁷⁹ Paragraph 30, CCPR/C/ZAF/CO/1.

¹⁸⁰ Paragraph 31, CCPR/C/ZAF/CO/1.

abolished provisions on solitary confinement in 2008 and provided for laws on segregation in accordance with strict conditions. It unfortunately remains the case that despite this, super-maximum-security facilities are being used to keep inmates in conditions of effective prolonged solitary confinement.

In a report to the United Nations Human Rights Committee, the U.N. Special Rapporteur asserted that solitary confinement is a harsh measure which is contrary to the essential aims of rehabilitating offenders and facilitating their reintegration into society.¹⁸¹ Detaining people in solitary confinement or under the guise of any other form of involuntary separation that do not meet the minimum standards set out in the Rules, is in contradiction of the goals of rehabilitation and social integration and have serious, immediate and long-term implications for such prisoners.

* * *

¹⁸¹ Paragraph 76, A/66/268.

Annexure 1 - Zambia prison offences

Section 90: The following acts and omissions shall be minor prison offences when committed by a prisoner:

- (i) disobeying any order of the officer in charge or of any other prison officer or any rule or order made under this Act;
- (ii) treating with disrespect any prison officer or person authorised to visit the prison;
- (iii) being idle, careless or negligent at work or refusing to work;
- (iv) using any abusive, threatening, insolent or other improper language;
- (v) being indecent in language, act or gesture;
- (vi) committing any assault or act of violence;
- (vii) communicating with another prisoner, or any other person without authority;
- (viii) leaving his cell or ward or place of work or other appointed place, without permission;
- (ix) disfiguring, damaging or interfering with any part or fitting of the prison or any property which is not his own;
- (x) committing any nuisance in any part of the prison;
- (xi) receiving or having in his possession any prohibited article or attempting to obtain such article;
- (xii) making repeated and groundless complaints or malingering;
- (xiii) quarrelling with other prisoners;
- (xiv) wilfully bringing a false accusation against any prison officer or other Prisoner;
- (xv) doing any act calculated to create unnecessary alarm among prison officers or prisoners;
- (xvi) committing any act of insubordination;
- (xvii) refusing to wear the clothing issued to him or exchanging, losing, discarding, damaging, altering or defacing any part of it;
- (xviii) offending in any way against good order and discipline;
- (xix) attempting to commit any of the foregoing minor prison offences;
- (xx) aiding or abetting the commission of any of the foregoing minor prison offences.

Section 91: The following acts and omissions shall be major prison offences when committed by a prisoner:

- (i) mutiny or incitement to mutiny;
- (ii) committing or taking part in an aggravated or repeated assault on another prisoner;
- (iii) committing or taking part in an assault or attack on a prison officer;
- (iv) committing a minor prison offence after having twice previously been found guilty of the same minor prison offence;
- (v) escaping, conspiring with a person to procure the escape of a prisoner or assisting another prisoner to escape from the prison in which he is detained or from a conveyance, hospital or other place whatsoever where or in which he may be or whilst in course of removal in custody from one place to another or from any other lawful custody;
- (vi) possessing any instrument or other thing with intent to procure his own escape or that of another prisoner;
- (vii) omitting or refusing to help any prison officer to prevent an escape, an attempted escape or an attack upon that officer or upon another prisoner;
- (viii) committing any act of gross misconduct or insubordination;
- (ix) attempting to commit any of the foregoing major prison offences;
- (x) aiding or abetting the commission of any of the foregoing major prison offences.

Annexure 2 - Malawi prison offences

Section 89: The following acts and omissions shall be prison offences when committed by a prisoner—

- (1) mutiny;
- (2) incitement to mutiny;
- (3) quarrelling with any other prisoner;
- (4) making groundless complaints;
- (5) making false charges against prison officers in reply to any questions as to matters concerning the prison or prison discipline, or answering untruthfully any questions put by a prison officer while carrying out this Act;
- (6) holding any communication, in writing, by word of mouth or otherwise, with a prisoner or any other person in disobedience of the regulations of the prison;
- (7) doing any act calculated to create any unnecessary alarm among prisoners or prison officers;
- (8) omitting or refusing to march as ordered, when moving about the prison, or when proceeding to or returning from work;
- (9) refusing, without satisfactory reason, to eat the food prescribed;
- (10) eating or appropriating any food not assigned to him or taking from or adding to the portions of food assigned" to other prisoners;
- (11) without permission of a prison officer, removing food from a cookhouse or from a place where meals are served, or disobeying any order as to the issue and distribution of food and drink;
- (12) wilfully destroying food, or throwing it away without orders;
- (13) introducing into food or drink anything likely to render it unpalatable or unwholesome;
- (14) omitting or refusing to wear the clothing issued to him, or exchanging any portion of it for the clothing of other prisoners, or losing, discarding, damaging, or altering any part of it;
- (15) removing, defacing, or altering any distinctive number, mark, or badge attached on or worn on such clothing;
- (16) omitting or refusing to keep his person clean, or disobeying any order as to the cutting or shaving of hair;
- (17) omitting or refusing to keep clothing, blankets, bedding, or equipment clean, or disobeying any order as to the arrangement or disposition of any such articles;
- (18) interfering in any way with prison locks, lamps, or lights, or other public property without authority;
- (19) stealing the prison clothing or any part of the prison equipment of any other prisoner;
- (20) committing a nuisance in any part of the prison;
- (21) defacing or injuring the walls, furniture, or other property of the prison;
- (22) spitting on or otherwise soiling any floor, door, wall, or other part of the prison building, or any article in the prison;
- (23) wilfully fouling latrines, washing or bathing places;
- (24) failing or refusing to take due care of, or injuring, destroying, or misappropriating any tools or any clothing or other articles, being public property;
- (25) wilfully causing to himself, or failing to report, any illness, injury, or disability;
- (26) any act of insubordination;
- (27) failing to assist in the suppression of violence;
- (28) taking part in any attack upon any prison officer or upon another prisoner;

- (29) escaping, conspiring with a person to procure the escape of a prisoner or assisting or inciting another prisoner to escape from the prison in which he is detained or from a conveyance, hospital or other place whatsoever where or in which he may be or whilst in course of removal in custody from one place to another or from any other lawful custody;
- (30) possessing any instrument or other thing with intent to procure his own escape or that of another prisoner;
- (31) omitting or refusing to help any prison officer to prevent an escape, an attempted escape, or an attack upon such officer or upon another prisoner;
- (32) contravening or failing or neglecting to comply with any regulation or lawful order, including a standing order, made under this Act or under any regulation with which it is his duty to comply; (33) treating with disrespect any prison officer, or any visitor or any person employed in connexion with the prison;
- (34) being idle, careless, or negligent at work, or refusing to work;
- (35) leaving his cell or other appointed location, or his place of work, without permission;
- (36) receiving or having in his possession any prohibited article which he is not entitled to have;
- (37) any assault or act of violence;
- (38) making unnecessary noise;
- (39) disorderly or indecent behaviour;
- (40) insulting, threatening, or indecent language;
- (41) malingering, or refusing to undergo medical treatment;
- (42) wilfully bringing a false accusation against any prison officer or prisoner;
- (43) abetting the commission of any prison offence; or
- (44) any other act, conduct, disorder, or neglect to the prejudice of good order or discipline.

Annexure 3 - Kenya prison offences

PART VI – DISCIPLINE OF PRISONERS (PRISONS COUNCIL RULES, 1963)

66. Minor prison offences. Any prisoner who—
- (a) disobeys any order of the officer in charge or of any other prison officer or any prison rule; or
 - (b) treats with disrespect any officer or any person authorized to visit the prison; or
 - (c) is idle, careless, or negligent at work, or refuses to work; or
 - (d) uses any abusive, insolent, threatening or other improper language; or
 - (e) is indecent in language, act or gesture; or
 - (f) commits any assault; or
 - (g) communicates with another prisoner, or any other person, without authority; or
 - (h) leaves his cell or ward or place of work or other appointed place without permission; or
 - (i) wilfully disfigures or damages any part of the prison or any property which is not his own; or
 - (j) commits any nuisance; or
 - (k) has in his cell, ward, or in his possession, any unauthorized article, or attempts to obtain such an article; or
 - (l) gives to or receives from any person any unauthorized article; or
 - (m) makes repeated and groundless complaints; or
 - (n) in any way offends against good order and discipline; or
 - (o) attempts to do any of the foregoing things; or
 - (p) aids or abets the doing of any of the foregoing things, shall be guilty of a minor prison offence.
67. Aggravated prison offences. Any prisoner who—
- (a) mutinies or incites to mutiny; or
 - (b) commits or takes part in an aggravated or repeated assault on another prisoner; or
 - (c) takes part in an assault or attack on a prison officer; or
 - (d) commits any act of gross misconduct or insubordination, shall be guilty of an aggravated prison offence.

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