

THE NELSON MANDELA RULES: YARDSTICK FOR CONTEMPORARY CORRECTIONS?

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Note: The following text presents content, taken from a more extensive piece of work on the issue; the text hereafter has been prepared for the UNISA Webinar “Modern Trends in Corrections”, held at MS Teams on 19 November 2020. It must be understood as what it is, a sketch for a specific purpose. Reference made to “Slides” in the footnotes, refer to the accompanying Ppt.-slides prepared for the online presentation of the text. A more comprehensive paper is envisaged to be available by end of January 2021 only, where the slides will appear as figures, tables and so forth .

The Nelson Mandela Rules – yardstick for contemporary corrections?

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The objective of my talk today is to shed light on the relevance of the **Nelson Mandela Rules** (Mandela Rules) for contemporary corrections, globally.

The Mandela Rules are the revised version of the UN Standard Minimum Rules for the Treatment of Prisoners, which were approved at the First United Nations Crime Congress in 1955, and adopted by the UNGA in 1957.

My talk this morning is divided into 4 sections. **First**, I will look at the waypoints crossed on the way to the Mandela Rules. **Second**, I put forth the role of the MR as a normative model, different

aspects of which will be laid out in the **third** section. In the **fourth** section I want to highlight the congruence of the Mandela Rules with human rights instruments and social science evidence, congruence which delineates also their success.

Before I start, I would like to share a story which also demonstrates how multifaceted the question of relevance can be:

In 2018 a group of 3rd year students (Correctional Mgt.) decided to carry their student project to a correctional facility. They wanted to check the level of compliance with the Mandela Rules.

When they eventually left Windhoek for Omaruru CF, I thought something like: “The Mandela Rules are international soft law, not enforceable, not binding on anybody. We (Namibian) are already lacking behind schedule on the implementation of international covenants like the UNCRC – and if so, how far will the reality on correctional grounds differ from the Mandela Rules?” Well, I was surprised to learn later that a) what was to be expected, there were discrepancies between rule expectations and facts, e.g. provision of clothing and bedding, b) that most of the **Correctional Officers** were aware of the existence of the Mandela Rules, and c) and this impressed me, that the **Correctional Officers** showed discomfort in face of these discrepancies.

The latter point - in the context of this talk - seems important, because it was an anticipated corroboration of a statement, the Commissioner General of the Namibian Correctional Service (NCS), Mr RT Hamunyela, made a year later in an interview with a local media outlet, namely that, **and I quote:**

“many of the Nelson Mandela Rules have been incorporated into our laws, regulations, policies and CG's Directives. We worked in collaboration with the UNODC last year to determine the compliance rate, identify the gaps and train trainers of trainees to ensure that knowledge and implementation of the Nelson Mandela Rules goes wide and across the Department. We also utilize the commemoration of the Nelson Mandela Day, 18th July to educate officers on the Nelson Mandela Rules.” (New Era, 2019, 27 May) **unquote.**

The above tells us that there is no single measure of success of the SMR/Mandela Rules. Especially success cannot be measured empirically and against the reality of corrections from the perspective of the prisoner.¹ The MR are an orientation, and can be programmatic, and there are plenty of reasons why a country which has in principle subscribed to the Mandela Rules, is not even close to full compliance.² I will eclipse these considerations for now, as there are other

¹ The countries with the largest prison populations, USA, China, Russia, and Brazil, are known for countless, repeated and systematic violations of standards, old or new, and / or the commensurate international human rights treaties: the *International Covenant on Civil and Political Rights* (ICCPR) and the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT). These four countries hold a combined prison population of 5m inmates, which amount to close to forty percent of the world prison population of beyond 11m inmates.

² When measuring SMR compliance we should not expect the realities of inmates to uniformly point to a high degree of compliance. But I think that this is not required for a model to be valid. To understand the difference between commitment in principle (I will come back to this aspect below) and compliance in practice, it is helpful to analyse how the implementation of standards at operational level hinges on decisions taken elsewhere. Compliance with the SMR depends also on decisions taken at operational level. Local management and leadership are important. But as we know, before a change at operational level can be observed, a lot has to be considered at the level of planning, and strategic decision making. For instance, a change in the use of short term imprisonment frees resources which

normative criteria of interest, which indicate that the Mandela Rules indeed exert an enormous normative power. Before I address these criteria in **section three**, it is helpful to follow the waypoints crossed on the way to the adoption of the **Mandela Rules**.

Framing the process of the development are two *General Assembly resolutions from 2010 and 2015*:

The 2010 resolution, *General Assembly resolution 65/230 (para. 10, p. 3) of 21 December 2010* requested - with regard to the revision of the existing Standard Minimum Rules - the **Commission on Crime Prevention and Criminal Justice**³ (the CCPCJ is a functional commission of the Economic and Social Council (ECOSOC)), and here I quote:

- to establish, "... an open-ended **intergovernmental expert group** (...) to exchange information on best practices, as well as national legislation and **existing international law**, ...so that they reflect **recent advances in correctional science** and best practices, with a view to making recommendations to the Commission on possible next steps."

At the end of the process stands the 2010 resolution (GA Res 70/175, UNGAOR, 70th Sess, UN Doc A/RES/70/175 (2015) [*Mandela Rules*] of 17 December 2015), which adopts the *United Nations Standard Minimum Rules for the Treatment of Prisoners (the new Nelson Mandela Rules)*.

In between, there are the many resolutions of the **Crime Commission (CCPCJ)**, which recommended to the General Assembly from year to year the continuation of the development process.

Throughout the preparatory and negotiation processes, subject matter experts and correctional administrators provided evidence-based and pragmatic positions, which were fed into the revision of the SMR, and eventually became the basis for the accepted text of the Mandela Rules.

can be redirected again at operational level. Although not with immediate effect, means can be redeployed and this gradually changes the experience of those who are **a)** not shipping in anymore, and **b)** those who remain in the facilities. Similarly, a substantial reduction of the use of detention before, during and after the trial, makes a huge difference in the experience of those who are held to appear in court by other means than detention, and of course those who are still detained for that purpose. But there are external factors which place limits on what can be achieved at operational level, that is, policy decisions at higher than facility level, e.g. the overall budget, physical infrastructure, human resources, parole decisions, etc. Thus, beyond the optimisation of SMR-compliance, which lies within the prerogative of the facility management, lee-way for change depends on strategic decision making and planning elsewhere. If unit management, what I believe, coupled with case management, is the most Mandela Rules-commensurate approach to inmate management, the ability to implement it, depends in the final analysis on comprehension and acceptance of the principles, and values, underlying the Mandela Rules far-distanced from correctional facilities, that is society itself. Somewhere between society at large and the government portfolio/s responsible for corrections and the police, we observe the battles for budget appropriations from year to year, or within a five year rolling budget, which epitomise the degree of success in winning others over, first regarding the before mentioned principles and values, and second regarding the merits of the consequences flowing from there.

³ Here onwards referred to as 'Crime Commission'.

But, it is important to keep in mind that the work in substance took place outside the formal meetings of the **General Assembly**, the **Economic and Social Council**, and the **Crime Commission**.

Key to the revision of the SMR in substance were the altogether **four International Expert Group Meetings (IEGM)** from 2012 to 2015, and other **preparatory meetings** organized by NGOs and universities.

The IEGM produced extensive reports for the next ensuing annual meeting of the Crime Commission (CCPCJ).

Prison Reform International (PRI) and the **University of Essex** organized two preparatory meetings in 2012 and 2013, meetings which saw the production of the so-called Essex Papers 1 and 2, which synthesized relevant research, treaties, norms and practices.

Essex Meeting 1 preceded IEGM 2, and Essex Meeting 2 preceded the IEGM 3. Important also the sequence of documents: The IEGM reports served on the CCPCJ meetings, whereas the Essex Papers served on the IEGM.

This staged process saw to high quality outcomes, and ensured optimised efficiency in respect of time and other resources.

Essex Paper 1 for example was drafted based on the deliberations of experts at the meeting (Essex Meeting 1) and following a screening of existing regional and international standards on the relevant topics in order to use, as far as possible, existing standards. The paper provided proposals for revised text in the areas identified by the IEGM as well as a rationale for the respective revisions (Peirce, 2018, 276).

What **does not appear** immediately from the schedules of meetings and resolutions, is the breadth and depth of actor participation.⁴

The (positive) legitimacy of the Mandela Rules, which may be seen as underlying the normative regulatory effect of the rules, and which I will deal with in the **third** section below, surely stems partially from their emphatic participation.

Besides the involvement of so many Members States (n = 95), the participation and co-production of sharable knowledge by entities with observer status and so forth is overwhelming:

- UN-entities and specialised agencies
- Intergovernmental organisations
- NGOs
- Individual experts.

Among the NGOs, and throughout the process, Penal Reform International (PRI) played a special role, not only through continuously fostering support for the process on all sides, but also owing

⁴ See Slide 5.

to its collaboration with the **Human Rights Centre of Essex University** and the hosting of the so-called Essex Meetings.⁵

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The Mandela Rules have been adopted by acclamation in the Crime Commission (CCPCJ) in 2015, and by consensus, that is without voting, by the UNGA (75/75). But what counts as much in my view is the number of member States participating in the IEGMs, and the fact that the number of sponsors and co-sponsors at the Crime Commission increased over the years from a mere 16 to a stunning 55. By the end of the development process, altogether 95 Member States became involved the one way or other; 54 Member States had made a submission, and 83 had participated in IEGM, in different compositions.

In the following I want to report on how the Mandela Rules **behave** as a normative model. Initially I have used the term yardstick, and, synonymously benchmark, and point of reference. At closer inspection, though, it appears that the term **normative model** is most adequate.

A normative model prescribes standards and values (normative reasoning), which can be translated into practical measures. This is exactly what the Mandela Rules offer:

- state standards that involve criticism of present arrangements, and thus
- call for change in order to create a better future.

The enormous normative power of the Mandela Rules is effected through three different normative reference criteria, namely:

- legal
- regulatory, and
- thematic.

⁵ The fact that the then UK **Department for International Development** (DFID) provided core funding for PRI's work on the project may be extremely insightful regarding the contention, discussed very briefly toward the end of this text, namely that values are fact laden, they have an experiential basis, and hence, in principle and by extension, they are open to empirical investigation into discoverable truths about the good life and the good society. This may appear not too important to mention, but I draw a clear line between this funding and the scientific investigation by Alison Liebling, a mixed method study, "Prisons and their Moral Performance" (2004), which is deep-digging, but also deep cutting. It showcases for a selection of UK prisons, how specific installations / configurations of prison conditions, programmes, family ties, interaction with staff and outside groups, executed toward the realization of prison functions, among those prison safety, de facto lead to an incredible dehumanizing of the inmate. For me the funding appeared as if in response to this investigation, and as an attempt of the then UK government, to balance out the tort which was done to the inmates in UK prisons earlier.

⁶ In fact there was a third meeting organised by PRI and the University of Essex, which also produced another important document, Essex Paper 3, an extensive guideline through the Mandela Rules. This third Essex Meeting falls naturally outside the development process.

Normative generally means relating to an evaluative standard. A norm in this sense means a standard for evaluating or making judgments about behaviour or outcomes.

A legal norm, then, means a standard which (*inter alia*) produces obligations, which through a formal mechanism can be enforced against legal subjects. If this is a rough and incomplete approximation of what a legal norm is, it is also obvious that the **Mandela Rules** are no legal rules, they are a set of norms of **international soft law**, which is precisely characterised by the fact that it is not legally binding, and not enforceable. As such it will only be considered in law if the norm it hosts has been

- incorporated through (a) domestic legislative act
- used as an interpretative aid to clarify domestic law, or
- evolved to constitute customary international law.

In respect of the SMR, there are examples of each category from different jurisdictions. Since this is not a base line study, the following are only selected examples.

- Following the adoption of the Mandela Rules, Ireland and Canada have addressed prevailing legislative non-compliance regarding solitary confinement.
- In the case of Canada this followed two lawsuits. Both rulings affirmed the relevance of the *Mandela Rules* to Canada's administrative segregation laws and practices. In the one ruling the Court held that the Mandela Rules "**represent an international consensus of proper principles and practices in the management of prisons and the treatment of those confined.**" In the other ruling the court found that Canada's laws on administrative segregation violate section 7 and section 15 of the Canadian Charter of Rights and Freedoms, and, importantly so, that any analysis of *Charter* section 7 principles must consider international norms, especially the Mandela Rules.
- Also United States courts have pointed to the importance of the Standard Minimum Rules in the understanding of relevant domestic law, using descriptions like "**significant as expressions of the obligations to the international community of the member states of the United Nations,**" or citing the Standard Minimum Rules as among those "**contemporary expressions**" of the concern with minimizing "**dehumanizing treatment of prisoners.**"
- In the case of Argentina, the Supreme Court ruled that by virtue of Article 18 of the Constitution the UN Standard Minimum Rules constitute the "**standard of dignified treatment**" for incarcerated persons.

Although different courts handle the questions differently, the normative pressure emanating from the Mandela Rules has taken effect in many domestic decisions – globally; two further examples here are the court cases from Zimbabwe and Namibia.

- When the Constitutional Court of Zimbabwe in *Makoni v Commissioner of Prisons and another* recently struck down a system of life imprisonment without parole as violating the right to dignity and amounting to inhuman and degrading treatment in breach of that country's constitution that court drew upon international standards, including the UN Standard Minimum Rules of 1957 and 2015. The court emphasised "**the rehabilitative reorientation of the offender to render him fit and suitable for societal reintegration as a law-abiding and self-supporting citizen**", which is

emanated clearly from the Mandela Rules. The Namibian Supreme Court in *Gaingob v S* made reference to this decision when it held that ‘informal life sentences’ where the imposition of inordinately long terms of imprisonment of offenders until they die in prison, amount to cruel, degrading and inhuman or degrading treatment or punishment and infringe their right to human dignity enshrined in Art 8, because “these sentences, by effectively removing from all of the appellants the realistic hope of release in the sense referred to during their lifetimes.”

Interesting, but not surprising, there are no such court rulings reported from countries who have either not signed the **International Covenant of Civil and political Rights (ICCPR)**, like **North Korea**, or signed but not ratified, like **China**, or trying to distance themselves from such earlier undertaking like the **Russian Federation**.⁷

Outside the application of the law, prison standards play a huge role in corrections. In the absence of specific legislation, or if legislation is too general to provide operational guidance, prison rules provide order as they guide and direct behaviour, and the predictability in staff-inmate relationships reduces stress as much as decision making pressure on all sides, because now each other's actions make sense, and generalised behavioural expectations are being rewarded.

This has been the merit of prison rules certainly since the 1870 Declaration of Principles (of Prison Discipline), which was an outcome of the (first) National Congress on Penitentiary and Reformatory Discipline in Cincinnati (Ohio, USA). These principles are credited as “the basis for the development of standards in corrections” (Rodriguez, 2006).

But the Mandela Rules go far beyond this – as they have been, and re being – accepted as an authoritative normative model by so many. As such, they definitively exert a kind of ‘soft control’. The terms ‘soft control’ and ‘soft regulation’ have been suggested by Mörth (2005) for the discussion, which attaches to the term “international soft law”, namely whether political, moral or other requirements would be more (or less) compelling than a legal rule.

And indeed, the domino effect on the many societies who **subscribe to the ethical core underlying the Mandela Rules**, supports the claim that the Mandela Rules carry also a strong (positive) legitimacy, which looks at the empirical side of (popular) acceptance.

Before I highlight the dialogic relationship between the SMR and the European Prison Rules, which demonstrates the empirical side of the acceptance of the Mandela Rules, a short look at the standing of the SMR before the 2010 revision is in order. Even before their revision the rules had their sizable influence.

1. In the last revised version of its Manual (1966), the ACA, the American Correctional Association, previously the National Prison Association expressly adopted ‘minimum standards to govern

⁷ The deterioration of the human rights situation in Russia is object of regular reporting since the beginning of the third millennium; and in December 2015 a law was passed that gives the Constitutional Court of Russia the right to decide whether Russia can enforce, or ignore, resolutions from intergovernmental bodies such as the European Court of Human Rights.

correctional officials in dealing with the rights of prisoners' containing guidelines that are "identical or parallel" to the Standard Minimum Rules.

2. Likewise, the Kampala Declaration (1996), and the Arusha Declaration on Good Prison Practice (1999), although the substance of these resolutions went clearly beyond the then SMR, can be taken as motivated by the overall purpose of the Standard Minimum Rules, that was to promote the humanitarian spirit of the Universal Declaration of Human Rights into the correctional system.
3. The Standard Minimum Rules engaged also the European countries organised in the Council of Europe, which adopted the rules outright (and close to verbatim) in 1973. These (European) Standard Minimum Rules for the Treatment of Prisoners were eventually revised in 1987 and renamed the European Prison Rules (EPR); another revision followed in 2006.
4. It is also interesting to note that about the time when the Council of Europe revised the European SMR for the first time, in 1987, states participating in the Organization for Security and Co-operation in Europe (OSCE) committed to observing the internationally recognized standards relating to the administration of justice and the human rights of detainees, including the SMR.⁸

Again, much as referred to in respect of the court rulings making reference to the SMR in respect of legal interpretation of domestic law, the history books do not show records of positive, emphatic reception of the minimum standards in the set of countries mentioned above, i.e. North Korea, China, and the Russian Federation.⁹

With the adoption of the Mandela Rules, the UN rules became once more interesting for European prison administrations, academics and legal professions. After the previous revision of the EPR in 2006 the SMR were of little interest anymore since from then onward the EPR provided the more sophisticated regional document. The adoption of the Mandela Rules turned the tables again, as the Mandela Rules outperformed the EPR (2006) in various areas, and increased their persuasiveness and influence once more:

The 2020 amendments to the EPR then built, inter alia (besides for instance the deliberations of the CPT), on the new Mandela Rules. Shortly after the adoption of the Mandela Rules, calls for an update of the 2006 EPR were made. In June 2018 (Session CDPC (2018-11) the European Committee on Crime Problems mandated the Council for Penological Co-operation (PC-CP) to prepare preliminary draft texts amending the several rules of the European Prison Rules. On 1st July 2020, Committee of Ministers of the Council of Europe adopted several amendments to the European Prison Rules (EPR).

Here again the role of the SMR, now the Mandela Rules as pace maker can be observed. With the revision 2020, the EPR introduced a new rule 53A, which regulates separation, other than

⁸ Vienna 1989 Questions Relating to Security in Europe: Principles (23.2) in (OSCE HUMAN DIMENSION COMMITMENTS Volume 1 2nd Edition, xx).

⁹ The case of Russia calls for a separate discussion, because since 1975 the Russian Federation is participating member of the OSCE. The Russian Federation is also, since 1996, member of the Council of Europe. Since the beginning of the 3rd millennium are however attached growing doubts as to the human rights records of Russia, which as Soviet Union was admitted in 1973, and signed the Helsinki Final Act on 1 August 1975, and the Charter of Paris on 21 November 1990.

solitary confinement, which go along with amendments to rules 53 (Procedures) and 60 (Solitary confinement).

If the adjective 'thematic' relates to a unifying idea or motif, repeated or developed throughout a work, then the Mandela Rules are normative thematic in a double sense.

First, the Mandela Rules make a steep change to the SMR by highlighting a human rights focus, and placing the inmate's inherent dignity at the outset of the Mandela Rules

[Rule 1: "All prisoners shall be treated with the respect due to their inherent dignity and value as human beings."]

This shall not detract from the fact that the SMR were adopted on the back of UN Charter and UDHR. However, notwithstanding the emphasis on humane treatment and rehabilitation, the initial set of SMR emphasizes the prisoners' "dignity as human beings" only once, namely in SMR 60 (1).

The "human being" - and her "inherent dignity" - has been placed centre-stage only with the Mandela Rules (the Mandela Rules mention the term human dignity specifically in rr 5, 50, 58, 72 and 76), and this motif connects with each subsequent specification, each subsequent rule.

In a **second sense**, the Mandela Rules are normative thematic as they demonstrate what is **required from A to Z** in corrections, if prison administrations wanted to ensure respect for prisoners' inherent dignity throughout. For societies who endorse a commensurate picture of the human being, it is only if – at a minimum – these rules (R1 – R122) are observed, that the prevailing power imbalance between the prison administration and prisoners, which continuously places their human dignity at risk, can be neutralised.

The thematic areas, which are developed and specified in the Mandela Rules, from rule to rule, and which mirror in a way international and regional human rights instruments, rulings and norms, **indicate, present and document**, and this what I call 'normative thematic', **where the music plays**.

The Mandela Rules reflect very well their mandate from the initial General Assembly resolution A/Res/65/230, which read:

"...so that they reflect recent advances in correctional science and best practice,"

This is most evident with regard to rr 43 – 45, which frame the requirements for solitary confinement so as to correspond with the medical research.

The negative, and potentially long-lasting, impact of solitary confinement on the physical and mental health and wellbeing of prisoners is well-documented. Medical research confirms that the denial of meaningful human contact can lead to "isolation syndrome", the symptoms of which include anxiety, depression, anger, cognitive disturbances, perceptual distortions, paranoia, psychosis, self-harm and suicide, and which can destroy a person's personality.

Extended solitary confinement carries the risk of long term effects beyond the measure, even after the release of the prisoner.

On the topic solitary confinement, there is – as I see it – clearly a convergence of social science evidence and human rights foundation: Usually, the argument of prison management in support of solitary confinements holds that, under circumstances, there are no alternatives prison safety tactics. Facility, inmate, and staff safety reasons are given as justification for opposing limits on solitary confinements.

If the argument of effectiveness of solitary confinement for maintaining prison safety carries the use of prisoner isolation in practice only so far, it effectively means that the Mandela Rules limits arguments which make dealing with inmates, here solitary confinement, a function of institutional capacity, resources and management. In other words there is no recognition of correctional management necessities of broad discretion over solitary confinement in order to maintain prison order and safety beyond the limits of the Mandela Rules, and prison management has to look into the installation of configurations of better conditions, programmes, family ties, interaction with staff and outside groups, i.e. alternative strategies to achieve those goals. This is a burden on the correctional administration, but it shows the systemic influence of the inherent human dignity discussed under above.

The Mandela Rules on health care (rr 24 - 35) broadly state that the state must provide health care which is comparable to what is available to the general public. The social science evidence for the state's duty to provide health care has been less discussed, and the development process entered much more into debates about resources for implementation.

Therefore “(t)he central debates on this topic are more pragmatic than normative. In other words, there are no serious debates about prisoners’ rights to a wide range of health and mental health care services...” (Peirce, 2018, 280).

This has probably to do with the experience that the research here is settled and has been translated in to policy guidelines (policies on suicide, mental illness prevention, HIV issues, drug abuse, etc.).

The Mandela Rules on the other hand reflect squarely the existing international law, that is, human rights instruments, rulings and norms. The topics which have been mentioned nearly in any of the papers (Peirce, 2018, 280), starting with the Essex Papers.¹⁰

It may be, as Peirce (2018, 280) holds that “the majority of the rationales for new or changed content in the rules ... relate to *existing international and regional human rights instruments, rulings, and norms.*”

I am however of the opinion that the reflection of social science in corrections in the Mandela Rules, which is commensurate with the growing prominence of evidence based corrections policies in general, internationally, is not just incidental. The gains in evidence based corrections, since the Martinson report (1974) are very much co-incidental if one is inclined to accept that **human rights are the normative mantle of a picture of humanity** which allows each individual, in society, to unlock the utmost optimised potential.

In this context I would like to draw your attention to an article by Richard M. Ryan and Edward L. Deci entitled 'Self-Regulation and the Problem of Human Autonomy: Does Psychology Need Choice, Self-Determination, and Will?'

¹⁰ See Slide 15.

The text comes as close to the Mandela Rules as it gets, as the text deals with the merit of autonomy for self-regulation and wellness of the person, and shows how Self-Determination Theory (SDT) provides a comprehensive picture of the importance of autonomy and the dangers of heteronomy for well-being, healthy development, performance, creativity, and social integration.

This is of course highly debatable – and indeed debated – and I am not intending to extend the discussion here much further, especially if one accepts that values inflect facts, which are themselves “value laden”, and which leads us to the conclusion that there is no Archimedean point from which to gain objectivity.

But, from my inquiry for this presentation, I got the impression, that the SMR **then**, and the Mandela Rules **now**, lose their role as normative model in respect of any of the three aspects (legal, regulative, and thematic) the more authoritarian and less democratic a country is.

Conclusion

The Mandela Rules raise the floor for both human rights and prison safety, without framing of prisoner rights and prison safety as goals in opposition to one another. Explicated by the total exclusion of prolonged solitary confinement, the Mandela Rules reject the notion of a zero-sum trade-off between rights and safety. This is what sets the Mandela Rules apart from the initial set of SMR (1955/57). The congruence of the Mandela Rules with both existing international human rights instruments, rulings and norms, and evidence based corrections standards, gives almost a **double-barrel approach** for any promotion of the Mandela Rules. The persuasiveness of the Mandela Rules determines their reach as well as their limit, acceptance hinges on the overall subscription to the core of the **International Bill of Human Rights**. Within those limits the Mandela Rules are a normative model in three perspectives, i.e. legal, regulative and thematic - their relevance for contemporary corrections is beyond doubt

Thank you!

Only **you** can make the difference
[Leo Buscaglia]

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Documents - to be completed -

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NAMIBIA UNIVERSITY
OF SCIENCE AND TECHNOLOGY

Elucidating the **relevance** of the Standard Minimum Rules (the Nelson **Mandela** Rules) for contemporary corrections, globally.

OBJECTIVE

- ▶ **Waypoints:** coordinates on the way to the Nelson Mandela Rules (MR)
- ▶ The Mandela Rules as **yardstick** (benchmark), point of reference, or normative model
- ▶ **Reference** criteria (**normative**):
 - ▶ legal
 - ▶ regulative
 - ▶ thematic
- ▶ Between norms and facts: MR **congruent** with human rights and social **science evidence**
- ▶ Wrap-up

OUTLINE

- ▶ *Twelfth United Nations Congress on Crime Prevention and Criminal Justice, GA Res 65/230, UN-GAOR, 65th Sess, Supp No. 49, UN Doc A/RES/65/230 (2011);*
 - ▶ “reflect recent advances in correctional science and best practices”
 - ▶ **Twenty-first session, Vienna, 23-27 April 2012 Commission on Crime Prevention and Criminal Justice, E/CN.15/2012/L.4/Rev.2**
 - ▶ **Twenty-second session, Vienna, 22-26 April 2013 Commission on Crime Prevention and Criminal Justice, E/CN.15/2013/L.22/Rev.1**
 - ▶ **Twenty-third session, Vienna, 12-16 May 2014 Commission on Crime Prevention and Criminal Justice, E/CN.15/2014/19/Corr.1**
 - ▶ **Twenty-fourth session, Vienna, 18 – 22 May 2015 Commission on Crime Prevention and Criminal Justice**
- ▶ *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), GA Res 70/175, UNGAOR, 70th Sess, UN Doc A/RES/70/175 (2015) [Mandela Rules].*

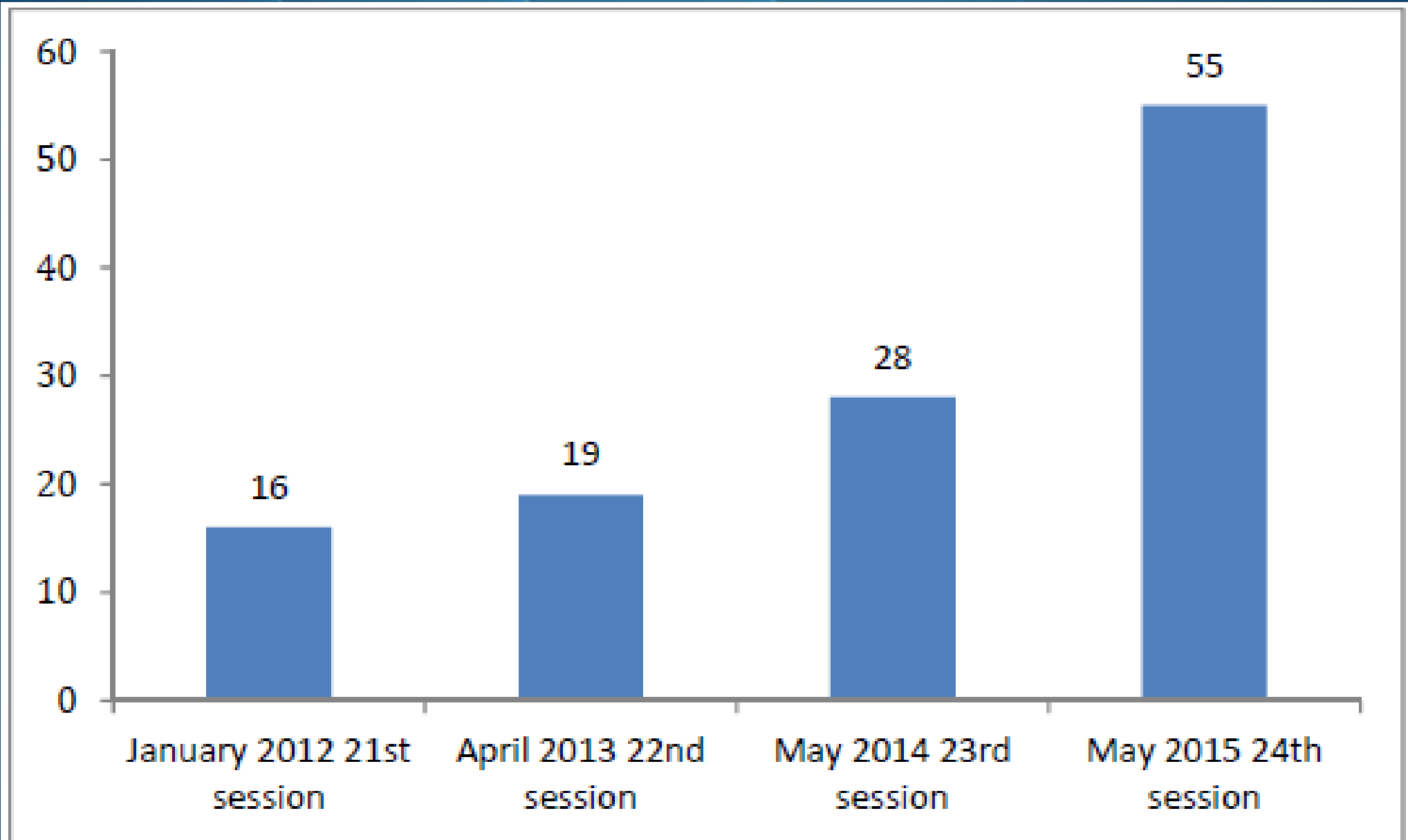
WAYPOINTS (1): SEQUENCE OF UN DECISIONS

Meetings IEGM / Essex	Dates	Documents
		Targeted Changes Paper (PRI)
IEGM 1	Jan/Feb 2012	Report on Meeting IEGM 1
Essex 1	Oct 2012	Essex Paper 1
IEGM 2	Dec 2012	Report on Meeting IEGM 2
Essex 2	Sep 2013	Essex Paper 1
IEGM 3	March 2014	Report on Meeting IEGM 3
IEGM 4	March 2015	Report on Meeting IEGM 4
Essex 3	April 2016	Essex Paper 1

WAYPOINTS (2): ITINERARY OF OTHER MEETINGS & DOCUMENTS

1	UN Member States (n = 95)	Angola, Algeria, Argentina, Australia, Austria, Azerbaijan, Bahrain, Belarus, Bolivia, Botswana, Belgium, Brazil, Burkina Faso, Canada, Chile, China, Colombia, Congo, Croatia, Costa Rica, Cote d'Ivoire, Cuba, Czech Republic, Denmark, Dominican Republic, Ecuador, Egypt, El Salvador, Estonia, Finland, France, Georgia, Germany, Guatemala, Guyana, Hungary, India, Indonesia, Iran, Iraq, Israel, Italy, Japan, Jordan, Kenya, Kuwait, Lebanon, Madagascar, Malaysia, Mauritius, Mexico, Morocco, Mozambique, Namibia, Netherlands, New Zealand, Nicaragua, Nigeria, Norway, Oman, Pakistan, Panama, Paraguay, Peru, Philippines, Poland, Qatar, Romania, Russian Fed., Saudi Arabia, Senegal, Serbia, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Sudan Swaziland, Sweden, Switzerland, Syrian Arab Republic, Tajikistan, Thailand, Tunisia, Turkey, Turkmenistan, Ukraine, UK, Uruguay, UAE, USA, Venezuela, Zambia, Zimbabwe	
2	Entities with observer status:	UN entities and specialized agencies	UN Office of the High Commissioner for Human Rights; Department of Peacekeeping Operations of the Secretariat; United Nations Office for Project Services; and World Health Organization
3		Affiliated regional institutions	International Scientific and Advisory Council; Raoul Wallenberg Institute of Human Rights Law and Humanitarian Law; United Nations Interregional Crime and Justice Research Institute; and African Institute for the Prevention of Crime and the Treatment of Offenders
4		Intergovernmental organizations	Council of Europe; International Committee of the Red Cross (ICRC); and European Committee for the Prevention of Torture.
5		NGOs with consultative status	American Civil Liberties Union (ACLU); Amnesty International; Centro de Estudios Legales y Sociales (CELS); Friends World Committee for Consultation (Quakers); Human Rights Watch; International Penal and Penitentiary Foundation; Open Society Institute; Penal Reform International; and World Network of Users and Survivors of Psychiatry.
6		Individual experts from various organization	Individuals from: Association of State Correctional Administrators (USA); Center for Human Rights and Humanitarian Law; University of the Western Cape; University of Essex; University of Nottingham; Ludwig Boltzmann Institute of Human rights; Latin American Committee for the Revision and Update of the SMRs; and individual experts from the host country.

ACTORS involved (1)



ACTORS involved (2): Co-sponsors (Jackson, 2015)

- ▶ Yardstick/Benchmark/Point of Reference: synonyms of **normative model** (standards for evaluation)



- ▶ MR state **standards, values, or concrete proposals** that involve criticism of present arrangements and thus calls for change in order to create a better future.



- ▶ MR is an explicit **normative model** as it **prescribes standards and values** (normative reasoning), which can be translated into practical measures.

YARDSTICK (BENCHMARK), ..., OR NORMATIVE MODEL

Mandela Rules

▶ **International Soft Law**

- ▶ not enforceable
- ▶ “words without teeth”
- ▶ “paper tiger”

Considered in law, if...

- ▶ **Incorporated** through a legislative act
- ▶ Used as an **interpretative aid** to clarify domestic law
- ▶ Evolved to constitute **customary international law**

REFERENCE CRITERIA (1.1): normative legal (required by law)

	Mechanism	Country	Act / Case
1	Updating domestic legislation on prison conditions	Ireland	S.I. No. 276 of 2017 PRISON (AMENDMENT) RULES 2017
		Canada	C-83 An Act to amend the Corrections and Conditional Release Act (Amended Solitary Confinement Bill)
2	Interpretative aid to clarify domestic laws	Zimbabwe	Makoni v Commissioner of Prisons and another Const. application No CCZ 45/15 Judgment CCZ 8/16 on 13 July 2016
		Namibia	Gaingob v S (SA 8/2008, p. 3.)
		USA	Lareau v. Manson, 507 F.Supp. 1177, 1189 (D. Conn. 1980); Sterling v. Cupp, 625 P.2d 123, 132 n. 21; Estelle v. Gamble, 429 U.S. 97 103-04 & n.8 (1976).
3	Customary international law	Argentina	"Verbitsky, Horacio s/ hábeas corpus" (Fallos 328:1146), sentencia del 3 de mayo de 2005, considerando 39 y punto resolutive 2, respectivamente
		Canada	Corporation of the Canadian Civil Liberties Association v Her Majesty the Queen, 2017 ONSC 7491, 43 CR (7th) 153 [CCLA]; British Columbia Civil Liberties Association v Canada (Attorney General), 2018 BCSC 62 at paras 50, 57, 43 CR (7th) 1 [BCCLA]
		USA	Lareau v. Manson, 507 F.Supp. 1177, 1189 (D. Conn. 1980) (SMR "may be significant as expressions of the obligations to the international community of the member states of the United Nations."); Sterling v. Cupp, 625 P.2d 123, 132 n. 21 (SMR among those "contemporary expressions" of the concern with minimizing "dehumanizing treatment of prisoners"); Estelle v. Gamble, 429 U.S. 97 103-04 & n.8 (1976).

REFERENCE CRITERIA (1.2): normative legal (required by law)

- ▶ Normative regulative
- ▶ Soft regulation/control (Möhrt, 2005)
 - ▶ authoritative ≠ authoritarian
 - ▶ Influential
 - ▶ persuasive

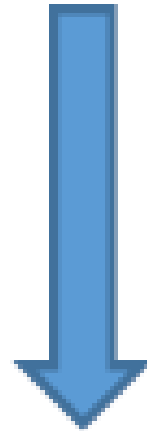
REFERENCE CRITERIA (2.1): normative regulative

SMR influence before the adoption of the Mandela Rules (2015):

- ▶ The **ACA Manual (1966)** contains guidelines “identical or parallel” to the Standard Minimum Rules.
- ▶ The **Kampala Declaration (1996)**, and the **Arusha Declaration on Good Prison Practice (1999)** can be taken as motivated by the overall purpose of the Standard Minimum Rules was to promote the humanitarian spirit of the Universal Declaration of Human Rights into the correctional system.
- ▶ European countries (**Council of Europe**) adopted the rules in **1973**, to become the (European) Standard Minimum Rules for the Treatment of Prisoners - revised in 1987 and renamed the **European Prison Rules (EPR)**.
- ▶ States participating in the **Organization for Security and Co-operation in Europe (OSCE)** committed to observing the internationally recognized standards relating to the administration of justice and the human rights of detainees, including the SMR.

REFERENCE CRITERIA (2.2): normative regulative

UN SMR (The Nelson Mandela Rules) 2015



EPR (European Prison Rules) 2020

REFERENCE CRITERIA (2.3): normative regulative

- ▶ **normative thematic**
 - ▶ developing specifications
 - ▶ Indicative / representative
 - ▶ didactic
 - ▶ demonstrative / documented

REFERENCE CRITERIA (3.1): normative thematic

Prohibition of torture, purpose of prison, prohibition of discrimination, confidentiality of medical records, deaths in custody, prohibitions on diet restriction and prolonged solitary confinement, prohibition on solitary confinement for vulnerable groups, limits on the use of restraints and force (prohibition for childbirth and medical treatment), people with disabilities, vulnerable groups, pretrial detainees, access to lawyers, grievance and complaints mechanisms, civil prisoners (debtors), and forced labour

REFERENCE CRITERIA (3.2): normative thematic

human rights instruments, rulings and norms

- ▶ prohibition of torture
- ▶ prohibition of discrimination
- ▶ confidentiality of medical records
- ▶ prohibitions on prolonged solitary confinement
- ▶ limits on the use of restraints and force (prohibition for childbirth and medical treatment)
- ▶ people with disabilities
- ▶ vulnerable groups
- ▶ pretrial detainees
- ▶ access to lawyers / grievance and complaints mechanisms
- ▶ forced labour

social science evidence in corrections

- ▶ solitary confinement
- ▶ health services
- ▶ personal autonomy and dignity

BETWEEN NORMS AND FACTS (1)

- ▶ **Facts** are **value** laden
- ▶ **Values** inflect **facts**
 - ▶ experiential basis
 - ▶ empirical investigation
 - ▶ discoverable truth
 - ▶ “good life”

BETWEEN NORMS AND FACTS (2)

1. The Mandela Rules raise the floor for both human rights and prison safety, without framing of prisoner rights and prison safety as goals in opposition to one another.
 - ▶ Explicated by the total exclusion of prolonged solitary confinement, the Mandela Rules reject the notion of a zero-sum trade-off between rights and safety.
 - ▶ This is what sets the Mandela Rules apart from the initial set of SMR (1955/57).
2. The congruence of the Mandela Rules with both existing international human rights instruments, rulings and norms, and evidence based corrections standards, gives almost a **double-barrel approach** for any promotion of the Mandela Rules.
 - ▶ The persuasiveness of the Mandela Rules determines their reach as well as their limit, acceptance hinges on the overall subscription to the core of the International Bill of Human Rights
3. (Within those limits) the Mandela Rules, are a normative model in three perspectives, i.e. legal, regulative and thematic - their relevance for contemporary corrections is beyond doubt

THANK YOU!

Only you can make the difference
Leo Buscaglia

A decorative graphic consisting of several parallel white lines of varying lengths, slanted upwards from left to right, located in the bottom right corner of the slide.

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