Making the *Mandela Rules*: Evidence, Expertise, and Politics in the Development of Soft Law International Prison Standards

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In 2015, the United Nations adopted the Revised Standard Minimum Rules for the Treatment of Prisoners*, known as the* Mandela Rules. *These new soft law standards are a significant normative reference for national legislators, courts, correctional administrators, and advocates on a range of prison conditions issues. The* Mandela Rules *include restrictions on solitary confinement that are far more stringent than longstanding Canadian law and practice and have already begun to inform the resolution of contemporary constitutional litigation.*

Despite their use in constitutional litigation, there is little empirical work done on how international standards, such as the Mandela Rules*, are generated—what evidence is relied upon, what compromises are made, and what pragmatic realities shape the final content. This article provides a window into the socio-legal aspects of developing soft law on a topic that is gaining prominence in international and domestic arenas. Drawing from both original interviews and official accounts, this article traces the formation of the UN* Mandela Rules *and examines how the preparatory and negotiation processes included an unusual degree of involvement of subject matter experts, with both advocates and correctional administrators working to generate evidence-based, pragmatic recommendations. The author argues that the process behind the* Mandela Rules *challenges assumptions about "correctional expertise" being opposed to restrictions on solitary confinement. Furthermore, this account of the making of the* Mandela Ru*les suggests that these new international norms are not aspirational or foreign, as some have assumed. Rather, they are the product of thoughtful grappling with both normative and operational principles across varying prison settings. The author concludes that judges and policy-makers should consider the broader context of the development of international standards when determining how to rely on international norms as a source of evidence in the resolution of domestic legal issues.*

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Introduction

When Canadian courts interpret constitutional rights, they often turn to international instruments that set out standards or norms, even when those instruments are not legally binding.[1] The launch of the 2015 *United Nations Standard Minimum Rules for the Treatment of Prisoners* (*the Nelson Mandela Rules*) (*Mandela Rules*),[2] named for one of the world's most famous prisoners and human rights advocates, gave new prominence to international prison standards, in both the courtroom and public discourse. Approved unanimously and to some fanfare by the United Nations General Assembly, the *Mandela Rules* are an update to the 1955 *United Nations Standard Minimum Rules for the Treatment of Prisoners* (SMRs).[3] Part of the reason for this revision was so that international prison standards would reflect "advances in correctional science and best practices" since the 1950s.[4] The process required considering sixty years of social science research, plus changes in prison operations, human rights laws, UN compliance mechanisms, and political dynamics. Contrary to initial dismissals of the *Mandela Rules* as a "paper tiger"[5]—words with no teeth—their influence

1. See e.g. *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54 at para 66, [2017] 2 SCR 386.

2. *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*].

3. *Ibid*; Penal Reform International, News Release, "Historic Update of International Prison Standards by the UN" (21 December 2015), online: PRI <www.penalreform.org/news/10071/>.

4. Katrin Tiroch, "Modernizing the Standard Minimum Rules for the Treatment of Prisoners: A Human Rights Perspective" in Frauke Lachenmann, Tilmann J Röder & Rüdiger Wolfrum, eds, *Max Planck Yearbook of United Nations Law*, vol 19 (Leiden: Koninklijke Brill, 2016) 278 at 284.

5. Thongchai, "Implementation of the Nelson Mandela Rules in Thailand" (18 July 2016), *Thailand Criminology and Corrections* (website), online: <thaicriminology.com/implementation-of-the-nelson-mandela-rules-in-thailand.html>.

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is already apparent internationally. Some countries, such as Argentina and Thailand, have drawn on the *Mandela Rules* for both legal argument and as a basis for updating domestic legislation on prison conditions.[6] The *Mandela Rules* are a prominent example of international soft law norms that shape domestic laws and practices, including in Canada.

One of the highest profile *Mandela Rules* is a prohibition on solitary confinement for certain groups[7] and a fifteen-day maximum cap on solitary confinement overall—a standard that surpasses even the most progressive existing policies.[8] For this reason, the *Mandela Rules* may help resolve the question of whether current Canadian laws, which permit indefinite solitary confinement, violate the *Canadian Charter of Rights and Freedoms*, especially provisions related to "security of the person" and "cruel and unusual punishment".[9]

Two recent Canadian lawsuits—*Corporation of the Canadian Civil Liberties Association v Her Majesty the Queen* (*CCLA*) and *British Columbia Civil Liberties Association v Canada (Attorney General)* (*BCCLA*)—rely upon the *Mandela Rules* as the international consensus on the legitimate bounds of solitary confinement.[10] Expert witnesses called by the plaintiffs in both cases reflected on the evidentiary foundations of the *Mandela Rules*, focusing mainly on the severe harms of prolonged solitary confinement. In *BCCLA*, plaintiff's counsel argued that the *Mandela Rules* are clear international norms "relevant"[11] to Canadian courts on

6. See Republica Argentina, Ministerio Público Fiscal, "Reglas Nelson Mandela: Las nuevas Reglas Mínimas de Naciones Unidas para el Tratamiento de los Reclusos" (Dirección General de Derechos Humanos, July 2016), online: <www.mpf.gob.ar/dgdh/files/2016/07/Documento-de-difusi%C3%B3n-sobre-las-Reglas-Mandela.pdf>. Even before the 2015 revisions, Argentinian prison law explicitly incorporated the 1955 SMRs as its minimum standards. A 2005 Argentinian Supreme Court decision ruled that the UN Standard Minimum Rules constitute the "standard of dignified treatment" for incarcerated persons required under Article 18 of the Constitution. *Ibid.* Also, Thailand has announced it will "pilot" full implementation of the *Mandela Rules* in one prison, Thonburi Remand Centre, and that compliance with the Rules will shape updates to its legislation. Thongchai, *supra* note 5.

7. "UN, International Experts Urge Countries to Apply 'Nelson Mandela Rules' in Prison", *UN News* (18 July 2016), online: <www.un.org/apps/news/story.asp?NewsID=54479#.WmUBMpM-fBI>; *Mandela Rules*, *supra* note 2, r 45. The prohibition applies to prisoners with disabilities, women, and children in certain situations. *Ibid.*

8. *Mandela Rules*, *supra* note 2, rr 43–45. The Special Rapporteur on torture originally proposed this fifteen-day maximum in a 2011 report. See *Interim Report of the Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UNGAOR, 66th Sess, UN Doc A/66/268 (2011) at 21–22 [*Interim Report*].

9. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, ss 7, 12.

10. Both rulings affirmed the relevance of the *Mandela Rules* to Canada's administrative segregation laws and practices. See *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*].

11. *British Columbia Civil Liberties Association v Canada (Attorney General)*, 2018 BCSC 62, 43 CR (7th) 1 (Written Submissions of the Plaintiffs at paras 499–500) [Plaintiff's Submissions].

solitary confinement in general, as well as on other principles.[12] The Canadian government, in contrast, referred to the *Mandela Rules* only to remind the court that they are non-binding standards.[13] While the reasons for judgment in the two cases differ, both the *CCLA*[14] and *BCCLA*[15] rulings find that solitary confinement puts prisoners at risk of severe psychological harms and declare the current laws governing administrative segregation to be unconstitutional. In *CCLA*, the Ontario Superior Court of Justice draws a parallel between the *Mandela Rules*, in the international arena, and the 1996 *Commission of Inquiry into Certain Events at the Prison for Women in Kingston* and 2014 *Coroner's Inquest Touching the Death of Ashley Smith* reports, in the domestic arena, as examples of norms that have evolved into widely accepted consensus.[16] In *BCCLA*, Leask J recognizes the *Mandela Rules* as part of an "emerging consensus in international law" on the harms and potential human rights violations of solitary confinement[17] and finds the fifteen-day time limit to be a "defensible standard".[18]

The growing prominence of the *Mandela Rules* in international and domestic debates raises the question of what kind of relevance, obligations, and insights these norms may offer to Canadian courts. Jeremy Waldron suggests that domestic courts should take international norms seriously insofar as they represent the accumulated knowledge of many states' efforts to set fair and feasible punishment policy.[19] To assess this question with regard to the *Mandela Rules*, some information about the process and rationales behind the norms is illuminating.

Prisoner cases often hinge on competing claims of expertise.[20] The *Mandela Rules* can offer some guidance on how to assess these claims. As Lisa Kerr sets

12. *Ibid* at paras 500, 648. For example, principles on the accommodation of disabilities, standards of decency, and prohibitions on discriminatory treatment. *Ibid*.

13. *British Columbia Civil Liberties Association v Canada (Attorney General)*, 2018 BCSC 62, 43 CR (7th) 1 (Final Argument of the Defendant at para 19) [Defendant's Final Argument].

14. *Supra* note 10 at para 254. Justice Marrocco found that "there is no serious question" about the harms of solitary confinement. *Ibid* at para 97.

15. *Supra* note 10 at para 247. Justice Leask found that "administrative segregation . . . is a form of solitary confinement that places all Canadian federal inmates subject to it at significant risk of serious psychological harm . . . and increased incidence of self-harm and suicide". *Ibid*.

16. *Supra* note 10 at para 59.

17. *Supra* note 10 at para 50.

18. *Ibid* at para 250.

19. In Waldron's view, domestic courts may draw on international standards as a source of guidance on difficult moral questions, not just as foreign law applying to interstate issues. Jeremy Waldron, "Foreign Law and the Modern *Ius Gentium*" (2005) 119:1 Harv L Rev 129 at 131–32, 146. The Ontario Superior Court ruling in *CCLA* reflects this view in its consideration of whether administrative segregation practices align with fundamental principles of justice: "[T]he limits on rights that may be justified under section 1 of the *Charter* cannot be considered in isolation from international norms". *Supra* note 10 at para 154.

20. See Lisa Kerr, "Contesting Expertise in Prison Law" (2014) 60:1 McGill LJ 43 [Kerr, "Contesting Expertise"].

out, when inmates challenge prison conditions, prison administrators tend to assert expertise-infused claims about safety, order, risk, and other justifications that an individual litigant can find difficult to refute.[21] Courts have tended to grant prison administrators a significant degree of discretion over the practice of solitary confinement.[22] For example, the Ontario Superior Court ruling in *CCLA* emphasizes the lack of procedural fairness in the current law, but does not challenge administrators' discretion in using segregation for purported safety objectives.[23] This relies on the assumption that permitting indefinite or prolonged segregation actually does or can improve prison safety. In contrast, the *BCCLA* ruling rejects this link, finding instead that segregation can harm prisoners and thus undermine security in the long-term.[24] This shift was crucial to the conclusion that current laws are unconstitutionally overbroad.[25] The *Mandela Rules*, both in its text and in the way in which the negotiation process unfolded, challenges the purported trade-off between rights and safety. They are a potential source of politically neutral expertise to help determine how much credibility to give claims about the links between segregation and management considerations, in a Canadian context.

Given that judges may draw on the *Mandela Rules* to resolve evidentiary and interpretive questions, a grounded understanding of the process that generated these soft law standards can help to assess the legitimacy of that judicial reliance. This article explores the genesis of the *Mandela Rules*: the UN and civil society processes; the objectives and positions of different actors; and the key rationales, debates, and decisions. It focuses on the role of expertise and empirical evidence in the process and substantive revisions, with an emphasis on the topic of solitary confinement. While this process was in many ways similar to the development of soft law in other areas, this article illustrates the complexity of building soft law norms based on interviews with participants and publicly available documents. Other scholars have explored the *Mandela Rules* and the revision process in terms of their international legal significance,[26] their

21. *Ibid*. See also Debra Parkes, "A Prisoners' *Charter*?: Reflections on Prisoner Litigation Under the *Canadian Charter of Rights and Freedoms*" (2007) 40:2 UBC L Rev 629.

22. Debra Parkes, "The Punishment Agenda in the Courts" (2014) 67 SCLR (2d) 589 [Parkes, "Punishment Agenda"]; Lisa Coleen Kerr, "The Chronic Failure to Control Prisoner Isolation in US and Canadian Law" (2015) 40:2 Queen's LJ 483 [Kerr, "Chronic Failure"]; Lisa Coleen Kerr, "The Origins of Unlawful Prison Policies" (2015) 4:1 Can J Human Rights 91.

23. *Supra* note 10 at paras 155, 225, 272–77.

24. *Supra* note 10 at paras 326–28.

25. *Ibid* at para 326.

26. See e.g. Bożena Gronowska, "Inter-American Prison Rules: Creating a Normal Life Behind Bars" (2016) 21:1 Comparative L Rev 31; Kasey McCall-Smith, "Introductory Note To United Nations Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules)" (2016) 55:6 ILM 1180; Tiroch, *supra* note 4.

process compared to other international standards,[27] the implementation challenges in specific places,[28] the role of non-governmental organizations (NGOs) in the process,[29] and broader human rights perspectives on international prison conditions.[30] Despite the *Mandela Rules*' explicit reference to "correctional science and best practice", and the general prominence of "evidence-based policy" in corrections,[31] there is little research on how social science evidence informed the *Mandela Rules* and the revision process.

The article proceeds in the following sections. First, it briefly explains the research methods used for this article, which draw on written and interview sources. Second, it reviews the history of international prison standards and their contemporary relevance, including how the *CCLA* and *BCCLA* rulings engaged with international standards and the *Mandela Rules* related to solitary confinement. It also outlines the key steps in developing the *Mandela Rules*. Third, it analyzes the role of empirical evidence and of expert participants in the written texts and the negotiation process. Fourth, it considers what this analysis might mean for Canadian courts deciding on challenges to prison laws and policies, and more generally for the implementation of improvements in prison conditions.

Because the process that built the *Mandela Rules* was inclusive, robust, and empirically grounded, this article argues that the *Mandela Rules* are a relevant and useful source of expertise and guidance. Furthermore, the input and role of correctional experts and civil society advocates in the negotiation process led to an unexpected agreement on new limits for solitary confinement. This article contends that this demonstrates the possibility of overcoming one of the main tensions in this debate: the presumed opposition between prisoner rights and facility safety.

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27. See e.g. Matti Joutsen, "International Standards and Norms as Guidance in the Criminal Justice System" (2016) UNAFEI Resource Material Series No 98 at 54, online: <www.unafei.or.jp/english/pdf/RS_No98/No98_VE_Joutsen.pdf>.

28. See e.g. Andrea Huber, "The Relevance of the Mandela Rules in Europe" (2016) 17:3 ERA Forum 299 [Huber, "Relevance of the Mandela Rules"]; Bronwyn Naylor, "Human Rights and Their Application in Prisons" (2016) 227 Prison Serv J 17.

29. See e.g. Annabel Jackson Associates, "Case Study of the Review of the Standard Minimum Rules" (2015), online: <annabeljacksonassociates.com/wp-content/uploads/2016/06/EA-Evaluation-of-PRI-SMR.pdf>.

30. See e.g. Andrew Coyle, "A Human Rights Approach to Prison Management" (2003) 13:2 Criminal Behaviour & Mental Health 77; Fiona M Jardine, "Information Access as a Human Right: Guantanámo Bay Detention Camp Compared to Supermax and Military Prisons of the United States" (Paper delivered at the iConference 2014, Humboldt University, Germany, 4–7 March 2014) at 20; Tomas Max Martin, "Scrutinizing the Embrace of Human Rights in Ugandan Prisons: An Ethnographic Analysis of the Equivocal Responses to Human Rights Watch Reporting" (2017) 9:2 J Human Rights Practice 247.

31. See e.g. "Evidence-Based Practices (EBP)", *National Institute of Corrections* (website), online: <nicic.gov/evidence-based-practices-ebp>.

I. Research Methods

To explore the process of making the *Mandela Rules*, this study uses the research method of process tracing. This involves tracking the appearances and roles of certain ideas, institutions, actors, and decisions on a given arena of policy, in multiple data sources and points in time.[32] To do this, I coded themes in official documents, public statements, and the recollections of people who participated in key events, and then I identified common themes and connections. This paper presents a discussion of the principal themes that emerged from this analysis.

Written documents and interviews with participants are the two main sources of primary data for this study. The key events in the *Mandela Rules* process were four International Expert Group Meetings (IEGMs), organized by the UN Office on Drugs and Crime (UNODC) from 2012 to 2015, and preparatory meetings organized by NGOs and universities. The written documents include UN reports, working papers, summaries of submissions, government and NGO submissions to the UN,[33] three preparatory expert meeting reports (known as the "Essex Papers"),[34] and an external evaluation of the role of the NGO Penal Reform International (PRI).[35]

This article also draws on seven confidential interviews, conducted in 2017, with individuals involved in the negotiation. I built the sample purposively from a public list of participants, as well as through suggestions from interviewees and others familiar with the process (i.e., snowball sampling); the sample is nei-

32. See Derek Beach & Rasmus Brun Pedersen, *Process-Tracing Methods: Foundations and Guidelines*. (Ann Arbor, MI: University of Michigan Press, 2013); David Collier, "Understanding Process Tracing" (2011) 44:4 PS: Political Science & Politics 823.

33. The UN's official list of documents linked to the IEGMs includes: working papers, submissions by member states, summaries of *notes verbales* and responses from member states, summary reports of meetings, and the text of resolutions and revisions. These documents are available on the UNODC site for each IEGM. United Nations Office on Drugs and Crime, "Fourth Meeting Documentation" (2015), *UNODC* (website), online: <www.unodc.org/unodc/en/justice-and-prison-reform/expert-group-meetings-8.html>; United Nations Office on Drugs and Crime, "Third Meeting Documentation" (2014), *UNODC* (website), online: <www.unodc.org/unodc/en/justice-and-prison-reform/expert-group-meetings6. html>; United Nations Office on Drugs and Crime, "2nd Meeting Documentation" (2012), *UNODC* (website), online: <www.unodc.org/unodc/en/justice-and-prison-reform/expert-group-meetings5.html>; United Nations Office on Drugs and Crime, "Meeting Documentation" (2011), *UNODC* (website), online: <www.unodc.org/unodc/en/justice-and-prison-reform/expert-group-meetings4.html>.

34. Penal Reform International & University of Essex, *Expert Meeting at the University of Essex on the Standard Minimum Rules for the Treatment of Prisoners Review: Summary*, UN Doc UNODC/CCPCJ/EG.6/2012/NGO/1, November 2012 [Essex Paper 1]; Penal Reform International & University of Essex, *Second Report of Essex Expert Group on the Review of Standard Minimum Rules for the Treatment of Prisoners*, UN Doc UNODC/CCPCJ/EG.6/2014/NGO.7, March 2014 [Essex Paper 2]; Penal Reform International & University of Essex, *Essex Paper 3: Initial Guidance on the Interpretation and Implementation of the UN Nelson Mandela Rules* (London: Penal Reform International, 2017)[Essex Paper 3].

35. Annabel Jackson Associates, *supra* note 29.

ther random nor comprehensive. Three interviewees were members of government delegations and four were civil society or international organization representatives; three of the seven were from countries in the Global South. Given the limited number of interviews and unofficial source material, this article does not suggest particular causal factors. Rather, it demonstrates what soft law development looks like in practice on one relatively contentious topic.

II. The *Mandela Rules*: Background and Process

A. History: Evolving Standards of Decency in Detention

The SMRs, which preceded the *Mandela Rules*, were born in the wake of post-war international human rights treaties. This unique political moment, in which countries were grappling with the horrors of wartime camps, galvanized an international agreement about basic human rights in detention.[36] These rights included requiring basic amenities for prisoners and prohibiting blackout cells, corporal punishment, and diet restriction (unless authorized by a doctor).[37] The UN Economic and Social Council approved the SMRs in 1957.[38] However, the international discussion on prison issues is much older, dating from the first International Prison Commission in 1872, in London, and the first International Penal and Penitentiary Commission in 1926. This first iteration of the Commission explicitly called itself a "Committee of Experts" before transitioning to the more general UN Congress on Crime Prevention and Criminal Justice in 1955.[39] Since then, the UN has held Crime Congresses every five years, and the thirteenth Congress (2015, Qatar) addressed the *Mandela Rules*.[40] The UN Commission on Crime Prevention and Criminal Justice (CCPCJ) recommended the approval of the *Mandela Rules* in May 2015,[41] and the UN Economic and Social Council and the General Assembly approved them later in 2015.[42]

36. Interview of Civil Society Participant 2 (July–September 2017) [Interview 2].

37. *Mandela Rules*, *supra* note 2, r 43.

38. *Resolutions*, ESC Res 663 (XXIV) C.II, UNESCOR, 24th Sess, Supp No. 1, UN Doc E/3048 (1957) at 12.

39. See Joutsen, *supra* note 27 at 55.

40. See UNODC, *Draft Doha Declaration on Integrating Crime Prevention and Criminal Justice into the Wider United Nations Agenda to Address Social and Economic Challenges and to Promote the Rule of Law at the National and International Levels, and Public Participation*, 13th United Nations Congress on Crime Prevention and Criminal Justice, UN Doc A/CONF.222/L.6, (March 2015).

41. UNESC, Commission on Crime Prevention and Criminal Justice, *Report on the Twenty-Fourth Session*, Supp No. 10, UN Doc E/2015/30, (July 2015) at vi.

42. *Mandela Rules*, *supra* note 2.

The *Mandela Rules* build upon longstanding international human rights treaties: the *International Covenant on Civil and Political Rights*[43] and the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT).[44] In recent years, statements about exactly how these norms should translate to prison conditions have become more explicit. In 2011, the UN Special Rapporteur on Torture, Juan Méndez, issued a report stating that prolonged solitary confinement constitutes torture, and made a public call for prohibition of the practice in most cases.[45] This explicit and unprecedented framing has influenced advocacy and legal debates.[46] In the Canadian context, the UN Committee's 2012 report on CAT compliance highlighted Canadian prisons' use of prolonged administrative segregation as a "principal concern".[47]

Regional agreements are also important reference points: the *European Prison Rules* (updated in 2006) and the *Inter-American Principles and Best Practices for the Protection of Persons Deprived of Liberty* (2008), as well as the *American Convention on Human Rights* (1978) and the *Inter-American Convention to Prevent and Punish Torture* (1987).[48] Compared to the *Mandela Rules*, the *Inter-American Principles* are more explicit on reducing overcrowding and approximating conditions of life

43. 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) [ICCPR].

44. 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) [CAT].

45. See *Interim Report*, *supra* note 8 at 21; "Solitary Confinement Should be Banned in Most Cases, UN Expert Says", *UN News* (18 October 2011), online: <www.un.org/apps/news/story. asp?NewsID=40097#.WbqIctOGO9Y>.

46. See US, National Institute of Justice, *Administrative Segregation in U.S. Prisons*, by Natasha A Frost & Carlos E Monteiro (Washington, DC: Department of Justice, 2016); Prisoner Reentry Institute, *Solitary Confinement: Ending the Over-Use of Extreme Isolation in Prison and Jail*, (New York: John Jay College of Criminal Justice, 2015) [Solitary Confinement Report]; Juan Méndez, "How International Law Can Eradicate Torture: A Response to Cynics" (2016) 22:2 Southwestern J Intl L 247.

47. UNOHCHR, Committee Against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Concluding Observations of the Committee Against Torture: Canada*, 48th Sess, UN Doc CAT/C/CAN/CO/6 (2012). Canada announced in 2016 that it would take steps to sign the Optional Protocol on the Convention Against Torture, which may lead to more robust external inspections of detention facilities. See "Canada to Join UN Anti-Torture Protocol After More Than a Decade", *The Globe and Mail* (2 May 2016), online: <www.theglobeandmail.com/news/politics/canada-to-join-un-anti-torture-protocol-after-years-of-delay-foreign-affairs/article29827536/>. See also Parkes, "Punishment Agenda", *supra* note 22.

48. Council of Europe, *European Prison Rules* (Strasbourg: Council of Europe Publishing, 2006) [*European Prison Rules*]; OAS, Inter-American Commission on Human Rights, 131st Sess, *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, OR OEA/SER/L/V/II.131 Doc 26 (2008) [*Inter-American Principles*]; *American Convention on Human Rights "Pact of San Jose, Costa Rica"*, 22 November 1969, OASTS No 36 (entered into force in 18 July 1978); *Inter-American Convention to Prevent and Punish Torture*, 9 December 1985, OASTS No 67 (entered into force 28 February 1987). Canada is not a signatory to either of these Organization of American States documents. The *Inter-American Principles* are monitored in part by the Rapporteur on the Rights of Persons Deprived of Liberty. See "Rapporteurship on the Rights of Persons Deprived of Liberty", *Organization of American States* (website), online: <www.oas.org/en/iachr/pdl/default.asp>.

outside prison,[49] while the *European Prison Rules* are more detailed on certain matters of prison organization and services.[50] Some regional prison standards are enforceable through courts, such as the Inter-American Court of Human Rights (IACHR),[51] though in practice such enforcement is relatively rare.[52]

Other standard minimum rules exist for specific groups of prisoners: women, juveniles, and people under non-custodial measures.[53] The *United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders*—known as the "Bangkok Rules" and approved in 2010—provided momentum and laid some groundwork for the development of the *Mandela Rules*.[54] Beyond the UN arena, the *Mandela Rules* also draw upon international professional standards regulating institutional practices for law enforcement, judges, and correctional staff.[55] This suggests an effort to align with existing rules that may be enforceable for their respective professions in ways that the *Mandela Rules* are not.

As non-binding standards, much of the *Mandela Rules*' influence is as an expressive statement that may shape legislation, policy, and legal decisions. In

49. *Inter-American Principles*, *supra* note 48, principle XVII; Gronowska, *supra* note 26.

50. *European Prison Rules*, *supra* note 48, part VIII; Huber, "Relevance of the Mandela Rules", *supra* note 28.

51. See *Pacheco Teruel et al (Honduras)* (2012), Inter-Am Ct HR (Ser C) No 241, *Inter-American Yearbook on Human Rights*: Volume 28:1 (2012). In this case, civil society groups took the state of Honduras to the Inter-American Court of Human Rights for the death of 107 prisoners in a 2004 prison fire, on charges of right to life, to humane detention conditions, and to proper judicial process (they were in preventive detention). *Ibid.*

52. The reality in many Latin American countries is that domestic legislation exists but is not widely enforced. See Christopher Birkbeck, "Imprisonment and Internment: Comparing Penal Institutions North and South" (2011) 13:3 Punishment & Society 307. Often, informal arrangements between personnel and inmates govern prison conditions. See Sacha Darke & Maria Lúcia Karam, "Latin American Prisons" in Yvonne Jewkes, Ben Crewe & Jamie Bennett, eds, *Handbook on Prisons*, 2nd ed (Abingdon: Routledge, 2016) 460; Sacha Darke & Chris Garces, "Surviving in the New Mass Carceral Zone" (2017) 229 Prison Serv J 2. In such contexts, international standards can be an advocacy tool for organizations pushing for change, both through lawsuits and public pressure. *Ibid.* In places with no domestic prison legislation, courts and policy-makers use international standards as the next-best reference. Interview of Civil Society Participant 3 (July–September 2017) [Interview 5]; Interview of Government Participant 3 (July–September 2017) [Interview 7].

53. *United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (The Bangkok Rules)*, GA Res 65/229, UNGAOR, 65th Sess, Supp No. 49, UN Doc A/RES/65/229 (2010) [*Bangkok Rules*]; *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*, GA Res 45/113, UNGAOR, 45th Sess, Supp No. 49, UN Doc A/RES/45/113 (1990) at 204–09 (these rules are also called the "Havana Rules"); *United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules)*, GA Res 45/110, UNGAOR, 45th Sess, Supp No. 49, UN Doc A/RES/45/110 (1990) at 195–99.

54. *Bangkok Rules*, *supra* note 53.

55. See e.g. Joutsen, *supra* note 27; International Association of Chiefs of Police, "Law Enforcement Code of Ethics", *IACP* (website), online: <www.theiacp.org/codeofethics> (adopted at the 64th Annual IACP Conference and Exposition, October 1957); *The Bangalore Principles of Judicial Conduct*, ECOSOC, Annex, Agenda Item 11(d), UN Doc E/CN.4/2003/65, (2003); International Corrections and Prisons Association, "Code of Conduct", *ICPA* (website), online: <icpa.ca/code-of-conduct>.

complex matters that require cooperative global governance or regulation—such as environmental, international trade, and labour standards—soft law is often a key step in building both hard law and stronger enforcement of voluntary rules.[56] States may promote and comply with soft law, non-binding standards when they find domestic or international benefits, not just due to legal consequences.[57] International human rights standards can also give legitimacy to the demands of political or civil actors pushing for domestic policy change, though this influence is stronger when the standards are in binding treaties.[58] Standards can also serve as a blueprint for domestic legislation or regional norms.[59]

In Canada and the United States, litigation on individual cases is a major lever for improving and enforcing laws and policies affecting prisons.[60] Though the US and Canadian domestic constitutional and policy frameworks are distinct, arguments in both countries draw on international norms, including those that regard prolonged solitary confinement as a form of torture.[61] Two prominent court rulings in Canada, on challenges to administrative segregation, *CCLA* and *BCCLA*, illustrate this.

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56. See John J Kirton & Michael J Trebilcock, "Introduction: Hard Choices and Soft Law in Sustainable Global Governance" in John J Kirton & Michael J Trebilcock, eds, *Hard Choices, Soft Law: Voluntary Standards in Global Trade, Environment and Social Governance* (Abingdon, UK: Routledge, 2016) 3 at 12.

57. See Andrew T Guzman & Timothy L Meyer, "International Soft Law" (2010) 2:1 J Leg Analysis 171.

58. See Adam S Chilton, "The Influence of International Human Rights Agreements on Public Opinion: An Experimental Study" (2014) 15:1 Chicago J Intl L 110; Annabel Jackson Associates, *supra* note 29 at 4, 16–17.

59. See e.g. Interview 7, *supra* note 52 (interviewee from a Global South country explained that politicians pushed bureaucrats working on new legislation to exceed the *Mandela Rules* standards).

60. See Efrat Arbel, "Contesting Unmodulated Deprivation: *Sauvé v Canada* and the Normative Limits of Punishment" (2015) 4:1 Can J Human Rights 121; National Institute of Justice, *supra* note 46; Marie Gottschalk, "Staying Alive: Reforming Solitary Confinement in U.S. Prisons and Jails" (2015) 125:1 Yale LJ Forum 253; Keramet Reiter, "Lessons and Liabilities in Litigating Solitary Confinement" (2016) 48:4 Conn L Rev 1167; Kerr, "Chronic Failure," *supra* note 22.

61. See Anna Conley, "Torture in US Jails and Prisons: An Analysis of Solitary Confinement Under International Law" (2013) 7:4 Vienna J on Intl Constitutional L 415; Kerr, "Contesting Expertise", *supra* note 20 at 80, 83; Méndez, *supra* note 46 at 266. The *BCCLA* ruling cites the *Mandela Rules*, as well as the ICCPR, the CAT, and the European Court of Human Rights and the Inter-American Court of Human Rights, as part of the "emerging consensus in international law". *Supra* note 10 at paras 50–54. The US has reservations to the ICCPR and the CAT to permit precedence of US Constitutional law for Eighth and Fourteenth Amendment considerations, which effectively set a tougher bar for cruel and degrading treatment. See United Nations, *Multilateral Treaties Deposited with the Secretary-General*, vol 1, c IV-4, online: <treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-4.en.pdf> at 13; United Nations, *Multilateral Treaties Deposited with the Secretary-General*, vol 1, c IV-9, online: <treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-9.en.pdf> at 7 [CAT Reservations].

The decision in *CCLA* took the *Mandela Rules* seriously, though stopped short of mandating parallel changes to Canada's current laws.[62] The *Mandela Rules* bolstered the plaintiffs' arguments calling for features like time limits on solitary confinement.[63] The Court accepted that the *Mandela Rules* "represent an international consensus of proper principles and practices in the management of prisons and the treatment of those confined"—a consensus in which Canada participated.[64] The Court rejected the government's argument that administrative segregation in Canadian prisons does not count as "solitary confinement" as defined by the *Mandela Rules*,[65] and found that Canadian practice violates a number of international norms.[66] Finally, Marrocco J fully accepted the expert evidence presented regarding the "foreseeable and expected" harms of solitary confinement on prisoners.[67] Despite these findings, Marrocco J called only for more robust reviews and declared the current laws unconstitutional only on this limited basis. Crucially, the ruling allows this review process to remain in the hands of the Correctional Service of Canada.[68] Critics argue that this negates any possible independence and is weaker than existing review procedures for disciplinary segregation.[69]

The *BCCLA* ruling, in contrast, set a bolder milestone—it found that Canada's current laws on administrative segregation violate section 7 and section 15 of the *Charter*. The Court declined to consider an argument that the *Mandela Rules* are *jus cogens*—a peremptory norm of customary international law, and, as such, themselves a principle of fundamental justice.[70] But, the Court's reasoning suggests that this is based more on prudence than a rejection of the premise of the argument.[71] The ruling stated that any analysis of *Charter* section 7 principles must consider international norms, specifically the *Mandela Rules*.[72] Like the *CCLA* ruling, the *BCCLA* decision made clear that Canada's current administrative segregation regime constitutes solitary confinement under the

62. *Supra* note 10.

63. *Ibid* at paras 34–35, 50–53.

64. *Ibid* at paras 61, 249.

65. *Ibid* at paras 40, 46.

66. *Ibid* at paras 45–46.

67. *Ibid* at para 240.

68. *Ibid* at para 172.

69 See Lisa Kerr, "Ontario Solitary Confinement Ruling Hardly Counts as a Victory", *The Globe and Mail* (19 December 2017), online: <www.theglobeandmail.com/opinion/ontario-solitary-confinement-ruling-hardly-counts-as-a-victory/article37387750/>.

70. *BCCLA*, *supra* note 10 at para 314.

71. *Ibid.* Justice Leask says: "While an interesting argument, I prefer to decide this case under the more established principles of fundamental justice." *Ibid.*

72. *Ibid* at para 560. The ruling describes how the *Mandela Rules* are part of a constellation of international treaties, principles, and reports. *Ibid* at paras 50–58.

Mandela Rules[73] and accepted that the practice causes severe risk of psychological harm to prisoners, especially those with mental illness.[74]

The *BCCLA* ruling aligns with several of the *Mandela Rules*' central provisions on solitary confinement. First, it endorsed the fifteen-day time limit: "[This] is a generous standard given the overwhelming evidence that even within that space of time an individual can suffer severe psychological harm. It is, nevertheless, a defensible standard."[75] Second, citing the relevant *Mandela Rules* provision and breaking with the Ontario Superior Court ruling, the Court mandated an independent review process—one not overseen by Correctional Service Canada staff—for administrative segregation decisions.[76] Finally, the *BCCLA* decision's analysis hinged in part on the finding that indefinite and prolonged solitary confinement is not beneficial for the security of a prison facility or of individual prisoners—and may even worsen security[77]—and that alternative tactics are feasible.[78] In the process of developing and negotiating the *Mandela Rules*, as the following sections of this paper argue, expert statements on the ineffectiveness of solitary confinement for prison safety were crucial factors. Therefore, to the extent that the links between segregation and facility safety are part of current or future lawsuits in Canada, the debates that shaped the *Mandela Rules* may be instructive.

The *BCCLA* ruling will likely require revisions to existing legislation, beyond proposed changes already under consideration.[79] The draft Bill C-56 contemplates a fifteen-day presumptive maximum stay in administrative segregation, with an eighteen-month interim maximum of twenty-one days, plus an external review process for cases that exceed this period.[80] This still falls short of *Mandela Rule* compliance, most importantly in that it allows the institutional head or warden to override the review recommendation in order to extend segregation beyond the presumptive time limits.

73. *Ibid* at para 137.

74. *Ibid* at para 247.

75. *Ibid* at para 250.

76. *Ibid* at paras 379, 409–10.

77. *Ibid* at paras 327–28, 553.

78. *Ibid* at para 590.

79. In February 2018, the Government of Canada filed a notice of appeal of the *BCCLA* ruling. See Mike Hager, "Federal Government Appealing B.C. Supreme Court Decision on Solitary Confinement", *The Globe and Mail* (19 February 2018), online: <www.theglobeandmail.com/news/national/civil-liberties-group-says-feds-to-appeal-bc-solitary-confinement-ruling/article38020115>.

80. See "Bill C-56: An Act to amend the Corrections and Conditional Release Act and the Abolition of Early Parole Act", *Correctional Services Canada* (website), online: <www.csc-scc.gc.ca/acts-and-regulations/005006-3000-eng.shtml>.

B. Process: Expert Work Upfront

The CCPCJ began its review of the SMRs for the Treatment of Prisoners in 2010, in response to a General Assembly resolution.[81] It culminated in December 2015, with UN General Assembly approval.[82] The key decisions took place at four International Expert Group Meetings.[83] In addition, PRI and the University of Essex organized three preparatory meetings between 2011 and 2013, funded in part by the British Department for International Development. These produced the three Essex Papers, which synthesized relevant research, treaties, norms and practices, and wrote recommended text.[84] Consultations with the UN Special Rapporteur on Torture took place in 2013.[85] The UNODC and its Secretariat, in collaboration with the CCPCJ, convened the IEGMs, provided preparatory content and reports on the proceedings.

IEGMs are a standard UN process, but they now include a wider range of participants on corrections issues. Prior to the early 1990s, a small group of North American and European groups were the main players. After 1992, there was a shift to give a greater role to member states in drafting and a greater emphasis on multilingualism.[86] The *Mandela Rules* IEGMs followed this model, with delegations from forty to sixty member states (diplomats and subject-matter experts). Entities with observer status included: UN entities and specialized agencies,[87] affiliated regional institutions,[88] intergovernmental organizations,[89] NGOs with consultative status,[90] and individual experts from various organiza-

81. *Twelfth United Nations Congress on Crime Prevention and Criminal Justice*, GA Res 65/230, UNGAOR, 65th Sess, Supp No. 49, UN Doc A/RES/65/230 (2011).

82. See *Mandela Rules*, *supra* note 2.

83. These IEGMs took place in Vienna (January–February 2012), Buenos Aires (December 2012), Vienna (March 2014), and Cape Town (March 2015).

84. Essex Paper 1, *supra* note 34; Essex Paper 2, *supra* note 34; Essex Paper 3, *supra* note 34.

85. See UNESC, Commission on Crime Prevention and Criminal Justice, *Work of the Expert Group on the Standard Minimum Rules for the Treatment of Prisoners*, 21st Sess, UN Doc E/CN.15/2012/18, February 2012 at para 2 (referring to "a high-level expert group meeting held in Santo Domingo from 3 to 5 August [2011]"). An Americas regional consultation also took place.

86. See Joutsen, *supra* note 27 at 60.

87. 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.

88. 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.

89. Council of Europe; International Committee of the Red Cross (ICRC); and European Committee for the Prevention of Torture.

90. 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.

tions.[91] The NGOs provided joint and individual statements and briefing notes.[92]

Research-based expert meetings ahead of formal UN meetings are common for international norm development processes, but had not previously occurred to this extent for prison issues. The group described above is a much wider cross-section of actors than those who wrote earlier iterations of international prison standards. One participant described how the *Mandela Rules* process was unusual: "Typically, the politicians do the talking about the general subject, and then when it comes time for substance, it's turned over to staff. The staff then puts it together."[93] This observer went on to say that in this process, the non-Secretariat experts "did the work at the front end".[94]

C. Priorities: Wrestling for a (Non-Binding) Shortlist

The first IEGM (2012, Vienna) set the scope and topics of revisions. The background paper prepared ahead of the meeting presented four options: a) a legally-binding instrument; b) a substantive restructuring and redrafting of the SMRs; c) redrafting only minimum, essential changes (such as old vocabulary); or d) leave the SMRs as they stand and add a preamble about alignment with current human rights and criminal justice instruments and implementation issues.[95]

Opening positions on this scope question were far apart. Some states and other actors opposed a full review out of fear that the revision process could in-

91. 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.

92. See American Civil Liberties Union et al, "Human Rights of Prisoners: the Process of Review of the UN Standard Minimum Rules for the Treatment of Prisoners" (Address delivered at the Human Rights Council, 14 March 2014), online: <cdn.penalreform.org/wp-content/uploads/2014/03/Joint-NGO-Oral-Statement-SMR_HRC25-Final.pdf>; American Civil Liberties Union et al, Briefing, "The Process of Review of the UN Standard Minimum Rules for the Treatment of Prisoners" (January 2015), online: <www.aclu.org/files/assets/_Joint%20NGO%20Briefing%20SMR%20Review%20Rev_FINAL%2001-15.pdf>.

93. Interview 2, *supra* note 36.

94. *Ibid.*

95. See *Report on the Meeting of the Expert Group on the Standard Minimum Rules for the Treatment of Prisoners Held in Vienna from 31 January to 2 February 2012*, UNODC, UN Doc UNODC/CCPCJ/EG.6/2012/1 (2012); Essex Paper 1, *supra* note 34 at 1–2; Annabel Jackson Associates, *supra* note 29 at 6; UNODC, "Background Note: Open-Ended Intergovernmental Expert Group Meeting on the United Nations Standard Minimum Rules for the Treatment of Prisoners", (31 January–2 February 2012), online: <www.unodc.org/documents/justice-and-prison-reform/AGMs/Background_note.pdf>.

advertently *reduce* the "floor" of minimum standards.[96] Others called for bold progressive revisions, and pushed for the *Mandela Rules* to be legally binding.[97] However, most states refused this proposal, as they knew that they would be in non-compliance with some of the new *Mandela Rules*.[98] Certain countries wanted only a limited set of updated terms and references.[99]

The US argued that the timing for revising the 1955 SMRs was not appropriate given the global financial crisis.[100] Several interviewees mentioned that the US also argued against substantive revisions more generally.[101] The US submission does not say this in writing; it merely requests the inclusion of the topic of incarcerated women in the *Mandela Rules*.[102]

Ultimately, the first IEGM agreed on a targeted changes approach: redrafting rules only on certain identified issues, plus a preamble about prisoners' dignity and updates to terminology.[103] Some civil society actors saw this as a "loss for human rights" or a limiting framework,[104] while others argued that it was a pragmatic compromise.[105] One observer characterized the fact that the revision occurred at all as a surprise, given that some countries had an interest in eliminating or reducing the standards.[106] Also, it set the general principle that revisions should not lower the standards of existing 1955 SMRs. Setting the scope of the *Mandela Rules* at this medium range was a compromise between boldness and feasibility.

The main debate then shifted to the question of which issues would make the list for revisions. The categories listed for revisions skew toward the priorities of more sophisticated and well-funded systems: prisoners' inherent dig-

96. See e.g. UNODC, Finland, Ministry of Justice, *Response of the Government of Finland to Note CU 2011/26 and Note CU 2012/157/DO/JS*, UN Doc UNODC/CCPCJ/EG.6/2012/Gov.3, 2012.

97. See Secretariat to the Governing Bodies, *Summaries of Replies from Member States to the Notes Verbales of 8 March 2011 and 11 September 2012*, 2nd Mtg, UNODC/CCPCJ/EG.6/2012/CRP.1, 2012 [*Replies to Notes Verbales*]; Annabel Jackson Associates, *supra* note 29 at 6; Interview 2, *supra* note 36; Interview of International Organization Participant 1 (July–September 2017) [Interview 6].

98. Interview 7, *supra* note 52.

99. See e.g. *Replies to Notes Verbales*, *supra* note 97 (South Africa supported limited changes but not a revision of the definition of "prisoner" to include all forms of detention).

100. See *ibid.*

101. See Interview of Civil Society Participant (July–September 2017) [Interview 1]; Interview of Government Participant 1 (July–September 2017) [Interview 3]; Interview 5, *supra* note 52.

102. See *Replies to Notes Verbales*, *supra* note 97.

103. For example, this led to dropping references to "insane prisoner" and adding new language on LGBTQ prisoners. See UNODC, *Report on the meeting of the Expert Group on the Standard Minimum Rules for the Treatment of Prisoners held in Buenos Aires from 11 to 13 December 2012*, UN Doc UNODC/CCPCJ/EG.6/2012/4, December 2012 at paras 12, 15.

104. See Interview 5, *supra* note 52.

105. See Annabel Jackson Associates, *supra* note 29 at 14.

106. See Interview 2, *supra* note 36.

nity and value; medical and health services; disciplinary action and punishment (including solitary confinement); deaths in custody and torture; vulnerable groups and special needs; access to legal representation; and complaints and independent inspection. This list does not include numerous priorities of countries from the Global South[107] and NGOs.[108]

Interviewees from Global South countries suggested that the discussion should have devoted more attention to basic resource issues—overcrowding, food, space, and staff—since they shape implementation of any standards.[109] In the subsequent meetings and papers, the focus was on specific changes to each identified area.

III. Negotiations and Debates: Which Evidence and Voices Count for What

A. The Essex Papers: Framing Normative and Evidence-Based Rationales

The *Mandela Rules*' process involved a relatively high degree of input from subject-matter experts, not just from diplomats accredited to the UNODC. This was due in large part to the "Essex meetings", where practitioners, administrators, researchers, service providers, and advocates had a more direct role than in the IEGMs.[110] The Essex Papers clearly influenced the structure

107. See Centro de Estudios Legales y Sociales & Conectas Derechos Humanos, *Contributions for the Revision of the United Nations Standard for the Treatment of Prisoners*, UN Doc UNODC/CCPCJ/EG.6/2014/NGO.3, January 2014 [CELS]. Several Latin American NGOs' priorities did not make it into the list of targeted changes: the state as guarantor of prisoners' rights; non-violent management models; search procedures; different definitions of facility and cell space and overcrowding; and transfers. *Ibid* at 2.

108. See American Civil Liberties Union, *Statement of the American Civil Liberties Union on Solitary Confinement*, UN Doc UNODC/CCPCJ/EG.6/2014/NGO.6, March 2014 [ACLU Statement]; Amnesty International, *Revising the Standard Minimum Rules for the Treatment of Prisoners: Amnesty International Briefing on Discrimination and at Risk Groups in Prison*, UN Doc UNODC/CCPCJ/EG.6/2014/NGO.8, March 2014. See also CELS, *supra* note 107; Friends World Committee for Consultation, *The Revision of the Standard Minimum Rules for the Treatment of Prisoners: Prison Safety and the Children of Imprisoned Parents*, UN Doc UNODC/CCPCJ/EG.6/2014/NGO.1, October 2013; World Network of Users and Survivors of Psychiatry, *Submission to Second Intergovernmental Expert Group Meeting on the Review of the Standard Minimum Rules on the Treatment of Prisoners*, UN Doc UNODC/CCPCJ/EG.6/2012/NGO/5, December 2012. The World Network of Users and Survivors of Psychiatry argued for specific rules addressing the rights of persons with disabilities and "psychosocial disabilities" (mental health problems), particularly informed consent and autonomy regarding treatment. *Ibid*. See also World Network of Users and Survivors of Psychiatry, *Statement to the Second Intergovernmental Expert Group Meeting on the Review of the Standard Minimum Rules on the Treatment of Prisoners*, UN Doc UNODC/ CCPCJ/EG.6/2012/NGO/5/Add.1, December 2012 [WNUSP Statement].

109. See Interview 5, *supra* note 52; Interview 6, *supra* note 97; Interview 7, *supra* note 52.

110. Though this is a diverse list, interestingly it does not include formerly incarcerated people.

of the discussions and the actual text of the final version of the *Mandela Rules*. The final revised rules included, in whole or in part, seventy-seven percent of the 162 changes proposed in two of the Essex Papers; most of these changes used close to the exact wording in the Essex Papers.[111] In two key issue areas—health services and disciplinary action—over eighty percent of the recommendations of the Essex Papers appear in the final agreed upon text.[112] One interviewee said that the specific language of the Essex Papers was essential to the quality of the final text.[113] All of the respondents in my interviews spoke positively about how the Essex Papers presented categories of topics for revision, scholarly justifications, and potential language for revised text.[114] The official version of events, the UNODC Secretariat Working Papers, and meeting reports also align with the Essex Papers.

The *Mandela Rules*' mandate to reflect current social science in corrections reflects the increasing prominence of broader "evidence-based" corrections policies in the US, Canada, and internationally.[115] Nonetheless, the majority of the rationales for new or changed content in the rules presented in these written submissions—Essex Papers, Secretariat Working Papers, member state submissions, and NGO statements—relate to existing international and regional human rights instruments, rulings, and norms. These are listed for nearly every thematic area addressed in the papers.[116] Rationales rooted in social science evidence are more limited; they are generally presented as complementary justifications. The written accounts of the *Mandela Rules* process clearly invoke social science evidence on two issues: solitary confinement and health services.

The *Mandela Rules* on health care (Rules 24–35) specify that the state must provide health care similar to what is available to the general public.[117] They add required services for mental health, dentistry, HIV, tuberculosis, and drug

111. See Annabel Jackson Associates, *supra* note 29 at 12.

112. See *Ibid.*

113. See Interview 1, *supra* note 101.

114. See *ibid*; Interview 2, *supra* note 36; Interview 3, *supra* note 101; Interview 5, *supra* note 52; Interview 6, *supra* note 97; Interview 7, *supra* note 52.

115. See Edward J Latessa, Shelley J Listwan & Deborah Koetzle, *What Works (and Doesn't) in Reducing Recidivism* (Waltham: Anderson, 2014); Faye S Taxman & Steven Belenko, *Implementing Evidence-Based Practices in Community Corrections and Addiction Treatment* (New York: Springer, 2012); Solitary Confinement Report, *supra* note 46.

116. 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.

117. *Mandela Rules*, *supra* note 2, r 24 para 1.

dependence.[118] There is also significant new detail on the role of mental health professionals, on keeping prisoner files, on provisions for confidentiality, and on prisoners' autonomy for medical decisions.[119] Further, the *Mandela Rules* eliminate a doctor's role in allowing solitary confinement—a key change.[120] There are protections for independent clinical assessment of prisoners' physical conditions and health status, and for health care professionals' duty to report inhumane situations without reprisal.[121]

On health issues, Essex Paper 1 cites international organizations' "evidence-based practices" for most of services listed above, without explaining in detail.[122] This suggests that the research here is settled and already translated into policy guidelines. The World Health Organization policies listed are: the "comprehensive suicide policy", policies on mental illness prevention and screening, on HIV issues, on the social determinants of health, and on health care in prisons in general; the UNODC Drug Abuse Treatment Toolkit is also cited.[123]

The Essex Papers' justification for the *Mandela Rules*' mandate that states must provide these health care services is based on policy guidelines more than primary research. This framing suggests that the Essex Papers take for granted the validity of the primary research underlying the guidelines. James E. Ryan, writing about social science evidence in racial desegregation cases, proposes that social science evidence may be more persuasive when arguing about *how* a norm should be applied, not whether that norm is valid for a given issue or context.[124] From this perspective, the way the Essex Papers refer to social science evidence on health care suggests that the 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[125] or about the importance of physicians' independence from prison administrators in determining a prisoner's health needs or status. The debate is about resources for implementation.

118. *Ibid*, r 24 para 2.

119. *Ibid*, rr 25–26.

120. *Ibid*, r 46.

121. *Ibid*, rr 33–34.

122. Essex Paper 1, *supra* note 34 at 8–19.

123. See *ibid* at 6, 15–16.

124. James E Ryan, "The Limited Influence of Social Science Evidence in Modern Desegregation Cases" (2003) 81:4 NCL Rev 1659 at 1662.

125. A notable dissension in this arena is the statement by the World Network of Users and Survivors of Psychiatry, which makes a normative argument about personal autonomy and dignity to reject "standard" approaches to diagnosing and medicating mental health conditions and for preventing suicide and self harm. See WNUSP Statement, *supra* note 108. This view is not reflected in the final version of the *Mandela Rules*.

B. Solitary Confinement: Clear Harms, Questionable Effectiveness

On disciplinary questions, the *Mandela Rules* emphasize proportionality, due process, and consideration of mental illness when applying disciplinary measures.[126] They restrict the use of physical restraints, and call for greater use of alternative dispute resolution and prevention.[127] Rule 44 defines solitary confinement as confinement in a cell for twenty-two hours per day or more without meaningful human contact.[128] Rules 43 and 44 prohibit indefinite and prolonged (fifteen days or more) solitary confinement; Rule 45 prohibits any form of solitary confinement for people with certain mental and physical health conditions, pregnant women, and children. Solitary confinement must be used only as a last resort, subject to independent review, and with competent authorization.[129] Health care professionals cannot have a role in the decision to use solitary confinement, must monitor the health conditions of prisoners in solitary confinement, and must have the ability to recommend changes or release if harms occur.[130]

Social science evidence shows that solitary confinement often has harmful physical and psychological effects on prisoners, with stronger evidence of harm for cases of prolonged periods of confinement.[131] In contrast, the social science evidence on facility safety benefits is much weaker: research does *not* support the notion that solitary confinement is an effective safety tool.[132] One major report concludes that there is a "dearth of empirical evidence demonstra-

126. *Mandela Rules*, *supra* note 2, r 39.

127. *Ibid*, rr 36–48.

128. *Ibid*.

129. *Ibid*, rr 43–45.

130. *Ibid*, r 46.

131. For a full review of research on administrative segregation in the US system, see National Institute of Justice, *supra* note 46. Researchers broadly agree that solitary confinement causes harms to the inmate, though there are distinctions related to time periods. Some researchers find that any period of solitary confinement causes lasting damage. See e.g. Santiago Almanzar, Craig L Katz & Bruce Harry, "Treatment of Mentally Ill Offenders in Nine Developing Latin American Countries" (2015) 43:3 J American Academy Psychiatry & L 340; Craig Haney et al, "Examining Jail Isolation: What We Don't Know Can Be Profoundly Harmful" (2016) 96:1 Prison J 126; American Civil Liberties Union, *Caged In: Solitary Confinement's Devastating Harm on Prisoners with Physical Disabilities*, by Jamelia Morgan (2017), online: <www.aclu.org/report/caged-devastating-harms-solitary-confinement-prisoners-physical-disabilities>. Other researchers find no significant harms—but also no positive effects—for short periods of solitary confinement. See e.g. Ryan M Labrecque, *The Effect of Solitary Confinement on Institutional Misconduct: A Longitudinal Evaluation* (PhD Dissertation, University of Cincinnati, 2015) (Proquest); Robert G Morris, "Exploring the Effect of Exposure to Short-Term Solitary Confinement Among Violent Prison Inmates" (2016) 32:1 J Quantitative Criminology 1; Ivan Zinger, Cherami Wichmann & DA Andrews, "The Psychological Effects of 60 Days in Administrative Segregation" (2001) 43:1 Can J Crim 47.

132. See Cyrus Ahalt et al, "Reducing the Use and Impact of Solitary Confinement in Corrections" (2017) 13:1 Intl J Prisoner Health 41; Almanzar, Katz & Harry *supra* note 131; David M Bierie, "Is Tougher Better? The Impact of Physical Prison Conditions on Inmate Violence"

ting effectiveness".[133] Research on prison safety issues generally is limited and fraught with methodological challenges; it is difficult to isolate the effects of a single disciplinary tactic. Also, current research does not clearly back any specific alternative prison safety tactic,[134] though some correctional agencies and researchers are studying alternatives.[135] Yet, despite the lack of evidence of solitary confinement's effectiveness, prison managers and government representatives cite facility and inmate safety reasons as the primary justification for opposing limits on solitary confinement.[136]

In the *Mandela Rules*' preparatory documents, solitary confinement is the issue with the most reference to empirical research. But, the documents only mention research about the harms of solitary confinement, not about its (lack of) facility safety results. This is likely because it is less compelling to cite a *lack* of evidence for a tactic's effectiveness than to show clear evidence of negative effects. Instead, when the *Mandela Rules*' development process addressed prison operations and safety issues, correctional professionals were the key source of knowledge and expertise. Their role is discussed in the following section.

In the written documents, references to research on the harms of solitary are substantial. The first Essex Paper recommends a full rewrite of the previous Rule 31-32,[137] which identified prohibited punishments for infractions and permitted solitary confinement and diet restriction if a medical officer provided approval. The argument is explicit:

> The proposed language . . . focuses on the aspects of solitary confinement that are most damaging to a person's psychological health and wellbeing and therefore justify a ban on the use of such

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(2012) 56:3 Intl J Offender Therapy & Comparative Criminology 338; Arjen Boin & William AR Rattray, "Understanding Prison Riots: Towards a Threshold Theory" (2004) 6:1 Punishment & Society 47; James Byrne & Don Hummer, "In Search of the 'Tossed Salad Man' (and Others Involved in Prison Violence): New Strategies for Predicting and Controlling Violence in Prison" (2007) 12:5 Aggression & Violent Behavior 531; Susan Clark Craig, "Rehabilitation Versus Control: An Organizational Theory of Prison Management" (2004) 84:4 Prison J (Supplement) 92S; National Institute of Justice, *supra* note 46; Beth M Huebner, "Administrative Determinants of Inmate Violence: A Multilevel Analysis" (2003) 31:2 J Crim Just 107; Labrecque, *supra* note 131; Morris, *supra* note 131; Michael D Reisig, "Rates of Disorder in Higher-Custody State Prisons: A Comparative Analysis of Managerial Practices" (1998) 44:2 Crime & Delin 229; Ann Marie Rocheleau, "An Empirical Exploration of the 'Pains of Imprisonment' and the Level of Prison Misconduct and Violence" (2013) 38:3 Crim Just Rev 354; Sharon Shalev, *Thinking Outside the Box? A Review of Seclusion and Restraint Practices in New Zealand* (Auckland: New Zealand Human Rights Commission, 2017) [Shalev, *Thinking Outside the Box?*].

133. National Institute of Justice, *supra* note 46 at 12.

134. See *ibid*.

135. See e.g. Vera Institute of Justice, "Solitary Confinement: Common Misconceptions and Emerging Safe Alternatives", by Alison Shames, Jessa Wilcox & Ram Subramanian (2015), online: <www.vera.org/publications/solitary-confinement-common-misconceptions-and-emerging-safe-alternatives>.

136. See e.g. *BCCLA*, *supra* note 10 at paras 3, 346; *CCLA*, *supra* note 10 at paras 64, 160–61.

137. Essex Paper 1, *supra* note 34 at 20–23.

confinement generally and not limited to disciplinary purposes. *This is based on medical research which confirms that the denial of meaningful human contact can cause 'isolation syndrome' the symptoms of which include anxiety, depression, anger, cognitive disturbances, perceptual distortions, paranoia, psychosis, self-harm and suicide, and can destroy a person's personality.*[138]

The Essex Papers refer to well-known experts and studies on the psychological harms of "supermax" cells and solitary confinement,[139] as well as to the 2007 "Istanbul Statement on the Use and Effects of Solitary Confinement" of the International Psychological Trauma Symposium.[140] The UNODC Secretariat's summary of international good practice explicitly refers to the "extremely harmful psychological and sometimes physiological effects" of solitary confinement and the Istanbul Statement.[141] At no point do the Essex Papers question whether or not prolonged solitary confinement causes harm. Rather, the discussion is more about what time limits should be recommended and how to protect particularly vulnerable groups. This is likely because research findings are more settled regarding the negative psychological effects of prolonged solitary confinement, while there is more variation in effects from short periods.[142] The *Mandela Rules*' prohibition on prolonged and indefinite solitary confinement reflects this distinction.

One point of debate about solitary confinement in Canada is the extent to which international research findings apply to the Canadian context. Research on individual harms is central to the arguments and decisions in *CCLA* and *BCCLA*, the lawsuits challenging administrative segregation in Canadian federal prisons.[143] The rationales in the process of developing the *Mandela Rules* were grounded in solitary confinement research primarily from the US. The inclusion of this evidence implies that the international community considers US research relevant to other settings, even if the specific conditions of solitary confinement vary. For example, one interviewee, a correctional professional from a Global South country, said that even though solitary confinement is not always "solitary" (multiple people can be in a segregation cell), "[i]t is still a

138. Essex Paper 1, *supra* note 34 at 20 [emphasis added].

139. For example, Essex Paper 1 and Essex Paper 3 cite studies by Craig Haney, Stuart Grassian, and Sharon Shalev. Essex Paper 1, *supra* note 34 at 20, n 85; Essex Paper 3, *supra* note 34 at 86, n 312.

140. See Essex Paper 1, *supra* note 34 at 15, 21, 32–33; Essex Paper 3, *supra* note 34 at 71, 75, 76, 87, 91, citing "The Istanbul Statement on the Use and Effects of Solitary Confinement" in Sharon Shalev, ed, *A Sourcebook on Solitary Confinement* (London: Mannheim Centre for Criminology, 2008) 78.

141. See UNODC, *Notes and Comments on the United Nations Standard Minimum Rules for the Treatment of Prisoners*, online: <www.unodc.org/documents/justice-and-prison-reform/AGMs/Notes_and_comments-1250048-DMU_version.pdf>.

142. See Essex Paper 1, *supra* note 34 at 20, n 85; Essex Paper 3, *supra* note 34 at 86, n 312.

143. *CCLA*, *supra* note 10 at paras 235–54; *BCCLA*, *supra* note 10 at paras 104–254; Plaintiffs' Submissions, *supra* note 11.

prison within a prison".[144] Such an interpretation stands in contrast with the Canadian government's submission, which claims that the *Mandela Rules* are based on "the most severe conditions of confinement that can be found in the world"[145]—that is, not Canada. Moreover, the Ontario Superior Court explicitly rejected the notion that "the [Mandela] Rules are aimed at 'less civilized' countries".[146]

If we accept the social science research consensus on the harms of solitary confinement, the debate then turns to whether and how it may be justified in limited amounts to achieve other goals, specifically prison order and safety. Government arguments in both of the lawsuits challenging administrative segregation cite the "correctional management necessity" of broad discretion over solitary confinement, in order to handle inmate violence and infractions.[147] In the *Mandela Rules* preparatory process, there is no reference to social science research on the safety and management outcomes of solitary confinement, alternative tactics, or other procedures relevant to safety, such as bodily searches.[148]

Research on solitary confinement and prison safety outcomes is far from settled: its methods and findings are mixed. Many studies find insignificant or negative effects of isolation on prison order.[149] Studies showing positive safety outcomes tend to look at the overall picture of a given system or facility: policy framework, management strategies, facility conditions, inmate characteristics, and staff attitudes.[150] Some US and European studies suggest that positive-incentives disciplinary strategies—as well as better conditions, programs, family ties, and interaction with staff and outside groups—may contribute to reduced violence levels.[151] It is difficult to compare solitary confinement to other disci-

144. See Interview 7, *supra* note 52.

145. See Defendant's Final Argument, *supra* note 13 at para 19.

146. *CCLA*, *supra* note 10 at para 268.

147. Defendant's Final Argument, *supra* note 13 ("[m]aintaining the security and safety of all persons in a penitentiary is a complicated and difficult task . . . situations arise that require the removal of persons from the general population" at para 9). The Ontario Superior Court ruling, similarly, accepts the importance of some managerial discretion over administrative segregation for this reason. See *CCLA*, *supra* note 10, paras 173–75.

148. One interviewee raised this point about searches: prison administrators object to prohibiting certain searches altogether (e.g., infants, bodily cavities) as they believe this generates an incentive for visitors to hide contraband there. However, this debate rarely refers to empirical data about the primary sources and methods of contraband entering facilities, nor about the collateral effects of different search practices on visits, trust, family ties, etc. See Interview 2, *supra* note 36.

149. See Ahalt et al, *supra* note 132 at 44; Almanzar, Katz & Harry, *supra* note 131; Bierie, *supra* note 132; Boin & Rattray, *supra* note 132; Byrne & Hummer, *supra* note 132; Craig, *supra* note 132 at 111; National Institute of Justice, *supra* note 46; Huebner, *supra* note 132 at 114; Labrecque, *supra* note 131; Morris, *supra* note 131; Reisig, *supra* note 132; Rocheleau, *supra* note 132 at 369; Shalev, *Thinking Outside the Box?*, *supra* note 132.

150. See e.g. Boin & Rattray, *supra* note 132; Byrne & Hummer, *supra* note 132; Craig, *supra* note 132 at 110S; Huebner, *supra* note 132; Reisig, *supra* note 132 at 229–30.

151. See Craig, *supra* note 132 at 105S–107S; Huebner, *supra* note 132.

plinary methods in a way that isolates the effects of a single intervention. Further, data and measurements on the use of solitary confinement are in consistent and incomplete.[152] Definitions of "order" and "safety" in prisons are multi-faceted. In some countries, violence patterns depend mainly on how inmate-led power arrangements control resources.[153] A reduction in violent incidents may not be due to meaningful improvements in prison management methods. Research on "what works" for prison safety needs to account for these different dynamics.

To be clear, the *Mandela Rules* do not make any claims one way or the other about the effectiveness of solitary confinement for maintaining prison safety. Instead, they push for expanded use of alternative tactics mainly because solitary confinement harms prisoners. Reports and conferences about implementation of new approaches call for more data, studies, and transparency, particularly in countries with less institutional capacity and resources.[154] Many countries in Latin America lack basic prison data;[155] only a few have any information on prison violence or discipline methods.[156] Without studies that enable meaningful comparison, the discussion about "good practices" more generally is not grounded in empirical data or clear definitions and metrics.[157]

Despite being absent in written texts, the management and safety facets of the solitary confinement issue were a major part of the negotiation process. This discussion now turns to the role that experts, from civil society and from corrections agencies, played.

C. Negotiations: Politics and Priorities

The recollections and reflections of the people who participated in the process provide a peek behind the negotiation room doors. All of the interviewees

152. See National Institute of Justice, *supra* note 46. There is some descriptive US data. See Sarah Baumgartel et al, "Time-In-Cell: The ASCA-Liman 2014 National Survey of Administrative Segregation in Prison" (2015) Yale Law School Public Law Research Paper No 552 (however, such data in Global South countries is nearly non-existent).

153. See Andrés Antillano, "When Prisoners Make the Prison: Self-Rule in Venezuelan Prisons" (2017) 229 Prison Serv J 26 at 27–29; Benjamin Lessing, "Inside-Out: The Challenge of Prison-Based Criminal Organizations", Brookings Institution. (2016), online: <www.brookings.edu/research/inside-out-the-challenge-of-prison-based-criminal-organizations> at 1–2.

154. See Essex Paper 3, *supra* note 34 at 29, 42; Solitary Confinement Report, *supra* note 46 at 32–33; Penal Reform International & Thailand Institute of Justice, "Summary of Discussions: The Southeast Asia Regional Consultation on the Implementation of the Revised United Nations Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules)" (2016), online: <cdn.penalreform.org/wp-content/uploads/2016/09/Summary-of-discussions_Mandela-Rules-SEA-Regional-consultation-August2016-1.pdf>.

155. See Darke & Karam, *supra* note 52.

156. See Guillermo Sanhueza, Francisca Brander & Fernando Fuenzalida, "First Survey on Prison Life in Chile: A Social Work Call for Prison Reform" (2017) Intl Social Work 1.

157. See *Replies to Notes Verbales*, *supra* note 97.

for this study said that social science rationales and evidence were not very prominent in negotiations at the formal IEGMs.[158] Rather, the statements of people widely perceived as subject-matter experts carried the most weight. Several interviewees noted that there simply was not much time for actual presentation or discussion of the rationales of any given recommendation or revision.[159] Optional side events provided some details of research evidence relevant to the proposed revisions on certain topics, but these were not part of the main discussions.[160]

The topic of LGBTQ prisoners' rights illustrates the compromises and choices that member state delegations made during the negotiation process. The proposed revisions to the *Mandela Rules* would prohibit discriminatory treatment based on sexual orientation, and would require the classification of transgender prisoners according to their self-determined gender. According to interviewees, certain countries resisted these revisions due to "punitive attitudes" toward prisoners in general and "cultural beliefs" about sexual orientation.[161] Though the push to include LGBTQ status as a prohibited class for discrimination or a vulnerable group failed, Argentina's proposal to allow prisoners to register according to their self-perceived gender (Rule 7) was unexpectedly successful.[162] In one account of this debate, this outcome was simply the result of those countries choosing their battles and focusing their resistance elsewhere.[163]

Reflecting on the negotiations over solitary confinement, interviewees broadly agreed that at the outset, any major new restrictions seemed unreachable. The US government's initial position was against robust restrictions.[164] Several South American countries favoured strong restrictions, and argued this purely on the basis of normative human rights and international law related to torture.[165] Another government respondent suggested that some countries were motivated to adjust policy due to public criticism of specific cases of severe solitary confinement situations.[166] One participant described his member

158. See Interview 1, *supra* note 101; Interview 2, *supra* note 36; Interview 3, *supra* note 101; Interview of Government Participant 2 (July–September 2017) [Interview 4]; Interview 5, *supra* note 52; Interview 6, *supra* note 97; Interview 7, *supra* note 52.

159. See Interview 1, *supra* note 101; Interview 3, *supra* note 101; Interview 6, *supra* note 97.

160. See Interview 3, *supra* note 101.

161. Interview 1, *supra* note 101; Interview 3, *supra* note 101; Interview 5, *supra* note 52; Interview 6, *supra* note 97.

162. *Mandela Rules*, *supra* note 2, r 7(a).

163. See Interview 5, *supra* note 52.

164. See Interview 1, *supra* note 101; Interview 2, *supra* note 36, Interview 3, *supra* note 101; Interview 5, *supra* note 52; Interview 6, *supra* note 97.

165. See Interview 5, *supra* note 52.

166. See Interview 4, *supra* note 158.

state delegation as caught between normative and empirical arguments for drastic limits on the practice, on the one hand, and the reality that it is widely used across its own prison and jail system, on the other: "We were in the middle [between those wanting no restrictions and those wanting total prohibition]. But we couldn't go too close to saying no to solitary, because we have it, right?"[167]

According to some interviewees, three factors influenced the change in the US position on solitary confinement.[168] All related to specific expert policy knowledge more than about broader empirical evidence. First, civil society organizations showed how the US position at the *Mandela Rules* negotiations was not aligned with recent changes in domestic policies under the Department of Justice (under the Obama administration), which restricted the use of solitary confinement.[169] Observers perceived that US officials understood that solitary confinement practices are clearly out of step with much of international law,[170] but until this stage, the US delegations had seemingly accepted this "outlier" status.[171] The potential misalignment with domestic policy was more decisive. This argument relied on the knowledge and influence of civil society groups familiar with domestic law and policy, not international standards or academic research. Second, the US was striking a balance between its domestic reality (widespread use of solitary confinement) and its international donor position (promoting better prison conditions). This created an incentive to move towards a more progressive position in an international forum. As one respondent said: "We don't want to undermine what is happening in terms of reforming [prison] systems internationally."[172] Third, the involvement of correctional professionals from the US—though at a late stage—was crucial. This is discussed in the next section.

D. Correctional Administration Experts: Complicating Management Imperatives

According to interviewees, the most influential expertise on the management considerations in the *Mandela Rules*' process was that of particular individual correctional leaders, especially in the fourth IEGM.[173] They provided a level of credibility on this issue that neither diplomats nor civil society represen-

167. Interview 3, *supra* note 101.

168. See Interview 1, *supra* note 101; Interview 3, *supra* note 101.

169. See US, Department of Justice, *Report and Recommendations Concerning the Use of Restrictive Housing* (Washington, DC: Department of Justice, 2016).

170. Specific US reservations in the CAT provide a loophole from a purely legal point of view. CAT Reservations, *supra* note 61 at 7.

171. See Interview 1, *supra* note 101; Interview 5, *supra* note 52.

172. Interview 3, *supra* note 101.

173. See Interview 1, *supra* note 101; Interview 2, *supra* note 36; Interview 3, *supra* note 101; Interview 5, *supra* note 52; Interview 7, *supra* note 52.

tatives could. Contrary to stereotypes, this "administration" perspective was not automatically in favour of punitive measures and broad prison staff discretion—and this proved important for building consensus on the *Mandela Rules*.[174]

Interviewees also mentioned the varying level of involvement of subject-matter experts in the IEGM delegations.[175] At the Vienna meetings, member state diplomats accredited to UNODC led the debates, but were not able to provide as much substantive content. Delegations that included prison management professionals enabled more concrete and detailed negotiations. Two participants said that the second Vienna meeting in 2014—which was a backup solution after a planned meeting in Brazil was cancelled at a late stage—nearly fell apart because of the lack of subject-matter experts.[176] One interviewee said that outside of the Vienna meetings, the IEGM was composed of "a pretty professional group of government and NGO people . . . not normal political people".[177]

The prison management perspective is especially salient for countries whose use of solitary confinement relies on facility safety rationales (rather than simply for punitive reasons). Two US state-level correctional directors, from Colorado and Washington, joined the fourth IEGM in Cape Town as accredited experts, and played a pivotal role.[178] Both are known reformers in the US; one famously spent twenty-four hours in a solitary confinement cell in his own system[179] and spoke to the IEGM audience about the harrowing experience.[180] Each argued to the IEGM that strong restrictions on solitary confinement would *not* hamper an administrator's ability to manage a facility safely. They cited examples from their respective state reforms to demonstrate this. Even though neither state has restrictions as strict as those in the *Mandela Rules*, their statements nonetheless changed the narrative in the negotiations, and influenced the US delegation position. The directors' professional role as administrators, combined with their personal credibility and testimonies, gave their views influence.[181] One participant speculated: "My guess is they [the IEGM] came up with and agreed to the 15 days limit [on solitary confinement]

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174. See Interview 1, *supra* note 101; Interview 2, *supra* note 36; Interview 3, *supra* note 101.

175. The external evaluation makes a similar point. See Annabel Jackson Associates, *supra* note 29; Interview 3, *supra* note 101; Interview 5, *supra* note 52; Interview 6, *supra* note 97.

176. See Interview 5, *supra* note 52; Interview 6, *supra* note 97.

177. Interview 2, *supra* note 36.

178. See Interview 1, *supra* note 101; Interview 2, *supra* note 36; Interview 3, *supra* note 101; Interview 5, *supra* note 52.

179. See Rick Raemisch, "My Night in Solitary", *The New York Times* (20 February 2014), online: <www.nytimes.com/2014/02/21/opinion/my-night-in-solitary.html?mcubz=1&_r=0>.

180. See Interview 3, *supra* note 101.

181. See Interview 1, *supra* note 101; Interview 2, *supra* note 36; Interview 3, *supra* note 101; Interview 5, *supra* note 52.

because they had respect for the two of them [US state prison administrators]. Those two were practical and obviously concerned with human rights."[182]

One observer noted that it is rare for the US delegations to engage experts outside of the federal system.[183] Including these two leaders was a strategic move by US civil society organizations, which arranged, paid for, and secured accreditation for the two leaders.[184] The US delegation quickly realized that they held a unique voice and experience. It shifted its approach, and gave the state correctional administrators a prominent role, including a literal seat at the negotiation table, not the observer row.[185]

More broadly, having correctional practitioners as part of member state delegations greatly facilitated informal conversations and rapport, which in at least one instance help to overcome an "impasse" on wording.[186] When the UN approved the *Mandela Rules*, the Colorado Department of Corrections issued a press release heralding the revised *Mandela Rules* as "important", with emphasis on the role of its director on the topic of solitary confinement.[187] Two interviewees with correctional practice backgrounds in Global North countries admitted that prior to the revision process, they had little awareness of the *Mandela Rules*.[188] They reflected that ongoing networks among correctional professionals in different countries contribute to better implementation of the *Mandela Rules* into their domestic and international assistance work.[189]

E. Civil Society Experts: The Influence of "Serious Advocates"

A stereotype of prisoner rights advocates is that they insist on conditions and rules that are too idealistic and ignore the difficulties that prison staff face in their daily work. Some correctional professionals reflected that when advocates set unrealistic targets, the negotiation falters and the international standards become less relevant.[190] Efforts to build meaningful standards that will actually influence daily practice require dismantling some of this "us versus them" mentality between advocates and correctional personnel.[191]

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182. Interview 2, *supra* note 36.

183. See *ibid.*

184. See Interview 1, *supra* note 101.

185. See *ibid*; Interview 3, *supra* note 101.

186. Interview 3, *supra* note 101.

187. US Department of State & Colorado Department of Corrections, Joint Media Note, "Colorado Department of Corrections, U.S. State Department Help Successful United Nations Push to Update Antiquated Standards for Treatment of Prisoners" (23 May 2015).

188. See Interview 3, *supra* note 101; Interview 4, *supra* note 158.

189. See Interview 3, *supra* note 101; Interview 4, *supra* note 158.

190. See Interview 2, *supra* note 36; Interview 6, *supra* note 97.

191. See Solitary Confinement Report, *supra* note 46.

In the *Mandela Rules*' process, civil society advocates were influential because they proactively offered feasible proposals and took operational issues seriously. As a result, member states and correctional practitioners perceived the civil society actors as serious, knowledgeable, and expert colleagues—not idealistic or adversarial. Although the materials the civil society group co-produced (i.e., the Essex Papers and briefing materials) shaped this perception, their role in the negotiation process—convening, facilitating, catalyzing—was equally important. PRI encouraged a balanced and "not academic" approach to revising the *Mandela Rules*.[192] This sometimes meant persuading other NGOs to accept compromise positions.[193] This resulted in a final text that was described as "practical" and "aligned with human rights" by participants from both advocacy and correctional administration positions.[194]

A crucial choice by civil society actors was to reach out to correctional professionals. The civil society coordinators of the revision process deliberately recruited and facilitated the participation of correctional administrators from a range of countries, on member state delegations and as individual experts.[195] Several interview respondents commented that prison administrators from countries in Europe, Asia, and South America spoke in favor of progressive revisions on a range of issues—the collegial and pragmatic tone of the advocates, in part, enabled this dialogue.[196]

PRI coordinated the input of other organizations and some governments in the IEGM process, and disseminated accessible and substantive briefing materials and updates.[197] PRI reached out to domestic human rights NGOs that had little engagement with international processes and/or prisoner rights.[198] This required PRI to be fluent in all aspects of the *Mandela Rules* and the implementation issues they raise, not just one or two priority issues, as well as domestic political dynamics of other countries. PRI's work was recognized as "authoritative" and PRI as an "engine" of the process.[199] Even government officials who viewed NGOs as secondary players—"we hear them out but they don't change our positions"—readily acknowledged that the briefing materials

192. See "Introduction to the 'Mandela Rules' with Andrea Huber" (15 June 2015) (podcast) at 00h:11m:41s, online: Penal Reform International <www.penalreform.org/resource/podcast-introduction-to-the-mandela-rules-with-andrea/>.

193. See e.g. Annabel Jackson Associates, *supra* note 29 at 11. NGOs agreed to recognize that independent investigation of deaths in custody is "outside the remit of prison administration". *Ibid.*

194. Interview 1, *supra* note 101; Interview 2, *supra* note 36.

195. See Annabel Jackson Associates, *supra* note 29.

196. See Interview 5, *supra* note 52; Interview 6, *supra* note 96; Interview 7, *supra* note 52.

197. See Annabel Jackson Associates, *supra* note 29 at 9–11, 14.

198. See Interview 1, *supra* note 101.

199. Annabel Jackson Associates, *supra* note 29.

and side events organized by NGOs were useful and professional, which helped to overcome the potential mistrust between human rights advocates and institutional officials.[200]

One additional key "serious advocate" expert was not a direct participant in the *Mandela Rules*' process, but exerted significant influence: UN Special Rapporteur Against Torture, Juan Méndez. In 2011, his office issued a report identifying prolonged solitary confinement as torture.[201] Press and advocacy documents cited this statement, and nearly every document that fed into the *Mandela Rules* mentions it.[202] Méndez's voice carried weight, due to his personal and institutional credibility. His statements were bolstered by reports and statements along similar lines issued by the Inter-American Rapporteur on Persons Deprived of Liberty.[203] Méndez established the fifteen-day cap on solitary confinement as a bold but feasible limit—much less than the standard thirty days, but short of a total ban. This has become a de facto reference point as a good faith effort at balancing human rights principles with feasible targets. The Ontario Superior Court in *CCLA* describes the fifteen-day maximum as having "evolved from a contextual analysis to a hard and fast rule because the international community came to a consensus".[204] One respondent reflected: "Some countries disagreed with the fifteen-day cap, but you aren't going to stand up and disagree with the Rapporteur against Torture".[205]

Conclusion

The *Mandela Rules* are an example of a new generation of soft law international norms: voluntary standards and oversight mechanisms, built collaboratively by many countries within the UN structure, with the goal of solving a complex global problem. In the realm of prisons, the *Mandela Rules* are distinct from earlier standards and other human rights instruments for two reasons. First, they integrate empirical research and expertise as part of their rationale. Second, they balance normative human rights principles with practical operational considerations for prisons. In this sense, the story of the development of the *Mandela Rules* has implications for how courts, institutions, advocates, and practitioners think about these international standards, as well as, perhaps, international norms addressing other global problems.

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200. Interview 3, *supra* note 101.

201. *Interim Report*, *supra* note 8 at 21.

202. See Essex Paper 1, *supra* note 34 at 20; Essex Paper 2, *supra* note 34 at 20; Essex Paper 3, *supra* note 34 at 88; ACLU Statement, *supra* note 108 at 3; CELS, *supra* note 107 at 10.

203. See Interview 5, *supra* note 52.

204. *Supra* note 10 at para 59.

205. Interview 5, *supra* note 52.

The new international prison standards emerged from discussions that combined human rights principles, social science evidence, individual experts, and political compromises. The primary rationales for the revisions were based on international laws and norms. Social science evidence appeared in secondary, complementary ways, mainly on health and solitary confinement issues. On health issues, there was little debate about the substance of the revised rules, and the *Mandela Rules*' process used social science evidence mostly to guide policy implementation. On solitary confinement, there was more debate about the content of the revisions to the *Mandela Rules*. As this paper has set out, the preparatory meetings and documents drew on social science evidence about the physical and psychological harms of solitary confinement to bolster the rationale for setting new restrictions. The debates considered this evidence, alongside moral principles, prison operations issues, and political realities. This process led to a significant milestone: the international community reached an agreement that solitary confinement should be prohibited or limited to fifteen days. With this clear position decided, the international community's discussions can turn to implementation. Taking up Ryan's point that some courts draw on social science evidence more for pragmatic implementation questions than for normative ones,[206] this shift means that there is a need for more research on alternatives to solitary confinement, including effects on prisoner health, facility safety, internal investigations, and due process.

Apart from their groundbreaking restrictions on solitary confinement, the *Mandela Rules* are remarkable for being prison standards that aim to improve *both* human rights and prison safety. The process for building the *Mandela Rules* rejected the framing of prisoner rights and prison safety as goals in opposition to one another. Government officials often contend that broad discretion over solitary confinement is a common sense and rational strategy for maintaining prison order and safety.[207] Others suggest that the balance between prisoner well-being and facility safety must be merely recalibrated.[208] These frames contain the flawed assumption that solitary confinement is necessary and beneficial for prison facility safety. This study shows that the *Mandela Rules* development process broke away from the notion of a zero-sum trade-off between rights and safety, due in large part to statements by US correctional leaders about achieving prison safety without prolonged solitary confinement. The lack of social science research evidence on the effectiveness of solitary confinement

206. Ryan, *supra* note 124 at 1662–64.

207. See Defendant's Final Arguments, *supra* note 13 at para 753; National Institute of Justice, *supra* note 46 at 12; Kerr, "Contesting Expertise", *supra* note 20 at 77–84; Naylor, *supra* note 28.

208. See *CCLA*, *supra* note 10 at para 227. The call for a "genuine attempt to balance" these two factors, seemingly in opposition, by giving more attention to the harms that prisoners suffer underlies much of the Ontario Superior Court ruling. *Ibid.*

for prison safety aligns with this shift, but was a secondary factor. Correctional professionals and advocates may reasonably disagree on the details of appropriate restrictions and monitoring of segregation. But the *Mandela Rules* process shows that "correctional management expertise" does not endorse solitary confinement as a necessary prison safety tool. This same insight is at the heart of the *BCCLA* decision: prolonged administrative segregation, through its negative effects on individual prisoners, can undermine long-term facility safety, rather than enhancing it.[209] This is a crucial shift for future discussions about implementation of the *Mandela Rules* and alternatives to segregation, in Canada and internationally.

The *Mandela Rules*' process also balanced setting bold goals with pragmatism about implementation challenges. The new standards are neither a rehash of basic points that most countries already comply with nor a utopic wish list of prisoner advocates. The *Mandela Rules* are ambitious standards, some of which go substantially beyond current practices. But they also leave room for countries to implement the principles and rules in different ways in different settings.[210] The *Mandela Rules* are indeed an example of Waldron's theory of when international norms may be appropriate guidance for domestic cases—law as a problem-solving enterprise.[211] From this perspective, the *Mandela Rules*' occasional references to varying levels of implementation across countries[212] are not meant as a loophole for non-compliance, but rather as a necessary element of pragmatism. Some countries need to increase resources for basic infrastructure and services. Other countries—such as Canada—need to build new policies and practices to replace solitary confinement, and to ensure the meaningful participation of correctional staff in such reforms. Translating new standards into ongoing practice in corrections is complex, and can lead to unanticipated incentives and problems.[213] Durable change requires internal institutional alignment on the rationale and pathway for reforms, not just external pressure, scrutiny, or metrics.[214] The *Mandela Rules*' process shows that Canada

209. *Supra* note 10 at paras 326–328.

210. See Interview 2, *supra* note 36.

211. Waldron, *supra* note 19 at 146.

212. See e.g. *Mandela Rules*, *supra* note 2, Preamble, Preliminary Observation 2 ("not all rules are capable of application in all places and at all times").

213. See Ivan Zinger, "Human Rights and Federal Corrections: A Commentary on a Decade of Tough on Crime Policies in Canada" (2016) 58:4 Can J Corr 609; Heather Schoenfeld, "Mass Incarceration and the Paradox of Prison Conditions Litigation" (2010) 44:3/4 Law & Soc'y Rev 731.

214. See R Arjen Boin & Marc HP Otten, "Beyond the Crisis Window for Reform: Some Ramifications for Implementation" (1996) 4:3 J Contingencies & Crisis Management 149; Brian W Head, "Reconsidering Evidence-Based Policy: Key Issues and Challenges" (2010) 29:2 Policy & Society 77; Fergus McNeill et al, "Reexamining Evidence-Based Practice in Community Corrections: Beyond 'A-Confined View' of What Works" (2012) 14:1 Justice Research & Policy 35.

cannot dismiss the new standards as being only for other places where corrections systems are less sophisticated—and also that local context shapes what counts as an improvement.

The story behind the *Mandela Rules* also raises a point of caution: the rules are the product of political compromises among countries with differing priorities and resources, finalized under deadlines and procedural limitations. The participants resolved many of these tensions by retaining the *Mandela Rules*' status as *non-binding* (similar to other soft law norms); as minimum standards, the rules represent a floor, not a statement of excellence. In this perspective, the *Mandela Rules* are a starting point, not a full road map.

International soft law standards in any social policy field are always an evolving effort to balance the tension between being too generic and too prescriptive.[215] Scholars find that countries often improve coordination and compliance mechanisms over time.[216] As one *Mandela Rules* development participant put it: "We managed to raise the non-binding floor by a few feet, and that matters".[217] This study shows that the *Mandela Rules* represent the accumulated, empirically grounded knowledge and serious problem solving efforts of credible people in the international community, from a wide range of contexts. Because the process integrated moral, operational, social science, and implementation considerations, the *Mandela Rules* are important and relevant to Canadian courts, corrections agencies, and civil society. The process behind the *Mandela Rules* also reshaped the way the international community approached the issue of solitary confinement: it overcame the perceived opposition between prisoner rights and facility safety. For Canadian debates on solitary confinement, the *Mandela Rules* offer not just well-founded principles and standards, but also an example of how to build agreement on feasible solutions for this contentious issue.

215. See Joutsen, *supra* note 27; Interview 6, *supra* note 97.
216. See Guzman & Meyer, *supra* note 57 at 205; Kirton & Trebilcock, *supra* note 56.
217. Interview 5, *supra* note 52.