

THE UNIVERSITY OF ZAMBIA

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**SEXUAL VIOLENCE AND HIV/AIDS IN PRISONS VIS-À-VIS THE
RIGHT TO LIFE UNDER ARTICLE 12 OF THE CONSTITUTION OF
ZAMBIA**

BY

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A dissertation submitted to the University of Zambia Law Faculty in partial fulfillment of the requirements for the Award of the Bachelor of Laws (LLB) Degree.

2011

DECLARATION

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ABSTRACT

It is a notorious fact that violence is part of life in prisons in Zambia. This includes sexual violence among prisoners despite the existence of established international standards for conditions in prisons. Acts of sexual violence perpetrated by prisoners against each other lead to prisoners contracting HIV/AIDS. This paper thus examines the impact of sexual violence and HIV/AIDS in prisons on prisoners' enjoyment of the right to life.

In doing so, the paper examines the legal structure in place dealing with the protection of the human rights of prisoners. This includes domestic legislation such as the Constitution and the Prisons Act. Reference is also made to international human rights instruments to ascertain the level of protection of the human rights of prisoners on the international plane.

This dissertation also looks into the consequences of sexual violence in prisons. It is enquired what factors contribute to the high prevalence of sexual violence and HIV infection rates in prisons. In doing so, this dissertation also looks at the impact of sexual violence and HIV/AIDS on the prison community in light of the extremely poor prison conditions and what impact this has on victims of sexual violence. This paper also looks into what measures are in place to deal with the problems of sexual violence and HIV/AIDS in prisons. Issues such as access by prisoners to treatment and the policy against distribution of condoms are also looked into.

The paper also examines the standard used to interpret the right to life. Reference is made to decisions of international tribunals such as the European Court of Human Rights and the United Nations Human Rights Committee. The paper looks into the extent to which the right to life is upheld in relation to prisoners. In this regard, the paper examines the impact that sexual violence and HIV/AIDS coupled with the poor conditions in prisons has on the enjoyment of the right to life by prisoners.

From the discussion, recommendations are made on how to address the problems facing the prison community in this regard and ultimately enhance the enjoyment of the right to life by prisoners. A conclusion is drawn as to whether the prevalence of sexual violence which leads to prisoners contracting HIV and the prevalence of HIV in light of the poor conditions of prisons in Zambia amounts to a violation of the right to life of prisoners.

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DEDICATION

This paper is dedicated to my parents Ezron and Ennie Yosa who have served as my inspiration and have been an invaluable source of support and encouragement.

TABLE OF CONTENTS

Title.....	i
Declaration.....	ii
Supervisor’s Approval.....	iii
Abstract	iv
Acknowledgements.....	v
Dedication.....	vi
Table of Contents.....	vii
Table of Statutes.....	xi
Table of International Instruments	xii
Table of Cases	xiii
List of Abbreviations	xiv

CHAPTER 1

THE PROBLEM OF HIV/AIDS IN ZAMBIAN PRISONS: A GENERAL INTRODUCTION

1.0. Introduction.....	1
1.1. Statement of the Problem.....	3
1.2. Rationale and Justification.....	4
1.3. Definitions.....	5

1.4.	Methodology.....	6
1.5.	The Problem of HIV/AIDS in Prisons: General Introduction.....	6
1.6.	Conclusion.....	8

CHAPTER 2

THE LEGAL STRUCTURE FOR THE TREATMENT OF PRISONERS

2.0.	Introduction.....	9
2.1.	Domestic Legislation.....	9
2.1.1.	The Constitution of Zambia.....	10
2.1.2.	The Prisons Act.....	11
2.2.	International Instruments.....	11
2.2.1.	Standard Minimum Rules for the Treatment of Prisoners.....	12
2.2.2.	Body of Principles for the Protection of all Persons under any Form of Detention or Imprisonment.....	13
2.2.3.	The Universal Declaration of Human Rights (UDHR).....	15
2.2.4.	The International Convention on Civil and Political Rights.....	16
2.2.5.	The International Covenant on Economic, Social and Cultural Rights.....	17
2.2.6.	The Convention Against Torture and Other Cruel and Inhuman or Degrading Treatment or Punishment.....	18
2.3.	Conclusion.....	19

CHAPTER 3

THE IMPACT OF SEXUAL VIOLENCE AND HIV/AIDS IN PRISONS

3.0.	Introduction.....	20
3.1.	HIV/AIDS in Prisons.....	21
3.2.	Access to Treatment	22
3.3.	Prevalence of Sexual Violence in Prisons.....	24
3.4.	Conclusion.....	28

CHAPTER 4

THE EXTENT TO WHICH PRISONERS' RIGHT TO LIFE IS UPHELD

4.0.	Introduction.....	29
4.1.	Standard of Interpretation of the Right to Life.....	30
4.2.	The Extent to Which Prisoners' Right to Life is Upheld.....	34
4.3.	The Policy Against Distribution of Condoms.....	37
4.4.	Conclusion.....	38

CHAPTER 5

RECOMMENDATIONS AND CONCLUSION

5.0.	Introduction.....	40
5.1.	Conclusion.....	40
5.2.	Recommendations.....	43

5.2.1. Sexual Violence.....	44
5.2.2. Tuberculosis.....	44
5.2.3 HIV/AIDS.....	45
5.2.4 Systemic Reforms.....	46
Bibliography	48

TABLE OF STATUTES

The Constitution of Zambia, Cap 1 of the Laws of Zambia

The Penal Code, Cap 87 of the Laws of Zambia

The Prisons Act, Cap 97 of the Laws of Zambia

TABLE OF INTERNATIONAL INSTRUMENTS

Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment

Optional Protocol to the Convention Against Torture and Other Cruel and Inhuman or Degrading Treatment or Punishment (OPCAT)

International Covenant on Civil and Political Rights

International Covenant on Economic, Social, and Cultural Rights

The Standard Minimum Rules for the Treatment of Prisoners

United Nations Universal Declaration of Human Rights

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Younger v. the United Kingdom, Application No. 57420/00, ECHR 2003-I. Available at <http://www.echr.coe.int/./hudoc+database> Accessed on 14/12/210

LIST OF ABBREVIATIONS

AIDS – Acquired Immune Deficiency Syndrome

ARASA – AIDS Rights Alliance for Southern Africa

A.R.T - Anti-Retroviral Treatment

ARVs - Anti-Retroviral Drugs

HIV – Human Immune-Deficiency Virus

ICESCR - International Covenant on Economic, Social and Cultural Rights

ICCPR - International Convention on Civil and Political Rights

PRISCCA - Prisons Care and Counselling Association

SMRs - Standard Minimum Rules for the Treatment of Prisoners

UDHR - Universal Declaration of Human Rights

CHAPTER 1

THE PROBLEM OF HIV/AIDS IN ZAMBIAN PRISONS: A GENERAL INTRODUCTION

1.0. INTRODUCTION

The right to not be arbitrarily deprived of life is a universal right protected by several human rights instruments and its exercise is essential for the enjoyment of all other human rights. If not respected, all other rights lack meaning.¹ It is trite that prisoners upon incarceration are lawfully deprived of their enjoyment of certain rights such as the right to personal liberty and the right to freedom of movement. However, the right to life is one that prisoners continue to enjoy even while incarcerated. The right to life is enshrined under Article 12 of the Constitution of Zambia.² Article 12 also sets out the circumstances under which an individual may lawfully be deprived of the right to life. Incarceration is not one of the grounds set out in the Constitution by which an individual may be deprived of this right.

Like all persons in society, prisoners are entitled to enjoy the highest attainable standard of physical and mental health. This right is guaranteed under international law in Article 25 of the United Nations Universal Declaration of Human Rights (1948)³ and Article 12 of the International Covenant on Economic, Social, and Cultural Rights (1966).⁴ The international community has generally accepted that prisoners retain all rights that are not taken away as a fact of incarceration.

Loss of liberty alone is the punishment, not the deprivation of fundamental human rights. It follows therefore that loss of liberty upon incarceration must not result in derogation of all other rights not lost by virtue of imprisonment. States therefore have an obligation to implement legislation, policies and programmes consistent with international human rights norms to ensure that prisoners are provided a standard of care and treatment equivalent to that

¹ International Commission of Jurists. ICJ. Sexual Orientation, Gender Identity and International Human Rights Law. Human Rights Education Associates. 2009. Page. 87

² Constitution of Zambia, Cap 1 of the Laws of Zambia.

³ Adopted by the United Nations General Assembly on 10th December 1948

⁴ Adopted by General Assembly resolution 2200A (XXI) of 16 December 1966

available in the outside community. This rule cannot be dependent on the material resources available to the national government in question.

It is a cardinal rule of international human rights law that the right to life must always be interpreted in an expansive way and any of its limitations must be approached with a restrictive interpretation. Further, the state is required to take positive measures to safeguard the right to life.⁵ States are required to;

‘take reasonable measures to protect their citizens from being arbitrarily deprived of life. These include, at the level of public policy, the obligation to combat and prevent crime, and at the level of action by security forces, the obligation to prevent specific foreseeable acts of violence.’⁶

An individual’s right to life is also violated where the authorities knew or ought to have known of a real and immediate risk to the life of an individual from the acts of a third party and failed to take measures to avoid that risk.⁷

Every person deprived of his or her liberty must be treated with humanity and respect for the inherent dignity of the human person.⁸ The duty to protect and preserve this right imposes on states a positive obligation towards persons who are particularly vulnerable because of their status as prisoners. The Standard Minimum Rules for the Treatment of Prisoners (SMRs)⁹ and the Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment set out the international standards for the treatment of persons deprived of liberty through incarceration.

Rule 93 of the SMRs stipulates that prisoners have the right to humane treatment during detention. States therefore have the obligation to organise their system of detention and penitentiary services in order to protect detainees from any kind of threats and acts of torture,

⁵ General Comments and Recommendations Adopted by the UNHR Treaty Bodies; General Comment No. 6. LUND 1998

⁶ International Commission of Jurists (ICJ). *Sexual Orientation, Gender Identity and International Human Rights Law*. Page. 89

⁷ See the case of *Farmer v Brennan* 511 US Supreme Court [1994] 825

⁸ Article 10 of the International Convention on Civil and Political Rights

⁹ Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

cruel and inhuman or degrading treatment or punishment, sexual violence, corporal punishment, forced intervention or coercive treatment, and from any method intended to obliterate their personality or to diminish their physical or mental capacities.¹⁰

1.1. STATEMENT OF THE PROBLEM

Zambian prisons provide a harsh, cruel and inhospitable environment where only the fittest survive. The number of inmates that have died as a result of the poor living conditions in overcrowded penitentiaries is on the increase. Prisoners' complaints often go unheeded. The state of Zambian prisons should be regarded as a scandal.¹¹

Problems such as overcrowding have not escaped Zambian prisons. It is problems such as overcrowding that have in turn given rise to the innumerable violations of the rights of prisoners.

‘Overcrowding creates a haven for the spread of various communicable diseases such as tuberculosis, dysentery and the like. However, because of the limited space in the prisons caused by overcrowding, it is virtually impossible to separate the terminally ill such as those suffering from tuberculosis from the rest of the inmates.’¹²

It is a notorious fact that violence is part of life in prisons in Zambia. This includes sexual violence among prisoners despite the existence of the aforementioned international standards for conditions in prisons. Acts of sexual violence perpetrated by prisoners against each other lead to prisoners contracting HIV/AIDS.¹³ The problems facing HIV positive prisoners are compounded by the problem of overcrowding and as a result they are extremely vulnerable to contracting communicable diseases such as tuberculosis. This has an adverse effect on their already vulnerable health.

Most prisons demonstrate an inadequate warder to prisoner ratio and thus prison officials fail to supervise inmates properly. This results in violence being perpetrated especially where

¹⁰ International Commission of Jurists (ICJ). *Sexual Orientation, Gender Identity and International Human Rights Law*. Page 81-82

¹¹ Charlotte Mweemba. *The Rights of Prisoners in Zambia: A Critical Analysis*. Obligatory Essay submitted to the School of Law in partial fulfilment of the award of Bachelor of Laws Degree. 2002. Page 36

¹² International Commission of Jurists (ICJ). *Sexual Orientation, Gender Identity and International Human Rights Law*. Page 54

¹³ Jo Fidgen. *How to Stop HIV Spreading in Zambia's Prisons*. Available from the [African Perspective](http://www.africanperspective.org) website. www.bbc.co.uk/podcasts/series/afpersp Accessed on 20/09/2010

there is no categorisation between juveniles and adults. Also, violence is widespread as warders tolerate and abet the tyranny of the strongest prisoners who they call “captains” over the weak prisoners.¹⁴ Prison officials tend to turn a blind eye to such acts of violence and as a result the plight of victims of such violence is usually ignored.

Additionally, it is official prison policy in Zambia that condoms are not to be distributed in prisons. This policy is in furtherance of the country’s anti-sodomy laws. However, it has been argued by certain sections of civil society that this policy must be abolished as it leaves prisoners without protection from contracting HIV/AIDS. As a result, a large number of prisoners contract the virus whilst in incarceration and these prisoners subsequently die from the virus even after release from prison. The situation of those prisoners that remain incarcerated and have the virus is further compounded by the lack of access to adequate medical care.¹⁵

It is argued that as a result, the right to life in prisons is grossly undermined. Many prisoners die while in prison and the number is increasing. The death toll is attributed to the deplorable conditions that exist in prisons. It is the living conditions in prisons coupled with the absence of government commitment to the plight of prisoners that results in an encroachment of on the prisoners’ right to life.¹⁶

1.2. RATIONALE AND JUSTIFICATION

The overall purpose of the study to discuss the prisoners’ right to life is of importance as prisoners are currently a section of society that is marginalised and their human rights continue to be encroached upon with little or no interference by the state. The overall purpose of the study is thus to determine whether or not there is violation of prisoners’ right to life by the exposure of prisoners to HIV/AIDS by the prison authorities.

Specifically, the study will look into;

¹⁴ Kabanda L. Lopa. *The Violation of the Fundamental Human Rights of Prisoners in Zambia: The Role Played by the Three Arms of Government*. Obligatory Essay submitted to the School of Law in partial fulfilment of the award of Bachelor of Laws Degree. 2005. Page 23

¹⁵ Zambia Releases Prisoners with HIV, “AIDS Analysis in Africa.” Vol 5. Page 77 Publisher information unavailable.

¹⁶ International Commission of Jurists (ICJ). *Sexual Orientation, Gender Identity and International Human Rights Law*. Page 25

- i. The law relating to protection of prisoners' rights in Zambia vis-à-vis sexual violence and the right to life.
- ii. International standards in the protection of prisoners' rights with specific focus on the right to life and whether these standards are adhered to in Zambia.
- iii. Whether the lack of, or insufficiency of protection of prisoners from sexual violence and contraction of HIV by prison authorities amounts to a violation of prisoners' right to life as enshrined in the Constitution and international human rights instruments.
- iv. Whether the policy against distribution of condoms in prisons constitutes a violation of the right to life as enshrined in the Constitution and international human rights instruments.

The research is justified on the basis that it is important to establish the standard by which prisoners' rights, particularly the right to life, in light of the HIV/AIDS situation in prisons are to be protected. It is also significant in that it aims to come up with practical and legal solutions to the problem of prisoners contracting HIV during incarceration.

1.3. DEFINITIONS

HIV – Human Immune-Deficiency Virus

AIDS – Acquired Immune Deficiency Syndrome

Prisoner – The term “prisoner” has been used to describe all who are held in such places, including adult and juvenile males and females detained in criminal justice and correctional facilities during the investigation of a crime; while awaiting trial; after conviction and before sentencing; and after sentencing.

Prison – This means any building, enclosure or place or part thereof declared to be a prison under Section 3, or deemed to have been so established as provided in Section 147 and

includes a temporary prison established under section 4 and a youth corrective centre deemed to be a prison under section 133.¹⁷

Human Right – this refers to the rights an individual possesses by virtue of being human.¹⁸

Sexual Violence – This refers to acts of sodomy, rape and indecent assault as defined in the Penal Code.¹⁹

1.4. METHODOLOGY

The research methodology employed is of a qualitative nature. It includes desk research and field investigations in the form of interviews with relevant officials from the Zambia Prison Services, and other non-governmental organisations working with prisoners. Interviews with prisoners were also conducted in order to establish prisoners' experiences during incarceration.

Secondary data in the form of books, journals, scholarly articles as well as internet sources was also consulted with a view to disseminating current information. Reference is also made to international human rights instruments. Additionally, reference has also been made to the jurisprudence set out by decided cases in various jurisdictions and also decisions of international human rights tribunals regarding the interpretation of the right to life and prison conditions.

1.5. THE PROBLEM OF HIV/AIDS IN PRISONS

HIV in prisons is both a public health and a human rights issue that needs to be addressed urgently for an effective response. Despite this prison settings in Zambia have received surprisingly little attention. It is common knowledge that sexual relations and sexual violence are prevalent among inmates and this is a leading cause of transmission of HIV/AIDS among inmates. Common high-risk behaviour in the prison environment includes unprotected sex (mostly anal and between males), rape, sex bartering and “prison marriages”. In addition,

¹⁷ Section 2 of the Prisons Act, Cap 97 of the Laws of Zambia.

¹⁸ Theodor Meron. *Human Rights in International Law: Legal and Policy Issues*. [Oxford: Clarendon Press. 1984

] Page 74

¹⁹ The Penal Code, Cap 87 of the Laws of Zambia

unsafe injecting practices among injecting drug users, blood exchange and the use of non-sterile needles and other cutting instruments for tattooing are widespread.²⁰

However, despite the high prevalence of HIV/AIDS in prisons, it is a matter that is not receiving the required attention from the state. It is a problem that is compounded by severe overcrowding in prisons and the nonchalant attitude of prison officials who turn a blind eye to the prevalent acts of sexual relations and sexual violence among inmates. Mwandawa,²¹ in his study had the following to say regarding the problem of sodomy in Zambian prisons;

‘One of the inmates stated that “men sleep with men.” According to him, there was a group of prisoners whom he labelled sodomists who turned other men into “women.” Interestingly, some prison officials were present when the preceding explanation was given. None seemed to be moved. Nor was there a counter claim against the assertion for the existence of sodomy.’

Prisons in Zambia are extremely overcrowded. Overcrowding contributes to the deterioration of the physical conditions of prison premises. It also results in poor supervision and safety, which significantly increases the risk of gang activity and violence. Tension, frustration, and idleness among prisoners are often released through sex and sexual abuse.²² The HIV/AIDS infection rate in prisons is alarming. This is aggravated by unnatural sexual acts amongst the prisoners themselves and because of the overcrowding, nothing much can be done about it.

Rape and other forms of sexual violence among male and female prisoners are rife in prisons, between prisoners of the same sex, and between staff and prisoners particularly female prisoners.

‘Sodomy is rife. It is usually practiced by hardcore convicts on juveniles..... furthermore, it is a known fact that HIV affects one’s immune system and therefore, the more one is exposed to infectious diseases, the more one becomes vulnerable to developing full blown AIDS.’²³

These are all practices which have the end result of contraction of HIV/AIDS by inmates.

A study undertaken by Human Rights Watch, established the HIV prevalence rates in Zambian prisons. It was found that;

²⁰ United Nations Office on Drugs and Crime. HIV and Prisons in sub-Saharan Africa: Opportunities for Action. 2007. Available at <http://www.unodc.org> Page 1. Accessed on 13/2010

²¹ Bernard Mwandawa. The Rights of a Prisoner and Prison Conditions in Zambia: A Comparative Study. Obligatory Essay submitted to the School of Law in partial fulfilment of the award of Bachelor of Laws Degree. 2003. Page 25

²² UN Office on Drugs and Crime. HIV and Prisons in sub-Saharan Africa: Opportunities for Action. Page 2

²³ UN Office on Drugs and Crime. HIV and Prisons in sub-Saharan Africa: Opportunities for Action. Page 55

‘while HIV prevalence among Zambian adults is 15 percent, available evidence suggests that HIV prevalence in Zambian prisons is significantly higher. A study conducted in 1998-99 in three Zambian prisons found a male HIV prevalence of 27 percent, and a prevalence of 33 percent among female inmates. Based on these data, prevalence has until recently been routinely estimated at 27 percent of the overall prison population. HIV/AIDS has had deadly consequences in the prison population, among officers and inmates between 1995 and 2000, an estimated 2,397 inmates and 263 prison staff died from AIDS-related illnesses.’²⁴

Prisoners are a most-at-risk population not only for HIV and other sexually transmitted infections (STIs), but also for tuberculosis (TB). In prisons, overcrowding, lack of ventilation and poor prevention practices dramatically increase the risks of TB transmission. TB is also the most common opportunistic infection among people living with HIV in Africa.²⁵ The combination of the high prevalence of both TB and HIV in prisons is responsible for a high mortality rates amongst prisoners.

1.6. CONCLUSION

It is noteworthy that the problem of HIV/AIDS in prisons is compounded by several factors such as sexual violence, overcrowding and a severe lack of action by prison authorities and the state. It is further noteworthy from aforementioned statistics that the HIV/AIDS prevalence rate is higher among the prison population than the general population of Zambia. Prisoners being a part of the Zambian population most vulnerable to exposure to HIV, it is imperative that extensive preventative measures be put in place. However, the attitude of the state and prison officials in this regard leaves much to be desired and as a result, HIV/AIDS continues to ravage the prison population. The state has an obligation to its citizens and this includes the prison population, to safeguard the lives of its citizens. In conclusion, it is noted that the HIV/AIDS situation in prisons is one that requires urgent and decisive action from prison authorities and the state.

²⁴ Human Rights Watch. *Unjust and Unhealthy: HIV, TB, and Abuse in Zambian Prisons*. 2010. Available at <http://www.hrw.org> Page 15 Accessed on 13/12/2010

²⁵ Theodor Meron. *Human Rights in International Law: Legal and Policy Issues*. Page 2

CHAPTER 2

THE LEGAL STRUCTURE FOR THE TREATMENT OF PRISONERS

2.0. INTRODUCTION

In any civilized society, the state is charged with the responsibility of protection of the fundamental rights and freedoms vested in and inherent in every individual by virtue of their being human. This obligation extends also to those deprived of their liberty by virtue of incarceration. It is generally accepted that prisoners retain all rights that are not taken away by virtue of incarceration. It is the loss of liberty that is the punishment and not the deprivation of fundamental human rights. Prisoners being a vulnerable section of society, it is incumbent upon the state to ensure that the deprivation of liberty does not entail the deprivation of the other fundamental rights still enjoyed by the prison population.

There exists an international as well as domestic framework for the protection of the fundamental rights of prisoners intended to be a guide to governments in the administration of the penitentiary system. This chapter will look into the legal structure in place for the treatment of prisoners. This will include an overview of existing legislation in Zambia; namely the Prisons Act²⁶ and the Constitution of Zambia.²⁷ International human rights instruments relating to the treatment of prisoners will also be evaluated in order to ascertain the international standard to be adhered to. Decisions of international human rights tribunals will also be considered.

2.1. DOMESTIC LEGISLATION

The main pieces of legislation dealing with the rights of prisoners in Zambia are the Constitution of Zambia²⁸ and the Prisons Act.²⁹ The Constitution provides for the protection of the fundamental human rights of prisoners whereas the Prisons Act provides for the establishment and management of the prison system.

²⁶ The Prisons Act, Cap 97 of the Laws of Zambia

²⁷ Constitution of Zambia, Cap 1 of the Laws of Zambia

²⁸ Constitution of Zambia, Cap 1 of the Laws of Zambia

²⁹ The Prisons Act, Cap 97 of the Laws of Zambia

2.1.1. THE CONSTITUTION OF ZAMBIA

The Constitution of Zambia³⁰ is the supreme law of the land as emphasized in Article 1(3) and any law that is inconsistent with it shall to the extent of the inconsistency be void. The Constitution is binding on all persons in the Republic of Zambia and also on all organs of the State at all levels.³¹ Further, it is provided in Article 11 that it is recognised and declared that every person in Zambia has been and shall continue to be entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed, sex or marital status, but subject to the limitations contained in the bill of rights.

The Constitution guarantees the right to life in Article 12.³² Article 12(1) provides that;

‘A person shall not be deprived of his life intentionally except in the execution of a sentence or order of a court in respect of a criminal offence under the law in force in Zambia of which he has been convicted.’

The right to life is a fundamental right on which the enjoyment of all other rights is dependent. Article 12 also contains the exceptions under which this right may be taken away and imprisonment is not one of the recognised exceptions. It follows thus, that prisoners have their right to life protected by the Constitution and as such the state is under an obligation to ensure that prisoners’ right to life is protected.

The Constitution also prohibits torture, inhuman or degrading punishment or other like treatment in Article 15.³³ This is the only non-derogable provision in the Constitution together with the protection from slavery and forced labour contained in Article 14. The Constitution further provides for directive principles of state policy in Article 112.³⁴ Article 112 provides *inter alia*, that the State shall endeavour to provide clean and safe water, adequate medical facilities and decent shelter to all persons and take all measures to constantly improve such facilities. It is also provided that the State shall strive to provide a

³⁰ Cap 1 of the Laws of Zambia

³¹ Article 1(4) of the Constitution of Zambia, Cap 1 of the Laws of Zambia.

³² Constitution of Zambia, Cap 1 of the Laws of Zambia

³³ Constitution of Zambia, Cap 1 of the Laws of Zambia

³⁴ Constitution of Zambia, Cap 1 of the Laws of Zambia

clean and healthy environment for all. It is noteworthy however, that these provisions are not justiciable.

2.1.2. THE PRISONS ACT

The Preamble of the Act provides that the purpose of the Act is to;

‘provide for the establishment of prisons, for a prison service, for the discipline of prison officers, for the management and control of prisons and prisoners lodged therein.’

The Prisons Act does not contain any express provisions regarding the rights of prisoners. However, it does contain certain provisions designed to prevent abuse and torture of prisoners. The Act contains provisions that safeguard the right to safe custody and security of the person and the right to a healthy environment and accommodation.

It is however, disconcerting to note that the Act still contains provisions that allow for corporal punishment.³⁵ The Prisons Act also establishes minimum standards for medical care, and requires that the officer in charge of each prison maintain a properly secured hospital, clinic, or sick bay within the prison.³⁶

2.2. INTERNATIONAL INSTRUMENTS

International protection of the rights of prisoners is found in a number of human rights instruments. However, the instruments dealing specifically with the rights of prisoners are the Standard Minimum Rules for the Treatment of Prisoners (SMRs)³⁷ and the Body of Principles for the Protection of all Persons under any Form of Detention or Imprisonment.³⁸ General protection of prisoners’ rights is to be found in instruments such as the Universal Declaration of Human Rights (UDHR),³⁹ the International Convention on Civil and Political Rights (ICCPR),⁴⁰ the International Covenant on Economic, Social and Cultural Rights

³⁵ Sections 99-105 of the Prisons Act, Cap 97 of the Laws of Zambia

³⁶ The Prisons Rules, Cap 97 of the Laws of Zambia

³⁷ Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

³⁸ General Assembly Resolution A/RES/43/173 adopted on 9th December 1988

³⁹ Adopted by the United Nations General Assembly on 10th December 1948

⁴⁰ Entered into force on 23rd March 1976

(ICESCR),⁴¹ and the Convention Against Torture and Other Cruel and Inhuman or Degrading Treatment or Punishment (CAT).⁴²

2.2.1. STANDARD MINIMUM RULES FOR THE TREATMENT OF PRISONERS (SMRs)

The Standard Minimum Rules for the Treatment of Prisoners (SMRs)⁴³ are amongst the oldest international instruments dealing with the welfare of prisoners. As compared to other instruments, the SMRs are the most detailed regarding the treatment of prisoners. These rules set out what is generally accepted as being good principle and practice in the treatment of prisoners and the management of institutions. They contain rules that cover a wide range of subjects from health and hygiene to religion and torture. For the purpose of this dissertation, only a few relevant rules shall be outlined.

Rule 31 of these rules deals with the prohibition of cruel, inhuman or degrading punishments. It provides that;

‘corporal punishment, punishment by placing in a dark cell, and all cruel, inhuman or degrading punishments shall be completely prohibited as punishments for disciplinary offences.’

Rule 32(2) goes further to prohibit punishment that may be prejudicial to the physical or mental health of a prisoner.

The SMRs also outline certain guiding principles intended to show the spirit with which correctional institutions should be run. Rule 57⁴⁴ provides that;

‘imprisonment and other measures which result in cutting off an offender from the outside world are afflictive by the very fact of taking from the person the right of self-determination by depriving him of his liberty. Therefore the prison system shall not, except as incidental to justifiable segregation or the maintenance of discipline, aggravate the suffering inherent in such a situation.’

⁴¹ Entered into force on 3rd January 1976.

⁴² Entered into force on 10th December 1984.

⁴³ Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

⁴⁴ Standard Minimum Rules for the Treatment of Prisoners

It is further provided in Rule 60 (1) that prison authorities should seek to minimize any differences between prison life and life at liberty which tend to lessen the responsibility of the prisoners or the respect due to their dignity as human beings. It can be observed from the foregoing that the SMRs were drafted in the spirit of upholding the human rights of prisoners inherent by virtue of their humanity.

The SMRs are minimum standards which every state must aim to achieve. They establish the minimum standards below which prison conditions must not fall. This was recognized in the complaint before the Human Rights Committee of *Womah Mukong v. Cameroon*.⁴⁵ The Committee, regarding the SMRs stated thus;

‘As to the conditions of detention in general, the Committee observes that certain minimum standards regarding the conditions of detention must be observed regardless of a State party’s level of development..... It should be noted that these are minimum requirements which the Committee considers should always be observed, even if economic or budgetary considerations may make compliance with these obligations difficult.’

It was also stated by the Human Rights Committee in *Munguwambuto Kabwe Peter Mwamba v Zambia*⁴⁶ that;

‘persons deprived of their liberty may not be subjected to any hardship or constraint other than that resulting from the deprivation of liberty; they must be treated in accordance with, inter alia, the Standard Minimum Rules for the Treatment of Prisoners.’

2.2.2. BODY OF PRINCIPLES FOR THE PROTECTION OF ALL PERSONS UNDER ANY FORM OF DETENTION OR IMPRISONMENT

Adopted in 1978, the Body of Principles for the Protection of all Persons under any Form of Detention or Imprisonment⁴⁷ provide guidelines as to how governments ought to discharge their international obligations towards prisoners. It is stated in the preliminary observations that the SMRs should serve to stimulate a constant endeavour to overcome practical

⁴⁵ Communication No. 458/1991, U.N. Doc. CCPR/C/51/D/458/1991 available at www.unhcr.org Accessed on 14/12/2010

⁴⁶ Communication No. 1520/2006, U.N. Doc. CCPR/C/98/D/1520/2006 available at www.unhcr.org Accessed on 14/12/2010

⁴⁷ General Assembly Resolution A/RES/43/173 adopted on 9th December 1988

difficulties in the way of their application, in the knowledge that they represent, as a whole, the minimum conditions which are accepted as suitable by the United Nations.

Principle 1 of the Body of Principles provides that all persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person. It is provided that;

‘There shall be no restriction upon or derogation from any of the human rights of persons under any form of detention or imprisonment recognized or existing in any State pursuant to law, conventions, regulations or custom on the pretext that this Body of Principles does not recognize such rights or that it recognizes them to a lesser extent.’⁴⁸

Torture, cruel, inhuman or degrading treatment or punishment is prohibited under Principle 6. It is further provided that;

‘the term “cruel, inhuman or degrading treatment or punishment” should be interpreted so as to extend the widest possible protection against abuses, whether physical or mental, including the holding of a detained or imprisoned person in conditions which deprive him, temporarily or permanently, of the use of any of his natural senses, such as sight or hearing, or of his awareness of place and the passing of time.’

Principle 7 (2) places an obligation on prison officials who have reason to believe that a violation of the Body of Principles has occurred or is about to occur to report the matter to their superior authorities and, where necessary, to other appropriate authorities or organs vested with reviewing or remedial powers. Principle 7 (3) goes on to provide that;

‘Any other person who has ground to believe that a violation of this Body of Principles has occurred or is about to occur shall have the right to report the matter to the superiors of the officials involved as well as to other appropriate authorities or organs vested with reviewing or remedial powers.’

The right to have prompt access to medical personnel and medical assistance is recognised in Principle 24. It is provided that;

‘a proper medical examination shall be offered to a detained or imprisoned person as promptly as possible after his admission to the place of detention or imprisonment, and thereafter medical care and treatment shall be provided whenever necessary. This care and treatment shall be provided free of charge.’

⁴⁸ Principle 2 of the Body of Principles for the Protection of all Persons under any Form of Detention or Imprisonment

It is further provided that nothing in the Body of Principles shall be construed as restricting or derogating from any right defined in the International Covenant on Civil and Political Rights.⁴⁹ The Body of Principles provide for the securing of the individual rights of prisoners. They are binding on governments to the extent that the norms contained therein elucidate the broader standards contained in human rights instruments.

2.2.3. THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

The Universal Declaration of Human Rights (UDHR)⁵⁰ proclaims in its Preamble that;

‘all human beings are born free and equal in dignity and in rights.’

This proclamation makes no exception. It follows therefore that it applies with equal force to prisoners as well. It stems from this therefore, that save for those rights lawfully taken away by virtue of incarceration, prisoners are as much as the non-prisoner entitled to the enjoyment of their human rights.

The UDHR⁵¹ also provides that there should be respect for the right to life, security of the person and equal protection of the law. Torture, cruel, inhuman and degrading treatment or punishment is also prohibited under Article 5. It is noteworthy that this right is non-derogable meaning that at no time can it ever be abrogated.

The UDHR, although not legally binding, has acquired legal, moral and political force throughout the international community by virtue of its overwhelming acceptance. The principles encapsulated therein have acquired customary international law status thus becoming binding on states.

⁴⁹ See Principle 39

⁵⁰ Adopted by the United Nations General Assembly on 10th December 1948

⁵¹ Adopted by the United Nations General Assembly on 10th December 1948

2.2.4. INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR)

The Preamble of the International Covenant on Civil and Political Rights⁵² (ICCPR) provides that that recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world. It goes on to recognise that these rights derive from the inherent dignity of the human person. The language used is all-encompassing and contains no exceptions.

The ICCPR is binding upon state parties upon ratification. Zambia is a state party to the Convention and is thus bound by its provisions. Article 6 recognises the right to life as being inherent in all human beings. The Human Rights Committee noted that the right to life has been too often narrowly interpreted. The expression “inherent right to life” cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures.⁵³

Article 7 deals with the prohibition of torture or cruel, inhuman or degrading treatment or punishment. In the view of the Committee the prohibition must extend to corporal punishment, including excessive chastisement as an educational or disciplinary measure. Even such a measure as solitary confinement may, according to the circumstances, and especially when the person is kept incommunicado, be contrary to this Article 7. It is also the duty of public authorities to ensure protection by the law against such treatment even when committed by persons acting outside or without any official authority.⁵⁴

Article 10 deals specifically with persons deprived of their liberty and provides that;

‘all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.’

It was noted by the Human Rights Committee that persons deprived of their liberty enjoy all the rights set forth in the Covenant, subject to the restrictions that are unavoidable in a closed

⁵² Entered into force on 23rd March 1976

⁵³ CCPR General Comment No. 06: The right to life (art. 6): 04/30/1982.

⁵⁴ CCPR General Comment No. 07: Torture or cruel, inhuman or degrading treatment or punishment (Art. 7): 05/30/1982.

environment. Treating all persons deprived of their liberty with humanity and with respect for their dignity is a fundamental and universally applicable rule. Consequently, the application of this rule, as a minimum, cannot be dependent on the material resources available in the state party.⁵⁵

2.2.5. INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (ICESCR)

It has already been noted that prisoners retain the enjoyment of all rights not deprived of them by virtue of incarceration. It follows thus, that since prisoners retain their humanity, they are entitled to the enjoyment of the rights contained in the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁵⁶ Article 12(1) of the ICESCR recognises the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. This is not a right that prisoners cease to enjoy as a result of incarceration. This is a right that is essential for the enjoyment of the right to life. Violation of the right to health seriously undermines the enjoyment of the right to life.

The Committee on Economic, Social and Cultural Rights has stated that any discrimination in access to health care and underlying determinants of health, as well as the means and entitlements for their procurement which has the effect of nullifying or impairing the equal enjoyment or exercise of the right to health is proscribed.⁵⁷

The ICESCR like the ICCPR is binding on all state parties upon ratification. Zambia is party to the Convention and is thus bound by its provisions. Unlike the ICCPR however, the ICESCR provides for the progressive realisation of the rights contained therein.

⁵⁵ CCPR General Comment No. 21: Replaces general comment 9 concerning humane treatment of persons deprived of liberty (Art. 10): 04/10/1992.

⁵⁶ Entered into force on 3rd January 1976.

⁵⁷ ECSCR General Comment No. 14: The Right to the Highest Attainable Standard of Health, Article 12, paragraph 18

2.2.6. THE CONVENTION AGAINST TORTURE (CAT)

Torture is a particularly barbaric violation of the right to physical and mental integrity and represents a direct attack on the core of human personality.⁵⁸ The Convention Against Torture and Other Cruel and Inhuman or Degrading Treatment or Punishment⁵⁹ (C.A.T) defines torture in Article 1(1) as;

‘Any act by which severe pain or suffering, whether physical or mental is intentionally inflicted on a person.....when such pain or suffering is inflicted by or at the instigation of or with the consent of or acquiescence of a public official or other person acting in official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.’

Other forms of ill-treatment lacking one or more of the elements in the definition might amount to cruel, inhuman or degrading treatment or punishment which is equally prohibited by the convention. The Convention Against Torture thus requires imprisonment or detention with a view to preventing cases of torture and other cruel or degrading treatment. It also requires state parties to take effective legislative, administrative and judicial measures to prevent the aforementioned treatment. Zambia is a party and ratified the convention on 5th November 1991.

The General Comments by the United Nations Human Rights Committee on the prohibition of torture, cruel, inhuman or degrading treatment under Article 7 of the ICCPR apply with equal force to the provisions of the CAT. The Committee noted that the prohibition against torture relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim.⁶⁰ The Committee further stated that, even in situations of public emergency, no derogation is allowed and likewise no justification or extenuating circumstances may be invoked to excuse a violation of this right.

Further, the Optional Protocol to the Convention Against Torture and Other Cruel and Inhuman or Degrading Treatment or Punishment (OPCAT),⁶¹ provides for a system of

⁵⁸ Manfred Nowak. ‘Civil and Political Rights’ In Janusz Symonides. (Ed.) Human Rights: Concepts and Standards. [Aldershot: Dartmouth Publishing Co. Ltd, 2000] Page 78

⁵⁹ Entered into force on 10th December 1984.

⁶⁰ CCPR General Comment No. 20: Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (Art. 7): 03/10/1992.

⁶¹ Adopted by the General Assembly on 18th December 2002 and Entered into force on 22nd June 2006

regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.

2.3. CONCLUSION

In conclusion, it is noted that it is internationally recognised that there must be a minimum standard of treatment afforded to prisoners. International instruments set out in great detail the minimum standards to be adhered to in the treatment of prisoners. The same however, cannot be said of domestic legislation which is quite vague in its provisions. This is especially notable of the Prisons Act where the protection of prisoners' rights is by inference only. While the Constitution on the other hand contains some provisions relevant to prisoners, the protection afforded by these provisions is nowhere near adequate as they are couched in very general terms and lack the attention to detail seen in the international instruments.

CHAPTER 3

THE IMPACT OF SEXUAL VIOLENCE AND HIV/AIDS IN PRISONS

3.0. INTRODUCTION

Good prisoner health is good public health. Prisoners come from and mostly return to the community, carrying infectious diseases from one to the other. Among the diseases prisoners are exposed to is HIV/AIDS. One of the factors leading to the rampant levels of HIV infection rates in prisons is sexual violence among prisoners.

In 2000, Heads of State and Government representatives from 189 countries made an unprecedented commitment in the United Nations Millennium Declaration⁶² to halt and reverse the HIV epidemic by 2015. At the 2006 UN High Level Meeting on AIDS, world leaders committed;

‘to pursuing all necessary efforts ... towards the goal of universal access to comprehensive prevention programmes, treatment, care and support by 2010.’⁶³

Achieving this objective requires the inclusion of all sectors in these efforts, including prisons.

People who break the law should be held accountable and the appropriate punishment may be imprisonment. But for detainees in Zambian prisons—a third of whom have never been convicted of any crime—being held behind bars can have life-threatening consequences. Overcrowding, malnutrition, rampant infectious disease, grossly inadequate medical care, and routine violence at the hands of prison officers and fellow inmates make Zambian prisons death traps.⁶⁴

This chapter will look at the impact of sexual violence among prisoners in light of the HIV/AIDS infection rates in prisons. Also considered in this chapter will be the measures

⁶² United Nations. 2000. United Nations Millennium Declaration, Resolution 55/2. 8 September 2000. Available at <http://www.un.org/millennium/declaration> Accessed on 13/12/2010

⁶³ United Nations. Political Declaration on HIV/AIDS; UN Resolution 60/62, 25 June 2006 Available at <http://data.unaids.org/pub/Report/2006> Accessed on 13/12/2010

⁶⁴ Human Rights Watch. Unjust and Unhealthy: HIV, TB, and Abuse in Zambian Prisons. Page 4

have been put in place by the prison authorities to deal with the high HIV infection rates among prisoners.

3.1. HIV/AIDS IN PRISONS

A study conducted by Human Rights Watch⁶⁵ found that HIV prevalence among Zambian adults is 15 percent while available evidence suggests that HIV prevalence in Zambian prisons is significantly higher at 27 percent in male prisons and 33 percent among female inmates.⁶⁶

The problem of HIV/AIDS in prisons is one that is exacerbated by a number of factors. These include the weakness of the criminal justice and judicial systems, social stigma, institutional and societal neglect, lack of resources for maintenance of existing penal institutions, poor food and nutrition, lack of health care, overcrowding, mixing of un-sentenced and convicted persons, high-risk sexual and other behavior (such as injecting drug use and blood mixing) and lack of conjugal visits.

One of the principal factors leading to the rampant HIV infection rates in prisons is high risk sexual behaviour among inmates which includes rape, sex bartering and unprotected sex. Same sex relations, including “marriages” between male prisoners, are common, although considered circumstantial. Gang rape and sexual abuse (e.g. exchange of men for favors among gangs and individual prisoners) take place frequently. Consequently, victims of continual rape and sexual abuse often resort to prostitution as a survival or coping mechanism.⁶⁷

The plight of inmates who contract HIV in prisons is aggravated by the rampant overcrowding in Zambian prisons. A study by Human Rights Watch⁶⁸ found that Mukobeko Maximum Security Prison, a facility built in 1950 for a capacity of 400, housed 1731

⁶⁵ Human Rights Watch. *Unjust and Unhealthy: HIV, TB, and Abuse in Zambian Prisons*. Page 19

⁶⁶ Oscar O. Simooya, “‘Behind Walls’: A Study of HIV Risk Behaviors and Seroprevalence in Prisons in Zambia,” *AIDS*, vol. 15(13), 2001, Page 741-44.

⁶⁷ United Nations Office on Drugs and Crime. *HIV and Prisons in sub-Saharan Africa: Opportunities for Action*. Page 17.

⁶⁸ Human Rights Watch. *Unjust and Unhealthy: HIV, TB, and Abuse in Zambian Prisons*. Page 29

inmates⁹⁸—433 percent of its capacity while Lusaka Central Prison, a facility built in 1923 with a capacity of 200 housed 11,451—573 percent of capacity.

The grossly overcrowded prisons are a haven for highly infectious diseases such as tuberculosis (TB). As a result, prisoners are a most-at-risk population not only for HIV and other sexually transmitted infections (STIs), but also for tuberculosis (TB). The problem of HIV/AIDS in prisons cannot be discussed without talking about the prevalent rates of tuberculosis in prisons. This is a clear breach of Rule 10 of the SMRs which provides that;

‘All accommodation provided for the use of prisoners and in particular all sleeping accommodation shall meet all requirements of health, due regard being paid to climatic conditions and particularly to cubic content of air, minimum floor space, lighting, heating and ventilation.’⁶⁹

In prisons, overcrowding, lack of ventilation and poor prevention practices dramatically increase the risks of TB transmission. TB is also the most common opportunistic infection among people living with HIV in Africa. The combination of the high prevalence of both TB and HIV in prisons is responsible for a high mortality rates amongst prisoners.⁷⁰

This is especially a problem for HIV positive prisoners who are highly susceptible to contracting tuberculosis (TB) worsening their already fragile health. The high HIV prevalence, coupled with poor prison conditions, raises a significant risk of tuberculosis (TB) infection. A check at Lusaka Central Prison and Kamwala Remand Prison found that the risk of TB transmission is high as sick and healthy inmates are routinely mixed together, and multiple inmates reported frequent coughing. This constitutes a breach of Article 12 of the ICESCR.⁷¹

3.2. ACCESS TO TREATMENT

While some effort is being made to provide anti-retroviral treatment (ART) to inmates, the situation on the ground leaves much to be desired. ‘In the general population, in 2004, the Zambian government introduced free access to antiretroviral therapy (ART) in the public

⁶⁹ Standard Minimum Rules for the Treatment of Prisoners. Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

⁷⁰ U.N office on Drugs and Crime. HIV and Prisons in sub-Saharan Africa: Opportunities for Action. Page 2

⁷¹ International Covenant on Economic, Social and Cultural Rights. Entered into force on 3rd January 1976.

health sector. In June 2005, the government declared the ART service package (including counseling, x-rays, and CD4 testing) free of charge. The *Zambian National HIV/AIDS Policy* includes prisoners and commits to providing HIV prevention information, voluntary counseling and testing upon admission to custody, and detection and treatment programs to prisoners.⁷²

The annual report of the Human Rights Commission for 2009⁷³ found that inmates received supplies of Anti-Retroviral Drugs (ARVs). They also received surplus food in addition to the daily rations. The diet of inmates who are HIV-positive was supplemented with soya donated to prisons by the churches.

A report by the United States Bureau of Democracy, Human Rights, and Labor⁷⁴ found that prisoners routinely complained that authorities denied them access to medical care as provided for by law. Failure to remove or quarantine sick inmates and the lack of infirmaries at many prisons resulted in the spread of airborne illnesses such as tuberculosis, leading to the reinfection and death of prisoners. It was also found that drugs to combat tuberculosis were available, but the supply was erratic. Antiretroviral treatment was available to some prisoners with HIV/AIDS; however, poor nutrition often rendered the treatment ineffective.

However, an interview with the Medical Director of the Zambia Prisons Service, Dr Chisela Chileshe revealed that the supply of ARVs to inmates was erratic. He stated that most sickly inmates, the majority of whom are in the advanced stage of their HIV infection with very low CD4 counts, have been unable to access antiretroviral treatment despite opportunistic infections seriously manifesting themselves.⁷⁵

Medical care is almost non-existent. The Zambia Prisons Service employs only 14 healthcare workers to serve 15,300 inmates, and only 15 of the country's 86 prisons have clinics or sick bays. Inmates are frequently prevented from accessing health facilities outside the prison based on the sole judgment of non-medical officers and other inmates or because of a lack of

⁷² Human Rights Watch. *Unjust and Unhealthy: HIV, TB, and Abuse in Zambian Prisons* pp. 19-20

⁷³ Annual Report. Human Rights Commission. 2009. Page 16. Available at <http://www.hrc.org.zm> Accessed on 14/12/2010

⁷⁴ 2009 Human Rights Report: Zambia. Bureau of Democracy, Human Rights, and Labor: US State Department. Page 6. Available at www.state.gov/g/tip Accessed on 14/12/2010

⁷⁵ Interview with Dr. Chisala Chileshe. 06/01/2011

transport or security fears on the part of prison officers.⁷⁶ This lack of access by prisoners to health facilities amounts to a violation of Article 12 of the ICESCR and is also a breach of the State's obligation to provide adequate medical facilities under Article 112 of the Constitution of Zambia.⁷⁷

In an interview with the Voice of America⁷⁸ Joseph Amon, Health and Human Rights Division Director of Human Rights Watch, one of the groups that worked on the report, says inmates with HIV and tuberculosis are worst affected. He said;

'Again and again people were saying, "I have been sick for months, I have been unable to get access to treatment. We have seen people die in our cells and we have called out that they needed to get help, they needed to get treatment, and the prison officials have said, "This is a prisoner who might escape, we cannot take them," or "This is a prisoner who is faking it, he is not really ill." And what happens is that, in fact, people are dying.'

3.3. PREVALENCE OF SEXUAL VIOLENCE IN PRISONS

It must be noted that while most sexual activity among inmates is consensual, sexual assaults are quite prevalent. According to human rights watch, sexual activity between male inmates is common, including both consensual sex between adults, and relationships where sex is traded by the most vulnerable in exchange for food, soap, and other basic necessities not provided by the prison. PRISCCA,⁷⁹ ARASA,⁸⁰ and Human Rights Watch also documented cases of rape between male prisoners.⁸¹

The problem of sexual violence in prisons is compounded by the rampant overcrowding and understaffing in prisons. The result is that juveniles who are supposed to be separated from adult inmates are housed together with the adult inmates. According to Dr. Chileshe,⁸² most of the juvenile delinquents who are awaiting trial were sharing the same cell with adult convicts, a situation that exposed them to high risks of exposure to sodomy. This is a clear

⁷⁶ Human Rights Watch. Unjust and Unhealthy: HIV, TB, and Abuse in Zambian Prisons. Page 16-17

⁷⁷ Constitution of Zambia, Chapter 1 of the Laws of Zambia.

⁷⁸ Selah Hennessy. Rights Groups Report Zambia's Prisons Spread HIV and TB. 27 April 2010. Available at <http://www.voanews.com> Accessed on 13/12/2010

⁷⁹ Prisons Care and Counselling Association

⁸⁰ AIDS Rights Alliance for Southern Africa

⁸¹ Human Rights Watch. Unjust and Unhealthy: HIV, TB, and Abuse in Zambian Prisons. Page 6

⁸² Interview with Dr. Chisala Chileshe. Medical Director of the Zambia Prisons Service 06/01/2011

breach of Rule 57 of the SMRs⁸³ which provides that the prison system shall not, except as incidental to justifiable segregation or the maintenance of discipline, aggravate the suffering inherent in such a situation.

The situation is further aggravated by the fact that most prisons demonstrate an inadequate warden to prisoner ratio and consequently prison officials fail to supervise inmates properly. This results in violence being perpetrated especially where there is no categorisation between juveniles and adults. Also, violence is widespread as warders tolerate and abet the tyranny of the strongest prisoners who they call 'captains' over the weak prisoners.⁸⁴ Prison officials tend to turn a blind eye to such acts of violence and as a result the plight of victims of such violence is usually ignored.

A study by the United Nations Office on Drugs and Crime also yielded similar results. The study found that prisons in most sub-Saharan African countries are extremely overcrowded. Overcrowding contributes to the deterioration of the physical conditions of prison premises. It also results in poor supervision and safety, which significantly increases the risk of gang activity and violence. Tension, frustration, and idleness among prisoners are often released through sex and sexual abuse.⁸⁵

An inmate at the Lusaka Central Prison, Luckson Muganda, revealed more on what's happening inside Zambia's male prisons;

'I feel sorry for the guys that have got small bodies because they are the most targeted ones. Boys get raped everyday in here. The sad part is also that the prison warders leak the prisoner's information to other inmates, so if it happens that you are not serving a long sentence, calling them "*Mulendo*" meaning a visitor, so that will alarm other inmates to do all sorts to that new inmate before he leaves since they know that he's only staying for a short time.'⁸⁶

⁸³ Standard Minimum Rules for the Treatment of Prisoners Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

⁸⁴ Kabanda L. Lopa. "The Violation of the Fundamental Human Rights of Prisoners in Zambia: The Role Played by the Three Arms of Government." Page 23

⁸⁵ UN Office on Drugs and Crime. HIV and Prisons in sub-Saharan Africa: Opportunities for Action. Page 2

⁸⁶ Interview: Luckson Muganda. Lusaka Central Prison. 06/01/2011

A similar story was told by Godfrey Malembeka, who spent four years in a Zambian prison before becoming executive director of PRISCCA⁸⁷, a Zambian prisoner rights organization. He stated that sexual violence was rife in prisons and that prison warders tended to turn a blind eye towards the violence. He also stated that such acts of sexual violence are perpetrated mostly on juvenile inmates in exchange for protection and items such as food.⁸⁸

A similar finding was made by Mwandiswa. He stated that one of the inmates stated that “men sleep with men.” According to the said inmate, there was a group of prisoners whom he labelled sodomists who turned other men into “women.” Mwandiswa also noted interestingly, that some prison officials were present when the preceding explanation was given and that none seemed to be moved nor was there a counter claim against the assertion for the existence of sodomy.⁸⁹

It must be noted that the problem of sexual violence in prisons is not endemic to male prisons only. In female prisons however, it is mostly perpetrated by male prison warders. In a study by the United Nations Office on Drugs and Crime it was established that in the closed environment of prisons, women are especially vulnerable to sexual abuse, including rape, by both male staff and other male prisoners. There are countries where women prisoners are held in small facilities adjacent to or within prisons for men. In some prison facilities, there are no separate quarters for women and they may be supervised by male prison staff. They are also susceptible to sexual exploitation and may engage in sex for exchange of goods such as food, drugs, cigarettes and toiletries.⁹⁰

Sexual violence in prisons has a variety of consequences. A report of the Urban Institute⁹¹ stated that victims of prison sexual violence experience serious physical injury and the risk of other health conditions and that another significant concern is the increased risk of contracting HIV/AIDS and other sexually transmitted infections.

⁸⁷ Prisons Care and Counselling Association

⁸⁸ Interview: Godfrey Malembeka. 12/012011

⁸⁹ Bernard Mwandiswa. “The Rights of a Prisoner and Prison Conditions in Zambia: A Comparative Study.” Page 26

⁹⁰ United Nations Office on Drugs and Crime. Women and HIV in prison settings. Available at <http://www.unodc.org> Page 2

⁹¹ The Urban Institute. Addressing Sexual Violence in Prisons: A National Snapshot of Approaches and Highlights of Innovative Strategies Final Report. Available at <http://www.urban.org> Page 3. Accessed on 14/12/2010

The consequence of the prevalent sexual violence and activity among inmates is the increased HIV infection rates in prisons. The plight of infected inmates is exacerbated by harsh prison conditions such as overcrowding. As a result, prisoners have little autonomy to protect themselves. They have minimal control over such factors as overcrowding that contribute to sexual and other forms of violence or injecting drug use.

Unbridled overcrowding has an adverse effect on the already fragile health of infected inmates as it increases exposure to highly infectious diseases such as tuberculosis. Failure to remove or quarantine sick inmates and the lack of infirmaries at many prisons resulted in the spread of airborne illnesses such as tuberculosis, leading to the reinfection and death of prisoners.⁹²

The situation is also worsened by the poor diet in prisons and the lack of medical treatment available. Where antiretroviral treatment was available to some prisoners with HIV/AIDS poor nutrition often rendered the treatment ineffective.⁹³ It is a vicious circle in prisons as the same conditions which lead to the high prevalence of HIV in prisons further exacerbate the plight of infected inmates.

The appalling physical conditions of prisons, along with inadequate food and nutrition and almost non-existent health services, seriously exacerbate the prevalence of HIV inside prisons. These conditions lead prisoners to 'often exchange basic goods (hygiene products such as soap or personal items such as blankets or shoes) for sex as those items may be unavailable for the majority while in prison. In the same way, poor food and nutrition, including low quality and scarcity of food for those incarcerated, drives prisoners towards exchange of sex for food.'⁹⁴ Scarcity of these basic goods also worsens the problem of sexual violence as they are used as a tool for the oppression and coercion of weaker prisoners to submit to sexual violence.

⁹² 2009 Human Rights Report: Zambia. Bureau of Democracy, Human Rights, and Labor. Page 6

⁹³ 2009 Human Rights Report: Zambia. Bureau of Democracy, Human Rights, and Labor. Page 7

⁹⁴ United Nations Office on Drugs and Crime. HIV and Prisons in sub-Saharan Africa: Opportunities for Action.

3.4. CONCLUSION

It is therefore noteworthy that the problem of HIV/AIDS in prisons and the prevalent sexual violence are related problems. The spread of HIV in prisons is aggravated by the rampant sexual violence in prisons. Both problems are in turn exacerbated by other factors such as overcrowding. It has been noted that overcrowding results in poor supervision of inmates by prison authorities and as such, acts of sexual violence are prevalent.

Sexual violence has an adverse impact on inmates' health as it results in their contracting HIV. As a result of the extremely harsh conditions in prisons, prisoners' predicament is further worsened by factors such as overcrowding. Overcrowding has an adverse effect on the health of prisoners who contract HIV are exposed to highly infectious diseases such as tuberculosis. As a result, the health of prisoners who contract HIV deteriorates rapidly often resulting in death.

It has also been noted that another issue further compounding the problem of HIV is the lack of adequate medical care. There is a severe lack antiretroviral treatment and medication for diseases such as tuberculosis. It has also been noted that the condition of HIV positive prisoners is also exacerbated by the poor diet available in prisons.

When all these factors are put together, it is noticeable that the combination of sexual violence and HIV with the poor prison conditions has far reaching consequences for inmates. The overall result is that prisoners are dying of the virus with very little government effort towards averting the situation.

CHAPTER 4

THE EXTENT TO WHICH PRISONERS' RIGHT TO LIFE IS UPHELD

4.0. INTRODUCTION

The right to life is the most fundamental human right upon which the enjoyment of all other human rights are dependent. The right to not be arbitrarily deprived of life is a universal right and is protected by several human rights instruments. Its exercise is essential for the enjoyment of all other human rights. If not respected, all other rights lack meaning.⁹⁵

Article 12 of the Constitution of Zambia⁹⁶ enshrines the right to life. This right is not absolute as is the case with the right to protection from torture and any other cruel or inhuman treatment which is non-derogable even in times of war or public emergency.

‘The right to life is the supreme human right from which no derogation is permitted, even in time of war or public emergency. Nevertheless, it is not an absolute right such as, for example, that pertaining to the prohibition of torture.’⁹⁷

Set out in Article 12⁹⁸ are the circumstances under which an individual may be deprived of the right to life. It is noteworthy that incarceration is not one of the grounds set out in this Article by which an individual may be deprived of this right. It is trite that prisoners retain all rights that are not taken away by virtue of incarceration. Incarceration must not result in the deprivation of fundamental human rights.

‘Some modes of treatment of human beings are so fundamental to the existence of anything we would be willing to call a society that it makes better sense to treat an acceptance of them as constitutive of man and woman as social beings rather than as artificial conventions. This view does not entail verified propositions, as science requires. Rather, it views human life as encompassing certain freedoms and sensibilities without which the designation human would not make sense.’⁹⁹

⁹⁵ International Commission of Jurists. *Sexual Orientation, Gender Identity and International Human Rights Law*. ICJ: Human Rights Education Associates. 2009. Page 87

⁹⁶ The Constitution of Zambia, Cap 1 of the Laws of Zambia.

⁹⁷ Manfred Nowak. “Civil and Political Rights” In Janusz Symonides. (Ed.) *Human Rights: Concepts and Standards*. [Aldershot: Dartmouth Publishing Co. Ltd, 2000] Page 75

⁹⁸ The Constitution of Zambia, Cap 1 of the Laws of Zambia

⁹⁹ Jerome Shestack. “The Philosophical Foundations of Human Rights.” In Janusz Symonides. (Ed.) *Human Rights: Concepts and Standards*. [Aldershot: Dartmouth Publishing Co. Ltd, 2000] Page 43-44

As prisoners are a vulnerable section of society, it is incumbent upon the state to ensure that the deprivation of liberty does not entail the deprivation of the other fundamental rights still enjoyed by the prison population. It was stated in the case of *Munguwambuto Kabwe Peter Mwamba v Zambia*¹⁰⁰ that persons deprived of their liberty may not be subjected to any hardship or constraint other than that resulting from the deprivation of liberty.

4.1. STANDARD OF INTERPRETATION OF THE RIGHT TO LIFE

The right to life is also protected by the Universal Declaration of Human Rights¹⁰¹ (UDHR) and the International Convention on Civil and Political Rights¹⁰² (ICCPR). The right to life represents the most fundamental of all human rights.¹⁰³ The United Nations Human Rights Committee¹⁰⁴ has also noted that the right to life enunciated in article 6 of the ICCPR is the supreme right from which no derogation is permitted even in time of public emergency which threatens the life of the nation. According to Article 6(1);

‘Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of life.’

The right to life recognises that every human has an essential right to live. That is, no human shall be arbitrarily deprived of his life. The meaning of the right to life is that the government should protect its population from arbitrary deprivation of life and threats to human life.¹⁰⁵ In commenting on the standard of interpretation of the right to life, the UN Human Rights Committee stated that it is a right which should not be interpreted narrowly.¹⁰⁶

The obligation to ensure the right to life also extends to other threats to human life, either natural or human made.¹⁰⁷ This obligation also extends threats and acts of third parties. It was further stated by the UN Human Rights Committee that the expression "inherent right to life"

¹⁰⁰ Communication No. 1520/2006, U.N. Doc. CCPR/C/98/D/1520/2006

¹⁰¹ Adopted by the United Nations General Assembly on 10th December 1948

¹⁰² Entered into force on 223rd March 1976

¹⁰³ Javaid Rehman. *International Human Rights Law: A Practical Approach*. [London: Pearson Education Ltd: 2003] Page 68

¹⁰⁴ CCPR General Comment No. 06: The right to life (art. 6): 04/30/1982.

¹⁰⁵ State of Human Rights in Zambia 2007: Human Rights in the Fifth National Development Plan. Human Rights Commission Available at <http://www.hrc.org.zm> Accessed on 14/12/2010

¹⁰⁶ CCPR General Comment No. 06: The right to life (art. 6): 04/30/1982.

¹⁰⁷ Jerome Shestack. *The Philosophical Foundations of Human Rights*. Page 78

cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures.

‘In this connection, the Committee considers that it would be desirable for State parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics.’¹⁰⁸

It follows from the foregoing that the state has an obligation to safeguard the right to life. In this regard the state has a positive obligation to adopt measures to eliminate malnutrition and epidemics. This obligation includes the duty to provide adequate nutrition to prisoners. It is also inclusive of the duty to take positive measures to curb the spread of HIV in prisons. Where the state fails to do so, it is in breach of its obligation to protect the right to life.

The right to life requires that the State takes reasonable measures to protect their citizens from being arbitrarily deprived of life. These include, at the level of public policy, the obligation to combat crime and at the level of action by security forces, the obligation to act to prevent certain foreseeable acts of violence. An individual’s right to life is thus violated where the relevant authorities knew or ought to have known of a real and immediate risk to the life of an individual from the criminal acts of a third party and failed to take measures to avoid that risk.¹⁰⁹

The American case of *Farmer v Brennan*¹¹⁰ exemplifies the principles regarding the interpretation of the right to life, especially in situations of incarceration. In this case, the Petitioner claims to have been beaten and raped by another inmate after being transferred by the respondent federal prison officials from a correctional institute to a penitentiary -typically a higher security facility with more troublesome prisoners and placed in its general population.

He sought damages and an injunction barring future confinement in any penitentiary, and alleged that respondents had acted with “deliberate indifference” to petitioner’s safety in violation of the Eighth Amendment¹¹¹ as enshrined in the American Constitution because

¹⁰⁸ CCPR General Comment No. 06: The right to life (art. 6): 04/30/1982.

¹⁰⁹ International Commission of Jurists. ICJ. Sexual Orientation, Gender Identity and International Human Rights Law. Page 89

¹¹⁰ 511 US Supreme Court [1994] 825. Available at <http://www.law.cornell.edu/supct> Accessed on 14/12/2010

¹¹¹ Enshrines the right to life under the US Constitution

they knew that the penitentiary had a violent environment and a history of inmate assaults and that petitioner would be particularly vulnerable to sexual attack.

It was held that a prison official may be held liable under the Eighth Amendment for acting with "deliberate indifference" to inmate health or safety only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it. The Court stated in its holding that;

'deliberate indifference entails something more than negligence, but is satisfied by something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result. Thus, it is the equivalent of acting recklessly. However, this does not establish the level of culpability deliberate indifference entails, for the term recklessness is not self defining, and can take subjective or objective forms.'¹¹²

It was further held that prison officials have a duty under the Eighth Amendment to provide humane conditions of confinement. They must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must protect prisoners from violence at the hands of other prisoners. However, a constitutional violation occurs only where the deprivation alleged is, objectively, "sufficiently serious," and the official has acted with "deliberate indifference" to inmate health or safety.

In the case of *Edwards v United Kingdom*,¹¹³ a mentally ill prisoner was killed by his cellmate, whom the prison authorities knew to be a paranoid schizophrenic. It was held that there was a violation of the State's obligation to protect the deceased's life since information was available which identified the cellmate as a real and serious risk to the deceased when placed in his cell.

This case highlights the State's increased obligation to protect the right to life of people who are uniquely unable to defend the right themselves. This increased obligation also extends to prisoners as people in detention are uniquely dependant on the State to safeguard their rights. The State therefore, has an enhanced obligation to protect them.

¹¹² 511 US Supreme Court [1994] 825. at Page 841

¹¹³ Application No. 46477/99 Available at <http://www.echr.coe.int/./hudoc+database> Accessed on 14/12/210

In the English case of *R (on the application of Amin) v Secretary of State for the Home Department*,¹¹⁴ M, a prisoner serving a sentence in a young offender institution, was killed by his cellmate, S, whose institutional behaviour was known to the Prison Service to be dangerous. It was held that the state had a duty to take appropriate legislative and administrative steps to protect life. It owed a particular duty to those involuntarily in its custody. Lord Bingham of Cornhill stated in his judgment that;

‘There is a great responsibility on the police or prison authorities to ensure that the citizen in its custody is not deprived of his right to life. Such persons must be protected against violence or abuse at the hands of state agents. They must be protected from self-harm. Reasonable care must be taken to safeguard their lives and persons against the risk of avoidable harm.’

The European Court of Human Rights expounded similar principles in the case of *Renolde v France*¹¹⁵ in which it stated that the first sentence of Article 2¹¹⁶ of the European Convention on Human Rights: The Convention for the Protection of Human Rights and Fundamental Freedoms¹¹⁷ enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction.

The Court further reiterated that Article 2 may imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual from another individual or, in particular circumstances, from himself.

However, this principle was qualified in that;

‘such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities, bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources.’¹¹⁸

It is clear from the foregoing authorities that where prison officials act with "deliberate indifference" to inmate health or safety where they have knowledge that inmates face a substantial risk of serious harm and disregard that risk by failing to take reasonable measures

¹¹⁴ (2003) 4 All E.R 1264

¹¹⁵ Application no. 5608/05. ECHR 2008-2. Available at <http://www.echr.coe.int/./hudoc+database> Accessed on 14/12/2010

¹¹⁶ Provides that "everyone's right to life shall be protected by law."

¹¹⁷ Entered into force on 3.09.1953

¹¹⁸ Application no. 5608/05. ECHR 2008-2. Available at <http://www.echr.coe.int/./hudoc+database> Accessed on 14/12/210

to abate it, the conduct of such officials could amount to a violation of the right to life. This amounts to a violation of the increased obligation the State has towards prisoners.

The state is under a positive obligation to ensure that inmates receive adequate food, clothing, shelter, and medical care, and it must protect prisoners from violence at the hands of other prisoners. The European Court of Human Rights also emphasised in the case of *Younger v. the United Kingdom*¹¹⁹ that persons in custody are in a vulnerable position and that the authorities are under a duty to protect them. The Court went on to state that the prison authorities, similarly, must discharge their duties in a manner compatible with the rights and freedoms of the individual concerned.

4.2. THE EXTENT TO WHICH PRISONERS' RIGHT TO LIFE IS UPHELD

It has been established that the right to life must not be interpreted in a narrow way. The state is under an obligation to take positive measures in order to safeguard this right. The positive measures to be undertaken by the state include the obligation to ensure that inmates receive adequate food, clothing, shelter, and medical care, and it must protect prisoners from violence at the hands of other prisoners.

The standard of protection of the right to life must be viewed in light of the prevalent sexual violence in prisons and the high rates of HIV infection in prisons. It has been established in the preceding chapter that acts of sexual violence lead to inmates contracting HIV. It was further noted that prison officials are aware of the existence of such violence but tend to turn a blind eye towards it. As established in *Renolde v France*,¹²⁰ the state is under a positive obligation to take preventive operational measures to protect an individual from violence perpetrated by another individual.

It can therefore be imputed that the knowledge of prison officials of the existence of sexual violence among inmates and their failure to take action brings into operation the principle set

¹¹⁹ Application no. 57420/00, ECHR 2003-I. Available at <http://www.echr.coe.int/./hudoc+database> Accessed on 14/12/210

¹²⁰ Application no. 5608/05. ECHR 2008-2.

out in *Farmer v Brennan*.¹²¹ Prison officials act with “deliberate indifference” to inmate health or safety whilst knowing that inmates face a substantial risk of serious harm and disregard that risk by failing to take reasonable measures to abate it. This, as established by the said principle, amounts to a violation of the right to life.

Also relevant is the decision of the European Court of Human Rights in *Edwards v United Kingdom*.¹²² This case highlighted the State’s increased obligation to protect the right to life of people who are uniquely unable to defend the right themselves. It was found that this increased obligation also extends to prisoners as people in detention are uniquely dependant on the State to safeguard their rights. The State therefore, has an enhanced obligation to protect them. There is thus a clear violation by the State of this obligation where prison officials have turned a blind eye to the prevalence of sexual violence in prisons as has been established to be the case in *Zambian prisons*.

This violation of the right to life is further aggravated by the poor prison conditions, poor diet and lack of medical care. The extent of the state’s obligation to protect the right to life does not end with protection from violence. It also extends to the obligation to ensure that inmates receive adequate food, clothing, shelter, and medical care in addition to the obligation to protect prisoners from violence at the hands of other prisoners.

It must be noted that human rights are interrelated and interdependent. The Constitution¹²³ protects a number of rights that indirectly pertain to the various economic, social and cultural rights. The right to life, for instance cannot be fulfilled without the right to health, which itself is not provided for in Part III of the Constitution. In addition, Part IX of the Constitution, the Directive Principles of State Policy, ensure that economic social and cultural rights are protected and fulfilled in the development and implementation of national policies and, the making and application of any laws.¹²⁴

¹²¹ 511 US Supreme Court [1994] 825

¹²² Application No. 46477/99

¹²³ The Constitution of Zambia. Cap 1 of the Laws of Zambia

¹²⁴ State of Human Rights in Zambia 2007: Human Rights in the Fifth National Development Plan. Human Rights Commission. Page 12. Available at <http://www.hrc.org.zm> Accessed on 14/12/210

It follows from this, keeping in mind the standard of interpretation of the right to life as enunciated by the UN Human Rights Committee,¹²⁵ that the fact that the right to health is not one enshrined in the Constitution does not mean that its violation has no bearing on the right to life. A violation of the right to health may in certain cases also amount to a violation of the right to life. The State is nevertheless in violation of its obligation under Article 12 of the ICESCR.

It is also noteworthy that under Article 112 of the Constitution, which provides for the Directive Principles of State Policy, it is provided that the State shall endeavour to provide adequate medical facilities and to take all measures to constantly improve such facilities. This is the only provision in the Zambian Constitution that deals with the right to health.

The Ghanaian case of *New Patriotic Party v Attorney General*¹²⁶ sheds light on the legal application of the Directive Principles of State Policy. It was held that the Directive Principles of State Policy had the effect of providing goals for legislative programmes and a guide for judicial interpretation but were not of and by themselves legally enforceable by any court. Nevertheless, where some provisions of the Directive Principles formed an integral part of some of the enforceable rights either because they qualified them or could be held to be rights in themselves, such provisions, could of themselves be justiciable.

It therefore follows in this regard, that the right to health qualifies the right to life. The State is thus under an obligation to uphold the right to health. In this regard, the failure by the state to ensure that inmates are provided with conducive conditions of incarceration and access to proper diet and medical care amounts to a violation of not only the right to health but also to a violation of the right to life. This is due to the fact that inmates who contract HIV as a result of sexual violence find their plight exacerbated by the poor prison conditions such as overcrowding which results in transmission of diseases such as tuberculosis. This in turn has an adverse effect on their already fragile health and consequently resulting in death. The

¹²⁵ CCPR General Comment No. 06: The right to life (art. 6): 04/30/1982 which states that the right to life must be given an expansive interpretation

¹²⁶ (1992) 2 LRC 283

combination of the high prevalence of both TB and HIV in prisons is responsible for a high mortality rates amongst prisoners.¹²⁷

The violation of the right to life, however, does not end there. The right to life is further violated by the failure by the state to provide anti-retroviral treatment to infected prisoners. The failure by prison officials to curb sexual violence added to the combination of poor diet, exposure to opportunistic infectious diseases such as tuberculosis and the lack of medical care, amounts to a violation of the right to life. Incarceration, in light of the factors mentioned above is now tantamount to being a death sentence.

4.3. THE POLICY AGAINST DISTRIBUTION OF CONDOMS

It is official prison policy in Zambia that condoms are not to be distributed in prisons. This policy is in furtherance of the country's anti-sodomy laws. However, it has been argued by certain sections of civil society that this policy must be done away with as it leaves prisoners without protection from contracting HIV/AIDS especially in light of the fact that the State has failed in its obligation to protect inmates from sexual violence. It is argued that maintaining this policy leaves prisoners without a last line of defence against contracting HIV.

Dr Simooya, who heads "In But Free" avers that;

'It's better to be practical and ask how we can prevent the transmission of HIV. We must consider putting condoms in prison.'¹²⁸

It is a view shared by the medical director of the Zambia Prisons Service, Dr Chisela Chileshe. He has been lobbying politicians to allow condoms into prison but says moral concerns are getting in the way. He says;

'Inmates are dying, and we need the well-established and recognised methods of prevention. We are talking about public health here. People must understand that health in prison is health

¹²⁷ UN Office on Drugs and Crime. HIV and Prisons in sub-Saharan Africa: Opportunities for Action. Page 2

¹²⁸ Jo Fidgen. How to Stop HIV Spreading in Zambia's Prisons.

in the community. The wall prevents an inmate from going outside, but the disease has no boundary.¹²⁹

According to Fidgen¹³⁰ National Aids Council (NAC) documents clearly state that legislation to decriminalise homosexuality is urgently needed so that condoms can be distributed to prisoners. But when pressed by Fidgen, NAC admitted that the statement does not reflect government policy.

Prisoners' rights activists have been calling for Zambia to adopt the strategy being used in Lesotho, a country with similar anti-sodomy laws. The prison authorities in Lesotho cannot distribute condoms, but they can make them available so they simply leave boxes of condoms in strategic places and refill them when they are empty.¹³¹

However, when prisoners were asked if they would use condoms if they were made available, most prisoners who were surveyed said no, as they were of the opinion that male-to-male sex is un-Christian, un-Zambian, and will promote homosexuality.¹³²

It is however, important to note that the provision of condoms is essential for the enjoyment of the right to health. Though, not justiciable under the Zambian Constitution, the State nevertheless has an obligation to ensure that prisoners enjoy the highest attainable standard of physical and mental health as provided by Article 12 of the ICESCR to which Zambia is party. It follows thus that the policy against distribution of condoms constitutes a violation of the right to life to the extent that prisoners are denied a "last resort" measure to protect themselves from contracting HIV through sexual violence. This is due to the fact that prison authorities and indeed the State, have failed in their obligation to protect prisoners from acts of sexual violence at the hands of other inmates.

4.4. CONCLUSION

In summation, it is noted that it is internationally accepted that the right to life is the supreme right from which no derogation is permitted even in time of public emergency which

¹²⁹ Interview with Dr. Chisela Chileshe. 06/01/2011

¹³⁰ Jo Fidgen. How to Stop HIV Spreading in Zambia's Prisons

¹³¹ Jo Fidgen. How to Stop HIV Spreading in Zambia's Prisons

¹³² Impromptu survey among inmates at Lusaka Central Prison. 06/01/2011

threatens the life of the nation. It is a right which should not be interpreted narrowly. In this regard, there is a positive obligation on the state to take positive measures to preserve this right.

It is also noted that preservation of prisoners' right to life imposes upon the state a duty to protect inmates from acts of sexual violence. As established in the case of *Farmer v Brennan*, the right to life is violated where prison officials act with "deliberate indifference" to inmate health or safety if they have knowledge that inmates face a substantial risk of serious harm and they disregard that risk by failing to take reasonable measures to abate it.

In this regard, prison officials have knowledge of the rampant acts of sexual violence in Zambian prisons but do not act to abate the practice. This is a clear violation of the increased obligation that prison officials have towards prisoners. It is thus a violation of the right to life as in totality, the consequences of sexual violence have an adverse impact on the enjoyment of the right to life.

It has also been noted that prisoners' right to life is also violated by the poor prison conditions which ultimately have an adverse effect on the health of inmates infected with HIV. Rampant overcrowding leads to the spread of tuberculosis which further weakens the health of inmates infected with HIV. The situation is compounded by the lack of medical care and the poor diet offered in prisons. All these factors when taken together constitute a violation of prisoners' right to life.

CHAPTER 5

RECOMMENDATIONS AND CONCLUSION

5.0. INTRODUCTION

It has been established in the foregoing chapters that HIV/AIDS and sexual violence present a serious problem to the prison community and has an impact on prisoners' right to life. The focus of the following chapter will be to make recommendations to address the plight of prisoners in this regard. In order to fully address the problem of sexual violence and HIV/AIDS in prisons, it is necessary to address a number of related problems such as overcrowding and tuberculosis. Recommendations will also be made in this regard in addition to recommendations dealing with sexual violence and HIV/AIDS. A conclusion will then be drawn based on the discussion of the problem of HIV/AIDS and sexual violence in prisons in the foregoing chapters to establish a position regarding whether there is a violation of prisoners' right to life.

5.1. CONCLUSION

According to international law, the penitentiary system shall treat prisoners with the essential aim of reformation and social rehabilitation.¹³³ It can be noted that the prison system in Zambia is substantially lacking in the attainment of this goal due to the poor conditions in prisons. As a result of the poor conditions in Zambian prisons, the problems of sexual violence, HIV/AIDS and infectious diseases such as TB are exacerbated.

In conclusion, it can be noted from the foregoing chapters that the problems of sexual violence and HIV/AIDS in prisons are exacerbated by a number of factors such as overcrowding, infectious diseases such as TB, poor supervision of inmates and the nonchalant attitudes of prison officials. It has been established that the problem of sexual violence is compounded by the rampant overcrowding in prisons which leads to poor supervision of inmates by prison authorities and increased prevalence of sexual violence. The

¹⁰³ ICCPR, art. 10; UN Human Rights Committee, General Comment No. 21, para. 10.

situation is further compounded by the fact that prison authorities have knowledge of such violence and do little or nothing at all to prevent it and deal with the perpetrators.

The problem of HIV/AIDS is another problem ripping through the prison community. It has been established that this problem is made worse by the rampant unprotected consensual sex among inmates, acts of sexual violence, overcrowding and infectious diseases such as TB. The plight of HIV positive prisoners is aggravated by the lack of proper medical care and access to treatment for TB and access to anti-retroviral therapy.

The existence of sexual violence and HIV/AIDS taken on their own do not constitute a violation of the right to life as enshrined in the Constitution and international human rights instruments. However, when the consequences of sexual violence coupled with HIV/AIDS are considered in light of the generally poor conditions, it can be concluded that there is a violation of prisoners' right to life.

It has been noted that the right to life must not be interpreted in a restrictive manner. The protection of this right requires that States adopt positive measures. Among the positive measures the state is required to undertake in order to protect the right to life is ensuring the enjoyment of the right to health. It has been noted that enjoyment of the right to health is cardinal to the enjoyment of the right to life.

It is also noteworthy that the state is also required to take appropriate steps to safeguard the lives of those within its jurisdiction as was established in *Renolde v France*.¹³⁴ The state is guilty of violating the right to life where prison officials act with "deliberate indifference" to inmate health or safety where it is known that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it.¹³⁵

It is therefore concluded that the absence of protection of inmates from sexual violence which often has the result of prisoners being infected with HIV, by the state amounts to a violation of the right to life. This conclusion is drawn in light of the existing conditions in prisons. Prisoners contract HIV as a result of acts of sexual violence which prison authorities have

¹⁰⁴ Application no. 5608/05. ECHR 2008-2.

¹⁰⁵ *Farmer v Brennan* 511 US Supreme Court [1994] 825.

knowledge of and fail to prevent. This is a clear violation of the increased obligation that prison authorities have towards inmates to protect their right to life. It has been noted that prison warders often act with “deliberate indifference” towards reports of sexual violence. This, where the consequences of such violence include the victim contracting HIV, amounts to a violation of the right to life.

There is further violation as a result of the poor prison conditions which provide a haven for highly infectious diseases such as TB which have an adverse effect on the health of the HIV positive victims of prison sexual violence. The situation is further aggravated by the lack of medical care. The prevalence of such diseases and the lack of adequate medical care is a clear violation of the right to the enjoyment of the highest attainable standard of physical and mental health enshrined in Article 12(1) of the ICESCR.

It has been noted already that though this right is not enshrined in the Constitution, this is a right which is cardinal to the enjoyment of the right to life. It therefore follows that the prevalent diseases and the lack of adequate medical care have a direct impact on the right to life. It is thus contended that when all these factors are taken in totality, there is a clear violation of the right to life. This is due to the fact that prisoners contract HIV as result of sexual violence and because of the poor conditions that exist in prisons and the lack of adequate medical care, the ultimate result is the death of such prisoners.

In this regard also, it is noted that the policy against distribution of condoms in prisons constitutes a violation of the right to life to the extent that prisoners are denied a “last resort” measure to protect themselves from contracting HIV through sexual violence. This is due to the fact that prison authorities and indeed the State, have failed in their obligation to protect prisoners from acts of sexual violence at the hands of other inmates.

In addition, it is important to state that the rampant acts of sexual violence in prisons coupled with the indifferent attitude of prison officials, constitutes a violation of the right to protection from torture and other cruel or degrading treatment. This is noted from the General Comments by the United Nations Human Rights Committee on the prohibition of torture, cruel, inhuman or degrading treatment under Article 7 of the ICCPR in which the Committee noted that the prohibition against torture relates not only to acts that cause physical pain but

also to acts that cause mental suffering to the victim.¹³⁶ It is noted that sexual violence causes not only physical pain but also mental suffering and anguish.

Improving the conditions in Zambia's prisons will require significant changes on the part of the Zambia Prisons Service, and will also require the coordinated efforts of actors throughout the Zambian government, civil society, and international agency and donor communities. In addressing general prison conditions, the Zambia Prisons Service will be unable to effect necessary change without improved support from Parliament and the international donor community.

To improve the delivery of medical services to prisoners, NGOs, international agencies and donors, and Zambian Parliament will also play a role in improving the availability and accessibility of services. To reduce the drastic overcrowding that now plagues the prisons, the Zambian judiciary, Parliament, police, and immigration officials will be indispensable in ensuring necessary changes to the law, implementation of non-custodial alternatives, and increased efficiency of the judicial process.

Clearly, resource constraints are a major consideration, but greater priority on prison funding needs to be put at the national level and greater support from international donors needs to be forthcoming if change is to be effected. Some reforms—particularly the proposed legal reforms—are resource-neutral; those that aren't are crucial to the realization of the rights of prisoners and are the responsibility of both the national government and international donors. All these measures will have a net effect of improving the protection of prisoners' right to life.

5.2. RECOMMENDATIONS

The following recommendations consist of measures to deal with the specific aspects that have a direct impact on the rights of prisoners vis-à-vis sexual violence and HIV/AIDS and ultimately on the enjoyment of the right to life by inmates.

¹³⁶ CCPR General Comment No. 20: Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (Art. 7): 03/10/1992.

5.2.1. SEXUAL VIOLENCE

In order to address the problem of sexual violence in prisons, it is recommended that Zambia Prison Service officials must investigate all complaints of sexual assault of inmates by other inmates or officers, and take appropriate action against those found responsible. Additionally, they must also investigate all complaints of physical, verbal, and sexual assault and abuse, by inmates and officers, against inmates suspected or charged with same-sex sexual conduct, whether in custody or prior to incarceration, and take appropriate action against those found responsible.

It is also recommended that prison authorities increase supervision of prisoners in order to curb the rampant acts of sexual violence. Additionally, disciplinary action must be taken against prison officials turning a blind eye towards such violence. It is also necessary for prison authorities ensure that juvenile inmates are separated from adult inmates as sexual violence is mostly perpetrated against juveniles.

5.2.2. TUBERCULOSIS

It has been observed that tuberculosis (TB) is another major problem which has an adverse effect on HIV positive inmates and in order to fully tackle the problem of HIV/AIDS in prisons, it is also necessary to deal with the problem of TB. It is therefore recommended in this regard that TB must be addressed by firstly providing TB screening to all inmates entering the prison, and all existing inmates through targeted surveys, sputum analysis, and, if needed, chest x-ray evaluation.

The Zambia Prison Service must also ensure prompt initiation on treatment for those with confirmed disease. It is also recommended that the Zambia Prison Service conduct a TB prevalence study to understand the true extent of the disease in the prisons. Also necessary is the establishing of capacity for TB testing and treatment at each prison clinic.

It is recommended that prison officers and “cell captains” be educated in TB symptoms and the necessity of referral for testing upon the appearance of symptoms. Further, educating prison medical officers in the co-management of HIV and TB is also necessary. It is also

recommended that clear guidelines and protocols for moving patients into and out of TB isolation, with regular checks to ensure that isolation is appropriate be established.

Another measure of cardinal importance in order to properly address the problem of TB is the improving immediately of the ventilation, sunlight, and cleaning of TB isolation cells in line with international standards. In this regard therefore, it is also necessary for the State to take measures to reduce overcrowding in prisons such as parole, speedy determination of cases of inmates on remand and in the long term, the construction of new prisons that comply with international standards.

Also recommended is prioritizing placing prisoners who are HIV positive and test positive for TB on continuous Isoniazid Preventive Therapy (IPT)¹³⁷ for prevention of active TB as IPT becomes available, given the higher risk of TB in the prison population. As testing and treatment for drug resistance become available in the general population, ensuring full prisoner inclusion in testing and treatment programs is also necessary.

5.2.3. HIV/AIDS

There is an urgent need to provide access to evidence based HIV prevention, care, treatment and support in prison settings in Africa. The first step to the development of adequate HIV prevention, treatment, and care programmes in prisons is to build, for each country, better knowledge of the situation, better knowledge of the extent of the problem, and identification of needs to address these problems.

It is recommended that the spread HIV/AIDS in prisons be addressed by offering voluntary HIV counselling and testing (VCT) to all inmates entering prison and all existing inmates. Prisoners should have access to confidential voluntary counselling and testing. In this regard it is also recommended that HIV voluntary counselling and testing and anti-retroviral therapy treatment and monitoring facilities at each prison be established. Linked to this is the necessity for ensuring prompt initiation of treatment for inmates with confirmed disease. Those who have been diagnosed with AIDS should have access to antiretroviral treatment,

¹³⁷ IPT refers to TB medication specially tailored to suit people who are HIV positive and is safe to be taken alongside anti-retroviral treatment.

adequate nutrition to enable them to follow their treatment, and prevention and treatment of opportunistic diseases; those with terminal diagnoses should also benefit from compassionate release.

Awareness about the risks of HIV transmission should be raised among prison populations and those in contact with them (e.g. prison staff, prison service providers, sexual partners) during incarceration and prior to release through targeted information, education, and behaviour change communication programs.

Access of prisoners to prevention commodities should be promoted in accordance with international guidelines for HIV prevention in prisons, including drug treatment for drug users, condoms, disinfectant for tattooing equipment, and safe needles and syringes. It is recommended that the Zambia Prisons Service and Ministry of Home Affairs should provide condoms to all prisoners and prison officers, in conjunction with education on harm reduction to increase condom acceptance.

In this regard, it is recommended that in light of the current legislation criminalizing same sex relations, the Zambia Prison Service adopt the strategy adopted in Lesotho by which prison authorities simply leave boxes of condoms in strategic places and refill them when they are empty. It is further recommended that HIV prevention, treatment, and care education, including information and sensitization on harm reduction and safer-sex practices in the context of same-sex sexual conduct at each prison to increase condom acceptance be provided.

5.2.4. SYSTEMIC REFORMS

It is further recommended that new prison officers be recruited to ensure adequate staffing in all facilities, including security and healthcare staff. Prison authorities must also conduct health screening of all prisoners upon entry and at regular intervals to check for diseases such as TB. The Government must establish medical facilities at each prison with at least the minimum of a clinical officer on staff, with a consistent supply of essential medications and a minimum capacity to conduct TB testing and treatment and HIV voluntary counselling and testing and anti-retroviral therapy treatment and monitoring.

Prison authorities must also accept prison responsibility for remandee and convict custody equally, escort remandees outside prison grounds for medical care on terms equal to convicts. In the intermediate and longer term, the Prisons Service, in collaboration with the Parliament and international donors, should secure enough funding for the prison budget to ensure conditions consistent with international standards and scale up prison-based medical care.

It is also recommended that in the long term, more prisons must be built by the Government in order to alleviate the problem of overcrowding in prisons. Furthermore, in order to alleviate the failings in the criminal justice system that exacerbate overcrowding and violate the rights of prisoners, the Zambian Parliament, judiciary, Police Service, and Prisons Service need to work together to decrease arbitrary arrests, increase the use of bail, and reduce judicial delays. In this regard, the Government, through the Ministry of Justice should issue guidelines for bail administration to encourage increased defendants' instruction in bail rights and increased granting of bail, considering accurate information about household incomes in Zambia

It is also recommended that significant effort should be made to scale up the use of parole and non-custodial alternatives to incarceration. In this regard, the Zambian Parliament should address overcrowding by taking steps to expand parole eligibility by amending the Prisons Act and Prisons Rules Finally it is also necessary to establish a comprehensive monitoring and evaluation system that records prison illness and deaths.

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