

**The applicability of regional human rights law dealing with imprisonment of
mothers in contemporary Africa**

by

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ABSTRACT

This study argues that the inflexible and generalizing character of article 30(d) of the African Charter on the Rights and Welfare of the Child impedes, in some cases, the realization of the best interests of children of incarcerated mothers in contemporary Africa. This rigidity issue and its consequences are partially addressed by General Comment No 1 (Article 30 of the African Charter on the Rights and Welfare of the Child) on ‘Children of incarcerated and imprisoned parents and primary caregivers’, which promotes an individualized and more flexible approach with respect to the decision of allowing children to reside in prison with their primary caregivers or separating them. However, a general comment is limited by virtue of being a soft law. Therefore, the author recommends that the Committee explores the possibility of amending the provision of article 30(d). In the meantime, the author also recommends that General Comment No 1 should be popularized and by doing so its normative value might be strengthened.

CHAPTER 1: INTRODUCTION

1.1 Background

The majority of women in prison worldwide are mothers.¹ In most parts of the world, women are still the primary or sole caregivers of children.² Therefore, it is reasonable to conclude that, at some point in time, a considerable number of children around the world bear the consequences of their primary caregiver being imprisoned. Such consequences take the form of separation of the children from their imprisoned primary caregiver or the form of co-detention. Having to choose between these two scenarios - separation or co - detention - is 'not a question of choosing between a good option and a bad option, but between two bad options'.³

The fact that the last decade registered an increase in the number of custodial sentences imposed on women⁴ means that the situation of a high number of children is worsening, rather than getting better. Still, women are not the only primary caregivers children may have: there are many men raising their children alone and the probability of men being imprisoned is higher, in comparison to women (only 4.45% of the prison population worldwide is represented by women).⁵

¹ R Taylor 'Women in prison and children of imprisoned mothers' Preliminary Research Paper, Quaker United Nations Office (2004) 24.

² United Nations Office on Drugs and Crime 'Handbook on Women and Imprisonment' (2nd ed), with reference to the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules) (2014) 17.

³ M Nari et al 'Encierro y Resistencia en las carceles de mujeres en Argentina' Paper prepared for delivery at the 2000 meeting of the Latin American Studies Association, Miami (2000) 17 in Friends World Committee for Consultation (Quakers) Submission to the Committee on the Rights of the Child Day of Discussion on Implementing Child Rights in Early Childhood, Children of Imprisoned Mothers 2.

⁴ R Epstein 'Mothers in prison: The sentencing of mothers and the rights of the child' Howard League 'What is Justice?' Working Papers 3(2014) 3.

⁵ R Walmsley 'World Female Imprisonment List (2nd ed) (Women and girls in penal institutions, including pre-trial detainees/remand prisoners)' at http://www.prisonstudies.org/sites/prisonstudies.org/files/resurces/downloads/wfil_2nd_edition.pdf (accessed 12 September 2014) 1.

Although international human rights treaties do not specifically provide for the rights of children whose primary caregiver is imprisoned, they do, generally, protect the rights of children. Article 3 of the Universal Declaration of Human Rights (Universal Declaration) and article 9 of the International Covenant on Civil and Political Rights (ICCPR) stipulate that everyone, including children, has the right to liberty. Article 25(2) of the Universal Declaration and Article 10(2) and 10(3) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) assign a high level of protection to mothers and children.

The institution of family, seen as a pillar of society, is entitled to ‘the widest possible protection and assistance’⁶ ‘by society and the State’.⁷ In the same line of thought, article 8(1) of the Convention on the Rights of the Child stipulates that State Parties must ‘respect the right of the child to preserve his or her identity, including [...] family relations’.⁸ Article 9(1) of the same treaty states that ‘a child should not be separated from his or her parents against their will’,⁹ except in a situation where the principle of the best interests of the child would require otherwise.

In the African context, article 18(1) of the African Charter on Human and Peoples’ Rights (African Charter) urges States to protect the ‘physical and moral health’¹⁰ of the family, seen as a reservoir of ‘morals and traditional values’¹¹ of the community, while article 18(3) provides for the protection of women’s and children’s rights.

The African Charter on the Rights and Welfare of the Child (African Children’s Charter) is the only human rights treaty that makes specific reference to the situation of children of imprisoned mothers. Article 30 of the treaty, entitled ‘Children of imprisoned mothers’, regulates the situation of women/mothers in sub-articles (a), (b), (c), (e) and (f), while sub-article (d) refers to children of incarcerated mothers. The children envisaged by article 30 are: the unborn, the infant and the young child.¹²

⁶ Article 10(1) of the International Covenant on Economic, Social and Cultural Rights (CESCR).

⁷ Article 23(1) of International Covenant on Civil and Political Rights (ICCPR).

⁸ Article 8(1) of the Convention on the Rights of the Child (CRC).

⁹ Article 9(1) of CRC.

¹⁰ Article 18(1) of the African Charter on Human and Peoples’ Rights.

¹¹ Article 18(2) of the African Charter.

¹² Article 30(1) of the African Charter on the Rights and Welfare of the Child (ACRWC).

Similar to other articles in the treaty, this article must be read through the lenses of article 4, which deals with the issue of ‘best interests of the child’, stipulating that ‘in all actions concerning the child undertaken by any person or authority the best interest of the child shall be the primary consideration’.¹³

In order to protect the children and to ensure that their best interest is being taken into consideration at all times, article 30 urges State Parties who have ratified the African Children’s Charter to ‘provide special treatment’ to those mothers that find themselves in conflict with the law. Significant in the context of this article is article (d), which states that ‘a mother shall not be imprisoned with her child’. Article 30(d) must be read in tandem with article 30(c) because article 30(c) complements article 30(d) in that it states that State Parties to this treaty must ‘establish special alternative institutions for holding such mothers’. While article 30(d) categorically prohibits the incarceration of mothers together with their children, reading article 30(d) together with article 30(c) could lead to a more flexible interpretation, allowing the possibility of children accompanying their mothers if ‘special alternative institutions’ could be provided.

The African Committee of Experts on the Rights and Welfare of the Child (the Committee) issued in 2013 its General Comment No 1 on ‘Children of incarcerated and imprisoned parents and primary caregivers’. According to General Comment No 1, such alternatives to incarceration would serve the principle of the best interest of the child and would consist of ‘prison nurseries’, ‘work-release programmes’, ‘treatment programmes’, ‘smaller facilities or halfway houses’.¹⁴ General Comment No 1 also stipulates that each case of primary caregivers’ imprisonment should be considered individually, in order to make sure that the rights of children under consideration are prioritized.¹⁵

¹³ Article 4(1) of the ACRWC.

¹⁴ African Committee of Experts on the Rights and Welfare of the Child (ACERWC) General Comment No 1 (Article 30 of the African Charter on the Rights and Welfare of the Child) on ‘Children of Incarcerated and Imprisoned Parents and Primary Caregivers’ (2013) 51, 52.

¹⁵ General Comment No 1 (2013) 1.4.

1.2 Problem statement

Prima facie there seems to be an incompatibility between the prohibitive and rigid character of article 30(d) of the African Children's Charter, on the one hand, and the flexibility of the provisions of the General Comment No 1, on the other hand.

This discrepancy is explained in the General Comment No 1 as follows: The Committee realized that children's rights are being violated when their primary caregiver is imprisoned. This violation could happen either by separation of the children from their primary caregiver or by the children's imprisonment with their caregiver.¹⁶ Taking the right decision in each case depends on a number of factors pertaining to the children such as their age, gender, maturity, the relationship with their mother¹⁷ as well as the willingness and capacity of extended family to take care of the child/children in question.

Article 30(d) prohibits the imprisonment of primary caregivers together with their child/children. The decision to take such a drastic measure is explained in General Comment No. 1 as follows: Ideally, all children should grow up 'in a family environment in an atmosphere of happiness, love and understanding'.¹⁸

When it comes to the interpretation of article 30(d) there is a need to look beyond the literal meaning of the words and consider the context in which it was elaborated.¹⁹ In this case, the literal interpretation of the treaty seems rigid and prohibitive in nature, and does not take into account individual specificities of the children under consideration. The possible solution to the rigidity issue of article 30 (d) is to give it a contextual interpretation by reading it together with article 30(c).

¹⁶ General Comment No 1 (2013) sections 3, 4.

¹⁷ General Comment No 1 (2013) section 24(c).

¹⁸ General Comment No 1 (2013) section 54.

¹⁹ Lord Lowry, Attorney General's Reference (No 1) [1988] HL.

The intention of the treaty body was undoubtedly to confer upon the African child a high level of protection, but the provisions of the treaty do not address the challenges of the contemporary African context.

The rationale of article 30(d) is based on the fact that the situation of prisons in a majority of African countries is extremely precarious, ‘burdened with overcrowding and an inability to satisfy basic human rights standards’.²⁰ Imprisoning children with their primary caregivers might deprive them of their basic needs such as nutritious food, good education, adequate health facilities, a conducive environment for a normal holistic development, and the opportunity to play.

Also, article 30(d) seems to be based on the assumption that in the African context even in the absence of the primary caregiver the child can be well cared for by the other parent or by a member of the extended family. In contemporary Africa this assumption is suspect, for a number of reasons.

First, given the fact that the primary caregiver is, in most cases, the mother and looking at the ‘social profile of women in prison’²¹ worldwide, the image that emerges is that of a woman plagued by a multiple deficiency: uneducated, unemployed, economically unstable, victim of abuse and violence, mentally fragile, addicted to drugs,²² product of broken homes, and perpetrator of such family settings. Such women often suffer social isolation and are less likely to engage in stable relationships. Therefore, when they are imprisoned, the probability of their children being taken care of by their fathers is very unlikely. The phenomenon of single motherhood is not an exception in the African continent, but it is actually a recurrent issue caused either by premarital childbearing, divorce or death of spouse.

Second, even if some incarcerated mothers are linked to an extended family, the traditional extended family, so close to the African heart, has become weaker than

²⁰ SK Kaggwa Report of the special rapporteur on prisons and conditions of detention in Africa, 52nd Ordinary Session of the African Commission on Human and Peoples’ Rights, Cote d’Ivoire (2012) 8.

²¹ R Taylor ‘Women in prison and children of imprisoned mothers’ Preliminary research paper, Quaker United Nations Office (2004) 4.

²² R Taylor ‘Women in prison and children of imprisoned mothers’ Preliminary research paper, Quaker United Nations Office (2004) 5.

before. This situation is the effect of poverty, the war or the HIV/AIDS pandemic which often lead to the crude reality of child-headed households.²³

Third, the issue of prejudice should also be mentioned. The stigma associated with being imprisoned affects the willingness of the broad family to accommodate the children of the imprisoned primary caregiver.²⁴

All these aspects have negative implications upon the child whose primary caregiver is incarcerated. The children under consideration get caught in the tension between conflicting rights that were supposed to benefit them. On the one hand, being imprisoned with their primary caregiver infringes on their right to freedom and to a wide range of socio-economic rights. On the other hand, being separated from their primary caregiver touches on their right to family care.

Although the provisions of General Comment No 1 fall into the category of soft law, meaning that they are non-binding in nature, such provisions sometimes seem to better protect the best interests of the child, due to their flexibility and individualistic approach. Soft law supplements the provisions of treaties in order to ‘elevate the level of protection in situations where, according to practical experience, violations of human rights standards are likely to occur’.²⁵ These instruments seem to possess ‘great persuasive force’²⁶ and ‘create expectations about future conduct’²⁷ despite the fact that they are highly contested on issues of ‘legitimacy and authoritativeness’.²⁸ Given the potential of these soft law standards, taking into account only the treaties and overlooking the general comments’ provisions would lead to ‘an ultimately

²³ M Skovdal & M Daniel ‘Resilience through participation and coping-enabling social environments: The case of HIV-affected children in sub-Saharan Africa’ (2012) 11(3) *African Journal of AIDS Research* 160.

²⁴ E Saunders & R Dunifon *Children of incarcerated parents* (2011) 4 in R Manjoo ‘Pathways to, conditions and consequences of incarceration for women’ Report of the Special Rapporteur on violence against women, its causes and consequences (2013) 23.

²⁵ C Tomuschat *Human rights: Between idealism and realism* (2nd ed) (2008) 39.

²⁶ F Viljoen *International human rights law in Africa* (2nd ed) (2012) 31.

²⁷ AT Guzman & TL Meyer ‘International soft law’ (2010) 2(1) *Journal of Legal Analysis* 174.

²⁸ C Blake ‘Normative instruments in international human rights law: Locating the general comment’ Centre for Human Rights and Global Justice Working Paper No 17 (2008) 25.

unsatisfactory patchwork quilt of obligations'.²⁹ For this reason, soft law has become 'an integral part of the international legal system'.³⁰

1.3 Research questions

The study intends to answer the following research questions:

1. How practical is it to implement the provisions of article 30(c) of the African Children's Charter in the African context?
2. What is the impact of article 30(d) on children, in contemporary Africa?
3. Can the provisions of General Comment No 1 as soft law override the provisions of article 30(d), which is hard law?

1.4 Literature review

In this study the author intends to fill in a gap in the existing literature, concerning the connection between article 30(c) and article 30(d) of the African Children's Charter and its consequences on the children of incarcerated mothers in contemporary Africa.

The principle of the 'best interests of the child' is a crucial issue, especially when it is considered in relation to the imprisonment of the primary caregiver. Opinions concerning this matter vary significantly from the prohibition of imprisoning children with their primary caregiver (as recommended in article 30(d) of the African Children's Charter) to the decision to allow children to be imprisoned with their primary caregiver, especially with the mother, for a number of years. Countries have developed policies that reflect the adherence to one of these opinions: as in 2011, Norway and China did

²⁹ P Alston & B Simma 'The sources of human rights law: Custom, jus cogens and general principles' (1988) *12 Year Book of International Law* 82 in C Blake 'Normative instruments in international human rights law: Locating the general comment' Centre for Human Rights and Global Justice Working Paper No 17 (2008) 26.

³⁰ AT Guzman & TL Meyer 'International soft law' (2010) 2(1) *Journal of Legal Analysis* 176.

not allow children to be imprisoned with their primary caregiver, while other countries such as India, Mexico or Spain permitted them to stay in prison with their primary caregiver for up to 6 years.³¹

Research has been conducted and studies have been written on this sensitive topic, analysing the advantages and disadvantages of imprisoning children with their mother. The proponents of co-detention have in mind the development of a particularly significant attachment between children and their mother.³² This bond – or its absence – has short-term and long-term consequences for the child’s psychological, educational and social development.³³ Therefore, in order to create conditions to form or sustain that bond, some have supported the idea of imprisoning primary caregivers together with their child/children, for a certain period of time. Other advantages of co-detention are related to the issue of breast-feeding; the nurturing and caring environment that the mother could offer to her child; and the absence of other alternatives for the child outside the prison.

Given the difficulties that are associated with prison life, and in an attempt to offer a decent life to children whose primary caregiver is imprisoned, the proponents of co-detention recommend the creation of special institutions such as ‘prison nurseries’ or ‘developing programmes’.³⁴ Not everyone is in support of such measures: There are those who argue that these measures wash away the punitive effect of prison life on the primary caregiver who actually broke the law.³⁵

³¹O Robertson ‘Collateral convicts: Children of incarcerated parents’ Recommendation and good practice from the UN Committee on the Rights of the Child, Day of General Discussion (2011) Quaker United Nations Office, Appendix 2: ‘Babies and children living in prison - age limits and policies around the world’ 74-76.

³²J Poehlmann ‘Representations of attachment relationships in children of incarcerated mothers’ (2005) 76(3) *Child Development* 679.

³³R Parke & KA Clarke-Stewart ‘Effects of parental incarceration on young children’ Working papers prepared for the ‘From prison to home’ conference (2002) 4-6.

³⁴AE Jbara ‘The price they pay: Protecting the mother-child relationship through the use of prison nurseries and residential parenting programs’ (2012) 87 *Indiana Law Journal* 1825.

³⁵AE Jbara ‘The price they pay: Protecting the mother-child relationship through the use of prison nurseries and residential parenting programs’ (2012) 87 *Indiana Law Journal* 1825.

There are others who argue that children should not be punished for the crimes of their parents, therefore they should not be deprived of liberty, especially if the detention conditions are not favourable for such a choice.³⁶

This study analysed the issue of co-detention and separation of children from their primary caregiver, and established that the best interests of the children under consideration can only be assessed on a case by case basis.

1.5 Proposed methodology

In this study I carry out a desktop research and I gather information from primary and secondary sources. I also analyse the data from a multidisciplinary perspective which includes a human rights law as well as a psychological, socio-economic, and cultural perspective.

1.6 Proposed structure

Chapter 1 introduces the study.

Chapter 2 sets a theoretical framework on the issue of punishment and analyses the dire situation of prisons in Africa, with a focus on women. The chapter deals also with the alternatives to incarceration for mothers in contemporary Africa, and concludes that despite solid international and regional treaty provisions, the implementation of the ‘special alternative institutions’ proposed by article 30(c) of the African Children’s Charter remains a challenge in most African countries.

Chapter 3 focuses on the principle of the ‘best interests of the child’ and its relation with the advantages and disadvantages of co-detention and of the separation of children

³⁶ V Chirwa Report of the special rapporteur on prisons and conditions of detention in Africa: Prisons in Malawi (2001) 36 in L Townhead ‘Women in prison & children of imprisoned mothers: Recent developments in the UN HR system’ Quaker United Nations Office (2006) 5.

from their incarcerated primary caregivers, in a contemporary African context. The chapter concludes that the choice between co-detention and separation of children from their imprisoned mothers should be made on an individual basis.

Chapter 4 establishes an incompatibility between the rigidity of article 30(d) of the African Children's Charter and the flexible provisions of General Comment No 1 of the ACERWC. The relevance and legitimacy of the soft law in asserting human rights is also discussed here. The chapter concludes that instead of providing an interpretation, by way of a general comment, the Committee should ideally have sought the amendment of article 30(d) in order to better protect the best interests of the child.

Chapter 5 concludes the study and offers recommendations.

1.7 Limitations of the study

This study is constrained by three types of limitations. One of them pertains to methodology in that the study could have benefited from the findings of field trips to various African prisons. Such trips could not be undertaken because of time and resource constraints. These constraints lead to the choice of a desktop research.

The second limitation is thematic. This study focuses mainly on the provisions of article 30 of the African Children's Charter as well as on the General Comment No 1 of the Committee.

The third limitation refers to the scope of the study. The author chooses to write about the situation of imprisoned mothers in contemporary Africa, to the deliberate exclusion of other types of primary caregivers.

CHAPTER 2: THE EFFECT OF IMPRISONMENT ON MOTHERS AND CHILDREN IN CONTEMPORARY AFRICA

This chapter is divided into six sections: the first section looks at the concept of punishment and its relation with society. Section two deals with various theories of punishment. Section three elaborates on the issue of imprisonment as a form of punishment. Section four focuses on the implications of imprisonment with respect to mothers in contemporary Africa. Section five focuses on alternatives to incarceration, as suggested by article 30(c) of the African Children's Charter, and their feasibility on the African continent. The last section represents the conclusion.

The aim of this chapter is to point out that the changes in the contemporary African society require changes in the way mother-offenders are to be punished, keeping in mind that what happens to the mother directly affects the wellbeing of her children. Article 30(c) of the African Children's Charter captures the necessity of change by suggesting the use of alternatives to imprisonment for mothers in conflict with the law. The challenge in contemporary Africa is to implement such measures.

2.1 Conceptual clarifications

2.1.1 Brief definition of the concept of punishment

Across the centuries, humanity has tried to address a number of vexing issues with respect to punishment such as its purpose, justification, methods and appropriateness. In very concise terms, punishment represents 'the sanction of the [...] law'.³⁷ Laws are mainly the expression of what is acceptable and what is not, in a society.

³⁷ MA Rabie & SA Strauss *Punishment – An introduction to principles* (1981) 6.

2.1.2 Punishment and society

There is undoubtedly a link between society, law and punishment. Punishment and society are dynamic and intertwined realities. Garland points out that legal punishment has social and cultural implications, and reflects a particular state ideology.³⁸ Punishment changed over time, reflecting societal transformation. In the words of Durkheim: ‘what was moral for one people, was immoral for another’.³⁹ The penal system is not an element in isolation, but in relationship with different aspects of society (law, politics, ideology and economy).⁴⁰

Different scholars expressed different views on the issue of punishment. For instance, Foucault envisages punishment as a control mechanism put in place by the government. At the centre of his philosophy of punishment stands the concept of the ‘disciplinary power’ of the state, which manifests itself through the existence of the prison.⁴¹

On his part, Durkheim understands legal punishment in terms of a social-emotional response to an offence, which violates social values.⁴² The purpose of punishment here is to restore social solidarity, which was broken by the criminal act. Durkheim’s penal system could be defined as ‘the retaliatory public expression of the *conscience collective*’.⁴³

2.2 Theories of punishment

The abstract concept of punishment took, over time, various forms characterized by a greater or lesser degree of severity. Some of the concrete expressions of the concept of punishment are: The death penalty, imprisonment, fines, corporal punishment or

³⁸ D Garland ‘Frameworks of inquiry in the sociology of punishment’ (1990) 41 *The British Journal of Sociology* 10, 11.

³⁹ E Durkheim *The division of labour in society* trans George Simpson (1964) 423.

⁴⁰ D Garland & P Young ‘Towards a social analysis of penalty’ in D Garland & P Young (eds) *The power to punish. Contemporary penalty and social analysis* (1983) 23.

⁴¹ B Smart ‘On discipline and social regulation: A review of Foucault’s genealogical analysis’ in D Garland & P Young (eds) *The power to punish. Contemporary penalty and social analysis* (1983) 77.

⁴² D Garland ‘Frameworks of inquiry in the sociology of punishment’ (1990) 41 *The British Journal of Sociology* 7.

⁴³ D Garland & P. Young ‘Towards a social analysis of penalty’ in D Garland & P Young (eds) *The power to punish. Contemporary penalty and social analysis* (1983) 12.

referral to various institutions.⁴⁴ Punishment philosophies broadly split into ‘past and future-oriented’⁴⁵ following the logic of the Latin saying: *Punitur quia peccatum est et ut ne peccetur* (he is punished because he committed an offence, and in order to prevent him to do wrong again). The two segments of this saying make reference to two main theories of punishment: the retributive and the prevention theories. The retributive theory looks at what has been done already (past-oriented), while the prevention theory focuses on future possibilities (future-oriented). The author will also discuss the rehabilitation theory, the issue of deterrence and restorative justice.

2.2.1 The retributive theory

According to Duff, in a retributivist approach the punishment finds its justification in the fact that the infliction of punishment is ‘deserved’ by the wrongdoer because of his offence.⁴⁶ The term ‘retributive’ has a double significance. On the one hand, it has a negative connotation because it implies the idea of vengeance.⁴⁷ On the other hand, retribution has a positive implication, being a yardstick in the administration of punishment. The punishment administered to the wrongdoer must be proportional with the offence committed.⁴⁸ In the Old Testament the expressions ‘eye for eye, tooth for tooth, hand for hand, foot for foot’⁴⁹ were not given as instigation to vengeance; in my opinion, they represent rather guiding principles for the administration of fair justice. For many scholars the retributivist approach contains ‘principles of justice and fairness’.⁵⁰

Finding a perfect balance between an offence and its corresponding punishment might turn out to be a difficult exercise. For that reason, proponents of the retributive theory proposed a set of punishments suitable for a particular offense, establishing upper and lower boundaries of those available options.⁵¹ This approach is known as the ‘limiting

⁴⁴ MA Rabie & SA Strauss *Punishment-An introduction to principles* (1981) 138.

⁴⁵ BA Hudson *Understanding justice. An introduction to ideas, perspectives and controversies in modern penal theory* (2003) 3.

⁴⁶ R Cruft et al (eds) *Crime, punishment and responsibility. The jurisprudence of Antony Duff* (2011) 7.

⁴⁷ DJ Cornwell *Doing justice better. The politics of restorative justice* (2007) 100.

⁴⁸ MA Rabie & SA Strauss *Punishment-An introduction to principles* (1981) 21.

⁴⁹ *The Holy Bible*, the Old Testament, Exodus 21:24, New King James version.

⁵⁰ RS Frase ‘Punishment purposes’ (2005) 58 *Stanford Law Review* 70.

⁵¹ M Haist ‘Deterrence in a sea of “just deserts”: Are utilitarian goals achievable in a world of “limiting retributivism”?’ (2009) 99 *Journal of Criminal Law and Criminology* 804.

retributivism’ and it was proposed by Morris.⁵² It has been pointed out that in an attempt to find the balance between offence and punishment, the issue of stigma should also be taken into account.⁵³

From a retributivist perspective, crime violates the laws of the state, rather than the rights of individuals and communities.⁵⁴ It is, therefore, the duty of the state to intervene in a conflict situation by punishing the criminal and restoring the wellbeing of the community. Bentham considers that it is defensible to sacrifice the happiness of one individual (the wrongdoer) through punishment in order to safeguard the wellbeing and safety of the community.⁵⁵ This idea forms the basis of the principle of utilitarianism.

Because of its association with the idea of ‘vengeance’, the retributivist theory started to lose its influence in the second half of the twentieth century.⁵⁶ The term ‘retributivist’ was in the last quarter of the twentieth century replaced by the concept of ‘just deserts’, a change that marked the rejuvenation of the movement.⁵⁷ The issue of ‘deserts’ is assessed in accordance with the damage caused by the offence and with the offender's degree of culpability.⁵⁸

The retributivist theory focuses excessively on the crime and its deserved punishment, but less on the offender.⁵⁹ Some scholars found more relevance in the prevention theory.

⁵² M Haist ‘Deterrence in a sea of “just deserts”: Are utilitarian goals achievable in a world of “limiting retributivism”?’ (2009) 99 *Journal of Criminal Law and Criminology* 804.

⁵³ N Walker *Punishment, danger and stigma. The morality of criminal justice* (1980) 163.

⁵⁴ DJ Cornwell *Doing justice better. The politics of restorative justice* (2007) 96.

⁵⁵ J Bentham ‘*The principles of penal law*’ in A von Hirsch & A Ashworth (eds) *Principled sentencing* (1992) 63 in B.A. Hudson *Understanding justice. An introduction to ideas, perspectives and controversies in modern penal theory* (2003) 19.

⁵⁶ M Haist ‘Deterrence in a sea of “just deserts”: Are utilitarian goals achievable in a world of “limiting retributivism”?’ (2009) 99 *Journal of Criminal Law and Criminology* 801.

⁵⁷ M Haist ‘Deterrence in a sea of “just deserts”: Are utilitarian goals achievable in a world of “limiting retributivism”?’ (2009) 99 *Journal of Criminal Law and Criminology* 801.

⁵⁸ CL Ten *Crime, guilt and punishment. A philosophical introduction* (1987) 146.

⁵⁹ RS Frase ‘Punishment purposes’ (2005) 58 *Stanford Law Review* 73.

2.2.2 The prevention theory

The prevention theory aims at protecting the society from the destabilizing effects of crime. Prevention can be achieved through multiple ways such as incapacitation or rehabilitation of offenders, and deterrence.⁶⁰ Through incapacitation, a criminal is actually cut off from society, temporary or permanently, with the purpose of preventing him from reoffending, and of discouraging others from offending in the same manner. This form of punishment can be achieved by death penalty or lengthy imprisonment sentences.⁶¹ Section three of this chapter is dedicated to the issue of imprisonment as a form of punishment.

2.2.3 The rehabilitation theory

The rehabilitation movement developed in the beginning of the twentieth century in the United States of America.⁶² This movement is a form of crime prevention whereby the offenders are perceived as disturbed individuals in need of treatment that would enable them to avoid recidivism. In this context, crime is not the result of criminal intent; its likelihood depends on circumstances outside the offender's control such as heredity factors or social environment.⁶³ This approach focuses more on the offender and less on his crime.

Rehabilitation dominated most of the twentieth century. However, towards the last quarter of the twentieth century, it became the target of much criticism from a number of scholars who believed that rehabilitation erases the criminal's sense of responsibility for his actions.⁶⁴ Rehabilitation was highly discredited by Martinson's famous article in which he expresses his lack of faith in the success of the rehabilitation process.⁶⁵ A few years later he appears more optimistic concluding that 'some programs are beneficial'.⁶⁶

⁶⁰ MA Rabie & SA Strauss *Punishment-An introduction to principles* (1981) 23-40.

⁶¹ BA Hudson *Understanding justice. An introduction to ideas, perspectives and controversies in modern penal theory* (2003) 32.

⁶² AW Alschuler 'The changing purposes of criminal punishment: A retrospective on the past century and some thoughts about the next' (2003) 70 *The University of Chicago Law Review* 1.

⁶³ AW Alschuler 'The changing purposes of criminal punishment: A retrospective of the past century and some thoughts about the next' (2003) 70 *The University of Chicago Law Review* 2.

⁶⁴ MA Rabie & SA Strauss *Punishment-An introduction to principles* (1981) 27.

⁶⁵ R Martinson 'What works? Questions and answers about prison reform' (1974) 35 *The Public Interest* 25.

⁶⁶ R Martinson 'New findings, new views: A note of caution regarding sentencing reform' (1979) 7 *Hofstra Law Review* 258.

This might mean that his critique came too soon in the development of rehabilitative techniques and that there is some utility in the rehabilitative approach to crime prevention.

Another point of criticism is related to the fact that rehabilitation processes are meant to change the offender's personality through coercive techniques such as 'indeterminate length of incarceration and forced treatment'.⁶⁷

2.2.4 Deterrence

Deterrence could be general or specific. General deterrence is defined as a threat meant to discourage illegal behaviour.⁶⁸ It is designed as a form of crime control exercised upon the citizens by the sanctions of the criminal law. The mere threat of punishment is expected to convince the citizens to abide by the law.⁶⁹ Specific deterrence is achieved by administering a type of punishment to an offender with the aim of discouraging him from reoffending.⁷⁰

The proposition of severe sentences was considered the best way of achieving general deterrence. However, evidence has proven that harsher forms of punishment do not guarantee a higher level of deterrence.⁷¹ The certainty of the punishment is more effective in general deterrence than its severity.⁷²

More than the fear of punishment, the element that brings about deterrence is actually the fear of social stigma.⁷³ Although 'some kinds of offence incur less moral condemnation than others', the reality is that all convictions are associated with a certain level of stigma.⁷⁴

⁶⁷ A von Hirsch *Doing justice: The choice of punishments* (1976) 127.

⁶⁸ N Walker *Punishment, danger and stigma. The morality of criminal justice* (1980) 65.

⁶⁹ MA Rabie & SA Strauss *Punishment-An introduction to principles* (1981) 32.

⁷⁰ G Gardiner 'The purposes of criminal punishment: I. The nature of punishment' (1958) 21 *The Modern Law Review* 121.

⁷¹ N Walker *Punishment, danger and stigma. The morality of criminal justice* (1980) 80.

⁷² MA Rabie & SA Strauss *Punishment-An introduction to principles* (1981) 37.

⁷³ G Gardiner 'The purposes of criminal punishment: I. The nature of punishment' (1958) 21 *The Modern Law Review* 123.

⁷⁴ N Walker *Punishment, danger and stigma. The morality of criminal justice* (1980) 156, 157, 146.

General deterrence was subjected to criticism on the account that its influence does not reach professional, passionate or mentally disturbed criminals who are more likely to commit crime, and ordinary people who are less likely to commit offences.⁷⁵ In response to various criticisms with respect to the theories of punishment scholars had proposed a restorative approach to justice.

2.2.5 Restorative justice

Restorative justice emerged as an attempt to solve some of the difficulties of the traditional penal system which by 1970 was characterized by overcrowded prisons, deterioration of detention conditions and dissatisfaction with the rehabilitative theories' results in many parts of the world.⁷⁶ Although there is no rigid definition of this concept,⁷⁷ there are a number of guiding principles that assess to what extent justice is restorative such as 'repairing the harm caused; participation; truth telling; ownership; catering for the needs of all stakeholders; active responsibility; reparations or compensation; and follow-up.'⁷⁸

The movement originated in the United States and Canada in the period 1970-1980 and blossomed in the last decade of the twentieth century,⁷⁹ especially in New Zealand where principles of restorative justice were used for serious offences as well as for minor ones.⁸⁰ Restorative justice approaches take a plethora of forms such as 'victim offender conferences, family group conferences or circles approaches'.⁸¹ Restorative justice can be identified in ancient civilizations⁸² or cultural and religious approaches

⁷⁵ MJF y Tella & FF y Tella *Punishment and culture: A right to punish?* (2006) 190.

⁷⁶ DJ Cornwell *Criminal punishment and restorative justice* (2006) 32.

⁷⁷ C Bezuidenhout 'Restorative justice with an explicit rehabilitative ethos: Is this the resolve to change criminality?' (2007) 20(2) *Acta Criminologica* 43.

⁷⁸ H Among 'The application of traditional justice mechanisms to the atrocities committed by child soldiers in Uganda: A practical restorative justice approach' (2013) 13 *African Human Rights Law Journal* 453.

⁷⁹ DJ Cornwell *Criminal punishment and restorative justice* (2006) 35.

⁸⁰ A Morris 'Critiquing the critics: A brief response to critics of restorative justice' (2002) 42(3) *The British Journal of Criminology* 602.

⁸¹ H Zehr & A Gohar *The little book of restorative justice* (2003) 47.

⁸² J Braithwaite 'Restorative justice: Assessing optimistic and pessimistic accounts' (1999) 25 *Crime and Justice* 1.

to conflict resolution.⁸³ Restorative justice is a culturally sensitive approach to doing justice.⁸⁴

Restorative justice aims at replacing custodial measures with community-based initiatives.⁸⁵ At the centre of this approach is a dialogue between the offender, the victim and the communities to which they belong.⁸⁶ Unlike the traditional criminal system, restorative justice is ‘both backward-looking in that it includes dealing with the “aftermath of the offence”, and forward-looking, in that it is a process that looks at the implications for the future’.⁸⁷

Restorative justice includes a higher number of stakeholders in the criminal process.⁸⁸ What is restored during this type of informal justice process is not only the ‘victim’s security, self-respect, dignity and sense of control’, but also the offender’s sense of responsibility, control and trust in a fair justice.⁸⁹ The offender must take active responsibility for his offence and that involves reparation of the harm committed.⁹⁰ In restorative justice the crime is not perceived as having been committed against the institution of the state, but against people, therefore the task of doing justice shifts from the state towards the community,⁹¹ turning restorative justice into what Braithwaite called ‘justice by the people’.⁹²

Although restorative justice does not exclude the idea of punishment, sometimes with the possibility of incarceration ‘as a strategy of last resort’,⁹³ the concept of punishment does not occupy front stage; its aim is rather reconciliation and social reintegration of

⁸³ H Zehr & A Gohar *The little book of restorative justice* (2003) 10.

⁸⁴ K McEvoy et al ‘Practice, performance and prospects for restorative justice’ (2002) 42(3) *The British Journal of Criminology* 472, 473.

⁸⁵ DJ Cornwell *Doing justice better. The politics of restorative justice* (2007) 47.

⁸⁶ M Wenzel et al ‘Retributive and Restorative Justice’ (2008) 32 *Law and Human Behaviour* 377.

⁸⁷ A Skelton & M Batley ‘Restorative justice: A contemporary South African review’ (2008) 22(3) *Acta Criminologica* 47.

⁸⁸ H Zehr & A Gohar *The little book of restorative justice* (2003) 11.

⁸⁹ A Morris ‘Critiquing the critics: A brief response to critics of restorative justice’ (2002) 42(3) *The British Journal of Criminology* 604.

⁹⁰ J Braithwaite ‘Restorative justice and de-professionalization’ (2004) 13(1) *The Good Society*. Symposium: Theory of Democratic Professionalism 28.

⁹¹ A Ashworth ‘Responsibilities, rights and restorative justice’ (2002) 42(3) *The British Journal of Criminology* 581.

⁹² J Braithwaite ‘Setting standards for restorative justice’ (2002) 42(3) *The British Journal of Criminology* 575.

⁹³ DJ Cornwell *Doing justice better. The politics of restorative justice* (2007) 159.

offenders.⁹⁴ Restorative justice focuses on the concept of needs (both that of the offender and of the victim) in an attempt to establish the root causes of the conflict.⁹⁵

Cornwell talks about the ‘democratisation’ of the criminal procedure,⁹⁶ which takes place in restorative justice; while Braithwaite refers to restorative justice as a ‘de-professionalizing project’ in which the parties involved in the conflict take prominence over lawyers.⁹⁷ Although deterrence is not the declared aim of restorative justice, practice has shown that restorative justice decreases the risk of reoffending.⁹⁸

The main criticism against restorative justice is the concern that criminals might get lighter sentences in restorative justice approaches than in traditional justice settings.⁹⁹ Because of this misgiving, principles of restorative justice are mainly applied to juveniles or to less serious offences.¹⁰⁰ Other factors that could negatively influence the implementation of restorative justice mechanisms are: Lack of unity among communities; lack of knowledge about restorative justice techniques, among judges and probation officers; and the conception that justice involves retribution.¹⁰¹ However, restorative justice represents an adjustment to traditional penal system, it is a more ‘humane’ and more appropriate approach to justice.¹⁰²

The theoretical concepts of punishment have found practical ways of application, over time. Therefore, as there are various theories of punishment, so there are various methods to punish offenders. One of such methods is represented by imprisonment.

2.3 Imprisonment as a form of punishment

⁹⁴ DJ Cornwell *Doing justice better. The politics of restorative justice* (2007) 51.

⁹⁵ H Zehr & A Gohar *The little book of restorative justice* (2003) 28.

⁹⁶ DJ Cornwell *Criminal punishment and restorative justice* (2006) 119, 110.

⁹⁷ J Braithwaite ‘Restorative justice and de-professionalization’ (2004) 13(1) *The Good Society*. Symposium: Theory of Democratic Professionalism 28.

⁹⁸ A Morris ‘Critiquing the critics: A brief response to critics of restorative justice’ (2002) 42(3) *The British Journal of Criminology* 606, 607.

⁹⁹ *R v Gladue* (1999) 1 S.C.R. 688.

¹⁰⁰ A Skelton & M Batley ‘Restorative justice: A contemporary South African review’ (2008) 22(3) *Acta Criminologica* 43.

¹⁰¹ JC Tsui ‘Breaking free of the prison paradigm: Integrating restorative justice techniques into Chicago’s juvenile justice system’ (2014) 104(3) *Journal of Criminal Law and Criminology* 653.

¹⁰² DJ Cornwell *Doing justice better. The politics of restorative justice* (2007) 69.

The institution of the prison can be traced to ancient civilizations.¹⁰³ Prisons were used initially to detain offenders awaiting trial: For instance the 12th century gaols (jails) in England.¹⁰⁴ The modern prison as a form of incapacitation and punishment was introduced at the end of the 18th century and the beginning of the 19th century in Europe ‘as an essential element in the punitive panoply’,¹⁰⁵ and it soon became the ‘primary form of punishment’.¹⁰⁶

Traditionally, imprisonment was not among Africans’ ways of punishing offenders.¹⁰⁷ The institution of the prison was introduced in Africa by the colonial rulers during the 19th century as a part of a wider array of coercive means of control and domination¹⁰⁸ which included the imposition of ‘taxes, censuses, portage and forced labour’ upon the indigenous population.¹⁰⁹ Before the colonial era, Africans used to punish criminals by ‘beating, ordeal by poison, [...] mutilation, reparations and compensatory payments, various forms of torture, enslavement, and banishment’.¹¹⁰

Colonial prisons seem to have had a double role: to get rid of the political adversaries, and to provide a cheap labour force for the colonial rulers.¹¹¹ In British colonial Africa, colonial masters were eager to put in place prisons,¹¹² which in the beginning had to be improvised in odd locations (cellars, storage rooms, etc.).¹¹³ Imprisonment soon became the most common way of punishing offenders. Prisons provided inmates with

¹⁰³ JC Mubangizi ‘Prisons and prisoners’ rights: Some jurisprudential and historical perspectives’ (2001) 14(3) *Acta Criminologica* 123.

¹⁰⁴ JC Mubangizi ‘Prisons and prisoners’ rights: Some jurisprudential and historical perspectives’ (2001) 14(3) *Acta Criminologica* 123.

¹⁰⁵ M Foucault *Discipline and punish: The birth of the prison* (1977) 231.

¹⁰⁶ JC Mubangizi ‘Prisons and prisoners’ rights: Some jurisprudential and historical perspectives’ (2001) 14(3) *Acta Criminologica* 124.

¹⁰⁷ J Lewin *Studies in African native law* (1947) 91.

¹⁰⁸ S Pete ‘Falling on stony ground: Importing the penal practices of Europe into the prisons of colonial Natal’ (Part 2) (2007) (13-2) *Fundamina* 124.

¹⁰⁹ F Bernault ‘The shadow of rule: Colonial power and punishment in Africa’ in F Dikotter (ed) *Cultures of confinement: A global history of the prison in Asia, Africa, Middle-East and Latin America* (2007) 60.

¹¹⁰ D Killingray ‘Punishment to fit the crime? Penal policy and practice in British colonial Africa’ in F Bernault (ed) *A history of prison and confinement in Africa* (2003) 100.

¹¹¹ F Bernault ‘The politics of enclosure in colonial and post-colonial Africa’ in F Bernault (ed) *A history of prison and confinement in Africa* (2003) 2.

¹¹² D Killingray ‘Punishment to fit the crime? Penal policy and practice in British colonial Africa’ in F Bernault *A history of prison and confinement in Africa* (2003) 97.

¹¹³ D Killingray ‘The maintenance of law and order in British colonial Africa’ (1986) 85 (340) *African Affairs* 434.

the opportunity to learn a trade.¹¹⁴ Customary law was rejected and replaced with the British law, which was considered superior.¹¹⁵

In French colonies such as Senegal imprisonment was used to repress Africans who rebelled against the colonial domination.¹¹⁶ For the native Africans imprisonment represented a state of ‘social degradation, and slavery.’¹¹⁷

Imprisonment soon proved itself to be a very expensive type of punishment to colonial authorities. Other types of punishment were consequently used such as ‘fines, stocks and whipping’.¹¹⁸ Although the prison was theoretically envisaged as ‘an apparatus for transforming individuals’,¹¹⁹ it has shown little efficiency concerning the rehabilitation of offenders or the issue of deterrence.¹²⁰ On the contrary, incarceration, especially for a short period of time, has proven to increase the risk of reoffending¹²¹ which, in turn, has led to congested prisons.¹²²

Although colonialists were criticised for perpetrating violence and harsh conditions of detention, the situation of postcolonial African prisons did not ameliorate.¹²³ Some scholars have attempted to explain this discouraging situation by suggesting that prison reform did not represent a priority for postcolonial African leaders due to the problematic colonial legacy.¹²⁴ During the postcolonial era, a number of African countries have registered a high number of incarcerations for political considerations.¹²⁵ The postcolonial prison system was characterized by an intensified oppression under

¹¹⁴ Lord Lugard *The dual mandate in British tropical Africa* (1965) 558.

¹¹⁵ D Killingray ‘Punishment to fit the crime? Penal policy and practice in British colonial Africa’ in F Bernault *A history of prison and confinement in Africa* (2003) 98.

¹¹⁶ D Konate ‘Ultimate exclusion. Imprisoned women in Senegal’ in F Bernault *A history of prison and confinement in Africa* (2003) 156.

¹¹⁷ D Konate ‘Ultimate exclusion. Imprisoned women in Senegal’ in F Bernault *A history of prison and confinement in Africa* (2003) 156.

¹¹⁸ D Killingray ‘The maintenance of law and order in British colonial Africa’ (1986) 85 (340) *African Affairs* 434.

¹¹⁹ M Foucault *Discipline and punish: The birth of the prison* (1977) 233.

¹²⁰ CL Ten *Crime, guilt and punishment* (1987) 8.

¹²¹ MA Rabie & SA Strauss *Punishment-An introduction to principles* (1981) 25.

¹²² DJ Cornwell *Doing justice better. The politics of restorative justice* (2007) 41, 43.

¹²³ J Sarkin ‘Prisons in Africa: An evaluation from a human rights perspective’ (2008) 5(9) *International Journal of Human Rights* 25.

¹²⁴ J Sarkin ‘Prisons in Africa: An evaluation from a human rights perspective’ (2008) 5(9) *International Journal of Human Rights* 26.

¹²⁵ J Sarkin ‘An overview of human rights in prisons worldwide’ in J Sarkin (ed) *Human rights in African prisons* (2008) 13.

the rule of certain African dictators, as was the case in Guinea, Central African Republic and Uganda.¹²⁶

2.3.1 Imprisonment of women in contemporary Africa

Contemporary African prisons seem, in general, to have retained the worst from the colonial prisons: corporal punishment, precarious conditions and forced labour.¹²⁷ Research reveals that many African prisons find themselves ‘at odds with human rights standards’.¹²⁸ Prisons in Africa are plagued by insufficient resources and high levels of overcrowding. These disadvantages lead to over-worked staff, poor hygiene, insufficient food, inappropriate medical attention, and insufficient contact with the outside world.¹²⁹ Abuse, lack of good governance and corruption add to the challenges inmates are facing.¹³⁰

The dire situation of African prisons must be understood in the context of wider problems faced by African societies such as poverty, epidemics, social disparities, poor infrastructure, unemployment, lack of education and instability.¹³¹ Some prison buildings date from the colonial era, being dirty and ill-ventilated, causing diseases and the premature death of many detainees.¹³²

Although all prisoners suffer from being detained in improper conditions, special categories of persons, such as women, are more affected by this reality. During colonial times, African women suffered the consequences of a triple discrimination: as women,

¹²⁶ F Bernault ‘The shadow of rule: Colonial power and punishment in Africa’ in F Dikotter (ed) *Cultures of confinement: A global history of the prison in Asia, Africa, Middle-East and Latin America* (2007) 87.

¹²⁷ F Bernault ‘The politics of enclosure in colonial and post-colonial Africa’ in F Bernault (ed) *A history of prison and confinement in Africa* (2003) 30.

¹²⁸ J Sarkin ‘Prisons in Africa: An evaluation from a human rights perspective’ (2008) 5(9) *International Journal of Human Rights* 22.

¹²⁹ Kampala Declaration on Prison Conditions in Africa (1996) Prison conditions and Plan of Action.

¹³⁰ J Sarkin ‘Prisons in Africa: An evaluation from a human rights perspective’ (2008) 5(9) *International Journal of Human Rights* 24.

¹³¹ J Sarkin ‘Prisons in Africa: An evaluation from a human rights perspective’ (2008) 5(9) *International Journal of Human Rights* 38.

¹³² J Sarkin ‘Prisons in Africa: An evaluation from a human rights perspective’ (2008) 5(9) *International Journal of Human Rights* 26, 28.

as prisoners and as Africans.¹³³ They were forced to live in improvised rooms, often not segregated from male inmates, used for domestic unpaid work around the prison, many accompanied by their young children in insanitary conditions, exposed to sexual violence and monitored by untrained staff.¹³⁴

In order to avoid the perpetuation of such conditions of detention and to safeguard the rights of prisoners, a number of international and regional instruments have been put in place over time.¹³⁵ These provisions cover a plethora of aspects of incarcerated persons, having also in mind the ‘distinctive needs of women prisoners’.¹³⁶ Some of the main standards with respect to prison conditions, as far as they relate to women, are captured in the following section.

As much as possible, non-custodial measures should always be the preferred option for mothers of minor children.¹³⁷ In cases where a custodial sentence must be imposed, women should be allowed to make arrangements in the best interests of their children, prior to incarceration, even if this would mean a ‘reasonable suspension of detention’, ‘diversionary measures and pre-trial and sentencing alternatives’.¹³⁸ Because of their caretaking responsibilities, women should not be imprisoned in remote areas, far from the place of residence of their children.¹³⁹ Women offenders separated from their children should be provided with opportunities to meet with their children.¹⁴⁰ Female

¹³³ D Konate ‘Ultimate exclusion. Imprisoned women in Senegal’ in F Bernault (ed) *A history of prison and confinement in Africa* (2003) 155.

¹³⁴ D Konate ‘Ultimate exclusion. Imprisoned women in Senegal’ in F Bernault (ed) *A history of prison and confinement in Africa* (2003) 158-161.

¹³⁵ The UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (2011), the UN Standard Minimum Rules for the Treatment of Prisoners (1955), the Body of Principles for the Protection of All Persons under Any Form of Detention and Imprisonment (1988), the Basic Principles for the Treatment of Prisoners (1990), the Kampala Declaration on Prison Conditions in Africa (1996), the Kadoma Declaration on Community Service Orders in Africa (1997), the Arusha Declaration on Good Prison Practice (1999) and The Ouagadougou Declaration and Plan of Action on Accelerating Prisons and Penal Reforms in Africa (2002).

¹³⁶ Resolution 2010/16 United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders, Rule 1.

¹³⁷ Resolution 2010/16 United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders, Rule 64.

¹³⁸ Resolution 2010/16 United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders, Rule 2(2) & Rule 57.

¹³⁹ Resolution 2010/16 United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders, Rule 4.

¹⁴⁰ UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (2011) Rule 52(3).

prisoners who have their children with them in prison, should be allowed ‘the maximum possible opportunities’ to spend time with their children.¹⁴¹

Female prisoners should be separated from male prisoners.¹⁴² No discrimination against women should be perpetrated on any grounds, including gender.¹⁴³ Prisons should be equipped in order to respond to the specific hygiene needs of women prisoners,¹⁴⁴ and also to assist female prisoners in pre and post-natal circumstances.¹⁴⁵ The supervision of female prisoners by male staff day and night has been prohibited by relevant instruments.¹⁴⁶ Punishment of female prisoners who are pregnant, breastfeeding or have minor children should not include ‘close confinement or disciplinary segregation’.¹⁴⁷ Prohibition of family contact should not be applied as a disciplinary measure on women prisoners.¹⁴⁸ Pregnant and breastfeeding mothers shall receive nutritious food.¹⁴⁹

However, incarcerated women worldwide still experience severe violations of their rights. The discrimination to which many of them were subjected prior to incarceration is perpetrated during imprisonment and after release, especially if they belong to certain minority groups such as sexual minorities, foreigners, indigenous people, Roma/Gypsies.¹⁵⁰

¹⁴¹ Resolution 2010/16 United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (2011) Rule 50.

¹⁴² Standard Minimum Rules for the Treatment of Prisoners (1955) Rule 8(a).

¹⁴³ Standard Minimum Rules for the Treatment of Prisoners (1955) I 6(1).

¹⁴⁴ Resolution 2010/16 United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (2011) Rule 4 (5).

¹⁴⁵ Standard Minimum Rules for the Treatment of Prisoners (1955) I 23(1).

¹⁴⁶ Standard Minimum Rules for the Treatment of Prisoners (1955) I 53(1), 53(2) & 53(3).

¹⁴⁷ Resolution 2010/16 United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (2011) Rule 22.

¹⁴⁸ Resolution 2010/16 United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (2011) Rule 23.

¹⁴⁹ Resolution 2010/16 United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (2011) Rule 48(1).

¹⁵⁰ R Manjoo ‘Pathways to, conditions and consequences of incarceration for women’, Report of the Special Rapporteur on violence against women, its causes and consequences (2013) 4; L Townhead ‘Women in prison and children of imprisoned mothers. Recent developments in the United Nations Human Rights System’ Paper (The Quaker United Nations Office) (2006) 7.

Prison surveys reveal the fact that a majority of imprisoned women are uneducated, therefore ignorant of their basic rights;¹⁵¹ they are poor,¹⁵² often single mothers, victims of abuse.¹⁵³ Being unable to pay fines, bail or to hire a lawyer, many spend years in pre-trial detention.¹⁵⁴ In Rwanda, for instance, 50-75% of women prisoners are under remand.¹⁵⁵

Although incarcerated women represent a minority of the prison population,¹⁵⁶ their number is on the increase worldwide,¹⁵⁷ with an estimated rate of 400% increase since 2007.¹⁵⁸ This increase is due partly to the ‘war on drugs’ policy and partly to the change in sentencing guidelines.¹⁵⁹ This female demographic increase in prisons seems unjustified, given the fact that the majority of women offenders are non-violent, the primary or only caregivers of their children, and that incarceration is expensive and has proven to be an ineffective tool in reducing crime rates.¹⁶⁰

In Africa, women represent from 1% (Burkina Faso) to 6.3% (Mozambique) of the prison population.¹⁶¹ They are vulnerable just because they are women.¹⁶² Women in prison experience overwhelming challenges because of the states’ inability to provide

¹⁵¹ United Nations Office on Drugs and Crime ‘Handbook on Women and Imprisonment’ (2nd ed), with reference to the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (The Bangkok Rules) (2014) 8.

¹⁵² J Ashdown & M James ‘Women in detention’ (2010) 92 (877) *International Review of the Red Cross* 123.

¹⁵³ C Kruttschnitt & R Gartner ‘Women’s imprisonment’ (2003) 30 *Crime and Justice* 19, 20.

¹⁵⁴ United Nations Office on Drugs and Crime ‘Handbook on Women and Imprisonment’ (2nd ed), with reference to the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (The Bangkok Rules) (2014) 109.

¹⁵⁵ M Bastick & L Townhead ‘Women in Prison: A commentary of the UN Standard Minimum Rules for the Treatment of Prisoners’ (2008) 110.

¹⁵⁶ R Brett ‘Introduction and overview’ in R Taylor ‘Women in prison and children of imprisoned mothers’ Preliminary research paper (2004) ii.

¹⁵⁷ AE Jbara ‘The price they pay: Protecting the mother-child relationship through the use of prison nurseries and residential parenting programs’ (2012) 87 *Indiana Law Journal* 1825.

¹⁵⁸ R Manjoo ‘Pathways to, conditions and consequences of incarceration for women’ Report of the Special Rapporteur on violence against women, its causes and consequences (2013) 7.

¹⁵⁹ C Kruttschnitt & R Gartner ‘Women’s imprisonment’ (2003) 30 *Crime and Justice* 9.

¹⁶⁰ D Inniss ‘Developments in the law: Alternatives to incarceration’ (1998) 111 (7) *Harvard Law Review* 1929, 1930.

¹⁶¹ SK Kagwa Report of the Special Rapporteur on Prisons and Conditions of Detention in Africa, 52nd Ordinary Session of the African Commission on Human and Peoples’ Rights, Cote d’Ivoire (2012) 12.

¹⁶² United Nations Office on Drugs and Crime ‘Handbook on Women and Imprisonment’ (2nd ed), with reference to the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules) (2014) 7.

for their special needs.¹⁶³ These struggles testify to the fact that prisons were not designed with women in mind.¹⁶⁴

In cases where women are incarcerated in annexes of males' prisons, men and women actually share the same cells in countries like Mozambique and Central African Republic,¹⁶⁵ or the same bathrooms and toilets, as it is the situation in Benin.¹⁶⁶

Where prisons for women do exist, they are highly overcrowded, because they are few in number.¹⁶⁷ They are also situated in remote areas,¹⁶⁸ which impacts on the quality of contact between female prisoners and their families, especially the children.¹⁶⁹

In comparison with male facilities, women's prisons get less attention. They are less funded, they offer less qualitative programmes, lower wages for the same work, less family and conjugal visits.¹⁷⁰ Often times, the trainings received by women offenders perpetuate certain stereotypes¹⁷¹ which are discriminatory in nature.

Apart from basic needs that apply to all prisoners, women have special needs related to their reproductive health, which require special arrangements in prison. Unqualified medical staff, lack of medicines and facilities are some of the challenges they face.¹⁷² Pregnant women and nursing mothers are special categories whose nutritional and

¹⁶³ SK Kaggwa Report of the Special Rapporteur on Prisons and Conditions of Detention in Africa, 52nd Ordinary Session of the African Commission on Human and Peoples' Rights, Cote d'Ivoire (2012) 9.

¹⁶⁴ J Ashdown & M James 'Women in detention' (2010) 92 (877) *International Review of the Red Cross* 140.

¹⁶⁵ V Chirwa Report of the Special Rapporteur on Prisons and Conditions of Detention in Africa: Prisons in Mozambique (2001) 11; EVO Dankwa Special Rapporteur on Prisons and Conditions of Detention in Africa: Prisons in the Central African Republic (2000) 22.

¹⁶⁶ EVO Dankwa Report of the Special Rapporteur on Prisons and Conditions of Detention in Africa: Prisons in Benin (1999) 39.

¹⁶⁷ J Ashdown & M James 'Women in detention' (2010) 92 (877) *International Review of the Red Cross* 130.

¹⁶⁸ R Taylor 'Women in prison and children of imprisoned mothers' Preliminary research paper (2004) 8.

¹⁶⁹ L Townhead 'Women in prison and children of imprisoned mothers. Recent developments in the United Nations Human Rights System' (2006) 7.

¹⁷⁰ R Taylor 'Women in prison and children of imprisoned mothers' Preliminary research paper (2004) 10-13, 38.

¹⁷¹ J Sarkin 'An overview of human rights in prisons worldwide' in J Sarkin (ed) *Human rights in African prisons* (2008) 25.

¹⁷² United Nations Office on Drugs and Crime 'Handbook on Women and Imprisonment' (2nd ed), with reference to the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (The Bangkok Rules) (2014) 19.

medical needs are not adequately met in most prisons in Africa.¹⁷³ Giving birth in prison in the absence of adequate health facilities and qualified personnel or being transferred to the hospital in shackles represent grave violations of female prisoners' human rights.¹⁷⁴ Some women prisoners who are not dangerous are tied to the bed while in labour. Many female prisoners are subjected to medical examination in the presence of male guards.¹⁷⁵

Female prisoners become victims of multifaceted sexual violence from other prisoners or from prison's staff. Taking into account the fact that many women prisoners have been subjected to domestic violence or sexual abuse prior to incarceration, experiencing the same problems in prison impacts severely on their emotional and mental wellbeing.¹⁷⁶ Being often supervised by male staff day and night exacerbates their distress.

Women in prison often exhibit signs of mental instability (depression, anxiety, self-rejection) and many are addicted to drugs or alcohol, being in need of a treatment, which is not available in most prisons. These disadvantages increase the risk of self-harm and suicidal tendencies for women while in prison.¹⁷⁷

Statistics have established that a majority of female prisoners are mothers.¹⁷⁸ Therefore, a great deal of their mental and emotional distress is caused by the uncertain situation of their children, in case of separation.¹⁷⁹ Maternal incarceration has a deeper impact on children than the paternal one because usually it is the mother who is the primary or the sole caregiver of the children. In the case of paternal incarceration, in a majority of

¹⁷³ Human Rights Watch Submission to the Day of General Discussion on Children of Incarcerated Parents (2011) 1.

¹⁷⁴ J Ashdown & M James 'Women in detention' (2010) 92 (877) *International Review of the Red Cross* 134.

¹⁷⁵ R Manjoo 'Pathways to, conditions and consequences of incarceration for women' Report of the Special Rapporteur on violence against women, its causes and consequences (2013) 14.

¹⁷⁶ M Bastick & L Townhead 'Women in Prison: A commentary of the UN Standard Minimum Rules for the Treatment of Prisoners' (2008) 18.

¹⁷⁷ J Ashdown & M James 'Women in detention' (2010) 92 (877) *International Review of the Red Cross* 134-135.

¹⁷⁸ United Nations Office on Drugs and Crime 'Handbook on women and imprisonment' (2nd ed), with reference to the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (The Bangkok Rules) (2014) 18.

¹⁷⁹ RD Parke & KA Clarke-Stewart 'Effects of parental incarceration on young children' Working papers prepared for the 'From prison to home: The effect of incarceration and re-entry on children, families and communities' Conference (2002) 1.

cases, the mother will take responsibility for the care of the children; but in the case of maternal incarceration it is mostly the grandparents, relatives or friends that assume such a responsibility.¹⁸⁰ The imprisonment of mothers affects not only their immediate family but the whole society, through the consequences suffered by their children.¹⁸¹ Research has proved that, in general, the existence and alternative care of dependent children is not taken into account when women are being sentenced.¹⁸²

Imprisonment carries a deeper stigmatization for women than for men.¹⁸³ An imprisoned woman will eventually lose her job, her accommodation and, subsequently, the custody of her children.¹⁸⁴

Women are imprisoned mostly for non-violent drug-related offences, prostitution, property crimes or 'crimes against morality' (adultery).¹⁸⁵ In countries where abortion is illegal, women are imprisoned even when they have a miscarriage or they give birth to a stillborn child.¹⁸⁶ Many countries criminalize even the abortions of pregnancies that happened as a result of rape.¹⁸⁷ In certain societies women who try to run away from an abusive home are also imprisoned.¹⁸⁸

Although being able to receive visitors is essential for the prisoner's 'mental wellbeing and social reintegration',¹⁸⁹ there are many complaints from prisoners and visitors

¹⁸⁰ RD Parke & KA Clarke-Stewart 'Effects of parental incarceration on young children', Working papers prepared for the Conference 'From prison to home: The effect of incarceration and re-entry on children, families and communities' (2002) 3.

¹⁸¹ R Taylor 'Women in prison and children of imprisoned mothers' Preliminary research paper (2004) 24.

¹⁸² R Epstein 'Mothers in prison: The sentencing of mothers and the rights of the child' (2004) Howard League. What is Justice? Working Papers (3) 2.

¹⁸³ L Townhead 'Women in prison and children of imprisoned mothers' Recent developments in the United Nations Human Rights System (2006) 8.

¹⁸⁴ L Townhead 'Women in prison and children of imprisoned mothers' Recent developments in the United Nations Human Rights System (2006) 8.

¹⁸⁵ United Nations Office on Drugs and Crime 'Handbook on Women and Imprisonment' (2nd ed), with reference to the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (The Bangkok Rules) (2014) 103.

¹⁸⁶ United Nations Office on Drugs and Crime 'Handbook on Women and Imprisonment' (2nd ed), with reference to the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (The Bangkok Rules) (2014) 12.

¹⁸⁷ R Manjoo 'Pathways to, conditions and consequences of incarceration for women' Report of the Special Rapporteur on violence against women, its causes and consequences (2013) 7.

¹⁸⁸ R Manjoo 'Pathways to, conditions and consequences of incarceration for women' Report of the Special Rapporteur on violence against women, its causes and consequences (2013) 8.

¹⁸⁹ Resolution 2010/16 United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules) Rule 43.

concerning the unpleasant requirements they need to fulfil in order to be allowed to see each other such as degrading and humiliating bodily searches, interdiction of direct contact between children and mothers, unfriendly staff, extremely short visits and long waiting in prison's halls.¹⁹⁰

2.4 Alternatives to imprisonment for women/mothers

Taking into account the destabilizing impact that women's imprisonment has on them, their families, children and society, and recalling that imprisonment does not bring reformation and does not safeguard against reoffending, finding alternatives to incarceration for women represents a desirable option.

2.4.1 International instruments

Internationally, the guiding principles for the implementation of non-custodial alternatives are set by the UN Standard Minimum Rules for Non-Custodial Measures. The document makes available an extensive list of alternatives to imprisonment such as verbal sanctions, conditional discharge, penalties, fines, confiscation order, suspended/ deferred sentence, probation supervision, community service, referral to an attendance centre, house arrest and any other mode of non-institutional treatment or a combination of alternatives.¹⁹¹ Such options reflect human rights principles and aim at rehabilitating offenders.¹⁹² When using non-custodial measures there is an exchange between community and offenders: the former gets involved in doing justice, and the latter manifests responsibility towards his community.¹⁹³

2.4.2 Regional instruments

Although alternatives to incarceration have also been used in Western countries, they are very close to the African 'cultural approach to justice' aimed at reconciling and

¹⁹⁰ M Bastick & L Townhead 'Women in prison: A commentary of the UN Standard Minimum Rules for the Treatment of Prisoners' (2008) 33.

¹⁹¹ UN Standard Minimum Rules for Non-Custodial Measures (1990) 8.2.

¹⁹² UN Standard Minimum Rules for Non-Custodial Measures (1990) 1.5.

¹⁹³ UN Standard Minimum Rules for Non-Custodial Measures (1990) 1.2.

restoring.¹⁹⁴ Article 30 of the African Children's Charter states that 'measures alternative to institutional confinement' and 'special alternative institutions'¹⁹⁵ should be put in place by State Parties in order to preserve the institution of the family and avoid the undesirable consequences of imprisonment. These indications are reiterated in General Comment No 1 on 'Children of incarcerated and imprisoned parents and primary caregivers' where State Parties are called to first consider non-custodial measures for a sole/primary caregiver taking into account the protection of the public, the best interest of the child and the gravity of the offence.¹⁹⁶

Pre-trial detention of a mother could be substituted by the use of bail, summons procedures, written notices and life bonds, while non-custodial measures - which are not foreign to African tradition - such as community service, correctional supervisions, fines, restorative justice approaches should be preferred to incarceration.¹⁹⁷

Where such alternatives cannot be applied, the mother and her infants or young children should be placed in 'special alternative institutions' as a matter of last resort and depending on the best interest of the child. Unfortunately, scarcity of resources often impedes the establishment of such institutions.¹⁹⁸

These institutions should promote children's rights and the creation of a solid bond between mother and children through the use of prison nurseries and work-release programmes.¹⁹⁹ Such facilities should be smaller in size than normal prisons, resembling half-way houses, built inside communities, in order to reduce cost and far distance travelling when visiting prisoners. They could offer treatment programmes for substance abuse mothers, educative programmes and psychological counselling.²⁰⁰ The use of open prisons and pre-release arrangements should be encouraged.²⁰¹

¹⁹⁴ V Stern 'An Alternative Vision: Criminal Justice Developments In Non-Western Countries' (2001) 28 *Social Justice* 92, 93.

¹⁹⁵ Article 30(d) & 30(c) of the African Charter on the Rights and Welfare of the Child.

¹⁹⁶ General Comment No 1 on 'Children of incarcerated and imprisoned parents and primary caregivers' (2013) para 24(a).

¹⁹⁷ General Comment No 1 (2013) para 46, 48.

¹⁹⁸ General Comment No 1 (2013) para 50.

¹⁹⁹ General Comment No 1 (2003) para 51

²⁰⁰ General Comment No 1 (2013) para 52, 61 (c), (d).

²⁰¹ General Comment No 1 (2013) para 61 (f), (g).

The Kampala Declaration on Prison Conditions in Africa contains a section on ‘Alternative sentencing’ aimed at alleviating the overcrowding of African prisons through ‘amnesties, pardons’, ‘compensation for damage’, ‘mediation’, ‘civil reparation’, ‘financial recompense’, ‘reconciliation’, open institutions and community service for less severe offences.²⁰² These alternatives reflect human rights standards better than custodial sentences and are gaining increasing recognition among African states. Customary practice should be preferred to imprisonment, which should be considered a matter of last resort and used only for grave offences.²⁰³

The Kadoma Declaration on Community Service Orders in Africa (1997) is dedicated entirely to the development of community service orders as a positive alternative to incarceration, which brings healing to the community.²⁰⁴ There is a need to create public awareness through campaigns and develop mechanisms for measuring the effectiveness of such alternatives. Research and development of new schemes are also recommended.²⁰⁵

However, there is a gap between the solid theoretical framework and the difficult situation of the penitentiary system in many African countries. Despite the relative success of alternative options in some African countries such as Zimbabwe, Kenya, South Africa, Uganda, Tanzania,²⁰⁶ their efficiency is limited by insufficient funds, public prejudices, difficulty in monitoring, corruption, untrained magistrates, prosecutors and officers, and lack of political will. Therefore, many offenders, including women and mothers, still end up in prison for relatively minor crimes that could have been handled in a less harmful and more dignifying manner.

²⁰² The Kampala Declaration on Prison Conditions in Africa (1996) 2, 3, 4.

²⁰³ The Kampala Declaration on Prison Conditions in Africa (1996) 3, 4.

²⁰⁴ The Kadoma Declaration on Community Service Orders in Africa (1997) para 3.

²⁰⁵ The Kadoma Declaration on Community Service Orders in Africa (1997) para 5, 7.

²⁰⁶ Penal Reform International and the Zimbabwean National Committee on Community Service ‘Community service in practice’ (1997) 3; L Mugambi ‘Implementation of CS orders programme: The Kenyan experience’ Paper presented at the training of magistrates and state attorneys on implementation of community service in Uganda. Workshop Report (2012) Annex 11; A Skelton ‘Alternative sentencing review’ (2004) 6 Civil Society Prison Reform Initiative Research Paper Series (7) 13-49; Penal Reform International ‘Alternatives to imprisonment in East-Africa: Trends and challenges’ (2012) 7-29.

2.5 Conclusion

Every organized society has tried to find appropriate ways of punishment for those who did not comply with generally accepted rules. Over time, societal transformation determined changes in the type of punishment applied to wrongdoers. One of the way to punish offenders is imprisonment. The institution of the prison was introduced in Africa during the colonial rule as a mark of repression and dominance. After independence imprisonment still remained the primary form of punishment in Africa, which led to congested prison facilities.

Imprisonment has not proven to be a successful means of crime prevention. Imprisoning offenders requires enormous resources, it does not lower crime rates, nor does it rehabilitate offenders. On the contrary, imprisonment attracts social stigma and has severe repercussions on prisoners' physical and mental health, family ties and employment prospects.

The analysis undertaken in this study led to the conclusion that the dire situation of a majority of prisons in Africa infringes on the prisoners' human rights and dignity, in general. The situation of women offenders is of greater concern because women represent, in a majority of cases, the primary caregiver of their minor children. There is a need, therefore, to make alternative measures to incarceration available to women, taking also into account the gravity of the offence and the protection of society. This approach to justice would serve the best interests of their dependent children.

This study also pointed out that there are sufficient provisions in international and regional instruments for the implementation of non-custodial measures in Africa.

CHAPTER 3: ARTICLE 30(d) OF THE AFRICAN CHILDREN'S CHARTER AND THE BEST INTERESTS OF THE CHILD

This chapter is structured as follows: Section 1 deals with the 'best interests' principle and concludes that the rigidity of article 30(d) does not serve the 'best interests' of the child. Part 2 expands on the reason why the provision of article 30(d) is not always in the 'best interests' of the children under consideration, by weighing up the advantages and disadvantages of co-detention and separation of children from their imprisoned mothers. The chapter concludes that the 'best interests' of a particular child should be determined on an individual basis.

3.1 The 'best interests' of the child

3.1.1 The 'best interests' concept

The 'best interests' principle aims at safeguarding the rights and wellbeing of children in every action taken in the private or public sphere by persons and authorities.²⁰⁷ It is the expression of the highest level of protection with respect to children. All the provisions contained in international and regional instruments concerning children are to be applied keeping in mind the ultimate goal of achieving the 'best interests' of the child.

The 'best interests' principle is not a new concept.²⁰⁸ The Declaration of the Rights of the Child (1959) makes reference to it in the context of the child's holistic development where the 'best interests of the child shall be the paramount consideration'.²⁰⁹

3.1.2 Comparative perspective of the 'best interests' principle in the African Children's Charter and the Convention of the Rights of the Child

Two relevant treaties dedicated to the promotion of children's wellbeing deal with the 'best interests' principle: the African Children's Charter and the Convention on the

²⁰⁷ Article 4(1) of the African Children's Charter; Article 3(1) of the CRC.

²⁰⁸ General Comment No 14 (2013) of the CRC Committee (art. 3, para. 1) I.A.2.

²⁰⁹ Declaration of the Rights of the Child (1959) Principle 2.

Rights of the Child (CRC). Article 4(1) of the African Children's Charter states that 'in all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration'. Article 3(1) of the CRC stipulates that 'in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration'.

By comparison, it seems that the African Children's Charter offers a higher standard of protection by promoting the 'best interests of the child' as *the*²¹⁰ primary consideration, while the CRC envisages the 'best interests of the child' as *a*²¹¹ primary consideration. In other words, in the African Children's Charter the 'best interests' principle is overriding all other considerations, while in the CRC the 'best interests' is one among other considerations.²¹² The 'best interests' principle has the final say in the African Children's Charter, but in the CRC it is a voice among other voices. However, as Freeman has rightly pointed out, 'that a child's best interests should be "first consideration" (let us leave out whether this is preceded by the definite or indefinite article) is an exhortation to consider specifically the best interests of the child and to give the child's best interests greater weight than other considerations'.²¹³

The 'best interests' principle is reiterated in other articles of both treaties, in relation with 'freedom of thought, conscience and religion',²¹⁴ 'parental care and protection',²¹⁵ 'parental responsibilities',²¹⁶ 'adoption',²¹⁷ 'separation from parents',²¹⁸ 'family environment',²¹⁹ deprivation of liberty²²⁰ and juvenile justice.²²¹ As Kaime has pointed

²¹⁰ My emphasis.

²¹¹ My emphasis.

²¹² A Skelton 'The development of a fledgling child rights jurisprudence in Eastern and Southern Africa based on international and regional instruments' (2009) 9 *African Human Rights Law Journal* 486.

²¹³ M Freeman *A commentary on the United Nations Convention on the Rights of the Child. Article 3. The best interests of the child* (2007) 61.

²¹⁴ Article 9(1) of the African Children's Charter.

²¹⁵ Article 19(1) of the African Children's Charter.

²¹⁶ Article 20(1) (a) of the African Children's Charter; Article 18(1) of the CRC.

²¹⁷ Article 24 of the African Children's Charter; Article 21 of the CRC.

²¹⁸ Articles 25(2) (a) & 25(3) of the African Children's Charter; Article 9(3) of the CRC.

²¹⁹ Article 20(1) of the CRC.

²²⁰ Article 37(c) of the CRC.

²²¹ Article 40(2) of the CRC.

out, ‘there is no provision in the African Children’s Charter and no right or freedom recognised therein, with respect to which the principle is not relevant.’²²²

3.1.3 The ‘best interests’ principle in General Comment No 14 (2013) of the Committee on the Rights of the Child

The concept of the child’s ‘best interests’ is clarified in General Comment No 14 (2013) on the right of the child to have his or her best interest taken as a primary consideration (art. 3, para. 1) of the Committee on the Rights of the Child. According to the Committee on the Rights of the Child, the ‘best interests’ is a ‘dynamic concept’ meant to ensure the enjoyment by the child of all his or her rights stipulated in the Convention.²²³ The ‘best interests’ concept has a triple dimension: it represents a ‘substantive right’ in itself, being able to clarify a situation dominated by conflicting interests; it is also an ‘interpretative legal principle’ in cases where multiple options are available; and it constitutes a ‘rule of procedure’ establishing the potential effect of a decision on a particular child.²²⁴

Cognizant of the fact that ‘all actions taken by a State affect children one way or another’, State Parties have an obligation to ensure that the ‘best interests’ of the child is taken into consideration in all decisions made by public institutions that have the potential of impacting the child, directly or indirectly.²²⁵ As Viljoen has pointed out, the ‘best interests’ principle is a ‘criterion against which a State Party has to measure all aspects of its laws and policy regarding children’.²²⁶

The ‘best interests’ concept must be assessed on an individual basis, considering carefully the particular situation of the child under consideration.²²⁷ The principle must be ‘flexible and adaptable’,²²⁸ keeping in mind the uniqueness of each child.²²⁹

²²² T Kaime *The African Charter on the Rights and Welfare of the Child: A socio-legal perspective* (2009) 110.

²²³ General Comment No 14 I.A.1.

²²⁴ General Comment No 14 I.A.6. (a), (b), (c).

²²⁵ General Comment No 14 IV.A.1. (b) 20.; III.14. (a).

²²⁶ F Viljoen ‘The African Charter on the Rights and Welfare of the Child’ in T Boezaart (ed) *Child law in South Africa* (2009) 336.

²²⁷ General Comment No 14 IV.A.3.32.

²²⁸ General Comment No 14 IV.A.3.32.

²²⁹ General Comment No 14 V.A.49.

Assessing what is in the ‘best interests’ of a particular child should take into consideration a range of factors such as his or her age, gender, maturity, the presence or absence of a disability, the type of family arrangement, and his or her culture.²³⁰ Determining what would be in children’s ‘best interests’ should also incorporate child participation, their identity, the preservation of family environment and relationships, the protection of the child, his or her vulnerability, his or her right to health and education.²³¹

Family is envisaged as the ‘natural environment’ for child development.²³² Therefore, unless it is in the child’s ‘best interests’, separation from family should be regarded as a measure of last resort due to its grave consequences on the child’s wellbeing.²³³ Considering the fact that the ‘best interests’ principle must be applied also for children whose parents are in conflict with the law, there is a need for assessing the potential effect of sentences on those particular children; as much as possible, alternatives to imprisonment should be made available in such cases in order to safeguard the ‘best interests’ of the child.²³⁴

3.1.4 Selected case law on the best interest of the child

The principle can be invoked to protect the rights of individual children as well as those of children seen as a group.²³⁵ The following case law is illustrative in this regard.

S v M (Centre for Child Law as *amicus curiae*). This South African case makes reference to article 30 of the African Children’s Charter with respect of the ‘South Africa’s obligations under international law’.²³⁶ The case deals with the issue of sentencing of a primary caregiver and bread winner, Mrs M, found guilty of having committed fraud and theft on multiple occasions.

²³⁰ General Comment No 14 V.A.48.

²³¹ General Comment No 14 V.A.1. (a) - (g).

²³² General Comment No 14 V.A.1. (c) 59.

²³³ General Comment No 14 V.A.1. (c) 61.

²³⁴ General Comment No 14 IV.A.2. (b) 28.; V.A.1. (c) 69.

²³⁵ General Comment No 14 A. 1. (c) 23.

²³⁶ *S v M* 2008 3 SA 232 (CC) 19.

In 1996 she was sentenced to a fine as well as to imprisonment, which was suspended for five years. In 1999 she was shortly imprisoned and then released on bail. In 2002 she was sentenced by Wynberg Regional Court to four years' imprisonment. After serving for only three months, the Cape High Court released her on bail. Later on, the same court sentenced her to imprisonment under the following arrangement: after serving eight months in prison, she could have been released under correctional supervision. The Court denied her leave to appeal against the sentence. She turned towards the Supreme Court of Appeal but her request was denied. Then she successfully appealed to the Constitutional Court against her sentence. Because Mrs M is a primary caregiver, the Constitutional Court held that the 'best interests' of her three minor children must be taken into account. The South African Constitution provides for the right of children to 'family care or parental care, or to appropriate alternative care when removed from the family environment'.²³⁷ Also, 'a child's best interests are of paramount importance in every matter concerning the child'.²³⁸

When a court has the possibility of choosing among several sentencing options, the type of punishment for a primary caregiver should be 'the least damaging to the interests of the children'.²³⁹ On the one hand, the court should strive to maintain 'the integrity of family care';²⁴⁰ on the other hand, the court has the duty 'to punish criminal misconduct'.²⁴¹ Sachs J pointed out that separation of children from their primary caregiver impacts the children 'profoundly and at every level', and leaves 'severe negative consequences' on the parent-children relationship.²⁴²

Therefore, considering the emotional, developmental, physical, material, educational and social disadvantages that Mrs M's imprisonment would have upon her minor children, the court decided that it was in the benefit of all parties involved that Mrs M be placed under correctional supervision rather than to be sentenced to imprisonment.²⁴³

²³⁷ Section 28(1) (b) of the Constitution of the Republic of South Africa (1996).

²³⁸ Section 28(2) of the Constitution of the Republic of South Africa (1996).

²³⁹ Sachs J, *S v M* 2008 3 SA 232 (CC) para 33.

²⁴⁰ Sachs J, *S v M* 2008 3 SA 232 (CC) para 38.

²⁴¹ Sachs J, *S v M* 2008 3 SA 232 (CC) para 39.

²⁴² Sachs J, *S v M* 2008 3 SA 232 (CC) para 42.

²⁴³ *S v M* 2008 3 SA 232 (CC) para 67, 76.

*De Villiers v S*²⁴⁴ is another relevant case law concerning the imprisonment of mother caregivers, in which the Supreme Court of Appeal of South Africa found that ‘failure to consider the best interests of an offender’s young children, when imposing a sentence, constitutes a grave misdirection’.²⁴⁵ Ms de Villiers, the primary caregiver of two minor children, was found guilty of having committed fraud on employer when in position of trust, in 2007. She was arrested in 2009, and in 2011 she was sentenced by the trial court to eight years’ imprisonment, from which three years were suspended. She was released on bail pending an appeal to the Gauteng Local Division (Johannesburg). The regional court refused leave to appeal and withdrew her bail. Ms de Villiers appealed against the regional court’s decision to the Supreme Court of Appeal, which solicited the Centre for Child Law to get involved in the case as *amicus curiae*. The Supreme Court of Appeal found that the sentence of eight years’ imprisonment was unjustified and that it did not take into account the best interests of the two children involved. Therefore, the Supreme Court of Appeal sentenced Ms de Villiers to ‘three years’ imprisonment from which she may be placed under correctional supervision in the discretion of the Commissioner or a parole board’.²⁴⁶ She was also granted a period of four weeks to make arrangements for the care of her minor children.

In *The Institute for Human Rights and Development in Africa (IHRDA) and the Open Society Justice Initiative (on behalf of children of Nubian descent in Kenya) against the Government of Kenya* (the Nubian Case), the Committee used the ‘best interests’ principle to decide in the case involving the Nubian children living in Kenya, who were discriminated against and rendered stateless by the Kenyan government. The Nubians originated from central Sudan. Under the British colonial rule, they were forcefully enrolled in the military in the early 1900s. The Nubians were denied not only the request to return to Sudan upon demobilisation, but also British citizenship. When Kenya got its independence in 1963, the Nubians were denied Kenyan nationality because they did not possess any ancestral land in Kenya. Due to this situation, the Nubians lacked identification documents, which prevented them from registering the birth of their children.

²⁴⁴ *De Villiers v S* (20367/2014) [2015] ZASCA 119.

²⁴⁵ *De Villiers v S* (20367/2014) [2015] ZASCA 119 1.

²⁴⁶ *De Villiers v S* (20367/2014) [2015] ZASCA 119 18.

The communication was submitted by the Institute for Human Rights and Development in Africa and the Open Society Justice Initiative in 2009 and was declared admissible by the Committee in 2010. In the absence of an answer to the note verbal sent twice to the Respondent State, the Committee decided in 2011 to consider the communication during its 17th Ordinary Session.

The complainants were faced with procedural challenges such as the need to exhaust local remedies. The Committee ruled that the ‘best interest’ principle overrides the need of the complainants to comply with procedural requirements. It was not in the Nubian children’s ‘best interests’ to continue to live in a state of multiple deprivation: of registration at birth, nationality, and socio-economic rights. According to the Committee, the ‘best interests’ principle is a matter of urgency that requires concrete and immediate steps.²⁴⁷

3.1.5 Scholarly interpretation of the ‘best interests’ principle

Parker provides a number of examples where the ‘best interests’ or the ‘welfare’ principle was used by various domestic courts in cases concerning family law matters such as custody, guardianship, access to, and adoption of a child.²⁴⁸ The welfare standard is a primary consideration in decisions concerning children because they are vulnerable persons, deeply affected by legal decisions.²⁴⁹ Children depend on others for the fulfilment of their needs,²⁵⁰ lacking the capability and maturity to take decisions in their best interest.²⁵¹

²⁴⁷ The Institute for Human Rights and Development in Africa and the Open Society Justice Initiative (On behalf of Children of Nubian Descent in Kenya) against the Government of Kenya Communication: No. Com/002/2009 22 March 2011, available at <http://www.acerwc.org/?wpdmdl=8690> (accessed 17 August 2015).

²⁴⁸ For specific examples see S Parker ‘The best interests of the child - principles and problems’ (1994) 8 *International Journal of Law and the Family* 27.

²⁴⁹ C Piper ‘Assumptions about children’s best interests’ (2000) 22(3) *Journal of Social Welfare and Family Law* 262.

²⁵⁰ F Viljoen ‘The African Charter on the Rights and Welfare of the Child’ in T Boezaart (ed.) *Child law in South Africa* (2009) 332.

²⁵¹ ND Reppucci & CA Crosby ‘Law, psychology and children: Overarching issues’ (1993) 17(1) *Law and Human Behaviour* 6.

Scholars' view of the 'best interests' standard vary significantly. Some scholars consider that the principle is capable of providing guidance in decisions concerning children; others think the principle is ineffective and advocate its abandonment.²⁵² The principle was the target of much scholarly debate and criticism because of the perception that it is rather vague, indeterminate and open-ended.²⁵³ These characteristics may lead to 'arbitrary and subjective decisions'.²⁵⁴ Another point of criticism refers to the absence of objectivity when it comes to assessing and applying the principle.²⁵⁵ For this reason, establishing what would be best for a particular child is rather a speculative exercise.²⁵⁶

The decision concerning the 'best interests' of a child is sometimes informed by a judge's system of values and beliefs²⁵⁷ due to lack of consensus in establishing a criteria for determining a child's 'best interests'.²⁵⁸ Elster considers that for a judge to be able to decide in the 'best interests' of a child he must know all available options and their outcomes, as well as each outcome's value.²⁵⁹ It is obviously impossible to foresee how the present available options will evolve in the child's future; for this reason, some scholars have dismissed the utility and efficacy of the 'best interests' principle which can be 'used to justify any decision'.²⁶⁰

Scholars have different views concerning what should be taken into account when deciding the 'best interests' of a child. As Freeman noted, 'there are different

²⁵² H Reece 'The paramouncy principle: Consensus or construct?' (1996) 49 *Current Legal Problems* 303.

²⁵³ S Parker 'The best interests of the child - principles and problems' (1994) 8 *International Journal of Law and the Family* 26.

²⁵⁴ M Skivenes 'Judging the child's best interests: Rational reasoning or subjective presumptions?' (2010) 53(4) *Acta Sociologica* 339.

²⁵⁵ B Clark 'A "golden thread"? Some aspects of the application of the standard of the best interest of the child in South African Family Law' (2000) 1 *Stellenbosch Law Review* 15.

²⁵⁶ J Heaton 'Some general remarks on the concept "best interests" of the child' (1990) 53 *Journal for Contemporary Roman-Dutch Law* 96.

²⁵⁷ RH Mnookin 'Child-custody adjudication: Judicial functions in the face of indeterminacy' (1975) 39(3) *Law and Contemporary Problems* 267.

²⁵⁸ RH Mnookin 'Child-custody adjudication: Judicial functions in the face of indeterminacy' (1975) 39(3) *Law and Contemporary Problems* 260.

²⁵⁹ J Elster 'Solomonic judgments: Against the best interest of the child' (1987) 54(1) *The University of Chicago Law Review* 12.

²⁶⁰ M King 'Playing the symbols – Custody and the law commission' (1987) 17 *Family Law* 189 in H Reece 'The paramouncy principle: Consensus or construct?' (1996) 49 *Current Legal Problems* 298.

conceptions of what is in a child's best interests.'²⁶¹ For some, the psychological dimension of a child's life seems to take precedent over other aspects in determining the 'best interests' of a child.²⁶² For others, 'continuity and stability in relationships' is considered highly beneficial especially for young children.²⁶³ It is believed that it is always best for children to grow up with their own parents.²⁶⁴ The child's opinion must also be considered when determining his or her 'best interests'.²⁶⁵ Eekelaar identifies two methods of establishing the best interests of the child, namely: the 'objectivization' and the 'dynamic self-determinism'.²⁶⁶ Objectivization refers to the ability of the decision-maker to assess what is in the child's best interest, while self-determinism is a participatory process which 'allows scope for the child to determine what those interests are'.²⁶⁷ On his part, Mnookin differentiates between short-term and long-term indicators when establishing what would be in a child's 'best interests'.²⁶⁸

Some have argued that applying the 'best interests' standard may generate conflictual situations and may be detrimental to the rights of others such as the parents or society. Children's rights should not trump the rights of others, but should stand on equal footing with adults' rights.²⁶⁹ In other words, the 'best interests' standard should not be absolute.²⁷⁰ This clarification gets more relevance in the context of traditional settings such as African communities where the child's 'best interests' are intimately linked to those of his or her nuclear or extended family²⁷¹ and, in some cases, the 'best

²⁶¹ M Freeman *A commentary on the United Nations Convention on the Rights of the Child. Article 3. The best interests of the child* (2007) 27.

²⁶² B Clark 'A "golden thread"? Some aspects of the application of the standard of the best interest of the child in South African Family Law' (2000) 1 *Stellenbosch Law Review* 19.

²⁶³ RH Mnookin 'Child-custody adjudication: Judicial functions in the face of indeterminacy' (1975) 39(3) *Law and Contemporary Problems* 264, 265.

²⁶⁴ M Skivenes 'Judging the child's best interests: Rational reasoning or subjective presumptions?' (2010) 53(4) *Acta Sociologica* 341.

²⁶⁵ M Skivenes 'Judging the child's best interests: Rational reasoning or subjective presumptions?' (2010) 53(4) *Acta Sociologica* 341.

²⁶⁶ J Eekelaar 'The interests of the child and the child's wishes: The role of dynamic self-determinism' (1994) 8 *International Journal of Law and the Family* 46.

²⁶⁷ J Eekelaar 'The interests of the child and the child's wishes: The role of dynamic self-determinism' (1994) 8 *International Journal of Law and the Family* 43, 46.

²⁶⁸ RH Mnookin 'Child-custody adjudication: Judicial functions in the face of indeterminacy' (1975) 39(3) *Law and Contemporary Problems* 260.

²⁶⁹ H Reece 'The paramountcy principle: Consensus or construct?' (1996) 49 *Current Legal Problems* 302.

²⁷⁰ J Elster 'Solomonic judgments: Against the best interest of the child' (1987) 54(1) *University of Chicago Law Review* 26.

²⁷¹ B Rwezaura 'The concept of the child's best interests in the changing economic and social context of Sub-Saharan Africa' (1994) 8 *International Journal of Law and the Family* 100.

interests' of the child must cede in favour of the larger group's interests.²⁷² However, upholding children's best interests enhances the societal welfare.²⁷³

As other treaty provisions, the 'best interests' principle cannot be understood in abstract, but it must be seen in the context of cultural and socio-economic specificities of each community, provided that the core of the principle is being preserved.²⁷⁴ The 'implications of the principle will vary over time and from one society [...] to another.'²⁷⁵ However, in a conflictual situation the welfare of the child must override cultural practices that are detrimental to him or her.²⁷⁶ Traditional values and treaty provisions should both collaborate in order to generate a higher level of protection for children.²⁷⁷

3.1.6 Article 30(d) and the 'best interests' concept

The issue of incarcerated mothers' children was not discussed in the CRC and the OAU Declaration of the Rights and Welfare of the African Child.²⁷⁸ At the Workshop on the Draft Convention on the Rights of the Child, held in Nairobi in 1988, the drafters of the ACRWC promised that the 'Charter will be serving Africa's children if it addresses this problem directly.'²⁷⁹

²⁷² P Alston 'The best interests principle: Towards a reconciliation of culture and human rights' (1994) 8 *International Journal of Law and the Family* 5.

²⁷³ M Freeman *A commentary on the United Nations Convention on the Rights of the Child. Article 3. The best interests of the child* (2007) 41.

²⁷⁴ A An-na'im 'Cultural transformation and normative consensus on the best interests of the child' (1994) 8 *International Journal of Law and the Family* 63; B Rwezaura 'The concept of the child's best interests in the changing economic and social context of Sub-Saharan Africa' (1994) 8 *International Journal of Law and the Family* 109.

²⁷⁵ P Alston & B Gilmour-Walsh *The best interests of the child. Towards a synthesis of children's rights and cultural values* (1996) 2.

²⁷⁶ Article 21(1) of the African's Children Charter.

²⁷⁷ A An-na'im 'Cultural transformation and normative consensus on the best interests of the child' (1994) 8 *International Journal of Law and the Family* 70, 71.

²⁷⁸ T Manuh 'The draft Convention: Its adequacy and relevance for Africa's children' in African Network for the Prevention and Protection against Child Abuse and Neglect & UNICEF *The rights of the child. Selected proceedings of a workshop on the draft Convention on the Rights of the Child: An African perspective* (1989) 58.

²⁷⁹ T Manuh 'The draft Convention: Its adequacy and relevance for Africa's children' in African Network for the Prevention and Protection against Child Abuse and Neglect & UNICEF *The rights of the child. Selected proceedings of a workshop on the draft Convention on the Rights of the Child: An African perspective* (1989) 58.

Article 30(d) of the ACRWC states clearly that States Parties shall ‘ensure that a mother shall not be imprisoned with her child’. In other words, article 30(d) opts for separation of children from their incarcerated mother. The rationale behind article 30(d) was undoubtedly the protection of children whose mother is imprisoned. The decision of article 30(d) is based on two main assumptions: that the prison conditions across the African continent are not fit to accommodate children of incarcerated mothers; and that the communal African life could provide a viable alternative for such children.

3.2 Children residing in prison with their mother in contemporary Africa

3.2.1 Overview

According to Global Legal Research Centre, most African prisons do not provide ‘special accommodation’ for children residing in prison with their mother, with the exception of Egypt, Kenya and South Africa.²⁸⁰ Ugandan law provides for ‘special facilities’ for such children,²⁸¹ but in practice there are no funds allocated for the accommodation of ‘pregnant women and mothers with infants’.²⁸²

The State Party Reports submitted by African countries to the Committee provide, to some extent, information concerning the present situation of children residing in prison with their mothers. In Namibia, for example, the state has put in place ‘special provisions for the sentencing, treatment and accommodation in prison of expectant mothers and mothers of infants and young children’.²⁸³ In Rwanda’s prisons there are special wards reserved for mothers with children under three years old. The Government of Rwanda has created Early Childhood Development Centres for children under three years of age residing in prison with their mother. However, in Rwanda a

²⁸⁰ ‘Laws on children residing with parents in prison’ (2004) The Law Library of Congress, Global Legal Research Centre 8-68 available at <https://www.loc.gov/law/help/children-residing-with-parents-in-prison/children-residing-with-parents-in-prison.pdf> (accessed 3 October 2015).

²⁸¹ Prisons Act of 2006 § 59 (2006) available at <http://www.icla.up.ac.za/images/un/use-of-force/africa/Uganda/Prisons%20Act%20Uganda%202006.pdf> (accessed 3 October 2015).

²⁸² United States Department of State, Bureau of Democracy, Human Rights and Labor, Country reports on human rights practices for 2013: Uganda 5 (2014) available at <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?dlid=220173&year=2013#wrapper> (accessed 3 October 2015).

²⁸³ State Party Report of the Republic of Namibia on the African Charter on the Rights and Welfare of the Child (2004-2012) 85 (Report on file with the author).

mother is imprisoned with her child only under special circumstances where the Judge finds it necessary.²⁸⁴ A baby-friendly unit has been established since 2006 in the female section of the Nsawam Prisons in Ghana, as part of a prison reform initiative.²⁸⁵ Since 2011, a number of female correctional centres in South Africa have been equipped with mother and child units, which allow children to reside in prison with their mothers until the age of two.²⁸⁶ Expectant and nursing mothers in Zimbabwean prisons receive antenatal and postnatal care. The day care centre put in place at the biggest female prison in Zimbabwe provides a ‘normal environment’ for the children who reside in prison with their mother.²⁸⁷

African countries have adopted national policies concerning the children of imprisoned mothers. The Table below provides the age until which a child is allowed to reside in prison with his or her mother in some African countries.²⁸⁸

Table 1: Age limits for children residing in prison with their mother across Africa

State	Limit for children living in prison	Date information collected
Burkina Faso	2 years	2006
Burundi	2 years	Undated
Congo	1 year	1994
Egypt	2 years	2008
Eritrea	No upper limit	Undated
Ghana	2 years or when weaned	2011

²⁸⁴ Second and Third Periodic Reports of the Republic of Rwanda on the Implementation of the African Charter on the Rights and Welfare of the Child, Period: 2006-2013 (2014) 41 (Report on file with the author).

²⁸⁵ Initial, First and Second Consolidated Report of the Republic of Ghana to the African Committee of Experts on the Rights and Welfare of the Child (2005-2013) (2014) 88 (Report on file with the author).

²⁸⁶ Initial Country Report of the Republic of South Africa on the African Charter on the Rights and Welfare of the Child (2000-2013) 70 (Report on file with the author).

²⁸⁷ Initial Report of the Government of the Republic of Zimbabwe under the African Charter of the Rights and Welfare of the Child (2013) 61 (Report on file with the author).

²⁸⁸ O Robertson ‘Collateral convicts: Children of incarcerated parents’ Recommendations and good practice from the UN Committee on the Rights of the Child Day of General Discussion 2011, Appendix 2: Babies and children living in prison – age limits and policies around the world (2012) 74-76.

Kenya	4 years	2011
Niger	5 years	2009
Nigeria	18 months	2007
Sierra Leone	2 years	2010
South Africa	2 years	2010
Sudan	6 years	Undated
Tanzania	Until normal lactation period expires	2009
Zambia	4 years	2011

Choosing between separation of children from their incarcerated mothers and co-detention is choosing between two evils. Each option has its own advantages and disadvantages.

3.2.2 Advantages of separation

Being separated from their imprisoned mother means that instead of being raised in prison, children will grow up in one of the following (formal or informal) settings: extended family or family friends (kinship care); with their father; foster care; orphanage; on the streets. It has been established that being raised in a family environment represents the best alternative for children.²⁸⁹ They need stability and continuity when growing up. Being removed from their familiar environment is often not in their 'best interests'. However, being separated from their incarcerated mother is to the advantage of children only if the adults in charge are able and willing to take care of them. Otherwise they might end up being neglected or abused.

3.2.3 Disadvantages of separation

Effects on the child

²⁸⁹ Preamble of the African Children's Charter.

A major disadvantage of separating children from their imprisoned mothers is the dissolution of the vital bond and attachment between the two. Children separated from their incarcerated mother often experience emotional and mental disturbances such as ‘separation anxiety and post-traumatic stress’.²⁹⁰ Children of incarcerated parents grow up displaying behavioural problems.²⁹¹ They may exhibit ‘externalizing behaviours such as aggression, defiance, and disobedience’ but also ‘internalizing behaviours such as depression, anxiety and withdrawal’.²⁹² One of the activities that lead to bonding is the act of breastfeeding. It is the World Health Organization’s recommendation that ‘infants should be exclusively breastfed for the first six months of life to achieve optimal growth, development and health’.²⁹³ It has been also recommended that partial breastfeeding should be continued until the child is two years old.²⁹⁴

Children of female prisoners often experience unstable living arrangements: They may repeatedly change accommodation, caregivers and neighbourhood.²⁹⁵ In some cases, siblings are separated from each other in order to release the caregiver’s financial and psychological burden.²⁹⁶ In some cases, children of incarcerated women are raised in orphanages, despite the recommendation that family-like care is better than institutional care.

In the absence of the mother, children may suffer different forms of traumatising. They may be exposed to abuse, exploitation and various discriminations while in kinship care.²⁹⁷ Their academic performance will deteriorate as a consequence of their mother’s imprisonment.²⁹⁸ Some may drop out of school due to the inability to pay

²⁹⁰ CF Hairston ‘Focus on children with incarcerated parents. An overview of the research literature’ A report prepared for the Annie E. Casey Foundation (2007) 18.

²⁹¹ J Murray & DP Farrington ‘Effects of parental imprisonment on children’ (2008) 37(1) *Crime and Justice* 133.

²⁹² CF Hairston ‘Focus on children with incarcerated parents. An overview of the research literature’ A report prepared for the Annie E. Casey Foundation (2007) 19.

²⁹³ World Health Organization & UNICEF ‘Global strategy for infant and young child feeding’ (2003) para 10.

²⁹⁴ BL Horta & CG Victora *Long-term effects of breastfeeding: A systematic review* (2013) 1.

²⁹⁵ M Bastick & L Townhead ‘Women in prison. A commentary on the UN Standard Minimum Rules for the Treatment of Prisoners’ (2008) 42.

²⁹⁶ O Robertson ‘The impact of parental imprisonment on children’ Women in prison and children of imprisoned mothers series Research Paper (2007) 34.

²⁹⁷ JL Roby ‘Children in informal alternative care’ (2011) UNICEF Discussion paper 20 available at http://www.unicef.org/protection/Informal_care_discussion_paper_final.pdf (accessed October 3 2015).

²⁹⁸ J Murray & DP Farrington ‘The effects of parental imprisonment on children’ (2008) 37(1) *Crime and Justice* 135.

school fees. Also, when children are not told the truth about their mother's incarceration, the sudden disappearance of the mother may cause confusion and may be perceived by the child as a bereavement.²⁹⁹

Effects on the relationship with incarcerated mother

Separation affects not only the children but the mothers as well. This observation is valid especially for mothers of infants and young children who 'form an inseparable biological and social unit' with their children.³⁰⁰ Lack of information concerning the fate of their children could be emotionally and mentally devastating for incarcerated mothers.³⁰¹ The frequency and quality of children's contact with their incarcerated mother suffers due to distance, cost implications, unfriendly visiting arrangements or reluctant caregivers.³⁰²

Often times imprisoned mothers do not even mention the fact that they have minor children in their care from fear of losing custody;³⁰³ often times the issue of dependent children does not arise at all in any stage of the criminal process.³⁰⁴ Consequently, the state cannot provide for such children if there is no mention of their existence at the time of sentencing the mother. Therefore those children might end up on the streets, at risk of being forced into prostitution, pornography or begging.

3.2.4 Advantages of co-detention

Co-detention offers infants and young children the possibility of bonding and creating a secure attachment with their mother. Being breastfed is a priceless advantage to the child due to the fact that breast milk significantly reduces the risk of 'morbidity and

²⁹⁹ O Robertson 'Collateral convicts. Children of incarcerated parents'. Recommendations and good practice from the UN Committee on the Rights of the Child Day of General Discussion 2011 (2012) 46.

³⁰⁰ World Health Organization 'Global strategy for infant and young child feeding' (2003) 3.

³⁰¹ CF Hairston 'Focus on children with incarcerated parents. An overview of the research literature' A report prepared for the Annie E. Casey Foundation (2007) 15.

³⁰² NG La Vigne et al 'Broken bonds. Understanding and addressing the needs of children with incarcerated parents' (2008) Urban Institute Justice Policy Centre 1, 6.

³⁰³ O Robertson 'The impact of parental imprisonment on children' Women in prison and children of imprisoned mothers series Research Paper (2007) 47.

³⁰⁴ R Epstein 'Mothers in prison: The sentencing of mothers and the right of the child' Howard League What is Justice? Working Papers No 3 (2014) 10.

mortality due to infectious diseases’, especially ‘in the first two years of life’.³⁰⁵ The familiar and nurturing presence of the mother can be reassuring in the midst of a hostile environment such as the prison. This arrangement could provide a higher level of mental stability for both mother and children. Having their children with them in prison could represent, for many women, a better alternative than being unaware of their children’s fate. It is a way of avoiding a situation in which the child might be abandoned or end up on the streets. Having their children with them has proven to reduce recidivism rate for many female prisoners especially if conditions of detention are adequate.³⁰⁶

3.2.5 Disadvantages of co-detention

Being in prison with the mother may expose children to various risks, depending on the level of prison’s development. Most prisons across Africa are not equipped to provide for the specific needs of children.³⁰⁷ Children in prison with their mother lack a balanced diet. In most prisons there is no food allocated for the needs of children,³⁰⁸ thus mothers are expected to share their meagre portion of food with their children. Also, formula and baby bottles are not provided in most African prisons.³⁰⁹ A majority of African prisons do not provide for children’s clothing and hygiene materials with the exception of Botswana, Ethiopia, Malawi, Namibia, South Africa, Swaziland, Tanzania, Uganda, where the Prison Service should provide for the children’s ‘necessities’.³¹⁰ Poor nutrition, associated with dire living conditions in prison and the contact with other prisoners may expose children to various sicknesses. Most African prisons still lack proper medical care, sufficient nurses and doctors, medicines, and trained staff.³¹¹ Because of these deficiencies many infants and young children get sick

³⁰⁵ BL Horta & CG Victora *Long-term effects of breastfeeding: A systematic review* (2013) 1.

³⁰⁶ AE Jbara ‘The price they pay: Protecting the mother-child relationship through the use of prison nurseries and residential parenting programs’ 2012 87(4) *Indiana Law Journal* 1831.

³⁰⁷ O Robertson ‘Children imprisoned by circumstance’ *Human rights and refugees publications* (2008) 16.

³⁰⁸ V Chirwa Report of the Special Rapporteur on Prisons and Conditions of Detention in Africa: Prisons in Malawi (2001) 18.

³⁰⁹ Human Rights Watch, Submission for the Day of General Discussion on Children of Incarcerated Parents (2011) 2.

³¹⁰ ‘Laws on children residing with parents in prison’ (2004) The Law Library of Congress, Global Legal Research Centre 8-68.

³¹¹ United Nations Office on Drugs and Crime ‘Handbook on women and imprisonment’ (2014) 19, 20.

and some die.³¹² Lack of stimulation in infants and young children in prison impacts negatively on their ‘cognitive development’.³¹³ Lack of sufficient space and facilities for play proves to be detrimental to their ‘safe physical development’.³¹⁴

Life in prison also expose children to different types of abuse.³¹⁵ They may witness aggressive language or behaviour from prison staff and inmates, which will lead to the development of aggressive tendencies.³¹⁶ Inadequate or lack of education due to financial constraints is another challenge for children residing in prison.³¹⁷

Children living in prison with their mother are cut off from the real world, having little or no contact at all with the ‘outside’. After release, these children may experience difficulties in relating with others and in adjusting to their new environment.³¹⁸ Children can stay in prison with their mother for a specific period of time, according to national laws. Separation from the mother represents a dramatic moment for both mother and children. Even if they leave the prison together with their mother, such children will have to face the shame, humiliation and stigma of having been in prison.³¹⁹ This situation affects their self-esteem.³²⁰

³¹² O Robertson ‘Children imprisoned by circumstance’ Human rights and refugees publications (2008) 24.

³¹³ RD Parke & KA Clarke-Stewart ‘Effects of parental incarceration on young children’ Working papers prepared for the ‘From prison to home’ conference (2002) 14.

³¹⁴ Quaker United Nations Office ‘Children of imprisoned mothers’ Submission to the Committee on the Rights of the Child Day of Discussion on Implementing Child Rights in Early childhood (2004) 1.

³¹⁵ R Taylor ‘Women in prison and children of imprisoned mothers’ Preliminary research paper (2004) 52.

³¹⁶ P Reebye ‘Aggression during early years – Infancy and preschool’ (2005) 14(1) *Journal of the Canadian Academy of Child and Adolescent Psychiatry* 16-20.

³¹⁷ O Robertson ‘Collateral convicts: Children of incarcerated parents’ Recommendations and good practice from the UN Committee on the Rights of the Child Day of General Discussion 2011, Appendix 2: Babies and children living in prison – age limits and policies around the world (2012) 25.

³¹⁸ O Robertson ‘Children imprisoned by circumstance’ Human rights and refugees publications (2008) 29, 30.

³¹⁹ O Robertson ‘Collateral convicts: Children of incarcerated parents’ Recommendations and good practice from the UN Committee on the Rights of the Child Day of General Discussion 2011, Appendix 2: Babies and children living in prison – age limits and policies around the world (2012) 29.

³²⁰ R Manjoo ‘Pathways to, conditions and consequences of incarceration for women’ Report of the Special Rapporteur on violence against women, its causes and consequences (2013) para 79.

3.3 Conclusion

Enumerating the advantages and disadvantages of separation or co-detention in an abstract manner could only provide a theoretical framework. It is in the individual assessment of a specific case that the ‘best interests’ of that particular child will emerge. However, the generalizing and inflexible character of article 30(d) does have an enormous impact on children whose mother is incarcerated. The author does not, in any way, suggest that co-detention is an ideal situation, but in some cases it seems to be the only option available.³²¹

The point of this chapter is that a generalising and rigid approach such as the one expressed by article 30(d) cannot work towards the ‘best interests’ of the child since what is in the ‘best interests’ of a child is determined on an individual basis. The Bangkok Rules reiterate the fact that ‘decisions to allow children to stay with their mothers in prison shall be based on the best interests of the children’.³²² Such decision must also take into account the conditions of detention and the presence of caregivers.³²³

³²¹ O Robertson ‘Children imprisoned by circumstance’ Human rights and refugees publications (2008) 1, 6.

³²² United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders, Rule 49.

³²³ M Bastick & L Townhead ‘Women in prison. A Commentary of UN Standard Minimum Rules for the Treatment of Prisoners’ (2008) 54.

CHAPTER 4: THE (IN)COMPATIBILITY BETWEEN ARTICLE 30(d) AND GENERAL COMMENT NO 1

This chapter is divided in five sections followed by a brief conclusion. Section one introduces the Committee. Section two focuses on General Comment No 1, as an interpretation of article 30 of the African Children's Charter. Section three makes a comparative analysis between article 30 of the African Children's Charter and General Comment No 1. Section four deals with rules of treaty interpretation. The last section is an analysis of article 30(d) of the African Children's Charter through the lens of treaty interpretation. The aim of this chapter is to point out the fact that although General Comment No 1 is the legitimate product of the Committee's interpretative mandate, the inflexibility of article 30(d) could not be corrected through an interpretative act, but through an amendment.

4.1 The African Committee of Experts on the Rights and Welfare of the Child

Article 32 of the African Children's Charter provides for the establishment of the Committee. The Committee was established in 2001, two years after the coming into force of the African Children's Charter.³²⁴ The Committee is a treaty body functioning under the Department of Social Affairs of the African Union.³²⁵ The Committee is comprised of '11 members of high moral standing, integrity, impartiality and competence in matters of the rights and welfare of the child' who 'serve in their personal capacity'.³²⁶ The Committee holds its Ordinary Sessions twice a year; the 24th Ordinary Session took place December 2014 in Addis Ababa.³²⁷

Article 42 of the African Children's Charter deals with the pluralistic mandate of the Committee, which includes: Promoting and protecting children's rights contained in the African Children's Charter; monitoring the implementation of the rights comprised in the African Children's Charter; and interpreting the provisions of the African Children's Charter. The interpretation is done through General Comments. So far, the

³²⁴ BD Mezmur 'The Committee: An update' (2006) 6 *African Human Rights Law Journal* 551.

³²⁵ BD Mezmur 'The Committee: An update' (2006) 6 *African Human Rights Law Journal* 567.

³²⁶ Article 33(1) and 33(2) of the African Children's Charter.

³²⁷ Report of the 24th Session of the Committee (ACERWC) (2014).

Committee has issued two general comments: General Comment No 1 on article 30 of the African Children's Charter (2013); and General Comment No 2 on article 6 of the present Charter. According to the Report of the 24th Session of the Committee (2014) a third General Comment on article 31 of the Children's Charter is in the making.

The Committee is also in charge of the reporting mechanism under which every State Party is required to compile a comprehensive report concerning the children's rights situation. Reports are due for submission within two years of treaty ratification and thereafter every three years.³²⁸ Many State Parties' initial and periodic reports are long overdue.³²⁹ Based on such reports, the Committee has issued several Conclusion Observations and Recommendations.³³⁰

The Committee has also a quasi-judicial mandate of dealing with communications.³³¹ So far, the Committee has given three decisions: Decision on children in Northern Uganda (2005); Decision on children of Nubian descent in Kenya (2009); Decision on the Senegal *talibé* children (2012). The fourth decision is still pending.³³²

Since 1991 the Committee also organises the Day of the African Child, an annual event which takes place on 16 June, aiming at promoting thematic issues related to children's rights.³³³ Since 2009 a Civil Society Organisation Forum is held under the auspices of the Committee right before the Committee sessions.³³⁴ This forum represents a 'platform for partnership and networking and its role as a catalyst for advocacy around children's rights in Africa cannot be over-emphasised.'³³⁵

Under article 45(1) of the Children's Charter, the Committee is requested to undertake investigative missions to State Parties for the purpose of detecting violations of

³²⁸ Article 43(1)(a) & (b) of the African Children's Charter.

³²⁹ J Sloth-Nielsen & BD Mezmur 'Like running on a treadmill? The 14th and 15th sessions of the Committee' (2010) 10 *African Human Rights Law Journal* 538-539.

³³⁰ <http://acerwc.org/state-reports/> (accessed 8 October 2015).

³³¹ Article 44(1) of the African Children's Charter.

³³² <http://acerwc.org/communications/> (accessed 8 October 2015).

³³³ F Viljoen 'The African Charter on the Rights and Welfare of the Child' in T Boezaart *Child Law in South Africa* (2009) 344.

³³⁴ F Viljoen 'The African Charter on the Rights and Welfare of the Child' in T Boezaart *Child Law in South Africa* (2009) 344.

³³⁵ J Sloth-Nielsen & BD Mezmur 'Like running on a treadmill? The 14th and 15th sessions of the Committee' (2010) 10 *African Human Rights Law Journal* 552.

children's rights. In 2005 the Committee undertook a fact-finding mission to Northern Uganda.³³⁶ In 2014 the Committee carried out two advocacy missions: one to Central African Republic³³⁷ and one to South Sudan.³³⁸ A mission to Tanzania was undertaken in August 2015 to assess the situation of children with albinism.³³⁹

The Committee embarked on advocacy visits to several African countries in order to lobby for the ratification of the Children's Charter and for the implementation of its provisions. Subsequently, some countries responded positively.³⁴⁰

The work of the Committee was undermined since its inception by a series of factors such as 'lack of coordination, inadequate resources, inertia and non-attendance by Committee members and lack of continuity in membership.'³⁴¹

4.2 General Comment No 1 as an interpretation of art 30

4.2.1 The interpretative mandate of the Committee

As stated above, one aspect of the mandate of the Committee is to interpret the provisions of the Children's Charter 'at the request of a State Party, an Institution of the Organization of African Unity or any other person or Institution recognized by the Organization of African Unity'.³⁴²

Black's Law Dictionary defines interpretation as 'the process of determining what something, especially the law or a legal document, means; the ascertainment of meaning to be given to words or other manifestations of intention'.³⁴³ One of the ways

³³⁶ <http://pages.au.int/acerwc/pages/investigation-missions>.

³³⁷ African Committee of Experts on the Rights and Welfare of the Child, Mission report of the ACERWC to assess the situation of children affected by the conflict in Central African Republic (2014).

³³⁸ Report of the 24th Session of the Committee (ACERWC) (2014).

³³⁹ African Committee of Experts on the Rights and Welfare of the Child, Press release: Investigation mission of the ACERWC on the situation of children with albinism in Tanzania (2015).

³⁴⁰ BD Mezmur 'The Committee: An update' (2006) 6 *African Human Rights Law Journal* 565.

³⁴¹ F Viljoen 'The African Charter on the Rights and Welfare of the Child' in T Boezaart *Child Law in South Africa* (2009) 350.

³⁴² Article 42(c) of the African Children's Charter.

³⁴³ BA Garner (ed) *Black's Law Dictionary* (9th ed).

the Committee interprets the treaty provisions is by issuing General Comments. These are ‘interpretative instruments’³⁴⁴ through which treaty bodies ‘give voice to their understanding of substantive treaty provisions’.³⁴⁵ Although they belong to the category of soft law, therefore creating non-binding obligations for States Parties, General Comments do have ‘great persuasive force’.³⁴⁶

Another path through which the Committee fulfils its interpretative mandate is by accepting communications ‘from any person, group or nongovernmental organization recognized by the Organization of African Unity, by a Member State, or the United Nations to any matter covered by this Charter.’³⁴⁷

4.2.2 General Comment No 1

General Comment No 1 was informed by the ‘importance and invisibility of the issue of children affected by the incarceration of their parents’.³⁴⁸ The Committee acknowledges the fact that when mothers are imprisoned, children have their rights violated, whether they reside in prison with their mothers, whether they are separated from them.³⁴⁹ This General Comment was aimed at assisting States Parties in the effective and full implementation of the provisions of article 30 of the Children’s Charter.³⁵⁰ The present general comment seeks to ‘strengthen understanding of the meaning and application of Article 30 and its implications’.³⁵¹

The Committee suggests that article 30 of the Children’s Charter should be read in conjunction with other relevant articles contained in the Charter such as: article 3 (non-discrimination), article 4(1) (the ‘best interests’ principle), article 4(2) (the right to be heard), article 5 (the right to survival and development), article 6 (the right to birth registration), article 11 (the right to education), article 14 (the right to health), article 16 (the right to be protected from abuse), article 19 (the right to enjoy parental care and

³⁴⁴ C Blake ‘Normative instruments in international human rights law: Locating the general comment’ (2008) Centre for Human Rights and Global Justice Working Paper No 17, 4.

³⁴⁵ F Viljoen *International human rights law in Africa* (2nd ed) (2012) 31.

³⁴⁶ F Viljoen *International human rights law in Africa* (2nd ed) (2012) 31.

³⁴⁷ Article 44(1.) of the African Charter on the Rights and Welfare of the Child.

³⁴⁸ General Comment No 1 para 5.

³⁴⁹ General Comment No 1 para 3 & 4.

³⁵⁰ General Comment No 1 para 6 & 8(b).

³⁵¹ General Comment No 1 para 8(a).

protection), article 25 (the right to special protection and assistance when separated from parents).³⁵²

A mother's incarceration should not impede the enjoyment by her child of all the rights stipulated in the Children's Charter.³⁵³ In situations where custodial sentences cannot be avoided, the living conditions of children residing with their mothers in prison should be 'as close as possible' to those of children living outside; children in co-detention should grow up in a prison nursery, assisted by team of specialists.³⁵⁴ In the case whereby children are separated from their mothers, States Parties are under an obligation to provide alternative (formal or informal) arrangements for the care of those children, on a case-by-case basis and on the 'best interests' principle.³⁵⁵ Only a judge has the authority to separate children from their parents, making use of the same principle.³⁵⁶ Judges are expected to use the 'best interests' standard as a guiding principle also when choosing between a range of different sentences.³⁵⁷ The 'best interests' of the child should not be used as a pretext to avoid parental imprisonment if the law requires it.³⁵⁸ States Parties are also requested to consider the impact which a custodial sentence of the mother would have on the best interests of her children.³⁵⁹

Given the fact that the aim of incarceration should be the 'reformation', 'integration' and 'rehabilitation' of mothers, the Committee proposes various measures for achieving this aim such as rehabilitative and educative programs; counselling; facilitating contact between mothers and their family/community; the use of half-way houses, pre-release schemes and open prisons.³⁶⁰

There seems to be a discrepancy between treaty provisions and the reality on the ground. In many States Parties, lack of funds impede the creation of 'special alternative

³⁵² General Comment No 1 para 12.

³⁵³ General Comment No 1 para 19.

³⁵⁴ General Comment No 1 para 29.

³⁵⁵ General Comment No 1 para 29, 40.

³⁵⁶ General Comment No 1 para 38.

³⁵⁷ General Comment No 1 para 36(e).

³⁵⁸ General Comment No 1 para 39.

³⁵⁹ General Comment No 1 para 24(b).

³⁶⁰ General Comment No 1 para 60, 61.

institutions’ for keeping mothers in conflict with the law, as well as prison renovations; therefore, co-detention should be considered a matter of last resort.³⁶¹

General Comment No 1 covers also the issue of children born in remand or prison facilities. States Parties are requested to provide for the ‘temporary release, parole or suspended sentence (for minor or casual offences)’ of expectant mothers who find themselves in conflict with the law. This approach will enable them to deliver in a hospital rather than in remand or prison facilities.³⁶² If a custodial sentence must be given and children are born in remand or prison facilities, States Parties are under an obligation to register those children at birth without mentioning the circumstances of their birth.³⁶³ All the provisions of article 30 apply in equal measure to children born in remand or prison facilities as to those brought by their mother upon incarceration.

Also, the special treatment provided by article 30 applies to primary caregivers/mothers who found themselves in ‘all stages of criminal proceedings’ from arrest to conviction, sentencing, incarceration, release and reintegration. The scope of article 30 covers long-term as well as short-term incarceration, sporadic incarceration and the death penalty of primary caregivers.³⁶⁴ Given the fact that pre-trial detention can be very long in the African context and, therefore, detrimental to the child-primary caregiver relationship, States Parties are requested to prioritize all criminal cases against primary caregivers and to minimise arrests of such persons.³⁶⁵ The detention of accused primary caregivers could be replaced by alternative measures such as bail, summon procedures, written notices and life bonds.³⁶⁶

4.3 The relation between article 30(d) and General Comment No 1

³⁶¹ General Comment No 1 para 50.

³⁶² General Comment No 1 para 21(a).

³⁶³ General Comment No 1 para 21(b) & 21(c).

³⁶⁴ General Comment No 1 para 11 & 33.

³⁶⁵ General Comment No 1 para 41-44.

³⁶⁶ General Comment No 1 para 46 & 54.

Although both article 30 and its General Comment seek to promote and protect the rights of the child and, therefore, speak with one voice for the plight of African children, there is a particular issue on which the two documents take a different approach. This issue is contained in article 30(d) that says: ‘ensure that a mother shall not be imprisoned with her child’. The Committee explains that the provision of article 30(d) sprang from the importance given by the African Children’s Charter to the family environment in which children are supposed to grow up; article 30(d) also emphasizes State Parties’ duty to put in place alternatives to incarceration for mothers.³⁶⁷

Under the subsection entitled ‘An individualized, informed and qualitative approach’ of the General Comment No 1, the Committee is challenging ‘stereotyped and oversimplified’ narratives that suggest ‘a uniformity of situations’ concerning children of incarcerated mothers.³⁶⁸ The reality on ground is that each child of incarcerated mothers has a unique situation which makes impossible the use of generalizations.³⁶⁹ For this reason, the Committee is advocating for ‘an individualized, qualitative approach’ as opposed to ‘a quantitative, categorical approach based on generalized and simplistic assumptions’.³⁷⁰ Article 30(d) finds itself at odds with the approach proposed by the Committee by its lack of flexibility and individualization, and by proposing a uniform solution which is supposed to solve the issue of all children of incarcerated mothers. The Committee suggests that relevant statistics concerning children of incarcerated parents may contribute to the development of appropriate ‘policy and practice’ that would serve the best interests of such children.³⁷¹ There is also a need for various professionals who interact with children of incarcerated mothers to receive adequate training that would enable them to assist the children under consideration in their various struggles.³⁷²

The decision concerning co-detention or separation of children from their incarcerated mothers should be ‘subject to judicial review’ and should take into account the ‘age, sex, level of maturity, quality of relationship with mother and the existence of

³⁶⁷ General Comment No 1 para 54.

³⁶⁸ General Comment No 1 para 14.

³⁶⁹ General Comment No 1 para 14.

³⁷⁰ General Comment No 1 para 15.

³⁷¹ General Comment No 1 para 16.

³⁷² General Comment No 1 para 16.

alternatives available to the family'.³⁷³ Judges are expected to balance up the best interests of the child against 'the gravity of the offence and public security' before sentencing a mother,³⁷⁴ giving priority to non-custodial sentences as much as possible.³⁷⁵

4.4 Treaty interpretation

Just like the interpretation of statutes, treaty interpretation should follow certain rules. The Vienna Convention on the Law of Treaties (1969) proposes at first a literal approach to treaty interpretation, by stipulating that treaties should be interpreted 'in good faith in accordance with the ordinary meaning' of the terms, taking into account the context as well as the object and purpose of the treaty.³⁷⁶ If following the above rule of interpretation the meaning of a treaty provision is 'ambiguous or obscure' or the result is 'absurd or unreasonable', additional materials may complement the treaty: The *travaux préparatoires* and 'the circumstances of its conclusion'.³⁷⁷

The same rule of interpretation is proposed in *Becke v Smith* where it is considered a 'useful rule' to stick to the 'ordinary meaning of the words used' unless this leads to 'any manifest absurdity or repugnance'.³⁷⁸

Two main approaches dominate the field of treaty interpretation: original interpretation; and progressive interpretation.³⁷⁹ Original or literal interpretation is done by keeping in mind the intention of the parties at the time of drafting the treaty. Progressive interpretation takes into account social and linguistic changes in circumstances from the time of drafting to the time of interpreting the treaty.³⁸⁰ Both theories have been criticized over time. Despite its objectivity, the main flaw of the literal interpretation is rigidity. On the other hand, progressive interpretation has been criticised for being too

³⁷³ General Comment No 1 para 24(c).

³⁷⁴ General Comment No 1 para 39.

³⁷⁵ General Comment No 1 para 24(a).

³⁷⁶ Article 31(1.) of the Vienna Convention on the Law of Treaties (1969).

³⁷⁷ Article 32(a), (b) of the Vienna Convention on the Law of Treaties.

³⁷⁸ *Becke v Smith* (1836) 2 M & W [296 N.W. 2d 887] 195.

³⁷⁹ RN Graham 'A unified theory of statutory interpretation' (2002) 23(1) *Statute Law Review* 92.

³⁸⁰ RN Graham 'A unified theory of statutory interpretation' (2002) 23(1) *Statute Law Review* 92, 104.

subjective and for granting too much interpretative powers to the treaty monitoring body.³⁸¹

According to Shaw, treaty interpretation must take into consideration the following three components: the terms used; the intention of the drafters; and the purpose of the treaty.³⁸² Depending on the emphasis given to each component, three interpretative approaches emerge: The first approach is objective in nature, focusing on the text of the treaty; this approach represents the literal interpretation of a treaty. The second and third approaches are subjective in nature. The second gravitates around the intention of the drafters; the third approach emphasizes the object and purpose of the treaty, and has been criticised for elevating the judiciary higher than the legislature.³⁸³

4.5 Rules of interpretation and article 30(d)

The wording of article 30(d) is extremely clear: States must ‘ensure that a mother shall not be imprisoned with her child’. The literal meaning of this treaty provision is evident: mothers are not permitted to take their children with them in prison. In other words, upon their mothers’ incarceration, children should be separated from them. Ordinarily, the use of a purposive interpretation does not arise here because the purposive interpretation is applied only when the meaning of a treaty is ‘ambiguous or obscure’,³⁸⁴ which is not the case here. Article 30(d) does not call for an interpretation. In fact, ‘it is not permissible to interpret what has no need of interpretation’.³⁸⁵ I used the word ‘ordinarily’ because, under certain circumstances, the best interests of the child might prevail over technical considerations. I will return to this issue shortly in order to ascertain whether this is one of such circumstances.

In spite of the clarity of the meaning of article 30(d), the Committee embarked on a purposive interpretation through General Comment No 1. This act was probably motivated by a number of factors: First, to achieve ‘a better protection of children of

³⁸¹ RN Graham ‘A unified theory of statutory interpretation’ (2002) 23(1) *Statute Law Review* 113.

³⁸² MN Shaw *International law* (2008) 933.

³⁸³ MN Shaw *International law* (2008) 932, 933.

³⁸⁴ Article 32(a), (b) of the Vienna Convention on the Law of Treaties.

³⁸⁵ E de Vattel *Le droit des gens* 199 (1916) 1758 in J Tobin ‘Seeking to persuade: A constructive approach to human rights treaty interpretation’ (2010) 23 *Harvard Human Rights Journal* 48.

imprisoned parents and caregivers'.³⁸⁶ Second, to respond to changes in circumstances in the African society from the time of the Children's Charter's drafting to the time when General Comment No 1 was issued (over 20 years). Third, to promote the four principles on which the African's Charter is built, especially the best interests of the child.³⁸⁷

While the treaty says in article 30(d) that children should not accompany their mothers in prison, General Comment No 1 says that under certain circumstances children could reside in prison with their mothers. Thus, General Comment No 1 reads into article 30(d) a meaning that is not manifestly there. Although commendable, this approach undermines certainty of laws and, thus, might cause confusion in the mind of States Parties as to the nature and scope of their exact obligations. The flexibility of General Comment No 1 seems to contradict the rigid, clear wording of article 30(d), by presenting co-detention as an option for children in contemporary Africa.

Elaborating, further, on the impact of uncertainty that might be introduced by very elastic interpretations of treaty provisions, the Special Rapporteur on the Right to Education pointed out that when general comments go 'far beyond the text' of the treaty they interpret, such an approach 'undermines the principle of legal security by reading into a legal text a content that simply is not there'.³⁸⁸ Interpretative bodies sacrifice 'fidelity to a text...in order to [...] keep pace with the perceived necessities of changing times'.³⁸⁹

As Tomuschat has noted, soft law does 'elevate the level of protection in situations where, according to practical experience, violations of human rights standards are likely

³⁸⁶ General Comment No 1, para 8(f).

³⁸⁷ The four principles of the African Children's Charter are: non-discrimination; the best interest of the child; survival, protection and development; and child participation.

³⁸⁸ K Tomasevski 'Experiences with legal enforcement of the right to education as food-for-thought in exploring models for an optional protocol to the International Covenant on Economic, Social and Cultural Rights', United Nations Doc. E/CN.4/2004/WG.23/CRP.4, para 8 available at http://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=OCBsQFjAAahUKEwje457769XIAhVEuBoKHdgpDDk&url=http%3A%2F%2Fwww.ohchr.org%2FDocuments%2FIssues%2FESCR%2FWG%2FSession1%2F2004-crp4En.doc&usq=AFQjCNFB64oH9j758NvGSvGu_3mCAeaQvQ (accessed 22 October 2015).

³⁸⁹ DF Vagts 'Treaty interpretation and the new American ways of law reading' (1993) 4 *European Journal of International Law* 499 in J Tobin 'Seeking to persuade: A constructive approach to human rights treaty interpretation' (2010) 23 *Harvard Human Rights Journal* 22.

to occur'.³⁹⁰ In the case of General Comment No 1 the Committee intended to elevate the best interests of children whose mothers are incarcerated. However, the 'best interests' principle is not an absolute one.³⁹¹ The 'best interests' principle cannot represent the justification for which the interpretation of the Committee in General Comment No 1 would alter the core of article 30(d).

Despite the fact that soft law has its 'legitimacy' and 'usefulness',³⁹² in the hierarchy of laws soft law (general comments included) is subsidiary to hard law (treaty provisions), and it can be seen as 'a second best alternative to hard law'.³⁹³ Because soft law and hard law do not stand on the same footing, soft law cannot alter fundamentally the meaning of a treaty provision.³⁹⁴

Ideally, article 30(d) does not require an interpretation; rather, it requires an amendment. Article 48 of the African Children's Charter deals with the issue of 'amendment and revision of the Charter'. A written request of a State Party to the Secretary-General of the OAU represents the first step towards amending the Charter. In the second stage of the process, all States Parties must be notified of the request. Then the Committee steps in and gives its opinion on the amendment. The last stage is the voting: The amendment is approved by the majority of the States Parties.

4.6 Conclusion

Because of its lack of individualization, flexibility and sensitivity to change in context and circumstances, article 30(d) of the African Children's Charter seems not to serve the best interests of children of incarcerated mothers in contemporary Africa. For this reason, General Comment No 1 has stepped in to solve the rigidity issue and to enhance the level of protection of the children under consideration. General Comment No 1 has

³⁹⁰ C Tomuschat *Human rights: Between idealism and realism* (2nd ed) (2008) 39.

³⁹¹ J Elster 'Solomonic judgements: Against the best interest of the child' (1987) 54(1) *The University of Chicago Law Review* 26.

³⁹² C Tomuschat *Human rights: Between idealism and realism* (2nd ed) (2008) 39.

³⁹³ T Meyer 'Soft law as delegation' (2009) 32 *Fordham International Law Journal* 900.

³⁹⁴ Article 31(1.) of the Vienna Convention on the Law of Treaties (1969).

provided flexibility to article 30 and it has interpreted the provision of article 30(d) in the light of Africa's new realities. However, although the content of General Comment No 1 is indeed a reflection of human rights activism, the author thinks that the Committee embarked in a task which goes beyond its mandate. The author further considers that, ideally, the Committee should have sought and can still seek an amendment of that particular treaty provision. However, amending a treaty is a cumbersome process that requires a long period of time. In the meantime, the author recommends that General Comment No 1 should be popularized and used increasingly by State Parties when deciding if children should reside in prison with their primary caregiver or they should be separated from them. In doing so, the best interests of children under consideration are safeguarded.

CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

This chapter is divided into two sections. The first section contains the conclusion of the thesis. This study concludes that the rigid character of article 30(d) does not work towards the achievement of the best interests of all children whose mothers are incarcerated. In order to address this challenge the Committee has issued General Comment No 1 which promotes a case-by-case assessment in order to establish what is in the best interests of children under consideration. However, the General Comment has its limitations, in that it belongs to the category of soft law.

The second part consists of recommendations. This study recommends that States Parties read article 30(d) in the broader context of article 30, together with article 30(c) which promotes the establishment of ‘special alternative institutions’ for mothers in conflict with the law. The author also recommends the amendment of article 30(d) in line with the situation faced by children of incarcerated mothers in contemporary Africa. In the meantime, the author also recommends the use of General Comment No 1 in order to augment the promotion and protection of the rights of children under consideration. The study also recommends the increased use of alternative measures to incarceration for mothers and the improvement of prison facilities, especially the mother and child units, in line with the international and regional instruments’ recommendations.

5.1 Conclusion

Written or unwritten penal laws require that evil-doers must be sanctioned one way or another. However, the sanctions provided by laws have changed over time, reflecting a paradigm shift in state ideology and societal transformation as they relate to the way offenders are punished. Punishments took different forms across centuries such as corporal punishment, poisoning, banishment, compensation, enslavement and fines. In Africa, imprisonment became a tool used by colonialists to bring to order not only those who rebelled against the law, but also those who rebelled against colonial dominance.

Independence did not bring substantive changes in the manner offenders were dealt with by authorities. Imprisonment still remains the preferred way to sanction criminals,

despite the wide array of negative implications of such an approach. Imprisoning offenders places an enormous financial burden upon the state whose duty it is to provide services and facilities in prisons. In addition, evidence has shown that imprisonment is unable to reduce crime rate. Furthermore, custodial sentences are an inefficient tool in reforming incarcerated individuals. Rather incarceration brings about stigmatization of the prisoners and their families, broken homes, health challenges, truncated destinies.³⁹⁵

The challenges and difficulties that offenders experience during incarceration are exacerbated when it comes to female prisoners. The reason why women offenders should receive greater attention is that a majority of them are the primary caregiver of minor children. Imprisoning a mother has direct implications on every aspect of her children's life. Since imprisonment did not prove to deal in a satisfactory manner with the issue of crime, it seems necessary to adopt other means of punishing offenders. Alternatives to incarceration seem to better protect the best interest of children whose primary caregiver is incarcerated.

Every child and every family setting is unique. Therefore, it becomes evident that the only way to determine what is in the best interests of the child under consideration should be done by assessing the advantages and disadvantages of both co-detention or separation of each child from his primary caregiver (in this case, the mother).

The idea of child specificity is provided for in international and regional instruments such as General Comment No 14 of the Committee on the Rights of the Child and General Comment No 1 of the Committee. Both documents mention the issue of alternatives to incarceration as a way to address the individuality of the child of primary caregivers, and to protect the best interests of the child under consideration.

A plethora of international and regional instruments speak about various options of non-custodial measures and their benefits for the prisoners, especially for women offenders. However, the provisions contained in these instruments have not materialized in a majority of African countries where judges still prefer to give out custodial sentences. Although non-custodial measures have been implemented, to some

³⁹⁵ See Chapter 2 for a detailed discussion.

extent, in few African countries, there are many challenges that limit their full implementation. Therefore, a great number of mother offenders are still given custodial sentences, thereby denying them the flexibility available under different forms of alternative measures of punishment.

Article 30(d) demands the separation of children from their imprisoned mothers. Such a rigid provision provides a uniform solution that does not necessarily guarantee the best interests of all the children under consideration. The respect for the law (article 30(d) in this case) could override, in some instances, the best interests of the children under consideration. Being separated from their incarcerated mothers could be in the best interests of some children, but for some other children this separation could be synonymous with being abandoned, abused or neglected. Unfortunately, in the absence of reliable alternative care, co-detention represents for some children of incarcerated mothers the best available option. In order to address the rigidity of article 30(d) and to ameliorate the situation of children whose mothers are incarcerated, General Comment No 1 provides for an individual assessment in establishing the best interests of the children under consideration. General Comment No 1 broadens the options of the children whose primary caregivers are in prison. However, although the content of General Comment No 1 represents a step forward in achieving better rights for the children of imprisoned mothers, this instrument belongs to the category of soft law. Therefore, its provisions cannot override, in principle, the provision of article 30(d).

5.2 Recommendations

5.2.1 Amendment of article 30(d)

Whenever primary caregivers are incarcerated, their minor children suffer many violations of their rights. Due to the multifaceted impact that the provision of article 30(d) has on the wellbeing and the best interests of children of incarcerated primary caregivers in Africa, there is a need to address the inflexibility of article 30(d). General Comment No 1 represents an attempt to solve the rigidity inherent in article 30(d). However, a General Comment is, by its nature, mainly an interpretative instrument. As a soft law, a General Comment, therefore, cannot alter the core of the treaty provision

it is meant to interpret. Ideally, the rigidity of article 30(d) is curable through an amendment of its provisions.

The author recommends that the Committee rather explores the possibility of amending article 30(d) according to the provisions of article 48 of the African Children's Charter, in order to offer a higher level of protection of children under consideration. The author recommends the following amendment of article 30(d):

Current provision reads:

[E]nsure that a mother shall not be imprisoned with her child.

The amended provision should read:

*[E]nsure that a mother shall not be imprisoned with her child
unless the circumstances of the child suggest otherwise.*

The author is aware of the fact that amending a treaty provision is a laborious exercise that could delay the enjoyment of their rights by the children of incarcerated mothers. In the meantime, the author recommends that General Comment No 1 is advocated among State Parties in order to confer a higher level of protection upon the children under consideration. Also, the rigidity issue could be addressed, to some extent, by reading article 30(d) in tandem with article 30(c) that recommends the establishment of 'special alternative institutions for holding such mothers'. Reading article 30(d) in the broader context of article 30 renders it more flexible and more accommodating for children of imprisoned mothers.

5.2.2 Increased use of alternatives to incarceration for mothers

Evidence has shown that serving a prison term does not necessarily lead to the reformation, rehabilitation and reintegration of mother offenders in society. In addition, a mother's imprisonment leads to stigmatization and loss of social, professional and material privileges. Furthermore, the incarceration of a mother deeply affects the minor children in her care. Against such a discouraging background, the overuse of custodial sentences is not justified. The author recommends that whenever the courts are in a position to choose between more sentencing options, a non-custodial sentence should always be considered for primary caregivers, especially for mothers. This approach will

preserve the family environment and the best interests of the children under consideration.

5.2.3 Improvement of prison facilities for mothers and children

The author is aware of the fact that not all primary caregivers can benefit from the privileges of a non-custodial sentence. This situation might be due to either the severity of the offence committed by the primary caregiver or to the need to protect the society from future harm. Therefore, the author recommends that when a custodial sentence cannot be avoided, and when co-detention proves to be in the best interests of the child under consideration, the prison authorities should provide facilities and services that adequately address the needs of primary caregivers, especially mothers, and those of their minor children. The services and facilities envisaged here include health, nutrition, education, accommodation, visits, contact with the outside world, trainings. Such facilities and services must comply with international and regional standards set out in various instruments dealing with protection of incarcerated person's rights.

5.2.4 Individualized approach in decision-making concerning separation or co-detention

The rigid provision of article 30(d), if applied to all minor children of incarcerated primary caregivers, may not ensure the achievement of the best interests of the child in all cases under consideration. This observation is based on the fact that children and their family environment are unique. Therefore, a uniform solution cannot be applied to all of them and expect to safeguard the best interests of all children whose primary caregivers might be in conflict with the law. The author recommends that the decision between co-detention and separation of minor children from their primary caregivers should be based on an individual analysis of the unique circumstances of each child. This approach will better protect the best interests of the children under consideration.

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