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The applicability of the best interests principle to children of imprisoned mothers in contemporary Africa: Between hard and soft law

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Summary: *This article argues that article 30(d) of the African Charter on the Rights and Welfare of the Child in fact, in some instances, may impede the actualisation of the best interests of the children of incarcerated mothers in contemporary Africa, due to its inflexible and generalising formulation. The African Committee of Experts on the Rights and Welfare of the Child attempted to address the limitations inherent in article 30 by issuing its first General Comment on 'Children of incarcerated and imprisoned parents and primary caregivers', which promotes an individualised and far more flexible approach to the decision of whether to prohibit or allow children to reside in prison with their mothers. However, the persuasive value of a General Comment is limited by virtue of belonging to the category of soft law. Therefore, the African Children's Committee should explore the possibility of amending article 30(d) in order to preserve the best interests of children whose mothers are incarcerated.*

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Key words: *children's rights; best interests principle; imprisoned mothers; co-detention; soft law; treaty interpretation; Africa*

1 Introduction

Considering the fact that the majority of imprisoned women worldwide are mothers¹ and that in most parts of the world, especially in Africa, women commonly are the primary or sole caregivers of children,² it is reasonable to conclude that a sizeable number of children live with the consequences of their mothers' imprisonment. In other words, such children are either separated from their incarcerated mothers or they experience co-detention.

International and regional human rights treaties protect the right of children to both liberty³ and a family environment.⁴ Children's rights instruments prohibit the separation of children from their parents except in situations where the preservation of the child's best interests would otherwise require.⁵ The African Charter on the Rights and Welfare of the Child (African Children's Charter) is unique in making special provision for the (unborn, infants or young)⁶ children of imprisoned mothers. For the purposes of this article, of particular significance is article 30(d), which states that 'a mother shall not be imprisoned with her child'. Article 30 applies in equal measure to children born in remand or prison facilities as to those accompanying their mothers upon incarceration. However, the interpretative document based on this article, General Comment 1 on 'Children of incarcerated and imprisoned parents and primary caregivers' of the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee), stipulates that every such

- 1 R Taylor 'Women in prison and children of imprisoned mothers' Preliminary Research Paper, Quaker United Nations Office (2004) 24, https://quino.org/sites/default/files/resources/Preliminary%20Research%20Paper_women%20in%20prison%20and%20children%20of%20imprisoned%20mothers.pdf (accessed 6 October 2020). United Nations Office on Drugs and Crime *Handbook on women and imprisonment* (2014) 18, with reference to the United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (Bangkok Rules) (2014), file:///Users/ramona/Downloads/women_and_imprisonment_-_2nd_edition.pdf (accessed 6 October 2020).
- 2 Prison Reform Trust 'What about me? The impact on children when mothers are involved in the criminal justice system' (2018) 5, 10, 14, <http://www.prisonreformtrust.org.uk/portals/0/documents/what%20about%20me.pdf> (accessed 4 August 2020). United Nations Office on Drugs and Crime (n 1) 17.
- 3 Art 3 Universal Declaration; art 9 ICCPR; art 6 African Charter.
- 4 Art 10(1) ICESCR; art 23(1) ICCPR; art 8(1) CRC; art 19 African Children's Charter.
- 5 Art 19(1) African Children's Charter; art 9(1) CRC; General Comment 14 on the right of the child to have his or her best interests taken as a primary consideration (2013) of the Committee on the Rights of the Child (art 3, para 1) VA1 (c) 59, 61.
- 6 Art 30(1) African Children's Charter.

case must be individually considered by weighing various factors pertaining to the child (their age, gender, maturity, relationship with their mother)⁷ and the availability of appropriate alternative caregiving arrangements, ensuring that the best interests of the child take pre-eminence.⁸ The treaty body goes even further by admitting that in some instances it may be decided 'that it is in children's best interests to live in prison with their mothers'.⁹ Therefore, there seems to be an incompatibility between the prohibitive and rigid character of article 30(d) of the African Children's Charter and the flexibility and openness of General Comment 1 with regard to deciding the fate of children whose mothers are kept in carceral facilities. The General Comment promises to better support the actualisation of the best interests of the child, due to its individualistic approach to the decision-making process. However, the question arises as to whether a general comment (as soft law) can override the provisions of a treaty article (as hard law).

A distinction needs to be made between the nature of obligations outlined in articles 30(a) to (c) and 30(d). Articles 30(a) to (c) provide for the obligations of state parties to undertake measures in order to avoid the result anticipated in article 30(d), which imposes an obligation of result. In fact, it may be argued that the combination of the words 'ensure' and 'shall' in article 30(d) places a strict and categorical obligation on state parties to 'ensure that a mother shall not be imprisoned with her child'. Therefore, whatever measures state parties decide to undertake, either to comply with the non-custodial measures provided for in article 30(a) or the alternative institutional measures provided for in articles 30(b) and (c), they must do so with a view to ensuring that the result in all cases is that a mother is not imprisoned with her child.

2 Brief overview of the best interests rule

The 'best interests' principle intends to uphold the rights and well-being of children in every action undertaken in the private or public arena by any person and authority.¹⁰ This principle is not a novel concept,¹¹ as the Declaration of the Rights of the Child (1959) refers to it in the context of the child's holistic development where the 'best interests of the child shall be the paramount consideration'.¹² In

7 General Comment 1 (2013) para 24(c).

8 General Comment 1 para 1.4.

9 General Comment 1 para 55.

10 Art 4(1) African Children's Charter; art 3(1) CRC.

11 General Comment 14 (art 3 para 1) IA2.

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

the African Children's Charter, the 'best interests' principle overrides all other considerations,¹³ and its relevance is inclusive to all rights and freedoms bestowed upon children in the regional document.¹⁴ The 'best interests' rule is a 'dynamic concept',¹⁵ a 'criterion against which a state party has to measure all aspects of its laws and policy regarding children',¹⁶ because 'all actions taken by a state affect children one way or another'.¹⁷ In order to guarantee its efficiency, the 'best interests' concept must be sufficiently 'flexible and adaptable',¹⁸ giving carefully consideration to each child's unique circumstances¹⁹ and vulnerabilities. This assessment cannot be conducted without involving children's substantive participation or without an explicit intent to preserve the family environment.²⁰

Regarding its practical application, the principle became the subject of intense scholarly debate and criticism due to its being perceived as deprived of objectivity,²¹ vague, indeterminate and open-ended,²² which may inform 'arbitrary and subjective decisions'.²³ Establishing what would be best for a particular child is rather a speculative exercise.²⁴ For this reason, some scholars find it ineffective and advocate its abandonment,²⁵ while others still believe in its capability to provide guidance in decisions concerning children. One point of criticism refers to the fact that since 'there are different conceptions of what is in a child's best interests',²⁶ this principle may

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- 13 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.
 - 14 T Kaime *The African Charter on the Rights and Welfare of the Child: A socio-legal perspective* (2009) 110. See also M Gose *The African Charter on the Rights and Welfare of the Child. An assessment of the legal value of its substantive provisions by means of a direct comparison to the Convention on the Rights of the Child Community Law Centre* (2002) 25, <https://dullahomarinate.org.za/childrens-rights/Publications/Other%20publications/The%20African%20Charter%20on%20the%20Rights%20and%20Welfare%20of%20the%20Child.pdf> (accessed 4 August 2020).
 - 15 General Comment 14 IA1.
 - 16 F Viljoen 'The African Charter on the Rights and Welfare of the Child' in T Boezaart (ed) *Child law in South Africa* (2009) 336.
 - 17 General Comment 14 IVA1 (b) 20; III.14 (a).
 - 18 General Comment 14 IVA3.32.
 - 19 General Comment 14 IVA3.32; VA48, 49.
 - 20 General Comment 14 VA1 (a)-(g).
 - 21 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.
 - 22 S Parker 'The best interests of the child - Principles and problems' (1994) 8 *International Journal of Law and the Family* 26.
 - 23 M Skivenes 'Judging the child's best interests: Rational reasoning or subjective presumptions?' (2010) 53 *Acta Sociologica* 339.
 - 24 J Heaton 'Some general remarks on the concept "best interests" of the child' (1990) 53 *Journal for Contemporary Roman-Dutch Law* 96.
 - 25 H Reece 'The paramountcy principle: Consensus or construct?' (1996) 49 *Current Legal Problems* 303.
 - 26 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.

be utilised by officials invested with decision-making powers 'to justify any decision'.²⁷ In order to avoid situations in which decisions with regard to a child's best interests are informed by an individual's system of values and beliefs,²⁸ scholars have attempted to provide specific indicators²⁹ in assisting with the determination of a child's 'best interests', such as psychological considerations,³⁰ 'continuity and stability in relationships',³¹ and the child's opinion.³²

Some scholars have argued that applying the 'best interests' standard may generate conflictual situations and may be detrimental to the rights of others (primary caregivers, community or society). Insofar as children's rights should not be given less weight than adults' rights,³³ they cannot trump other's rights either. In other words, the 'best interests' standard cannot not be absolute.³⁴ This becomes more relevant in traditional settings such as African communities where the child's best interests are intimately linked to those of the nuclear or extended family³⁵ and, in some cases, the best interests of the child must cede in favour of the larger group's interests.³⁶ However, upholding children's best interests should eventually lead to the preservation of societal welfare.³⁷ A child's 'best interests' can be fully understood in the context of cultural and socio-economic specificities of the community, provided that its core is being preserved.³⁸ The 'implications of the principle will vary over time and from one society ... to another'.³⁹ However, in a conflictual situation, the welfare of the child must override cultural practices detrimental to him or her.⁴⁰ Traditional values and treaty provisions

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- 27 M King 'Playing the symbols – Custody and the law commission' (1987) 17 *Family Law* 189; H Reece 'The paramountcy principle: Consensus or construct?' (1996) 49 *Current Legal Problems* 298.
- 28 RH Mnookin 'Child-custody adjudication: Judicial functions in the face of indeterminacy' (1975) 39 *Law and Contemporary Problems* 267.
- 29 Mnookin (n 28) 260.
- 30 Clark (n 21) 19.
- 31 Mnookin (n 28) 264 265.
- 32 Skivenes (n 23) 341.
- 33 Reece (n 25) 302.
- 34 J Elster 'Solomonic judgments: Against the best interest of the child' (1987) 54 *University of Chicago Law Review* 26.
- 35 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.
- 36 P Alston 'The best interests principle: Towards a reconciliation of culture and human rights' (1994) 8 *International Journal of Law and the Family* 5.
- 37 Freeman (n 26) 41.
- 38 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; Rwezaura (n 35) 109.
- 39 P Alston & B Gilmour-Walsh *The best interests of the child. Towards a synthesis of children's rights and cultural values* (1996) 2.
- 40 Art 21(1) African's Children Charter.

must corroborate to generate the highest level of protection for children.⁴¹

2.1 Best interests of children of imprisoned mothers

The best interests rule becomes highly instrumental in the context of imprisoning a child's mother. Opinions concerning this sensitive matter bifurcate into strictly prohibiting or permitting children to accompany their mothers in prison (for a particular period of time provided by domestic legislation). Research conducted on this controversial topic attempts to substantiate the advantages and disadvantages of both sides.

Despite inaccurate data, it is estimated that as at 2017, approximately 19 000 children were living in prison with their primary caregivers, usually the mother.⁴² Proponents of co-detention argue that it may afford infants and young children an opportunity to bond and develop a secure attachment with their mother,⁴³ an 'inseparable biological and social unit',⁴⁴ with undeniable (short and long-term) consequences for the child's psychological, social and educational development.⁴⁵ Being breastfed is beneficial to the child by significantly reducing morbidity and mortality rates in the first two years of life.⁴⁶ This temporary arrangement could provide a higher level of mental stability for both mother and child and could prevent child abandonment. However, the mother's familiar and nurturing presence may be the only reassuring element in the midst of a hostile environment such as the prison. Carefully considering the myriad of difficulties associated with prison life and in order to preserve the best interests of the child, supporters of co-detention rather recommend the creation of special institutions where the impact of co-detention on the holistic development of the child could be mitigated.⁴⁷

41 An-na'im (n 38) 70, 71.

42 United Nations Global Study on Children Deprived of Liberty (2019) 343, https://www.chr.up.ac.za/images/publications/UN_Global_Study/United%20Nations%20Global%20Study%20on%20Children%20Deprived%20of%20Liberty%202019.pdf (accessed 6 October 2020).

43 J Poehlmann 'Representations of attachment relationships in children of incarcerated mothers' (2005) 76 *Child Development* 679.

44 World Health Organisation 'Global strategy for infant and young child feeding' (2003) 3, <https://apps.who.int/iris/bitstream/handle/10665/42590/9241562218.pdf;jsessionid=16D8237EB1F86CF19528078350560F44?sequence=> (accessed 6 October 2020).

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

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

47 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.

On the other hand, it has been argued that children should never be punished for their parents' crimes and that, therefore, they should not be deprived of their right to liberty, especially if the conditions of detention are not in favour of such choice.⁴⁸ Co-detention leads to multifaceted violations of children's rights⁴⁹ and may expose them to various risks, depending on the level of prison development and the duration of the stay. Most contemporary African prisons find themselves 'at odds with human rights standards',⁵⁰ being under-resourced, understaffed and overcrowded, evidently translating into overall precarious conditions of detention.⁵¹ Therefore, such institutions are ill-equipped or completely unable to provide for the specific needs of children.⁵² Truth be told, most African prisons do not even provide special accommodation for children in co-detention, with the exception of pioneering South Africa as well as certain prison facilities in Ethiopia, Ghana, Kenya and Uganda, where since 2014 mother and baby units have been created.⁵³ The majority of African prisons do not provide for the basic necessities of infants and young children such as formula, bottles,⁵⁴ clothing and hygiene products, with sporadic exceptions (Botswana, Ethiopia, Malawi, Namibia, South Africa, Swaziland, Tanzania and Uganda).⁵⁵ In certain African countries, non-governmental organisations (NGOs) or religious organisations have stepped in to fill this huge gap.⁵⁶ Children residing in prison facilities with their mothers lack a balanced diet,

48 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 and children of imprisoned mothers: Recent developments in the UN HR system' Quaker United Nations Office (2006) 5, http://www.wunrn.org/news/2006/08_21_06/082706_women_in.pdf (accessed 6 October 2020).

49 General Comment 1 para 4.

50 J Sarkin 'Prisons in Africa: An evaluation from a human rights perspective' (2008) 5 *International Journal of Human Rights* 22; MC van Hout & R Mhlanga-Gunda "'Mankind owes to the child the best that it has to give": Prison conditions and the health situation and rights of children incarcerated with their mothers in sub-Saharan African prisons' (2019) 19 *BMC International Health and Human Rights* 2, <https://bmcinthealthhumrights.biomedcentral.com/articles/10.1186/s12914-019-0194-6> (accessed 4 August 2020).

51 66th ordinary session: Intersession activity report, Honorable Commissioner Maria Theresa Manuela, Special Rapporteur on Prisons, Conditions of Detention and Policing in Africa (13 July-7 August 2020) 9, file:///Users/ramona/Downloads/Activity%20Report%20Comm%20Manuela%2066OS_ENG.pdf (accessed 4 August 2020).

52 O Robertson 'Children imprisoned by circumstance' Human Rights and Refugees Publications (2008) 16, https://quino.org/sites/default/files/resources/ENGLISH_Children%20Imprisoned%20by%20Circumstance.pdf (accessed 6 October 2020). Van Hout & Mhlanga-Gunda (n 50) 2.

53 Van Hout & Mhlanga-Gunda (n 50) 7.

54 Human Rights Watch Submission for the Day of General Discussion on Children of Incarcerated Parents (2011) 2, <https://www.ohchr.org/Documents/HRBodies/CRC/Discussions/2011/Submissions/CRCDayofDiscussionSubmission.pdf> (accessed 6 October 2020).

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

56 Van Hout & Mhlanga-Gunda (n 50) 7.

as food normally is not allocated to these children,⁵⁷ their mothers expected to share their meagre portion with them. Additional food for nursing mothers and their children was reported to be provided only in carceral facilities in South Africa, Ethiopia, Kenya, Uganda and Namibia.⁵⁸ Unsanitary living conditions in mixed and overcrowded prison facilities, in close proximity to other prisoners, may exacerbate prior vulnerabilities in infants and young children, increase morbidity levels or may turn out to be fatal.⁵⁹ Insufficient space and a lack of facilities for play, cognitive stimulation and education in infants and young children in co-detention is detrimental to their overall development.⁶⁰ Life in prison may also expose children to various types of abuse,⁶¹ aggressive language or behaviour of prison staff or inmates, leading to the development of aggressive tendencies⁶² and other negative emotional, mental or behavioural outcomes.⁶³ Being cut off from free society, children residing in carceral facilities may upon release experience difficulties in relating to others and adjusting to a completely different environment.⁶⁴ These children also experience shame, humiliation and stigma of having lived in prison,⁶⁵ adversely impacting on their self-esteem.⁶⁶ According to

57 Chirwa (n 48) 18.

58 Van Hout & Mhlanga-Gunda (n 50) 8.

59 Robertson (n 52) 24.

60 RD Parke & KA Clarke-Stewart 'Effects of parental incarceration on young children' Working papers prepared for the 'From prison to home' conference (2002) 14; 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, https://www.quino.org/sites/default/files/resources/ENGLISH_Collateral%20Convicts_Recommendations%20and%20good%20practice.pdf (accessed 6 October 2020).

61 R Taylor 'Women in prison and children of imprisoned mothers' Preliminary research paper (2004) 52, https://quino.org/sites/default/files/resources/Preliminary%20Research%20Paper_women%20in%20prison%20and%20children%20of%20imprisoned%20mothers.pdf (accessed 6 October 2020).

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

63 United Nations Global Study on Children Deprived of Liberty (2019) 351, https://www.chr.up.ac.za/images/publications/UN_Global_Study/United%20Nations%20Global%20Study%20on%20Children%20Deprived%20of%20Liberty%202019.pdf (accessed 7 October 2020). S Sarkar & S Gupta 'Prevalence of aggressive behaviour among children co-detained with imprisoned mothers in a selected prison of North India' (2017) 2 *International Journal of Paediatrics and Child Care* 1-5, <https://symbiosisonlinepublishing.com/pediatrics-childcare/pediatrics-child-care12.php> (accessed 6 October 2020).

64 O Robertson 'Children imprisoned by circumstance' (2008) *Human Rights and Refugees Publications* (2008) 29 30.

65 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; Prison Reform Trust (n 2) 5.

66 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.

national laws, children who are permitted to reside in prison with their mothers can only do so for a specific period of time, after which they must be removed. This type of separation from their mother is as dramatic for both the child and the mother.

State party reports submitted to the African Children's Committee during the last decade to some extent provide information regarding children whose mothers are incarcerated. In most African states these children's circumstances remain alarming due to insufficient funds allocated to the renovation of prisons, the recruitment of qualified staff and the provision of basic services. As at 2017, Niger reported no special treatment for pregnant offenders or the mothers of infants and young children.⁶⁷ In Chad, prisons are mixed and do not provide for the special needs of pregnant offenders or the mothers of infant and young children.⁶⁸ As at 2017, Burkina Faso reported no measures taken since 2006 to implement article 30 of the African Children's Charter.⁶⁹ In Kenya, female probation hostels accommodate mother offenders accompanied by their infants or young children (until the age of two), who can access education through early childhood development (ECD) centres, as well as basic services.⁷⁰ Articles 320 to 323 of the Benin Child Code set the legal framework for the protection of children of incarcerated mothers.⁷¹ In Eswatini infants and young children may reside in prison with their mothers until the age of two, but information regarding the conditions of detention is unavailable.⁷² Tanzania in 2015 adopted legislative measures for the protection of the children of incarcerated mothers.⁷³ The government

- 67 Republic of Niger Report submitted by Niger under art 43(1)(b) of the African Charter on the Rights and Welfare of the Child (2017) 105, <https://acerwc.africa/wp-content/uploads/2018/04/EN-CADBE-Niger-Adopt%C3%A9-le-23-mars-2017-1.pdf> (accessed 8 August 2020).
- 68 Republique du Tchad Rapport initial et les premier, deuxieme, troisieme et quatrieme rapports du Tchad relative a la mise en oeuvre de la CADBE (2014) 101, <https://acerwc.africa/wp-content/uploads/2018/04/Rapport-initial-Tchad-Fr.pdf> (accessed 8 August 2020) 101.
- 69 Burkina Faso Deuxieme and troisieme rapports periodiques cumules du Burkina Faso sur la mise en oeuvre de la Charte Africaine des Droits et du Bien-etre de l'Enfant en application a l'article 43-1 de la Charte 63 64, https://acerwc.africa/wp-content/uploads/2018/04/Burkina-Faso_2%C3%A8me-et-3%C3%A8me-rapprt-CADBE-VERSION-final-d%C3%A9c-2011.pdf (accessed 8 August 2020).
- 70 Republic of Kenya The second and third state party periodic report 2012-2017 on the African Charter on the Rights and Welfare of the Child (2018) 70, https://acerwc.africa/wp-content/uploads/2019/09/Kenya_2nd_Periodic_Report.pdf (accessed 8 August 2020).
- 71 Republic of Benin Combined (Initial and Periodic) report of Benin on the implementation of the African Charter on the Rights and Welfare of the Child (1997-2015) IXc, <https://acerwc.africa/wp-content/uploads/2018/04/Benin-Initial-Report-Eng.pdf> (accessed 8 August 2020).
- 72 The Kingdom of Swaziland's Initial Report on the African Charter on the Rights and Welfare of the Child 2016 64, <https://acerwc.africa/wp-content/uploads/2018/04/Final-ACRWC-report-Swaziland-30-Nov-2016-2.pdf> (accessed 8 August 2020).
- 73 United Republic of Tanzania Consolidated 2nd, 3rd and 4th reports on the implementation of the African Charter on the Rights and Welfare of the Child by

of Sierra Leone reported having provided medical, psycho-social and parenting support to mothers of infants in prison, despite dire conditions of detention.⁷⁴ In Mauritania, female offenders are accommodated in separate sections of the prison where children can reside with them until the age of five, although insufficient resources impede their proper development.⁷⁵ Rwanda enacted legislation (Law 54/2011) which prioritises non-custodial sentences for pregnant mothers and mother offenders. When custodial sentences cannot be avoided, special wards are reserved for mothers with children under the age of three years, who receive food supplements and benefits from ECD centres. However, a mother is imprisoned with her child only under special circumstances where the judge deems it necessary.⁷⁶ In 2019 Guinea reported the creation of special facilities for holding pregnant offenders and mothers of infants and young children, as well as the prevention of imprisoning a mother with her child if all conditions for the well-being and optimal development of the child are not met.⁷⁷ Namibian authorities created 'special provisions' regarding 'sentencing, treatment and accommodation' of pregnant mothers and the mothers of infants and young children.⁷⁸ A prison reform has since 2006 been initiated in Ghana to the benefit of mothers imprisoned with their children.⁷⁹ Since 2009, several female correctional centres in South Africa have been equipped with child-friendly mother and baby units, which allow children to reside in prison with their mothers until the age of two and to benefit from healthcare services and ECD centres.⁸⁰ With a view to actualising

the Government of the United Republic of Tanzania (2015) 51, <https://acerwc.africa/wp-content/uploads/2018/04/Tanzania-Consolidated-2nd-3rd-and-4th-Periodic-Reports-FINAL-Oct-2015-1.pdf> (accessed 8 August 2020).

- 74 Government of the Republic of Sierra Leone Initial Report on the African Charter on the Rights and Welfare of the Child (2002-2014) 111, <https://acerwc.africa/wp-content/uploads/2018/04/Sierra-Leone-GSL-State-Party-Report-on-the-ACRWC-Final-for-Web-Email.pdf> (accessed 8 August 2020).
- 75 Republique Islamique de Mauritanie Rapport initial sur les mesures d'application des dispositions de la Charte Africaine des Droits et Bien-etre de l'Enfant prises par la Mauritanie, <https://acerwc.africa/wp-content/uploads/2018/04/Initial-Report-Mauritania-French.pdf> (accessed 8 August 2020).
- 76 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, <https://www.acerwc.africa/initial-and-periodic-reports/> (accessed 7 August 2020).
- 77 Republique de Guinee Deuxieme, troisieme, quatrieme, cinquieme and sixieme rapports periodiques sur l'application de la Charte Africaine des Droits et du Bien-etre de l'Enfant (CADBE) sec 176, https://acerwc.africa/wp-content/uploads/2020/01/Guinea_1st_Periodic_Report.pdf (accessed 8 August 2020).
- 78 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 author).
- 79 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 author).
- 80 South Africa's second country report to the African Committee of Experts in the Rights and Welfare of the Child on the African Charter on the Rights and Welfare of the Child (Reporting period 2013-2016) (on file with author) 72 73.

the best interests of the children of mother offenders, authorities have established a day care centre in the biggest female prison in Zimbabwe and proposed to make operational an open prison for female offenders.⁸¹

On the other hand, separating children from their incarcerated mothers at the point of incarceration may prove to be in a child's best interests only if conducive alternative care is available to adequately compensate for the loss of parental care. However, in certain instances, the absence of such alternatives outside the prison environment may simply mean that 'it is in the child's best interest to remain with the mother'⁸² as the only available option.⁸³ It has been established that being raised in a family environment most often represents the best alternative for children,⁸⁴ as it provides them with a sense of belonging, stability and continuity. The children of female prisoners separated from their mothers often experience unstable living arrangements⁸⁵ and end up in (formal or informal) settings such as kinship care, with their fathers, in foster or institutional care, with adoptive parents, or on the streets. Siblings may be separated to relieve the caregiver's financial burden.⁸⁶ In the absence of their mother, children may suffer different forms of traumatisation⁸⁷ and might be exposed to abuse, exploitation and discrimination while in alternative care.⁸⁸ Their academic performance may deteriorate,⁸⁹ while some children may be forced to drop out of school due to the caregivers' inability to pay fees. Children separated from their incarcerated mothers commonly experience emotional or mental disturbances,⁹⁰ which manifest through problematic behaviour,⁹¹

81 Initial Report of the Government of the Republic of Zimbabwe under the African Charter of the Rights and Welfare of the Child (2013) 61, https://acerwc.africa/wp-content/uploads/2018/04/Zimbabwe_Initial_Report_under_the_ACRWC.pdf (accessed 8 August 2020)

82 General Comment 1 para 50.

83 Van Hout & Mhlanga-Gunda (n 50) 1 6.

84 Preamble to the African Children's Charter.

85 M Bastick & L Townhead 'Women in prison. A commentary on the UN Standard Minimum Rules for the Treatment of Prisoners' (2008) 42, https://www.peacewomen.org/sites/default/files/HR_Prisoners_QUNO_2008_0.pdf (accessed 6 October 2020).

86 O Robertson 'The impact of parental imprisonment on children' Women in Prison and Children of Imprisoned Mothers Serles Research Paper (2007) 34, https://www.quno.org/sites/default/files/resources/ENGLISH_The%20impact%20of%20parental%20imprisonment%20on%20children.pdf (accessed 6 October 2020).

87 General Comment 1 para 3.

88 JL Roby 'Children in informal alternative care' (2011) UNICEF Discussion paper 20, http://www.unicef.org/protection/Informal_care_discussion_paper_final.pdf (accessed 3 October 2015).

89 J Murray & DP Farrington 'The effects of parental imprisonment on children' (2008) 37 *Crime and Justice* 135. Prison Reform Trust (n 2) 5.

90 CF Hairston 'Focus on children with incarcerated parents. An overview of the research literature' Report prepared for the Annie E Casey Foundation (2007) 18.

91 Murray & Farrington (n 89) 133.

whether 'externalising behaviours such as aggression, defiance, and disobedience' or 'internalising behaviours such as depression, anxiety and withdrawal'.⁹² When children are not made privy to the truth regarding their mother's incarceration, her sudden disappearance may be perceived by the child as bereavement.⁹³ The frequency and quality of children's contact with their incarcerated mother may be impacted by factors such as distance, cost implications, unfriendly visiting arrangements or caregivers' reluctance,⁹⁴ adversely affecting the purpose for which it was intended.

Although incarcerated women represent a minority of the prison population,⁹⁵ the number of custodial sentences imposed on women and, implicitly, the number of women in carceral facilities worldwide has skyrocketed by 50 per cent in the last two decades,⁹⁶ due to harsher policies and stricter sentencing guidelines.⁹⁷ The inability of many women offenders to pay fines, to bail themselves out of prison or to hire a lawyer exacerbates the issue.⁹⁸ This female demographic increase in prisons seems unjustified, given that the majority of women are usually imprisoned for non-violent offences (most often property or drug-related).⁹⁹ Although incarceration is an expensive undertaking for states and its effectiveness in reducing crime rates – especially in the short term – has not yet been elucidated,¹⁰⁰ custodial sentences seem to have remained one of the frequently employed ways of punishing offenders, including women.¹⁰¹ Evidence has proved that the existence of dependent minor children and their alternative care arrangements are not always taken into account when sentencing women offenders.¹⁰² Imprisoned mothers often elect not

92 Hairston (n 90) 19.

93 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.

94 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.

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

96 Van Hout & Mhlanga-Gunda (n 50) 1. See also AE Jbara 'The price they pay: Protecting the mother-child relationship through the use of prison nurseries and residential parenting programmes' (2012) 87 *Indiana Law Journal* 1825; 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, https://howardleague.org/wp-content/uploads/2016/04/HLWP_3_2014.pdf (accessed 6 October 2020).

97 C Kruttschnitt & R Gartner 'Women's imprisonment' (2003) 30 *Crime and Justice* 9.

98 United Nations Office on Drugs and Crime (n 1) 109.

99 United Nations Office on Drugs and Crime 12 103; Manjoo (n 66) 7 8.

100 D Inniss 'Developments in the law: Alternatives to incarceration' (1998) 111 *Harvard Law Review* 1929 1930.

101 General Comment 1 para 48.

102 Epstein (n 96) 10; H Millar & Y Dandurand 'The impact of sentencing and other judicial decisions on the children of parents in conflict with the law. Implications

to mention their caregiving responsibilities towards minor children, from fear of losing custody.¹⁰³ Consequently, it is not uncommon for such children to end up on the streets, at risk of becoming victims of trafficking and exploitation. In order to prevent such – and other – unfavourable outcomes of maternal incarceration, the African Children’s Committee stepped in by issuing General Comment 1 in an attempt to ensure that the child’s best interests remain the primary consideration and to promote the use of non-custodial sentences for sole or primary caregivers in line with considerations about ‘the child-caring responsibilities of a convicted person’.¹⁰⁴

3 The (in)compatibility between article 30(d) and General Comment 1

‘International law-making is a complex and dynamic process characterised by the use of different instruments, including non-binding ones, and the participation of diverse actors, including non-state actors.’¹⁰⁵ One such instrument in the field of human rights law is represented by General Comments which, by nature, scope and purpose, are interpretative documents¹⁰⁶ through which treaty bodies ‘give voice to their understanding of substantive treaty provisions’.¹⁰⁷ Although they belong to the more encompassing category of soft law, thereby creating non-binding obligations for states, their ‘great persuasive force’¹⁰⁸ and ‘practical effects’¹⁰⁹ in the international legal discourse, of which they form an integral part,¹¹⁰ must be acknowledged. Soft law ‘plays a crucial role in creating a common understanding of the existing rules, and their interpretation’.¹¹¹ The notion of soft law escapes the rigid confines of

for sentencing reform’ February 2017 7, https://icclr.org/wp-content/uploads/2019/06/Millar-and-Dandurand-2017_Impact-of-Sentencing-on-Children-on-Parents_07_02_2017.pdf (accessed 4 August 2020).

103 Robertson (n 86) 47.

104 General Comment 1 para 35.

105 M Barelli ‘The role of soft law in the international legal system: The case of the United Nations Declaration on the Rights of Indigenous Peoples’ (2009) 58 *International and Comparative Law Quarterly* 964, <http://www.jstor.org/stable/25622251> (accessed 21 September 2020).

106 C Blake ‘Normative instruments in international human rights law: Locating the general comment’ (2008) Centre for Human Rights and Global Justice Working Paper 17 4.

107 F Viljoen *International human rights law in Africa* (2012) 31.

108 As above.

109 F Snyder ‘The effectiveness of European community law: Institutions, processes, tools and techniques’ (1993) 56 *Modern Law Review Limited* 32, <https://onlinelibrary.wiley.com/doi/pdf/10.1111/j.1468-2230.1993.tb02852.x> (accessed 24 September 2020).

110 AT Guzman & TL Meyer ‘International soft law’ (2010) 2 *Journal of Legal Analysis* 176.

111 S Lagoutte, T Gammeltoft-Hansen & J Cerone (eds) *Tracing the roles of soft law in human rights* (2016) 6-7.

a uniform definition. However, for the purpose of this article soft law refers to 'non-binding rules or instruments that interpret or inform our understanding of binding legal rules'.¹¹² The debate around the place and topicality of soft law in the international human rights law system is still ongoing, soft law being regarded either as 'law, quasi law, or not law at all'.¹¹³ Some legal scholars and law practitioners argue that 'soft law cannot be simply dismissed as non-law',¹¹⁴ while others argue that 'it is not law at all, strictly speaking'.¹¹⁵ For some scholars its imprecise or ambiguous¹¹⁶ character seems to be incongruent with the notion of law itself, which requires certainty. However, despite their influential nature in law-making processes, soft law instruments have always been shadowed by questions around 'authoritativeness',¹¹⁷ legitimacy and state compliance.¹¹⁸ Soft law generates weaker levels of compliance by states than hard law.¹¹⁹ Although the use of soft law 'provides the benefits of speed, informality, less onerous procedural limitations',¹²⁰ it lacks 'enforceability and formal legal status'¹²¹ and leads to political rather than legal consequences.¹²² Soft law, in general, 'elevate[s] the level of protection in situations where, according to practical experience, violations of human rights standards are likely to occur'.¹²³ In this case a mother's incarceration might impede the realisation of the best interests of her minor dependent children.

General Comment 1 was intended to 'strengthen understanding of the meaning and application of article 30 and its implications'¹²⁴ and to support stakeholders in its effective implementation through

112 AT Guzman & TL Meyer 'International soft law' (2010) 2 *Journal of Legal Analysis* 174.

113 D Shelton 'Normative hierarchy in international law' (2006) 100 *The American Journal of International Law* 292, <https://www.jstor.org/stable/3651149> (accessed 25 September 2020).

114 Barelli (n 105) 959.

115 Guzman & Meyer (n 112) 172.

116 As above.

117 C Blake 'Normative instruments in international human rights law: Locating the general comment' Centre for Human Rights and Global Justice Working Paper 17 (2008) 25.

118 See B Kabumba 'Soft law and legitimacy in the African Union: The case of the Pretoria Principles of Ending Mass Atrocities Pursuant to article 4(H) of the AU Constitutive Act' in O Shyllon (ed) *The Model Law on Access to Information for Africa and other regional instruments: Soft law and human rights in Africa* (2018), <https://www.corteidh.or.cr/tablas/33768.pdf> (accessed 21 September 2020).

119 Guzman & Meyer (n 112) 180.

120 Human Rights Council Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism A/74/335 29 August 2019, <https://digitallibrary.un.org/record/3828852?ln=en> (accessed 25 September 2020).

121 S Lagoutte, T Gammeltoft-Hansen & J Cerone (eds) *Tracing the roles of soft law in human rights* (2016) 3.

122 Shelton (n 113) 319.

123 C Tomuschat *Human rights: Between idealism and realism* (2008) 39.

124 General Comment 1 para 8(a).

legislation, policy and practice.¹²⁵ The document was informed by the realisation that whenever mothers are imprisoned, their children's rights are violated, whether they reside in prison with their mothers or are separated from them.¹²⁶ Soft law documents are widely used in the field of human rights, being commonly intended to 'humanise' hard law and to address shortcomings with regard to specific provisions in hard law documents.¹²⁷ General Comment 1 was aimed at correcting a deficiency in the wording of article 30(d) and its adjacent consequences in terms of preserving the best interests of the children of imprisoned mothers. The African Children's Committee is rightfully challenging 'stereotyped and oversimplified' narratives involving the children of imprisoned mothers, that would suggest 'a uniformity of situations' in which such children find themselves.¹²⁸ The reality is that every such child experiences unique circumstances, rendering the use of generalisations impossible.¹²⁹ For this reason, when deciding what would be in the best interests of a child whose mother is incarcerated, the African Children's Committee is advocating a 'nuanced', 'individualised, qualitative approach' as opposed to a 'categorical approach based on generalised and simplistic assumptions'.¹³⁰ Article 30(d) finds itself at odds with the approach proposed in General Comment 1 exactly by adopting such an approach deprived of individualisation. Article 30(d) proposes a 'blanket' solution, which obviously cannot be applied to all children of incarcerated mothers and expect to see their best interests actualised. From this perspective the two documents seem to be impossible to reconcile.

The rationale of article 30(d) was based on the premise that, ideally, children should grow up 'in a family environment in an atmosphere of happiness, love and understanding',¹³¹ which most African prisons are unable to provide. Undoubtedly, the treaty body's intention was to confer upon African children the highest level of protection in the circumstances of their mothers' incarceration, considering the precarious conditions in most African prisons. However, the treaty does not address ancillary challenges arising, in a contemporary African context, from attempting to implement such a narrow directive.

125 General Comment 1 paras 6 & 8(b).

126 General Comment 1 paras 3 & 4.

127 *Kabumba* (n 118) 172 189.

128 General Comment 1 para 14.

129 *As above*.

130 General Comment 1 para 15.

131 General Comment 1 para 54.

Article 30(d) seems to be based on the assumption that in the absence of the mother, her dependent child or children can be cared for by the father or a member of the extended family. In contemporary Africa, however, this assumption is rather questionable, for a number of reasons. First, these women are often undereducated, unemployed, economically unstable,¹³² single mothers, engaged in unstable relationships. Therefore, when imprisoned the probability of their child or children being taken care of by the father is highly unlikely. This stands in sharp contrast with situations where the father is the one incarcerated, in which case the mother is almost always assuming child care responsibilities.¹³³ Therefore, a mother's incarceration usually generates a greater impact on the child's life as compared to a father's imprisonment.¹³⁴ Second, the structure of the broader family – worldwide, but especially in Africa – has been greatly weakened over the past few decades by poverty, armed conflicts, displacement, migration, pandemics and other social misfortunes, leading to the inability of its members to assume caregiving responsibilities for the children of an incarcerated mother. Third, the stigma associated with imprisonment may adversely affect the willingness of the broader family to accommodate the children of imprisoned mothers.¹³⁵ Therefore, changes in contemporary African society require readjustments in the way mother offenders are punished, bearing in mind that what happens to the mother directly or indirectly affects the well-being of her children.

It is the understanding of the African Children's Committee that a mother's incarceration should not impede the enjoyment by her children of all the rights stipulated in the treaty, as these children 'have equal rights with all other children'.¹³⁶ Depriving them of their rights would be tantamount to discrimination.¹³⁷ When sentencing mother offenders, judges are expected to balance the best interests of the child involved, 'the gravity of the offence and public security'.¹³⁸ Illustrative in this regard are the five-step guidelines provided in the *S v M* decision, with the aim of promoting 'uniformity of principle, consistency of treatment and individualisation of outcome'.¹³⁹

¹³² Taylor (n 1) 5.

¹³³ JM Kjellstrand et al 'Characteristics of incarcerated fathers and mothers: Implications for preventing interventions targeting children and families' (2012) 34 *Children and Youth Services Review* 2409-2415, <https://www.sciencedirect.com/journal/children-and-youth-services-review/vol/34/issue/12> (accessed 8 August 2020).

¹³⁴ Prison Reform Trust (n 2) 5.

¹³⁵ E Saunders & R Dunifon *Children of incarcerated parents* (2011) 4; Manjoo (n 66) 23.

¹³⁶ General Comment 1 para 19.

¹³⁷ General Comment 1 para 20.

¹³⁸ General Comment 1 para 39.

¹³⁹ *S v M* 2007 18 (CC) para 36.

Although priority must as much as possible be given to non-custodial sentences,¹⁴⁰ in situations where a custodial sentence cannot be avoided, its impact on the dependent children should be carefully thought through, keeping in mind that ‘the final outcome’ in any situation involving children is determining and realising their best interests.¹⁴¹ Although the best interests principle should not be invoked as a pretext to avoid maternal incarceration if the law requires it for preserving public safety,¹⁴² a mother’s incarceration without her child imposes limitations on the child’s right to parental care and protection (article 19 of the African Children’s Charter).¹⁴³ Given that pre-trial detention can be excessively protracted in Africa and, therefore, detrimental to the child-mother relationship, it is imperative to prioritise criminal cases against mother offenders and to ‘minimise arrests’ in favour of alternative measures (bail, summons, written notices and life bonds).¹⁴⁴ The current international and regional theoretical framework in support of non-custodial measures for mother offenders¹⁴⁵ is solid enough to have altered the way in which sentencing women offenders in contemporary Africa is being determined. Such alternatives are also supported by the African ‘cultural approach to justice’ aimed at reconciliation and restoration.¹⁴⁶ Despite the relative success of adopting alternative options in selected African countries,¹⁴⁷ their efficiency is rather limited by public prejudices or scepticism, monitoring challenges, corruption, untrained staff, legal rigidity, and a lack of political engagement, among others.¹⁴⁸ Since the aim of incarceration should

140 General Comment 1 para 24(a).

141 General Comment 1 paras 22 & 24(b).

142 General Comment 1 para 39.

143 General Comment 1 para 38.

144 General Comment 1 paras 41-46.

145 UN Standard Minimum Rules for Non-Custodial Measures (1990); Kampala Declaration on Prison Conditions in Africa (1996); Kadoma Declaration on Community Service Orders in Africa (1997); Arusha Declaration of Good Prison Practice (1999); Ouagadougou Declaration and Plan of Action on Accelerating Prison and Penal Reform in Africa (2003).

146 V Stern ‘An alternative vision: Criminal justice developments in non-Western countries’ (2001) 28 *Social Justice* 92-93.

147 Penal Reform International and the Zimbabwean National Committee on Community Service ‘Community service in practice’ (1997) 3, <https://www.penalreform.org/resource/community-service-practice/> (accessed 6 October 2020). 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; Penal Reform International ‘Alternatives to imprisonment in East-Africa: Trends and challenges’ (2012) 7, <https://www.penalreform.org/resource/alternatives-imprisonment-east-africa-trends-challenges/> (accessed 6 October 2020).

148 Prison Reform International Global prison trends. Special focus 2020: Alternatives to imprisonment, <https://cdn.penalreform.org/wp-content/uploads/2020/05/Global-Prison-Trends-2020-Penal-Reform-International-Second-Edition.pdf> (accessed 6 October 2020).

be the 'reformation', 'integration' and 'rehabilitation' of mother offenders, the African Children's Committee proposes various alternatives to incarceration, in line with African tradition with regard to justice.¹⁴⁹ However, in many African countries the scarcity of resources allocated to prison renovations or to the creation of 'special alternative institutions' for mother offenders would suggest that in order to preserve the child's best interests, co-detention should be considered only as a matter of last resort.¹⁵⁰

Realising a child's best interests is inclusive of realising his or her right to life, survival and development, which requires providing basic services (health, food, shelter, education and an adequate standard of living) and protecting the child from violence and abuse¹⁵¹ – an extremely difficult or almost unattainable task in most prison facilities across the continent.¹⁵² The living conditions of children in co-detention should be 'as close as possible' to those of children living in free society, surrounded by a team of specialised staff.¹⁵³ However, the Children's Committee acknowledges the fact that separating children from their imprisoned mothers could also impose limitations on the enjoyment by her children of their rights to life, survival and development.¹⁵⁴ When children are separated from their mothers, state parties are under an obligation to ensure their best interests by providing viable alternative arrangements for their care, decided upon on a case-by-case basis and upon meaningful consultation with the child.¹⁵⁵

3.1 Applying treaty interpretation principles to article 30(d)

In order to achieve its purpose, treaty interpretation must adhere to certain rules, similar to those employed in domestic law interpretation, keeping in mind that such rules do not obey a hierarchical order.¹⁵⁶ Article 31 of the Vienna Convention on the Law of Treaties provides a general rule of interpretation: 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'¹⁵⁷ Different 'judicial attitudes'¹⁵⁸

149 General Comment 1 paras 60 & 61.

150 General Comment 1 para 50.

151 General Comment 1 para 26.

152 General Comment 1 para 27.

153 General Comment 1 para 29.

154 As above.

155 General Comment 1 paras 29 & 40.

156 J Dugard *International law. A South African perspective* (2007) 417 418.

157 Vienna Convention on the Law of Treaties (1969) art 31(1).

158 Dugard (n 156) 417.

originate from this overarching principle. However, the literal and the progressive approach, respectively, dominate the realm of treaty interpretation.¹⁵⁹ A literal or textual¹⁶⁰ interpretation of a treaty is done by giving effect to the 'grammatical meaning' of the words.¹⁶¹ The progressive or teleological¹⁶² treaty interpretation 'emphasises the object and purpose of a treaty',¹⁶³ taking into account social and linguistic changes in circumstances from the time of drafting to the time of interpreting a treaty.¹⁶⁴ Both theories have over time been criticised: the former for its rigidity; the latter for its subjectivity and for granting excessive interpretative powers to treaty-monitoring bodies.¹⁶⁵

Although there is theoretical consensus between article 30 and its General Comment with regard to the promotion and protection of the best interests of children of mother offenders, there are aspects in both documents that are obviously incongruent and apparently irreconcilable. Section 20 of the General Comment in question sharply contrasts with article 30(d) by referring to 'children imprisoned with their parents/primary caregivers' – a peculiar group of children who should not have existed in the first place, if article 30(d) would have been read and applied *ad litteram* by judicial officers. In the same vein, section 55 of the General Comment is even further removed from article 30 by advocating co-detention as being 'in children's best interests' (provided that safeguards are put in place), as opposed to the categorical prohibition of article 30(d).

The wording of article 30(d) is unequivocal, namely, that 'a mother shall not be imprisoned with her child'. A literal/textual interpretation of this sentence can only mean that upon their mothers' incarceration, children should be separated from them. The use of a purposive interpretation does not arise in this context, as purposive interpretation is applied only when the meaning of a treaty is 'ambiguous or obscure',¹⁶⁶ which evidently is not the case. Therefore, article 30(d) does not call for such an interpretation. In fact, 'it is not permissible to interpret what has no need of interpretation'.¹⁶⁷ However, in spite of the clear meaning of article

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

160 Dugard (n 156) 417.

161 As above.

162 As above.

163 As above.

164 Graham (n 159) 104.

165 Graham (n 159) 113.

166 Arts 32(a) & (b) Vienna Convention.

167 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.

30(d), the African Children's Committee embarked on its purposive interpretation – a decision motivated by mainly two factors. The first factor is to ensure 'a better protection of children of imprisoned parents and caregivers',¹⁶⁸ in line with the best interests principle. The second is to respond to changes in circumstances in African society from the time of drafting the Children's Charter's to the time of issuing General Comment 1.

While the treaty provides that children should not accompany their mothers in prison (article 30(d)), its General Comment seems to contradict this rigid, crystal clear wording by stating that, in certain cases, co-detention may be an option for children in contemporary Africa. Thus, General Comment 1 reads into article 30(d) a meaning that is not manifestly present. Although 'a soft law document is to be preferred to no document at all',¹⁶⁹ and although the African Children's Committee's intention is commendable, this approach may lead to ambiguity with regard to the nature and scope of stakeholders' obligations emanating from treaties, which in turn might 'favour non-compliance'.¹⁷⁰ Also, if state compliance with treaty regulations is difficult to enforce, how much more difficult will it be to enforce compliance with soft law guidelines? Elaborating further on the impact of uncertainty that might be introduced by very elastic interpretations of treaty provisions, it has been rightly pointed out that when a General Comment goes 'far beyond the text' of the treaty it intends to interpret, it actually 'undermines the principle of legal security by reading into a legal text a content that simply is not there'.¹⁷¹ Interpretative bodies may sometimes sacrifice 'fidelity to a text ... in order to ... keep pace with the perceived necessities of changing times'.¹⁷²

General Comment 1 is the legitimate product of the African Children's Committee's interpretative mandate, but the inflexibility of article 30(d) could not be corrected through an interpretative act, but rather through an amendment. Due to its lack of sensitivity to changes in circumstances in contemporary Africa over a time span of two decades, article 30(d) of the African Children's Charter is unable

¹⁶⁸ General Comment 1 para 8(f).

¹⁶⁹ Barelli (n 105) 964.

¹⁷⁰ Barelli (n 105) 972.

¹⁷¹ 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.

¹⁷² 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 support the actualisation of the best interests of the children of incarcerated mothers. For this reason, the Children's Committee has decided to interpret the provision of article 30(d) in light of Africa's new realities. However, although the content of General Comment 1 indeed is a reflection of children's rights activism, the Committee embarked on a task beyond its mandate. Ideally, the Committee should have rather sought (and can still seek) an amendment of that particular treaty provision, albeit a cumbersome and lengthy process. In the meantime, General Comment 1 should be popularised and increasingly utilised by judicial officers in order to safeguard the best interests of the children of incarcerated mothers. However, since the best interests principle is not absolute,¹⁷³ it cannot justify the interpretation proposed in General Comment 1, which actually alters the core of article 30(d). Notwithstanding its 'usefulness',¹⁷⁴ soft law is – and should be – subsidiary to hard law, 'a second best alternative to hard law'.¹⁷⁵ Soft law does not stand on an equal footing with hard law and cannot fundamentally alter the intended meaning of a treaty provision.¹⁷⁶

4 Conclusion and recommendations

Every child and all family settings are unique. Therefore, it becomes evident that the only way in which to determine what is in the best interests of a particular child should be done by assessing the advantages and disadvantages of both co-detention or separation from the incarcerated mother. A plethora of international and regional instruments make reference to alternative, non-custodial measures and their benefits for women offenders and their minor children. Although these measures have been utilised to some extent in selective African countries, challenges remain that limit their widespread implementation. Therefore, a large 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. Respect for the law (article 30(d)

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

174 C Tomuschat *Human rights: Between idealism and realism* (2008) 39.

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

176 Art 31(1) Vienna Convention.

in this case) may in some instances override, the best interests of the children involved. 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 abandonment, abuse or neglect. Unfortunately, in the absence of reliable alternative care, co-detention for some children of incarcerated mothers represents the only 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 1 provides for an individual assessment in establishing the best interests of the children under consideration and broadens their options. However, although the content of General Comment 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 do not have the power to override, in principle, the provisions of article 30(d).

4.1 Recommendations

4.1.1 *Amendment of article 30(d)*

Due to the multifaceted impact that article 30(d) has on the best interests of the children of incarcerated mothers in contemporary Africa, it is imperative to address its inflexibility. General Comment 1 represents an attempt to solve the rigidity inherent in article 30(d). However, General Comments are mainly interpretative instruments, soft law, unable to alter the core of the treaty provision they are called on to interpret. Ideally, the rigidity of article 30(d) is curable through an amendment, which could be done under article 48 of the African Children's Charter, in order to uphold the best interests of the children under consideration. The amended provision should read: [E]nsure that a mother shall not be imprisoned with her child *unless the circumstances of the child require otherwise*.

Cognisant of the fact that amending a treaty provision is a laborious exercise, the author recommends that, in the meantime, awareness and understanding of General Comment 1 should be advanced among state parties in order to confer a higher level of protection upon the children under consideration.

4.1.2 *Individualised approach in decision making concerning separation or co-detention*

Taking into account the uniqueness of each child and his or her family environment, the uniform prescription of article 30(d), if applied to all minor children of incarcerated mothers, may not ensure the realisation of their best interests. It is recommended that choosing between co-detention and separation of minor dependent children from their incarcerated mothers should be based on an individual analysis of the unique circumstances of each child, in order to safeguard the child's best interests.

4.1.3 *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 stigmatisation and deeply affects the minor children in her care. Against such a discouraging background, the overuse of custodial sentences remains unjustified. It is recommended that whenever the courts are in a position to choose between sentencing options, a non-custodial sentence should always be considered for primary caregivers, especially mothers. This approach will preserve the family environment and the best interests of the children under consideration.

4.1.4 *Improvement of prison facilities for mothers and children*

Since not all primary caregivers can benefit from the privileges of a non-custodial sentence due to either the severity of the offence committed or to the need to protect society from future harm, it is recommended that when a custodial sentence cannot be avoided, and when co-detention proves to be in the best interests of the child, prison authorities should provide facilities and services (compliant with international and regional standards) that adequately address the needs of dependent minor children with regard to their holistic development.