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

by

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A mini-dissertation submitted in partial fulfilment of the requirement for the degree

(MPhil Multi-disciplinary Human Rights)

In the Faculty of Law,
University of Pretoria

(January 2016)

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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 women\(^4\) 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).\(^5\)

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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.
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

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13 Article 4(1) of the ACRWC.
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. 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 mother 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’. 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. 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 article30(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 to 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’.\textsuperscript{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’\textsuperscript{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,\textsuperscript{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

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

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

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

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

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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

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 chose 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.

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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.\textsuperscript{38} Punishment changed over time, reflecting societal transformation. In the words of Durkheim: ‘what was moral for one people, was immoral for another’.\textsuperscript{39} The penal system is not an element in isolation, but in relationship with different aspects of society (law, politics, ideology and economy).\textsuperscript{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.\textsuperscript{41}

On his part, Durkheim understands legal punishment in terms of a social-emotional response to an offence, which violates social values.\textsuperscript{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’.\textsuperscript{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

\begin{itemize}
\item \textsuperscript{38} D Garland ‘Frameworks of inquiry in the sociology of punishment’ (1990) 41 \textit{The British Journal of Sociology} 10, 11.
\item \textsuperscript{39} E Durkheim \textit{The division of labour in society} trans George Simpson (1964) 423.
\item \textsuperscript{40} D Garland & P Young “Towards a social analysis of penalty” in D Garland & P Young (eds) \textit{The power to punish. Contemporary penalty and social analysis} (1983) 23.
\item \textsuperscript{41} B Smart ‘On discipline and social regulation: A review of Foucault’s genealogical analysis’ in D Garland & P Young (eds) \textit{The power to punish. Contemporary penalty and social analysis} (1983) 77.
\item \textsuperscript{42} D Garland ‘Frameworks of inquiry in the sociology of punishment’ (1990) 41 \textit{The British Journal of Sociology} 7.
\item \textsuperscript{43} D Garland & P. Young ‘Towards a social analysis of penalty’ in D Garland & P Young (eds) \textit{The power to punish. Contemporary penalty and social analysis} (1983) 12.
\end{itemize}
referral to various institutions. Punishment philosophies broadly split into ‘past and future-oriented’ 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. The term ‘retributive’ has a double significance. On the one hand, it has a negative connotation because it implies the idea of vengeance. 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. In the Old Testament the expressions ‘eye for eye, tooth for tooth, hand for hand, foot for foot’ 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’.

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. This approach is known as the ‘limiting

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retributivism’ and it was proposed by Morris.\textsuperscript{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.\textsuperscript{53}

From a retributivist perspective, crime violates the laws of the state, rather than the rights of individuals and communities.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{57} The issue of ‘deserts’ is assessed in accordance with the damage caused by the offence and with the offender's degree of culpability.\textsuperscript{58}

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

\begin{itemize}
\item \textsuperscript{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.
\item \textsuperscript{53} N Walker Punishment, danger and stigma. The morality of criminal justice (1980) 163.
\item \textsuperscript{54} DJ Cornell Doing justice better. The politics of restorative justice (2007) 96.
\item \textsuperscript{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.
\item \textsuperscript{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.
\item \textsuperscript{58} CL Ten Crime, guilt and punishment. A philosophical introduction (1987) 146.
\item \textsuperscript{59} RS Frase ‘Punishment purposes’ (2005) 58 Stanford Law Review 73.
\end{itemize}
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. 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. 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. 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. 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. Rehabilitation was highly discredited by Martinson's famous article in which he expresses his lack of faith in the success of the rehabilitation process. A few years later he appears more optimistic concluding that 'some programs are beneficial'.

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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’.  

2.2.4 Deterrence

Deterrence could be general or specific. General deterrence is defined as a threat meant to discourage illegal behaviour. 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. Specific deterrence is achieved by administering a type of punishment to an offender with the aim of discouraging him from reoffending.

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. The certainty of the punishment is more effective in general deterrence than its severity.

More than the fear of punishment, the element that brings about deterrence is actually the fear of social stigma. 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.

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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.\textsuperscript{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.\textsuperscript{76} Although there is no rigid definition of this concept,\textsuperscript{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.’\textsuperscript{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,\textsuperscript{79} especially in New Zealand where principles of restorative justice were used for serious offences as well as for minor ones.\textsuperscript{80} Restorative justice approaches take a plethora of forms such as ‘victim offender conferences, family group conferences or circles approaches’.\textsuperscript{81} Restorative justice can be identified in ancient civilizations\textsuperscript{82} or cultural and religious approaches

\textsuperscript{75} MJF y Tella & FF y Tella \textit{Punishment and culture: A right to punish?} (2006) 190.
\textsuperscript{76} DJ Cornwell \textit{Criminal punishment and restorative justice} (2006) 32.
\textsuperscript{77} C Bezuidenhout ‘Restorative justice with an explicit rehabilitative ethos: Is this the resolve to change criminality?’ (2007) 20(2) \textit{Acta Criminologica} 43.
\textsuperscript{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 \textit{African Human Rights Law Journal} 453.
\textsuperscript{79} DJ Cornwell \textit{Criminal punishment and restorative justice} (2006) 35.
\textsuperscript{80} A Morris ‘Critiquing the critics: A brief response to critics of restorative justice’ (2002) 42(3) \textit{The British Journal of Criminology} 602.
\textsuperscript{81} H Zehr & A Gohar \textit{The little book of restorative justice} (2003) 47.
to conflict resolution. Restorative justice is a culturally sensitive approach to doing justice.

Restorative justice aims at replacing custodial measures with community-based initiatives. At the centre of this approach is a dialogue between the offender, the victim and the communities to which they belong. 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’. Restorative justice includes a higher number of stakeholders in the criminal process.

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. The offender must take active responsibility for his offence and that involves reparation of the harm committed. 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, turning restorative justice into what Braithwaite called ‘justice by the people’.

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

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offenders. 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.

Cornwell talks about the ‘democratisation’ of the criminal procedure, 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. Although deterrence is not the declared aim of restorative justice, practice has shown that restorative justice decreases the risk of reoffending.

The main criticism against restorative justice is the concern that criminals might get lighter sentences in restorative justice approaches than in traditional justice settings. Because of this misgiving, principles of restorative justice are mainly applied to juveniles or to less serious offences. 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. However, restorative justice represents an adjustment to traditional penal system, it is a more ‘humane’ and more appropriate approach to justice.

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**

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The institution of the prison can be traced to ancient civilizations. Prisons were used initially to detain offenders awaiting trial: For instance the 12th century gaols (jails) in England. 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’, and it soon became the ‘primary form of punishment’.

Traditionally, imprisonment was not among Africans’ ways of punishing offenders. 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 domination which included the imposition of ‘taxes, censuses, portage and forced labour’ upon the indigenous population. 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’.

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. In British colonial Africa, colonial masters were eager to put in place prisons, which in the beginning had to be improvised in odd locations (cellars, storage rooms, etc.). Imprisonment soon became the most common way of punishing offenders. Prisons provided inmates with

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105 M Foucault Discipline and punish: The birth of the prison (1977) 231.
the opportunity to learn a trade. Customary law was rejected and replaced with the British law, which was considered superior.

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

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’. Although the prison was theoretically envisaged as ‘an apparatus for transforming individuals’, it has shown little efficiency concerning the rehabilitation of offenders or the issue of deterrence. On the contrary, incarceration, especially for a short period of time, has proven to increase the risk of reoffending which, in turn, has led to congested prisons.

Although colonialists were criticised for perpetrating violence and harsh conditions of detention, the situation of postcolonial African prisons did not ameliorate. 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. During the postcolonial era, a number of African countries have registered a high number of incarcerations for political considerations. The postcolonial prison system was characterized by an intensified oppression under

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114 Lord Lugard *The dual mandate in British tropical Africa* (1965) 558.
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,
as prisoners and as Africans.\textsuperscript{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.\textsuperscript{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.\textsuperscript{135} These provisions cover a plethora of aspects of incarcerated persons, having also in mind the ‘distinctive needs of women prisoners’.\textsuperscript{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.\textsuperscript{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’.\textsuperscript{138} Because of their caretaking responsibilities, women should not be imprisoned in remote areas, far from the place of residence of their children.\textsuperscript{139} Women offenders separated from their children should be provided with opportunities to meet with their children.\textsuperscript{140} Female

\textsuperscript{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).
\textsuperscript{136} Resolution 2010/16 United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders, Rule 1.
\textsuperscript{137} Resolution 2010/16 United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders, Rule 64.
\textsuperscript{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.
\textsuperscript{139} Resolution 2010/16 United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders, Rule 4.
\textsuperscript{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.  

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

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.

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143 Standard Minimum Rules for the Treatment of Prisoners (1955) I 6(1).
Prison surveys reveal the fact that a majority of imprisoned women are uneducated, therefore ignorant of their basic rights; they are poor, often single mothers, victims of abuse. Being unable to pay fines, bail or to hire a lawyer, many spend years in pre-trial detention. In Rwanda, for instance, 50-75% of women prisoners are under remand.

Although incarcerated women represent a minority of the prison population, their number is on the increase worldwide, with an estimated rate of 400% increase since 2007. This increase is due partly to the ‘war on drugs’ policy and partly to the change in sentencing guidelines. 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.

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

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

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, or the same bathrooms and toilets, as it is the situation in Benin.

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

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. Often times, the trainings received by women offenders perpetuate certain stereotypes 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. Pregnant women and nursing mothers are special categories whose nutritional and

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medical needs are not adequately met in most prisons in Africa.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{177}

Statistics have established that a majority of female prisoners are mothers.\textsuperscript{178} Therefore, a great deal of their mental and emotional distress is caused by the uncertain situation of their children, in case of separation.\textsuperscript{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

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

\(^{188}\) 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

¹⁹² UN Standard Minimum Rules for Non-Custodial Measures (1990) 1.5.
restoring. Article 30 of the African Children’s Charter states that ‘measures alternative to institutional confinement’ and ‘special alternative institutions’ 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.

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.

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.

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. 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. The use of open prisons and pre-release arrangements should be encouraged.

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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.
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. 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.

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. There is a need to create public awareness though campaigns and develop mechanisms for measuring the effectiveness of such alternatives. Research and development of new schemes are also recommended.

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, 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.

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

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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.
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 primary consideration, while the CRC envisages the ‘best interests of the child’ as a 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. 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

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210 My emphasis.
211 My emphasis.
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.’

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

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).
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. 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.

Family is envisaged as the ‘natural environment’ for child development. 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. 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.

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. 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’. 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.
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’. Also, ‘a child’s best interests are of paramount importance in every matter concerning the child’.

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’. On the one hand, the court should strive to maintain ‘the integrity of family care’; on the other hand, the court has the duty ‘to punish criminal misconduct’. 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.

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.
De Villiers v S\textsuperscript{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’.\textsuperscript{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’.\textsuperscript{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.

\textsuperscript{244} De Villiers v S (20367/2014) [2015] ZASCA 119.
\textsuperscript{245} De Villiers v S (20367/2014) [2015] ZASCA 119 1.
\textsuperscript{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

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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

conceptions of what is in a child’s best interests.” 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. For others, ‘continuity and stability in relationships’ is
considered highly beneficial especially for young children. It is believed that it is
always best for children to grow up with their own parents. The child’s opinion must
also be considered when determining his or her ‘best interests’. Eekelaar identifies
two methods of establishing the best interests of the child, namely: the ‘objectivization’
and the ‘dynamic self-determinism’. 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’. On his part, Mnookin differentiates between short-term and long-term
indicators when establishing what would be in a child’s ‘best interests’.

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. In other words, the ‘best interests’ standard should not
be absolute. 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 family and, in some cases, the ‘best

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
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?’
265 M Skivenes ‘Judging the child’s best interests: Rational reasoning or subjective presumptions?’
266 J Eekelaar ‘The interests of the child and the child’s wishes: The role of dynamic self-determinism’
267 J Eekelaar ‘The interests of the child and the child’s wishes: The role of dynamic self-determinism’
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
271 B Rwezaura ‘The concept of the child’s best interests in the changing economic and social context
interests’ of the child must cede in favour of the larger group’s interests. However, upholding children’s best interests enhances the societal welfare.

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. The ‘implications of the principle will vary over time and from one society [...] to another.’ However, in a conflictual situation the welfare of the child must override cultural practices that are detrimental to him or her. Traditional values and treaty provisions should both collaborate in order to generate a higher level of protection for children.

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. 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.’

276 Article 21(1) of the African’s Children Charter.
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. Ugandan law provides for ‘special facilities’ for such children, but in practice there are no funds allocated for the accommodation of ‘pregnant women and mothers with infants’.

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’. 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

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mother is imprisoned with her child only under special circumstances where the Judge finds it necessary. 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. 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. 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.

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.

<table>
<thead>
<tr>
<th>State</th>
<th>Limit for children living in prison</th>
<th>Date information collected</th>
</tr>
</thead>
<tbody>
<tr>
<td>Burkina Faso</td>
<td>2 years</td>
<td>2006</td>
</tr>
<tr>
<td>Burundi</td>
<td>2 years</td>
<td>Undated</td>
</tr>
<tr>
<td>Congo</td>
<td>1 year</td>
<td>1994</td>
</tr>
<tr>
<td>Egypt</td>
<td>2 years</td>
<td>2008</td>
</tr>
<tr>
<td>Eritrea</td>
<td>No upper limit</td>
<td>Undated</td>
</tr>
<tr>
<td>Ghana</td>
<td>2 years or when weaned</td>
<td>2011</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Country</th>
<th>Time Frame</th>
<th>Year</th>
</tr>
</thead>
<tbody>
<tr>
<td>Kenya</td>
<td>4 years</td>
<td>2011</td>
</tr>
<tr>
<td>Niger</td>
<td>5 years</td>
<td>2009</td>
</tr>
<tr>
<td>Nigeria</td>
<td>18 months</td>
<td>2007</td>
</tr>
<tr>
<td>Sierra Leone</td>
<td>2 years</td>
<td>2010</td>
</tr>
<tr>
<td>South Africa</td>
<td>2 years</td>
<td>2010</td>
</tr>
<tr>
<td>Sudan</td>
<td>6 years</td>
<td>Undated</td>
</tr>
<tr>
<td>Tanzania</td>
<td>Until normal lactation period expires</td>
<td>2009</td>
</tr>
<tr>
<td>Zambia</td>
<td>4 years</td>
<td>2011</td>
</tr>
</tbody>
</table>

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’. Children of incarcerated parents grow up displaying behavioural problems. They may exhibit ‘externalizing behaviours such as aggression, defiance, and disobedience’ but also ‘internalizing behaviours such as depression, anxiety and withdrawal’. 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’. It has been also recommended that partial breastfeeding should be continued until the child is two years old.

Children of female prisoners often experience unstable living arrangements: They may repeatedly change accommodation, caregivers and neighbourhood. In some cases, siblings are separated from each other in order to release the caregiver’s financial and psychological burden. 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 traumatisation. They may be exposed to abuse, exploitation and various discriminations while in kinship care. Their academic performance will deteriorate as a consequence of their mother’s imprisonment. Some may drop out of school due to the inability to pay

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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

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mortality due to infectious diseases’, especially ‘in the first two years of life’. 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.

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. Children in prison with their mother lack a balanced diet. In most prisons there is no food allocated for the needs of children, 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. 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’. 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. Because of these deficiencies many infants and young children get sick.

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

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

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. 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. This situation affects their self-esteem.

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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

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

326 Article 33(1) and 33(2) of the African Children’s Charter.
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. Many State Parties’ initial and periodic reports are long overdue. Based on such reports, the Committee has issued several Conclusion Observations and Recommendations.

The Committee has also a quasi-judicial mandate of dealing with communications. 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.

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. Since 2009 a Civil Society Organisation Forum is held under the auspices of the Committee right before the Committee sessions. 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.'

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

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328 Article 43(1)(a) & (b) of the African Children’s Charter.
331 Article 44(1) of the African Children’s Charter.
children’s rights. In 2005 the Committee undertook a fact-finding mission to Northern Uganda.\textsuperscript{336} In 2014 the Committee carried out two advocacy missions: one to Central African Republic\textsuperscript{337} and one to South Sudan.\textsuperscript{338} A mission to Tanzania was undertaken in August 2015 to assess the situation of children with albinism.\textsuperscript{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.\textsuperscript{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.’\textsuperscript{341}

\section*{4.2 General Comment No 1 as an interpretation of art 30}

\subsection*{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’.\textsuperscript{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’.\textsuperscript{343} One of the ways

\begin{thebibliography}{9}
\bibitem{336}http://pages.au.int/acerwc/pages/investigation-missions.
\bibitem{338}Report of the 24\textsuperscript{th} Session of the Committee (ACERWC) (2014).
\bibitem{342}Article 42(c) of the African Children’s Charter.
\bibitem{343}BA Garner (ed) \textit{Black’s Law Dictionary} (9th ed).
\end{thebibliography}
the Committee interprets the treaty provisions is by issuing General Comments. These are ‘interpretative instruments’ through which treaty bodies ‘give voice to their understanding of substantive treaty provisions’. Although they belong to the category of soft law, therefore creating non-binding obligations for States Parties, General Comments do have ‘great persuasive force’.

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.’

### 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’. 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. 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. The present general comment seeks to ‘strengthen understanding of the meaning and application of Article 30 and its implications’.

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

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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).
A mother’s incarceration should not impede the enjoyment by her child of all the rights stipulated in the Children’s Charter. 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. 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. Only a judge has the authority to separate children from their parents, making use of the same principle. Judges are expected to use the ‘best interests’ standard as a guiding principle also when choosing between a range of different sentences. The ‘best interests’ of the child should not be used as a pretext to avoid parental imprisonment if the law requires it. 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.

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.

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...
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

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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’. 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, giving priority to non-custodial sentences as much as possible.

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. 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 preparatoires and ‘the circumstances of its conclusion’.

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’.

Two main approaches dominate the field of treaty interpretation: original interpretation; and progressive interpretation. 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. 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 criticized 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).
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.
subjective and for granting too much interpretative powers to the treaty monitoring body.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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’,\textsuperscript{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’.\textsuperscript{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

\textsuperscript{382} MN Shaw International law (2008) 933.
\textsuperscript{383} MN Shaw International law (2008) 932, 933.
\textsuperscript{384} Article 32(a), (b) of the Vienna Convention on the Law of Treaties.
imprisoned parents and caregivers’. 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.

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’. Interpretative bodies sacrifice ‘fidelity to a text…in order to […] keep pace with the perceived necessities of changing times’.

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

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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.
to occur’. 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. 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’, 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’. Because soft law and hard law do not stand on the same footing, soft law cannot alter fundamentally the meaning of a treaty provision.

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

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.\textsuperscript{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

\textsuperscript{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:

\textit{[E]nsure that a mother shall not be imprisoned with her child.}

The amended provision should read:

\textit{[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.

\textbf{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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