

AFRICAN UNION

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

الاتحاد الأفريقي



UNION AFRICAINE

Comité Africain d'Experts sur les  
Droits et le Bien-être de l'Enfant

UNIÃO AFRICANA

## GENERAL COMMENT ON ARTICLE 30 OF THE AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD

ACERWC/GC/01 (2013),  
adopted by the Committee at its twenty-second Ordinary Session  
(04 - 08 November, 2013)

## Contents

	<i>Paragraphs</i>	<i>Page</i>
1. Introduction.....	1-5	3
1.1 Objectives of the General Comment.....	6-8	4
1.2 Scope of the General Comment.....	9-13	6
1.3 An individualized, informed and qualitative approach.....	14-16	8
2. Principles of the African Charter on the Rights and Welfare of the Child.....	17-22	9
3. The Scope and Nature of Article 30.....	33-61	17
3.1 “Special Treatment”.....	33-63	17
3.1.1 Ensure that a non-custodial sentence will always be first considered when sentencing such mothers.....	35-40	17
3.1.2 Establish and promote measures alternative to institutional confinement for the treatment of such matters.....	41-49	20
3.1.3 Establish special alternative institutions for holding such mothers.....	50-53	23
3.1.4 Ensure that a mother shall not be imprisoned with her child.....	54-55	24
3.1.5 Ensure that a death sentence shall not be imposed on such mothers.....	56-59	24
3.1.6 The essential aim of the penitentiary system will be the reformation, the integration of the mother to the family and social rehabilitation.....	60-63	26
4. Dissemination and reporting obligations.....	64-66	28
4.1 Dissemination of the General Comment.....	64-65	28
4.2 State Reporting.....	66	29

## 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”

*“Every child has his or her own dignity. If a child is to be [...] imagined as an individual with a distinctive personality, and not merely as a miniature adult waiting to reach full size, he or she cannot be treated as a mere extension of his or her parents, umbilically destined to sink or swim with them.”<sup>1</sup>*

Justice Albie Sachs

### 1. Introduction

1. The African Committee of Experts on the Rights and Welfare of the Child (the Committee) was established with a mandate to promote and protect the rights enshrined in the African Charter on the Rights and Welfare of the Child (African Children’s Charter). In particular, the Committee is expected to formulate and lay down principles and rules aimed at protecting the rights and welfare of children in Africa.<sup>2</sup>
2. Through the Reporting Procedure provided for under Article 43 of the African Children’s Charter, the Committee interacts with States Parties by reviewing their reports and issuing observations and recommendations aimed at improving the implementation of the rights of the child where the desired standard of implementation is deemed not to have been achieved.
3. The Committee recognizes that children face many violations of their rights under the African Children’s Charter when their parents and/or primary caregivers come

<sup>1</sup> S V M (CCT 53/06) [2007] ZACC 18 (September 2007) at para 18.

<sup>2</sup> Article 42 (a) (ii), African Children’s Charter.

into conflict with the law. Through its consideration of States Parties' Reports, and other activities falling within its mandate, the African committee has become aware that children can be affected by both the stigma of their parent or primary caregiver's involvement with the criminal justice system as well as by the trauma of separation caused by arrest, pre-trial detention and imprisonment.<sup>3</sup>

4. Children living in prison with their mothers experience a range of violations of their rights, including psychosocial and health problems and difficulties in accessing education. Parental incarceration can also result in difficulties for children living apart from their parents such as financial and material hardship, instability in family relationships and residential mobility. It can result in worsening performance at school, shame, and social and institutional stigma. In some States Parties, parents are under pressure to terminate their parental rights upon conviction. Incarceration may also damage parents' perception of themselves as parents. The psychological repercussions can be analogous to those resulting from other forms of loss, such as death or divorce, although some repercussions are distinct.
5. In recognition of the importance and invisibility of the issue of children affected by the incarceration of their parents/ primary caregivers, the African Committee decided to prepare its first General Comment on this theme.

### 1.1 Objectives of the General Comment

6. The overall purpose of the General Comment is to support States Parties, and

<sup>3</sup> For example, in the country report submitted by Cameroon, the Government of Cameroon stipulates that mothers are separated from their children once imprisoned. The African Committee has also issued concluding observations for the States of Uganda and Tanzania regarding article 30 of the African Children's Charter. For example, in the Concluding Observations to Tanzania in 2010, the African Committee urged the State Party to enact 'comprehensive provisions in the juvenile justice standards ... in accordance with Articles 17 & 30 of the ACRWC.' In the Concluding Observations to Uganda also in 2010, the African Committee observed that 'the Report doesn't provide information pertaining to the treatments given to incarcerated pregnant mothers and incarcerated mothers of babies and young children and recommends that this information be included in the next reports.'

other stakeholders,<sup>4</sup> in the effective implementation of Article 30. Article 30 lays out a number of provisions ensuring 'special treatment' for pregnant women and mothers who are accused or convicted of criminal offences. Under this Article, States Parties must ensure that non-custodial sentences are always considered first for pregnant women and mothers of young children and they must establish alternatives to detention for them. Article 30(1)(f) also states: 'the essential aim of the penitentiary system will be the reformation, the integration of the mother to the family and social rehabilitation.'

7. Article 30 is informed by the fact that children of incarcerated parents/primary caregivers may find a number of their rights violated as a result of this incarceration. When a criminal court detains a child's parent, the court reshapes the child's family just as much as a family law court issuing an order of custody, adoption, or divorce, and as a result children's best interests need to have a primary role in such circumstances. As a result, there is often an acute need for special treatment, and support services, which will vary depending on the child's particular family circumstances and the stage of the criminal proceedings.
8. The General Comment, therefore, seeks to:
  - (a) Strengthen understanding of the meaning and application of Article 30 and its implications for States Parties, international organisations, civil society organisations, community-based structures and society at large;
  - (b) Elaborate on the scope of legislation, policy and practice necessary to achieve full implementation of Article 30;
  - (c) Engage in a constructive dialogue with States Parties on the constitutional, policy, legal and operational framework for the effective implementation of Article 30;

<sup>4</sup> The preamble to the African Children's Charter states that the promotion and protection of the rights and welfare of the child can only be fulfilled once everyone (which does not just include States Parties – even though States Parties have a primary duty to fulfil their obligations) perform their duties.

- (d) Promote and encourage regular periodic reports submission by States Parties with particular to the constitutional, policy, legal and administrative measures undertaken by States Parties to fulfill their obligations under Article 30;
- (e) Highlight positive approaches in implementing Article 30, benefitting from the monitoring experience of the African Committee as well as researches on the issue; and
- (f) Enhance cooperation at continental and international levels for a better protection of children of imprisoned parents or caregivers.

## 1.2 Scope of the General Comment

9. Article 30 provides in full that:

“30.1. States Parties to the present Charter shall undertake to provide special treatment to expectant mothers and to mothers of infants and young children who have been accused or found guilty of infringing the penal law and shall in particular:

- (a) ensure that a non-custodial sentence will always be first considered when sentencing such mothers;
- (b) establish and promote measures alternative to institutional confinement for the treatment of such mothers;
- (c) establish special alternative institutions for holding such mothers;
- (d) ensure that a mother shall not be imprisoned with her child;
- (e) ensure that a death sentence shall not be imposed on such mothers;
- (f) the essential aim of the penitentiary system will be the reformation, the integration of the mother to the family and social rehabilitation.”

10. Article 30 of the African Children’s Charter is explicitly focused on children of incarcerated mothers. However, the African Committee takes the view that Article 30 can be extended to apply to children affected by the incarceration of their sole or primary caregiver - this may be another family member such as a grand-parent or a foster parent. This is because large numbers of children in Africa are orphaned or living separated from their parents but may still require the protections guaranteed in Article 30 when their sole or primary caregiver is deprived of their liberty.

11. Article 30 applies when primary caregivers are accused or found guilty of infringing the respective criminal law. This encompasses all stages of criminal proceedings starting from arrest and continuing through to release and integration. As such, long-term incarceration, short-term incarceration, sporadic incarceration, with a primary caregiver moving in and out of prison and the death penalty are within the scope of Article 30 and this General Comment. This General Comment also applies whether the primary caregiver is in custody or subject to non-custodial measures.

12. Whilst Article 30 is an important and unique article regarding the special treatment to be given to this group of children, other articles of relevance to the issue that are considered in this General Comment include: the right not to be discriminated against based on the status of their parents (Article 3), the best interests of the child as the primary consideration in actions affecting children (Article 4(1)), the opportunity to be heard in any judicial and administrative proceedings affecting them (Article 4(2)) and the right to survival and development (Article 5). Other Articles of relevance include the rights to be registered immediately after birth (Article 6), to education (Article 11), to health (Article 14), to protection against abuse (Article 16), to the enjoyment of parental care and protection (Article 19), and to special protection and assistance when separated from parents (Article 25).

13. In this General Comment, unless otherwise expressly stated, the following

expressions shall be interpreted and applied as explained herein below:

13.1 **“Mother”** should be understood not only a “mother” but also to include a “father” and any “caregiver” under whose custody a child is placed either under recognized formal arrangements or informal mechanisms available in a given society. In this context, the expression “mother” entails “parents” and “caregivers” who may include a grandparent, a relative, or a member of the extended family who, according to certain prevailing circumstances like death or illness of the child’s parents, becomes the primary caregiver or main supporter of the child;

13.2 **“Imprisonment”** should entail that it is not necessary that the place of deprivation of liberty of a child’s parent or primary caregiver is official. Imprisonment, in the context of this General Comment, should also be applicable to both formal and informal carceral, remand and prison facilities. It should further apply to secret places where deprivation of liberty of a parent or caregiver may take place, including retention centres, secret prisons or other non-official detention places. In addition, “imprisonment” should include pre-trial detention.

### **1.3 An individualized, informed and qualitative approach**

14. The issue of children of incarcerated primary caregivers is not susceptible to formalistic determinations of children’s best interests. For instance, both the “child-at-risk” narrative and the “good mother” narrative that exist in a number of laws and policies in African countries are stereotyped and oversimplified and contribute, in negative ways, to misperceptions about incarcerated parents and their children by suggesting a uniformity of situations and appropriate responses that does not necessarily exist. In actuality, the situations of the parents, primary caregivers and children involved vary widely and defy easy analysis and solutions. It is also often

difficult, or even inappropriate, to generalize about the family circumstances that existed prior to incarceration, as well as the circumstances following incarceration, as they are often quite varied.

15. States Parties should take an individualized, qualitative approach that is nuanced and based on actual information about incarcerated parents/caregivers and children, rather than a quantitative, categorical approach based on generalized and simplistic assumptions. An individualized approach is required when reading Article 30 with Article 4 (the best interest of the child) of the African Children’s Charter.

16. In order to encourage such an approach, statistics about children of incarcerated parents should be routinely and consistently gathered by relevant agencies to help develop policy and practice in States Parties. Furthermore, professionals working with children at all stages of the criminal justice process, as well as other professionals such as teachers and social workers who may come into contact with children of incarcerated parents, must be trained to appropriately provide any needed support.

## **2. Principles of the African Charter on the Rights and Welfare of the Child**

17. The African Children’s Charter is grounded by the following four principles:

- (a) Non-discrimination of children (Article 3 of the Charter);
- (b) The best interest of the child (Article 4(1) of the Charter);
- (c) The right to survival, protection and development of each child (Article 5 of the Charter); and
- (d) The right to participation (Article 4(2) of the Charter).

### ***Non-discrimination of children***

18. Article 3 of the African Children’s Charter provides that “every child shall be

entitled to the enjoyment of the rights and freedoms recognized and guaranteed in this Charter irrespective of the child's or his/ her parents' or legal guardians' race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status." The principle of non-discrimination is fundamentally rooted in a number of international human rights instruments. It is set out in Articles 2 of the United Nations Convention on the Rights of the Child (CRC), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESCR). Article 2(2) of the CRC obliges States Parties to ensure that no child is discriminated against on the basis of the actions of his or her parents. In this regard, a child 'cannot be treated as a mere extension of his or her parents, umbilically destined to sink or swim with them [...] the sins and traumas of fathers and mothers should not be visited on their children.'<sup>5</sup>

19. Article 3 provides for the equal enjoyment of the rights and freedoms of the African Children's Charter to all children within the jurisdiction of States parties. In this context, the concept of discrimination encompasses any distinction, exclusion or preference.<sup>6</sup> Children whose parents/ primary caregivers are involved with the criminal justice system have equal rights to all other children and these rights should not be affected because of the status of their parent.

20. In order to prevent discrimination, States Parties should put measures in place to provide children imprisoned with their parents/primary caregivers with the equivalent services that children who are not imprisoned would receive. Therefore, access to services such as education and health care cannot be restricted for children who are imprisoned with their parents/ primary caregivers just because they find themselves incarcerated since this would amount to a form of discrimination against

<sup>5</sup> *per* Justice Sachs in *S v M* (CCT 53/06) [2007] ZACC 18 (September 2007) at para 18.

<sup>6</sup> Human Rights Committee, General Comment No. 3, 13<sup>th</sup> Session, 1981, available at <http://www.unhchr.ch/tbs/doc.nsf/0/c95ed1e8ef14cbec12563ed00467eb5?OpenDocument> (accessed 1 October 2013).

such children. Furthermore, measures should be in place to ensure that children are not discriminated against in accessing their rights because of their parents/ primary caregivers' incarceration; for example, their access to education and healthcare should not be disrupted.

21. In particular, States Parties are urged to undertake measures to prevent and eliminate discrimination against children whose parents or primary care givers are incarcerated. In recognition of the risk of discrimination that may occur against children born in remand or prison facilities, States Parties should undertake the following measures:

- (a) where expectant mothers are facing criminal charges or have been condemned to custodial sentence, arrangement for temporary release, parole or suspended sentence (for minor or casual offences) should be made to enable expectant accused or prisoners to deliver outside the remand or prison facilities;
- (b) where birth occurs in remand or prison facilities, States Parties should ensure that they shall be registered in the local birth registration office; and
- (c) there should be no mention of remand or prison as place of birth on a child's birth records. Only the locality shall be mentioned in the child's birth records.<sup>7</sup>

#### ***The best interest of the child***

22. Article 4(1) of the African Children's Charter provides that "in all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration." There are three important aspects of this principle that should be upheld. Firstly, it says that in all actions concerning the child. This is not limited to certain actions only. Therefore, States Parties are to respect, protect and

<sup>7</sup> Such measures were also pronounced by the Indian Supreme Court in *R.D. Updhyaya v State of AP*, [2006] INSC 204, at para 11. The prohibition on naming the place of birth of those in detention or prison is included in Rule 23(1) of the Un Standard Minimum Rules on the Treatment of Prisoners.

fulfil the best interest of children in all actions concerning children. Secondly, it says that any person or authority should fulfil the best interests of children. This places a requirement on all officials or persons that might come into contact with a child or deal with a matter in which a child is involved. Therefore, prison officials, police officials and justice officials would fall within the ambit of this provision. Lastly, Article 4(1) requires that the best interests of the child be the primary consideration in matters involving children. Therefore persons dealing with matters involving children, within the ambit of the African Children's Charter, should ensure the best interest of the child as the final outcome.

23. The best interests of the child must be the primary consideration in relation to all actions that may affect children whose parents are in conflict with the law, whether directly or indirectly, in accordance with Article 4. States should create and implement laws/policies to ensure this at all stage of judicial and administrative decision-making during the criminal justice process, including arrest, pre-trial measures, trial and sentencing, imprisonment, release and reintegration into the family and community.

24. To meet this obligation it demands that States Parties have in place procedural guarantees. States Parties are urged to put in place policy, legislative, administrative and judicial measures to ensure that the best interests of the children whose mothers are in carceral institutions are safeguarded. Such measures, among others, should include the following:

- (a) As a general rule, States Parties should ensure that alternatives to custodial sentences for expectant prisoners or those with children. In this regard, States Parties should undertake both legislative and administrative measures to ensure they give priority consideration to non-custodial measures when courts sentence or decide on pre-trial measures for a child's sole or primary carer, subject to the need to protect the public and the child and bearing in mind

- the gravity of the offence.<sup>8</sup> This necessarily entails that States Parties should ensure that where protection of the public is not at issue, and subject to the seriousness of the offence, an alternative to imprisonment should be applied;
- (b) States Parties should ensure that their respective legislation provides for safeguards to expectant prisoners or those with children where it is considered imperative for judges or magistrates to impose custodial sentences to such prisoners. Such safeguards should include judicial consideration of the impact of a custodial sentence on the best interests of a child of the accused or convicted parent or caregiver;
- (c) States Parties should put in place legislative and administrative mechanisms to ensure that a decision for a child to live in prison with his/her mother or care giver is subject to judicial review. Criteria for taking such a decision should be developed and include consideration of the individual characteristics of the child such as age, sex, level of maturity, quality of relationship with mother and the existence of quality alternatives available to the family;
- (d) States Parties should include consideration of the child's own views and give them due weight in accordance with the age and maturity of the child;
- (e) States Parties should put in place both legislative and administrative measures to ensure that they take into account the importance of maintaining direct contact with parents or caregivers on a regular basis particularly during early childhood as well as the overall conditions of incarceration. Contact with the parent or caregiver living outside the detention facility and other family members should be facilitated by State Parties.

***The right to survival, protection and development of each child***

25. Article 5(1) of the African Children's Charter categorically provides that: 'Every

<sup>8</sup> A similar obligation is imposed on States by the UN General Assembly Resolution 63/241. See UN General Assembly, Resolution: Rights of the Child, A/RES/ 63/241, para 47; and United Nations Human Rights Council resolution 19/37 on the rights of the child, para 69.

child has an inherent right to life.’ The use of the word “inherent” in this article connotes that it is not a right bestowed upon the child by society; but rather an existing right that society is under an obligation to protect.<sup>9</sup> This right shall be protected by law. In addition, Article 5(2) stipulates that “States Parties to the present Charter shall ensure, to the maximum extent possible, the survival, protection and development of the child.” The use of the word “survival” denotes placing a positive obligation on States to ensure that appropriate measures are taken to prolong the child’s life.<sup>10</sup> Besides, the child’s right to development entails a comprehensive process of realising children’s rights in order to allow them grow up in a healthy and protected manner, free from fear and want, and to develop their personality, talents and mental and physical abilities to their fullest potential consistent with their evolving capacities.<sup>11</sup>

26. The child’s right to life, survival and development requires that the child’s rights to health, food, shelter, education and adequate standard of living. In respect of the child’s right to education, it is to be noted that this is fundamental to the child’s development into a responsible and informed citizen, capable of defending his or her rights. This imperative is also reflected in Article 6 of the CRC and 6(1) of the ICCPR, which together with Article 5 of the African Children’s Charter; impose on the State a positive obligation not only to protect the life of the child but also to provide adequate resources to ensure the child’s survival and development. In addition, the concept of prolonging the child’s life entails an obligation imposed on States Parties to undertake measures to protect the child from violence and abuse in all settings.

27. Children living in prisons with their parents/ primary caregivers often experience

<sup>9</sup> Detrick, S.L., *A Commentary on the United Nations Convention on the Rights of the Child* The Hague: Kluwer Law International, 1999, p. 126.

<sup>10</sup> Report of the Working Group on a Draft Convention on the Rights of the Child, E/CN.4/1988, para 21.

<sup>11</sup> Nowak, M., *Article 6 – The Right to Life, Survival and Development* Leiden: Martin Nijhoff, 2005, p. 2; and Tomkin, J., *Orphans of Justice: In Search of the Best Interests of the Child when a Parent is Imprisoned – A Legal Analysis* Geneva: Quaker United Nations Office, 2009, 13.

serious violations of their right to survival, protection and development arising from their living conditions; they may not be registered at birth nor have access to education or health facilities and they may experience violence at the hands of other detainees or prison employees. In relation to children not imprisoned with their parents/primary caregivers, the right to survival and development is also subject to limitation as the primary person entrusted with realizing this right is absent.

28. In order to ensure that children’s right to survival, protection and development is protected and realized, States Parties should implement the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules). In particular, they must ensure that children living in prison should never be treated as prisoners themselves. They should not be subjected to disciplinary punishments. In principle, they should be free to leave the prison and participate in outside activities, in compliance with security considerations. Mechanisms should be in place to protect children from all forms of physical and psychological abuse in prisons. Punishment by close confinement or segregation should not be applied to pregnant women, women with infants and breastfeeding mothers in prison. Disciplinary sanctions for women prisoners shall not include a prohibition of family contact, especially with children.

29. On admission to prison the number and personal details of children accompanying their mothers should be recorded. If a baby is born whilst his or her mother is in prison then their birth must be registered in accordance with Article 6 of the African Children’s Charter. During the time which they spend in prison, children should be provided with good quality primary health care services on an ongoing basis and their development should be monitored by a prison psychologist and specialists in child development. The environment provided for the child’s upbringing should be as close as possible to that of a child outside prison, with a nursery staffed by specialists who can take care of the child while separated from his or her mother. When children who accompany incarcerated parents to prison can no longer be

accommodated there (for example, where they reach the maximum age allowed in law or regulation), alternative arrangements must be made that consider and reflect the child's best interests.

### ***The right to participation***

30. Article 4(2) of the African Children's Charter stipulates that: "In all judicial or administrative proceedings affecting a child who is capable of communicating his/her own views, an opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings, and those views shall be taken into consideration by the relevant authority in accordance with the provisions of appropriate law."

31. This article prescribes for the participation of children in judicial or administrative proceedings affecting them. It also allows that children be able to appoint an impartial person to represent their views. The only limitation to this article is that it only allows children who are capable of communicating their views the opportunity to do so. Finally, the views of these children should be taken into consideration, as it holds sufficient weight.

32. Children should have the opportunity to take part in sentencing procedures against their parent/primary caregiver and if necessary should be able to have a legal representative or guardian to give meaningful effect to their right to participation. Similarly, children imprisoned with their parents/primary caregivers should have the opportunity to take part in any administrative decision affecting them. For example, parole boards should take the views of a child into account when considering parole of a parent/ primary caregiver.

### **3. The Scope and Nature of Article 30**

#### **3.1 "Special treatment"**

33. The special treatment that Article 30 envisages extends to those expectant mothers, and mothers of infants and young children who are "accused or found guilty of infringing the penal law". Therefore, such mothers should benefit from the special treatment beginning from the arrest, up to the ultimate conviction, sentencing, imprisonment and reintegration phase of the criminal justice process.

34. Use of the word "special" implies a much higher level of obligation for States Parties than that required in ordinary circumstances<sup>12</sup>. This reflects the heightened vulnerability of these children who should benefit from a special measure. In some instances, the term "special" can also imply that states parties need to act with urgency.

#### **3.1.1 Ensure that a non-custodial sentence will always be first considered when sentencing such mothers**

35. The African Committee is fully aware that sentencing procedures are diverse and complex in the various States Parties to the African Children's Charter. The African Committee is also aware that many States Parties do not take into account the child-caring responsibilities of a convicted person when they are taking decisions on sentencing.

36. Implementation of Article 30 requires that States parties review their sentencing procedure and reform it accordingly so that:

<sup>12</sup> For instance, in the context of education, States have the obligation to take "special measures in respect of female, gifted and disadvantaged children..." Children with disabilities have a right to "special measures of protection". In addition, a child accused of or found guilty of having infringed the penal law shall have the right to a "special treatment..."

(a) A sentencing court should find out whether a convicted person is a primary caregiver whenever there are indications that this might be so.

(b) The court should also ascertain the effect on the children concerned of a custodial sentence if such a sentence is being considered.

(c) If the appropriate sentence is clearly custodial and the convicted person is a primary caregiver, the court must apply its mind to whether it is necessary to take steps to ensure that the children will be adequately cared for while the caregiver is incarcerated.

(d) If the appropriate sentence is clearly non-custodial, the court must determine the appropriate sentence, bearing in mind the best interests of the child.

(e) Finally, if there is a range of appropriate sentence, then the court must use the principle of the best interests of the child as an important guide in deciding which sentence to impose.<sup>13</sup>

37. Therefore, a non-custodial sentence should be considered first, before imposing a custodial one, and should a custodial sentence be considered, then it should be appropriate taking the best interest of the child into consideration.

38. Article 19 of the African Children's Charter grants a child the entitlement to enjoyment of parental care and protection. With the sentencing of parents to

<sup>13</sup> This guidance is loosely based upon that provided in a South African case *S v M* Case CCT 53/06 [2007] ZACC 18, paragraph 36.

prison or custodial settings, the rights of a child in terms of Article 19 of the African Children's Charter are restricted. Article 19(1) reaffirms that only a judicial authority can separate a child from parental care, and only if it is in the best interest of such child. Therefore, when considering custodial sentences against convicted mothers/parents, the court in a Member State must have considered the best interest of children, as not only Article 30(1)(a) and Article 4 requires it, but also Article 19(1) in relation to the separation of a child from his/ her parental care.

39. Article 30 should not be interpreted as allowing for convicted parents/ primary caregivers to evade accountability for their offences. Taking children's best interests into account does not mean that parents and caregivers cannot be detained or imprisoned. Such an approach would render systems of criminal law unworkable, to the detriment of society as well as the interests of children, who benefit along with everyone else from the prevention of crime. States Parties must ensure that judicial officers are equipped to be able to weigh the best interests of the child versus the gravity of the offence and public security when considering the incarceration of a mother/ parent.

40. If the parent/primary caregiver of the child is imprisoned, then States Parties are under an obligation to ensure appropriate alternative care for such child/ children in accordance with Article 25 of the African Children's Charter. Such care could be informal with existing family, or in formal institutions, foster care or even adoption. Whatever form it takes, the African Committee recommends that the Guidelines for the Alternative Care of Children are consulted and followed<sup>14</sup>. The process of identifying alternative care should begin, ideally, immediately following arrest. Whether such care is appropriate should be decided on a case-by-case basis and grounded in the principle of the best interests of the child<sup>15</sup>. Alternative care provision should be

<sup>14</sup> U.N. General Assembly, 64th Session. Guidelines for the Alternative Care of Children (A/RES/64/142). 24 February 2010

<sup>15</sup> See the UN Guidelines for the Alternative Care of Children at paras 48 and 82

supervised and reviewed regularly. The child should be fully consulted and have his or her views taken into account when making decisions about placements.

### **3.1.2 Establish and promote measures alternative to institutional confinement for the treatment of such matters**

#### ***Alternative measures to pre-trial detention***

41. The purpose of detaining an accused person pre-trial or during trial is to secure their attendance at court and to ensure the protection of witnesses and/ or victims. Such detention can have a serious impact upon children yet judges rarely consider a mother or father's caring responsibilities when determining pre-trial measures. Nor do they take into account the fact that childcare responsibilities may be an indication that alleged offenders are unlikely to abscond and that pre-trial detention is therefore less likely to be necessary.

42. Furthermore, the period of pre-trial detention can be very lengthy therefore increasing the length of time a child is kept from their parent/ primary caregiver. If acquitted, the mother/ parent and child have to build their relationship from where it left off (if the child was not detained with the mother/ parent). This is not an easy endeavour and without the necessary support, can be to the detriment of the parent/ child relationship. In relation to pre-trial and trial detention, the uncertainty of whether a parent will or might return can have a negative impact on the stability of the child's home environment.

43. States Parties must ensure that criminal cases against parents/primary caregivers are prioritised and processed expeditiously, as it is known that accused persons spend an excessive amount of time in pre-trial detention in Africa. The communication link between parents/primary caregivers that are in detention and their children should be promoted and States Parties have a duty to ensure that there are established legislative and administrative measures to ensure that children

whose parents or caregivers are in carceral institutions have regular contacts with their parents or caregivers.

44. States Parties must put mechanisms in place to minimise arrests of parents/ primary caregivers, taking all other considerations into account, such as the crime allegedly committed. Should the police not have had an alternative to secure attendance at court, then the presiding officer at the first appearance of such person should:

- (a) Establish whether the accused person is the parent/primary caregiver of a child;
- (b) Establish the circumstances the child might find him/herself after the arrest taking into account the best interest of the child; and
- (c) Based on this, make a decision whether or not to release the defendant.

45. The release of parent/primary caregiver at court proceedings should be dealt with as a matter of priority. In other words, establishing the above criteria should not necessarily await a social worker investigation. The judicial officer should take the initiative to ask the defendant of her specific situation at home and corroborate this evidence with any testimony provided by the arresting police officer. A child may also be called as witness in order to ensure his/ her involvement in the decision-making process, thus complying with Article 4(2) of the African Children's Charter.

46. Many States Parties have established ways to secure the attendance of accused persons without resorting to detention. These include posting bail, using summons procedures, written notices to appear at court and life bonds. It is the opinion of the African Committee that these measures should be given priority over detaining an accused person, especially if such person is a parent/primary caregiver of a child.

### ***Alternative measures for sentencing***

47. The situation with post-trial sentences is slightly different in that, if it is a prison sentence, it would normally last for a certain, predetermined period of time. Be that as it may, the impact that this sentence would have on a child, would still be negative (whether the child is placed in alternative care while the parent/primary caregiver is imprisoned or whether the child still stays with a remaining caregiver). Hence the importance of establishing and promoting measures alternative to the institutional confinement of parents in criminal matters relating to them.

48. A sentence of a custodial nature is not the only form of sentencing in States Parties but is frequently used. Other forms of sentencing convicted persons include community service related sentences, correctional supervisions, fines, and sentences of a restorative justice nature (such as victim-offender mediation and family group counselling), amongst others. The Kadoma Declaration of 1997 calls on African States to promote community service orders that are in conformity to African traditions, as an alternative to custodial sentences in certain cases. This alternative sentencing phenomena is thus not new to the African continent.

49. It goes without saying that not all States Parties have these sentence options for convicted adults within their legal framework. The African Committee therefore encourages States Parties to pass the necessary legislation to give effect to such sentences and to implement said legislation. Where States Parties do have alternatives to custodial sentencing options in place, presiding officers should have the ability to carefully balance all the interests in relation to sentencing and place a special emphasis on the best interest of a child in handing down his/ her sentence on a parent/primary caregiver.

### **3.1.3 Establish special alternative institutions for holding such mothers**

50. Article 30 (1) (c) calls on States Parties to establish 'special alternative institutions' for holding mothers. Many States Parties do not allocate sufficient resources to prison upgrades such that special alternative institutions which protect the rights of children could realistically be established. Therefore, such institutions should only be considered as a last resort where alternatives to detention cannot be considered and it is in a child's best interests to remain with their mother or primary caregiver.

51. Such institutions must focus on realising children's rights; for instance, programs that allow mothers to reside together with their infants in prison nurseries could be expanded and employed where deemed in a child's interests. Work-release programs that expand the opportunities for work release in lieu of prison and also provide greater opportunities for incarcerated parents to participate in direct care of their children should be encouraged.

52. In addition, expanding treatment programs and providing priority for substance abuse programs to parents facing incarceration could contribute to reducing incarceration and time served in incarceration facilities. The geographic location of prisons, as well as structural and financial barriers that make visits from children difficult and expensive needs to form part of the "special" nature that these incarceration facilities need to try to address. As much as possible, minimizing distance between imprisoned mothers/ parents and children should be embraced as a policy of incarceration facilities. Making funds available for smaller facilities or halfway houses that could be built in communities to accommodate non-violent inmates with children might be worth consideration.

53. It is important for States Parties to ensure that reforms are implemented comprehensively and do not depend upon the good will and direction of the facilities' leadership and personnel, but rather upon the force of law.

### 3.1.4 Ensure that a mother shall not be imprisoned with her child

54. Article 30 (d) says that States must ensure ‘a mother shall not be imprisoned with her child.’ This reflects the importance placed in the Charter for children to grow up in a ‘family environment in an atmosphere of happiness, love and understanding.’ This provision also reinforces the obligation on States Parties to provide alternatives to pre and post trial custody for caregivers and/or pregnant women.

55. However, when it is decided that it is in children’s best interests to live in prison with their mothers then States Parties have the same obligations to respect, protect and fulfil their rights as they do to any other child in their jurisdiction. A number of safeguards need to be put in place. For instance, children’s nutritional needs, in particular optimal duration of breastfeeding, should be a relevant factor when considering for how long children should live with incarcerated mothers.<sup>16</sup> There should be regular assessments of which living environment is in a child’s best interests, and guidance should be prepared on how to conduct such assessments, and how to do so in a way that does not damage parent-child bonding.<sup>17</sup> National Human Rights Institutions and other independent monitoring bodies should be encouraged to participate in monitoring the treatment and conditions of children living in prison with their mothers. It is also important to underscore the point that law, policy and practice should emphasize that no child should remain in prison following the release, execution or death of their incarcerated parents/mothers.

### 3.1.5 Ensure that a death sentence shall not be imposed on such mothers

<sup>16</sup> Robertson, O., *Collateral Convicts: Children of Incarcerated Parents: Recommendations and Good Practice from the UN Committee on the Rights of the Child Day of General Discussion* Geneva: Quaker, 2012.

<sup>17</sup> Ibid.

56. Article 30 (1) (e) provides that States must ensure that a death sentence shall not be imposed on pregnant women or mothers of young children. This is reiterated in the Protocol on the Rights of Women in Africa in Article 4 (1) (j). Article 30 provides States Parties with clear direction on law prohibiting such sentences. Almost every country in the world prohibits the death penalty for a pregnant woman. However, some States Parties to the African Children’s Charter only delay execution until shortly after the birth in violation of Article 30 (1) (e)

57. Furthermore, Article 5 of the African Children’s Charter prohibits the “pronouncement” of the death sentence for crimes committed by children.

58. States Parties must provide a child with information about whether a parent/ primary caregiver is in detention with the possibility of being executed, and also what has happened to the remains of an executed mother/ parent.<sup>18</sup> States Parties that still retain the death penalty should observe the Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty, as adopted by the UN Economic and Social Council and endorsed by consensus by the UN General Assembly in 1984, which sets out the most basic guarantees to be observed in death penalty cases. States Parties should also ensure that such prisoners are held in conditions that comply with those set out in the UN Standard Minimum Rules for the Treatment of Prisoners. In addition, in States Parties that still retain the death penalty, it is of the utmost importance that it is not mandatory for any crime as this prevents, *inter alia*, consideration of the child’s best interests when sentencing a parent or caregiver. Therefore, States Parties should consider including a provision in legislation to commute the sentences of prisoners who have spent more than a certain number of years on death row, without any final outcome of the appeals process or application for commutation or pardon, to an appropriate alternative sentence.

<sup>18</sup> The United Nations Human Rights Council adopted resolution 19/37 on the rights of child. Paragraph 69(f) also addresses the situation when a mother/ parent is on death row. See Human Rights Council Resolution A/HRC/RES/19/37 available at [http://ap.ohchr.org/Documents/dpage\\_e.aspx?b=10&se=126&t=11](http://ap.ohchr.org/Documents/dpage_e.aspx?b=10&se=126&t=11). See also United Nations Human Rights Council resolution 22/11.

59. Finally, in jurisdictions where so-called “civil death” laws exist which provide that persons serving a certain amount of minimum and maximum sentence are “civilly dead” and may not enter into and/or exercise certain civil acts (for instance marriage) should not automatically be used to ban mothers from exercising their rights and responsibilities in relation to their children. In addition, although not directly related, it is important for States Parties to address through law reform the practice where by upon the death of the natural mother, the children of unwed fathers automatically become wards of the State, thereby invalidating a father’s parental rights.

### **3.1.6 The essential aim of the penitentiary system will be the reformation, the integration of the mother to the family and social rehabilitation**

60. Article 30 (1) (f) requires that States have a prison system which has as its essential aim the ‘reformation, the integration of the mother to the family and social rehabilitation.’ This has implications for law, policy and training on how to deal with children of parents who have been arrested and imprisoned particularly regarding how children can contact the parent and be contacted by them, and follow-up by social welfare services to ensure children ‘outside’ have their rights protected and are not subject to social exclusion or discrimination.

61. On the African continent multiple initiatives have been undertaken to promote the reformation of prisons to ensure that inmates are rehabilitated and integrated into society upon being discharged from correctional facilities. These include the following:

- (a) The Kampala Declaration on Prison Conditions in Africa of 1996;
- (b) The Arusha Declaration on Good Prison Practice of 1999; and
- (c) The Ouagadougou Declaration and Plan of Action on Accelerating Prisons and Penal Reforms in Africa of 2002.

These include measures such as:

- (a) Promoting rehabilitation and development of programs during the period of imprisonment or non-custodial sentence schemes;
- (b) Ensuring that unsentenced prisoners have access to these programs;
- (c) Providing civic and social education;
- (d) Providing social and psychological support with adequate professionals;
- (e) Promoting contact with the family and community by:
  - (i) Encouraging civil society groups to visit the prison and work with offenders;
  - (ii) Improving the environment for visitors so that physical contact is permissible;
  - (iii) Setting up a privilege system including day, week-end and holiday leave
  - (iv) subject to satisfying appropriate criteria.
  - (v) Sensitizing families and community in preparation for the reintegration of the person back into society and involve them in rehabilitation and development programs;
- (f) Developing half-way houses and other pre-release schemes in partnership with civil society groups; and
- (g) Extending the use of open prisons in appropriate circumstances.

62. Such measures are not new to the African continent and certainly not new to States Parties to the African Children’s Charter and they should be used to promote the integration of mothers/ parents back into the family and society upon completing a custodial sentence.

63. The UN Guidelines for the Alternative Care of Children provide that States

‘should pay special attention to ensuring that children in alternative care because of parental imprisonment...have the opportunity to maintain contact with their parents and receive any necessary counselling and support in that regard<sup>19</sup>.’ However, prison buildings and regimes are often remote and inaccessible for children visiting detained or imprisoned parents. This is a particular challenge for detained mothers since many countries have a limited number of facilities for female detainees. This can mean that children have to travel very long distances from their home to visit their mother which incurs financial costs and can also take up school time. If a decision is taken to imprison a parent or other primary caregiver then the relevant authorities should first establish where the child is living in order to have the parent or caregiver sent to a facility within suitable travelling distance of the child’s home. Furthermore, consideration should be given to circumstances where the parent or caregiver is a foreign national who may require assistance in maintaining contact with children in their home country through telephone, email or written correspondence. Conversely, States Parties should provide assistance to the children of their nationals who are deprived of their liberty in another country, including when under death sentence, and to their national prisoners in other countries to enable the children to benefit from such assistance.

#### 4. Dissemination and Reporting Obligations

##### 4.1 Dissemination of the General Comment

64. The Committee recommends that States Parties, in collaboration with non-state agencies, including the private sectors and the civil society organizations, should widely disseminate the present General Comment across government, including within ministries and departments that work on criminal justice issues and those

<sup>19</sup> UN Guidelines for the Alternative Care of Children at para 82.

responsible for implementing the African Children’s Charter. It should also be distributed and made known to different groups of professionals working for and with children, including judges, lawyers and legal aid providers, teachers, guardians, social workers, officials of public or private welfare institutions, as well as to all children and civil society.

65. States Parties should include information in their periodic reporting to the African Committee on the challenges they face and the measures they have taken to respect, protect and fulfil children’s rights in the context of the deprivation of liberty of parents/primary caregivers.

##### 4.2 State Reporting Obligation under the General Comment

66. In measuring and evaluating progress made in the implementation of Article 30 of the Charter, the Committee shall require States Parties to provide detailed information, which shall include statistical data, on progress made, achievement, and factors for success or challenges faced in the implementation of the Article along the following indicators:

- (a) **Indicator 1: *Constitutional and legislative measures***: detailed specific information should be provided to show if there are any constitutional and legislative frameworks adopted by States Parties to implement Article 30;
- (b) **Indicator 2: *Policy measures***: detailed specific information should be availed to explain how national policy frameworks and action plans translate constitutional and legislative measures into concrete and measurable actions to implement Article 30;
- (c) **Indicator 3: *Implementation mechanisms***: detailed specific information should be made to indicate how do policies, action plans and programmes are implemented to ensure that States Parties effectively implement Article 30;

**(d) Indicator 4: *Level of enjoyment of Article 30 by right holders:*** States Parties are obliged to indicate the level and extent to which they have fared in the implementation of Article 30, by particularly indicating whether or not they are moving towards full implementation; and

**(e) Indicator 5: *Evaluation and monitoring mechanisms:*** States Parties are obliged to indicate mechanisms and frameworks they have put in place to ensure evaluation and monitoring of the implementation of Article 30.



## The African Committee of Experts on the Rights and Welfare of the Child (ACERWC)

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

P.O. Box 3243 Roosevelt Street (Old Airport Area), W21K19, Addis-Ababa, Ethiopia

Tel: (+251) 115 182 215 Fax: (+251) 553 5716

[www.acerwc.org](http://www.acerwc.org)