

# Chapter 31

## Article 30

### Children of imprisoned mothers

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1. State 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.

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1 Introduction .....	435
2 Context .....	436
3 Legal interpretation .....	437
3.1 Special treatment .....	437
3.2 Non-custodial options .....	440
3.2.1 Role of the prosecution .....	440
3.2.2 Mandatory minimum sentences .....	441
3.2.3 The best interests of the child and sentencing .....	441
3.3 Establish and promote measures alternative to institutional confinement for the treatment of such mothers .....	442
3.4 Establish special alternative institutions for holding such mothers .....	444
3.5 Ensure that a mother shall not be imprisoned with her child .....	448
3.6 Ensure that a death sentence shall not be imposed on such mothers .....	448
3.7 The essential aim of the penitentiary system will be the reformation, the integration of the mother to the family and social rehabilitation .....	450
4 Conclusion .....	452

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## 1 Introduction

The United Nations Standard Minimum Rules for the Treatment of Prisoners (UNSMR) was for 60 years the principal instrument regarding the rights of those deprived of their liberty. However, the Rules paid scant attention to women in prison. The Bangkok Rules were a response to this lacuna and were indeed presented as a supplement to the UNSMR. The UNSMR were revised and adopted by the General Assembly in 2015 and the revised UNSMR (2015) deal more extensively with women in prison, evidently informed by the Bangkok Rules.

The African Charter on Human and Peoples' Rights (African Charter) does not pay particular attention to prisoners' rights or to women in prison, save that discrimination against women and

children must be eliminated.<sup>1</sup> It should be noted that the African Charter on the Rights and Welfare of the Child (African Children's Charter) predates the Bangkok Rules by some 11 years since it entered into force in 1999. The African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) has between 2008 and 2022 made 44 substantive General Comments with reference to article 30 in its Concluding Observations on state reports. The overwhelming majority of these Comments refer to the substance of General Comment 1 on the Charter.

The term 'mother' is used in line with the wording of article 30, but it should be pointed out that article 30 could equally apply to the more inclusive concept of 'primary care giver'.

In the following parts some context is given on imprisonment in Africa. This is followed by an item-by-item commentary on article 30 of the African Children's Charter's. Article 30 is unique in international human rights law, and finds no equivalent elsewhere. It is testimony to the recognition of the very adverse conditions faced by children when incarcerated with their primary care giver, invariably their mother.<sup>2</sup> The Charter does not exist in a legal vacuum, and other instruments, such as the Bangkok Rules, UNSMR (2015) and the Council of Europe Recommendations to Member States Concerning Children with Imprisoned Parents are useful resources.

## 2 Context

Since article 30 deals with children of imprisoned mothers, some brief reflection on the African prison population is necessary. There are in total some 1,4 million (1 385 350) prisoners in Africa according to the latest data from the World Prison Brief.<sup>3</sup> Of this group, 43 per cent, or 518 980, are awaiting trial. Women constitute 3,29 per cent of the total African prison population. South Sudan has the highest proportion of female prisoners at 10,9 per cent or 916 prisoners. Rwanda, however, has the largest number of female prisoners at 4 808 or 5,4 per cent, followed by South Africa at 4 712 or 3 per cent.

The Central African Republic (CAR) has the highest proportion of pre-trial detainees (all categories) held in prisons at 84,1 per cent or 1 674, followed by Gabon at 80,2 per cent and Liberia at 71,2 per cent. The high proportion of pre-trial detainees is indicative of a criminal justice system moving at a very slow pace to adjudicate matters. This has significant rights implications. South Africa has the largest pre-trial detainee population at 55 912 (35,6 per cent of the total), followed by Nigeria at 54 170 (or 69 per cent). The imprisonment rate per 100 000 of the population ranges from the highest at 637/100 000 in Rwanda to The Gambia at 22/100 000. The average per 100 000 across the 54 African countries is 127/100 000 and the median at 97 per 100 000. The average imprisonment rate per 100 000 of the population for the world is 176 and Africa thus features substantially below the world average.

Data on children held in prisons as well as children imprisoned with their mothers is not readily available, although snapshot data does emerge from time to time. For example, in South Africa, as on 29 February 2024 there were 61 infants in prison with their mothers.<sup>4</sup>

The data referred to above covers prisons with reference to 'prison' in the conventional sense of the word, that is, an officially-designated facility under the state's prison administration used to

1 OAU African Charter on Human and Peoples' Rights, Banjul, 1986, art 18(3).

2 A majority of African prisons do not provide for infants' and young children's basic necessities such as formula, bottles, clothing and hygiene products, with sporadic exceptions (Botswana, Ethiopia, Malawi, Namibia, South Africa, Swaziland, Tanzania, Uganda); see A Miamingi 'The applicability of the best interests principle to children of imprisoned mothers in contemporary Africa: Between hard and soft law' (2020) 20 *African Human Rights Law Journal* 713.

3 WPB 'World prison brief – Africa' (2024), <https://www.prisonstudies.org/map/africa> (accessed 8 October 2024).

4 Department of Correctional Services 'Daily reporting on inmate population – February 2024' (Dept of Correctional Services 2024).

detain persons prior to the conclusion of their trials as well as for the purposes of serving a term of imprisonment. It is also the case in some countries that, due to limited prison space, police holding cells are also used for pre-trial detainees apart from the normal movement of suspects through police holding cells; typically, a 24 or 48-hour period. Police holding cells are generally accepted, even if in good condition, not to be suitable for detention extending beyond a few days at most. Accurate data on how long suspects remain in police cells as well as the number of children held there with their mothers unfortunately is unknown and worthy of investigation. The African Children's Charter does not define what imprisonment means and to an extent the term applies to other situations where people are not free to leave at their own will.<sup>5</sup>

The Preamble to the Charter notes the following:

Noting with concern that the situation of most African children, remains critical due to the unique factors of their socio-economic, cultural, traditional and developmental circumstances, natural disasters, armed conflicts, exploitation and hunger, and on account of the child's physical and mental immaturity he/she needs special safeguards and care,

While the Preamble to the Charter does not specifically identify the deprivation of liberty or exposure to the criminal justice system as a distinct threat to the well-being of children, it can be assumed that the plea for 'special safeguards and care' as noted would also extend to children deprived of their liberty, be it that they are suspects or that they are imprisoned with their mothers.

### 3 Legal interpretation

#### 3.1 Special treatment

The African Children's Charter places an obligation on states to provide special care as it uses the wording 'shall undertake to provide special treatment'. It does not qualify or limit the obligation with wording such as 'subject to available resources', the duration of custody, sentence status or sentence length. The obligation is immediate and unqualified and, with reference to General Comment 1,<sup>6</sup> starts from the moment of arrest until release and reintegration.<sup>7</sup> The General Comment further notes that the word 'special' implies a higher level of obligation than in ordinary situations, and that this not only applies to the substance of care provided but also with regard to the urgency required.<sup>8</sup> A priority requirement would then be that there is recognition in law of the situation where children are imprisoned with their mothers and that the law provides for alternatives. The African Children's Committee has lamented situations where there is no or inadequate legal provision for such situations.<sup>9</sup>

5 UN 'Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2006), art 4(2), <https://www.ohchr.org/en/instruments-mechanisms/instruments/optional-protocol-convention-against-torture-and-other-cruel> (accessed 8 October 2024).

6 The fact that this was the first General Comment to be adopted by the Committee was probably occasioned by the fact that the provision has no equivalent in CRC, and hence there would be no overlap with the work of the CRC Committee.

7 African Children's Committee General Comment 1 (Article 30 of the African Charter on the Rights and Welfare of the Child) on Children of Incarcerated and Imprisoned Parents and Primary Caregivers (2013) para 31.

8 General Comment 1 (n 7) para 34.

9 African Children's Committee Concluding Observations and Recommendations by the African Committee of Experts on the Rights and Welfare of the Child to the Government of Lesotho on Its Initial Report on the Status of Implementation of the African Charter on the Rights and Welfare of the Child (2015) para 53; African Children's Committee Concluding Observations and Recommendations of the African Committee of Experts on the Rights and Welfare of the Child to the Kingdom of Lesotho on Its First Periodic Report on the Implementation of the African Charter on the Rights and Welfare of the Child (2023) para 43; African Children's Committee Concluding Observations and Recommendations of the African Committee of Experts on the Rights and Welfare of the Child on the Initial Report of the Republic of Malawi on the Implementation of the African Charter on the Rights and Welfare of the Child' (2018) para 32; African Children's Committee Concluding Observations and Recommendations by the African Committee of Experts on the Rights and

The special treatment requirement should also be read together with the best interests of the child requirement set out in the Convention on the Rights of the Child (CRC) and the Children's Charter.<sup>10</sup> It is noted, in a plain reading of the Charter, that it is concerned with the lawful imprisonment of the mother. It does not address unlawful imprisonment or imprisonment by non-state actors.

The criminal justice process starts formally with arrest, and it is thus advisable, with reference to article 30, to look at the process in its entirety and not concentrate attention on sentencing, and thus to pay particular attention to the roles of the police and prosecution service. The International Covenant on Civil and Political Rights (ICCPR) guarantees the right to be free from arbitrary arrest and detention; to be informed of the charges; to be brought before a court (or other appropriate authority); not to be detained prior to trial unless justified; the right to challenge one's detention; and to claim compensation in the event of unlawful arrest and detention.<sup>11</sup> These rights are then echoed in the African Charter on Human and Peoples' Rights (African Charter).<sup>12</sup> Further guidance is given in the African Commission on Human and Peoples' Rights (African Commission)'s Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (Luanda Guidelines), which note the following:<sup>13</sup>

- (1)(c) Where appropriate, particularly for minor crimes, efforts should be made to divert cases away from the criminal justice system and utilise recognised and effective alternatives that respect applicable international law and standards. Alternatives to arrest and detention should be promoted under a framework that includes reasonable accommodation for persons with disabilities, and a framework that promotes the best interests of children in conflict with the law.

It is generally the requirement that the arrest of an individual requires a warrant of arrest issued by a judicial authority (for instance, a prosecutor or magistrate). However, police officials (and other officials with powers of arrest) are also afforded the power to arrest without a warrant, which power is discretionary. When executing such an arrest, it flows that the decision can be tested in court and therefore needs to be based on evidence, be rational and in the interests of justice.

The Luanda Guidelines also note:<sup>14</sup>

- Detention in police custody shall be an exceptional measure. Legislation, policy, training and standard operating procedures shall promote the use of alternatives to police custody, including court summons or police bail or bond.
- States should establish measures to promote transparency with regard to police custody, including inspections by judicial authorities or an independent body and lay visiting schemes involving local community representatives and legal and health personnel.

Ideally the necessary standing orders, or similar instrument, need to be in place to guide decision makers at operational level on how to deal appropriately, in the spirit of rendering 'special treatment', when contemplating or executing an arrest of a mother with a child. Such an arrest should be done in

Welfare of the Child on the Initial Report of the Islamic Republic of Mauritania on the Status of Implementation of the African Charter on the Rights and Welfare of the Child (2019) para 46.

10 CRC Committee General Comment 7 (2005) Implementing Child Rights in Early Childhood' (Geneva: UNCRC, 2006); CRC Committee General Comment 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (art 3 para 1) (Geneva: UNCRC, 2013).

11 International Covenant on Civil and Political Rights (1976) art 9 (ICCPR).

12 Arts 6 & 7 African Charter.

13 African Commission Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (Luanda 2015) art 1(c), <https://achpr.au.int/index.php/en/node/853> (accessed 8 October 2024).

14 African Commission Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa Art 6.

such a manner so as to have as little impact as possible if there are children present (that is, in a child-sensitive manner), or the arrest be executed in their absence.<sup>15</sup>

Immediately following arrest and ensuing deprivation of liberty, typically in police custody, it must be determined, with some urgency, if detention pending trial is required. It is in this sense that 'special treatment' is required at an early stage to assess the personal circumstances of the care giver and the child against objective standards, with the overriding concern being the best interests of the child.<sup>16</sup> Proper and thorough records must be kept of children admitted with their mothers, especially when transferred from one institution to another.<sup>17</sup> Noting that detention should only be used as a measure of last resort, the other standards would then relate to the risks of abscondment, interference with evidence or witnesses, and the interests of justice. Handling the case within the normal timelines prescribed by law and subject to the ordinary policies and directives would not constitute 'special treatment'. Special treatment would rather mean that measures are taken to expedite decision making, avoiding custody and exploring alternatives. It similarly means that there should be a warning mechanism in place if such cases are not progressing at a satisfactory speed.

The African Children's Committee has expressed its concern regarding the detention of religious minorities resulting in large-scale arrests, which also included the arrests of children with care givers, who are then detained for an unspecified period of time.<sup>18</sup> The Committee urged the use of alternatives and avoiding the detention of mothers with children.

Domestic legislation typically provides for some form of conditional release by the police under certain conditions. In some jurisdictions the prosecution service also has the discretion to grant bail prior to first appearance under certain conditions.<sup>19</sup> The implication is that the applicable policy and standing orders need to provide guidance to prosecutors in matters where a mother has been arrested with a child. Being the primary care giver can, under the appropriate conditions, at least add weight to a bail application and even serve as exceptional circumstances in certain cases.<sup>20</sup>

Under the obligation of 'special treatment', it is well within the powers of the prosecution service to formulate guidelines on dealing with matters where a mother has been arrested with a child. On the role of prosecutors, the United Nations Office on Drugs and Crime (UNODC) has noted that

[t]he creation of established protocols providing guidance to prosecutors when dealing personally with those who require special assistance can assist in ensuring that all those who are required to participate in the criminal trial process are accommodated in a manner where they can fully participate in that process.<sup>21</sup>

Such guidelines could deal with, but are not limited to, its position on bail and conditional release; the conditional and unconditional withdrawal of charges (for instance, diversion); plea and sentence

15 Council of Europe Recommendation CM/Rec(2018)5 of the Committee of Ministers to Member States Concerning Children with Imprisoned Parents (Strasbourg: Council of Europe, 2018) para 8, <https://edoc.coe.int/en/children-s-rights/7802-recommendation-cmrec20185-of-the-committee-of-ministers-to-member-states-concerning-children-with-imprisoned-parents.html> (accessed 8 October 2024).

16 Art 4(1) African Children's Charter.

17 Council of Europe (n 15) paras 13 & 14.

18 African Children's Committee Concluding Observations and Recommendations by the African Children's Committee on the Combined Period Report of the State of Eritrea on the Status of Implementation of the African Charter on the Rights and Welfare of the Child (2022) para 50.

19 Criminal Procedure Act 51 of 1977 sec 59A.

20 A Skelton & M Courtenay 'The impact of children's rights on criminal justice' (2012) 25 *SA Journal of Criminal Justice* 181.

21 UNODC *The status and role of prosecutors – A United Nations Office on Drugs and Crime and International Association of Prosecutors guide* (2014) 51, [https://www.unodc.org/documents/justice-and-prison-reform/14-07304\\_ebook.pdf](https://www.unodc.org/documents/justice-and-prison-reform/14-07304_ebook.pdf) (accessed 8 October 2024).



agreements; and the formulation and amendment of charges in light of certain facts. Where alternatives to prosecution are feasible in law, these need to be actively explored and guided by standing orders or a similar instrument. The UN *Guidelines on the role of prosecutors* read in this regard:<sup>22</sup>

- 18 In accordance with national law, prosecutors shall give due consideration to waiving prosecution, discontinuing proceedings conditionally or unconditionally, or diverting criminal cases from the formal justice system, with full respect for the rights of suspect(s) and the victim(s). For this purpose, states should fully explore the possibility of adopting diversion schemes not only to alleviate excessive court loads, but also to avoid the stigmatisation of pre-trial detention, indictment and conviction, as well as the possible adverse effects of imprisonment.
- 19 In countries where prosecutors are vested with discretionary functions as to the decision whether or not to prosecute a juvenile, special consideration shall be given to the nature and gravity of the offence, protection of society and the personality and background of the juvenile. In making that decision, prosecutors shall particularly consider available alternatives to prosecution under the relevant juvenile justice laws and procedures. Prosecutors shall use their best efforts to take prosecutory action against juveniles only to the extent strictly necessary.

### 3.2 Non-custodial options

The Kampala, Kadoma and Ouagadougou Declarations all called for the wider availability of non-custodial sentences and at the time, community services orders were very much in vogue.<sup>23</sup> The UN Standard Minimum Rules for Non-Custodial Measures (Tokyo Rules) list the following non-custodial sentence dispositions: verbal sanctions, such as admonition; reprimand and warning; conditional discharge; status penalties; economic sanctions and monetary penalties, such as fines and day-fines; confiscation or an expropriation order; restitution to the victim or a compensation order; suspended or deferred sentence; probation and judicial supervision; a community service order; referral to an attendance centre; house arrest; any other mode of non-institutional treatment; or any combination of the preceding.<sup>24</sup> The Tokyo Rules also encourage the use of measures in lieu of custodial time, such as furlough and half-way houses; work or education release; various forms of parole; remission and pardon.<sup>25</sup> The Tokyo Rules therefore do not see an ‘all or nothing’ interpretation in the use of non-custodial measures and recognise that a fair sentence may include a custodial component. This is in line with the observation in the African Children’s Committee General Comment 1 reading that ‘[a]rticle 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.’<sup>26</sup> There should, therefore, in general, be available to courts a range of sentencing options in order to support the individualisation of punishment and restrict the use of imprisonment in general.<sup>27</sup>

#### 3.2.1 Role of the prosecution

Article 12 of the *Guidelines on the role of prosecutors* notes that prosecutors ‘shall, in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect human dignity

22 UN ‘Guidelines on the role of prosecutors’ (Cuba, Havana: Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990) secs 18-19, <https://www.ohchr.org/en/professionalinterest/pages/roleofprosecutors.aspx> (accessed 8 October 2024).

23 L Muntingh ‘Alternative sentencing in Africa – Some lessons learnt and future prospects’ in J Sarkin (ed) *Human rights in African prisons* (2008) 178-200.

24 UN United Nations Standard Minimum Rules for Non-Custodial Measures (Tokyo Rules) 1990 art 8(2).

25 UN (n 24) art 9(2).

26 African Children’s Committee General Comment 1 (n 7) para 39.

27 Tokyo Rules (n 24) art 1(5).

and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system'. This should be read with article 18 of the *Guidelines on the role of prosecutors* cited above with particular reference to avoiding the adverse consequences of imprisonment. To this end, it is relevant how charges are formulated and when convicted, what sentence the prosecution is asking for. It is then incumbent on the prosecutor to not simply 'seek the maximum penalty that might be possible under the offence or offences of conviction, but instead balance the interests present'.<sup>28</sup> It is advisable that there are protocols in place to guide prosecutors when dealing with vulnerable persons.<sup>29</sup> The prosecution has a potentially pivotal role in alerting the court to important factual matters, such as that the accused has a child of which they are the primary care giver. Standards for professional and ethical conduct of prosecutors would require that they inform the court of important circumstantial facts.<sup>30</sup> Elsewhere it has been remarked that '[t]he prosecution should also contribute what information it can; its normal adversarial posture should be relaxed when the interests of children are involved'.<sup>31</sup>

### 3.2.2 *Mandatory minimum sentences*

A number of jurisdictions provide for mandatory minimum sentences, where the law requires judges to impose a specific minimum prison term for certain crimes. A number of African countries have mandatory minimum sentences for certain offences such as drug trafficking, murder and terrorism. A mandatory minimum custodial sentence would be in contravention of article 30(1)(a) of the Charter as a mandatory minimum sentence obliges the court to impose a custodial sentence. South Africa is a useful example to explore some of the issues since the history of mandatory sentencing there is well documented and there are some noteworthy decisions. An important feature of the South African legislation is that it allows the sentencing court to deviate from the prescribed minimum if there are 'substantial and compelling circumstances' to do so.<sup>32</sup>

In *Noorman v S*<sup>33</sup> it was found that being a parent and primary care giver of a child are substantial and compelling circumstances to deviate from the mandatory minimum sentence in South Africa. The appellant murdered her abusive common law husband, attracting the prescribed minimum sentence of 15 years. The trial court noted that there were substantial and compelling reasons to deviate but not deviate substantially, and imposed 13 years' imprisonment. On appeal, the Supreme Court of Appeal criticised the regional court for not conducting a thorough inquiry and actively engaging with the best interests of the child principle.<sup>34</sup>

The danger of mandatory minimum sentences is that they, on the one hand, limit the court's discretion by prescribing a mandatory minimum and, on the other, may not provide guidance on what are recognised substantial and compelling reasons to deviate from the prescribed minimum, allowing for misguided interpretations and ignoring important information when imposing sentence.

### 3.2.3 *The best interests of the child and sentencing*

Since article 4(1) of the African Children's Charter requires that the best interests of the child 'shall be the primary consideration' in all actions, the question then arises as to how this can be served in sentencing the primary care giver or parent that offended the law, yet balancing the interests of society.

28 UNODC (n 21) 48.

29 UNODC (n 21) 47-51.

30 UN (n 22) arts 8 & 12.

31 *M v S* [2007] ZACC 18 (Constitutional Court 2007).

32 Criminal Law Amendment Act (as Amended) Act 105 of 1997 sec 51(3).

33 2011 ZAWCHC 120.

34 Skelton & Courtenay (n 20) 184.

General Comment 1 to the Charter alludes to the South African case of *M v S*. Briefly, the case involved a single mother of three boys who had been convicted in several credit card fraud matters. She was given a sentence of four years' direct imprisonment, and her children were without family support and heading for institutional care. Based on the case, the General Comment noted a number of procedural guidelines:<sup>35</sup>

- A sentencing court should find out whether a convicted person is a primary caregiver whenever there are indications that this might be so.
- The court should also ascertain the effect on the children concerned of a custodial sentence if such a sentence is being considered.
- 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.
- If the appropriate sentence is clearly non-custodial, the court must determine the appropriate sentence, bearing in mind the best interests of the child.
- Finally, if there is a range of appropriate sentences, then the court must use the principle of the best interests of the child as an important guide in deciding which sentence to impose.

The South African Constitution uses slightly different wording from the Charter's 'primary consideration' and states that 'the best interests of the child are of paramount importance in every matter concerning the child'.<sup>36</sup> When the matter reached the Constitutional Court, the Court pointed out that the regional court magistrate handed down a custodial sentence without 'giving sufficient independent and informed attention' to the impact on the children of imprisoning M. The Constitutional Court observed that the High Court was not unsympathetic to the plight of M and her children, but should have actively engaged in enquiries and assessed the information gained. In essence, the Constitutional Court argued that the sentencing courts should have actively engaged with the constitutional obligation concerning the best interests of the child, and by virtue of this misdirection, the Constitutional Court was now entitled to consider the appropriateness of sentencing.<sup>37</sup> What the Court in effect required was 'special treatment' since a decision was being made that would impact on children and that required an active engagement by the trial court in assessing the impact of different sentencing options: The court must do something more than the usual where children are present.

There are instances where women have killed their partners or husbands to escape prolonged and/or intense domestic violence. Under such circumstances the child or children have most likely experienced victimisation, be that directly or indirectly, even if they were very young. There already is a substantial body of case law from a various jurisdictions dealing with the battered women syndrome and trial courts need to properly assess credible claims in this regard.<sup>38</sup>

### 3.3 Establish and promote measures alternative to institutional confinement for the treatment of such mothers

The purpose of article 30(1)(b) is to encourage the use of alternatives to institutional confinement by *establishing and promoting measures* that would facilitate and enable alternatives to institutional confinement. The purpose is to ensure that alternatives are considered consistently and that when

35 African Children's Committee General Comment 1 (n 7) para 36.

36 Constitution of the Republic of South Africa, 1996 sec 28(2).

37 *M v S* (n 31) para 48.

38 *S v Ferreira & Others* (245/03) [2004] ZASCA 29 (Supreme Court of Appeal 1 April 2004); *Rex v Shongwe* High Court Swaziland 2008; *R v Bear* 44905161 (Provincial Court of Saskatchewan 26 March 1999); *People v Humphrey* 13 Cal.4th 1073 S045985 (California Supreme Court 1996); *R v Thornton* [1996] 1 WLR 1174 (England and Wales Court of Appeal (Criminal Division) 1995); *Malliga v State by Inspector of Police* (Madras High Court 2002).



a mother with a child is facing imprisonment, or is already imprisoned, there should be clear and well-known guidance for decision makers. This would then apply to the pre-trial stage as well as, if convicted, following the trial. The General Comment does not elaborate on what these measures could be, but some guidance can be gleaned from the Bangkok and Tokyo Rules respectively.

The Tokyo Rules note that there should be flexibility with regard to the nature and gravity of the offence in the context of the personality and background of the offender (also accused) and protection of society with a view to preventing the unnecessary use of imprisonment.<sup>39</sup> To this end the Tokyo Rules advise that the definition and application of non-custodial measures be described in law that would deal with the application criteria, covering the gravity of the offence and the personality, background and the offender and the purpose of sentencing.<sup>40</sup> The Tokyo Rules further encourage the non-trial resolution of the case, be that by the police or prosecution service,<sup>41</sup> and notes further that pre-trial detention should be a measure of last resort<sup>42</sup> and that alternatives to pre-trial detention should be used as early as possible.<sup>43</sup> The Bangkok Rules cross-refer to the Tokyo Rules and then add that 'gender-specific options for diversionary measures and pretrial and sentencing alternatives shall be developed within member states' legal systems, taking account of the history of victimisation of many women offenders and their caretaking responsibilities'.<sup>44</sup> The Bangkok Rules further state that resources need to be availed to develop and make accessible non-custodial measures with interventions to address common underlying issues resulting in women's contact with the criminal justice system. Importantly, the relevant rule adds that such programmes need to take account of women's child care responsibilities and to provide for women-only services.<sup>45</sup>

When sentencing, courts should have the power to consider mitigating circumstances, such as the nature of criminal conduct and frequency of such conduct in light of women's child care responsibilities.<sup>46</sup> There equally is scope for suspending the implementation of a custodial sentence for a reasonable period (for instance, six months in Côte d'Ivoire)<sup>47</sup> to allow the mother to take care of the child following birth. The Committee has recommended that

before pronouncing a conviction, the courts should determine whether those convicted have dependent children and take into consideration the impact of all possible convictions on children. The best interests of the child should be a primary consideration when choosing a sentence; non-custodial sentences that are least harmful to children should be considered as a priority.<sup>48</sup> [Original: *Le Comité recommande également à l'État Partie qu'avant de prononcer une condamnation, les cours devraient établir si les personnes reconnues coupables ont des enfants dépendants et prendre en considération l'impact de toutes les condamnations possibles sur les enfants.*]

39 Tokyo Rules (n 24) Rule 2.3.

40 Tokyo Rules (n 24) Rules 3.1-3.2.

41 Tokyo Rules (n 24) Rule 5.

42 Tokyo Rules (n 24) Rule 6.1.

43 Tokyo Rules (n 24) Rule 6.2; Council of Europe (n 15) para 2.

44 United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (Bangkok Rules) 1990 Rule 57.

45 Bangkok Rules (n 44) Rule 60.

46 Bangkok Rules (n 44) Rule 61.

47 African Children's Committee *Observations Finales et Recommandations Du Comité Africain D'experts Sur Les Droits et Le Bien-Être de l'Enfant* (CAEDBE) *Sur Le Premier Rapport Périodique de La République de Côte d'Ivoire Sur La Mise En œuvre de La Charte Africaine Sur Les Droits et Le Bien-Être de l'Enfant* (2023) para 43.

48 African Children's Committee *Observations Finales et Recommandations Du Comité Africain d'Experts Sur Les Droits et Le Bien-Être de l'Enfant* (CAEDBE) *Sur Le Rapport Périodique de La République de Guinée Sur La Mise En œuvre de La Charte Africaine Sur Les Droits et Le Bien-Être de l'Enfant* (2021) para 43.

The Bangkok Rules further provide for the scope of non-custodial sentences and the need for non-custodial sentences for pregnant women and women with dependent children. It is first noted that conditional release mechanisms (for instance, parole) need to favourably take into account women's caretaking responsibilities. It is noted further that non-custodial options are preferred for pregnant women and women with dependent children, but that a custodial option could be considered if the offence was serious or violent or she presents a continuing threat, and after taking into account the best interests of the child.<sup>49</sup> Legislation could also provide for a minimum term of the sentence to be served in custody prior to conditional release.

### 3.4 Establish special alternative institutions for holding such mothers

General Comment 1 and other instruments emphasise that imprisonment, as a rule, is a measure of last resort and this is especially so in the event that children are involved. It generally is the case that prison conditions in Africa fail to meet the minimum standards of humane detention with reference to at least available accommodation, resulting in overcrowded facilities; access to adequate nutrition; access to proper health care; and rapidly-decaying infrastructure. In addition to these limitations, it is noted that access to support services, education and training are frequently limited if not non-existent. Prisoners also remain highly reliant on family members to bring essentials such as soap, medicine, bedding and/or cash to purchase essential items that the state ought to provide.<sup>50</sup> Visiting imprisoned family members in prison brings new and unplanned expenses to the household, often resulting in a cessation of contact and support due to cost.<sup>51</sup> The establishment of such institutions where mothers and children can be accommodated will most likely be a function of resource availability, but it is not impossible to meet these requirements in a flexible manner. The aim should therefore be to meet these standards within available facilities and, where possible, add infrastructure to address special needs.

It is a general requirement (see UNSMR 2015) that adults are detained separately from children (that is, children who are awaiting trial or sentenced); men separately from women; and sentenced prisoners separately from unsentenced prisoners.<sup>52</sup> The UNSMR (2015) provides as follows with regard to women in prison:

#### Rule 28

In women's prisons, there shall be special accommodation for all necessary prenatal and postnatal care and treatment. Arrangements shall be made wherever practicable for children to be born in a hospital outside the prison. If a child is born in prison, this fact shall not be mentioned in the birth certificate.

#### Rule 29

- (1) A decision to allow a child to stay with his or her parent<sup>53</sup> in prison shall be based on the best interests of the child concerned. Where children are allowed to remain in prison with a parent, provision shall be made for
  - (a) internal or external childcare facilities staffed by qualified persons, where the children shall be placed when they are not in the care of their parent;

49 Bangkok Rules (n 44) Rules 63-64.

50 L Muntingh & J Redpath 'The socio-economic impact of pre-trial detention in three African countries' (2018) 10 *The Hague Journal on the Rule of Law* 139-164.

51 As above.

52 United Nations Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules) (New York 2015) Rules 11 & 112.

53 The African Children's Charter refers explicitly to mothers, but the General Comment takes a more gender neutral stance, broadening the scope to parents. Miamingi (n 2) argues that although this is a purposive interpretation of art 30, '[t]he wording of article 30(d) is unequivocal: "a mother shall not be imprisoned with her child"', and there is therefore a seeming incompatibility of the General Comment with the Charter text.

- (b) child-specific health care services, including health screenings upon admission and ongoing monitoring of their development by specialists.
- (2) Children in prison with a parent shall never be treated as prisoners.

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) does not deal specifically with children of imprisoned mothers but does set general requirements in respect of women's access to health care and, more specifically, with regard to pre- and post-natal care.<sup>54</sup>

- 14(2) States Parties shall take all appropriate measures to
- (a) provide adequate, affordable and accessible health services, including information, education and communication programmes to women especially those in rural areas;
  - (b) establish and strengthen existing pre-natal, delivery and post-natal health and nutritional services for women during pregnancy and while they are breast-feeding.

The Bangkok Rules set a number of practical standards pertaining to the treatment and conditions of detention of pregnant women, breastfeeding mothers and mothers with children in prison.<sup>55</sup>

In Rules 48 to 52 the Bangkok Rules deal with the treatment and conditions of detention of pregnant women, breastfeeding mothers and mothers with children in prison, which are discussed in brief below. The Bangkok Rules, differently from the African Children's Charter, do not seem to envisage 'separate alternative institutions' for such mothers, and the standards set in the Bangkok Rules are then understood to set minimum standards and to leave it to the prison administration to meet those standards. It therefore does not set the expectation that there ought to be a 'separate alternative institution' – the purpose for this should be spelled out. If states have the resources to provide such alternative institutions, this would be encouraged, but resource constraints are real.

#### Rule 48

- (1) Pregnant or breastfeeding women prisoners shall receive advice on their health and diet under a programme to be drawn up and monitored by a qualified health practitioner. Adequate and timely food, a healthy environment and regular exercise opportunities shall be provided free of charge for pregnant women, babies, children and breastfeeding mothers.
- (2) Women prisoners shall not be discouraged from breastfeeding their children, unless there are specific health reasons to do so.
- (3) The medical and nutritional needs of women prisoners who have recently given birth, but whose babies are not with them in prison, shall be included in treatment programmes.

Rule 48 deals with the basic requirements of pre- and post-natal care to ensure that the mother and (unborn) child are healthy through access to health care, proper nutrition, a healthy environment and adequate exercise. The Rule furthermore encourages breastfeeding and therefore raises the question of whether the domestic prison administration has a breastfeeding policy. The recommended exclusive breastfeeding period according to the World Health Organisation (WHO) is six months and then mixed feeding until the age of 23 months.<sup>56</sup> There appears to be a wide age range up to which children

54 African Union Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) (African Union 2003) art 14(2).

55 Bangkok Rules (n 44).

56 WHO 'Breastfeeding' WHO 2015, <https://www.who.int/news-room/questions-and-answers/item/breastfeeding> (accessed 8 October 2024).

can remain with their imprisoned mothers: two years (for instance, South Africa);<sup>57</sup> three years (for instance, Benin,<sup>58</sup> Rwanda<sup>59</sup> and Burundi)<sup>60</sup> and five years (for instance, Mauritania).<sup>61</sup>

#### Rule 49

Decisions to allow children to stay with their mothers in prison shall be based on the best interests of the children. Children in prison with their mothers shall never be treated as prisoners.

The African Children's Charter deals with the best interests of the child in article 4 and also provides that if the child is capable of communicating their own views, such views must be taken into consideration by the relevant authority. As noted, different jurisdictions provide for different periods that children can remain with their mothers in prison. Nonetheless, the Commentary on the Bangkok Rules<sup>62</sup> notes that issues to be taken into account would include the conditions in prison and the quality of care the child can expect to receive on the outside if they do not remain with their mother. The second issue flowing from this is that prison administrations should demonstrate a level of flexibility and that rigid adherence to policy may not always produce the best course of action. If children remain with their mothers in prison, the internal environment should be as close as possible to a normal environment in society. The decision for a child to remain with its mother in prison needs to be provided for in law, ensuring that the decision is based on a proper assessment by professionals who are familiar with the best interests requirement. As time passes, it will be required to assess the situation on a regular basis, noting, for example, the recommendations from WHO regarding the minimum exclusive breastfeeding period. To this should also be added the possibilities for release and perhaps a more flexible approach if a release date is within the not-too-distant future. The available infrastructure, conditions of detention and access to services in and outside of prison are all factors to be taken into account when children stay with their mothers in prison and the conditions attached to that.

#### Rule 50

Women prisoners whose children are in prison with them shall be provided with the maximum possible opportunities to spend time with their children.

The first implication of this rule is that a mother's access to her child should not be used as a disciplinary or punitive measure. A further issue is that while all prisoners are required to perform some basic cleaning of their cells and environment, it would be contrary to this rule to expect mothers with young children with them in prison to perform work that goes beyond basic cleaning of the immediate in environment. A further implication is that mothers must be able to spend time with the children in a suitable environment.

57 Correctional Services Act 111 of 1998 sec 20(1).

58 African Children's Committee Concluding Observations and Recommendations by the African Children's Committee on the Initial Report of the Republic of Benin on the Status of Implementation of the African Charter on the Rights and Welfare of the Child (2019) para 42.

59 African Children's Committee Concluding Observations and Recommendations by the African Children's Committee on the on the Second and Third Periodic Report of the Republic of Rwanda on the Status of Implementation of the African Charter on the Rights and Welfare of the Child (2015) para 35; African Children's Committee Concluding Observations and Recommendations by the African Children's Committee on the on the Second Periodic Report of the Republic of Rwanda on the Status of Implementation of the African Charter on the Rights and Welfare of the Child' (2019) para 45.

60 African Children's Committee Concluding Observations and Recommendations by the African Children's Committee on the Initial Report of the Republic of Burundi on the Status of Implementation of the African Charter on the Rights and Welfare of the Child' (2018) para 42.

61 African Children's Committee Concluding Observations and Recommendations by the African Children's Committee on the Initial Report of the Islamic Republic of Mauritania on the Status of Implementation of the African Charter on the Rights and Welfare of the Child para 46.

62 Bangkok Rules (n 44) Rule 41.

## Rule 51

- (1) Children living with their mothers in prison shall be provided with ongoing health-care services and their development shall be monitored by specialists, in collaboration with community health services.
- (2) The environment provided for such children's upbringing shall be as close as possible to that of a child outside prison.

When managed properly, the structured environment of a well-run prison enables access to proper healthcare services and the accurate monitoring with record keeping of the growth and development of the child. The prison environment should also ensure that such children access health services in line with national health policy and standards, such as vaccinations.

## Rule 52

- (1) Decisions as to when a child is to be separated from its mother shall be based on individual assessments and the best interests of the child within the scope of relevant national laws.
- (2) The removal of the child from prison shall be undertaken with sensitivity, only when alternative care arrangements for the child have been identified and, in the case of foreign-national prisoners, in consultation with consular officials.
- (3) After children are separated from their mothers and placed with family or relatives or in other alternative care, women prisoners shall be given the maximum possible opportunity and facilities to meet with their children, when it is in the best interests of the children and when public safety is not compromised.

The *UN guidelines for the alternative care of children* note that the removal of children

- should be based on rigorous assessment, planning and review, through established structures and mechanisms,
- should be carried out on a case-by-case basis,
- should be done by suitably qualified professionals in a multidisciplinary team,
- should involve full consultation at all stages with the child, according to his/her evolving capacities, and with his/her parents or legal guardians,
- all concerned should be provided with the necessary information on which to base their opinion.
- states should make every effort to provide adequate resources and training for the professionals responsible for determining the best form of care.<sup>63</sup>

Tobin adds that the separation of a child from the parent must be necessary for the best interest of the child - the necessity principle.<sup>64</sup> CRC in General Comment 14 noted that such separation should occur only as a last resort, such as when the child is in danger of experiencing imminent harm or when otherwise necessary, and the separation should not occur if less intrusive measures could protect the child. Tobin concludes that separation must only be considered after all other reasonable and available alternative to separation have been exhausted.<sup>65</sup> To assess the best interests of the child, the following should be considered:<sup>66</sup>

- the child's own freely-expressed opinions and wishes consistent with article 12 [of CRC];
- the views and capacities of the child's family members (parents, siblings, and other interested parties);
- the level of risk associated with the child's current and potential alternative living arrangements;
- the likely effects of separation of a child from his or her parents and the potential for family reintegration;
- any special developmental needs which the child may have; and

63 UN *Guidelines for the alternative care of children* (2019) para 57.

64 J Tobin (ed) *The UN Convention on the Rights of the Child: A commentary* (2019) 320.

65 As above.

66 Tobin (n 64) 321.



- any other issues which are appropriate including for example the child's ethnic, religious, cultural, or linguistic background.

The commentary on the Bangkok Rules notes that if a child is separated from the mother, continued communication between the mother and child should be made possible to limit the risk of psychological damage caused by the separation and, furthermore, if possible, provide for extended visits and/or home leave for the mother to assist with the settling of the child with the carer outside of prison.<sup>67</sup>

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

As noted in General Comment 1, the sub-article reflects the importance placed in the African Children's Charter on the importance of a child growing up in a suitable environment and that prison is deemed not to be that, unless it is in the best interests of the child.<sup>68</sup> When it indeed is in the best interests of the child to be in prison with their mother, the state has a duty to promote, protect and fulfil the rights of such children. Due to the mother's restriction of liberty, she cannot go out and seek to access the required services (for instance, health care) and resources (for instance, food, adequate accommodation, and so forth). She and the child are entirely dependent on the state for their well-being, which means that the state must establish and maintain the necessary structures and systems to ensure that the child is not disadvantaged in any way due to the mother's imprisonment.

In reflective summary, article 30(1)(a) requires that alternatives to custody must be considered first; article 30(1)(b) requires that the necessary measures be established as alternatives to custody, and article 30(1)(c) requires the establishment of facilities suitable for holding mothers with children. This logical chain is in pursuit of article 30(1)(d), namely, to ensure that children are not imprisoned with their mothers.

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

General Comment 1 clearly notes that the death penalty is 'not to be imposed on pregnant women and mothers of young children'. It further cites article 4(1)(j) of the Maputo Protocol to affirm the point. However, there is a difference here in that General Comment 1 refers to the imposition of the death penalty, while the Protocol refers to the execution of pregnant and nursing women: 'ensure that, in those countries where the death penalty still exists, not to carry out death sentences on pregnant or nursing women'.<sup>69</sup> In practical terms this would mean that the execution is postponed until breastfeeding is deemed to be at a level that the child can continue without it. Based on the WHO guidelines on breastfeeding noted above, this would be somewhere from seven to 24 months. It is difficult to see how the execution of the mother at this stage can in some way supersede the primary or paramount status of the best interests of the child. The Charter therefore sets a higher standard seeking the exclusion of the death penalty as a sentencing option for mothers. A subsequent resolution of the African Commission asked for better protection of women on death row.<sup>70</sup>

A move away from the death penalty was first endorsed by the African Commission in 1999 by urging states to limit the imposition of the death penalty only to the most serious crimes; consider establishing a moratorium on executions of the death penalty; and reflect on the possibility of abolishing the death

67 Bangkok Rules (n 44) Rule 41.

68 African Children's Committee General Comment 1 (n 7) para 54.

69 Maputo Protocol (n 54) art 4(2)(j).

70 African Commission Resolution on the Need for Better Protection of Women Sentenced to Death in Africa' (Banjul, 2021), <https://achpr.au.int/index.php/en/adopted-resolutions/483-resolution-need-better-protection-women-sentenced-death-afri> (accessed 8 October 2024).

penalty.<sup>71</sup> It is noted that this occurred shortly after the 1989 adoption by the United Nations General Assembly of the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty.<sup>72</sup> A 2008 resolution of the African Commission called for a moratorium on the death penalty<sup>73</sup> and in 2019 it called for the abolition of the death penalty.<sup>74</sup> A 2022 African Commission resolution monitoring progress on the abolition of the death penalty<sup>75</sup> noted that 25 state parties to the African Charter had abolished the death penalty in their legislation, being Angola, Benin, Burkina Faso, Burundi, Cape Verde, Chad Congo, Côte d'Ivoire, Djibouti, Gabon, Guinea, Guinea Bissau, Equatorial Guinea, Madagascar, Mauritius, Mozambique, Namibia, Central African Republic, Rwanda, São Tomé & Príncipe, Senegal, Seychelles, Sierra Leone, South Africa and Togo. The same resolution deplored the fact that at least 18 African states pronounced death sentences in 2021 (Botswana, Cameroon, Egypt, The Gambia, Ghana, Kenya, Malawi, Mali, Mauritania, Nigeria, Uganda, Democratic Republic of the Congo (DRC), Somalia, Sudan, South Sudan, Tunisia, Zambia and Zimbabwe) and that four of these carried out executions (Botswana, Egypt, Somalia and South Sudan).

The above brief history shows that there has been substantial progress in abolishing the death penalty in practice, if not in law. This development raises questions about the next ultimate sentence; that of life imprisonment, and whether the imposition of life imprisonment on such mothers would be in the best interests of the child. Life imprisonment means many different things in the different jurisdictions of Africa, and even in the same jurisdiction the meaning of life imprisonment may change.<sup>76</sup> It is not within the scope of the *Commentary* to delve into the detail of life imprisonment globally, or even in Africa. Nonetheless, it is useful to briefly reflect on some of the key issues raised by Van Zyl Smit and Appleton in their global study of life imprisonment.<sup>77</sup> The first concerns terminology, and they distinguish four types of life imprisonment under two broad categories, being formal and informal life sentences. Under formal life sentences there are two types being life without parole (LWOP) and life with parole (LWP). Release from LWOP technically is not possible, bar exceptional intervention from the executive, whereas in the case of LWP, there is a routine consideration for release. Under informal life sentences, the first type is a *de facto* life sentence where the court imposes an inordinately long fixed term of imprisonment, for instance, a hundred years. The second type is the *post-conviction indefinite detention* and this may take on a variety of forms that are not formally called 'life imprisonment', but has the effect of life imprisonment. There are many variations and examples, which include the sentence of 'imprisonment for public protection' in England and Wales between 2005 and 2012 where release was only possible with the approval of a parole board.<sup>78</sup> Another example is from South Africa where a court could declare a person a 'dangerous criminal', impose an indefinite prison term but with

71 African Commission Resolution Urging States to Envisage a Moratorium on Death Penalty' (Banjul, 1999), <https://achpr.au.int/index.php/en/adopted-resolutions/42-resolution-urging-states-envisage-moratorium-death-penalty-achpres4> (accessed 8 October 2024).

72 UN Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty (New York 1989), <https://www.ohchr.org/en/instruments-mechanisms/instruments/second-optional-protocol-international-covenant-civil-and> (accessed 8 October 2024).

73 Resolution Calling on State Parties to Observe a Moratorium on the Death Penalty 2008, <https://achpr.au.int/index.php/en/adopted-resolutions/136-resolution-calling-state-parties-observe-moratorium-death-penalty> (accessed 8 October 2024).

74 Resolution on the Abolition of the Death Penalty in Africa (Banjul 2019), <https://achpr.au.int/index.php/en/adopted-resolutions/416-resolution-abolition-death-penalty-africa-achpr-res-416-l> (accessed 8 October 2024).

75 African Commission Resolution on the Death Penalty and the Prohibition of Torture and Cruel, Inhuman or Degrading Punishment or Treatment (Banjul 2022), <https://achpr.au.int/index.php/en/adopted-resolutions/544-resolution-death-penalty-and-prohibition-torture-and-cruel> (accessed 8 October 2024).

76 J Mujuzi 'Life imprisonment in South Africa: Yesterday, today, and tomorrow' (2009) 1 *SA Journal for Criminal Justice* 1-38.

77 D van Zyl Smit & C Appleton *Life imprisonment – A global human rights analysis* (2019).

78 As above.

a review date within the sentence jurisdiction of the court to review the sentence which it may then confirm, convert to a conditional release, or release the person unconditionally.<sup>79</sup>

The imposition of life imprisonment without parole would then in effect undermine the standard set in the following subsection being 30(1)(f), namely, that the essential aim of the penitentiary system is to be reformation, reintegration of the mother into the family and society. With life without parole there is, therefore, no possibility that the child could at some point in the future revive or establish a meaningful relationship with their mother.

In the case of life with parole, it would then mean that the so-called minimum non-parole period, the term served before the prisoner can be considered for release, should not be of such a length that it becomes meaningless or irrelevant to the life and development of the child. For example, in the case of South Africa, the minimum non-parole period is 25 years for all persons so sentenced.<sup>80</sup> This would present a significant obstacle if the aim is family and social reintegration.

Life imprisonment has not featured on the agenda of the African Children's Committee or on the agenda of the African Commission. With the progress made in the abolition of the death penalty across Africa, there may be some renewed pressure on defining the scope, purpose and appropriateness of life imprisonment for mothers of young children.

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

An essential requirement is that the staff that have contact with and work with children and their imprisoned mothers shall be trained in the appropriate legislation, policies and applicable standards.<sup>81</sup> In particular, this refers to the African Children's Charter and accompanying General Comment 1. There are a number of soft law instruments promoting prison reform with the overarching aim that imprisonment should have a constructive impact on the lives of prisoners and former prisoners. The UNSMR (2015) is instructive in this regard, noting that there should be proper health care to ensure that health does not present an obstacle to prisoners' rehabilitation;<sup>82</sup> that they be detained close to their communities of origin and places of social rehabilitation;<sup>83</sup> that prison administrations should actively engage the support of civil society to support rehabilitation;<sup>84</sup> that the prison administration should maintain a flexible approach in classification and security to encourage self-discipline and support rehabilitation;<sup>85</sup> that post-release public and/or private agencies should actively support re-entry and counter stigmatisation and exclusion;<sup>86</sup> that prisoners should be appropriately classified to support their rehabilitation;<sup>87</sup> that sentenced prisoners should have access to work and actively participate in their rehabilitation;<sup>88</sup> that the daily and weekly regime shall be of such a nature that there is sufficient time for work, rest and participation in rehabilitation activities;<sup>89</sup> that rehabilitation efforts must continue throughout the sentence and prisoners must be provided with the means and encouraged to

79 Criminal Procedure Act secs 286A-286B.

80 Correctional Services Act sec 73(6)(v).

81 Council of Europe (n 15) para 7.

82 Mandela Rules (n 52) Rule 25.

83 Mandela Rules (n 52) Rule 59; see also Council of Europe (n 15) para 16.

84 Mandela Rules (n 52) Rule 88; Council of Europe (n 15) para 6.

85 Mandela Rules (n 52) Rule 89.

86 Mandela Rules (n 52) Rule 90.

87 Mandela Rules (n 52) Rule 93.

88 Mandela Rules (n 52) Rule 96.

89 Mandela Rules (n 52) Rule 102.

maintain and build relation with family and friends in society;<sup>90</sup> that unsentenced persons should not be excluded from the programmes that could be to their benefit; and that such programmes imply in no way any measure of guilt in an non-convicted person.<sup>91</sup> When a parent is serving a prison sentence, due consideration should be given in sentence planning to programmes and other interventions to support a positive parent-child relationship.<sup>92</sup>

In respect of children imprisoned with their mothers, this would mean that there is regular and meaningful contact with the other parent/guardian or family, especially if it is foreseen that the mother will remain in prison and the child is to be placed in an appropriate form of care.<sup>93</sup> Visits by families to prisons can be costly, especially if such facilities are remote. Care should thus be taken to ensure, as far as possible, that such mothers remain accessible to their children.<sup>94</sup> The African Children's Committee has commended Ethiopia and Rwanda for involving civil society organisations in supporting mothers and children.<sup>95</sup> Visiting times and opportunities should also be scheduled that they do not interfere with other elements of a child's life wishing to visit an imprisoned parent.<sup>96</sup> Visiting facilities should also be conducive to children visiting in order that they 'can feel safe, welcome and respected'.<sup>97</sup>

Imprisoned parents who wish to do so should be supported to remain involved in the parenting of their children and be in contact with, for example, school administration, health and welfare services, and participate in taking decisions, unless it is not in the child's best interests.<sup>98</sup> This is reflective of the notion of through-care, namely, that prison authorities cooperate with other external agencies (governmental and non-governmental) to support current imprisonment as well as prepare for release, and support the release and re-entry process.<sup>99</sup>

Prison administrations are responsible for maintaining discipline in their institutions and allowance for visits by family and friends forms an important component of the incentives for good behaviour. The restriction of visits by a child who longer is with the mother due to the mother's ill-discipline would be a harsh but not unacceptable punishment, provided that some form of contact is maintained. Nonetheless, restricting contact between a parent and a child should be done only under exceptional circumstances and for the shortest possible period of time.<sup>100</sup> For example, the South African Correctional Services Act sets a minimum of one hour per month for visits for all categories of prisoners as the absolute minimum.<sup>101</sup>

The Africa Children's Charter does not set a minimum requirement for visits with reference to frequency and duration by children to an imprisoned parent, but has remarked that restricting contact

90 As above; Mandela Rules (n 52) Rule 107.

91 Mandela Rules (n 52) Rule 122.

92 Council of Europe (n 15) para 41.

93 Tobin (n 64) 315 & 325.

94 Council of Europe (n 15) para 3.

95 African Children's Committee Concluding Observations and Recommendations by the African Children's Committee on the First Periodic Report of the Federal Democratic Republic of Ethiopia on the Status of the Implementation of the African Charter on the Rights and Welfare of the Child (2021) para 33; African Children's Committee Concluding Observations and Recommendations by the African Children's Committee on the on the Second Periodic Report of the Republic of Rwanda on the Status of Implementation of the African Charter on the Rights and Welfare of the Child para 45.

96 Council of Europe (n 15) para 18.

97 Council of Europe (n 15) paras 20-21.

98 Council of Europe (n 15) para 27.

99 Council of Europe (n 15) para 44.

100 Council of Europe (n 15) para 30.

101 Correctional Services Act sec 13(3).

to one visit per month of 30 to 60 minutes negatively affects the child's right to parental care and may be harmful to their development.<sup>102</sup> In the event that a parent is imprisoned at a remote location, there should be flexibility with regard to visiting times and allow the combining of visiting entitlements.<sup>103</sup>

## **4 Conclusion**

The low numbers of women imprisoned in Africa and even fewer with children result in effective deprioritisation of compliance with article 30 of the African Children's Charter. State reporting to the African Children's Committee ought to be guided to report in more detail on the situation to ensure that accurate records are kept and that data is collected over time.<sup>104</sup> Practice and policy development will be significantly strengthened through consistent and transparent monitoring of all places of detention.

102 African Children's Committee Concluding Observations and Recommendations by the African Children's Committee on the Initial Report of the Islamic Republic of Seychelles on the Status of the Implementation of the African Charter on the Rights and Welfare of the Child (2022) para 45.

103 Council of Europe (n 15) para 22.

104 Council of Europe (n 15) para 5.