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## **Mothers behind Bars and Children left Outside**

**Balancing the Child's Best Interests and the Right to Family Life of the Imprisoned Mother:  
Need for Penal Reform?**

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## ABSTRACT

“Not my crime, still my sentence”<sup>1</sup>, in Europe it is estimated that there are around 37.000 children with an imprisoned mother. Women locked up behind bars are often mothers. Being in prison brings some difficulties to fully exercise their parental rights. Moreover, Article 3 of the Convention on the Rights of the Child expresses that the best interests of the child shall be a primary consideration in all actions concerning children. The principle has been criticised for being too vague and indeterminate and it certainly cannot be a primary consideration when the parent is convicted for having committed a crime. There are also no binding guidelines on how to balance the best interests of the child with other interests, such as the right to family life of the imprisoned mother and the right of the state to punish for crime, which might conflict. This research aims to contribute to the existing literature concerning children with imprisoned mothers and to help shift the narrative so that prison authorities and states assure a more child-considerate approach in criminal justice systems.

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<sup>1</sup> This is the slogan of the campaign of the organisation ‘Children of Prisoners Europe’. The campaign aims to raise greater awareness for children with a parent in conflict with the law. *See:* <https://childrenofprisoners.eu/>.

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## LIST OF ABBREVIATIONS

Bangkok Rules	United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders
CoE	Council of Europe
COPE	Children of Prisoners Europe
CRC	United Nations Convention on the Rights of the Child
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
GC	General Comment
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
INCCIP	International Coalition for Children with Incarcerated Parents
Nelson Mandela Rules	United Nations Standard Minimum Rules for the Treatment of Prisoners
ONLUS	Organizzazione Non Lucrativa di Utilità Sociale (Non-Profit Organisation of Social Utility)
PTSD	Post-traumatic Stress Disorder
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNGA	United Nations General Assembly
US	United States

## INTRODUCTION

1. **ISSUE** – It is estimated that millions of children around the world have a parent in prison. In Europe, available data suggest that approximately 723 064 children are separated from their imprisoned parents, among who 36 903 children with imprisoned mothers.<sup>2</sup> Although the female prison population is much smaller than the male prison population, in recent years the rate of imprisoned women has increased faster than the rate of imprisoned men.<sup>3</sup> Especially women from minority groups, including racial, ethnic, religious, national and linguistic minorities and indigenous women, are disproportionately deprived of their liberty.<sup>4</sup> Furthermore, a study from 1997 in the UK showed that over two thirds of imprisoned women are mothers with dependent children.<sup>5</sup>

From the children’s perspective, the loss of a primary caregiver due to imprisonment is more likely to occur when a mother, rather than a father is imprisoned, because women are more often the primary caregiver of their children.<sup>6</sup> This is especially the case for young children. Therefore, maternal imprisonment is thought to be more disruptive for a child.<sup>7</sup> The separation that maternal imprisonment brings has various adverse effects on both mothers and children.<sup>8</sup> The most important one is that children will need an immediate replacement carer.<sup>9</sup> In many cases, it will be the other parent or other family members who look after the children. However, there can be situations in which this is not possible; for example, if there are no other family members left or if the children are part of a criminal family. In these cases, children are taken into social care.

During the last 200 years, the effects of imprisonment have been discussed widely.<sup>10</sup> The broader field of prisoners and human rights almost exclusively focuses on the balance between the rights of the imprisoned on the one hand and society’s legitimate use of power on the other

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<sup>2</sup> The amount is calculated with a parenting rate of 1.3, which means that averagely every prisoner would have 1.3 children. It should also be noted that states do not systematically keep track on how many children each prisoner has. The number is therefore only an estimation. See: <https://childrenofprisoners.eu>.

<sup>3</sup> N. BOOTH, *Maternal Imprisonment and Family Life. From the Caregiver’s Perspective*, Bristol, Bristol University Press, 2021, 3; M. NOWAK, *The United Nations Global Study on Children deprived of liberty*, 2019, 346-347.

<sup>4</sup> M. NOWAK, *The United Nations Global Study on Children deprived of liberty*, 2019, 346-347.

<sup>5</sup> *Ibid.*

<sup>6</sup> S. MINSON, *Maternal Sentencing and the Rights of the Child*, London, Palgrave Macmillan, 2020, 2; P. SCHARFF-SMITH and L. GAMPELL, *Children of imprisoned parents*, 2011, <https://childrenofprisoners.eu/the-dihhr-report/>, 5; M. NOWAK, *The United Nations Global Study on Children deprived of liberty*, 2019, 346-347.

<sup>7</sup> S. MINSON, *Maternal Sentencing and the Rights of the Child*, London, Palgrave Macmillan, 2020, 18.

<sup>8</sup> N. BOOTH, *Maternal Imprisonment and Family Life. From the Caregiver’s Perspective*, Bristol, Bristol University Press, 2021, 1.

<sup>9</sup> *Ibid.*, 5.

<sup>10</sup> P. SCHARFF-SMITH, *When the Innocent are Punished. The Children of Imprisoned Parents*, London, Palgrave Macmillan, 2014, 8.

hand.<sup>11</sup> National courts and the European Court of Human Rights (hereinafter: ECtHR) have secured and enforced the rights of prisoners in several ways. Focus has been on the prisoner's right to family life, since maintenance of the prisoners' family and parental relationships can have positive effects for their rehabilitation process. At the same time, little attention has been given to rights of holders outside of prison and the question how imprisonment of a relative can influence their lives and human rights. In the case of children of prisoners, this can be explained because children have very limited personal access to legal remedies and their cases are typically not taken to court.<sup>12</sup> Hitherto, when the rights of others outside prison come into play, it is mostly in connection with the prisoner's right to privacy and family life.<sup>13</sup>

2. **RELEVANCE** – Research has shown the impact of maternal imprisonment on children and, in the past decades, the amount of research about the effects of parental imprisonment has increased significantly. However, there is no clarity on how to use the principle of the best interests of the child in decisions concerning the imprisonment of a mother. With the intention of filling this gap, this work analyses the best interests of children with imprisoned mothers and how it could be balanced with the right to family life of the mother. Additionally, perhaps the time has come to rethink the prison sentence as different prison reform, and even abolition, movements are coming to the foreground. Recently, the Covid-19 pandemic exposed the issues of the prison system and its various challenges and contributed to make them visible again.<sup>14</sup>
  
3. **RESEARCH QUESTIONS** – The central research question of this work is “*How could the balancing exercise between the best interests of the child and the rights of a mother in prison help shape prison law and concrete prison practice?*” This research question splits further into a number of sub-research questions. An answer must first be formed on these sub-research questions before the central research question can be answered. The sub-research questions are:
  - 1) *What are the historical and legal background of issues experienced by children with imprisoned mothers?*

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<sup>11</sup> *Ibid.*, 11.

<sup>12</sup> *Ibid.*

<sup>13</sup> P. SCHARFF-SMITH, *When the Innocent are Punished. The Children of Imprisoned Parents*, London, Palgrave Macmillan, 2014, 87.

<sup>14</sup> As the Covid-19 pandemic showed, many prisons fail to meet even the most basic standards of healthcare. This is caused by poor prison conditions, which can be linked to not having enough funds and staff. See: PENAL REFORM INTERNATIONAL, “Global Prison Trends 2021. Special Focus: Prisons in crises”, 2021, <https://cdn.penalreform.org/wp-content/uploads/2021/05/Global-prison-trends-2021.pdf>, 28.

- 2) *What are the best interests of a child with an imprisoned mother, taken into consideration the effects of maternal imprisonment on children, and the balance with the rights of the mother in prison?*
- 3) *How are the best interests of a child with an imprisoned mother guaranteed in practice?*

4. **RESEARCH METHODOLOGY** – To answer such questions, the research is principally based on an analysis of the existing literature and empirical research. For this literature research, several research databases are consulted, including HeinOnline, Westlaw, Google Scholar, Routledge e-books, and websites of relevant organisations (such as Children of Prisoners Europe and Penal Reform International). The research methodology excludes fieldwork and as such, the scope of the study is limited to desktop research. The study is thus limited to available data. A part of the thesis will be based on data provided by the Bulgarian female prison in Sliven based on an open questionnaire, as well as my own experience when visiting the Belgian prison in Hasselt for a previous university course during my Master of Laws at the KU Leuven.

This work is primarily written from a legal perspective. International, regional and national legislation, case law, and literature are researched. Nevertheless, because of the complexity of children's rights and the detrimental effects imprisonment can have on mothers and their children, this work will also include relevant historical, psychological, criminological and social perspectives.

The geographical focus of the research will primarily be on Europe. Some comparative legal research will be included as well, mainly between European countries; however, a small part will be devoted to South Africa.

5. **LIMITATIONS OF THE RESEARCH** – The issue of the best interests of children with imprisoned mothers plays a central role both for young children living together with their mother in prison, as well as children living outside the prison. This work will be limited to the best interests of the children living outside the prison. Where relevant, the issue of children living together with their mother behind bars will be briefly discussed.

For the scope of this work, the definition of 'imprisoned' shall be understood as: someone who committed a crime and is therefore convicted by a criminal court with a prison sentence, and thus deprived of liberty. The research therefore excludes mothers in pre-trial detention.

Moreover, this work examines the role of the child's best interests when a parent is imprisoned from a gender perspective. The focus of this work will therefore be on imprisoned

mothers. However, this does not imply nor minimise the impacts that imprisonment of a father has on his children.

Because of the limited time frame to conduct research, I was not able to carry out in-person visits to prisons. Therefore, Chapter IV is mainly based on existing online information and empirical studies, in addition to the open questionnaire answered by the Bulgarian female prison in Sliven.

Finally, the sources researched for this thesis study were consulted before the 15th of July 2022, this research does not consider additional circumstances after this date.

6. **STRUCTURE** – This work consists of five chapters. Chapter I introduces some definitions and terminology which are relevant for the further understanding of this work. Furthermore, this chapter explores the historical and legal background of children of imprisoned mothers. In particular, it analyses the different children's rights relevant to children of imprisoned mothers.

Chapter II examines the principle of the best interests of the child and the applicability of the principle to children of imprisoned mothers. To understand why the best interest principle is relevant to children of imprisoned mothers, this chapter provides an overview of the impact of maternal imprisonment on children.

Chapter III analyses the other side of the coin, namely the right to family life of the imprisoned mother. This chapter investigates case law of the European Court of Human Rights and exposes in which cases there could possibly be a tension between the best interests of the child and the right to family life of the mother.

Chapter IV researches the bests interest of children with imprisoned mothers in practice. The chapter will briefly touch upon the Covid-19 pandemic and the way in which national jurisdictions approach the realisation of the best interests of the child.

Chapter V provides several recommendations for legislators, policy makers, judges and prison authorities. Furthermore, it will explore possible penal reform and upcoming prison abolition movements.

## CHAPTER I. CHILDREN OF IMPRISONED MOTHERS: HISTORICAL AND LEGAL BACKGROUND

### 1. Definitions and Terminology

7. **DEFINITION OF A ‘CHILD’** – The definition of a ‘child’ is provided in Article 1 of the UN Convention on the Rights of the Child: “*A child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.*”<sup>15</sup> Thus, legally speaking a child is a person from birth until up to the age of eighteen years. Nonetheless, childhood is not a fixed universal experience, it has an evolving nature. Childhood is not solely determined by facts of age or immaturity.<sup>16</sup> It is a categorisation that combines the empirical facts with an interpretation of these facts agreed on as a society.<sup>17</sup> Developmental theories started to see childhood as a staged process.<sup>18</sup> Children need different degrees of protection, provision, prevention and participation at different stages in their life. When it comes to children with imprisoned mothers, what is in their best interests will differ depending on the childhood stage they are in.<sup>19</sup> For example, the Bulgarian legislation provides a distinction between minors (children up to fourteen years of age) and juveniles (children between the age of fourteen and the age of adulthood (eighteen) who are legally more independent), which are two different childhood stages. Furthermore, the principle of the best interests of the child is one of the main principles the CRC is built upon. The interpretation provided in the CRC will be used through the rest of this work. Usually, it is in the best interests of the child to live together with their mother.
8. **DEFINITION OF MOTHERHOOD** – Under ‘motherhood’ can be understood that from a child’s birth onwards a mother is responsible for the well-being and development of that child.<sup>20</sup> It is the contribution of the mother to the development of the child. From the perspective of the child, the mother is the primary caregiver when the child is very young (a toddler or a minor especially when dependence is the greatest). The mother is associated with the immediate care

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<sup>15</sup> Art. 1 Convention on the Rights of the Child of 20 November 1989, *United Nations Treaty Series*, vol. 1577, 46.

<sup>16</sup> D. ARCHARD, *Children: rights and childhood*, London-New York, Routledge, 2004, 25.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*, 40.

<sup>19</sup> In general, children develop their competences, such as walking or recognising objects, at roughly the same age. Although there could be some differences between societies or between children in a same society, stages of childhood are mainly based on the age of children. See: D. ARCHARD, *Children: rights and childhood*, London-New York, Routledge, 2004, 89.

<sup>20</sup> A. VERHAGEN, B. CLAES and E. KAMPHUIS, “Children and incarcerated parents: A Dutch perspective on recovery-focused work”, *European Journal of Parental Imprisonment* 2019, (10) 10.

of the child and the development of their emotional world. The status of ‘mother’ in principle remains despite restrictions imposed by the imprisonment.<sup>21</sup> Mothering can take on different functions as a child gets older and is part of the right to family life.<sup>22</sup> The right to family life involves the right for parents and children to meet and correspond, but also the right for the parents to exercise parental rights over their children.<sup>23</sup> The study will focus only on mothers who have not been legally deprived of their parental responsibilities.

9. **BALANCE OF RIGHTS** – Both the principle of the best interests of the child and the right to family life of the imprisoned mother are not absolute rights and can be limited. In some cases, the best interests of the child can conflict with the rights of the imprisoned mother. An obvious example is when the mother is abusive or negligent towards the child. In that case it is beneficial for the child, and thus in their best interests, that the mother is imprisoned and the child does not have to live together with her anymore. However, from the mother’s perspective, this will be an interference in her right to family life. In those cases, the best interests of the child prevails against the right to family life of the mother.

## ***2. Brief Overview of the History of Contemporary Prisons and the Surrounding Society***

10. **THE BIRTH OF THE PRISON AS A PUNISHMENT SYSTEM** – The issue of children of imprisoned mothers is part of a broader discussion on how prisons influence and relate to the surrounding society.<sup>24</sup> Contemporary prisons were only born at the end of the 18<sup>th</sup> century. During the Enlightenment, prisons replaced a wide range of corporal punishments and became the institutions on which contemporary prisons are built upon.<sup>25</sup> As a reaction on the arbitrariness of

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<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*

<sup>23</sup> R. WOLLESWINKEL and M. TABIB, “Chapter two: The historical and legal background” in K. PHILBRICK, L. AYRE and H. LYNN (eds.), *Children of Imprisoned Parents. European Perspectives on Good Practice*, 2014, (24) 26.

<sup>24</sup> Punishment in general is a complex matter that differs in time and place. Across time and places, there always existed a variety of punishments. A brief outline of the historical development of criminal punishment does injustice to the complexity of the historical reality. It is therefore important to keep in mind that punishment systems are determined by the social context, political structure and relationship of the individual to the state, economical structure, the needs of a society, and the resources of a society. *See also*: P. SCHARFF-SMITH, *When the Innocent are Punished. The Children of Imprisoned Parents*, London, Palgrave Macmillan, 2014, 21.

<sup>25</sup> Before the existence of the state and the prison system, punishment happened through private revenge. After the period of private revenge, punishment became a public matter as a central state authority in society grew. With this also the purpose of punishment changed from pure revenge, to deterrence and improvement of the individual. Although a form of locking up in some way or another already existed during the Ancient and Medieval times, prisons as institutions used for punishment date back to the 18<sup>th</sup> century. Previous institutions were called, among other things, ‘tuchthuizen’ or bridewells. ‘Order, discipline and hard work’ was the adage of these early prisons and prisoners had the obligation to fulfil forced labour. The punishment was often corporal and draconian, and prisoners lived in horrible conditions. Nonetheless, the institutions were initially relatively liberal in terms of contact with each other and the outside world. *See*: A. NEYS and T. PETERS, “De geschiedenis van het gevangeniswezen”, in A. NEYS, T. PETERS,

punishments, the attention for the prison sentence grew because of the influences of Cesare Beccaria, John Howard and Jeremy Bentham. Beccaria advocated, among other things, for the abolition of torture and the death penalty. Howard introduced the idea of isolation behind prison walls, which was believed to lead the offender to become a better person.<sup>26</sup> Bentham came up with the idea of a panopticon as a prison model, which enables constant surveillance of prisoners.<sup>27</sup> During this period the emphasis on punishments switched from the body to the mind, according to the idea that the mind needs to be disciplined in order to make the prisoner a better person.

11. **MODERN PRISONS AND ISOLATING PRISONERS FROM FAMILY AND SOCIETY** – In the 19<sup>th</sup> century prisons became more present throughout Europe and North America.<sup>28</sup> Quite a few of the prisons that exist today were designed and constructed in the 19<sup>th</sup> century.<sup>29</sup> The main idea in the 19<sup>th</sup> century was rehabilitation through isolation.<sup>30</sup> Overall there were two different prison models: the Auburn and Pennsylvania system. The Auburn system consisted of solitary cells, but the prisoners were permitted to work together during the day, however still under condition of silence.<sup>31</sup> The Pennsylvanian model, on the other hand, emphasised total isolation, silence and solitude.<sup>32</sup> The Auburn system became the dominant model in the US, while in Europe the Pennsylvanian system was preferred.<sup>33</sup> The purpose of both systems was for prisoners to reacquire their own good self by spending time alone in a cell.

One of the consequences of isolation was that almost all prisoners' contact with their family and the outside world was cut off.<sup>34</sup> Although it was not the original purpose, prisoners became increasingly detached from society rather than being re-integrated into it.<sup>35</sup> This consequence is a starting point for the prison system we still use today. Nevertheless, in the 20<sup>th</sup> century, prison

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F. PIETERS and J. VANACKER (eds.), *Tralies in de weg. Het Belgisch gevangeniswezen: historiek, balans en perspectieven*, Leuven, Universitaire Pers Leuven, 1994, (1) 2-3; E.M. PETERS, "Prison before the Prison. The Ancient and Medieval Worlds.", in N. MORRIS and D.J. ROTHMAN (eds.), *Practice of Punishment in Western Society*, New York-Oxford, Oxford University Press, 1995, (3) 3; P. SCHARFF-SMITH, *When the Innocent are Punished. The Children of Imprisoned Parents*, London, Palgrave Macmillan, 2014, 21.

<sup>26</sup> A. DAVIS, *Are Prisons Obsolete?*, New York, Seven Stories Press, 2003, 41.

<sup>27</sup> *Ibid.*, 46.

<sup>28</sup> P. SCHARFF-SMITH, *When the Innocent are Punished. The Children of Imprisoned Parents*, London, Palgrave Macmillan, 2014, 21.

<sup>29</sup> P. SCHARFF-SMITH, "Imprisonment and Internet-Access", *Nordic Journal of Human Rights* 2012, (454) 456.

<sup>30</sup> P. SCHARFF-SMITH, *When the Innocent are Punished. The Children of Imprisoned Parents*, London, Palgrave Macmillan, 2014, 22.

<sup>31</sup> A. DAVIS, *Are Prisons Obsolete?*, New York, Seven Stories Press, 2003, 47.

<sup>32</sup> *Ibid.*

<sup>33</sup> P. SCHARFF-SMITH, *When the Innocent are Punished. The Children of Imprisoned Parents*, London, Palgrave Macmillan, 2014, 23.

<sup>34</sup> *Ibid.*, 22.

<sup>35</sup> *Ibid.*, 25.

visiting regimes changed.<sup>36</sup> Prisoners, for example, received more visiting time. Today, we can find different prison systems across Europe. Therefore, the possible impact of a prison sentence on a mother and her child(ren) will differ if the mother is locked up in an open or closed prison regime. However, in most countries prisoners are locked up and are therefore also cut off from society. Most people do not care about what is happening behind the bars, as long as the detainees remain inside. Nevertheless, most detainees return sooner or later back to society. This is also the case for imprisoned mothers.

12. **PRISONERS' RIGHTS BECOME PART OF PENAL POLICIES** – Although prisons have existed since the late 18<sup>th</sup> century, it took a while before prisoners' rights became an area of serious legal and penal concerns.<sup>37</sup> Over the years, there have been movements in the way imprisonment is rationalised or legitimised with retribution being the most important rationale. New purposes, such as reintegration or rehabilitation of the prisoner, and compensation of the victims, emerged more recently. In general, in Europe, the key principle for punishment is that the punishment has to be proportionate, implying that the punishment will only be effective, and rehabilitative for the prisoner, when it is proportionate.<sup>38</sup> States assume that the benefits the imprisonment has on society and prisoners outweighs the damaging impact to society, prisoners, and their children.<sup>39</sup> However, the prison context of today makes it difficult to reach the above-mentioned purposes. The focus on these purposes came mainly as a result of gaining more insights on the effects that imprisonment has on people. In the 1960s and 1970s prisoners' rights became gradually a concern in the Western world.<sup>40</sup> The effects of imprisonment have been discussed intensively during the past 200 years, with studies showing the detrimental effects of the institutionalisation.<sup>41</sup> This is also reflected in the creation of international and regional human

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<sup>36</sup> *Ibid.*, 26.

<sup>37</sup> P. SCHARFF-SMITH and E. VILLMAN, "Prisons, families and human rights. From prisoners' rights to the rights of prisoners' children" in A. PARKES and F. DONSON, *Parental Imprisonment and Children's Rights*, Abingdon-New York, 2021, (135) 135.

<sup>38</sup> This is different from the idea of prevention in the US. It is notable that the principle of the best interests of the child are not at all considered here. The US is also no party to the CRC.

<sup>39</sup> K. PHILBRICK, "Assessing the impact on a child when their parent is imprisoned: some ethical questions", *European Journal of Parental Imprisonment* 2015, (3) 3.

<sup>40</sup> P. SCHARFF-SMITH and E. VILLMAN, "Prisons, families and human rights. From prisoners' rights to the rights of prisoners' children" in A. PARKES and F. DONSON, *Parental Imprisonment and Children's Rights*, Abingdon-New York, 2021, (135) 135.

<sup>41</sup> A. LIEBLING and S. MARUNA, "Introduction: the effects of imprisonment revisited" in A. LIEBLING and S. MARUNA (eds.), *The Effects of Imprisonment*, London-New York, Routledge, 2013, (1) 4; P. SCHARFF-SMITH, "Children of Imprisoned Parents in Scandinavia: Their Problems, Treatment and the Role of Scandinavian Penal Culture", *Law in Context: A Socio-Legal Journal* 2015, (147) 147.

rights conventions, rules, and guidelines after World War II which started to influence prison standards.<sup>42</sup>

13. **PRINCIPLE OF NORMALISATION AND HUMAN DIGNITY** – Together with the creation of new rules and guidelines regarding the prison sentence came the ‘principle of normalisation’. This principle means that life behind bars should resemble as much as possible life outside the prison. First of all, this implies that prisoners maintain all their rights when imprisoned except those inherently taken away because of the deprivation of liberty.<sup>43</sup> Secondly, it suggests that the prison conditions should resemble the conditions in the free community in the best way possible.<sup>44</sup> The principle can be found in human rights standards, but also in national laws.<sup>45</sup> In 1955, the United Nations Standard Rules for the Treatment of Prisoners (hereinafter: Nelson Mandela Rules) were adopted.<sup>46</sup> Although the Rules are not legally binding, they establish a number of fundamental minimum standards on how prisoners should be treated.<sup>47</sup> Rule 5(1) of the Nelson Mandela Rules states that:

*“[t]he prison regime should seek to minimize any differences between prison life and life at liberty that tend to lessen the responsibility of the prisoners or the respect due to their dignity as human beings”.*<sup>48</sup>

The principle of normalisation intends to ensure prisoners’ human rights and to reduce the harmful effects of imprisonment. Furthermore, the Council of Europe recommends that “[l]ife in prison shall approximate as closely as possible the positive aspects of life in the community”.<sup>49</sup> This means that all Member States of the Council of Europe should apply this principle. According to it, imprisoned mothers should, as much as possible, be able to continue to exercise their parental rights from prison.

Moreover, Article 10(1) ICCPR expresses that “[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person”.

Human dignity is at the core of human rights. Prisoners should be recognised as human beings

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<sup>42</sup> *Ibid.*

<sup>43</sup> P. SCHARFF-SMITH, “Imprisonment and Internet-Access”, *Nordic Journal of Human Rights* 2012, (454) 455.

<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid.*, 461.

<sup>46</sup> UN General Assembly, “Resolution 70/175: United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)”, 17 December 2015, UN Doc. A/RES/70/175.

<sup>47</sup> P. SCHARFF-SMITH and E. VILLMAN, “Prisons, families and human rights. From prisoners’ rights to the rights of prisoners’ children” in A. PARKES and F. DONSON, *Parental Imprisonment and Children’s Rights*, Abingdon-New York, 2021, (135) 136.

<sup>48</sup> Rule 5 UN General Assembly, “Resolution 70/175: United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)”, 17 December 2015, UN Doc. A/RES/70/175.

<sup>49</sup> Council of Europe Committee of Ministers, “Recommendation Rec(2006)2-rev of the Committee of Ministers to Member States on the European Prison Rules”, 1 July 2020, 8.

who deserve respect for their human dignity. People come to prison as punishment, not for punishment. The prison sentence is about the deprivation of someone's liberty, and in principle only that.<sup>50</sup> However, some other human rights, such as the right to family life, are at stake when undergoing the sentence. The interference with those rights should be minimalised. Although it is the right to liberty that is revoked, by imprisonment the right to family life will be affected as well, but this is not the right that is targeted.

14. **PENAL POPULISM AND PENAL REFORM** – At the same time when prison sentences are becoming more 'humane', penal policies around the world have moved towards tougher sentencing, longer prison sentences and growing prison populations.<sup>51</sup> The use of imprisonment has been on the rise in many countries for the last couple of decades. Not only in the US, but also in Europe there can be seen a trend of 'penal populism'. It is a discourse used by political parties to show the public they want to be tough on crime, which is more based on feelings and intuitions rather than a more quantifiable indicator.<sup>52</sup> This political climate could become increasingly problematic for prisoners' children.<sup>53</sup> A consequence of penal populism is namely that people, who did not fall under the targeted groups in previous criminal legislation, now end up in prison because of tougher laws. This affects both the male as female population. Either way, it causes more mothers to end up in prison and thus more children of imprisoned parents who are left outside. More research should be done to understand the actual impact of penal populism resulting in proposals to change legislation and reform penal policy, and in which ways these could influence the rights of prisoners' children.

Nonetheless, there is also a countermovement happening in the last decades. More voices are pleading for prison reform, and even prison abolition.<sup>54</sup> In Belgium for example, the non-profit organisation 'De Huizen', which is part of the larger European organisation 'RESCALED', challenges the concept of prisons and introduces a new concept of detention

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<sup>50</sup> B. NAYLOR, "Human Rights and Respect in Prisons: The Prisoners' Perspective", *Law in Context: A SocioLegal Journal* 2014, (84) 84.

<sup>51</sup> Today the term 'mass incarceration' is used to describe the prison situation in the US. The US incarcerates more people than any other country in the world. This started with the different criminal policies, such as the 'war on drugs' introduced by president Nixon and implemented by president Reagan. See: P. SCHARFF-SMITH, *When the Innocent are Punished. The Children of Imprisoned Parents*, London, Palgrave Macmillan, 2014, 214.

<sup>52</sup> According to criminologist JOHN PRATT "penal populism speaks to the way in which criminals and prisoners are thought to have been favoured at the expense of crime victims in particular and the law-abiding public in general". See: J. PRATT, *Penal Populism*, Abingdon-New York, Routledge, 2007, 12.

<sup>53</sup> P. SCHARFF-SMITH, *When the Innocent are Punished. The Children of Imprisoned Parents*, London, Palgrave Macmillan, 2014, 214.

<sup>54</sup> However, it should be noted that prison reform and prison abolition movements date back from the time where the prison became the main form of punishment. See also: A. DAVIS, *Are Prisons Obsolete?*, New York, Seven Stories Press, 2003, 9.

houses.<sup>55</sup> The concept of detention houses would make it possible to better cherish family ties between the detained mother and her child(ren). In this time of reform movements, it is important to look into how the rights of children with imprisoned parents, and especially the best interests of these children, should inform policy makers and help shape prison law and concrete prison practice.

### 3. *The Human Rights of Children of Imprisoned Mothers*

#### 3.1 International and Regional Legal Framework

15. **UN CONVENTION ON THE RIGHTS OF THE CHILD** – Until recently, children’s rights have rarely been used or mentioned in the context of children of imprisoned parents.<sup>56</sup> Children’s rights and the child’s best interest should be of primary consideration in all matters which concern children. The rights of all children are guaranteed under the United Nations Convention on the Rights of the Child. The Convention was adopted in 1989 and, at present, it is the most ratified human rights convention. A total of 196 countries ratified the CRC (the United States has signed it but has yet to ratify it), which shows that the idea that children have their own rights could be seen as universally adopted.<sup>57</sup> This universal nature of the CRC makes it possible to recognise everywhere in the world the same definition of the child, as well as the same status and rights of children.<sup>58</sup> The CRC makes a move towards recognising the child as an active holder of rights and not only as a passive object. The CRC considers the child as a person endowed with rights they obtain at birth and which they will be able to exercise independently, according to their age and maturity.<sup>59</sup> The rights of the child contained in the CRC are not just applicable to some children, but they are applicable to all children regardless of sex, ethnicity, background etc.<sup>60</sup> This means that they shall likewise apply to children who have a mother in prison. Other than Article 9(4) CRC, the Convention does not explicitly address children with imprisoned parents.

The Committee on the Rights of the Child (hereinafter: the Committee) monitors the implementation of the CRC. It further examined the specific situation of children with imprisoned parents. For example, on 30 September 2011 the Committee devoted its Day of

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<sup>55</sup> See for more information: <https://dehuizen.be/en/home>; <https://www.rescaled.org/>.

<sup>56</sup> P. SCHARFF-SMITH, *When the Innocent are Punished. The Children of Imprisoned Parents*, London, Palgrave Macmillan, 2014, 19.

<sup>57</sup> J. ZERMATTEN, “The rights of children with imprisoned parents: Their best interests and views”, *European Journal of Parental Imprisonment* 2019, (3) 3.

<sup>58</sup> *Ibid.*

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*, 4.

General Discussion to the topic of ‘Children of incarcerated parents’.<sup>61</sup> The purpose was to raise awareness and explore child rights issues related to children of imprisoned parents. The Committee formulates several recommendations concerning children left outside when their parent is incarcerated. First of all, the Committee recommends that alternatives to detention should be made available and applied on a case-by-case basis when a parent is in conflict with the law. Secondly, the Committee reiterates the obligations for states formulated in the CRC, such as the right to non-discrimination, the right to have regular and direct contact with a separated parent, the right to privacy, and the right to have their view taken into account. Regarding the right to have regular and direct contact, the Committee specifies that children have the right to regularly visit their parents if this is in their best interests. It recommends states to ensure that the visit context, inside the prison, is respectful to the child’s dignity and right to privacy. Furthermore, the Committee pointed out that decisions concerning the removal of financial or other support should be taken with the best interests of the children as a primary consideration. Other recommendations include the duty of states to convey child-friendly information and to take the best interests of the child into account when sharing this information, to guarantee alternative means of communication (next to the visits), and to train professionals working with children of imprisoned parents.

To further enhance the implementation of the CRC, the UN General Assembly adopted Guidelines for the Alternative Care of Children.<sup>62</sup> The Guidelines contain desirable orientations for policy and practice regarding social protection and child welfare. They are applicable to situations where the child’s own family is unable to provide adequate care for the child, and thus the state is responsible to ensure appropriate alternative care.<sup>63</sup> This is the case when the mother of a child is imprisoned and she was the sole primary caregiver. In these cases, the child will need a caregiver outside prison.<sup>64</sup> The Guidelines state, first of all, that states need to promote parental care, prevent family separation, and promote family integration. Furthermore, states should design legislative, policy and financial conditions to provide for adequate alternative care options. Additionally, there are guidelines to determine the most appropriate form of care, which should be in the best interests of the child. And lastly, the UNGA

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<sup>61</sup> Committee on the Rights of the Child, “Report and Recommendations of the Day of General Discussions on ‘Children of Incarcerated Parents’”, 30 September 2011.

<sup>62</sup> UN General Assembly, “Resolution 64/142: Guidelines for the Alternative Care of Children”, 24 February 2010, UN Doc. A/RES/64/142.

<sup>63</sup> Alternative care includes both formal and informal care. With formal care is meant: all care ordered by administrative or judicial authorities. Informal care on the other hand is based on private arrangements. *See*: UN General Assembly, “Resolution 64/142: Guidelines for the Alternative Care of Children”, 24 February 2010, UN Doc. A/RES/64/142.

<sup>64</sup> *See also*: Committee on the Rights of the Child, “Report and Recommendations of the Day of General Discussions on ‘Children of Incarcerated Parents’”, 30 September 2011, 8.

established several guidelines regarding the different types of care provision (such as informal care, foster care and residential care).

16. **OTHER HUMAN RIGHTS INSTRUMENTS** – Although the CRC is the primary source for children’s rights in international human rights law, it is not the only source. Children’s rights are also protected by the European Convention on Human Rights and the International Covenant on Civil and Political Rights. In addition, Article 24 of the Charter of Fundamental Rights of the European Union recognises the rights of the child and it provides the principle of the best interests of the child.<sup>65</sup> Nonetheless, the CRC and other human rights conventions contain several rights that are of particular relevance to the situation of children whose parents are in prison, such as the right to family life.
  
17. **NELSON MANDELA RULES** – The UN adopted several documents including guidelines for the prison practice. In 2015 the UN adopted the Nelson Mandela Rules, which lay down a minimum standards framework for imprisonment broadly.<sup>66</sup> Although they are not legally binding, they provide several guidelines regarding children with imprisoned parents.<sup>67</sup> For example, Rule 7 declares that the names of the prisoner’s family members, and where applicable, their children, their children’s ages, location and custody or guardianship status, shall be entered in the prisoner file management system.<sup>68</sup> Furthermore, Rule 29 stipulates that a decision to allow a child to stay with their parent in prison shall be based on the best interests of the child. Regarding entry procedures for visitors, Rule 60 establishes that body cavity searches should not be applied to children.
  
18. **BANGKOK RULES** – The United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (hereinafter: Bangkok Rules) supplement the Nelson Mandela Rules.<sup>69</sup> The Rules were adopted to address the void when it comes to specific characteristics and needs of women offenders and prisoners. They include provisions regarding

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<sup>65</sup> So far, the African Charter on the Rights and Welfare of the Child is the only human rights convention that contains a provision expressly dedicated to children of imprisoned mothers. Article 30(1) requires state parties “*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*”.

<sup>66</sup> The UN Nelson Mandela Rules revised the Standard Minimum Rules for the Treatment of Prisoners, which were first adopted in resolutions of 1957 and 1977.

<sup>67</sup> UN General Assembly, “Resolution 70/175: United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)”, 17 December 2015, UN Doc. A/RES/70/175.

<sup>68</sup> *Ibid.*

<sup>69</sup> UN General Assembly, “Resolution 65/229: United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules)”, 16 March 2011, UN Doc. A/RES/65/229.

the rights of imprisoned mothers, and specific rules regarding pregnant women, breastfeeding mothers, and mothers with children in prison. Rule 52 stipulates that decisions regarding the separation of a child from its mother shall be based on the individual assessments and the best interests of the child within the scope of relevant national laws.

19. **EUROPEAN PRISON RULES** – At the European level, the Council of Europe adopted in 1973 the European Prison Rules, and in 2006 it completely adopted a new version, which was revised in 2020.<sup>70</sup> As stated in Rule 108, the European Prison Rules shall be updated regularly. Human rights in the prison context are continuously evolving.<sup>71</sup> One of the changes implemented in the newest version of 2020 is a distinctive approach towards women prisoners.<sup>72</sup> Rule 34 requires states to develop specific gender-sensitive policies and to take positive measures to meet the distinctive needs of women prisoners.

The Prison Rules set out standards on the management of prisons and the treatment of prisoners. The purpose is to provide critical guidance to prison staff on how to protect and safeguard the human rights of prisoners.<sup>73</sup> They apply in all 47 Member States, however they are not binding. Several Rules focus on prisoners' rights to maintain links with their family, however there is almost no explicit reference to children of prisoners. The only references made are to children born inside the prison or those granted authorisation to remain with their imprisoned mother. Rule 17(1) describes that prisoners shall be allocated, as far as possible, to prisons close to their home. Furthermore, Rule 24 establishes the contact of the prisoner with the outside world. Prisoners shall be allowed to communicate with their families and visits shall be such as to allow prisoners to maintain and develop family relationships, which is based on the normalisation principle.

20. **COUNCIL OF EUROPE RECOMMENDATION** – In addition, the Council of Europe released in 2018 Recommendation CM/Rec(2018)5 of the Committee of Ministers to Member States concerning children with imprisoned parents.<sup>74</sup> The Recommendation can be seen as a landmark legislation regarding children with imprisoned parents. It came as a response to Italy's 2014

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<sup>70</sup> Council of Europe Committee of Ministers, "Recommendation Rec(2006)2 of the Committee of Ministers to Member States on the European Prison Rules", 11 January 2006.

<sup>71</sup> PENAL REFORM INTERNATIONAL, "European Prison Rules. Short Guide", 2021, 1.

<sup>72</sup> Other changes were made regarding records and file management, foreign nationals, special high security or safety measures, instruments of restraints, requests and complaints, prison management, and inspections and monitoring. *See*: EUROPEAN NPM FORUM, "Updating the European Prison Rules", 2020.

<sup>73</sup> PENAL REFORM INTERNATIONAL, "European Prison Rules. Short Guide", 2021, 1.

<sup>74</sup> Council of Europe Committee of Ministers, "Recommendation CM/Rec(2018)5 of the Committee of Ministers to Member States concerning Children with Imprisoned Parents", 4 April 2018.

Memorandum of Understanding between the Ministry of Justice, the National Ombudsman for Childhood and Adolescence, and COPE member organisation *Bambinisenzasbarre ONLUS*. The Recommendation acknowledges that children with imprisoned parents are entitled to the same rights as all children and recognises that parental imprisonment has long-lasting effects on the well-being of many children in Europe. Moreover, it addresses the needs of those children with a parent in prison and provides 56 guidelines for good practice. It applies to all children whose parents are in prison, including those living with their parent in prison. One of the underlying values the Recommendation is written on, is the best interests of the child. The Recommendation states that:

*“in all matters concerning children, children’s rights and best interests should be of primary consideration, also bearing in mind that children with imprisoned parents have committed no crime and should not be treated as being in conflict with the law as a result of the actions, or alleged actions, of their parents”.*<sup>75</sup>

### **3.2 Key Rights as Protected in the Convention on the Rights of the Child**

21. **BEST INTEREST PRINCIPLE** – All children’s rights protected in the CRC are applicable to children of imprisoned mothers. However, there are some rights that have a particular relevance. Above all, there is the right of the child to have their best interests assessed and considered as a primary consideration in all actions or decisions that concern them. The best interest of the child can be found in Article 3(1) CRC. The provision states that authorities need to take the best interests of the child as a primary consideration in all actions concerning children. In principle, it is in the best interests of the child to live together with their mother. When it comes to imprisoning mothers, the best interests of the child can play a role when the decision of the sentence needs to be taken. In addition, the best interests of the child could also play a role afterwards, during the imprisonment, when the authorities take decisions regarding contact and visiting regimes.

The best interest principle is identified by the Committee as one of the four general principles for implementing and interpreting the rights protected in the Convention.<sup>76</sup> Furthermore, the principle is referred to in several other provisions within the Convention.

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<sup>75</sup> Council of Europe Committee of Ministers, “Recommendation CM/Rec(2018)5 of the Committee of Ministers to Member States concerning Children with Imprisoned Parents”, 4 April 2018, 11.

<sup>76</sup> The three other general measures are: the principle of non-discrimination, the right to life, survival and development, and the right to express their views. *See*: Committee on the Rights of the Child, “General Comment No. 5 (2003) on General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6)”, 27 November 2003, UN Doc. CRC/GC/2003/5.

Pursuant to Article 18(1) CRC, the best interests of the child are the basic concern of both parents who are responsible for the upbringing and development of the child. The provision of Article 20 CRC states that the child is entitled to special protection and assistance when it is in its best interest to be removed from its family environment. Moreover, Article 9 provides that a child can only be separated from its parents when it is necessary for the best interests of the child.

22. **SEPARATION FROM PARENTS IN THE CASE OF IMPRISONMENT AND RIGHT TO CARE –** Additionally, Article 9 CRC has further relevance for children of prisoners.<sup>77</sup> It contains the right to care and company of the parent. The first paragraph obliges states to ensure that a child shall not be separated from their parents against their will, except when competent authorities determine that such separation is in the best interests of the child. Paragraph 2 specifies further that in proceedings regarding possible separation, all interested parties shall be given an opportunity to participate and make their views known. In Paragraph 3 it emphasises that children have the right to maintain personal relations and direct contact with both parents on a regular basis, except when it is contrary to the child's best interests. Paragraph 4 addresses the right to essential information about the whereabouts of the absent parent in the case of parental imprisonment. Thus, children who are separated from their parents have the right to regular and direct contacts with them. This is of relevance for children whose mother is in prison, since the child is separated from its mother. Relationships between the imprisoned mother and her children can be particularly maintained and fostered through visits.
23. **RIGHT TO FAMILY LIFE –** The child's right to care and company of the parent is related to the child's right to family life. In the CRC, the family is considered as the fundamental group of society and the natural environment for the growth and well-being of children. The Preamble of the CRC mentions that the family should be protected so that it can fully assume its responsibilities within the community. Furthermore, Article 16 CRC outlines that “[n]o child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence” and that “[t]he child has the right to the protection of the law against such interference or attacks”. According to Article 20 CRC children have the right to special

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<sup>77</sup> P. SCHARFF-SMITH, *When the Innocent are Punished. The Children of Imprisoned Parents*, London, Palgrave Macmillan, 2014, 88.

protection when a child is partially or totally deprived of their family structure.<sup>78</sup> This is the case when their mother is imprisoned.

24. **NON-DISCRIMINATION** – Another right relevant to children of prisoners is the right not to be discriminated. The provision of Article 2 CRC contains the duty for states to protect children from discrimination or punishment on the basis of the status or activities of their parents.<sup>79</sup> When a mother is imprisoned, her child(ren) should not be discriminated because of that. The provision contains both positive and negative obligations for the state. In its report, as a result of the Day of General Discussion on ‘Children of incarcerated parents’, the Committee on the Rights of the Child expressed that states should take appropriate measures to ensure that children with imprisoned parents are protected from stigmatisation. It also noted that these children have themselves not come into conflict with the law.

25. **VIEWS OF THE CHILD** – A last right with particular significance in the context where a parent is facing imprisonment, is the right to be heard. Paragraph 1 states that

*“[s]tates Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child”.*

According to Article 12(2) CRC, children have the right to be heard in any judicial or administrative proceeding which affects them. In its GC No. 12(2009), the Committee has been more specific concerning the right of the child to express their views and to be heard.<sup>80</sup> The Committee interprets that ‘in all matters affecting the child’ means that the child must be heard if the matter under discussion affects the child.<sup>81</sup> The Committee supports a broad definition and it does not specifically refer to the situation of children with imprisoned parents.<sup>82</sup> However, matters such as sentencing a mother, the transfer of the imprisoned mother or visits do affect the children concerned. The right to be heard applies both to proceedings which are initiated by the child, as well as to those initiated by others which affect the child. The Committee refers in this regard to parental separation or adoption. It encourages states to introduce legislation requiring decision-makers in judicial or administrative proceedings to explain the extent of the

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<sup>78</sup> J. ZERMATTEN, “Preface: Children of prisoners: European Perspectives” in K. PHILBRICK, L. AYRE and H. LYNN (eds.), *Children of Imprisoned Parents. European Perspectives on Good Practice*, 2014, (9) 9.

<sup>79</sup> S. MINSON, *Maternal Sentencing and the Rights of the Child*, London, Palgrave Macmillan, 2020, 34-35.

<sup>80</sup> Committee on the Rights of the Child, “General Comment No. 12 (2009) on the right of the child to be heard”, 20 July 2009, UN Doc. CRC/C/GC/12.

<sup>81</sup> *Ibid.*, 10.

<sup>82</sup> *Ibid.*

consideration given to the views of the child and the consequences for the child. Since the imprisonment of a mother can fall under parental separation, this also applies to children with imprisoned mothers.

## CHAPTER II. THE BEST INTERESTS OF CHILDREN OF IMPRISONED MOTHERS AND THE EFFECTS OF IMPRISONMENT

### 1. *The Best Interests of the Child: Scope, Determination and Procedural Guarantees*

26. **BEST INTEREST PRINCIPLE IN ARTICLE 3 CRC** – The best interest principle of the child has been contested because of its vagueness.<sup>83</sup> The idea to leave this principle rather vague, was probably done on purpose. The concept of the best interests of the child is namely dependent on the individual case, and sensitive to the facts and circumstances. Furthermore, it is important to keep in mind that different societies and different historical periods will have another view.<sup>84</sup> The principle can be found in Article 3 CRC. The first paragraph lays down the best interest principle, which is seen as a general principle applicable to all the rights set out in the following articles.<sup>85</sup> The norm of Article 3(1) CRC states that:

*“In all official actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, or administrative authorities, the best interests of the child shall be a primary consideration”.*<sup>86</sup>

During the drafting stage the provision has been subject of debate.<sup>87</sup> The first draft of the Convention included the child’s best interests as ‘the paramount consideration’.<sup>88</sup> In other words, they are not just a factor, the first consideration or most important consideration, but they are determinative. Nevertheless, some state delegations did not agree, as a result of which the current article contains ‘a primary consideration’.<sup>89</sup> The consequence of this is that the best interests of the child will not have absolute priority over other considerations. An exception

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<sup>83</sup> Because of its vagueness, deciding what is in the best interests of the child is rather a speculative exercise. Therefore, the principle may inform arbitrary and subjective decisions. On the other hand, vagueness brings flexibility, what makes it possible to apply the principle to very different situations where a child’s interests are at stake. *See*: O. KHAZOVA, “Interpreting and applying the best interests of the child: the main challenges” in COUNCIL OF EUROPE (ed.), *The best interests of the child. A dialogue between theory and practice*, 2016, (27) 27; A. MIAMINGI, “The Applicability of the Best Interests Principle to Children of Imprisoned Mothers in Contemporary Africa: Between Hard and Soft Law”, *African Human Rights Law Journal* 2020, (713) 716; H. REECE, “The paramountcy principle: Consensus or construct?”, *Current Legal Problems* 1996, (267) 303; M. SKIVENES, “Judging the child’s best interests: Rational reasoning or subjective presumptions?”, *Acta Sociologica* 2010, (339) 339.

<sup>84</sup> M. FREEMAN, *A commentary on the United Nations Convention on the Rights of the Child. Article 3. The best interests of the child*, Leiden-Boston, Martinus Nijhoff Publishers, 2007, 27.

<sup>85</sup> *Ibid.*, 25.

<sup>86</sup> Article 3(1) Convention on the Rights of the Child of 20 November 1989, *United Nations Treaty Series*, vol. 1577, 46.

<sup>87</sup> M. FREEMAN, *A commentary on the United Nations Convention on the Rights of the Child. Article 3. The best interests of the child*, Leiden-Boston, Martinus Nijhoff Publishers, 2007, 26.

<sup>88</sup> *Ibid.*, 25.

<sup>89</sup> *Ibid.*, 26.

where the best interests of the child are to be the paramount consideration – and thus the determining factor – is when a decision on adoption has to be taken.<sup>90</sup>

27. **DEFINITION OF BEST INTERESTS** – The CRC does not define what is meant by ‘best interests’. The Committee emphasises in its GC No. 14(2013) that the best interests of the child are a substantive right, a fundamental, interpretative legal principle, and a rule of procedure.<sup>91</sup> The Committee also states that the concept of the child’s best interests is complex and that its content must be determined on a case-by-case basis. Moreover, the concept is flexible and adaptable. The principle should be applied on an individual basis, which means that the specific circumstance of the child, such as the personal context, situation and needs, must be taken into consideration. A possible definition of what the best interests of the child are, is given by JOHN EEKELAAR is the following:

*“[b]asic interests, for example to physical, emotional and intellectual care developmental interests, to enter adulthood as far as possible without disadvantage; autonomy interests, especially the freedom to choose a lifestyle of their own”.*<sup>92</sup>

28. **WHICH ACTIONS?** – In General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), 29 May 2013, UN Doc. CRC/C/GC/14, the Committee explains that ‘actions’ referred to in Article 3(1) CRC “*not only include decisions, but also all acts, conduct, proposals, services, procedures and other measures*”.<sup>93</sup> Inaction or failure to take action and omissions also fall under the term ‘actions’. Furthermore, the Committee emphasises that the best interest principle applies to actions that both directly and indirectly affect children. The term ‘concerning’ should be interpreted in the broad sense. It refers to decisions directly concerning a child, children as a group or children in general, but also to actions that have an effect on a child, children as a group or children in general when they are not the direct target of this action. The Committee specifies that for measures

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<sup>90</sup> Committee on the Rights of the Child, “General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)”, 29 May 2013, UN Doc. CRC/C/GC/14, 3.

<sup>91</sup> *Ibid.*, 10.

<sup>92</sup> J. EEKELAAR, “The Importance of Thinking That Children Have Rights”, *International Journal of Law and the Family* 1992, (221) 231.

<sup>93</sup> Committee on the Rights of the Child, “General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)”, 29 May 2013, UN Doc. CRC/C/GC/14, 7.

*“that are not directly aimed at the child or children, the term “concerning” would need to be clarified in the light of the circumstances of each case in order to be able to appreciate the impact of the action on the child or children”.*<sup>94</sup>

Thus, not all decisions targeting children indirectly fall within the scope of Article 3(1) CRC. In this regard, EEKELAAR makes a distinction between decisions *about* children and decisions *affecting* children.<sup>95</sup> He suggests that in decisions that affect children indirectly, *“the focus of the decision-maker should be on reaching the ‘best’ solution to the issue to be decided rather than on what outcome would be best for the child”.*<sup>96</sup>

29. **ASSESSMENT AND DETERMINATION OF THE CHILD’S BEST INTERESTS** – According to General Comment No. 14(2013) the assessment and determination of the child’s best interests consists of two steps, which shall be followed when making a decision.<sup>97</sup> The assessment of the best interests means evaluating all the relevant interests and balancing all the elements. The determination is the formal process and includes strict procedural guarantees. When assessing the child’s best interests, decision-makers have to look at the individual case, in the light of the specific circumstances of each child. These specific circumstances relate to the individual characteristics of a child, such as age, sex or level of maturity, and the social and cultural context in which the child finds itself. It is possible that the best interest principle may, in certain cases, limit the child’s right to be raised by its parents in a family environment.

The Committee provides a non-exhaustive and non-hierarchical list of elements to be taken into consideration by decision-makers. The first two elements are the child’s views and the child’s identity. Furthermore, the Committee states that *“[g]iven the gravity of the impact on the child of separation from his or her parents, such separation should only occur as a last resort measure”.*<sup>98</sup> Other elements to be considered are care, protection and safety of the child, the child’s situation of vulnerability (such as disability or belonging to a minority group), the child’s right to health, and the child’s right to education.

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<sup>94</sup> *Ibid.*

<sup>95</sup> J. EEKELAAR, “Two Dimensions of the Best Interests Principle: Decisions About Children and Decisions Affecting Children” in E. SUTHERLAND and L.-A. BARNES MACFARLANE (eds.), *Implementing Article 3 of the United Nations Convention on the Rights of the Child: Best Interests, Welfare and Well-being*, Cambridge, Cambridge University Press, 2016, (99) 99.

<sup>96</sup> *Ibid.*, 99-100.

<sup>97</sup> Committee on the Rights of the Child, “General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)”, 29 May 2013, UN Doc. CRC/C/GC/14, 12.

<sup>98</sup> *Ibid.*, 14-15.

30. **BALANCING DIFFERENT INTERESTS** – After the assessment and determination of the child’s best interests, another balancing exercise may come to light, namely the balancing of the best interests of the child with interests and rights of other actors involved. The predominance of the best interest is not absolute.<sup>99</sup> Once the best interests of the child are assessed and determined, they might conflict with other interests or rights, such as rights of other children, or the parents.<sup>100</sup> The GC recommends that a suitable compromise should be the aim, however how to reach this suitable compromise is not further explained.<sup>101</sup> If there is no suitable compromise,

*“authorities and decision-makers will have to analyse and weigh the rights of all those concerned, bearing in mind that the right of the child to have his or her best interests taken as a primary consideration means that the child’s interests have high priority and not just one of several considerations. Therefore, a larger weight must be attached to what serves the child best”*.<sup>102</sup>

Only in cases where the competing interests or rights are sufficiently important, the outcome of the child’s best interests assessment will need to be changed.<sup>103</sup> This approach is relevant when we look at the possible tension between the right to family of an imprisoned mother and the best interests of her child(ren).

Moreover, there is a public interest when the state authorities sentence people. Punishment is connected to the idea of public danger and the state will not refuse to punish. States implicitly accepted, for certain proven serious crimes, that the impact of a prison sentence on children is justified. Therefore, the right of the state to punish shall prevail over the best interests of the child. However, if the best interests of the child would be damaged in a serious way, the state authorities can decide to postpone the prison sentence for a long period. The terms connected to the postponement can be, for example, when the child reaches a certain age at which they do not necessarily need the mother anymore for their further development and, thus, where the execution would be possible. Another possible term could be to postpone the execution until alternative care is found to replace the care given by the mother. Besides postponement of the execution of the sentence, states can also pardon mothers in conflict with the law

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<sup>99</sup> A. MIAMINGI, “The Applicability of the Best Interests Principle to Children of Imprisoned Mothers in Contemporary Africa: Between Hard and Soft Law”, *African Human Rights Law Journal* 2020, (713) 717.

<sup>100</sup> Committee on the Rights of the Child, “General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)”, 29 May 2013, UN Doc. CRC/C/GC/14, 10.

<sup>101</sup> *Ibid.*

<sup>102</sup> *Ibid.*

<sup>103</sup> J. EEKELAAR, “The Role of the Best Interests Principle in Decisions Affecting Children and Decisions about Children”, *The International Journal of Children’s Rights* 2015, (3) 5.

unconditionally.<sup>104</sup> When deciding on these alternatives to the immediate punishment of the sentence, state authorities need to balance the public interest of the execution of the penalty and the public interest to respect the rights of the child. The best interests of the child can guide in which way their rights should be protected.

31. **PROCEDURAL SAFEGUARDS** – The Committee identified a number of procedural safeguards to guarantee the implementation of the child’s best interests in its GC No. 14(2013):

*“States must put in place formal processes, with strict procedural safeguards, designed to assess and determine the child’s best interests for decisions affecting the child, including mechanisms for evaluating the results. States must develop transparent and objective processes for all decisions made by legislators, judges or administrative authorities, especially in areas which directly affect the child or children”.*<sup>105</sup>

Sentencing decisions concerning mothers may have a far-reaching and long-term impact on children, whereas decisions made during the execution of the penalty may affect children as well in significant ways. Therefore, states and their public authorities should pay special attention to some child-friendly safeguards. The Committee provides seven safeguards. **Firstly**, the Committee sums up some safeguards in accordance with the right of the child to express its own views. This includes communicating with children to reach meaningful child participation and the identification of their best interests. To reach this goal, children should be informed about the process, and possible and sustainable solutions and services. **Secondly**, to map out all elements necessary for the best interests assessment, facts and information relevant to a particular case must be obtained by well-trained professionals, and the information must be verified and analysed prior to being used in the assessment. A **third** guarantee is related to the time perception of children. The timing of decisions should, as far as possible, correspond to the children’s perception of how it can benefit them. Moreover, since children develop and their capacity to express their views evolves, the decisions should be reviewed at reasonable intervals. **Fourth**, a multidisciplinary team of professionals should be involved in assessing the child’s best interests.<sup>106</sup> The professionals should have expertise in the area of child and adolescent development. **Another** safeguard is appropriate legal representation for the child, especially when there is potential conflict with the current guardian or representative. **Sixth**, any

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<sup>104</sup> In general, a pardon can be understood as a decision from the executive power to exempt someone from punishment for a crime.

<sup>105</sup> Committee on the Rights of the Child, “General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)”, 29 May 2013, UN Doc. CRC/C/GC/14, 18.

<sup>106</sup> *Ibid.*

decision concerning children must be motivated, justified and explained. The motivation should include the factual circumstances regarding the child, the elements been found relevant for the assessment, the content of the elements in the individual case, and how they have been weighed to determine the child's best interests. As a **last** safeguard, states should establish mechanisms to review or revise decisions concerning children.

## ***2. The Best Interests of the Child when a Mother is Imprisoned***

32. **CHILDREN AS INDIRECT TARGET OF DECISIONS** – Different decisions regarding the imprisonment of a mother could affect her children. First of all, decisions made by prison authorities concerning visiting and contact regimes can indirectly affect children. Visiting and contact regimes in prison are primarily designed with the prisoner in mind: it is the right of the imprisoned mother to receive visits. Nonetheless, changes in those regimes can have an adverse impact on children. This could be, for example, the case when a mother is not allowed to have visits because of a disciplinary sanction imposed by the prison authorities. However, since imprisonment is about targeting the right to liberty, and not the right to family life, this can only be a temporary sanction. Imprisonment cannot interfere more than necessary in the right to family life of the prisoner, thus restrictions regarding contact and visiting regimes should be limited.

In addition, the sentencing decision indirectly affects children as the mothers – and not the child – is the central component of it. These decisions, as well as the decisions regarding contact with the mother, fall in essence under the best interest principle. In what follows next, this work will first have a look at the best interests of the child when the sentencing decision is taken, and secondly, at the contact and visiting regimes during the imprisonment of the mother.

### **2.1 Best Interests of the Child before Maternal Imprisonment: the Sentencing Decision**

33. **DECISION OF THE CRIMINAL SENTENCE** – The imprisonment of a mother itself can lead to interference with children's rights and interests. When criminal judges decide on a sentence, they need to balance numerous factors; examples of these factors include the protection of the public, the seriousness of the offence, and the personal circumstances of the offender.<sup>107</sup> A judge could take into account the fact that the accused person is a parent. Moreover, the probable impact of a sentence on the children of the accused person could also be a factor. Some research suggests that in the criminal justice process adult offenders are seen primarily as

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<sup>107</sup> H. MILLAR and Y. DANDURAND, "The Best Interests of the Child and the Sentencing of Offenders with Parental Responsibilities", *Criminal Law Forum* 2018, (227) 228.

individuals, with a limited attention to their role as parents or their dependent children.<sup>108</sup> Other studies suggest national criminal jurisprudence always considers as a standard practice the parental responsibilities of the perpetrator when individualising the penalty and determining the initial regime of execution, especially when the person is a parent to a minor or is a single parent.<sup>109</sup>

Nonetheless, the sentencing decision can be seen as a decision indirectly affecting children, and thus falls under the scope of Article 3 CRC. By taking the best interests of the child into consideration, courts could play a role in responding to the needs of children of mothers in conflict with the law.<sup>110</sup> Because the principle of the best interests of the child is vague and ambiguous, this leaves criminal courts a broad judicial discretion.

34. **INTERPRETATION COMMITTEE ON THE RIGHTS OF THE CHILD** – The principle of the best interests of the child has been interpreted by the Committee in the case of imprisonment and conviction of parents. In its General Comment No. 14(2013), the Committee expressed that the principle applies to children affected by the situation of their parents in conflict with the law, and interpreted that the reference to ‘courts of law’, in Article 3(1) CRC, extends to criminal court proceeding matters with a direct or indirect impact on children.<sup>111</sup> Additionally, the Committee stated that when a primary caregiver is in conflict with the law, alternatives to detention need to be applied on a case-by-case basis, “*with full consideration of the likely impacts of different sentences on the best interests of the affected child or children*”.<sup>112</sup>

Furthermore, the Committee recommended in observations to Thailand that

*“[w]here the defendant has childcaring responsibilities, [...] the principle of the best interests of the child (art. 3) is carefully and independently considered by competent professionals and taken into account in all decisions related to detention, including*

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<sup>108</sup> C. FLYNN, B. NAYLOR and P. FERNANDEZ ARIAS, “Responding to the needs of children of parents arrested in Victoria, Australia. The role of the adult criminal justice system”, *Australian & New Zealand Journal of Criminology* 2015, (1) 3; H. LAUWEREYS, “Judicial discretion and the child’s best interests in Belgian sentencing law and practice”, *European Journal of Parental Imprisonment* 2019, (9) 10.

<sup>109</sup> I. PUSHKAROVA, *The Children of Imprisoned Parents in the Pardoning Practice*. In: *Society and Law Legal Periodical*, *Iss. 6*, 2019, 79-99.

<sup>110</sup> C. FLYNN, B. NAYLOR and P. FERNANDEZ ARIAS, “Responding to the needs of children of parents arrested in Victoria, Australia. The role of the adult criminal justice system”, *Australian & New Zealand Journal of Criminology* 2015, (1) 5; H. MILLAR and Y. DANDURAND, “The Best Interests of the Child and the Sentencing of Offenders with Parental Responsibilities”, *Criminal Law Forum* 2018, (227) 238.

<sup>111</sup> Committee on the Rights of the Child, “General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)”, 29 May 2013, UN Doc. CRC/C/GC/14, 8; H. MILLAR and Y. DANDURAND, “The Best Interests of the Child and the Sentencing of Offenders with Parental Responsibilities”, *Criminal Law Forum* 2018, (227) 240.

<sup>112</sup> Committee on the Rights of the Child, “General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)”, 29 May 2013, UN Doc. CRC/C/GC/14, 15.

*pretrial detention and sentencing, and decisions concerning the placement of the child.”*<sup>113</sup>

In 2011, during the general discussion on ‘children of incarcerated parents’, this recommendation has been expanded and issued as a general recommendation to all states that ratified the Convention.<sup>114</sup> The report and recommendations of that discussion session state that when parents and primary caregivers are being sentenced, non-custodial sentences should, wherever possible, be chosen over custodial sentences.<sup>115</sup> In other words, alternatives to imprisonment should be considered to ensure the best interest of the child.<sup>116</sup>

35. **OTHER INTERNATIONAL AND EUROPEAN STANDARDS** – In addition, other international human rights standards suggest that the principle of the best interests of the child must be considered as a separate legal consideration in constructing a sentence. As stated above, Rule 52 of the Bangkok Rules provides that decisions regarding the separation of a child from the mother shall be based on the individual assessments and the best interests of the child within the scope of relevant national laws. Guideline 48 of the UN Guidelines for the Alternative Care of Children expresses that when a child’s main carer is subject to deprivation of liberty as a result of sentencing decisions, non-custodial sentences should be taken when appropriate and possible, and the best interests of the child should be given due consideration.<sup>117</sup> Furthermore, at the European level, Guideline 2 of the Recommendation CM/Rec(2018)5 of the CoE stipulates as one of the basic principles that

*“[w]here a custodial sentence is being contemplated, the rights and best interests of any affected children should be taken into consideration and alternatives to detention be used as far as possible and appropriate, especially in the case of a parent who is a primary caregiver”.*<sup>118</sup>

When a mother is being given a custodial sentence, the best interests of her child(ren) need to be considered. Furthermore, Guideline 10 provides that before a judicial order or sentence is

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<sup>113</sup> Committee on the Rights of the Child, “Concluding Observations: Thailand”, 17 March 2006, UN Doc. CRC/C/THA/CO/2, 11.

<sup>114</sup> P. SCHARFF-SMITH, *When the Innocent are Punished. The Children of Imprisoned Parents*, London, Palgrave Macmillan, 2014, 97.

<sup>115</sup> Committee on the Rights of the Child, “Report and Recommendations of the Day of General Discussions on ‘Children of Incarcerated Parents’”, 30 September 2011, 6.

<sup>116</sup> P. SCHARFF-SMITH, *When the Innocent are Punished. The Children of Imprisoned Parents*, London, Palgrave Macmillan, 2014, 97.

<sup>117</sup> UN General Assembly, “Resolution 64/142: Guidelines for the Alternative Care of Children”, 24 February 2010, UN Doc. A/RES/64/142, 10.

<sup>118</sup> Guideline 2 Council of Europe Committee of Ministers, “Recommendation CM/Rec(2018)5 of the Committee of Ministers to Member States concerning Children with Imprisoned Parents”, 4 April 2018.

imposed on a parent, the judiciary needs to take the rights and needs of their children, and the potential impact, into consideration. In this regard, the judiciary should examine the possibility of reasonably suspension of the execution of a prison sentence and the possible replacement with community sanctions or measures.

In general, international standards give the preference to non-custodial sentences when a criminal court has to decide on the sentence of a mother; however, this is not absolute.<sup>119</sup> The wording in the different standards often refers to ‘where appropriate’ or ‘where possible’. Furthermore, the standards do not explain how the best interests of the child should be assessed in these decisions. Additionally, it is notable that none of the above-mentioned international standards state that the best interests of the child with an imprisoned mother should be a primary or paramount consideration in the sentencing decision. Moreover, the standards are not legally binding, but they are soft law. Judges are not obliged to take the best interests of the child into consideration. They may consider the best interests, but the question is whether they should be obliged to do so. If a criminal court would take the best interests of the child as an additional consideration for deciding on the sentence, there is a high chance that the best interests will change at the time of the execution of the sentence, as children, unlike adults, change a lot and their development is very dynamic. It would therefore be more preferable if the institutions responsible for deciding on the execution of the sentence, are obliged to consider the best interests of the child as a primary consideration.

## **2.2 Best Interests of the Child during Maternal Imprisonment: Contact and Visiting Regimes**

36. **MATERIAL CHANGE OF CIRCUMSTANCES REGARDING THE CHILD’S BEST INTERESTS** – When the court decides that imprisonment is the only appropriate sentence in the case of a mother in conflict with the law, the best interests of the child need to be taken further into consideration during the execution of the prison sentence.<sup>120</sup> The circumstances regarding the child’s best interests could change. For example, the criminal court could consider whether the child has a father that could provide adequate care while the mother is in prison; however during the imprisonment of the mother, the father could die or fall gravely ill, or is himself incarcerated, or abandons the child. It is also possible that the personal needs of the child to communicate and receive care from the mother change due to individual developmental situations such as school

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<sup>119</sup> H. LAUWEREYS, “Sentencing the parents, punishing the children? The role of the child’s best interests in sentencing decisions concerning adult offenders”, (PhD diss., University of Gent, 2020-2021), 98.

<sup>120</sup> H. LAUWEREYS, “Sentencing primary caregivers in South Africa: the role of the child’s best interests”, *South African Journal on Human Rights* 2020, (154) 174.

or age challenges. It must always be kept in mind that a convicted parent is not necessarily a bad parent and their involvement in the child's life cannot be always replaced by someone else's care or be skipped or postponed, as children's needs are age-determined and therefore time-fixed. According to the Committee on the Rights of the Child, "*decisions taken should be reviewed at reasonable intervals as the child develops and his or her capacity to express his or her views evolves*".<sup>121</sup> The child's best interests can change over time, and it shall be possible to adapt decisions to this change.

37. **REGULAR AND DIRECT CONTACT WITH MOTHER** – Furthermore, decisions concerning the contact between an imprisoned mother and her children need to bear in mind the risk presented by the offender, the needs and best interests of the child, and the balance with the mother's right to a family life. As Article 9(3) CRC states, children who are separated from their mother have the right to regular and direct contact, if this is not in conflict with the child's best interests. The provision covers many issues, such as telephone calls, email, letters, visits, home leave, possible sentence interruption, probation and even the location of the prison.<sup>122</sup>
38. **INTERNATIONAL AND EUROPEAN STANDARDS CONCERNING CONTACT AND VISITING REGIMES** – Several international instruments set out standards for contact and visits with the children in mind. In the recommendations of the Committee made during the Day of General Discussion on Children of Incarcerated Parents: "*The Committee emphasises that children have the right to regularly visit their parent(s), if this is in their best interests.*"<sup>123</sup> The Committee recommends in this regard that states need to take measures to ensure that the visit context is respectful to the child's dignity and right to privacy.<sup>124</sup> This introduces certain standards for the visit situation in the prison.<sup>125</sup> It further recommends that states provide for the visits to occur in a child-friendly environment.<sup>126</sup> This means that states need to allow "*visits at times that do not negatively interfere with other elements of the child's life, such as schooling, and for durations*

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<sup>121</sup> Committee on the Rights of the Child, "General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)", 29 May 2013, UN Doc. CRC/C/GC/14, 19.

<sup>122</sup> P. SCHARFF-SMITH, *When the Innocent are Punished. The Children of Imprisoned Parents*, London, Palgrave Macmillan, 2014, 101.

<sup>123</sup> Committee on the Rights of the Child, "Report and Recommendations of the Day of General Discussions on 'Children of Incarcerated Parents'", 30 September 2011, 7.

<sup>124</sup> *Ibid.*

<sup>125</sup> P. SCHARFF-SMITH, *When the Innocent are Punished. The Children of Imprisoned Parents*, London, Palgrave Macmillan, 2014, 101.

<sup>126</sup> Committee on the Rights of the Child, "Report and Recommendations of the Day of General Discussions on 'Children of Incarcerated Parents'", 30 September 2011, 7.

*conducive to building or maintaining strong relationships*".<sup>127</sup> Moreover, the Committee suggests states to permit visits to take place outside the prison, to facilitate "*necessary emotional bonding between the child and the imprisoned parent in a child-friendly environment*".<sup>128</sup> With regard to children placed in alternative care because of parental imprisonment, the UN Guidelines for the Alternative Care of Children formulate that states should ensure that children "*have the opportunity to maintain contact with their parents and receive any necessary counselling and support in that regard*".<sup>129</sup>

On the European level, the Recommendation CM/Rec(2018)5 foresees in several guidelines regarding allocation, communication, contact and visits. For example, Guideline 20 recommends that "[a] designated children's space shall be provided in prison waiting and visiting rooms (with a bottle warmer, a changing table, toys, books, drawing materials, games, etc.)". Moreover, it states that "[p]rison visits shall provide an environment conducive to play and interaction with the parent".

To conclude, by providing minimum standards concerning contact and visit regimes, these international standards determine which contact and visits are considered in the child's best interests.

39. **WHEN CONTACT IS NOT IN THE CHILD'S BEST INTERESTS** – When a criminal court decides to sentence a mother with imprisonment, in principle it would be in the best interests of the child to remain in contact with her. However, for some children it is in their best interest when contact with their imprisoned mother ceases, for example when the mother is negligent.<sup>130</sup> The report in response to the Day of General Discussion to the topic of 'Children of incarcerated parents' of the Committee, states that the Working Group on 'Children left 'outside' when their parent is incarcerated'

*"reiterated that the best interests of the child must be the paramount consideration in determining if visits are appropriate- having due regard to situations where this may not be the case, including when the incarcerated parent had committed a violent act or an act of abuse against the child"*.<sup>131</sup>

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<sup>127</sup> *Ibid.*

<sup>128</sup> *Ibid.*

<sup>129</sup> UN General Assembly, "Resolution 64/142: Guidelines for the Alternative Care of Children", 24 February 2010, UN Doc. A/RES/64/142, 14.

<sup>130</sup> P. SCHARFF-SMITH and L. GAMPELL, *Children of imprisoned parents*, 2011, <https://childrenofprisoners.eu/the-dihr-report/>, 4.

<sup>131</sup> Committee on the Rights of the Child, "Report and Recommendations of the Day of General Discussions on 'Children of Incarcerated Parents'", 30 September 2011, 5.

Another situation, in which it is possible that it is not in the child's best interests to visit their imprisoned mother, is when the visiting environment in prison would not be child-friendly and will traumatise the child. Visiting conditions in the prison could cause too much distress and suffering to children. To decide whether a prison visit can take place in a child-friendly matter, the previous mentioned standards should be kept in mind. It will be in these two situations (the mother is negligent or the prison does not provide child-friendly conditions for visits) that the best interests of the child will most likely be in conflict with the right to family life of the imprisoned mother. However, the state is obliged to ensure appropriate visiting environment as part of the obligations for respect for the right of both the mother and child to a family life and failure to do so would normally result in liability for damage of rights. Although visits will not be recommendable in unfriendly environment, the state authorities cannot legitimately ground a refusal to allow visits based only on this consideration.

### ***3. The Effects of Imprisonment on Children of Imprisoned Mothers***

40. **MULTI-VULNERABILITY** – The role of the best interests of the child when imprisoning a mother needs to be addressed, since research shows that the prison sentence can have a particular impact on children. Children of imprisoned parents are being described as ‘invisible’ or ‘unintended’ victims of crime, or as ‘orphans of justice’.<sup>132</sup> The UN Committee on the Rights of the Child recognised children of prisoners as being at particular risk.<sup>133</sup> Moreover, children affected by maternal imprisonment are a multi-vulnerable group. They are prone to multiple risks and all those risks together make them extra vulnerable. They are first of all vulnerable because they are children and are additionally vulnerable because of the loss of their mother through imprisonment. Furthermore, crime related risk factors can play a role, such as drugs, alcohol, poverty and education. However, the multi-vulnerability of children of prisoners as such is not identified in protective and preventive state policies.<sup>134</sup> JOSEPH MURRAY argued that the effects of imprisonment on children of prisoners are almost entirely neglected in academic research, prison statistics, public policy and media coverage.<sup>135</sup> Nonetheless, the last decades, research on the effects of parental, and more specifically maternal imprisonment, on children

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<sup>132</sup> C. FLYNN, B. NAYLOR and P. FERNANDEZ ARIAS, “Responding to the needs of children of parents arrested in Victoria, Australia. The role of the adult criminal justice system”, *Australian & New Zealand Journal of Criminology* 2015, (1) 2.

<sup>133</sup> Committee on the Rights of the Child, “General Comment No. 7 (2005) on Implementing child rights in early childhood”, 20 September 2006, UN Doc. CRC/GC/7/Rev.1, 16.

<sup>134</sup> I. PUSHKAROVA, “The Children of Imprisoned Parents in the Pardoning Practice. In: Society and Law Legal Periodical”, *Iss. 6*, 2019, 79-99.

<sup>135</sup> J. MURRAY, “The effects of imprisonment on families and children of prisoners” in A. LIEBLING and S. MARUNA (eds.), *The effects of imprisonment*, Portland, Willan Publishing, 2005, (442) 442.

started to receive more attention.<sup>136</sup> A study in the UK showed that boys whose parent was in prison before the age of 10 years were twice as prone to antisocial behaviour and other adverse outcomes.<sup>137</sup> Another study in the US showed that imprisonment of mothers led to increased risks of criminal adulthood for their children.<sup>138</sup>

41. **SECONDARY PRISONISATION** –The effects of imprisonment on people other than the convicted person, such as their children, is sometimes referred to as ‘collateral consequences’, ‘collateral damage’ or ‘third party impact’.<sup>139</sup> The impact of the imprisonment of a relative on the members of their family can also be called ‘secondary prisonisation’.<sup>140</sup> Secondary prisonisation has the effect of transforming the lives of children with imprisoned mothers.<sup>141</sup> AIELLO and MCCORKEL conclude in their research that “*the core aspects of secondary prisonisation among children involve discipline of the body and regulation of emotion*”.<sup>142</sup> Children can suffer a range of problems when their mother is imprisoned. These problems can go from depression, hyperactivity, aggressive behaviour, withdrawal, regression, clinging behaviour to sleep problems, eating problems, running away, truancy and poor school grades.<sup>143</sup> Research states that parental imprisonment is linked to harms and disadvantages to children, and that it can contribute to child trauma.<sup>144</sup> However, it is difficult to isolate the particular impacts of imprisonment on the lives of children from other risk factors.<sup>145</sup>

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<sup>136</sup> See for example: B. AIELLO and J. MCCORKEL, “‘It will crush you like a bug’: Maternal incarceration, secondary prisonization, and children’s visitation”, *Punishment & Society* 2017, (1); D.H. DALLAIRE, J.L. ZEMAN and T.M. THRASH, “Children’s Experiences of Maternal Incarceration-Specific Risks: Predictions to Psychological Maladaptation”, *Journal of Clinical Child & Adolescent Psychology* 2015, (109); S. HISSEL, C. BIJLEVELD and C. KRUTTSCHNITT, “The well-being of children of incarcerated mothers: An exploratory study for the Netherlands”, *European Journal of Criminology* 2011, (346); A. JONES and A. WAINAINA-WOZNA, “Children of prisoners: interventions and mitigations to strengthen mental health”, 2013; H. MILLAR and Y. DANDURAND, “The Best Interests of the Child and the Sentencing of Offenders with Parental Responsibilities”, *Criminal Law Forum* 2018, (227).

<sup>137</sup> A. JONES and A. WAINAINA-WOZNA, “Children of prisoners: interventions and mitigations to strengthen mental health”, 2013, 24.

<sup>138</sup> *Ibid.*, 25.

<sup>139</sup> H. MILLAR and Y. DANDURAND, “The Best Interests of the Child and the Sentencing of Offenders with Parental Responsibilities”, *Criminal Law Forum* 2018, (227) 227-228.

<sup>140</sup> L. REIZABAL, I. GARCIA, E. SANSINENEA et al., “Psychological Effects of Secondary Prisonization on Older Parents”, *Trends in Psychology* 2021.

<sup>141</sup> F. DONSON and A. PARKES, “Making children visible. Children’s rights and their role in parent-child contact within the prison system” in A. PARKES and F. DONSON (eds.), *Parental Imprisonment and Children’s Rights*, Abingdon-New York, 2021, (45) 49.

<sup>142</sup> B. AIELLO and J. MCCORKEL, “‘It will crush you like a bug’: Maternal incarceration, secondary prisonization, and children’s visitation”, *Punishment & Society* 2017, (1) 16.

<sup>143</sup> J. MURRAY, “The effects of imprisonment on families and children of prisoners” in A. LIEBLING and S. MARUNA (eds.), *The effects of imprisonment*, Portland, Willan Publishing, 2005, (442) 446.

<sup>144</sup> J. ARDITTI, “Child Trauma Within the Context of Parental Incarceration: A Family Process Perspective”, *Journal of Family Theory & Review* 2012, (181) 195; S. MINSON, *Maternal Sentencing and the Rights of the Child*, London, Palgrave Macmillan, 2020, 33; S. WAKEFIELD and C. WILDEMAN, “How Much Might Mass Imprisonment Affect

42. **BACKGROUND FACTORS** – Children are different and have distinct experiences, even within the same family.<sup>146</sup> This results in different reactions to maternal imprisonment, whose effects on a child depends on several factors.<sup>147</sup> A first factor is the nature of the relationship between the mother and her child.<sup>148</sup> Some children might have experienced none or only very limited contact with their mother prior to the maternal imprisonment, while others had regular contact or lived together with their mother in close and positive relation.<sup>149</sup> The maternal imprisonment will be harder for the latter group of children. Furthermore, the age of the child can be of significant importance. For instance, 2-years-old children are still very dependent on their mother and will have a separate experience of 14-years-old children. The psyche and development of a child are important factors in determining how maternal imprisonment affects the child. Another factor is the family situation in which the child lives. A lot of the children of imprisoned mothers have difficult family backgrounds as their mothers come from, and find themselves living in, fragile and problematic family situations. It is important to keep in mind that intersectionality plays a role when it comes to how children are affected. Some children are affected in different ways because of gender, lower education, poor living conditions or being part of an ethnic minority. Some research states that the prison serves as a structuring institution that increases racial and social inequality.<sup>150</sup> Research also shows that children will be subject to a greater stigma when they come from a socioeconomic, geographic or ethnic community already associated with negative prejudices.<sup>151</sup>

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Childhood Inequality?” in R. CONDRY and P. SCHARFF-SMITH, *Prisons, Punishment, and the Family: Towards a New Sociology of Punishment?*, Oxford, Oxford University Press, 2018, (58) 58.

<sup>145</sup> S. MINSON, *Maternal Sentencing and the Rights of the Child*, London, Palgrave Macmillan, 2020, 33.

<sup>146</sup> A. JONES and A. WAINAINA-WOZNA, “Children of prisoners: interventions and mitigations to strengthen mental health”, 2013, 483; P. SCHARFF-SMITH, *When the Innocent are Punished. The Children of Imprisoned Parents*, London, Palgrave Macmillan, 2014, 55.

<sup>147</sup> P. SCHARFF-SMITH, *When the Innocent are Punished. The Children of Imprisoned Parents*, London, Palgrave Macmillan, 2014, 55.

<sup>148</sup> *Ibid.*, 56.

<sup>149</sup> *Ibid.* See also the case studies in I. PUSHKAROVA, “The Children of Imprisoned Parents in the Pardoning Practice. In: *Society and Law Legal Periodical*”, *Iss. 6*, 2019, 79-99

<sup>150</sup> Although these inequalities are more profound in US prisons, the inequalities are also visible in European prisons. C. JARDINE, “Constructing and maintaining family in the context of imprisonment”, *Brit. J. Criminol.* 2018, (114) 115; S. WAKEFIELD and C. WILDEMAN, *Children of the Prison Boom. Mass Incarceration and the Future of American Inequality*

<sup>151</sup> O. GILL and M.J. DEEGAN, *Children of prisoners A guide for community health professional*, London, Barnardo’s, 17.

43. **EFFECTS OF MATERNAL IMPRISONMENT** – A first effect of maternal imprisonment is that prisoners’ children could experience economic problems.<sup>152</sup> This is the case when the child’s family suddenly loses the income of the imprisoned mother.<sup>153</sup> Additionally, new costs such as transport for prison visits and telephone call charges arise.<sup>154</sup> However, it should be noted that studies show that many imprisoned mothers were not employed at the moment of conviction and that in cases of drug problems, the imprisonment could have a positive effect on the financial situation.<sup>155</sup> For some children, imprisonment of a mother can be a benefit, for example when the mother is severely abusive, the imprisonment could, in such cases, lead to more stable conditions within the family.<sup>156</sup> Outweighing the financial implications are the emotional and social impact on children. The EU COPING Project sums up some of the emotional and behavioural impacts: “*feelings of helplessness, isolation, fearfulness, disappointment, withdrawal, restlessness, anger, lashing out at others, emotional instability or restriction*”.<sup>157</sup> Furthermore, the COPING Project notices that children receive stigma of having a mother in prison.<sup>158</sup>
44. **EFFECTS ON THE RELATIONSHIP BETWEEN CHILD AND MOTHER** – In addition, the imprisonment of a mother has a severe impact on the future relationship between a child and parent.<sup>159</sup> However, this applies particularly in situations where there was some sort of existing relationship between the mother and the child existing before the imprisonment, with the obvious consequence for the child to have to live without the regular closeness of its mother.<sup>160</sup> Children of imprisoned mothers may be placed in foster families, or in public state care. In ultimate cases, the parental rights of the mother may be terminated by the state. On moments of

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<sup>152</sup> C.F. HAIRSTON, “Prisoners and Families: Parenting Issues During Incarceration”, *Papers prepared for the "From Prison to Home" Conference 2002*, (42) 44; A. JONES and A. WAINAINA-WOZNA, “Children of prisoners: interventions and mitigations to strengthen mental health”, 2013, 481; P. SCHARFF-SMITH, *When the Innocent are Punished. The Children of Imprisoned Parents*, London, Palgrave Macmillan, 2014, 64.

<sup>153</sup> P. SCHARFF-SMITH, *When the Innocent are Punished. The Children of Imprisoned Parents*, London, Palgrave Macmillan, 2014, 64.

<sup>154</sup> *Ibid.*

<sup>155</sup> C.F. HAIRSTON, “Prisoners and Families: Parenting Issues During Incarceration”, *Papers prepared for the "From Prison to Home" Conference 2002*, (42) 44.

<sup>156</sup> *Ibid.*, 36 and 44.

<sup>157</sup> The EU COPING Project aimed to address the deficiency in knowledge about the impact of parental imprisonment, by investigating the mental health needs and resilience of children of prisoners and the most promising policy and intervention responses in four countries: the UK (England and Wales), Germany, Romania and Sweden. *See*: A. JONES and A. WAINAINA-WOZNA, “Children of prisoners: interventions and mitigations to strengthen mental health”, 2013, 482.

<sup>158</sup> *Ibid.*, 484.

<sup>159</sup> P. SCHARFF-SMITH, *When the Innocent are Punished. The Children of Imprisoned Parents*, London, Palgrave Macmillan, 2014, 60.

<sup>160</sup> *Ibid.*

contact with their imprisoned mother, during the visiting hours in the prison, the circumstances of this contact are significantly different from outside the prison. As it will be touched upon in Chapter IV, when several prison practices will be described, some prisons try to make the visiting environment child-friendly. However, children will still be exposed to the prison environment as an institution, to the security system and prison guards.

### CHAPTER III. BALANCE BETWEEN THE BEST INTERESTS OF THE CHILD AND THE RIGHT TO FAMILY LIFE OF THE MOTHER IN PRISON

45. According to the procedure of the Committee to determine the child's best interests, these interests can conflict with other interests of rights. In the case of children of imprisoned mothers, the right to family life of the mother can be a conflicting right. In that situation a balancing exercise between the two rights has to be done.

#### *1. The Right to Family Life in the Prison Context*

46. **MOTHERING FROM INSIDE THE PRISON** – The impact of imprisonment is gendered.<sup>161</sup> Women and their children experience specific consequences because of imprisonment. Since there are less female prisoners, in most countries there are fewer female prisons, which leads to the consequence that women's families, and thus their children, need to travel longer distances to visit them. In response to women's needs when imprisoned the Bangkok Rules address the gendered impacts of imprisonment.<sup>162</sup> Rule 57 recommends states to develop gender-specific sentencing alternatives. Furthermore, Rule 58 advises that women are only separated from their families with due consideration given to their background and family ties. According to Rule 61, when courts decide on the sentence, they need to contemplate a range of mitigating factors, including a women's caretaking responsibilities.

For an imprisoned mother it is important to maintain contact with their children and to retain a level of parental responsibility.<sup>163</sup> This enables her to be actively engaged and involved in their child's development and in that way contribute to their wellbeing, self-esteem and rehabilitation, as being in prison does not remove the willingness of a mother to continue mothering.<sup>164</sup> A study shows that imprisoned mothers indicate that separation from their children is one of the most difficult aspects of imprisonment.<sup>165</sup> Imprisonment can reshape,

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<sup>161</sup> B. CLARKE, R. KINSELLA and C. FLETCHER, "Reflecting on the Value(s) of Family Interventions for People Subject to Punishment in the Community" in M. HUTTON and D. MORAN, *The Palgrave Handbook of Prison and the Family*, Cham, Palgrave Macmillan, 2019, (409) 410; H. MILLAR and Y. DANDURAND, "The Best Interests of the Child and the Sentencing of Offenders with Parental Responsibilities", *Criminal Law Forum* 2018, (227) 246.

<sup>162</sup> H. MILLAR and Y. DANDURAND, "The Best Interests of the Child and the Sentencing of Offenders with Parental Responsibilities", *Criminal Law Forum* 2018, (227) 246.

<sup>163</sup> P. SCHARFF-SMITH and L. GAMPELL, *Children of imprisoned parents*, 2011, 4.

<sup>164</sup> N. BOOTH, *Maternal Imprisonment and Family Life. From the Caregiver's Perspective*, Bristol, Bristol University Press, 2021, 4; P. SCHARFF-SMITH and L. GAMPELL, *Children of imprisoned parents*, 2011, 4

<sup>165</sup> C.F. HAIRSTON, "Mothers in Jail: Parent-Child Separation and Jail Visitation", *Affilia* 1991, (9) 17.

disrupt or even terminate mothering, causing alienation between her and the child.<sup>166</sup> This can create great anxiety and distress to mothers in prison.

Being a mother is historically seen as a part of the identity of women.<sup>167</sup> Although contemporary feminists contend the maternal role and identity, current societies still largely attribute childcare to women.<sup>168</sup> Accordingly, the social construction of a woman implies that she must be able to be a good mother to her children under any circumstances, also when being imprisoned.<sup>169</sup> Nonetheless, experiences of imprisoned mothers differ substantially from those of free mothers.<sup>170</sup>

Furthermore, during the desistance process – the gradual process by which people eventually stop committing crimes – the change in perception of identity plays an important role.<sup>171</sup> Assuming a mother role can positively change the perception of one’s own identity.<sup>172</sup> People no longer see themselves as delinquents, but mainly as mothers or fathers.

47. **RIGHT TO FAMILY LIFE** – Articles 5 and 18 of the CRC include the responsibilities, rights and duties of parents. This implies that parents, and thus mothers, are allowed to assist their children in exercising their rights.<sup>173</sup> Parenting is part of the right to family life. What is specifically understood by parental rights varies between states. Parental rights include, in general, the right of parents to see and raise their children, custody, thus living with the child, and visiting rights which also fall under the parental rights. Other parental rights could be the right to take decisions linked to the child’s education or the right to administer the child’s property. It is possible for a mother to retain parental rights after a conviction with a prison sentence. The question whether she remains to have custody over her child(ren) depends on the length of the conviction. For short prison sentences, the mother usually keeps custody. However, longer prison sentences represent a more difficult issue. In most cases a mother living in prison will not

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<sup>166</sup> Alienation means, in this context, that the child does not fit in the life of the mother anymore. The child does not see the mother as their mother anymore, and vice versa, the mother the child as her child.

<sup>167</sup> U. SAIDA and E.K. POERWANDARI, “The Narrative of Women in Prison: The Parenting Practices and the Concepts of Mother in Incarcerated Women”, *Jurnal Studi Gender* 2020, (75) 89.

<sup>168</sup> S.L. BARNES and E. CUNNINGHAM STRINGER, “Is Motherhood Important? Imprisoned Women’s Maternal Experiences Before and During Confinement and Their Postrelease Expectations”, *Feminist Criminology* 2014, (3) 3.

<sup>169</sup> S.L. BARNES and E. CUNNINGHAM STRINGER, “Is Motherhood Important? Imprisoned Women’s Maternal Experiences Before and During Confinement and Their Postrelease Expectations”, *Feminist Criminology* 2014, (3) 3; U. SAIDA and E.K. POERWANDARI, “The Narrative of Women in Prison: The Parenting Practices and the Concepts of Mother in Incarcerated Women”, *Jurnal Studi Gender* 2020, (75) 92.

<sup>170</sup> S.L. BARNES and E. CUNNINGHAM STRINGER, “Is Motherhood Important? Imprisoned Women’s Maternal Experiences Before and During Confinement and Their Postrelease Expectations”, *Feminist Criminology* 2014, (3) 3.

<sup>171</sup> M. PINTELON, “Detentiehuizen voor moeders halen kinderen uit de cel”, *Knack* 2021.

<sup>172</sup> *Ibid.*

<sup>173</sup> H. MILLAR and Y. DANDURAND, “The Best Interests of the Child and the Sentencing of Offenders with Parental Responsibilities”, *Criminal Law Forum* 2018, (227) 241.

have physical custody of their child(ren). There are exceptions where children can stay with their mother in prison. For example, this is the case with minors in Bulgaria in which the state has decided it is in the best interest of the child to have them stay in prison with the mother and not have the mother's sentence execution postponed until the child grows. In some cases, the state could decide to terminate the parental rights of the mother. In those instances, the imprisoned mother will not be the legal mother anymore, but only the biological one and she will not be entitled to the right of family life with the child.

The right to family life can be found in multiple human rights instruments, for example in Article 12 UDHR, Article 17 ICCPR, Article 10 ICESCR and Article 8 ECHR. Article 16(3) UDHR considers the family as "*the natural and fundamental group unit of society and is entitled to protection by society and the State*". Families are seen as an important element to prisoners and to their rehabilitation process. When prisoners hold strong family ties during their imprisonment, the reintegration back into society can be easier. Additionally, Rule 58 of the Nelson Mandela Rules indicates that prisoners have the right to communicate with their family at regular intervals.

48. **RIGHT TO FAMILY LIFE UNDER ARTICLE 8 ECHR** – The provision of Article 8 ECHR states that “[e]veryone has the right to respect for his private and family life, his home and his correspondence. According to Article 8 ECHR ‘everyone’ has the right to respect for their private and family lives. Children, as well as adults are protected under this provision. States have negative and positive obligations to ensure the right of family life is respected.<sup>174</sup> The purpose of Article 8 is primarily to protect an individual against arbitrary interference by public authorities. However, in some cases the state has a positive obligation to interfere. The ECtHR considers whether the importance of the interest at stake and whether this requires a positive obligation from the state. In addition, the state has implicit procedural obligations. This means that the decision-making process with regard to the interference must be fair and sufficient to provide due respect to the interests safeguarded by Article 8.<sup>175</sup> The ECtHR emphasised that when a child has been taken away from its parents and placed with alternative carers, this “*is an even greater call than usual for protection against arbitrary interferences*”.<sup>176</sup> In the case *W v. the United Kingdom*, the Court states that the decision-making process with regard to children in its care must secure that the views and interests of the parents are made to known to and duly

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<sup>174</sup> REGISTRY OF THE COURT, “Guide on Article 8 of the European Convention on Human Rights”, 2021, 8.

<sup>175</sup> *Ibid.*, 72.

<sup>176</sup> ECtHR 8 July 1987, no. 9749/82, *W. v. the United Kingdom*, §62.

taken into account by the authorities.<sup>177</sup> The Court adds that they must be able to exercise in due time and that remedies should be made available to them. However, this should be seen together with the particular circumstances of the case and the serious nature of the decisions to be taken. In this particular case it concerned care proceedings because of post-natal depression and alcoholism of the mother. The question is to what extent this also relates to cases where the parent is being imprisoned by the state.

Nonetheless, the right to family life is not absolute. The state can interfere in an individual's right to family life. It may be subject to limitations if prescribed by law, necessary in a democratic society, and justified with a legitimate aim. The provision of Article 8(2) ECHR provides the next legitimate aims: "*interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others*". The prevention of disorder or crime is one of the legitimate aims listed. However, the question is whether the seriousness of the crime is such as to justify the seriousness of the interference of the child's rights.<sup>178</sup>

49. **RIGHT TO FAMILY LIFE IN PRISON AND THE CASE LAW OF THE ECtHR** – According to the ECtHR imprisonment entails a legitimate limitation to the right to family life.<sup>179</sup> For example, in most cases it normally impedes the living-together element of the right. At the same time, it emphasises that prison authorities have a duty to assist prisoners to maintain contact with their family.<sup>180</sup> This was concluded in the case of *Horych v. Poland*.<sup>181</sup> In the same case, the Court stated that:

*“positive obligations of the State under Article 8, in particular an obligation to enable and assist a detainee in maintaining contact with his close family [...], includes a duty to secure the appropriate, as stress-free for visitors as possible, conditions for receiving visits from his children, regard being had to the practical consequences of imprisonment”*.<sup>182</sup>

Even if the prisoner had not been denied visits from his children, the Court decided that there had been a violation of Article 8 ECHR because the prison environment had made it impossible for his children to visit him.

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<sup>177</sup> *Ibid.*, §63.

<sup>178</sup> A. JONES and A. WAINAINA-WOZNA, “Children of prisoners: interventions and mitigations to strengthen mental health”, 2013, 9.

<sup>179</sup> P. SCHARFF-SMITH and E. VILLMAN, “Prisons, families and human rights. From prisoners' rights to the rights of prisoners' children” in A. PARKES and F. DONSON, *Parental Imprisonment and Children's Rights*, Abingdon-New York, 2021, (135) 146.

<sup>180</sup> *Ibid.*

<sup>181</sup> ECtHR 17 April 2012, no. 13621/08, *Horych v. Poland*.

<sup>182</sup> *Ibid.*, §131-132.

In the case *Vintman v. Ukraine* the Court emphasised that “*the Convention does not grant prisoners the right to choose their place of detention, and the fact that prisoners are separated from their families, and at some distance from them, is an inevitable consequence of their imprisonment*”.<sup>183</sup> The Court clarifies that if a person is incarcerated in a prison that makes visits from family very difficult or even impossible because it is too far away, this could in some circumstances be an interference with the right to family life.<sup>184</sup> Furthermore, the ECtHR allows certain control measures in relation to the prisoners’ contact to the outside world.<sup>185</sup> For example, in the case of *Messina v. Italy* some special restrictions, with regard to the prisoner’s contact with the outside world and thus his family and daughter, were imposed.<sup>186</sup> The reason for these restrictions was based on his association with the mafia. The Court made a balance between the special status of the applicant as a member of the mafia and his right to family life. However, the Court did not find a violation of Article 8; whereas, the child’s right was not taken into consideration, but it is doubtful whether this would have made a difference in this specific case.<sup>187</sup> The partner and daughter had namely received permission for extra visits.<sup>188</sup>

These are just a few cases of the many cases regarding prisoners’ right to family life.<sup>189</sup> In these cases the Court traditionally sees family visits as a right attached to the prisoners themselves, and not as a right of their children.

## ***2. Balancing Parenting Rights and the Child’s Best Interests***

50. **BEST INTERESTS OF THE CHILD IN CASE LAW ECtHR** – The provision of Article 53 ECHR states that “[n]othing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party.” All parties to the

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<sup>183</sup> ECtHR 23 October 2014, no. 28403/05, *Vintman v. Ukraine*, §78.

<sup>184</sup> *Ibid.*

<sup>185</sup> P. SCHARFF-SMITH and E. VILLMAN, “Prisons, families and human rights. From prisoners’ rights to the rights of prisoners’ children” in A. PARKES and F. DONSON, *Parental Imprisonment and Children’s Rights*, Abingdon-New York, 2021, (135) 146.

<sup>186</sup> ECtHR 28 September 2000, no. 25498/94, *Messina v. Italy*.

<sup>187</sup> ECtHR 28 September 2000, no. 25498/94, *Messina v. Italy*, §74 and §83; P. SCHARFF-SMITH and E. VILLMAN, “Prisons, families and human rights. From prisoners’ rights to the rights of prisoners’ children” in A. PARKES and F. DONSON, *Parental Imprisonment and Children’s Rights*, Abingdon-New York, 2021, (135) 146.

<sup>188</sup> *Ibid.*

<sup>189</sup> In other cases the ECtHR accepted special regimes and control measures when prisoners are considered a particular security risk by the state authorities. This was for example the case in *Ciorap v. Moldova*. For security reasons, visits took place through a glass partition and physical contact was as good as forbidden. The Court decided that there was a violation of Article 8 since there was an absence of any demonstrated need for such far-reaching restrictions on the applicant’s rights. In the case of *Vidish v. Russia* the applicant was detained in a medical facility. The authorities of the facility introduced visiting fees for inmates and their families. Neither the prisoner, nor his children could afford paying these fees. The Court decided that this was an unlawful restriction on family visits and therefore that there was a violation of Article 8. See: ECtHR 15 March 2016, no. 53120/08, *Vidish v. Russia*; ECtHR 19 June 2007, no. 12066/02, *Ciorap v. Moldova*.

ECHR are also parties to the UNCRC. Therefore, any provision of the ECHR must be interpreted in conformity with the UNCRC, including the principle of the best interests of the child.<sup>190</sup> Recently, a shift can be seen from a focus on prisoners' right to the rights of prisoners' children in the case law of the ECtHR. In the case of the ECtHR *Sabou and Pircalab v. Romania* (2004) the child's best interests came to attention.<sup>191</sup> The Court stated that imprisoned parents must not promptly lose their parental rights, and that the best interests of the child should always prevail. In this case, the applicant got sentenced by the national court to ten months' imprisonment for defamation. Besides the prison sentence, the national court added an ancillary penalty, namely the prohibition during detention of the exercise of his profession, and of his parental and electoral rights. The Court stated that the denial of the prisoner's parental rights interfered with his right to respect for his family life. The legitimate aim according to the Romanian government was the preservation of safety, morals and education of minors. The Court noted that in cases like this, the best interests of the child are always of crucial importance. Moreover, the Court observed that the offence for which the applicant was convicted was unrelated to his parental skills. Therefore, the Court decided that there had been a violation of Article 8 ECHR.

As stated throughout this work, contact with a parent in prison is sometimes not in the best interests of the child. Parental imprisonment can, in some cases, even be beneficial for families and children.<sup>192</sup> For example, in the case of *M.C. v. Finland* (2001).<sup>193</sup> The case concerns a man who had killed his wife. After he was put in detention, his daughter was placed in public care and the contact between him and his daughter was prohibited.<sup>194</sup> The applicant had requested to take care of his daughter in prison, however this was dismissed. The Court noted that “*a fair balance has to be struck between the interests of the child remaining in public care and those of the parent being reunited with the child*”. Moreover, the Court stated that it will attach particular importance to the best interests of the child and that those may override the interests of the parent. The authorities put the daughter in public care and prohibited any contact because those were the only means through which they could safeguard her interests and ensure her development while the applicant was imprisoned. The applicant and his daughter namely lacked

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<sup>190</sup> N. MOLE and S. SLOAN, “Children with imprisoned parents and the European Court of Human Rights”, *European Journal of Parental Imprisonment* 2020, (3) 4.

<sup>191</sup> ECtHR 28 September 2004, no. 46572/99, *Sabou and Pircalab v. Romania*.

<sup>192</sup> P. SCHARFF-SMITH and E. VILLMAN, “Prisons, families and human rights. From prisoners' rights to the rights of prisoners' children” in A. PARKES and F. DONSON, *Parental Imprisonment and Children's Rights*, Abingdon-New York, 2021, (135) 150.

<sup>193</sup> ECtHR 25 January 2001, no. 28460/95, *M.C. v. Finland*.

<sup>194</sup> *Ibid.*

a common language and did not have any strong mutual relationship before the mother's death. Thus, in this case the ECtHR decided what was in the best interests of the child.<sup>195</sup>

To conclude, the ECtHR handled several cases regarding the right to family life of imprisoned parents. However, only a few cases took the best interests of the child into consideration. The balance of the rights of children with those of their parents can create difficulties for supporting these children's rights, especially when their parent is involved in the criminal justice system.<sup>196</sup> Additionally, it should be noted that in the cases mentioned above the applicants are all men; as a matter of fact, there is a much bigger male population residing in prison comparable to women.

51. **BALANCING THE RIGHTS OF THE MOTHER AND THE CHILD'S BEST INTERESTS** – According to GC No. 14(2013) of the Committee on the Rights of the Child, interests conflicting with the best interests of the child should be balanced. Although imprisoned mothers have parental rights, including the right to have contact with their child, primary consideration must be given to the children's best interests when implementing decisions about providing or restricting visits.<sup>197</sup> Moreover, decisions interfering in the rights of imprisoned mothers and their children have to be proportionate. This should be translated in the balancing exercise. Proportionality namely involves weighing the conflicting interests of the affected mother, the affected child, and the state or the community at large.<sup>198</sup> The Recommendation CM/Rec (2018)/5 of the CoE provides guidance in deciding what is proportionate. The underlying values of the Recommendation state first of all that apart from the best interests of the child, authorities also need to bear in mind that children with imprisoned parents themselves have not committed a crime and should not be treated as being in conflict with the law. Furthermore, it emphasises that “[a]ll interventions and measures in support of children with a parent in prison and their relationship with that parent should ensure they create no stigma and discrimination against these children”.

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<sup>195</sup> SCHARFF-SMITH and E. VILLMAN, “Prisons, families and human rights. From prisoners' rights to the rights of prisoners' children” in A. PARKES and F. DONSON, *Parental Imprisonment and Children's Rights*, Abingdon-New York, 2021, (135) 151.

<sup>196</sup> R. WOLLESWINKEL and M. TABIB, “Chapter two: The historical and legal background” in K. PHILBRICK, L. AYRE and H. LYNN (eds.), *Children of Imprisoned Parents. European Perspectives on Good Practice*, 2014, (24) 25.

<sup>197</sup> N. MOLE and S. SLOAN, “Children with imprisoned parents and the European Court of Human Rights”, *European Journal of Parental Imprisonment* 2020, (3) 3.

<sup>198</sup> *Ibid.*, 9.

## CHAPTER IV. THE BEST INTERESTS OF CHILDREN OF IMPRISONED MOTHERS IN PRACTICE

### *1. The Best Interests of Children with Imprisoned Mothers in National Jurisdictions*

#### **1.1. Belgium**

52. **PRINCIPLE OF THE BEST INTERESTS** – Belgium ratified the CRC, so the Convention is legally binding for the state. However, rights on paper do not mean that the rights are translated into practice.<sup>199</sup> It is the task of the state to implement the rights in practice. Belgium is a monist system, which implies international conventions are automatically part of the Belgian legal order. This means that the CRC is directly applicable, without any need to incorporate the Convention into domestic law.<sup>200</sup> Nevertheless, this does not mean that the rights are directly invocable by individuals in court.<sup>201</sup> Therefore each provision is looked at individually to find out if it has direct effect or not, this is done by the judges.<sup>202</sup> In addition to Article 3 CRC, the best interests of the child are also included in the Belgian Constitution, namely in Article 22bis(4).<sup>203</sup> However, there is no consensus in the Belgian courts whether Article 3 CRC and Article 22bis(4) of the Constitution have direct effect.<sup>204</sup> Therefore, it will depend on the context of the individual case whether the court would allow children with imprisoned parents, and their legal representatives, to invoke the principle. Nevertheless, Belgian state authorities still have the obligation under these two provisions to consider the best interests of children with imprisoned mothers in all decisions affecting the children.
53. **STATISTICS FEMALE PRISONERS AND THEIR CHILDREN** – Belgium counts nine prisons with a department for female prisoners.<sup>205</sup> According to the statistics of the organisation ‘Children of

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<sup>199</sup> H. CODD, “The Rights of Children of Imprisoned Parents” in M. HUTTON and D. MORAN, *The Palgrave Handbook of Prison and the Family*, Cham, Palgrave Macmillan, 2019, (365) 381.

<sup>200</sup> W. VANDENHOLE, “The Convention of the Rights of the Child in Belgian Case Law” in T. LIEFAARD and J.E. DOEK (eds.), *Litigating the Rights of the Child*, Dordrecht, Springer, (105) 106.

<sup>201</sup> *Ibid.*

<sup>202</sup> Deciding whether a provision has direct effect, is first of all based on an objective criterion, namely whether the treaty provision is sufficiently accurate and complete. Secondly, there is a subjective criterion, namely if the treaty parties had the intent to give individuals subjective rights.

<sup>203</sup> Belgian Constitution of 17 February 1994.

<sup>204</sup> K. HERBOTS and J. PUT, “De grondwettelijke verankering van kinderrechten”, *Tijdschrift Jeugd- en Kinderrechten* 2010, (9) 14; H. LAUWEREYS, “Judicial discretion and the child’s best interests in Belgian sentencing law and practice”, *European Journal of Parental Imprisonment* 2019, (9) 9.

<sup>205</sup> Five out of the nine prisons can be found in the Flemish Region: Gent, Brugge, Hasselt, Hoogstraten and Antwerpen. Three of those are located in the Walloon Region: Bergen, Lantin and Marche-en-Famenne. The last one is situated in Brussels. In Brugge, there is the possibility for children until 3 years to live with their mother in prison. Overcrowding and inhumane prison conditions have been a problem in Belgium for the past decades. The state has been frequently found to violate the human rights of prisoners by the ECtHR. *See for example*: ECtHR 9 September 2016, no. 73548/13, W.D. v. Belgium.

Prisoners Europe’ there are 507 female prisoners in Belgium.<sup>206</sup> The organisation estimates that approximately 659 children are living separated from their imprisoned mother.<sup>207</sup> However, Belgium does not keep track of the number of children with a mother in prison. In the criminal courts or prisons, there is no systematic record whether female prisoners have children. Nevertheless, in the French-speaking region of Belgium the organisation ‘Relais Enfants Parents’ helps 1800 children of prisoners living in 11 prisons in Brussels and Wallonia.<sup>208</sup>

54. **SENTENCING DECISIONS** – A study investigating whether and how Belgian criminal law judges interpret and apply the best interests of the child, found that the child’s best interests are unlikely considered in their usual sentencing practice.<sup>209</sup> In the study, seventeen Belgian correctional judges had been interviewed. Within the general principles of criminal law, Belgian judges enjoy certain judicial discretion which allows to take the circumstances of the case and the personal circumstance into consideration, as well as the child’s best interests, when deciding on the appropriate sentence for a mother (individualisation of criminal liability).<sup>210</sup> As a result of the study, several judges said that they do consider children in their decision; however, this was mainly to assess the risk of reoffending and the chances of rehabilitation, that is for the purposes of the criminal sentencing and outside the genuine scope of the rights of the parties to family life or the best interest of the child.<sup>211</sup>
55. **CONTACT AND VISITING REGIMES** – The general rules regarding contact and visiting regimes for prisoners can be found in the Prison Act of 12 January 2005.<sup>212</sup> Article 58 of the Prison Act provides that convicted prisoners have the right to three visits each week on three different days, and a minimum of one day on a Wednesday or in the weekend. Furthermore, the provision states that the duration of the visit shall be at least one hour. In addition to the three visits each week, every prisoner has each month the right to one ‘undisturbed visit’ of minimal two hours.<sup>213</sup> As stated above, the prison act does not contain provisions specifically dedicated to children of prisoners, with the only reference made to pregnant mothers and mothers living with

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<sup>206</sup> This number includes pre-trial detainees, remand prisoners, and convicted and sentenced prisoners. See: <https://childrenofprisoners.eu/>.

<sup>207</sup> The estimation is calculated with a parenting rate of 1.3, which means that averagely every imprisoned woman would have 1.3 children. See: <https://childrenofprisoners.eu/>.

<sup>208</sup> See: [www.relaisenfantsparents.be](http://www.relaisenfantsparents.be).

<sup>209</sup> H. LAUWEREYS, “Judicial discretion and the child’s best interests in Belgian sentencing law and practice”, *European Journal of Parental Imprisonment* 2019, (9) 9-10.

<sup>210</sup> *Ibid.*, 9

<sup>211</sup> *Ibid.*

<sup>212</sup> Prison Act of 12 January 2005.

<sup>213</sup> This undisturbed visit is allowed for the family of a prisoner, thus also applicable to their children.

their children in prison. The anchoring of family, and thus the visit of children in the Prison Act, could give rise to the perception that it concerns a mere right for the imprisoned mother.<sup>214</sup> Although it is both a right of the prisoner and their child(ren) in practice, there is no legal ground in the Belgian legislation on which the child can base themselves upon to take initiative with regard to the prison visitations.

As stated above, international and regional documents give recommendations on what a child-friendly prison visit could look like. In the prison of Hasselt, where both men and women are imprisoned or held in pre-trial detention, some initiatives were taken to make the experience of visiting a parent in prison more child-friendly. A first initiative is a child-friendly route from the entrance hall to the visitor area, with two mascots explaining how the prison works through pictures and games. In addition, colourful footsteps on the floor lead the way to follow. Another initiative are two booklets, one created for six to nine year olds and one for ten to twelve year olds, explaining in a language adapted to the age of the child what they see, hear and have to do. This includes instructions about opening the heavy doors and going through the metal detector.<sup>215</sup> Moreover, the prison organises every Saturday a children's workshop where children and their imprisoned parents are able to play, craft and keep the bond between them.

## 1.2. Bulgaria

56. **PRINCIPLE OF THE BEST INTERESTS** – As for Belgium, Bulgaria ratified the CRC. The Bulgarian Constitution provides in Article 5(4) that all international treaties should undergo constitutional ratification, meaning that treaties should be ratified by the Bulgarian General Assembly and be published in the Legal Gazette.<sup>216</sup> Following this process, international treaties will have direct effect on the domestic level and prevails over domestic law that would be in contradiction. Nonetheless, in 1993, the decision No. 7 of the Bulgarian Constitutional Court declared that this legal effect of international treaties does not apply in the criminal sphere. However, the international treaties can be used as a guideline and source of interpretation for both criminal courts when determining a sentence, and prison authorities when deciding on visiting regimes.

Thus, in Bulgaria, the CRC is constitutionally ratified and prevails over domestic law in all legal branches, except for the criminal law. Nevertheless, children of imprisoned parents

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<sup>214</sup> KINDERRECHTENCOALITIE, “Zie mij! Onzichtbare kinderen en hun rechten”, 2020, 277.

<sup>215</sup> C. VANDENREYDT and D. JACOBS, “Deze gevangenis wordt kindvriendelijker: ‘Papa zit in het nadenkhuysje’”, *Het Nieuwsblad* 2018.

<sup>216</sup> Bulgarian Constitution of 13 July 1991.

themselves fall within legal branches outside of criminal law. They are not held criminally liable by the courts, but their mother is, and their rights in relation to the convicted mother are mainly regulated by family law. So, the CRC is directly applicable for children with imprisoned mothers.

Furthermore, according to Article 3(3) of the Child Protection Act, the protection of the child is based upon ensuring the best interests of the child.<sup>217</sup> Paragraph 1, point 5 of the additional provisions – which provide terminology and interpretation for a more comprehensive the understanding of the Act – determines what should be understood under ‘best interests’. It states that the best interests are based upon consideration of desires and feelings of the child; physical, psychological and emotional needs; age; gender; past experience; and other characteristics; the danger or damage that has been caused, or is likely to be caused by the child; the ability of the parent to take care of the child; the consequences that might occur in change of circumstances; and other relevant acts. Looking particularly at the last part of this provision, the circumstance in which a mother is in conflict with the law, and therefore will be imprisoned, has to be considered when determining what is in the best interests of the child.

57. **STATISTICS FEMALE PRISONERS AND THEIR CHILDREN** – Bulgaria has one female prison, located in Sliven. Currently, there are 207 women imprisoned, among who one girl who is a juvenile. This number includes both convicted women, as well as women in pre-trial detention. From the total of convicted women, 73 are mothers and they all retained their parental rights after the imprisonment. This results in 120 children of imprisoned mothers living in Bulgaria; 91 children are minors under 14 years and 29 children are juveniles between 14 and 18 years old. Among the 207 imprisoned women, 52 are convicted with a prison sentence of 5 years or longer, 19 of the long-term convicted women are mothers.
58. **SENTENCING DECISIONS** – Similar to Belgium, courts need to individualise the criminal liability. As a standard practice in Bulgarian criminal courts, judges consider the parental status and responsibilities when deciding on a sentence. This includes, whether the accused is a single parent, or has dependent children, the age of those children, the level of closeness and connection between the children and the accused, and the type of care provided by the parent. Nonetheless, this will be observed from the perspective of the accused mother, and not from the standpoint of the child.

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<sup>217</sup> Child Protection Act of 31 May 2000 (Bulgaria).

In the Bulgarian legislation, Article 36 of the Bulgarian Criminal Code contains the purposes of sentencing.<sup>218</sup> This provision needs to be interpreted by courts that criminal liability is personal (Article 35(1)), imposed only on the perpetrator of the crime (Article 35(2)), and proportionate (Article 35(3)). Based on this, the sentence should, as limited as possible, affect third parties. However, it should be noted that the current criminal system is designed for responding on crimes, and not to deal with the interests of vulnerable groups; this is done by other legal branches, such as social law.

59. **PRACTICE OF PARDON IN BULGARIA** – A possible way to address the child’s best interests when a mother is imprisoned, is through the practice of pardon. In the context of pardon, a mother can be released and be reunited with her child(ren). In Bulgarian’s pardon practice the principle of the best interests of the child is the leading criterion in determining whether to pardon a convicted parent.<sup>219</sup> The best interests are assessed strictly, and the assessment is based on a comprehensive systematic analysis of all the circumstances of the case.<sup>220</sup> Elements taken into consideration are, for example, the moral and educational impact of the pardon decision on the child.<sup>221</sup>
60. **CONTACT AND VISITING REGIME** – In general, Articles 73 and 86 of the Penalties Execution and Detention Act (PEDA) entitles prisoners to visits twice a month, with the visits being generally 40 minutes long and taken in *ad hoc* premises.<sup>222</sup> However, for mothers whose children are visiting, the visits cannot be less than one hour, pursuant to the practice of the female prison. The long prison visits compensate for the financial costs undertaken by the children, and their potential guardians/caregivers, to travel to the prison. Since Bulgaria has only one female prison, a lot of women might find themselves imprisoned far away from their home environment. It shall be noted that when children are visiting, a space specifically equipped for them is provided. For instance, there are toys for the children in the room, which allows the imprisoned mother and child to play together during the visit, facilitating a moment in which they can bond. In addition to the two visits allowed per month, there is the possibility for the imprisoned mothers and their children to have visits via videoconference. When children are placed in foster families, because of a lack of another caregiver outside the prison, visits can

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<sup>218</sup> Criminal Code of 1 May 1968 (Bulgaria).

<sup>219</sup> *Extensively on these issues, see: I. PUSHKAROVA, “The Children of Imprisoned Parents in the Pardoning Practice. In: Society and Law Legal Periodical”, Iss. 6, 2019, 79-99.*

<sup>220</sup> *Ibid.*

<sup>221</sup> *Ibid.*

<sup>222</sup> Penalties Execution and Detention Act of 1 June 2009 (Bulgaria).

only take place after the opinion of the foster parent is consulted. When a child is living in a foster family, it could be that visiting the imprisoned mother does not fall within the best interests of the child.

61. **PREGNANT WOMEN AND YOUNG CHILDREN** – According to Article 85 PEDA children as young as up to 1 year of age can stay with their mothers in the prison. In such cases they live with them in a specially equipped kindergarten as a separate department in the prison under constant free medical care. The conditions there imitate home environment with the intention of creating a welcoming environment and avoiding that children living inside the prison strictly identify the setting as a prison. However, when the child is within this age, the execution of the penalty may be terminated until the child reaches 1 year of age and there are no other individual circumstances which necessitate the prolongation of the termination. The competent authority is the executing prosecution acting under Article 447 of the Code of Criminal Procedure.<sup>223</sup> When deciding whether to terminate the sentence or to leave the mother and child in prison the prosecution is guided by the best interests of the child. In some cases it can be in the best interests of the child to be imprisoned together with the mother. This would be the case in which the mother does not have a proper home.

When the sentence has been terminated or its initiation has been postponed (because the mother has been sentenced after the child was born but, before reaching one year of age), the mother is considered a free person for the period of non-execution of the penalty. The same rules apply when the convicted woman is pregnant.

### 1.3 Other Jurisdictions and their Practices

62. **SOUTH AFRICAN LANDMARK CASE** – A landmark case when it comes to sentencing parents and the best interests of children of prisoners can be found in South Africa. In 2007, the South African Constitutional Court decided on a case where a mother of three was convicted for fraud and got sentenced with four years of imprisonment.<sup>224</sup> The Constitutional Court decided a non-custodial sentence of house arrest, community service and a suspended sentence for the mother, based on the best interests of the child, and the fact that the mother was the primary caregiver.<sup>225</sup> In its balancing exercise, the Court weighed the personal circumstances of the accused, the

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<sup>223</sup> Code of Criminal Procedure of 29 April 2006 (Bulgaria).

<sup>224</sup> South African Constitutional Court 26 September 2007, S v. M.

<sup>225</sup> H. LAUWEREYS, “Sentencing primary caregivers in South Africa: the role of the child’s best interests”, *South African Journal on Human Rights* 2020, (154) 155.

interests of the community, the nature of the crime, *and* the child's best interests.<sup>226</sup> The best interests of the child should be an independent consideration.<sup>227</sup> The Court developed guidelines for sentencing primary caregivers.<sup>228</sup> However, questions regarding the elements that need to be examined and the weight given to the best interests of the child still remain unanswered.<sup>229</sup> According to the Court, preference should be given to non-custodial sentences, and if the custodial sentence was the only option, the best interests of the child should be considered to find appropriate care for the child.<sup>230</sup> Additionally, the Court stated that it is a misassumption to see the consideration of the best interests of the child as parents escaping the consequences of their actions.<sup>231</sup> The case has had an impact on criminal procedures in South-Africa, but it also had an impact on the regional and international level.<sup>232</sup> The case was, for example, highlighted during the UN Day of General Discussions on 'Children of Incarcerated Parents'.<sup>233</sup>

63. **ITALIAN PRACTICE** – As stated above, Italy's 2014 Memorandum of Understanding between the Ministry of Justice, the National Ombudsman for Childhood and Adolescence, and COPE member organisation *Bambinisenzasbarre ONLUS* was the basis for the Council of Europe Recommendation. The Memorandum was been revised in 2016, and it is regarded as a Charter of Rights of Children of Imprisoned Parents.<sup>234</sup> According to Article 1(3) the best interests of the child need to be taken into consideration when sentencing a parent. Furthermore, Article 2 contains requirements for children visiting prisons.

An Italian practice, for implementing the best interests of the child when deciding the sentence of a mother, is the so-called 'Finocchiaro Act'.<sup>235</sup> The law was established in 2001 and contains provisions for alternative measures to detention in order to protect the relationship between prisoners and minor children.<sup>236</sup> The provision of Article 3 contains special house

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<sup>226</sup> A. SKELTON and L. MANSFIELD-BARRY, "Developments in South African law regarding the sentencing of primary caregivers", *European Journal of Parental Imprisonment* 2015, (14) 14.

<sup>227</sup> South African Constitutional Court 26 September 2007, S v. M, 18 and 20.

<sup>228</sup> *Ibid.*, 22-23.

<sup>229</sup> H. LAUWEREYS, "Sentencing primary caregivers in South Africa: the role of the child's best interests", *South African Journal on Human Rights* 2020, (154) 157.

<sup>230</sup> A. SKELTON and L. MANSFIELD-BARRY, "Developments in South African law regarding the sentencing of primary caregivers", *European Journal of Parental Imprisonment* 2015, (14) 14.

<sup>231</sup> South African Constitutional Court 26 September 2007, S v. M, 21.

<sup>232</sup> A. SKELTON and L. MANSFIELD-BARRY, "Developments in South African law regarding the sentencing of primary caregivers", *European Journal of Parental Imprisonment* 2015, (14) 14-15.

<sup>233</sup> Committee on the Rights of the Child, "Report and Recommendations of the Day of General Discussions on 'Children of Incarcerated Parents'", 30 September 2011, 2.

<sup>234</sup> Memorandum of Understanding between The Ministry of Justice, The National Ombudsman for Childhood and Adolescence and *Bambinisenzasbarre ONLUS* of 6 September 2016 (Italy).

<sup>235</sup> P. SCHARFF-SMITH, *When the Innocent are Punished. The Children of Imprisoned Parents*, London, Palgrave Macmillan, 2014, 98.

<sup>236</sup> Finocchiaro Act of 8 March 2001 (Italy).

arrest for mothers with children under the age of 10 as an alternative to imprisonment.<sup>237</sup> However, there are two requirements: there should be no identified risk of the offender committing further crimes and they should have served at least one-third of their sentence.<sup>238</sup>

64. **SCANDINAVIAN PRISON PRACTICE** – When talking about prison practice, the prison system in Scandinavian countries are often referred to as being ‘good practice’. Across Scandinavian prison facilities, there are ‘children’s officers’, typically prison officers or social workers, who have the responsibility to ensure the rights of children with imprisoned parents in their institutions.<sup>239</sup> This includes, for example, shaping child-friendly visiting conditions and procedures, and organising parental study circles and special child-centred events in prison.<sup>240</sup> A remarkable initiative from Norway is that the rights of the child are directly written into their national prison law.<sup>241</sup> This initiative can be seen as a children’s rights-based approach to prison management. Nevertheless, this is only the theory, concrete standards and child-friendly practices are needed to fully fulfil the children’s rights.

## ***2. The Best Interests of Children of Imprisoned Mothers in a Crisis Situation: the Covid Pandemic***

65. **PRISONS IN LOCKDOWN** – In late March 2020, nations around the world shut down and a lot of prisons went into total lockdown. The Covid-pandemic profoundly affected the world and prisons experienced their worst crisis in recent history. The pandemic required states to take preventive measures to halt the spread of the virus in their communities at large, but also in their penal facilities.<sup>242</sup> It can be said that most prisons were unprepared for this pandemic, with states then adopting different methods to tackle the virus within prisons. Decisions were made to safely release people from prison and to increase the use of house arrest.<sup>243</sup>

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<sup>237</sup> P. SCHARFF-SMITH, *When the Innocent are Punished. The Children of Imprisoned Parents*, London, Palgrave Macmillan, 2014, 98; J. TOMKIN, “Orphans of Justice. In search of the best interests of the child when a parent is imprisoned: A legal analysis”, *QUNO Human Rights & Refugees Publications* 2009, 28.

<sup>238</sup> P. SCHARFF-SMITH, *When the Innocent are Punished. The Children of Imprisoned Parents*, London, Palgrave Macmillan, 2014, 98.

<sup>239</sup> P. SCHARFF-SMITH, “Children of Imprisoned Parents in Scandinavia: Their Problems, Treatment and the Role of Scandinavian Penal Culture”, *Law in Context: A Socio-Legal Journal* 2015, (147) 165.

<sup>240</sup> *Ibid.*

<sup>241</sup> P. SCHARFF-SMITH and E. VILLMAN, “Prisons, families and human rights. From prisoners’ rights to the rights of prisoners’ children” in A. PARKES and F. DONSON, *Parental Imprisonment and Children’s Rights*, Abingdon-New York, 2021, (135) 153.

<sup>242</sup> PENAL REFORM INTERNATIONAL, “Global Prison Trends 2021. Special Focus: Prisons in crises”, 2021, 11.

<sup>243</sup> It could be questioned why these groups were imprisoned in the first place. This could open room for discussion on reducing the use of imprisonment. Furthermore, the Covid-pandemic can change public attitudes towards imprisonment. People outside prisons felt what it is to have your liberty of movement restricted, and contact with friends and families

Nonetheless, the people inside prisons were negatively impacted by the measurements states made. The pandemic might have been as an opportunity for some free mothers to spend more time with their children, but this was not the case for mothers behind bars. Visits in prison were not able to continue as usual, with the obvious consequences that contact between imprisoned mothers and their children decreased. Visits were suspended to protect the people who live and work in the prisons despite of the psychological and social aspects of this decision. The suspension is an interference in the right to family life of imprisoned mothers and their children. It was, however, rightly seen as legitimate in the view of the grave danger for the health and life of prisoners imposed by the pandemic. This risk and the high mortality rates justified restrictions of family rights which are not absolute and can be limited in exceptional cases as long as the limitation is legal (established by law) and proportionate (both minimal and necessary). The same applies to the best interests of these children. They should be a primary consideration in all decisions which affect them in normal situations but, in exceptional cases, the principle may be limited. The question that arises is whether the limitations had indeed been proportionate, in the light; for examples, in the light of the possibilities to be substituted with videoconferences or more frequent phone calls.

66. **IMPACT OF COVID-19 ON CHILDREN WITH IMPRISONED MOTHERS** – In April 2020, the International Coalition for Children with Incarcerated Parents (hereinafter: INCCIP) gathered information about the impact of the Covid-19 pandemic on children of imprisoned parents.<sup>244</sup> The Coalition sent a survey throughout its network and received 57 responses from 14 different countries across 6 continents. One of the main findings was that there was a solidarity amongst families affected by imprisonment. They experienced similar practical and emotional difficulties trying to stay in contact with each other. As the pandemic continued, alternatives to the physical visits were developed. The most common alternative were virtual visits via videocalls.<sup>245</sup> However, contact through technology brings some issues with it; for example, some families might not be able to have the financial means to afford the right technology and stable access to internet.
67. **ASSESSING AND DETERMINING THE BEST INTERESTS OF THE CHILD IN A CRISIS SITUATION** – As stated before, decisions concerning prison visitation affect children with imprisoned

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suspended. See: PENAL REFORM INTERNATIONAL, “Global Prison Trends 2021. Special Focus: Prisons in crises”, 2021, 8-9.

<sup>244</sup> D. JENNINGS, “The impact of COVID-19 worldwide on children with an incarcerated parent”, *European Journal of Parental Imprisonment* 2020, (15) 15.

<sup>245</sup> Other alternatives were increasing the allowed phone time and the use of email.

mothers, and thus their best interests should be assessed and determined. However, the principle of the best interests of the child is not absolute. In the case of the Covid-19 pandemic one of those other interests is the protection of public health. Additionally, the ECtHR emphasises in its case law that prisoners are a vulnerable group and authorities have the duty to protect them.<sup>246</sup> When a pandemic, like Covid-19, breaks out, prisoners do not have the possibility to choose their medical care, but are dependent on the care provided within the prison; moreover, they are also not in control of their own health risks. Imprisoned mothers are therefore at higher risk than free mothers and need higher protection; this was especially the case when there was a high mortality rate at the beginning of the pandemic. The risk for imprisoned mothers to be infected was higher, as well as the hazard to have to bear serious consequences of the infection, including death. In this context, two interests of the child need to be balanced, namely the best interest of the child to keep their mother healthy and the best interest of the child to see the mother.

Moreover, it could be stated that there was no way of knowing, at the time of these decisions, that children would not have any kind of physical contact with their imprisoned mother for up to four to five months. However, as the Committee recommends in its GC No. 14(2013), decisions need to be reviewed at reasonable intervals. Furthermore, social distancing measures equally applied to the rest of society. When doing the balancing exercise, the decisions regarding visiting restrictions would have to go beyond what affects the rest of society.<sup>247</sup>

Nevertheless, the Covid-19 pandemic allowed for discussion concerning prison visits by children, and how to balance the negative consequences of suspended visits. Virtual visits could reduce the distress that some children with imprisoned mothers otherwise experience when the visits take place in the prison environment. However, for young children, who may not have reached an age to understand why the contact is via a screen, communication by video call may be particularly confusing.

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<sup>246</sup> See for example: ECtHR 6 December 2011, nr. 8595/06, *De Donder and De Clippel v Belgium*, §69; ECtHR 16 November 2000, nr. 21422/93, *Tanribilir v Turkey*, §72.

<sup>247</sup> N. MOLE and S. SLOAN, “Children with imprisoned parents and the European Court of Human Rights”, *European Journal of Parental Imprisonment* 2020, (3) 13.

## CHAPTER V. THE POSSIBILITY FOR FUTURE PENAL REFORMS

### 1. *Penal Reform or Prison Abolition?*

68. **PENAL REFORM** – With the Covid-pandemic fuelling new discussions about the European prison systems, and especially about the impact of the imprisonment of a mother on her child(ren), the time has come to improve the criminal justice system. Although there are movements happening to implement a child’s rights approach, current criminal justice systems consider children still more as collateral than individuals impacted by maternal imprisonment.<sup>248</sup> The rights of the prisoner, and more specifically the right to family life of imprisoned mothers, are put more central in sentencing rulings and decisions regarding visitations. As stated above, current criminal systems are designed to respond on crimes while the state has a right to punish perpetrators. Therefore, the criminal system limits the rights of the perpetrators it holds liable. On the other hand, criminal systems are not designed to protect rights, and to deal with interests of vulnerable groups (such as children with imprisoned mothers, but also victims) affected by the criminal liability.

Nonetheless, human rights are becoming more and more important in European legal systems, for example, in environmental and family law. This tendency is also happening in criminal law, as prisoners’ human rights are becoming of greater importance. However, the criminal system should develop better sensibility and insights to protect third parties; and assure that punishment does not have unnecessary impact on them. When human rights assume an increasingly central role, the criminal *justice* system needs to take all interests in mind, including the interests of the government and society to have offenders punished for their crimes, the interests of a mother in conflict with the law, and the interests of the child. It seems that national jurisdictions – although some ‘good practices’ exist – struggle to balance these interests. This shapes the question whether there is a need for penal reform, including reform of the prison system. As the research upon this work is based, there are several voices who plead for reform by shifting the attitude of focussing merely on the imprisoned mother but also aim attention to the child. A possible way to do this is by strengthening cooperation between the criminal and social systems, such as child protection, education and social services. Reforming the criminal justice system is one way to take the best interests of the child into consideration. However, some voices call for discussions on prison abolition and not merely a reform of it.

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<sup>248</sup> C. FLYNN, B. NAYLOR and P. FERNANDEZ ARIAS, “Responding to the needs of children of parents arrested in Victoria, Australia. The role of the adult criminal justice system”, *Australian & New Zealand Journal of Criminology* 2015, (1) 1.

69. **ABOLITION MOVEMENTS** – The appearance of the prison abolition movement dates back to the time where imprisonment became the main form of punishment. Abolition is seen “*as a tradition, a philosophy, and a theory of change*”, “*with the goal of eliminating imprisonment, policing, and surveillance and creating lasting alternatives to punishment and imprisonment*”.<sup>249</sup> Prison abolition has also been analysed from a feminist perspective.<sup>250</sup> Abolition feminist movements declare that the prison sentence has gender-specific consequences for women and emphasise the impact of the imprisonment on their families, especially their children.<sup>251</sup>

It should be noted that these movements especially exist in common law countries, such as the US and the UK.<sup>252</sup> Nonetheless, other forms of prison abolition can also be found in other countries. As stated in Chapter I of this work, in Belgium, but also in other European countries, there is a movement for detention houses. However, unlikely the ideas proposed by the abolition movements in the US and UK, the movement for detention houses introduces an alternative institution as replacement for prisons, implying that there will still be some form of punishment. Detention houses differ from prisons as they are “*small-scale, differentiated and community-integrated*”.<sup>253</sup> According to MANU PINTELON, coordinator of *vzw De Huizen* and RESCALED, detention houses could create an optimal educational context for children, which is in the interest of the child, the mother and society.<sup>254</sup> This includes a tailor-made approach for women and children; women could again – while receiving good guidance – take up responsibilities and perform caregiving responsibilities surrounded by a homely atmosphere.<sup>255</sup>

70. **PRISON ABOLITION AS A THINKING EXPERIMENT** – Prison abolition as a theory of change could solve the issue of children impacted by the imprisonment of their mother. If prisons were to be abolished, no mothers would end up in prison anymore, and no children would be affected by the imprisonment once again. However, for many people prison abolition is something unthinkable and implausible.<sup>256</sup> As ANGELA DAVIS, American political activist, expresses in her

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<sup>249</sup> A. DAVIS, G. DENT, E. MEINERS and B. RICHIE, *Abolition. Feminism. Now.*, London, Hamish Hamilton an imprint of Penguin Books, 2022, 50.

<sup>250</sup> P. GREER, “Dismantling Prisons: Abolitionist Feminism, Women, Incarceration and #MeToo”, 2021.

<sup>251</sup> It should also be noted that both abolition and feminism have several sub-movements with each contributing independent and different approaches to the same issues. *See also*: A. DAVIS, G. DENT, E. MEINERS and B. RICHIE, *Abolition. Feminism. Now.*, London, Hamish Hamilton an imprint of Penguin Books, 2022, 1-2.

<sup>252</sup> The reason for this is that mass incarceration is a greater phenomenon in those countries, in comparison with other countries of the Western World.

<sup>253</sup> *See*: [www.rescaled.org/](http://www.rescaled.org/).

<sup>254</sup> M. PINTELON, “Detentiehuizen voor moeders halen kinderen uit de cel”, *Knack* 2021.

<sup>255</sup> *Ibid.*

<sup>256</sup> A. DAVIS, *Are Prisons Obsolete?*, New York, Seven Stories Press, 2003, 9.

book: “[p]rison abolitionist are dismissed as utopians and idealists whose ideas are at best unrealistic and impracticable, and, at worst, mystifying and foolish”.<sup>257</sup> As stated in the beginning of this work, prisons appear as something natural in our lives and are seen as symbolic for punishment. For prison abolition to be considered as a real option, the view of society on prisons needs to change. Moreover, societies themselves need to change and focus on transformative justice, community-based responses, and prevention mechanisms, including investing in education, health and social housing. As this work sees prison abolition more as one of the many ways to think about the prison sentence in future, the following recommendations will not take this into account, but will rather aim for penal reform.

## 2. Recommendations

71. **SYSTEMATIC RECORDS ABOUT CHILDREN WITH IMPRISONED MOTHERS** – In addition to what is said before and drawn up by the findings of the research, this study provides some recommendations to legislators, policy makers, judges and prison authorities. A first recommendation concerns the systematic recording of children with imprisoned mothers. As seen in the Belgian example, systematic records about the numbers of children with imprisoned mothers, and more in general with imprisoned parents, is often lacking. GILL PUGH states in her book that scarceness of accurate statistics about a stigmatised group “*is often an indication that the group is of low status and is unlikely to be anyone’s priority*”.<sup>258</sup> Therefore, this work recommends states to start keeping systematic records about the number of children affected by maternal imprisonment. This represents a first step in recognising this multi-vulnerable group that needs to be considered in state policies.
  
72. **DOMESTIC LEGISLATION PROTECTING CHILDREN WITH IMPRISONED MOTHERS** – Secondly, a lot of the international and regional instruments concerning issues experienced by children with imprisoned mothers are merely soft law, for example the Recommendation CM/Rec (2018)/5 of the CoE. Transforming them to binding rules could help guaranteeing the rights of children in a more effective way, as the rules need to be clear and enforceable. However, when agreeing on binding rules internationally or regionally, there exists a risk that the rules will translate the

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<sup>257</sup> *Ibid.*, 10.

<sup>258</sup> G. PUGH, *Sentenced Families: Signs of Change for Children with a Parent in Prison*, Ipswich, Ormiston Children and Families Trust, 2004, 15; P. SCHARFF-SMITH, “Children of Imprisoned Parents in Scandinavia: Their Problems, Treatment and the Role of Scandinavian Penal Culture”, *Law in Context: A Socio-Legal Journal* 2015, (147) 150.

lowest common denominator rather than pursuing the highest standards of good practice.<sup>259</sup> Therefore, this work recommends states to pass legislation on the domestic level ensuring the rights of children with imprisoned mothers, but also with imprisoned parents more generally. Examples of good practice are the Finocchiaro Act in Italy and the initiative from Norway to write the rights of the child directly into their national prison law.

Moreover, as the principle of the best interests of the child is left vague on purpose, so state authorities have the possibility to individualise the best interests of the child in each case, this should be taken into account when formulating binding rules. As MOLE and SLOAN suggest in their article, “[r]ules must be clear and enforceable [...] but they must also have built-in provisions which allow for their flexible application in favour of a particular child or children”.<sup>260</sup>

73. **INFORM CHILDREN ABOUT THEIR RIGHTS AND OPTIONS** – As seen in the case law of the ECtHR, cases concerning family visits are brought before the Court by imprisoned parents who claim that their right to family life has been violated, rather than brought by children whose rights may be violated as well. Nonetheless, it is possible for children to bring cases before the ECtHR. However, as long as children are not informed about their rights and options, they will not consider taking action when a violation might occur. Furthermore, there also exists the possibility for children to file a complaint to the Committee of the Rights of the Child, if the state has ratified the Optional Protocol to the CRC on a communications procedure. However, no cases have been brought so far by children with imprisoned parents.<sup>261</sup> Therefore, this work motivates states to inform children with imprisoned parents about their rights and options to file complaints. In this way, the protection of the rights of children with imprisoned parents can be safeguarded and interpreted by the ECtHR and the CRC in specific cases, which can evolve in general principles useful for further development of good practices within states.
74. **CONTACT AND VISITING ENVIRONMENTS** – Furthermore, this work encourages states to ensure appropriate visiting environment for children of imprisoned mothers. A visiting environment should not cause distress or suffering to children. The recommendations formed in several international and regional instruments should be considered when designing these visiting environments. In addition, alternative means for communication were further developed during

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<sup>259</sup> N. MOLE and S. SLOAN, “Children with imprisoned parents and the European Court of Human Rights”, *European Journal of Parental Imprisonment* 2020, (3) 14.

<sup>260</sup> *Ibid.*

<sup>261</sup> *Ibid.*, 13.

the Covid-19 pandemic, such as virtual visits, can also be used in the future. Virtual visits could allow the visits to be more flexible, especially in cases where a mother would be allocated in a prison from a far distance from her environment. However, when deciding on the means of communication, the best interests of the child need to be determined and assessed. Moreover, prison facilities should be adapted with the right technologies to ensure that, for example, virtual visits can go smoothly.

75. **FURTHER RESEARCH** – This study should not be interpret as a complete study on the issues that children with imprisoned mothers face and it therefore encourages further research to be done. Ideas for further research could be the following: an empirical study about children visitation regimes in prisons, research about the impact of long-term parental imprisonment on children, or a study in cooperation with children of imprisoned mothers.

## CONCLUSION

When a mother is in conflict with the law, the principle of the best interests of the child, protected in Article 3 CRC, should be taken into consideration at the different stages of the criminal process, including when the sentence is determined, and when contact and visiting regimes are decided during the imprisonment. However, this principle is not absolute. In some situations, the right to family life of the imprisoned mother might conflict with the best interests of her child. This will be the case when contact with the imprisoned mother and prison visits are not in the best interests of the child. In those cases it is needed for state authorities to balance the best interests of the child with the right to family life of the mother. However, this balancing exercise is subjective. Moreover, the criminal justice system is a complex system. The interest of society at large to punish perpetrators plays a central role, and is what criminal systems are designed for. When determining and assessing the best interests of children with imprisoned mothers, this interest will also be considered by state authorities.

To conclude, it is needed to change the attitude, from focussing on merely the rights of the imprisoned mother to also focussing on the rights and best interests of the child. This will make the often forgotten victims of crime visible, and will influence criminal justice systems to become more just. It is time that criminal justice systems do not dehumanize people, but take the human rights of everyone affected, including the children of imprisoned mothers, into account.

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