



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

A short guide to General Comment No.1 on

Children of incarcerated and imprisoned parents and primary caregivers



The African Committee of Experts on the Rights and Welfare of the Child (ACERWC) was established under article 32 of the African Charter on the Rights and Welfare of the Child (ACRWC), adopted by the Head of States and Governments of the former Organization of African Unity (OAU), on 11th July 1990. The Committee consists of 11 members of high moral integrity, elected by the African Union Assembly for a single term of five years. They serve in their personal capacity. The Committee has the mandate to promote and protect the rights enshrined in the Charter particularly by formulating principles and rules aimed at protecting the rights and welfare of children in Africa. The Committee has also been bestowed with quasi-judicial functions to receive communication and investigate any matter covered by the African Children's Charter. The Committee is also vested with the mandate of giving authoritative interpretation of the provisions of the Charter at the request of a state party, an institution of the OAU/AU or any other person or institution recognized by OAU/AU, as is the case in this General Comment.

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A short guide to General Comment No.1 on **Children of incarcerated and imprisoned parents and primary caregivers**

In November 2013, the African Committee of Experts on the Rights and Welfare of the Child adopted a General Comment on the rights of children when their parents or primary caregivers are in conflict with the law. It provides States with guidance on the implementation of Article 30 of the African Charter on the Rights and Welfare of the Child. The following is a summary of this General Comment section by section. The full text of the General Comment is available on the website of the ACERWC. www.acerwc.org

Article 30 of the African Charter on the Rights and Welfare of the Child

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

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

What does the General Comment say?

Introduction

Children are often stigmatised by association by the arrest, pre-trial detention and imprisonment of their parents or primary caregivers.



Section one provides an introduction to the General Comment by highlighting some of the issues facing children when their parents or primary caregivers come into conflict with the law; for example, children are often stigmatised by association as well as harmed by the trauma of separation caused by arrest, pre-trial detention and imprisonment. They can experience financial and material hardship and instability in family relationships. Children living in prison with their mothers experience a wide range of violations of their rights including difficulties in accessing education and healthcare.

Objectives

The main objectives of the General Comment are to strengthen understanding of Article 30 of the African Charter on the Rights and Welfare of the Child (the Charter) and to define the legislation, policy and practice necessary to achieve its full implementation.

Scope

The Committee asserts that the provisions of Article 30 do not just apply to mothers but also to fathers and primary caregivers who may be a foster parent or another family member such as a grandparent. This is because large numbers of children in Africa are orphaned or living separately from their parents but may still require the protections guaranteed in Article 30. Article 30 applies when primary caregivers are accused or found guilty of infringing the criminal law. This encompasses all stages of criminal proceedings starting from arrest and continuing through to release and integration. The provisions of Article 30 apply whether the primary caregiver is in custody or subject to non-custodial measures.

The importance of an individualised, informed and qualitative approach

This section emphasises the importance of treating children whose primary caregivers are in conflict with the law in a way that is nuanced, informed and based on actual information about their situation. This means that it is important for States to gather data about this group of children to help develop effective policy and practice. It also means that professionals, such as teachers and social workers who may come into contact with such children, must be trained to provide much needed support.

Principles of the African Charter on the Rights and Welfare of the Child

Section two of the General Comment examines the four general principles of the Charter and their implications for implementation of Article 30.

Non-discrimination

Children whose primary caregivers are involved with the criminal justice system have the same rights as other children and these rights should not be affected because of the status of their parent/caregiver. In order to prevent discrimination, States should provide children imprisoned with their parents/primary caregivers with the equivalent services that children in the community receive, for example in relation to healthcare and education. They should also ensure that when babies are born in detention, no mention is made of the location of their birth on their birth record.

Children whose primary caregivers are involved with the criminal justice system have the same rights as other children.



A non-custodial sentence should always be considered when sentencing parents or primary caregivers.



The best interest of the child

The authorities should take into account the best interest of a child who may be affected when making decisions at all stages of the criminal justice process including arrest, pre-trial measures, trial and sentencing, imprisonment, release and reintegration into the family and community. In order to meet this obligation, the Committee recommends the following.

- ➔ The authorities should actively consider applying alternatives to pre-trial detention and to sentences of imprisonment when offenders are parents or primary caregivers of children. Taking children's best interests into account does not mean that parents and caregivers cannot be detained or imprisoned.
- ➔ A decision for a child to live in prison with his/her mother or primary caregiver must be subject to judicial review. Criteria for taking such a decision should be developed and include consideration of the individual characteristics of the child such as age, sex, level of maturity, quality of relationship with mother/caregiver and the existence of quality alternatives available to the family.
- ➔ Contact between imprisoned parents/caregivers and children must be facilitated where it is in a child's best interest.

The right to survival, protection and development of each child

The Committee takes a broad and holistic view of the right to survival, protection and development, explaining that it encompasses health, food, shelter, education and an adequate standard of living. It notes that children living in prisons with their parents/primary caregivers often experience serious violations of this right because of their living conditions, lack of birth registration and access to education or health facilities, and the risk of experiencing violence at the hands of other detainees or prison employees. The Committee recommends that States implement the

UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules) which have many relevant provisions, such as ensuring that children living in prison are never treated as prisoners themselves, that they are provided with good quality primary healthcare services, and that the environment provided for their upbringing is as close as possible to that of a child outside prison.

The right to participation

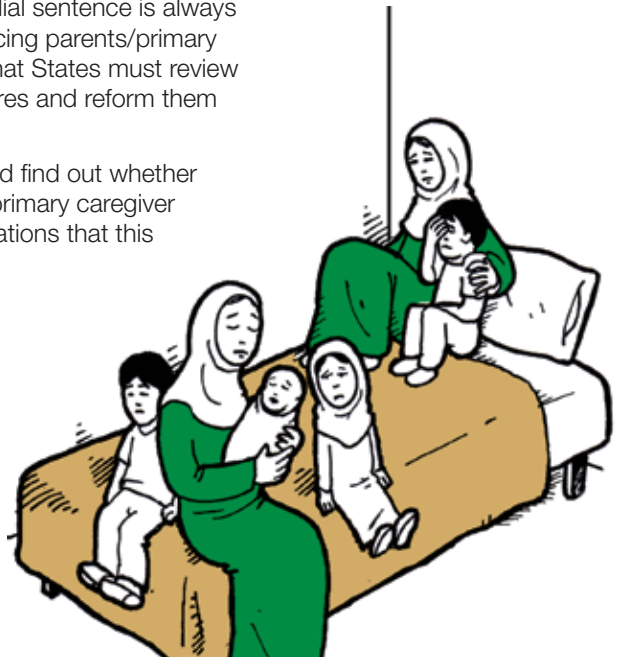
According to Article 4(2) of the Charter, children should have the opportunity to participate in judicial or administrative proceedings affecting them provided they are capable of communicating their views. For example, parole boards should take the views of a child into account when considering parole of their parent/primary caregiver.



The scope and nature of Article 30

The third section of the General Comment details the legal, policy and administrative steps that must be taken to implement Article 30. These include the following.

- ➔ Ensure that a non-custodial sentence is always considered when sentencing parents/primary caregivers. This means that States must review their sentencing procedures and reform them accordingly so that:
 - A sentencing court should find out whether a convicted person is a primary caregiver whenever there are indications that this might be so.



If a parent or caregiver is imprisoned, then States should ensure that a child is placed in appropriate alternative care.



- The court should also ascertain the effect of a custodial sentence on the children concerned if such a sentence is being considered.
- If the appropriate sentence is clearly custodial and the convicted person is a primary caregiver, the court must apply its mind to whether it is necessary to take steps to ensure that the children will be adequately cared for while the caregiver is incarcerated.
- If the appropriate sentence is clearly non-custodial, the court must determine the appropriate sentence, bearing in mind the best interests of the child.
- Finally, if there is a range of appropriate sentences, then the court must use the principle of the best interests of the child as an important guide in deciding which sentence to impose.

⇒ If a parent/caregiver is imprisoned, then States must ensure that a child is placed in appropriate alternative care. The Committee recommends that the UN Guidelines for the Alternative Care of Children are consulted and followed.

⇒ Establish alternative measures to pre-trial detention taking into account that childcare responsibilities may be an indication that alleged offenders are unlikely to abscond and that pre-trial detention is therefore less likely to be necessary. Many States have established ways to secure the attendance of accused persons without resorting to detention. These include bail and using summons procedures and written notices to appear at court. The Committee takes the view that these measures should be given priority over detaining an accused person if such person is the parent/primary caregiver of a child.

⇒ Establish special alternative institutions for mothers living in prison with their children to cater for the very exceptional circumstances when alternatives to detention cannot be considered and it is in a child's best interests to remain with their mother or primary caregiver.

The Committee emphasises that States have the same obligations to respect, protect and fulfil their rights as they do to any other child in their jurisdiction and recommends that National Human Rights Institutions and other independent monitoring bodies are encouraged to monitor the treatment and conditions of children living in prison with their mothers. It is also important that no child remains in prison following the release, execution or death of their parents/caregivers.

- ➔ Ensure that a death sentence is not imposed on pregnant women or mothers of young children. States that still retain the death penalty should observe the UN Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty.
- ➔ Article 30(1)(f) requires that States have a prison system which has as its essential aim the 'reformation, the integration of the mother to the family and social rehabilitation'. In order to achieve this, it is vital that parents/caregivers have regular contact with their children – provided it is in the child's best interests for this to take place.

A death sentence should not be imposed on pregnant women or mothers of young children.



It is vital that parents or primary caregivers have regular contact with their children.

VISITING ROOM



The relevant authorities should establish where a child is living in order that their parent or caregiver is sent to a facility within suitable travelling distance of the child's home.

However, prison buildings and regimes are often remote and inaccessible for children and this is a particular challenge for detained mothers since many countries have a limited number of facilities for female detainees. This can mean that children have to travel very long distances from their home to make visits which incurs financial costs and can take up school time. The relevant authorities should establish where a child is living in order that their parent/caregiver is sent to a facility within suitable travelling distance of the child's home. When a parent or caregiver is a foreign national they may require additional assistance with maintaining contact with children in their home country through telephone, email or written correspondence.

Dissemination and reporting obligations

The Committee recommends that States widely disseminate the General Comment across government. It should also be made known to different groups of professionals working for and with children, including judges, lawyers and legal aid providers, teachers, guardians, social workers, officials of public or private welfare institutions, as well as to children and civil society. States should include information in their periodic reporting to the Committee on the challenges they face and the measures they have taken to implement Article 30.



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Penal Reform International (PRI) is an independent non-governmental organisation that develops and promotes fair, effective and proportionate responses to criminal justice problems worldwide.

We promote alternatives to prison which support the reintegration of offenders, and promote the right of detainees to fair and humane treatment. We campaign for the prevention of torture and the abolition of the death penalty, and we work to ensure just and appropriate responses to children and women who come into contact with the law.

PRI is helping the ACERWC to promote and disseminate this General Comment as part of its work to improve the treatment of children in conflict and in contact with the law in Africa and beyond.

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