



Babies and Small Children Residing in Prisons

By Marlene Alejos

Foreword by Rachel Brett
Preface by Jean Zermatten

March 2005



Quaker United Nations Office



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This research was conducted in the framework of Ms Alejos' recently completed Executive Master on Children's Rights, offered jointly by the Faculty of Law of the Université de Fribourg and the Institut Universitaire Kurt Bösch of Sion, Switzerland.

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FOREWORD

In 2003, the Quaker United Nations Office, Geneva, began research on women in prison. Our aims were to better understand why increasing numbers of women are being imprisoned, identify the conditions in which women prisoners are kept around the world, and draw attention to the particular impact that imprisonment has on women. In July 2004, we published *Women in Prison and Children of Imprisoned Mothers: A Preliminary Research Paper*.

In looking into the situation of women in prison, it rapidly became clear to us that imprisonment of women has an enormous impact upon children. In many countries, the vast majority of detained and imprisoned women are mothers, and often the sole or main carer of minor children. These children fall into two categories: those who are separated from their mother when she is imprisoned, and those who go into prison with their mother.

Far too little consideration has been given to the situation of both of these groups of children. In particular, the adoption of the Convention on the Rights of the Child has led to the re-evaluation of many aspects of children's lives from a child rights perspective. This does not yet extend to the case of children of incarcerated parents.

The current paper by Marlene Alejos concerns babies and young children who stay in prison with their mothers. It is being published by the Quaker United Nations Office because we believe that it deserves a wider audience, and as a contribution to raising awareness about the situation of babies and young children in prison with their mothers, and to encourage greater consideration of the problems and dilemmas raised. This is not a situation in which there are obvious right and wrong answers: neither separating babies and young children from their mother nor imprisoning them with their mother is desirable. But what are the rights of the child in such a situation, and how can they best be protected? In the course of her research, Marlene Alejos has identified some examples of strategies and good practices: these are included in Annex 2.

Marlene Alejos has drafted 'Suggested guidelines for drafting legislation, regulations, policies and programmes regarding babies and small children residing in prisons'. We welcome comment on these, as well as further contributions to the examples of good practices.

Rachel Brett

Representative (Human Rights & Refugees)
Quaker United Nations Office, Geneva

PREFACE

Deprivation of liberty remains a very difficult, controversial and sensitive subject because it involves many parameters which affect the physical, mental and social health of a detainee: a State's criminal law policy on the one hand, and fundamental human rights obligations on the other. Few situations have seen so many violations of human rights; few situations have been so frequently addressed by all forms of international instruments: recommendations, minimum rules, good practice guidelines ...

When pregnant women or mothers with young children are deprived of liberty the situation becomes even more complex, because the interests of the mother and of the child may diverge (as may those of the father, which are very rarely taken into account). I can but note that national legislation is usually very circumspect or even silent about this point. Although there may be agreement on the special care that a pregnant woman must receive while in prison, the situation of the mother imprisoned with a newborn or young child raises more complicated issues and no international standard is clear on this point.

It is, therefore, necessary to repeat some of the basic principles, notably from the UN Convention on the Rights of the Child, which has become a universal legal instrument and which binds 192 States Parties, and which promotes:

- the idea that a child must not be separated from his or her parents except under very particular circumstances;
- the principle that a child has a right to both parents;
- the obligation to protect a child in danger;
- the absolute necessity to respect the child's interests.

The Universal Declaration of Human Rights also underlines the need for special care and protection for children.

It therefore seems astonishing that the special situation of children of imprisoned mothers has not been examined more by the international community, and has not been addressed by a special recommendation from one of the UN bodies, from a regional institution or from NGOs involved in the examination of detention.

Ms Marlène Alejos boldly decided to choose this as the subject of her Masters thesis in order to obtain the title of Executive Master on children's rights from the IUKB/University of Fribourg in collaboration with the Institut international des droits de l'enfant (Switzerland). Not only has she dealt with the subject in a scientific way, presenting the special situation of mothers of young children and raising the clash of interests that may occur between the potentially diverging interests of the mother and the child, not forgetting the father; but, above all, she has dared to propose general rules to be applied in this kind of situation to try to make States respect the human rights of all concerned.

I hope that this important, fundamental and innovative study will not only be read and brought to the attention of all concerned governmental and non-governmental organisations, but, above all, that it will inspire international, regional and particularly national legislators, for the good of the child, the mother, both parents and society in general.

A handwritten signature in black ink, appearing to read 'J. Zermatten', with a stylized flourish at the end.

Jean Zermatten

Juvenile court judge
Director of the Institut international des droits de l'enfant
Member of the Committee on the Rights of the Child

Sion, February 2005

ABBREVIATIONS

ACHR	Arab Charter on Human Rights
AP I and II	Protocols Additional to the Geneva Conventions of 12 August 1949
AU	African Union
CAT	United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CAT Committee	United Nations Committee against Torture
CEDAW	United Nations Committee on the Elimination of Discrimination against Women
CERD	United Nations Committee on the Elimination of Racial Discrimination
CESCR	United Nations Committee on Economic, Social and Cultural Rights
CHR	United Nations Commission on Human Rights
CM of the CoE	Committee of Ministers of the Council of Europe
CoE	Council of Europe
CPT	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
CRC	United Nations Convention on the Rights of the Child
CRC Committee	United Nations Committee on the Rights of the Child
EPR	European Prison Rules
EU	European Union
GA	United Nations General Assembly
Geneva Conventions	The Four Geneva Conventions of 12 August 1949 – for the amelioration of the condition of the wounded and sick in armed forces in the field; for the amelioration of the condition of the wounded, sick and shipwrecked members of armed forces at sea; relative to the treatment of prisoners of war; relative to the protection of civilian persons in time of war
HRC	United Nations Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICRC	International Committee of the Red Cross
IHL	International Humanitarian Law
LAS	League of Arab States
OAS	Organization of American States
SC	United Nations Security Council
SMR	United Nations Standard Minimum Rules for the Treatment of Prisoners
The Beijing Rules	United Nations Standard Minimum Rules for the Administration of Juvenile Justice
The Riyadh Guidelines	United Nations Guidelines for the Prevention of Juvenile Delinquency
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children’s Fund

DEFINITIONS

The following definitions, many of which are based on definitions contained in international human rights norms, are used in this paper:

“Children”: ‘every human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier’ (Convention on the Rights of the Child, article 1).

“Deprivation of liberty”: ‘any form of detention or imprisonment or the placement of a person in a public or private custodial setting, from which this person is not permitted to leave at will, by order of any judicial, administrative or other public authority’ (UN Rules for the Protection of Juveniles Deprived of their Liberty, Section II, rule 11(b)).

“Imprisoned parent”: mother or father deprived of her/his liberty – both adult and children (young parents under the age of 18). Since it is more common for children to remain in prisons with their mother, often the child’s main caregiver, the term “imprisoned mother” is more frequently used in this paper.

“Juvenile”: a child or young person who, under the respective legal system, may be dealt with for an offence in a manner which is different from an adult (Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), Rule 2.2(a)).

“Nursing infants”, “infants”, “newborns”, “small children”: the terms ‘nursing infants’ and ‘infants’ are both used in the Standard Minimum Rules to refer to children who are ‘allowed to remain in the institution with their mothers’ (Standard Minimum Rules for the Treatment of Prisoners, Part I, article 23(2)). No age range or age limit is set in the rules. For the purpose of this paper, the terms ‘nursing infants’, ‘infants’, ‘newborns’ and ‘small children’ are all used indistinctly in the text to refer to small children.

“Prisons”: the term is used to refer to any institution - police detention centre, military detention centre, centre for the detention of migrants and/or asylum seekers - or other place where persons are deprived of their liberty under any type and form of detention or imprisonment (under arrest or detention, under conviction or simply accompanying a person in custody).

“Teen-age parents” or “young parents”: mothers and/or fathers, under the age of 18.

PART I

Introduction

The Universal Declaration of Human Rights, adopted by the United Nations in 1948, proclaims that motherhood and childhood are entitled to special care and assistance and proclaims the right of everyone to a standard of living adequate for their health and well-being.¹ It also states that all human beings are born free, recognizing the right to life, to liberty and security of persons, as well as the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment. These basic human rights are recognized in legally binding international human rights conventions.²

When confronted with deprivation of liberty, persons of all ages and sexes undoubtedly fear for the conditions in which the deprivation of liberty might take place, as well as the impact this may have on their own lives, and on the lives of their family members. For small and dependent children, the deprivation of liberty of their main care-giver has adverse effects on their lives and on the enjoyment of their basic human rights. It may directly and most likely negatively affect the child's survival, health, development and their psychological and emotional well-being - all fundamental human rights stipulated in the main international human rights conventions and the almost universally ratified Convention on the Rights of the Child, adopted by the UN General Assembly on 20 November 1989.³

On several occasions during human rights monitoring and fact-finding visits to various countries conducted as part of my work with the UN Office of the High Commissioner for Human Rights, I have been confronted with the appalling situation of babies and small children residing in prisons with their imprisoned mothers. On one occasion, I saw a very small child running around the corridors in an adult male prison in the Philippines. The explanation was very simple and easy to understand but difficult to forget: the child was brought by his mother to the prison every day, so that the imprisoned father would take care of the child while the mother would go to work. This was most likely the only practical solution found by the parents that would allow the mother to secure the livelihood of their family, reflecting also the lack of options available for the day-care of small children of working mothers.⁴

If able to do so and in the absence of other (or better) options, mothers deprived of liberty very often prefer and choose to keep their babies and small children with them while in custody. If possible, some mothers may also choose to have their small children spend their weekends in prison with them. It is an accepted but frequently controversial practice in many countries. The opinion whether this is in the best interests of the child varies, resulting in

¹ UDHR, Article 25.

² Idem, Articles 1, 3 and 5.

³ As of 24 November 2004, the United States of America and Somalia had signed but not ratified the Convention on the Rights of the Child.

⁴ It is important to note that the prison regulations in this country did not stipulate that imprisoned fathers could keep their babies with them, even if this was done, as explained by the prison guards.

different approaches and policies being undertaken in different countries. But babies and small children residing in prisons frequently are invisible to the legal and prison systems. Small children share imprisonment with their mothers and often become victims of the frequently deficient, overcrowded and harsh prison systems. The fact that not many fathers ask that their small children be allowed to remain with them while in custody, even for weekends, also reflects the reality that most frequently it is women who assume the role as primary care-giver for children, that the deprivation of liberty of men and women may affect their children differently, that the prison environment may not be a positive environment for children and that, in general, not many male prisons have special arrangements for fathers to keep their children with them.

I often have asked myself how one could contribute to the respect, fulfilment and enjoyment of the basic and fundamental human rights of children that accompany their mothers in prisons – some without having had the opportunity to choose or to express their views and wishes (newborns and small children) and others (older children) who may choose to accompany their mothers for the fear of being separated from them, or others who may be forced to stay in the absence of other or better options. And I asked myself if, were these small children given the opportunity to choose, they would choose to be imprisoned with their mothers? Most likely, yes, but is this fair to them? Is it fair not to allow a child to stay with his/her imprisoned mother if they so desire? Is it fair for a child to be taken into prison by his/her mother? How do adults decide what is best for the children?

But for children of parents deprived of their liberty who accompany an imprisoned parent (mother) in custody, the change of residence results in more than a change of address. This paper focuses mainly on the situation of babies and small children accompanying their mothers in prisons, i.e. children that reside in prisons either for extended (more than one week) or short periods (such as days, weekends, vacations, etc.) The impact that the deprivation of liberty of pregnant women might have on their unborn babies, as well as the challenges faced by children who are not staying with their imprisoned mothers, are not issues covered in this paper, even if reference to these issues is frequently made. Studies and information available regarding children of imprisoned parents living outside prisons acknowledge the difficulties in monitoring the situation of these children. Very often these children remain under the care of other family members and/or friends, or are left on their own - in most cases, without much state support or monitoring. In many countries support groups for families, in particular children, of persons deprived of their liberty have been established.

In Part II of this paper I review and describe the international and some regional human rights protection frameworks applicable to all children, paying particular attention to specific issues that are relevant to small children residing in prisons. I also review the international human rights framework applicable to persons deprived of their liberty, in particular, special provisions regarding pregnant women and mothers of newborn babies. The dilemma between the rights of women (mothers) and the rights of children in this situation is reflected here.

A brief reference to international humanitarian law is also included, mainly to highlight how women and their small children can also be affected if women (pregnant women and mothers of small children) are deprived of their liberty during armed conflict, either for reasons directly related to the conflict (such as when prisoners of war or civilian internees) or for other reasons not directly related to the conflict (such as for ordinary crimes).

In Part III, I review written directives, regulations and programmes issued by executive bodies or prison authorities to provide guidance to prison directors and staff on the management of adult parents, mainly imprisoned pregnant women and mothers with babies/small children residing in prisons, in four countries – Australia, Cambodia, Canada and France. Information regarding prison conditions in general can be easily obtained and many reports on the conditions of detention of female prisoners frequently make reference to children residing in prisons. But not many countries have developed policies regarding small children residing in prisons, or even established comprehensive programmes to respond to the needs of mothers and small children residing in prisons. The selected policies are examples of policies and/or programmes being implemented in Asia and the Pacific, Europe and North America. Reference to policies in some countries in Latin America and Africa is also made in the text. The criteria used for selecting these policies was simply based on the availability of information but it would be interesting, in the future, also to obtain some written policies (if available) from countries in Latin America, Africa and the Middle East, to better reflect in the analysis how different cultures respond to these problems.⁵

Questions such as the application of the principle of the best interests of the child, recognition of parental responsibilities, the setting of upper age limits, guarantees for the protection and promotion of children’s rights, internal and/or external monitoring mechanisms, as well as the institutional approach to children living with their mothers in prisons - including how children are accounted for, the budget allocated to prisons for each child, the treatment of small children by prison staff, the infrastructure, availability of food and clean water, as well access to medical services, medicines, education and leisure activities, their contact with other family members and the community and other relevant issues - are addressed. Some examples of valuable practices for the care, assistance and protection of babies and small children living with their mothers/fathers in prisons, as well as relevant legislation, studies and other useful resources, have also been collected, and a summary description of these practices is included in Annex 2 to this paper.

In Part IV, I share some concluding observations regarding the application of relevant international human rights norms, in particular the Convention on the Rights of the Child, in the context of small children residing in prisons and some personal remarks after having concluded this research work.

At the end, in Part V, I present a draft proposal of ‘Suggested guidelines for drafting policies and regulations regarding babies and small children residing in prisons’ mainly intended for prison authorities and prison staff to engage them actively in the promotion and protection of the human rights of small children residing in prisons with an imprisoned parent (mother or father).

⁵ As reflected in Part II of the paper, at the regional level both the Organization of American States (which groups countries in Latin America) and the African Union (which groups countries in Africa) have developed regional norms that are relevant to the situation of children residing in prisons.

PART II

1. Relevant international human rights instruments and monitoring mechanisms

Important progress recognizing children as subjects of rights has been achieved during the last four decades and, following the adoption of the Convention on the Rights of the Child in 1989, important progress in the commitment to respecting, protecting and fulfilling children's rights and establishing protective legal frameworks and environments has also been made at the international, regional and national levels. But the reality shows that high numbers of children are still not enjoying their basic rights and/or suffer abuse, violence and discrimination. Children of imprisoned parents and children residing in prisons are part of a large group of children in especially difficult circumstances in need of special attention. To better understand the situation of children accompanying an imprisoned parent, it is important to review the norms and principles that are relevant to persons deprived of their liberty, in particular, special provisions for imprisoned pregnant women and imprisoned mothers.

The main human rights instruments setting protection and assistance frameworks and mechanisms which have been developed at the international level, and which are relevant to persons deprived of their liberty, include the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Rights of the Child (CRC), and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).⁶

Additional international instruments that provide guidance for States to comply with binding instruments include the 1957 UN Standard Minimum Rules for the Treatment of Prisoners (SMR)⁷, the 1988 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment ('the Body of Principles'), the 1990 Basic Principles for the Treatment of Prisoners, the 1985 UN Standard Minimum Rules for the Administration of Juvenile Justice (known as 'The Beijing Rules'), the 1990 UN Rules for the Protection of Juveniles Deprived of their Liberty (known as "JDL's" or 'Havana Rules') and the 1997 Guidelines for Action on Children in the Criminal Justice System, and others. While not all

⁶ These instruments are applicable in all countries even where States have not signed or ratified the treaties. Some principles from both the treaty law and other standard setting documents have become so widely recognized and respected that they can be considered customary international law, including such norms as the right to be free from torture. States can be considered in violation of international law even if they have not ratified any human rights treaty.

⁷ Adopted by the First UN Congresses on the Prevention of Crime and the Treatment of Offenders held at Geneva in 1955, and approved by the Economic and Social Council by its resolution 663 (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977. UN Congresses on the Prevention of Crime and the Treatment of Offenders have been held every five years since 1955 with the main aim of promoting the sharing and dissemination of expertise and experience; formulating international guidelines; facilitating collaboration between States and practitioners; fostering innovative approaches intended to renew and upgrade existing systems; and advocating for more humane and effective methods of crime prevention and criminal justice management.

these instruments, which have been adopted and welcomed by States, are legally binding instruments, those that are not contain generally accepted principles in other ‘legally binding instruments’. Efforts to draft a more comprehensive instrument, a ‘Charter’ for the human rights of persons deprived of their liberty, are also underway at the international level.⁸

All these norms and instruments apply to women and men alike. While no specific norms addressing the special needs of women deprived of their liberty and girl children in conflict with the law have so far been adopted, women and girl children are entitled to equal enjoyment and protection of all their human rights, without any discrimination (UDHR article 2; ICESCR article 3; ICCPR article 3; CRC article 2). The equality of rights between men and women is a fundamental value and a right reaffirmed and protected in all these principal norms. The situation of imprisoned pregnant women and imprisoned mothers has, however, been under discussion in the framework of the UN Congresses on the Prevention of Crime and the Treatment of Offenders. A resolution of the 8th UN Congress states that *“the use of imprisonment for certain categories of offenders, such as pregnant women or mothers with infants or small children, should be restricted and a special effort made to avoid the extended use of imprisonment as a sanction for these categories.”*⁹

1.1 International Covenant on Civil and Political Rights and the Human Rights Committee

International human rights norms clearly stipulate and reaffirm that persons deprived of their liberty retain their fundamental rights, except for those limitations directly linked to the fact of the deprivation of liberty. Their right to be treated with dignity and respect, as well as the prohibition of torture and cruel, inhuman, or degrading treatment or punishment is stipulated in the main international human rights instruments. The Human Rights Committee (HRC) - the supervisory body of the International Covenant on Civil and Political Rights - has stressed that States have an obligation towards persons who are particularly vulnerable because of their status as persons deprived of their liberty, by noting that: *“persons deprived of their liberty ... should not be subjected to any hardship or constraint other than that resulting from the deprivation of liberty; respect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons. Persons deprived of their liberty enjoy all the rights set forth in the Covenant, subject to the restrictions that are unavoidable in a closed environment ...”* (HRC General Comment 21 (1992)).

⁸ Reference to a draft ‘Charter’ for the human rights of persons deprived of their liberty, which is to be discussed during the Eleventh UN Congress on Crime Prevention and Criminal Justice to be held in Bangkok from 18 to 25 April 2005, is made in the intervention of Penal Reform International to the 60th Session of the Commission on Human Rights, agenda item 11(a) on Torture and Detention, Geneva 2 April 2004.

⁹ Resolution 19 “Management of criminal justice and development of sentencing policies” Report of the 8th UN Congress on the Prevention of Crime and Treatment of Offenders (Havana, 27 August – 7 September, 1990), UN Doc. A/Conf.144/28/Rev. 1, p. 164. As noted in the national report of the study conducted by a group of French experts with the support of BICE and AMAE (in support to a global study prepared at the initiative of UNICEF in 1967) it seems that already in 1970, and during the 4th UN Congress, held in Kyoto (Japan), a motion was presented by the French delegation to further promote the study of the situation of children of persons deprived of their liberty with a view to better reflect this situation in article 79 of the Standard Minimum Rules for the Treatment of Prisoners.

Regarding the equality of rights between men and women, as well as special provisions for imprisoned pregnant women and imprisoned mothers, the HRC has noted (interpretation of article 3; General Comment 28 (2000)) that *“the full effect of this provision [article 3] is impaired whenever any person is denied the full and equal enjoyment of any right”* and has asked State parties to ensure that the rights of persons deprived of their liberty are protected on equal terms for men and women. It has also noted that: *“Pregnant women who are deprived of their liberty should receive humane treatment and respect for their inherent dignity at all times, and in particular during the birth and while caring for their newborn children; States parties should report on facilities to ensure this and on medical and health care for such mothers and their babies.”*

The right of children to special measures of protection due to their status as children is also recognized in article 24 of the ICCPR. The HRC has noted that States should assess and determine the measures to be adopted to ensure that children can fully enjoy the rights contained in the Covenant without discrimination (General Comment 17 (1989)). It has also emphasized the main role and responsibility of the family, society and the State to guarantee the necessary protection to children, as well as the role of the State to ensure special protection to children who are deprived of their family environment. In the interpretation of ICCPR articles 3, 7, 10, 23 and 24, the HRC has also clearly recognized the rights and special protection needs of persons deprived of their liberty – specifically women, imprisoned pregnant women and imprisoned mothers.

1.2 Convention on the Rights of the Child and the Committee on the Rights of the Child

In addition to the other main human rights norms applicable to adults and children, provisions for the specific protection of children (boys and girls) under the age of 18, have been adopted and are contained in the Convention on the Rights of the Child. The CRC does not contain specific provisions regarding children accompanying an adult or a young parent in prison but it contains provisions that are directly relevant to the protection, assistance and care of children in special situations, and these provisions are applicable to small children living in prisons with their mothers, as described below. However, protection frameworks for children are frequently challenged by reality, and this is the case of small children living in prisons with an imprisoned mother or father. The fulfilment and exercise of their rights is directly affected by the deprivation of liberty of their primary caregiver.

Article 9 of the CRC, stipulates that States *“shall ensure that a child shall not to be separated from his/her parents against their will, except ... that such separation is necessary for the best interests of the child”* which is directly applicable to the situation of children of imprisoned parents. While this article also makes reference to the separation of children as a result of any action initiated by the State, such as detention or imprisonment (article 9.4), it only makes reference to the State obligation to provide the child with information concerning the whereabouts of the imprisoned parent. It is interesting to note that the discussions held during the drafting process of the Convention with regard to issues such as ‘parental care’, ‘non-separation from parents’, ‘the determination of the child’s place of residence’, ‘respect for the views of those involved (including children)’, ‘duration of the separation’, ‘the right of the child to maintain relations with both parents’ and ‘distinction by age’ relate mainly to the protection of children from abuse or neglect by parents, custody disputes, family

reunification or illegal abduction of children by one parent; but not the separation of children from parents when these are deprived of their liberty. While the situation of children separated from their parents due to their deprivation of liberty was in fact not discussed during the drafting process of the Convention, the text as adopted (article 9) is broad enough for the Committee on the Rights of the Child and States to interpret and apply it in situations in which children are or would be separated from their parents when these are deprived of their liberty.¹⁰

Article 5 of the CRC recognizes the role and responsibilities, rights and duties of parents, or the extended family or the community as provided for by local custom, to provide appropriate direction and guidance in the exercise by the child of the rights recognized in the Convention. Article 18 stipulates that States “*shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child*” and that “*the best interests of the child will be their basic concern*”. These provisions are directly relevant to the situation of small children residing in prisons since often children reside in prisons because they do not have anyone else to take care of them outside the prison. Frequently for children in these circumstances, their primary and often only caregiver has and continues to be the imprisoned mother who, given the deprivation of liberty, is not able to fully ensure the exercise by the child of his/her rights unless the necessary support is provided to her.

It is important, however, to highlight the obligation of States towards small children living in prisons. State Parties to the CRC have assumed obligations under international law to take action to ensure the realization of all rights in the CRC for all children within their jurisdiction, independently of the child’s or parent’s/legal guardian’s status, as stipulated in article 2(1) that reads: “*States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child’s or his or her parent’s or legal guardian’s race ... or other status.*”

Article 2(2) of the CRC stipulates also that: “*States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of status ...*” Children of imprisoned parents should not be discriminated against or punished as a result of the deprivation of liberty of their primary caregiver. States have in fact the obligation to ensure that children of imprisoned parents (mothers) are particularly protected. As interpreted by the Committee on the Rights of the Child and the Human Rights Committee, the non-discrimination obligation requires States actively to identify individual children and groups of children for whom recognition and realization of their rights may demand special measures in order to diminish or eliminate

¹⁰ The Polish delegation, for example, proposed inclusion of a provision that would give parents the right to determine the place of the child’s residence. This proposal was not accepted by the Australian delegation and others arguing that the Convention was not about parents’ rights but about children’s rights. Other draft proposals, such as the one presented by the representative of the United States, made reference to separation from parents to protect the child from maltreatment or abuse by the parents or where the parents were living separately, as well as with regard to family reunification in cases where the child was residing in a different country. A range or limit on the age was also discussed when, for example, referring to ‘a child of pre-school age shall not be separated from his parents...’ (Australia’s proposal). See *A Guide to the ‘Travaux Préparatoire’*, Part B, Drafting Process Article-by-Article, Article 6 (Parental care/Non-separation from parents) - Article 9, pages 162 to 181.

conditions that cause discrimination (General Comment 5 of the CRC and General Comment 18 of the HRC).

Article 3(1) of the Convention refers to the principle of the best interests of the child in all actions undertaken concerning children. In this regard, the CRC Committee has stressed that every legislative, administrative and judicial body or institution is required to apply the principle of the best interests of the child by systematically considering how children's rights and interests are or will be affected by their decisions and actions. The Convention stipulates that: "*States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents ...*" (article 3(2)).

A child whose primary caregiver is deprived of his/her liberty sees his/her life and protection environment directly affected. The exercise and fulfilment of their fundamental rights (in particular for small children) is certainly challenged. The exercise of the parental responsibilities by parents (or primary care-givers) deprived of their liberty is certainly not easy either. But the fact that a child is accompanying a parent in prison cannot be a justification or an excuse for a State not to assume its obligations towards these children and their imprisoned parents (with regard to their parental responsibilities). The obligation of States towards these children becomes in fact more relevant, as these children are more vulnerable and in need of special protection and assistance.

Children in this situation often see the exercise and fulfilment of all their basic rights affected - their right to survival and development (article 6), their right not to be separated from their parents against their will, unless such separation is necessary for the best interests of the child (article 9), their right to be protected from all forms of violence (article 19), their right to special protection and assistance by the State when temporarily or permanently deprived of their family environment (article 20), their right to enjoy the highest attainable standard of health, the right to access to health care services and the right to appropriate pre-natal and post-natal health care for mothers (article 24), their right to benefit from social security (article 26), their right to a standard of living adequate for their physical, mental, spiritual, moral and social development and the right to conditions of living necessary for their development (article 27), their right to education (article 28), their right to engage in play and recreational activities appropriate to their age (article 31), and their right to be treated with humanity and respect if deprived of liberty (article 37).

Most recently, during the discussion day on early childhood development, the Committee reaffirmed that: "*the Convention on the Rights of the Child reflects a holistic perspective on early childhood development based on the principles of indivisibility and interdependence of all human rights. Consequently, all of the rights recognised in the Convention apply to all persons below eighteen, including the youngest children (art.1).*"¹¹ It also noted that: "*Early childhood covers different age groups in different countries and regions, generally covering children aged below four to ones below eight years, and the Committee does not favour the one over the other.*" The Committee recognized that: "*the early childhood years are critical for laying a solid foundation for the sound development of the child's personality, talents,*

¹¹ UN Committee on the Rights of the Child, 17 September 2004, Recommendations of the Day of Discussion: Implementing Child Rights in Early Childhood.

mental and physical abilities.” The Committee urged States parties “*to develop rights-based, multidimensional and multi-sectoral strategies that promote a systematic and integrated approach to law and policy development, and provide comprehensive and continuous programmes in early childhood development, taking into consideration children’s evolving capacity ...*” and it made a call for States parties to ensure that all children, especially the most vulnerable, have access to these programmes. In identifying groups of children that are most vulnerable, the Committee identified “children living with mothers in prisons” as being among the most vulnerable.

1.3 The Standard Minimum Rules for the Treatment of Prisoners

With regard to provisions contained in other instruments applicable to adults and children, such as for example the UN Standard Minimum Rules, it is interesting to note the statement made in the preliminary observations of the SMR: “*the rules ... set out what is generally accepted as being good principle and practice in the treatment of prisoners and the management of institutions*” and “*they should ... serve to stimulate a constant endeavour to overcome practical difficulties in the way of their application, in the knowledge that they represent, as a whole, the minimum conditions which are accepted as suitable by the United Nations.*” It is stressed that these rules, which were drafted almost 50 years ago, reflect “what is generally accepted as being good principle and practice in the treatment of prisoners”. But the reality in many prisons around the world is unfortunately far from reflecting these principles and practices. Many of the principles contained in the SMR were incorporated in other main international human rights norms, drafted and adopted later, such as the Covenant on Civil and Political Rights and the Convention on the Rights of the Child.

Rule 7 of the SMR specifies that in every place where persons are imprisoned, registration records are to be kept recording *inter alia* “[t]he reasons for his commitment and the authority therefor”, and that no person shall be admitted into an institution without a valid commitment order. If implemented, this rule would mean that children living in prison with an imprisoned parent should also be registered and a responsible authority be identified for each of them.

Rule 8 of the SMR establishes the separation of prisoners by different categories, taking account of the prisoner’s sex, age, legal status, criminal record and the “necessities of their treatment”. The rules refer to the separation of prisoners by sex but do not fully address the special needs of pregnant women and imprisoned mothers with small children, as a special category. The only section in which reference is made to small children of imprisoned mothers is in the rules of general application, under the section of ‘Medical Services’, in which the SMR recommend that in women’s institutions “... *there shall be special accommodation for all necessary pre-natal and post-natal care and treatment*” and that arrangements be made for children to be born in a hospital outside the prison. It also notes that if a child is born in prison, this should not be reflected in their birth certificate.

Under the same section of medical services, however, the SMR make reference to the ‘authorization’ that may be given to children to stay with their mothers, stating that “*where nursing infants are allowed to remain in the institutions with their mothers...*” (SMR, Part I, article 23(2)). The implementation of this provision would, of course, only be possible if the mothers are also ‘authorized’ to keep the children with them. The exercise of his/her right by

a child not to be separated from his/her mother is directly linked to the exercise by the mother of her right as a mother not to be separated from her child. It would seem from the SMR that allowing children to stay with their mothers is an entitlement or privilege given to children and not to their mothers, to whom provisions in the SMR apply and the way it is in practice applied. However, the SMR do not refer to the principle of the best interests of the child (CRC article 3), leaving open the possibility to ‘allow’ children to remain with their mothers without due consideration of what is in the best interests of the child. The SMR do not refer to the responsibility of the State to ensure the child special protection and provide care and assistance as is necessary for his/her well being (CRC articles 3(2); 2(1); 20(1)). Neither do the SMR refer to the States’ obligation to assist the imprisoned parent in his/her child-rearing responsibilities (CRC article 18), in particular, given the limitations of imprisonment. There is no reference either to whether children would be ‘allowed’ to stay in an institution with their fathers or not, should they want to. The SMR seem only to recognize the biological and affective link child-mother and not the legal or de facto relationship child-father. The principle that both parents have common responsibilities for the upbringing and development of the child and that efforts to ensure the recognition of this principle should be made (CRC article 18), as well as the right of a child not to be separated from his or her parents against their will, except when the separation is necessary for the best interests of the child (CRC article 9) are not reflected in the SMR (obviously, these were drafted decades before the CRC was adopted). Special arrangements for fathers to be able to keep their children in prisons could be envisaged so that children, with due consideration of what is in their best interests, could be allowed also to remain with them, such as can be authorized for mothers (see example of Australia in the next section).

The medical services section of the SMR refers also to pre-natal and post-natal medical care and treatment for mothers, but it does not refer to specialized medical care and services for small children living in prisons. The rules fail to make concrete recommendations with regard to the right of access by children to such health care services and the obligation of the State to ensure the enjoyment of the highest attainable standard of health by children (CRC article 24). Reference to access to education on child health and nutrition, as well as the advantages of breastfeeding, hygiene and environmental sanitation, as stipulated in the CRC (article 24(1)), is also missing in the rules. The SMR refer only to provisions that should be made for “a nursery staffed by qualified persons, where the infants shall be placed when they are not in the care of their mothers”. While this provision is placed in the same section as medical services, the reference to the care of small children by qualified persons when not under the care of the mother cannot necessarily be interpreted as medical staff or persons with medical skills. The use of the term “qualified persons” could also be interpreted as any person who is qualified to look after small children, such as educators or social workers.

The rules neither establish an upper age limit for children living in prisons nor do they refer to the number of ‘nursing infants’ of the same mother who can remain in an institution with their mother. The term ‘nursing infants’ is not defined in the SMR and could be interpreted in different ways. It could be interpreted as children being breastfed (the more common interpretation), even if not all children are breastfed - in particular if their mother is under stress, which is frequently the case for imprisoned mothers.

While some provisions for special care and accommodation for women and girls, including pregnant women and mothers of small children, are set in the Standard Minimum Rules for the Treatment of Prisoners, it is important to highlight that there are many gaps in the rules

when addressing their special needs. Beyond the basic pre- and post-natal medical services for pregnant women, the standards fail to set specific standards and make more specific recommendations with regard to the special needs of pregnant women, mothers with children, and the children – in particular regarding adequate accommodation; sufficient (additional) food and safe drinking water; treatment and safety of children; health and specialized medical care and assistance for pregnant mothers and unborn children and small children; special hygiene and sanitation needs; provision of essential materials for pregnant women and for small children; preservation of family links by imprisoned mothers but also by the children; educational and recreational programmes for the children; registration of the children in the prison and by relevant social institutions; adequate facilities for children; and specialized attention and treatment for the enjoyment of their basic human rights and freedoms.

1.4 The Basic Principles for the Treatment of Prisoners and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment

The 1988 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and the 1990 Basic Principles for the Treatment of Prisoners also emphasize that all persons deprived of their liberty should be treated with dignity and be free of any form of discrimination, and that prisoners shall retain their human rights and fundamental freedoms as set out in the Universal Declaration of Human Rights and other international human rights norms.

Principle 5 contained in the Body of Principles stipulates that “*measures ... to protect the rights and special status of women, especially pregnant women and nursing mothers, children and juveniles, ... shall not be deemed to be discriminatory...*”

Principle 19 of the Body of Principles refers to the right of persons deprived of their liberty to communicate with the outside world, in particular the right to be visited and maintain contacts with family members.

Principle 31 of the Body of Principles is very important, as it stipulates that relevant authorities should ensure assistance to dependent members of the families of persons deprived of their liberty, in particular children. It also establishes that authorities should “*devote a particular measure of care to the appropriate custody of children left without supervision*”.

While the Body of Principles refers to measures of care of children left without supervision, no provision is stipulated with regard to children that accompany their imprisoned mothers.

1.5 The UN Rules for the Protection of Juveniles Deprived of the Liberty (Havana Rules) and the UN Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules)

When it comes to children in conflict with the law, the CRC does contain certain provisions for their protection and assistance. The CRC stipulates the principle of the use of imprisonment of a child as a measure of last resort, and for the shortest appropriate period

and limited to exceptional cases (article 37(b)), a principle also reflected in the 1990 UN Rules for the Protection of Juveniles Deprived of their Liberty (Rule 2). The right of children deprived of their liberty to be treated with humanity and respect for their dignity taking into account the needs of persons of their age, as well as the right of children not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment, are also stipulated in the CRC (articles 37 and 40). Minimum standards for the handling of juvenile offenders, promoting a fair and humane justice for juveniles in conflict with the law, are contained in the UN Standard Minimum Rules for the Administration of Juvenile Justice known as “The Beijing Rules”. The Beijing Rules also recognize the special needs of young female offenders when stating that: “*Young female offenders placed in an institution deserve special attention as to their personal needs and problems. They shall by no means receive less care, protection, assistance, treatment and training than young male offenders. Their fair treatment shall be ensured*” (Rule 26.4).

Neither the CRC nor other international human rights instruments address, however, the situation of young imprisoned mothers with small children.

2. Relevant regional human rights instruments and systems

The protection offered by international human rights norms and systems is complemented by regional human rights protection norms and systems. Regional systems have been established in Africa, in the Americas, in the Arab region and in Europe. Asia is the only region without a regional human rights mechanism.

In Africa, the countries of the African Union (AU) have established a regional human rights protection system and adopted key regional human rights instruments. Two key instruments that promote human rights in the African region are The African Charter on Human and Peoples’ Rights (African Charter)¹² and The African Charter on the Rights and Welfare of the Child.¹³ States Parties to the African Charter have also established within the African human rights protection system and mechanisms an African Human Rights Commission and an African Court on Human and Peoples’ Rights.¹⁴ Most recently, the AU also adopted The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa.¹⁵

¹² Adopted in Nairobi, Kenya in June 1981, and entered into force in 1986, has been signed/acceded/ratified by the 53 Member States of the OAU (now replaced by the AU).

¹³ Adopted in Addis Ababa, Ethiopia on 11 July 1990, has been signed by 37 and ratified by only 33 Member States of the AU. Countries that have not yet ratified the African Charter on the Rights and Welfare of the Child include: Burundi, Central Africa Rep., Congo, Djibouti, Democratic Rep. Of Congo, Gabon, Ghana, Guinea-Bissau, Liberia, Madagascar, Mauritania, Namibia, Sahrawi Arab Democratic Republic, Somalia, Saint-Tome & Principe, Sudan, Swaziland, Tunisia, Zambia.

¹⁴ The Protocol to the African Charter on Human And Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights was adopted in Burkina Faso on 9 June 1998. It has been signed by 43 and ratified by 19 Member States of the AU.

¹⁵ Adopted in Maputo, Mozambique on 11 July 2003, it has been signed by 31 and ratified by only 3 Member States of the AU, namely Comoros, Libya and Rwanda. It has not entered into force yet, as it is stipulated that it will enter into force after 15 ratifications.

Some progress has also been made in the African region with regard to the drafting of regional norms for the protection of persons deprived of their liberty. In 1996, the first Pan-African Seminar on Prison Conditions in Africa was held in Uganda, and the Kampala Declaration on Prison Conditions in Africa was adopted.¹⁶ Among other issues, participants in the Seminar recommended to the African Commission for Human and Peoples' Rights the appointment of a Special Rapporteur on Prisons and Conditions of Detention in Africa. Later in 1996, the mandate for the Special Rapporteur was established to assess prison conditions in Africa, to report on major problems, and to make recommendations to improve prisons and conditions of detention. Since the creation of the mandate, the Special Rapporteur has conducted several country visits to study prison conditions and to engage in a dialogue with authorities and relevant actors at the local level with a view to address major obstacles in prison systems. Following these country visits, the Special Rapporteur has also made specific recommendations for the improvement of prison conditions, and in some cases also has addressed the situation of pregnant women in prisons. The recommendations submitted by the Rapporteur following a visit to Mozambique in April and to Malawi in June 2001 recommend, for example, that: *"expecting and breast-feeding mothers, elderly women should not be sent to prison"*.

Most recently, in November 2003, and as a follow-up to the first and second Pan-African Conferences on prison conditions held in Kampala, Uganda (1996) and Ouagadougou, Burkina Faso (2002), the African Commission on Human and Peoples' Rights adopted the Ouagadougou Declaration and Action Plan on accelerating prisons and penal reform in Africa.¹⁷ The Ouagadougou Declaration recommended to the African Commission the drafting of an "African Charter on Prisoners' Rights" and endorsed the idea of developing a universal instrument (under the auspices of the United Nations) - a "Charter of Basic Rights for Prisoners", in which the African experience and concerns should be reflected. Unfortunately, neither the Ouagadougou Declaration nor Plan of Action address the specific situation of pregnant women deprived of their liberty and of small children residing in prisons.

The African Charter on the Rights and Welfare of the Child reaffirms adherence of African States to international human rights norms, making particular reference to the Convention on the Rights of the Child. It stipulates that the child occupies a 'unique and privileged position in the African society' and that the child should grow up in a family environment; requires particular care with regard to health, physical, mental, moral, social development and legal protection; and stresses that the promotion and protection of the rights and welfare of the child implies duties on everyone. The Charter defines children as 'every human being below the age of 18 years'. It also recognizes the principle of the best interests of the child to be a primary consideration in all judicial and administrative actions concerning the child, with the child's views to be heard and considered. It also stipulates that parents or persons directly responsible for the upbringing and development of the child shall ensure that the best interests of the child shall be a main concern at all times. Important survival and development, protection and participatory rights for children, in accordance with the customs, traditions, cultural or religious practices of the African people, are also stipulated,

¹⁶ The Kampala Declaration on Prison Conditions was also adopted by the United Nations in 1997 (ECOSOC Resolution 1997/36 of 21 July 1997).

¹⁷ 34th Ordinary session of the African Commission on Human and Peoples' Rights, held in Banjul, The Gambia, from 6-20 November 2003.

recognizing the equality of rights and responsibilities of spouses with regard to children and the entitlement of every child to parental care and protection, the right of every child to live with his or her parents and, if separated from his/her parents, only to ensure his/her best interests. The Charter also stipulates that States will support parents or other persons responsible for the care of children in their responsibilities and assist them in case of need of material assistance with regard to nutrition, health, education, clothing and housing; assist them in their child-rearing responsibilities and ensure the development of institutions responsible for providing care for children. The African Charter on the Rights and Welfare of Children has a specific provision on the issue of children of imprisoned mothers, which reads as follows:

“Article 30: Children of Imprisoned Mothers

1. *States Parties to the present Charter shall undertake to provide special treatment to expectant mothers and to mothers of infants and young children who have been accused or found guilty of infringing the penal law and shall in particular:*
 - a. *Ensure that a non-custodial sentence will always be first considered when sentencing such mothers;*
 - b. *Establish and promote measures alternative to institutional confinement for the treatment of such mothers;*
 - c. *Establish special alternative institutions for holding such mothers;*
 - d. *Ensure that a mother shall not be imprisoned with her child;*
 - e. *The essential aim of the penitentiary system will be the reformation, the integration of the mother to the family and social rehabilitation.”*

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa¹⁸ (which has not yet entered into force) builds on the principles set forth in the African Charter on Human and Peoples' Rights by further specifying values and principles relevant to women in Africa. It also contains additional provisions that are directly relevant to pregnant or nursing women deprived of their liberty. With regard to health and reproductive rights, the Protocol sets the obligation of Member States *“to establish and strengthen pre-natal, delivery and post-natal health and nutritional services for women during pregnancy and while they are breastfeeding”* (Article 14.2(b)). It also provides for the special protection of ‘women in distress’ and stipulates that States have an obligation *“to ensure the right of pregnant or nursing women or women in detention by providing them with an environment which is suitable to their condition and the right to be treated with dignity”* (article 24(b)).

In the Americas, countries grouped in the Organization of American States (OAS) (a regional inter-governmental organization established in 1948¹⁹) have adopted key regional

¹⁸ Adopted in Maputo, Mozambique on 11 July 2003. Has been signed by 31 and ratified by only 3 Member States of the AU, namely Comoros, Libya and Rwanda.

¹⁹ 35 countries are now Members States of the OAS: countries in North America (Canada, Mexico and United States of America), in Central America (Belize, Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua), in South America (Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, French Guyana, Guyana, Panama, Paraguay, Peru, Suriname, Uruguay, Venezuela), and in the Caribbean (Antigua and Barbuda, Barbados, Cuba*, Dominica, Dominican Republic, Grenada, Haiti, Jamaica, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, The Bahamas, Trinidad and Tobago. * By resolution of the Eighth Meeting of Consultation of Ministers of Foreign Affairs (1962) the current Government of Cuba is excluded from participation in the OAS.

human rights instruments such as the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights,²⁰ and the Inter-American Convention to Prevent and Punish Torture. The OAS has also established regional mechanisms and bodies with the main responsibility of monitoring and enforcing the application of regional human rights instruments, which form part of the Inter-American human rights system. These include the Inter-American Commission on Human Rights²¹ (created in 1959) and the Inter-American Court of Human Rights²² (established in 1978).

These Inter-American instruments also recognize that persons are born free and equal in dignity and in rights, and recognize the right to ‘special protection, care and aid’ of all women, during pregnancy and the nursing period, and all children (Declaration preamble and article 7). The American Convention stipulates also that every child has the right ‘to the measures of protection required by his condition as a minor, on the part of his family, society and the State’ (article 19).

The situation in prisons and conditions of detention in the Americas region, as well as the situation of children, have been issues of concern within the framework of the OAS. Special mechanisms, such as, for example, a working group and a Special Rapporteur on conditions of detention, have been established to study, report and make recommendations aimed at improving the conditions of detention in the region. Most recently, and following a meeting of Ministers of Justice and Attorneys General of the Americas,²³ the Government of Costa Rica took the initiative of launching an expert consultation process for the drafting of an Inter-American Declaration Governing the Rights and Care of Persons Deprived of Liberty. The draft text for an Inter-American Declaration of Persons Deprived of Liberty²⁴ that resulted from this process of consultations was formally introduced by the Government of

²⁰ As of May 2004, the following countries were parties to the American Convention on Human Rights: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, the Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay and Venezuela.

²¹ Under the OAS Charter all member states are subject to the jurisdiction of the Inter-American Commission of Human Rights and the provisions of the American Declaration of the Rights and Duties of Man. The Commission examines petitions filed by individuals who claim the violation of a protected right and makes recommendations on measures to be carried out by the state to remedy the violation. The Commission also conducts on-site visits to member countries of the OAS to analyze and report on the situation of human rights.

²² For those countries that have accepted the jurisdiction of the Inter-American Court, the Commission may also submit a case to the Court for a binding decision. As of May 2004, the following countries had accepted the jurisdiction of the Inter-American Court: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, the Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay and Venezuela.

²³ Third Meeting of Ministers of Justice and Attorneys General of the Americas, held in Costa Rica in March 2000. The Ministers of Justice and Attorneys General of the Americas have been holding annual meetings since 1997, and the issue of prison systems and conditions of imprisonment and detention have since been in their agenda. They have recently also recommended that member States promote the exchange of national experiences and technical cooperation on prison and penitentiary policy matters within the OAS. The Technical Secretariat for Legal Cooperation Mechanisms created, as a follow-up to a recommendation of the First Meeting of Authorities Responsible for Penitentiary and Prison Policies of the OAS Member States held in 2003, an Internet database with information on the prison systems in the countries of the region. The report of the meeting of prison officials is contained in the OAS document REMJA –V/doc.6/04 and can be found on the OAS website <http://www.oas.org>.

²⁴ Preliminary draft American Declaration on the Rights and the Care of Persons under any Form of Detention or Imprisonment (AG/CP/doc.630/01).

Costa Rica to the OAS General Assembly in 2001 and has since been under study by the Permanent Council.²⁵

The draft text of the Inter-American Declaration of Persons Deprived of Liberty is certainly of great value and, even if the declaration has not yet been adopted, the discussion of the draft text has reflected many of the serious problems in the prisons in the region. The debate has also served to reinforce the principle that persons deprived of their liberty should be treated with respect for their dignity and their human rights.

The draft declaration is based on international and regional human rights norms as well as humanitarian law, and it contains details on critical issues in prisons. It refers to institutional matters and individual rights, and aims at setting clear standards that could be used as a reference for the development and implementation of legislation, regulations and good practice at the national level. With regard to the situation of small children accompanying their mothers in prisons, the draft text does not directly address this situation. It refers only to 'women and dependent children' but not necessarily accompanying the imprisoned mother (or father) (draft article 11); to the 'separation of persons deprived of their liberty according to sex, age ... and the necessities of care' but not specifically mothers with small children (draft article 16); 'measures ... designed to protect the rights of women, especially pregnant women and nursing mothers, children and juveniles...' but not necessarily measures to protect and assist small children accompanying their mothers (draft article 20); 'measures ... to prevent ... the suffering inherent in imprisonment, and to minimize the negative impact of imprisonment among family members of persons deprived of their liberty, especially women with dependent children' but not necessarily small children accompanying their mothers in the prisons (draft article 22); 'the economic and social consequences that imprisonment and detention have on the dependants of those deprived of liberty shall be considered. Measures shall be adopted for the proper care and custody of children left without supervision' but not measures for the care and assistance of children accompanying their mothers. Draft article 4 somehow also suggests that the legal custody of children of imprisoned mothers could be at stake. The draft text also refers to the importance of independent monitoring of the conditions of imprisonment to ensure compliance with human rights norms and guarantees.

Arab States, grouped in the League of Arab States (LAS),²⁶ created in 1945 and currently composed of 22 States, have also established an Arab human rights regional system. An

²⁵ Several resolutions have been adopted on the study by the General Assembly of the OAS (AG/RES.1816; AG/RES.1897; AG/RES.1927). Member States have been requested to provide comments on the study and to respond to a questionnaire on this subject (CP/CAJP –1853/01). The Inter-American Commission on Human Rights has been requested by the GA to report on the situation of persons under any form of detention or imprisonment in the region, using as a basis its work on the subject. The GA has also asked the Permanent Council to "consider the advisability of preparing, in due course, an inter-American declaration on the rights and the care of persons under any form of detention or imprisonment."

²⁶ The League of Arab States Charter was adopted on 23/3/1945. The 22 Arab States that are Members of the LAS are: The Hashemite Kingdom of Jordan, United Arab Emirates, Kingdom of Bahrain, Republic of Tunisia, Democratic and Popular Republic of Algeria, Republic of Djibouti, Kingdom of Saudi Arabia, Republic of Sudan, Arab Republic of Syria, Republic of Somalia, Republic of Iraq, Sultanate of Oman, State of Palestine, State of Qatar, Federal Islamic Republic of Comoros, State of Kuwait, Republic of Lebanon, Socialist People's Libyan Arab Jamahiriya, Arab Republic of Egypt, Kingdom of Morocco, Islamic Republic of Mauritania, Republic of Yemen.

Arab Charter on Human Rights²⁷ was adopted in 1994, and a revised text was adopted during the Arab Summit held in Tunis in May 2004. Experts have noted that while the revised text of the Arab Charter enhances human rights protection, it is still not fully in line with international human rights norms and standards. The revised Arab Charter reaffirms the principles of the UN Charter, the UDHR, the ICCPR and the IESCR. It also makes reference to the Cairo Declaration on Human Rights in Islam.²⁸ With regard to children's rights, no specific reference is made in the revised Arab Charter to the Convention on the Rights of the Child, and article 3 on the right to non-discrimination does not set age as a ground for non-discrimination. The provision on the death penalty (Article 7(1)) stipulates that it shall not be imposed on persons under 18 years of age, but does not fully restrict States in this regard, as it states that: "*sentence of death shall not be imposed on persons under 18 years of age, unless otherwise stipulated in the laws in force at the time of the commission of the crime.*" Article 7(2) limits the death sentence with regard to pregnant women and nursing mothers and cites the principle of the best interests of the child, stipulating that: "*the death penalty shall not be inflicted on a pregnant woman prior to her delivery or on a nursing mother within two years from the date of her delivery; in all cases, the best interests of the infant shall be the primary consideration.*" With regard to women it stipulates that: "*State parties pledge to take all the requisite measures to guarantee equal opportunities and effective equality between men and women in the enjoyment of all the rights set out in the Charter.*" The Charter also recognizes in Article 20 that "*All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.*" Article 33, which refers to the family and the States obligations to the protection of the family and its members, as well as measures to guarantee the protection, survival, development and well-being of the child, reads as follows:

1. *"The family is the natural and fundamental group unit of society; it is based on marriage between man and a woman. Men and women of marrying age have the right to marry and to found a family according to the rules and conditions of marriage. No marriage can take place without the full and free consent of both parties. The laws in force regulate the rights and duties of the man and woman as to marriage, during marriage and at its dissolution.*
2. *The State and society shall ensure the protection of the family, the strengthening of family ties, the protection of its members and the prohibition of all forms of violence or abuse in the relations among its members, and particularly against women and children. They shall also ensure the necessary protection and care for mothers, children, older persons and persons with special needs and shall provide adolescents and young persons with the best opportunities for physical and mental development.*
3. *The States parties shall take all necessary legislative, administrative and judicial measure to guarantee the protection, survival, development and well-being of the child in an atmosphere of freedom and dignity and shall ensure, in all cases, that the child's best interests are the basic criterion for all measures taken in his regard, whether the child is at risk of delinquency or is a juvenile offender.*

²⁷ Adopted by the Council of the League of Arab States, resolution 5437 (102nd regular session) in 1994.

²⁸ The Cairo Declaration on Human Rights in Islam was adopted by the Islamic Conference in 1990.

4. *The States parties shall take all the necessary measures to guarantee, particularly to young persons, the right to pursue a sporting activity.*”

The revised Arab Charter also recognizes the right to social security, the right to development, the right to an adequate standard of living, the right to the highest attainable standard of physical and mental health and the right to free basic health-care services and access to medical facilities. It also clearly states that nothing in the Charter may be interpreted as impairing rights and freedoms protected by domestic law or those set forth in international and regional human rights instruments adopted or ratified by States and makes particular reference to the rights of women and the rights of children. The Charter also establishes an “Arab Human Rights Committee” and a monitoring system through periodic reports on the measures taken to implement the provisions in the Arab Charter.

Asia has not established a regional human rights mechanism and ratification of key international human rights instruments by countries in the region remains rather low. Exchange of information on prison systems and management has nevertheless taken place within the framework of annual meetings of correctional administrators of the Asia and Pacific region since 1980.²⁹

European countries grouped in the Council of Europe, which was established in 1949, have also established key regional human rights norms and mechanisms to ensure human rights protection throughout its member States (currently 46 countries). Countries in the Council of Europe adopted in 1950 the Convention for the Protection of Human Rights and Fundamental Freedoms. Its supervisory organs include the European Commission and the Court of Human Rights. Several Protocols to the European Convention on Human Rights and other key conventions relevant to women, children and persons deprived of their liberty have also been adopted. Key instruments include the European Social Charter adopted in 1961 and its revised version adopted in 1996, as well as the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment adopted in 1987 and its Protocols.

The European Convention for the Prevention of Torture and Inhumane or Degrading Treatment or Punishment established the European Committee for the Prevention of Torture and Inhumane and Degrading Treatment or Punishment, known as the “Committee for the Prevention of Torture” or CPT. The CPT is an important regional mechanism that addresses conditions of detention and treatment of persons deprived of their liberty in countries of the region. The CPT has developed working methods aimed at establishing a constructive dialogue with states to address issues of concern with regard to conditions of detention and treatment of persons deprived of their liberty. It conducts monitoring visits to countries, during which it visits different types of places of detention. While the dialogue with state authorities and the reporting of the CPT are in principle confidential, it is now a well-accepted practice that the reports of the CPT are made public with the consent of the state member concerned.

²⁹ A first meeting of the Asian and Pacific Conference of Correctional Administrators (APCCA) was held in Hong Kong in 1980 and annual conferences have been organized since. Information on the meetings, as well as on the prison systems in countries of the region, can be found on the website <http://www.apcca.org>

With regard to persons deprived of their liberty, imprisoned pregnant women, mothers with small children and small children residing in prisons, the Committee of Ministers of the Council of Europe had already in 1987 adopted Recommendation Nos. R (87)3 on the European Prison Rules (EPR) and R (98)7 Concerning the Ethical and Organisational Aspects of Health Care in Prison. These rules established minimum standards for the treatment of prisoners and for all aspects of prison administration and material conditions of detention. They set as a basic principle that “*the deprivation of liberty shall ... ensure respect for human dignity...*” While these rules do not make any reference to provisions in international human rights norms, in particular the Convention on the Rights of the Child, with regard to pregnant women and their babies R (87)3 on the European Prison Rules stipulates under the section on medical services (Article 28):

“1. Arrangements shall be made wherever practicable for children to be born in a hospital outside the institution. However, unless special arrangements are made, there shall in penal institutions be the necessary staff and accommodation for the confinement and post-natal care of pregnant women. If a child is born in prison, this fact shall not be mentioned in the birth certificate.

2. Where infants are allowed to remain in the institution with their mothers, special provisions shall be made for a nursery staffed by qualified persons, where the infants shall be placed when they are not in the care of their mothers.”

Recommendation R (98)7 Concerning the Ethical and Organisational Aspects of Health Care in Prison contains the following provisions regarding the mother and child:

“ 69. Mothers and children, like seriously ill, disabled and very old prisoners, may be regarded as a ‘particularly vulnerable’ group in prison. The prison doctor and other health care staff should therefore ensure the best possible care for mother and child, taking into account in particular the interests of the child and the living conditions arranged for mother and child in the prison. Those children who live with their mothers in prison should be able to leave the prison freely in order to visit their families living outside.”

The European Prison Rules are currently being revised by the Council for Penological Cooperation (PC-P) of the Council of Europe with the support, technical expertise and assistance of several European experts and representatives of national authorities. The Council of Europe also organizes periodic meetings or conferences of Directors of Prison Administration to exchange information and practices on good prison management and systems.

More recently, in June 2000, the Parliamentary Assembly adopted Recommendation 1469(2000) Mothers and babies in prison, in which it recognizes the ‘adverse effects of imprisonment of mothers on babies’. It also recognized that ‘early maternal separation causes long-term difficulties, including impairment of attachments to others, emotional maladjustment and personality disorders’ and that ‘the development of young babies is retarded by restricted access to varied stimuli in closed prisons’. The Parliamentary Assembly recommendation was later endorsed by the Council of Ministers, which recommended that Member States ‘make provision for a sufficient number of suitable varied community sanctions and measures, such as alternatives to pre-trial detention, probation as an

independent sanction, the suspension of the enforcement of a sentence to imprisonment, community service, victim compensation, treatment orders for drug or alcohol misusing offenders or intensive supervision for appropriate categories of offenders (e.g. dangerous offenders), sanctions and measures that are ‘commendable’ for women offenders with young children ‘to further a continuous caring relationship between mother and child’.³⁰ Both bodies also promote the idea that the prison management ‘should actively promote the father-child bond’ and recommend a ‘generous regime of visits’ and the creation of ‘child-friendly environments’ to further the relationship between father and child. Neither the Parliamentary Assembly nor the Council of Ministers recognize in their recommendations (or decisions) regarding mothers and babies the entitlement of children to their rights – their right not to be separated from their mother and other relevant rights - even if the Parliamentary Assembly recommendation encourages ‘the development of education programmes for criminal justice professionals on the issue of mothers and young children, using the United Nations Convention on the Rights of the Child and the European Convention on Human Rights’. Both recommendations (decisions) address the situation of the babies or small children more from the perspective of their entitlement to be cared for by their mothers.

Acknowledging that almost nine years after the adoption of the European Prison Rules the conditions of detention in members states of the Council of Europe have not improved, the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly has recommended that the Council of Europe draft and adopt a “European Prisons Charter” in close collaboration with the European Union, which should include a set of specific rules that are binding on member states.³¹ The draft text proposed by the Parliamentary Assembly includes a section entitled “Specific care for women and mothers in prison”, which recommends that ‘medical and nursing staff give particular attention to women’s conditions’, that ‘medical staff with gynaecological knowledge be made available in female sections and women’s prisons’ and that ‘convicted prisoners who are pregnant or have very young children may keep their children in prison up to the age of three’. It stipulates that steps be taken ‘to facilitate the care and placement of these children for such time as execution of the sentence continues, without cutting their links with their mothers’. It also notes that ‘in too many cases, such children are placed in orphanages’, but it does not really make any concrete suggestion to address this problem. The draft text also refers to efforts under way in Rennes (France), which could serve as a reference point for the setting up of family meeting places within the prisons for use by parents with very young children.

3. International humanitarian law

In situations of international or non-international armed conflict, persons affected by conflict, in addition to being protected by national laws, are protected by international humanitarian law (IHL). Human rights law and refugee law, applicable also in situations of armed conflict, provide complementary protection. The main instruments of international humanitarian law

³⁰ Council of Ministers Decision (CM(2001)15) under agenda item 10.2 ‘Mothers and babies in prison – Parliamentary Assembly Recommendation 1469 (2000) Draft’, 740th meeting of 7 February 2001.

³¹ Report on the Situation of European prisons and pre-trial detention centres, Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe, 19 February 2004 (Doc. 10097).

are the four Geneva Conventions of 1949³² (applicable in international conflicts) and their two Additional Protocols of 1977³³ (AP I is applicable in international conflicts, and AP II in non-international conflicts). The 1949 Geneva Conventions and Additional Protocols I and II, which are binding on both States and armed opposition groups, establish the principles for the protection of all those not taking part in hostilities.³⁴

IHL instruments contain detailed rules concerning the treatment of persons deprived of their liberty and also specific provisions on the treatment of women in detention. Women who are deprived of their liberty for reasons related to the conflict are entitled to the same general protection as men without any discrimination, but also benefit from additional protection, taking into account their specific medical and physiological needs (articles 14 and 16 of the Third Geneva Convention).³⁵ Article 132 of the Fourth Geneva Convention establishes, for example, that: *'Parties to the conflict shall, moreover, endeavour during the course of the hostilities, to conclude agreements for the release, the repatriation, the return to places of residence or the accommodation in a neutral country of certain classes of internees, in particular children, pregnant women and mothers with infants and young children...'* IHL also prohibits the execution of the death penalty on pregnant women or mothers with dependent children (article 76(3) of API).

³² First Geneva Convention for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field, 1949 (GC I); Second Geneva Convention for the Amelioration of the Condition of Wounded, and Shipwrecked Members of Armed Forces at Sea, 1949 (GC II); Third Geneva Convention relative to the Treatment of Prisoners of War, 1949 (GC III); and Fourth Geneva Convention relative to the Treatment of Civilian Persons in Time of War, 1949 (GC IV).

³³ Additional Protocol to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts, 1977 (AP I) and Additional Protocol to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of Non-International Armed Conflicts, 1977 (AP II).

³⁴ Civilians, and combatants not actively taking part in hostilities (or *hors de combat*) because they are wounded, sick, shipwrecked or captured.

³⁵ As noted in an ICRC study on the impact of armed conflict on women (*'Women facing War'* ICRC study on the impact of armed conflict on women, ICRC (2001)), examples of special protections could include giving additional food to pregnant and nursing mothers, the hearing of cases of detained or imprisoned pregnant women and maternity cases with priority, the admission of imprisoned pregnant women to institutions where they can receive medical treatment or other protection actions as relevant.

PART III

Legislation, policies, procedures and practices regarding babies and small children residing in prisons, in Australia, Canada, Cambodia and France

Small children residing in prisons with an imprisoned parent are ‘formally speaking’ not deprived of their liberty for having committed an offence or a crime. In reality, many of the small children residing in prisons, in particular babies, most often do not have any other choice. In the absence of better solutions for the care of the children, parents prefer that they remain with them in custody. Adults responsible for their care choose to keep the children in prison if permitted by the prison authorities (or in some instances social workers or judicial authorities), who decide whether they can be allowed to stay or not. Independently of how, and by whom, the decision is made, if a child is allowed to accompany an imprisoned parent, the prison becomes their home. In some countries special arrangements have been made to accommodate mothers with small children, but in many others these children simply share the cell (and bed, if available) of their mother, and sometimes also share the limited space with other adults. If prison resources are scarce and the conditions of detention are harsh, children suffer these limitations too, and general prison rules often apply to them too. But in some countries, children living in the prison are ‘invisible’ to the justice system and forgotten by the social services.³⁶ In many countries these children are not even registered (in the records of the institution or elsewhere) and are accepted to live in the institutions on an ‘informal’ basis only.

Statistics regarding the adult female prisoner population indicate that it represents in most countries much less than 10 % of the total prison population.³⁷ Even fewer are young female offenders. The number of small children living with their mothers in prisons throughout the world is simply not recorded. Statistics of the world prison population compiled by several international organizations do not show where these children are. In addition and mainly due to relatively low numbers, female adult and young prisoners, as well as their small children residing in prisons, are victims of systems established by and for men, without any attention to their vulnerability and special needs.

In an attempt to deal with the situation of imprisoned adult and teenage mothers and their children in prisons, some countries have started to adopt policy directives for the implementation of programmes to respond to their special needs. In this section, I analyse four examples of (written) prison regulations and policies regarding babies and small children residing in prisons (more often with their adult mothers), issued by relevant executive bodies

³⁶ It is very difficult to obtain information on the number of children residing in prisons. For example, when looking for statistics on children living with their imprisoned mothers in France, the official information regarding the adult prison population does not include this information (see website <http://www.justice.gouv.fr/chiffres/ap/chiffres2004.htm>) nor is it contained in the section of juvenile justice (<http://www.justice.gouv.fr/chiffres/mineurs02.htm>).

³⁷ Statistics compiled by the International Centre for Prison Studies/King’s College in London (http://www.kcl.ac.uk/depsta/rel/icps/worldbrief/world_brief.html). The Centre has set up and administers a database that contains information on prison systems throughout the world.

in the following countries: Australia, Cambodia, Canada and France. Other examples are briefly described in Annex 2.

The analysis of the selected policies aims to learn how some countries are responding to the situation of children residing in prisons, and assess how the principles of the Convention on the Rights of the Child, and other international human rights norms, have been incorporated in the national policies and directives issued by prison authorities in this regard. The analysis of the regulations is certainly limited by the fact that no field visits were carried out to assess the implementation of the selected policies and the situation of children residing in prisons in each of the selected countries. No real evaluation between the written policy and the practice could be made for this paper. Some valuable studies on the policies and programmes for children conducted by independent organizations in some of these countries were obtained, allowing me to have some information on how these are being implemented and the continuing challenges faced by children residing in prisons.

Additional information from organizations directly working with children residing in prisons in different parts of the world was also reviewed to get familiarized with prison practices in general, and the many challenges that children residing in prisons confront. Some examples of concrete situations in various countries are provided under each of the questions examined below. Information reviewed included reports from specialized prison research and monitoring work conducted by several national, regional and international academic, human rights and humanitarian organizations; media reports; policies; programmes; and State and alternative reports to the UN Committee on the Rights of the Child and the UN Human Rights Committee.

The following policies were examined:

- **Australia:** Policy Directive No. 10 entitled ‘Prisoner Mothers/Primary Care-Givers and their Children’, issued by the Ministry of Justice, Australia (14 May 2001).
- **Canada:** Directive 768 – ‘Institutional Mother-Child Program’ issued by the Commissioner of the Correctional Service, Canada (27 February 2003).
- **Cambodia:** Circular No. 15 S.K.A on ‘Communication with Female Detainees and Prisoners Accompanied with Child’ issued by the Ministry of Social Action, Labour and Veterans Affairs (MOSALVY), Cambodia (22 May 1995) and Proclamation No. 217 on Administration of Prisons, issued by the Ministry of Interior (MoI), Cambodia (31 March 1998).
- **France:** Circular 99-2296- ‘Conditions d’accueil des enfants laissés auprès de leur mère incarcérée’ issued by the Ministry of Justice, France (18 August 1999).

To analyse the selected regulations and policies, and to share information on general practices, using as a reference the Convention on the Rights of the Child, I address the following issues:

QUESTION 1 - Was the policy issued after the signature/ratification of the Convention on the Rights of the Child? Was the policy inspired by the Convention on the Rights of the Child? Is it explicitly mentioned in the policy that the policy has been adopted to ensure the application of the provisions in the Convention?

Australia ratified the Convention on the Rights of the Child in 1990. The policy directive was issued in 2001. No mention of the Convention on the Rights of the Child is made in the text.³⁸

Canada ratified the Convention on the Rights of the Child in 1991 and the policy was adopted in 2003. While the Convention is not directly mentioned in the text of the policy, the principle of the best interests of the child is stated as being the ‘pre-eminent consideration in all decisions relating to the participation in the Mother-Child Program’.

Cambodia ratified the Convention on the Rights of the Child in 1992. The Proclamation of the Ministry of Interior (MoI) was issued in 1998 and the circular of the Ministry of Social Action, Labour, Veterans and Youth (MOSALVY) was issued in 1995. The Proclamation of the MoI does not make any reference to the CRC, while the circular clearly states that it was issued with the purpose of ‘protecting the child and to properly implement the Convention on the Rights of the Child’.

France ratified the Convention on the Rights of the Child in 1990 and the policy was drafted in 1999. The circular makes explicit reference to France’s international obligation to implement the provisions contained in the Convention on the Rights of the Child.

Additional comments:

The policies issued in Cambodia and France are very clear about their commitment to and interest in ensuring the implementation of provisions contained in the Convention on the Rights of the Child. While not expressly noted, the authorities responsible for the issuing of the policy in Canada also seemed to have had the Convention in mind when it was drafted.

QUESTION 2 - Which authority is responsible for the administration of adult prisons and juvenile centres? Which authority has issued the policy? Was the authority responsible for coordinating actions on behalf of children and for monitoring the implementation of the Convention on the Rights of the Child involved in the drafting of the policy?

³⁸ Australia has ratified the Convention on the Rights of the Child but the ratification does not automatically result in the incorporation of the international norms into national laws. Only provisions incorporated into domestic legislation can be invoked by courts and enforced through national mechanisms.

In **Australia**, the administration of prisons is the responsibility of the Ministry of Justice, which is the authority that issued the policy directive on “Prisoner Mothers/Primary Care-Givers and their Children”.³⁹

In **Canada**, the administration of prisons is the responsibility of the Correctional Service of the Minister of Public Safety and Emergency Preparedness. The directive on the “Institutional Mother-Child Programme” was issued by the Commissioner of the Correctional Service of Canada and gives guidance on the implementation of the programme to the correctional institutional heads. The administration of youth custody facilities in Canada is under the responsibility of the Correctional Services too. Canada being a Federal State, the responsibility for the implementation of areas covered by the Convention on the Rights of the Child is shared by the Government of Canada, the provincial governments and the territorial governments, through a mechanism known as the (federal-provincial-territorial) Continuing Committee of Officials on Human Rights.

In **Cambodia**, the administration of prisons is the responsibility of the Ministry of Interior, which is the authority that issued the Proclamation on “Administration of Prisons” that contains a section on children of female prisoners. The circular on “Communicating with Female Detainees and Prisoners accompanied with Child” was issued by the Ministry of Social Action, Labour and Veterans Affairs (MOSALVY), giving instructions to the Municipal/Provincial Inspection Office of Social Action, Labour and Veterans Affairs. The administration of juvenile centres falls under the jurisdiction of the Ministry for the Rehabilitation of Juveniles.⁴⁰ MOSALVY is the agency responsible for the administration of State centres for orphans and abandoned children. The responsibility for the coordination of the implementation, consideration and evaluation of all policies and programmes relating to the life, development and protection of Cambodian children is the responsibility of the Cambodian National Council for Children (CNCE) established in 1995, which is presided over by MOSALVY.

In **France**, the administration of prisons is the responsibility of the Ministry of Justice, which issued the circular on “Les conditions d’accueil des enfants laissés auprès de leur mère incarcérée”. The circular is addressed to the penitentiary services, the directors and chiefs of penitentiary institutions, as well as to First Presidents, General Procurators, Presidents of the Tribunals of First Instance and Procurators of the Republic (Premier presidents, Procureur généraux, Presidents des tribunaux de grande instance, Procureur de la République). Detention centres for young offenders are also administered by the Department of Prison Administration of the Ministry of Justice.⁴¹ The ministry responsible for family affairs,

³⁹ Australia has in recent years been strongly criticized for the detention of child asylum seekers, either with their families or unaccompanied. The Department of Immigration and Multicultural and Indigenous Affairs is the Commonwealth agency responsible for implementing Australia's immigration laws and policies. It is responsible for the operation of Australia's immigration detention centres. These centres do not fall under the responsibility of the Ministry of Justice, and the policy directive examined in this paper does not apply to these centres.

⁴⁰ See Initial report of Cambodia to the CRC Committee (CRC/C/11/Add.16 or 24 June 1998, paragraph 232). Reference is made to the Subsidiary Decree no. 17 of the Council of Ministers, which defines the role and powers of the rehabilitation centre for juvenile delinquents.

⁴¹ The situation of young offenders in France is regulated by Ordinance of 2 February 1945 on child offenders, amended by the Act of 8 February 1995 and the Act of 1 July 1996, as reported by France to the CRC Committee in its second periodic report of 2003 (CRC/C/6/Add.26, paragraphs 380 to 394).

currently the Ministry of Employment and Solidarity, is responsible for the coordination of ministerial measures to implement the Convention on the Rights of the Child in France.

Additional comments:

The Committee on the Rights of the Child has recommended that State parties take action to ensure the realisation of all rights in the Convention for all children in their jurisdiction. The Committee has recommended the establishment of coordinating and monitoring bodies, and the development at national level of child-focused and child-sensitive bodies, to ensure that children's rights are a priority in all legislation, state plans and actions. The development of a children's rights perspective throughout government, the legislature and the judiciary has been identified as a key issue for the effective implementation of the Convention and the realisation of children's rights. In some countries, inter-ministerial coordinating mechanisms for following-up and monitoring the implementation of the Convention at the national level have been established. The challenge in many countries remains to make the children's rights agenda a priority, not only at the political level, expressing good intentions, but more importantly at the practical level, by all those that implement policies and/or act on behalf of the State and who can affect children's lives directly. In its General Comment 5 (2003), the Committee noted that "...effective implementation of the Convention requires visible cross-sectoral coordination to recognise and realise children's rights across Government, between different levels of government and between Government and civil society – including in particular children and young people themselves." It is very important to ensure that policies and programmes regarding parents deprived of their liberty and their dependent children, including children residing in prisons, take into account children's rights. The Convention on the Rights of the Child should be used to guide all actions regarding children of persons deprived of their liberty and the adoption/implementation of policies should be part of comprehensive plans of action for children.

QUESTION 3 - Is the principle that both parents have common responsibilities for the upbringing and development of the child recognized in the policy (CRC articles 18, 20)? When can dependent children accompany their mother and/or father in prison - eligibility, exceptions and limitations? How many children can stay with a mother/father? (CRC articles 2, 4, 5, 8, 9, 18, 20)

In **Australia**, a 'mother' or 'primary care-giver',⁴² who is responsible for the custody or care of a child or children, sentenced and remand prisoners, can request authorization from the Superintendent of the prison to have her/his child with her/him in the prison. Children are allowed to reside in prison with their mother generally until the age of 12 months. Children up to school age may stay overnight and, in exceptional circumstances, older children too. A 'mother' or 'primary care-giver' may also apply for permission for overnight stays or additional day visits by his/her child. It is clear in the policy that a father can be recognized as primary care-giver, and therefore can request authorization for a child to reside with him, or get authorization for day visits. As concerns a child residing in prison, the primary considerations for the authorization of a child staying in prison are the welfare and custody

⁴² The directive defines 'primary care-giver' as an individual, either male or female, who is responsible for the custody or care of a child or children.

status of the child and the availability of a designated nursery area in the prison. Australia's policy directive does not stipulate whether more than one child can stay in prison, but refers to children (plural) when stating that *'approval may be granted for mothers or primary care-givers.... who are responsible for the custody or care of a child or children...'*

In **Canada**, 'mothers'⁴³ can participate in the Mother-Child Programme and have their children living in the institution either on a full-time basis or on a part-time basis (weekends, holidays, school vacations). The definition of 'mother' given in the directive extends also to 'legal guardian', meaning that fathers, as well as step-mothers or any other male or female person responsible for the custody of a child, could apply. Only minimum or medium security prisoners are eligible to participate. Women convicted of a crime involving a child are not eligible to participate in the programme unless a psychiatric assessment determines that the prisoner does not represent a danger to the child.⁴⁴ The upper age limit of the child for full-time residency is four years (at the fourth birthday) and for part-time residency is twelve years (at the thirteenth birthday). The Deputy Commissioner may approve alternate age limits on an exceptional basis. Canada's policy directive does not refer to the number of children at a time for which mothers can request authorization for full-time or part-time residence, so can be interpreted as not having any restrictions in this regard.

In **Cambodia**, the circular issued by MOSALVY notes that it is their responsibility to 'separate those children away from the mother, in order to allow them to live with their family, close relatives, or in rescue centres, upon agreement of the mother and according to the actual circumstances'. It stipulates that infants should be brought away from the mother after reaching six months of age and in special situations even before the age of six months. The Proclamation of the Ministry of Interior does however stipulate that 'a child or children may live with their mother in the prison until they are six (6) years old'. Contrary to the MOSALVY circular, the MoI proclamation stipulates that children can remain with their mother. It also refers to 'a child or children', which means that more than one child may be authorized to stay with her/his mother in custody.

In **France**, only 'mothers'⁴⁵ (in principle, with the agreement of the father) can decide to keep their child with them in prison. The guiding principles stated in the relevant circular recall the rules of common law for the protection of children, the competence of social and sanitary mechanisms to undertake actions for the benefit of families and children, as well as the respect of the 'parental authority' of 'parents'. The age limit for children to stay in prison is in principle 18 months (Criminal Procedure Code art. D.401). However, some justified exceptions can be authorized by the Regional Director of the Prisons Services at the request of the mother and upon the recommendation of a Consultative Commission to be conformed for this purpose.⁴⁶ No reference is made in the policy with regard to the number of children of the same mother that can stay with her.

⁴³ 'Mother' is defined as biological or adoptive mother, legal guardian or step-mother.

⁴⁴ A psychiatric assessment completed by a psychiatrist selected by the Institutional Head after consultation with the child welfare authorities.

⁴⁵ No definition of the term 'mother' is given in the policy.

⁴⁶ A Consultative Commission would normally be composed by the Regional Director of the Penitentiary Services or his/her representative, a psychiatric doctor, a pediatric doctor affiliated to a service for the protection of mothers and children, a psychologist, the Head of the institution in which the mother is incarcerated and a social worker.

Additional comments:

The practice regarding the age limit, the number of children and the authorization for parents - mothers and/or fathers - to keep their children varies between countries. Canada's policy extends the definition of mothers to biological, adoptive, and step mothers and/or legal guardians. However, it is more common to see that children are authorized to accompany their imprisoned mother, and not their imprisoned father. Australia's policy clearly states that fathers can also apply to the programme. Small children are also reportedly living with their fathers in prisons in Bangkok (Thailand), for example.⁴⁷ Child-friendly visiting facilities to parents – fathers and mothers - have also been established in many countries. With regard to the number of children that can accompany a mother, not much is said in the policies examined. Cambodia's Proclamation does, however, note that 'a child or children' may live with their mother inside prison. While not referring to the number of children, the other policies examined could be interpreted as allowing more than one child to remain in the prison. If this is the case, mothers do not need to choose which child should stay with them.

QUESTION 4 - Is the right of a child not to be separated from his/her parents against their will respected (except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child) (CRC article 9)? Is it a right or a privilege for parents to keep their child (or children) with them in the prison (CRC articles 18, 20)?

In **Australia**, as per the written policy, it is the prisoner who is 'entitled' to keep the child with her/him. The right of a child not to be separated from his/her parents is not addressed in the policy, nor does any judicial review in this regard take place, even if the separation is the result of an action (the imprisonment) initiated by the State. It is important to note that authorisation for mothers or primary care-givers to keep their children is seen as an 'entitlement' that prisoners have if certain conditions are met. The policy directive also states that any breach of the rules of the agreement (that prisoners sign when authorized to keep their child) can lead to losing the 'privilege'. The policy directive does not make any reference to the rights of the child reflected in the Convention on the Rights of the Child or any other international human rights instruments.

In **Canada**, and as per the policy objective described in the directive, the programme was created with a view 'to provide a supportive environment that fosters and promotes stability and continuity for the mother-child relationship'. The programme seeks mainly to respond to the possible disruption of the mother-child relationship and it does not really address anyone's (mother or child) rights, nor is the separation of the child from his/her parents the object of any judicial review. It seems to be more of a support programme to imprisoned mothers with parental responsibilities. The policy directive does not make any reference to

⁴⁷ The article published by DEI, "*Des Enfants en Prison avec des Adultes*", notes that children in Thailand accompany their fathers at all times, including in prisons, since they have the paternal responsibility for children. This information has not, however, been directly confirmed.

the Convention on the Rights of the Child or any other international human rights instruments.

In **Cambodia**, as per the Proclamation of the Ministry of Interior, ‘children’ are simply allowed to live with their mother inside the prison. No reference is made to the right of the child not to be separated from his/her parents in the Proclamation of the MoI. However, the circular of MOSALVY refers to their ‘responsibility to separate those children away from their mother, in order to allow them to live with their family, close relatives, or in rescue centres, upon the agreement of the mother ...’ The right of the child not to be separated is not recognized in the MOSALVY circular, nor does it refer to the separation as being for the best interests of the child.

In **France**, the policy is very clear with regard to the right of parents to decide if a child of less than 18 months stays with his/her mother while she is in custody. The policy also states that, in reality, it is often the mother who makes the decision upon her imprisonment without any consequence on the parental authority. While mothers are the ones to decide if they want to keep their child with them, the judicial authorities are nevertheless required to make all efforts to find alternative solutions ‘to prevent’ a child accompanying his/her mother in prison. But, if the mother refuses to be separated from the child, neither the judiciary nor the penitentiary authorities can interfere or oppose the decision of the mother. The only exceptions are in situations of risk for the child, either for his/her health, security or morality or when (all) institutions do not have the capacity to accommodate the mother and child. If a father is not in agreement with the mother’s decision, he can request the Judge for Family Affairs to find an alternative for the child, but until then, the decision of the mother to keep the child in the prison has to be respected. France’s policy makes reference in its introductory remarks to international commitments regarding the Convention on the Rights of the Child, ratified by France. France’s policy is based mainly on the rights of women to decide if they keep their small children with them, but it does not, however, deal with the right of children not to be separated from their parents.

Additional comments:

The respect of rights of mothers and fathers, as well as of children, in situations when one or both parents are deprived of their liberty seems to present many challenges. The principle of the best interests of the child, as well as the right of a child not to be separated from his/her parent against their will unless such separation is necessary for the best interests of the child, should guide all decisions in this regard.

QUESTION 5 - Is the principle of the best interests of the child an overarching principle in the policy (CRC article 3)?

Australia’s policy directive does not specifically make reference to the principle of the best interests of the child, but the application form (to be completed by the prisoner when requesting authorization for her/his child to reside in the prison) states that ‘*Provision is being made for your child to live with you in prison, as it is currently considered to be in the best interests of the child and consistent with prison security and management.*’ The application form suggests that the principle of the best interests of the child is an accepted principle, but the assessment to be made for authorizing their stay is neither described in the

policy directive, nor does it provide any guidance as to how the principle is to be applied to ensure that the decision is in the best interests of the child.

Canada's directive clearly sets the principle of the best interests of the child as the pre-eminent consideration in all decisions relating to participation in the Mother-Child Programme by stating that: *“The objective of the Mother-child Program is to provide mechanisms that foster and promote stability and continuity for the child in its relationship with its mother. The best interests of the child, including the physical, emotional and spiritual well-being of the child is the primary consideration in decisions relating to participation in the Mother-child Program”*. The child welfare authorities are responsible for assisting in the assessment (in writing) of the best interests of the child at the moment of the application, and if the child welfare authorities do not provide this written assessment the Correctional Service is responsible for contracting a child care specialist or a child psychologist to do an assessment. Individual cases in the programme are also periodically reviewed by a Programme Board (after one month of participation and thereafter every six months) with the aim of ensuring that the programme participation continues to be in the best interests of the child.

Cambodia – the Proclamation of the MoI does not really stipulate that the principle of the best interests of the child is an overarching principle in the policy to allow children to stay with their mothers, even if it is noted that ‘the Prison Chief will provide for the child or children’s best interests, by arranging with the competent Ministry or family or relative for their care and safety outside the prison’. On its part, the MOSALVY circular does not make any reference to the principle of the best interests of the child. It further promotes the separation of the child from his/her mother to allow the child to live with their family or close relatives, or in rescue centres, without any assessment of what is in the best interests of the child.

France's circular does not refer to the principle of the best interests of the child. The guiding principles of the policy, as stated in the text, are more focused on respecting the parent’s exercise of their parental authority and the protection of childhood. Since it is up to the mother to decide if she keeps her child with her, the policy does not establish any mechanism or procedure to assess her decision in terms of what is in the best interests of the child.

QUESTION 6 - Who decides if a mother or father can keep a child (children) in prison? Who decides that the child shall be separated from his or her parents (CRC article 9)? What is the authorization process (CRC articles 2, 3, 4, 5)?

In **Australia**, it is the designated Superintendent who reviews applications and authorizes the mother or primary care-giver to keep her/his child, upon the recommendation of a ‘Paediatric Committee’ consisting of prison management staff, uniformed staff, a nurse or a medical practitioner and the Assistant Superintendent Prisoner Management. A representative of the Department of Family and Children’s Services may be requested to sit on the Committee and/or to submit written advice, should the designated Superintendent consider it appropriate. A prisoner willing her/his child to reside with her/him is required to submit an application to the designated Superintendent. If authorized to keep their child, the prisoner will be required to sign a contract acknowledging the conditions, accepting full responsibility for the care of

the child, and acknowledging having been informed about restrictions that may apply (such as, for example, keeping the child only in the nursery area; care arrangements for when the prisoner leaves the prison for medical or other reasons; urgent medical attention required by the child). Prisoners may also apply for children living outside the prison to stay overnight with them. The application/authorization process for temporary visits is the same. The frequency and the duration of visits are also decided by the designated Superintendent.

The process described in the policy directive for the assessment of the application refers only to the report to be made by a Paediatric Committee, which is to consider information regarding prior maternal/paternal contact, length of sentence and availability of appropriate prison facilities. No assessment of what is in the best interests of the child is apparently required to be made when considering the application. After an application for residence has been approved, the child is examined by a nurse or medical staff, to ensure that the child has no existing health problems and that residing in the prison will not be detrimental to his/her health.

In **Canada**, the ‘decision-maker’ with respect to programme participation, monitoring and termination is the Institutional Head. When a prisoner submits a request to participate in the programme, the child welfare authorities are requested by the Institutional Head to submit a written assessment of whether program participation is in the best interests of the child. If the child welfare authorities are unable to present such a report, the Institutional Head will request the assessment by a child care specialist or a child psychologist.

For acceptance to the programme, mothers have to meet all eligibility requirements (age of the child, classified as minimum or medium security, housed in institutions that offer the programme) and complete an application form (including women giving birth while incarcerated). It is not clear in the policy whether a mother who is in an institution that does not offer the programme can apply for a transfer. Applications are reviewed by the Programme Board,⁴⁸ which prepares a report containing information on the age of the child and the verification of custody status;⁴⁹ as well as an assessment of the degree of disruption to the child; the parenting abilities of the mother;⁵⁰ the mother-child relationship and the mother’s relationship with her other children; the child’s behavioural, medical and mental health history and the wishes of the child.

Once approved, the mother must sign a Parenting Agreement which sets out the terms and conditions of the programme. The policy also states that the mother shall be given the opportunity to seek legal counsel (at her own expense) prior to signing the agreement. Additional conditions to the Parenting Agreement may also be established, based on the assessment needs, upon the recommendation of the Programme Board and the approval of the Institutional Head.

In **Cambodia**, as per the Proclamation of the Ministry of Interior, the mother seems to be the one who decides whether her children live with her and no internal process for authorizing

⁴⁸ No information on who is on the Programme Board is given in the policy.

⁴⁹ In cases where there is ongoing custody litigation, decisions regarding the programme admission are deferred until the custody is decided.

⁵⁰ The policy states that the parenting abilities are evaluated using the scales developed by Magura, Moses and Jones (1981), Foucault (1992) and Steinhauer (1997)

this is in place, which also may leave it open for prison directors to exercise their power in this regard. However, it is noted that: ‘in cases where a child or children cannot reside at the prison, for example when the mother is too ill to properly care for them, ... the Prison Chief shall provide for the child or children’s best interests, by arranging with the competent Ministry, or relative for their care and safety outside the prison. The Prison Chief shall report to the Prisons Department on the arrangements made in respect of the child or children.’ The Prison Chiefs seem to be the responsible agents for deciding if the mother cannot take care of the child. The circular of MOSALVY, on its part, seems to promote more the idea of the separation of the child from the mother with her agreement and the ‘authorization’ of the prison to ‘allow them to live in hope and happiness outside the prison’. No mechanism or process to ensure respect for the right of the child not to be separated from his/her parents is in place.

In **France**, the decision is made by the mother only (in principle with the agreement of the father) and neither the judiciary nor the prison administration can object to it. Once the mother decides to keep her child, she simply has to give written notice about her decision to the head of the institution, which will see that she and her child are placed in an institution with the necessary facilities to accommodate mothers and children. The mother can also at any given time decide to put an end to the residence of her child in the prison, and for this purpose she also needs to inform the head of the penitentiary institution. The child is nevertheless separated from the mother when he/she reaches the age of 18 months. In exceptional and ‘well justified’ cases (not specified how), the mother can apply for an extension (usually up to two years of age). A judicial decision can also put end to the residence of the child in the prison, for example when a father is in disagreement with the decision, the Family Judge can change the place of residence of the child, or if the mother loses her parental authority or if the child is considered to be at risk.

Additional comments:

The question arises as to who in the family decides whether the child should accompany the mother in prison. In cases where parents have shared legal custody, can the mother decide by herself? Does she need to have the consent of the father? What happens if the father does not agree with the mother’s decision to keep the child in prison with her, or agree to alternative care for a child or children? Could a parent initiate a custody battle and prevent the child staying with their mother and/or prevent the mother keeping her child or children with her? Could a child challenge their mother’s decision to take them to prison, or their father’s decision to prevent them remaining with their mother? Or, could a father or someone else (like a grandparent) challenge the decision of the mother or the child? Could the mother challenge the decision of the child or the decision of the father? Who should have the ultimate word in this regard, and can one appeal? Does the child have a say in the decision making?

QUESTION 7 - Do children participate in the decision making to reside in prison, to terminate the agreement or any other decision affecting the child? Are the views of the child or children duly considered and by whom (CRC articles 9, 12)?

The policy in **Australia** does not have any specific provision to allow the child to participate in the decision making regarding the application, residence, and termination of his/her residence in prison.

The policy in **Canada** requires the Programme Board to assess ‘*where feasible, the wishes of the child*’ when reviewing applications from mothers to keep their children. Children may also request the Institutional Head to terminate the programme, but it is not clear in the policy how they can request this, and if they have direct access to the Institutional Head. It is further not clear from the policy how children’s views are sought and if the views of the child are given due weight in accordance with the age and maturity of the child, in particular for children participating in the full-time residency, which is for children up to four years of age.

In **Cambodia**, neither the Proclamation of the MoI nor the circular of MOSALVY stipulate any type of participation of the child or children with regard to the decision making as to whether to stay with their mother in prison. Since children are allowed to stay with their mothers until the age of six, their views about living in the prison could be sought – by the mother, by the prison and/or by the social authorities.

France’s policy does not have any specific provision to allow a child to participate in the decision making regarding his/her residence in the prison (this might also have to do with the age of the child).

Additional comments:

Some of the policies refer to ‘allowing children to stay with their mothers’, but the policies do not make any provision to hear the opinion of the children at any time. Policies are drafted in a way that children would seem to be the ones who get the authorization to stay, but not the authorization to decide or give their opinion about it. Policies tend to give the decision-making power to the mother and/or the prison and/or social authorities, which seem to be the ones deciding on children’s behalf.

QUESTION 8 - Once residing in prisons, how are children accounted for? Which authority remains responsible for them (CRC articles 7, 20)? How is the right of a child to a name from birth enforced, in particular for babies that are born in prison (CRC article 7)?

Australia’s policy directive does not specify how children are registered and which authority remains responsible for them. Nor does it describe the arrangements to be made for the registration of newly born babies.

Canada’s policy directive does not specify how children are registered in the prison records but it specifies that the presence of children shall be verified when formal visual counts of prisoners are made (four times a day). Child welfare authorities are also informed in writing of the application (and approval) for each child to reside in an institution. No details in the policy are given with regard to birth registration, in particular for children that are born in the prison or at a hospital or other medical facility. However, it is stipulated that the Correctional Service provide a photo identity card for the residing child on an annual basis. For children under 2 years of age, the cards are replaced every six months. The card includes the date of

birth of the child, a physical description, the name and telephone number of the institution and emergency telephone numbers of the institution. A copy of the card is placed in the mother's institutional file. It is not clear in the policy why the institution gives these cards to residing children, but the fact that the cards have the name and telephone numbers (including emergency numbers) of the institution implies that these are for external use. If children have their own birth certificate why do they need this identity card? Wouldn't it be detrimental for children to be identified as residing in the prison?

In **Cambodia**, the Proclamation does not stipulate how children will be accounted for by the institution, even if it is noted that the Prisons Department will provide food and medical care for children while they reside inside prisons. The Proclamation does however state that the mother is responsible for their care and safety. The Proclamation notes that 'if childbirth occurs inside the prison' the place of birth shall not be recorded as having been prison on the child's registration of birth', but it does not stipulate how this would be enforced, nor does it stipulate what would be written as the place of birth instead.

France's circular specifies that upon written notification of the mother's decision to keep her child with her to the Head of the institution, an identification card for the child is filled in and is attached to the mother's criminal file, recording the child's presence in the prison. Mothers have also to provide a copy of the child's birth certificate to confirm their relationship, and a copy of the certificate is placed in their file. As per the information provided by the mother, and in consultation with her, the institution will also inform the father (in writing) that the child is accompanying the mother in the prison. It is stipulated in the policy that the birth certificates of children born to mothers in custody (born in prisons) should not state the name of the institution (only the name and number of the street).

The circular repeatedly notes that children living in prisons accompanying their mothers are not deprived of their liberty, and that children residing in prisons remain under the main responsibility of their parents with the assistance of the social authorities. The Social Aid Services facilitate parents with the necessary financial and other types of assistance for the children. Mothers can also have access to remunerated work and professional training opportunities while in custody. The penitentiary administration does, nevertheless, provide children with their basic material needs – food, baby materials and other products needed for the child's hygiene. The circular also specifies that, given that the child is not incarcerated, the penitentiary administration does not assume the responsibility for his/her social and sanitary needs and that these services have to be facilitated by other concerned state institutions and departments, such as the 'Le service départemental de PMI' (which provides assistance to future mothers and mothers of children between 0 and 6 years); 'Le service départemental d'aide sociale à l'enfance' (which provides assistance for children, young adolescents and their families in difficult circumstances); or 'Le secteur de psychiatrie infanto-juvenile à l'établissement hospitalier' (which undertakes preventive actions and provides mental health care services for children).

Additional comments:

By allowing children to reside in prisons, a question remains often unanswered: what kind of responsibility are the prison authorities assuming for the children that reside in prisons? What is the responsibility of the social authorities towards these children?

QUESTION 9 - Are prison staff required to be trained to deal with children and on human rights issues? Do parents receive any information, guidance and assistance in their child-rearing responsibilities and education, such as on child health and nutrition, hygiene and sanitation, advantages of breastfeeding, etc. (CRC articles 3, 24, 37, 42)?

In **Australia**, the policy acknowledges that specialized training for prison staff is needed, and it requires the Superintendent to ‘ensure that methods used by prison staff in managing mothers, or primary care-givers, with babies are appropriate, and may facilitate extra training where necessary’. Support and counselling to the child and mothers is to be made available through the welfare services. The policy does not refer to training for prison staff on children’s rights.

In **Canada**, the Institutional Head has to ensure that staff receive training (from representatives of community services or agencies or from the Child-Mother Programme) on parenting and child safety issues and on intervention techniques in case of suspected child abuse or neglect. The policy also provides for mandatory parenting skills programmes and first aid courses for inmate babysitters proposed by the mother (it is presumed that if the courses are mandatory that they are available). The policy does not refer to training for prison staff on children’s rights.

In **Cambodia**, as per the Proclamation of the MoI, prison staff are not required to get any specialized training to deal with children, nor is it specified that they receive any human rights (or children’s rights) training. However, all prison officers are required to be trained in basic first-aid and retrained at least every three years. While it is notably a requirement to be trained, if resources are not available, most likely no training is provided to them. No child-rearing support programmes are required to be made available by the MoI or prison authorities. The Proclamation does, however, stipulate that female prisoners who are pregnant ‘shall be provided for taking care of her health before and after childbirth’ and ‘if childbirth occurs inside the prison, a health care provider is to attend, or the female prisoner and child are to be examined by a health care provider, as soon as possible after the birth’. The proclamation does not stipulate that resources will be made available to the prisons for this purpose, often an obstacle in the implementation of the policy in the country.

In **France**, while the principle of the policy is to reinforce the responsibility of the mother for the daily needs of her child, prison staff assigned to units/wings/institutions for mothers and children have, in addition to their security responsibilities, the responsibility to observe the mother-child relationship, to facilitate any information required by the mother and to reinforce family links. The policy favours the use of external services and assistance for mother and children, and suggests also the use of voluntary staff to assist them. It also encourages facilitating access by prison staff to training opportunities for specialized courses on the handling of small children. The circular does not refer to specialized training for prison staff on children’s rights.

QUESTION 10 - Who monitors the situation of mothers and children in prisons (CRC article 44)? How is the impact of the incarceration on the child evaluated and by whom (CRC article 6)?

In **Australia**, the policy does not establish any concrete mechanism to monitor the participation of mothers and children in the Child-Mother Programme and/or to evaluate the impact of incarceration on children. The policy refers only (in the medical section) to supervision to be maintained during the child's stay by a local child health sister ('sister' meaning fully registered nurse).

In **Canada**, prison staff monitor the adherence of mothers to the Parenting Agreement, the mother-child relationship, the well-being of the child and the running of the mothers units within the prisons. The Mother-Child Programme Board reviews the cases of each mother and child in the programme after one month and thereafter every six months with the aim of ensuring that the programme participation continues to be in the best interests of the child. The Institutional Head is also responsible for reporting on the programme and on any other situation that involves the well-being of the child to the Deputy Commissioner for Women, at least on a monthly basis. The directive stipulates that staff members have a duty to report any suspected abuse to the Child Welfare Authorities and Police Authorities. The Deputy Commissioner for Women is also responsible for conducting periodic programme evaluations.

In **Cambodia**, the Proclamation of the MoI only refers to the responsibility of the Prison Chief to report to the Prison Department what arrangements are made in respect of a child or children accompanying their mother in prison. The Proclamation does not envisage any monitoring of the situation of mothers and children, nor does it stipulate how the impact of incarceration on children is to be evaluated. Prisons are to be open to inspection by a representative of the King, members of the National Assembly, the Minister of Interior, the Minister of Justice, judges or prosecutors, Municipal Provincial Governors and any other person or organization so authorized by the Head of the Prisons Department. The social authorities – MOSALVY – are not listed as being authorized to inspect the prisons and the conditions of mothers and their children. On its part, the MOSALVY circular has assigned the Inspection Office of Social Action, Labour and Veterans Affairs 'to maintain contact with municipal/provincial prosecutors to discuss the modalities for cooperation with prisons, then request for a written authorization from prosecutors, and inform prisons of its purpose and responsibilities', 'to study the situation of the children and the mothers and discuss with the officials in charge of the prison in order to set up a programme according to the actual situation' and 'to contact various institutions in order to take care of the needs of children, for instance hospitals, local authorities, schools, etc.' The MOSALVY circular also stipulates that social workers 'shall keep all requests and files of the mother confidential' and for the implementation of the circular instructions, the Inspection Office of the Social Action, Labour and Veterans Affairs 'shall report on a regular basis on their activities and achievements to the Ministry.'

In **France**, no internal monitoring mechanism has been established and/or described in the circular. The circular does, nevertheless, stipulate that the judiciary authority and the prison administration can exceptionally - in situations of risk for the health, security or morality of the child - oppose the decision of the mother to keep her child. The Prosecutor (Procureur de la République) is to be informed by any person that becomes aware of this situation and in

cases of emergency he/she can decide to temporarily place the child in a temporary residence or centre and to call the attention of the Judge for Juveniles and Children ('Juge des enfants').

PART IV

1. Concluding observations

The deprivation of liberty certainly affects men, women and children differently. But very often small children, not involved in any crime themselves, are also directly affected by the deprivation of liberty of their main caregiver, in particular, they are most affected if it is their mother who is deprived of her liberty. For children, the deprivation of liberty of their main caregiver may also result in their own deprivation of liberty, since they are forced (by the circumstances) to accompany their mother into custody.

Some children are born while their mother is in custody, and one can observe that it is generally accepted around the world to allow (at least) nursing infants to remain in institutions with their mothers and/or to allow mothers to keep their small children with them. But when allowed to reside in prisons, these small children share their mother's imprisonment as well as the constraints that come with it, at least until a certain age, when they are faced with separation from their mother if she has to remain in custody and they are forced to leave the prison. While there might be positive and negative aspects for children to accompany their mothers, on a case-by-case situation, the principle of the best interests of the child should guide all decisions in this regard. But the application of the principle of the best interests of the child seems, in fact, to be far from being incorporated in the decision-making process regarding children of persons deprived of their liberty in the countries examined in this paper. In addition, the frequent dilemma between the rights of adults and children, in particular between the rights of women and the rights of the child, seems often to remain unaddressed and unresolved.

One can observe that there is an overall acceptance that motherhood and childhood should be entitled to special care, assistance and protection. It is clearly stipulated in international norms and also reflected in many public policies and practices regarding children of imprisoned parents. However, one can also observe that fatherhood is frequently forgotten, even if in the Convention on the Rights of the Child the parental responsibilities of both parents are recognized. Because the father-child relationship is often also affected by the relationship between the father and the child's mother, it adds to the dilemma between the rights of children and the rights of parents (mothers and fathers).

It is well recognized and much accepted that children are subjects of rights, entitled to basic human rights for their survival, development and well-being. There is also a broad recognition of the need for special considerations for children living in exceptionally difficult conditions. But one can observe that too many children face major challenges in their daily lives to even secure their survival, not to say their development and well-being. For many small children living with their mothers in prisons, these are merely aspirations. Their rights are forgotten and only their needs for care and protection are, if at all, addressed. Protection frameworks for children are clearly challenged when their main care-giver is deprived of his/her liberty. While the State assumes the responsibility for persons deprived of their liberty, it cannot (and should not) forget its obligations towards small children accompanying their mothers in prisons. It is the responsibility of the State to ensure the fulfilment of the

rights of children, moreover those living in State institutions, and to provide special protection, care and assistance to them.

A better understanding of the purpose of imprisonment, alternatives to prison, good prison practices and the application of internationally recognized human rights standards (taking due consideration of the special needs of women and children in detention) are issues being discussed in criminal justice and prison reform meetings at the national, regional and international levels. While alternatives to imprisonment for mothers with small children may be a better way to move forward, the reality in many countries shows the important and urgent need to at least develop specific prison policies to address the situation of mothers and their children, building upon international human rights standards and norms, in particular using the Convention on the Rights of the Child as a basic reference. Better conditions of detention for imprisoned mothers and children residing in prison - including special facilities, trained staff, and access to basic social services, educational and recreational activities - need to be secured.

It is important to note that policies and plans alone will not magically change the situation of children residing in prisons. Even in countries where policies have been adopted and programmes are implemented, the situation of children residing in prisons is not up to the established standards. Prison officials and all those directly responsible for the administration of prisons need to be sensitised about children's rights. While international and regional mechanisms have the potential to provide further review of the protection of human rights by States, each State is accountable for human rights violations within its domestic jurisdiction. The fundamental principles enumerated in the international and regional human rights and humanitarian law instruments for women deprived of their liberty and their children residing in prisons must still be translated into concrete actions. In order to do so effectively, the appropriate procedures and mechanisms in prisons are still to be developed at the national level in many countries.

2. Personal remarks

After having completed my research and this paper for the Master Programme, I realize that research and advocacy work on this subject needs strongly to be encouraged at the national and international levels if we want the situation of children of imprisoned parents not to be invisible in the child rights agenda. Only recently, during the discussion day on early childhood development in September 2004, did the Committee on the Rights of the Child clearly state and recognize that children living with mothers in prisons are among the most vulnerable, and yet babies and small children have been residing in prisons in many countries for a long time.

When we think about children in prisons, we tend to think about children who have come into conflict with the law. Many societies do not even want to see these children: they are the disgrace of the society. We have lately also seen a tendency to change policies and legislation, in particular in countries with problems of 'juvenile delinquency', to respond strongly to these social problems. Still, these are children behind bars, children that are spending precious years in closed environments, without much hope for a better life. No one residing in a prison can hope that their life will improve because of the imprisonment. Probably, not many people working with children deprived of their liberty dream about the successful future of any of these children. Only those that are real believers in human dignity and the worth of the human person may through their acts and example have a positive influence on these children.

Babies and small children residing in prisons are also spending precious years in closed environments. I wonder if they have dreams and what these could be. I hope that their innocence will at least allow them to have dreams, dreams that they can pursue. I myself had a dream, which is the dream that guided my research since the beginning. After having completed this study, I have now a challenge, a commitment and a plan that I will pursue. I hope sincerely that this paper will at least serve to advocate for dignified lives for children of imprisoned parents, in particular for children residing in prisons.

I take this opportunity to thank Prof. Jean Zermatten from IUKB for his valuable support and guidance. I had many supporters all along the research - in particular my son Adrian and my husband Ricardo, who had to agree to spend their weekends and holidays without me. It was not easy. My mother and my father, who are always present in my heart. Tanya, my close friend and colleague. I also want to acknowledge and thank the Office of the United Nations High Commissioner for Human Rights for the study leave granted to me to attend the courses.

I dedicate this work in particular to the children of my dreams.

PART V

Draft proposal - “Suggested guidelines for drafting legislation, regulations, policies and programmes regarding babies and small children residing in prisons”

I INTRODUCTION

These guidelines are intended to be a reference tool for drafting and implementing legislation, regulations, policies and programmes, which are in conformity with international standards and respect the human rights of persons deprived of their liberty and the rights of children. They focus in particular on the situation of imprisoned pregnant women and their unborn babies, as well on the situation of imprisoned parents and small children residing in prisons.

International and regional human rights instruments should be used as the framework of principles and standards against which to measure the rights of persons deprived of their liberty, in particular imprisoned pregnant women and children living in prisons. It should be highlighted that international standards are minimum accepted standards which should not prevent those responsible for the drafting of laws, regulations, policies and programmes to further develop them, with a view to offering stronger protections to the population with due consideration of traditions, customs and cultures in different countries of the world.

II INTERNATIONAL PROVISIONS

Of particular relevance are the following provisions and interpretation by treaty monitoring bodies:

“All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”

International Covenant on Civil and Political Rights, article 10

“Persons deprived of their liberty ... should not be subjected to any hardship or constraint other than that resulting from the deprivation of liberty; respect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons. Persons deprived of their liberty enjoy all the rights set

forth in the Covenant, subject to the restrictions that are unavoidable in a closed environment.”

Human Rights Committee, General Comment 21 on the rights of persons deprived of their liberty, Forty-fourth session (1992)

“Pregnant women who are deprived of their liberty should receive humane treatment and respect for their inherent dignity at all times, and in particular during the birth and while caring for their newborn children; States parties should report on facilities to ensure this and on medical and health care for such mothers and their babies.”

Human Rights Committee, General Comment 28 on Article 3 (Equality of rights between men and women), Sixty-eighth session (2000)

“The use of imprisonment for certain categories of offenders such as pregnant women or mothers with infants or small children should be restricted and a special effort made to avoid the extended use of imprisonment as a sanction for these categories.”

Resolution 19 “Management of criminal justice and development of sentencing policies” of the 8th UN Congress on the Prevention of Crime and the Treatment of Offenders⁵¹

“In women’s institutions there shall be special accommodation for all necessary pre-natal and post-natal care and treatment. Arrangements shall be made wherever practicable for children to be born in a hospital outside the institution. If a child is born in prison, this fact shall not be mentioned in the birth certificate.”

“Where nursing infants are allowed to remain in the institution with their mothers, provision shall be made for a nursery staffed by qualified persons, where the infants shall be placed when they are not in the care of their mothers.”

⁵¹ Report of the 8th UN Congress on the Prevention of Crime and Treatment of Offenders (Havana, 27 August – 7 September, 1990), UN Doc. A/Conf.144/28/Rev. 1, p. 164.

Standard Minimum Rules for the Treatment of Prisoners (Rule 23(1) and (2))

“Measures applied under the law and designed solely to protect the rights and special status of women, especially pregnant women and nursing mothers, children and juveniles ... shall not be deemed to be discriminatory...”

“The appropriate authorities shall endeavour to ensure, according to domestic law, assistance when needed to dependent and, in particular, minor members of the families of detained or imprisoned persons and shall devote a particular measure of care to the appropriate custody of children left without supervision.”

Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principles 5, 31

“Young female offenders placed in an institution deserve special attention as to their personal needs and problems. They shall by no means receive less care, protection, assistance, treatment and training than young male offenders. Their fair treatment shall be ensured.”

UN Standard Minimum Rules for the Administration of Juvenile Justice, “The Beijing Rules”, Rule 26(4)

“Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.”

“Motherhood and childhood are entitled to special care and assistance. All children ... shall enjoy the same social protection.”

Universal Declaration of Human Rights, Article 25

“States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.”

“In all actions concerning children, whether undertaken by public or private

social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

“States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.”

“State Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.”

“States Parties shall ensure to the maximum extent possible the survival and development of the child.”

“States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child ...”

“States 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.”

“States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child ...”

*Convention on the Rights of the Child, articles 2(1),
3, 6(2), 9(1), 12(1), 18(1)*

The following main international instruments are of relevance:

- Universal Declaration of Human Rights
- International Covenant on Civil and Political Rights
- International Covenant on Economic, Social and Cultural Rights
- Convention on the Elimination of All Forms of Discrimination against Women
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- Convention on the Rights of the Child
- The UN Standard Minimum Rules for the Treatment of Prisoners

- The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment
- The Basic Principles for the Treatment of Prisoners
- The UN Standard Minimum Rules for the Administration of Juvenile Justice, known as ‘The Beijing Rules’
- The UN Rules for the Protection of Juveniles Deprived of their Liberty
- Declaration on the Elimination of Violence against Women

The Convention on the Rights of the Child, almost universally ratified, should provide particular guidance to ensure the realisation of children’s rights, including for children residing in prisons.

III GENERAL ISSUES

a. Legal framework

- Appropriate legislation to ensure full compliance with obligations under international human rights law, including the Convention on the Rights of the Child, should be adopted. The supremacy of international human rights and humanitarian law in case of any conflict, as well as the applicability, legal effect and realization of the rights for persons deprived of their liberty and children, should be ensured.
- Provisions contained in the Convention on the Rights of the Child recognizing children as rights-holders, as well as the general principles of non-discrimination, the best interests of the child, the right to life, survival and development of the child and the right of a child to express his/her views on all matters affecting him/her and to have those views given due weight (CRC articles 2, 3, 6 and 12), should be incorporated into all relevant domestic legislation, including the Constitution. The holistic approach of the Convention, recognizing the inter-dependence and indivisibility of human rights, should also be highlighted in the domestic legal framework and all policies affecting children.
- Domestic legislation should recognize the principle that motherhood and childhood are entitled to special care, protection and assistance, and that in all actions concerning children of imprisoned parents, the best interests of the child should be a primary consideration. Legislation should also ensure the necessary support and assistance to families and to imprisoned parents in the performance of their parental and child-rearing responsibilities to secure the child’s survival, well-being and development, taking due consideration of the individual and family circumstances, the social services available, the duration of the prison term, the prison facilities and other issues that may directly affect the child.

b. Policies and strategies

- Comprehensive rights-based and gender-sensitive national strategies or plans of action for children linked to national development plans, using the Convention on the Rights of the Child as a guiding tool, should be adopted. These plans for children should reflect the highest level of commitment towards the realization of the rights of children, addressing also the problem of children under especially difficult circumstances - in particular the situation of children of imprisoned parents, imprisoned pregnant women and small children residing in prisons – and promoting respect for the right of children to survival, protection, development and participation.
- As part of the national plans for children, specific programmes to secure the realization of the rights of children of persons deprived of their liberty and children residing in prisons should be adopted. The necessary human and financial resources to implement and monitor these programmes and measures should be allocated.

c. Cooperation and assistance

- Coordination among key authorities and agencies responsible for ensuring respect and fulfillment of children's rights, as well as among those to be engaged in providing services and assistance to imprisoned pregnant women and children living in prisons, such as, for example, health, social and education authorities, should be ensured. The development of special collaborative arrangements with non-governmental organizations active in the field of human rights and gender issues and children's rights should also be promoted and facilitated by the relevant authorities, including by the prison authorities.
- The international community has a moral obligation towards children. Whenever countries are not able to respond to the basic needs of their population, they have an obligation to seek and obtain international assistance. Programmes of bilateral and multilateral agencies should seek to contribute to building the necessary capacities to operationalize the application of UN human rights standards and norms, including the Convention on the Rights of the Child. International assistance to facilitate specialized training for prison staff, to improve prison facilities, to facilitate adequate services for imprisoned pregnant women and children residing in prisons, as well as for the overall implementation of national strategies for children, should be secured.
- Sharing of information on good practices and experience of how countries are responding to the situation of imprisoned pregnant women and children residing in prisons, as well as research on the impact of the deprivation of liberty of parents and their dependent children residing in prisons, may assist others in developing appropriate strategies to secure the realization of children's rights.
- The involvement of prison officials, medical staff, social workers, teachers, legislators, judges, prosecutors, lawyers, community-based associations, women's associations, child rights workers, family members, central and local authorities, the

private sector and the community as a whole to ensure the realization of children's rights, in particular for those residing in prisons, should actively be encouraged.

d. *Monitoring*

- Independent monitoring of the situation of imprisoned pregnant women and children residing in prisons should be promoted. Frequent access to the prisons should be granted to relevant institutions - such as, for example, independent national human rights commissions, ombudsmen for children, legislators, community-based groups, church representatives, human rights and humanitarian NGOs and international organizations. Persons conducting monitoring tasks should be allowed to make periodic and unannounced visits to the premises, to meet and to speak freely and in private with imprisoned pregnant women and children residing in prisons.
- Internal mechanisms to monitor the delivery and quality of services for imprisoned pregnant women and small children residing in prisons, and to ensure that the mechanisms and programmes in place are efficient and meet the needs of the targeted population, should be established. Periodic reporting to competent authorities may assist in building the necessary public trust that conditions and treatment of imprisoned pregnant women and children residing in prisons are up to recognized standards. Reporting may also serve to call the attention of decision-makers to the importance of allocating resources for the programmes.

IV SPECIFIC ISSUES

a. *Drafting of prison policies for the management of parents (mothers/fathers) and children residing in prisons*

Purpose

- Prison authorities should draft, adopt and implement prison directives/orders/instructions to standardize and facilitate the administration of imprisoned parents (mothers/fathers), imprisoned pregnant women and children residing in prisons. Policies should seek to promote and protect children's rights, in particular, they should support the relationship between the child and primary caregiver and promote the relationship between the person deprived of his/her liberty and his/her family.
- Prison policies should facilitate instructions and guidance on the prison policy and practice to prison staff directly dealing with persons deprived of their liberty and their families, including the regular visits of children to their mother or father.

Making the link with international human rights standards

- Prison policies should clarify the domestic and international legal framework.

- Prison policies should be based on internationally recognized human rights standards and should emphasize international obligations, in particular with regard to children's rights and the Convention on the Rights of the Child.
- Prison policies should clearly reflect and state the obligations and commitment towards the realization of children's rights. Policies should establish the general principles contained in the Convention on the Rights of the Child – the principles of non-discrimination, the best interests of the child, the right of the child to life, survival and development and the right to participation - as overarching principles in all actions by the prison authorities concerning children.

Defining the rights of parents deprived of their liberty to keep their children in prison

- Prison policies should seek to promote stable and solid relationships between children and their primary care-givers (male or female, those responsible for the care of a child or children).
- Prison policies should preferably provide for arrangements to be made for pregnant women to be placed in community or residential programmes during the pre-natal and post-natal period.
- Policies should make arrangements to allow young imprisoned pregnant women, under the age of 18 years, to remain with their newborns and small children.
- Policies should seek to define separation plans and procedures. Separation plans should be agreed well in advance to ensure the understanding and acceptance of the separation by all parties affected. Arrangements for alternative care for children, as well as to support the children and parents in the process, should be envisaged in close cooperation with the social authorities. Counselling for parents and children should be envisaged.

Establishing an age-limit

- Prison policies should strongly advocate for the fostering of the mother-child and father-child relationship and encourage/support parents to develop and maintain their relationship with their children, including by allowing children to reside in prisons until a certain age, to be determined in accordance with local customs and traditions, and on a case-by-case analysis.
- Efforts to ensure protection of the right of newborn babies and small dependent children not to be separated from their parents unless such separation is necessary for the best interests of the child, should be made. The abrupt separation of mother-children should be avoided.
- Arrangements for children residing in prisons to leave the prisons at any time should be made if it is considered to be in the best interests of the child.

Defining the decision-making process

- Prison policies should clearly define the decision-making process, taking due consideration of the rights of all persons directly affected – mothers, fathers and children – and establishing the necessary mechanisms, in accordance with the legal framework, to allow all those concerned to actively participate in the decision-making process, ensuring that children are recognized as rights-holders, and that in all actions concerning them, the best interests of the child should be a primary consideration.
- Prison policies should promote and facilitate the participation of children in the decision-making, taking due consideration of their age.

Defining the application procedure and eligibility criteria

- Prison policies should ensure that simple, transparent and expeditious application procedures are established for imprisoned parents to be authorized to participate in any short/longer term child-parent programme. Applications should be reviewed by a multi-disciplinary Board and decisions should be based on clear pre-established criteria, which should address: child protection and safety issues, the child-primary care-giver relationship, the legal and custody status of the child, information about the family network or alternative care options for the child, psychological reports of the parent and child, information on the legal status of the parent submitting the application, information on the social services to be made available to the child, and any other pertinent information that might be relevant to the understanding of what would be in the best interests of the child. Appeal procedures should also be secured.
- The necessary information on existing programmes should be made available promptly to parents deprived of their liberty, and it should clearly explain the application procedures, eligibility criteria, authorization process, conditions for participation in any such programme, as well as other options available to parents in support of the exercise of their parental responsibilities and to facilitate their continuing link with their family members, in particular small dependent children. The necessary legal and socio-economic assistance should be provided to parents in this regard.

Raising awareness

- Prison policies should promote awareness of children's rights as an essential part of the work of prison officials and others working with children.

b. Management of parents and children residing in prisons

Responsibility for the children

- Prison policies should clearly establish the responsibilities of the prison authorities, as well as those of the parent deprived of their liberty, with regard to the health and safety of the child residing in prison. Policies should encourage the assessment of

specific needs and ensure the preparation, jointly with social authorities, of a child support and care plan.

Record keeping

- Policies should ensure that the presence of children, as well as the transfer/release of persons deprived of their liberty accompanied by children residing in prison, is recorded. Confidential records of children residing in prisons should be kept, preferably by social authorities.
- Policies should provide for the necessary arrangements to allow children residing in prisons to go out with an authorized adult. Visits to family members, as well as to external community services, should be facilitated and supported by the prison authorities.

Birth registration

- Policies should promote and facilitate the birth registration of children born in prison. The fact that children were born in prison should not be mentioned in the birth certificate.

Facilities and special allowances for children

- Separate clean, safe, drug-free and child-friendly facilities for parents and children should be made available by the prison system. Space with appropriate outdoor play facilities for children should be provided.
- Accommodation of persons deprived of their liberty with children residing in prison should be open, and free from locks and bars.
- Persons deprived of their liberty with children residing in prison should preferably be accommodated in individual rooms with adequate space, allowing for their privacy. Sleeping accommodation should meet health requirements and secure sufficient natural and artificial lighting, adequate ventilation, adequate sanitary installations, a shower/bath with sufficient clean water at a temperature suitable to the climate, and heating.
- Policies should make the necessary budgetary arrangements for children to receive basic bedding, clothes, as well as diapers and basic toiletries.
- Persons deprived of their liberty with children residing in prison should have access to clean and safe facilities to prepare food for children. Basic cooking utensils and equipment should be provided.

Food

- Prisons should be provided with the necessary additional financial resources to secure a balanced diet for pregnant women and small children. The preparation of food and the quantity and quality of the food should be monitored by medical officers.

- Supplementary diet requirements and appropriate milk for pregnant and breastfeeding women and infants should be provided by the prison system.
- Access to sufficient safe drinking water should be guaranteed.

Health issues

- Qualified medical staff should monitor the overall physical and mental health of persons deprived of their liberty and children residing in prison. Emergency plans to respond to urgent health matters of children residing in prison, including the transfer of children to hospitals, should be in place.
- Mothers' and children's access to health care services and medicines, including to reproductive health care and medical attention, gynaecological services and paediatricians, should be facilitated.
- Prison staff and persons deprived of their liberty should receive training in first aid, as well as on the basic principles for the health and nutrition of children, the advantages of breastfeeding and environmental sanitation, and the prevention of accidents.
- Free physical education and outdoor sports activities should be facilitated for persons deprived of their liberty and small children of suitable age, as appropriate.
- Counselling services for parents and children, as well as parenting-skills training, should be provided.
- Children residing in prisons should have access to health services at least consistent with community standards.

Work

- Prison policies should envisage establishing nurseries in prisons to allow persons deprived of their liberty to be able to participate in educational, sports and income generating activities.

Treatment of persons deprived of their liberty and children living in prisons

- Prison policies should prohibit the shackling and use of restraints on imprisoned women during pregnancy, during transport to a hospital or clinic, during labor, and immediately after the child is born. Shackling during labor may cause stress and cause medical complications during the delivery, compromising the health of the mother and the baby.
- Disciplinary measures and punishment of persons deprived of their liberty with children residing in prisons should be regulated by law and should conform to international standards.

- Policies and laws should prohibit and require sanctions for the use of physical disciplinary measures and corporal punishment of children residing in prisons.
- Prison authorities should also establish the necessary mechanisms to protect children residing in prisons from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of the parent or any other person.

Safety and security of children

- Policies should seek to ensure the safety and security of children residing in prisons. Measures to ensure a drug-free environment, as well as adequate and safe facilities and equipment, should be put in place.
- The children's presence in the institution should be verified at least during each count of all persons deprived of their liberty.
- Intrusive searches of children residing in prisons should not be permitted. Body searches of any kind should be prohibited and clear instructions on how to proceed in case of reasonable suspicion that a child may be carrying illegal objects should be adopted. Searches of children should only be conducted in the presence and with the authorization of the parent deprived of his/her liberty.
- In the event that force is to be used in prisons where children are residing, necessary measures should be taken to remove children from the area or to isolate them prior to any intervention. The use of force and firearms or any other means, such as tear gas, in prisons with children should be generally prohibited.
- Instruments of restraint, such as handcuffs or chains, should never be used on children residing in prisons.

Family and community contacts

- Policies should facilitate the contact of children residing in prison with their families outside the prison, without any restriction.
- Systems to enable children to go out of the prison, to parks and community centers, should be established, in particular for children that do not have access to their families outside the prison.

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ANNEX 2:

Examples of strategies and good practices

1. International/regional norms and resolutions

Title:	‘Article 30: Children of Imprisoned Mothers’ of the African Charter on the Rights and Welfare of the Child
Region/country:	Africa
Brief description:	<p>The African Charter on the Rights and Welfare of the Child contains a specific article on the situation of children of imprisoned mothers. It recognizes ‘expectant mothers’, ‘mothers of infants who have been accused or found guilty of infringing the penal law’ and their ‘young children’, as persons in need of special treatment. It promotes the idea of considering non-custodial sentences and measures alternative to institutional confinement for women offenders. This Charter is a good example of a regional norm, inspired by the Convention on the Rights of the Child, which recognizes children as rights-holders and addresses the specific situation of children of imprisoned mothers.</p> <p>Available: http://www.africa-union.org</p> <p>African Charter on the Rights and Welfare of the Child, adopted in Addis Ababa, Ethiopia, July 1990</p>

Title:	‘Mothers and babies in prison’ Parliamentary Assembly Recommendation 1469 (2000)
Region/country:	Europe
Brief description:	<p>This recommendation, which was later adopted by the Committee of Ministers of the Council of Europe, is a good example of the recognition by an inter-governmental body of the situation of children affected by the imprisonment of the mother. It addresses the issue of the separation of children from their mothers and the adverse effects this can have on the development of the child. It recommends the use of imprisonment of mothers with babies or young children as a last resort and encourages the use of community-based penalties instead. It also highlights the importance of facilitating training for criminal justice professionals, including on the UN Convention on the Rights of the Child. The on-going cooperation of CoE members States and the Directorate General of Legal Affairs of the CoE in the field of penitentiary systems, including to</p>

	<p>improve the situation of mothers and babies in the prison, was also highlighted by the Committee of Ministers when endorsing the recommendation of the Parliamentary Assembly.</p> <p>Available : http://cm.coe.int</p>
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2. Monitoring mechanisms

Title:	Mechanisms monitoring prison conditions at the international level – Human Rights Committee, Committee against Torture, Committee on the Rights of the Child and Special Rapporteur on Torture
Country/region:	International level
Brief description:	<p>Treaty monitoring bodies established as part of main international human rights conventions are mechanisms that monitor prison conditions at the international level. State Parties to the International Covenant on Civil and Political Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment, and the Convention on the Rights of the Child, are required to submit information on prison conditions to the relevant treaty monitoring bodies. Special procedures mechanisms: such as the Special Rapporteur on Torture, mandated to examine, monitor and publicly report on questions relevant to torture. As part of fact-finding country visits, the Rapporteur also conducts and reports on conditions of detention.</p> <p>More information can be found at: http://www.ohchr.org</p>

Title:	Mechanism monitoring prison conditions in Africa – Special Rapporteur
Country/region:	Africa
Brief description:	<p>The African Commission is the only regional organization to have appointed an individual with a mandate specifically focused on prisons and places of detention. The Special Rapporteur is empowered to examine the situation of persons deprived of their liberty within the territories of state parties to the African Charter on Human and Peoples' Rights. The Special Rapporteur on Prisons and Conditions of Detention in Africa is also a good</p>

	<p>example of the positive influence of NGOs on the African Commission. The Rapporteur submits reports of country visits, which have addressed recommendations with regard to imprisoned women and their children. The Rapporteur also conducts follow-up visits to countries.</p> <p>More information can be found at: http://www.africa-union.org</p>
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Title:	Mechanism monitoring prison conditions in countries in Europe – Committee for the Prevention of Torture (CPT)
Country/region:	Europe
Brief description:	<p>The European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment, known as the Committee for the Prevention of Torture (CPT), established within the framework of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, represents an important mechanism at the regional level for the monitoring of conditions of detention and treatment of persons deprived of their liberty. It conducts fact-finding visits to countries and issues (publishes) confidential reports. CPT has developed standards relating to the treatment of persons deprived of their liberty published in a brochure entitled “The CPT standards”. These standards address the specific situation of women deprived of their liberty and the need for ante-natal and post-natal care. Standards are complementary to those set out in other international instruments, including the European Convention on Human Rights, the United Nations Convention on the Rights of the Child, the United Nations Convention on the Elimination of All Forms of Discrimination Against Women and the United Nations Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment.</p> <p>More information can be found at: http://www.cpt.coe.int</p>

Title:	National monitoring mechanisms: the role of the Prisons Ombudsman (Procurador Penitenciario)
Country:	Argentina
Brief description:	<p>The post of the Prisons Ombudsman (<i>Procurador Penitenciario</i>) was created in 1993 in Argentina. The Ombudsman's task is to monitor the country's prisons to ensure that prisoners' rights are respected and that prison conditions meet minimum legal standards. The Ombudsman has a</p>

	<p>mandate to visit prisons, receive complaints of abuse, and make recommendations for reform. This is a good example of a national mechanism specifically monitoring and reporting on conditions of detention. The Ombudsman is also engaged in promotional activities. One such example is a cooperation agreement between the Ombudsman, the Faculty of Law of the University of Buenos Aires, and an NGO named INECIP, as part of which human rights training is provided to women deprived of their liberty.</p> <p>http://www.inecip.org/memoria2003.htm</p>
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Title:	National monitoring mechanisms: the role of Independent National Human Rights Institutions
Country:	
Brief description:	<p>The Committee on the Rights of the Child has recognized the important role that independent national human rights institutions (based on the Paris Principles) can play in the promotion and protection of the rights of the child at the national level, adopting in 2002, General Comment Nr. 2. In addition to national institutions, several offices of Ombudsman for Children have been established around the world, such as in Europe, where these organizations have also established the European Network of Ombudspersons for Children (ENOC). In other regions, such as in the Latinamerica, the Offices of the Ombudsman have also appointed 'Defensores de la Ninez'. These organizations with a specific mandate to promote and protect children's rights, also have a mandate to visit prisons and monitor and report on prison conditions. They cooperate closely with national NGOs as well as with international and regional human rights mechanisms. Independent rights-based organizations are a good example of mechanisms established at the national level to promote and protect children's rights. Many of these institutions may within their mandate address the situation of women deprived of their liberty and children residing in prisons.</p> <p>More information can be found at: CRC/GC/2002/2 - http://www.ohchr.org ENOC – http://www.ombudsnet.org/ Latinamerican Ombudsman Offices – http://www.iidh.ed.cr Forum of National Institutions - http://www.nhri.net/</p>

Title:	National monitoring mechanisms: the role of national NGOs
Country:	Cambodia (Example of LICADHO)
Brief description:	The Committee on Human Rights has stressed the important role that

	<p>different types of non-governmental organizations can play in promoting, protecting and monitoring children’s human rights. A good example is the work of a Cambodian non-governmental organization named LICADHO, which has been actively engaged in assisting children residing in prisons and in assessing their needs. LICADHO has established a very innovative project called “Adopt a Prison” with the participation of local NGO partners or individuals ready to support children residing in prisons. LICADHO also has other projects, such as the Children’s Rights office that promotes and defends the rights of children through its networks, monitoring and advocacy activities.</p> <p>More information: http://www.licadho.org/</p>
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Title:	International monitoring mechanisms: the role of International Human Rights NGOs
Country:	International
Brief description:	<p>Several international human rights organizations, working with local organizations, monitor conditions of detention around the world, These organizations also conduct specialized prison research and engage in advocacy campaigns for prisoners’ rights, to call the attention of the international community to prison conditions worldwide. International organizations frequently produce reports and participate in international meetings raising awareness on the situation of prisoners around the world, such as for example UN meetings (Commission on Human Rights, Working Group on Arbitrary Detention, Human Rights Committee, Committee against Torture, Committee on the Rights of the Child). These organizations also share information on specific situations with the UN special procedure mechanisms, such as the UN Special Rapporteur on Torture, Special Rapporteur on Violence against Women (and others). Some examples of organizations monitoring prison conditions (including the conditions of detention of women) are OMCT, Observatoire international des prisons, Human Rights Watch Prison Project and Amnesty International. Penal Reform International (PRI) is also a good example of an international non-governmental organization doing research and promoting the exchange of practices and lessons learned with a view to improving the conditions of detention around the world.</p> <p>More information can be found at :</p> <p>http://www.omct.org http://www.oip.org http://www.prison.eu.org/rubrique.php3?id_rubrique=576 http://www.hrw.org http://www.amnesty.org http://www.penalreform.org</p>

3. Policies, directives, plans of action and programmes

Title:	Directive 768 on the Institutional Mother-Child Program
Country:	Canada
Brief description:	<p>The Commissioner of the Correctional Service of Canada issued a directive to be used by the Correctional Service of Canada for the implementation of the Mother-Child Programme. It describes the policy objective and clearly states that the best interests of the child should be the paramount consideration in all decisions regarding the programme. It describes the responsibilities of prison officials; as well as provides guidance on services, accommodation, equipment and materials to be made available for expectant mothers and small children. It outlines the procedures for searches of children participating in the programme and the management of emergencies. It also establishes an internal monitoring, evaluation and periodic reporting system to the Deputy Commissioner for Women. The directive contains also, as attachments, models and forms of parenting agreements, health care plans, consent to the search of children, contingency and transition plans and other relevant documents.</p> <p>Reference: Commissioner's Directive 768, Correctional Service, Canada (2003)</p>

Title:	Policy Directive No. 10 Prisoner Mothers/Primary Care-Givers (male or female)
Country:	Australia
Brief description:	<p>The policy directive issued by the Department of Justice of Australia establishes conditions by which a prisoner or primary care-giver (male or female) can have her/his child with her/him in prison. This is a good example of a policy that also applies to male prisoners, the main considerations being that the parent maintains custody of the child and the welfare of the child. It recognizes and promotes the maintenance or development of the bond between the prisoner (mother or father) and her/his child, and the maintenance or development of the prisoner's responsibility for the care of her/his child.</p> <p>Available: http://www.justice.wa.gov.au</p>

Title:	Prison Service Order 4801 - The Management of Mother and Baby Units and the Application Service
Country:	UK
Brief description:	In 2000, the Prison Service issued PO 4801 to facilitate the

	<p>implementation of the Prison Service Rules of 1999 that included provisions for the establishment of mother and baby units and about maintaining family links. The Prison Service Order makes a clear link to international obligations, with particular emphasis on the UN Convention on the Rights of the Child. It is a good example of a policy document adopted by the prison authorities to ensure respect of the rights of children residing in the prisons.</p> <p>More information: http://pso.hmprisonservice.gov.uk</p>
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Title:	Circular 99-2296 (18 August 1999) – ‘Conditions d’accueil des enfants laissés auprès de leur mère incarcérée’
Country:	France
Brief description:	<p>This circular, issued by the Penitentiary Administration of the Ministry of Justice, was drafted to facilitate the implementation of domestic legislation (Code de procédure pénale, article D.401) which allows imprisoned mothers to keep their children up to the age of 18 months, or exceptionally for longer. It makes a clear link to international obligations, such as the Convention on the Rights of the Child, and clearly recognizes (and facilitates) the right of women to make a decision in this regard. It is a good example of a policy drafted by prison authorities to address the situation of women and children residing in prisons promoting the respect of the rights of women and children.</p> <p>Available: http://www.justice.gouv.fr</p>

Title:	Plan of Action
Country:	Ecuador
Brief description:	<p>The plan of action is intended to guide the formulation of legislation, policies and programmes at the national level to address the situation of children of imprisoned parents. The plan of action was drafted using a rights-based approach, with the Convention on the Rights of the Child as the main human rights instrument guiding the actions proposed. The plan also incorporates a broad range of United Nations standards and norms in human rights, crime prevention and criminal justice. The plan was drafted following a needs assessment that used the Convention on the Rights of the Child to measure the realization of children’s rights in this context. It is a good example of a plan of action that makes the link with the national plan for children, and a good example of technical cooperation provided to a country to assess the needs and draft policies using the Convention on the Rights of the Child as the main guiding tool.</p> <p>More information: http://www.ilanud.sol.racs.edu</p>

Title:	Guidelines for Parenting Skills Programs for Federally Sentenced Women, Correctional Service of Canada (January 1995)
Country:	Canada
Brief description:	<p>The Correctional Service of Canada (CSC) has designed guidelines to assist the CSC plan, develop, implement, and evaluate parenting skills programming for Federally Sentenced Women who reside in the new Federal Services for Women facilities across the country. It is based on five main principles to ‘create choices’ for women – empowerment, meaningful and responsible choices, respect and dignity, supportive environment and shared responsibility. These guidelines are a good example of tools prepared for the use of prison authorities to support women deprived of their liberty in assuming their parenting responsibilities.</p> <p>Available: http://www.csc-scc.gc.ca/text/prgrm/fsw/parenting/guidelines_e.shtml</p>

Title:	Legal Aid and Rehabilitation programme for women prisoners and their dependent children
Country:	Nepal
Brief description:	<p>The programme is run by the Centre for Victims of Torture (CVICT) in partnership with Terre des Hommes in Nepal. Assistance to children of women prisoners is provided, in particular to help them better integrate into their community while their mother remains imprisoned, or place them in a house for children if needed. Assistance to ensure their education, access to medical services and the facilitation of regular visits to their mothers in prison is also provided by the programme.</p> <p>References: more information can be found at http://www.penalreform.org/english/vuln_womennepal.htm</p>

4. Needs assessment studies

Title:	Research study on the situation of children residing in the prisons: “Innocent Prisoners”
Country:	Cambodia
Brief description:	In 2002, LICADHO, a Cambodian non-governmental organization, conducted a research study on the situation of children residing in prisons using the Convention on the Rights of the Child as well as other main international human rights instruments to assess the conditions of these

	<p>children. This is a very good example of an NGO's work to assess the realisation of children's rights and the specific needs of children residing in prisons. The report has become a very useful tool to advocate for specific attention and programmes which are rights-based for women deprived of their liberty and their children residing in prisons.</p> <p>More information: http://www.licadho.org</p>
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Title:	Research study on the conditions of detention of women deprived of their liberty in the five Central American countries
Country:	Central America: Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua
Brief description:	<p>As part of a joint OHCHR – ILANUD project on 'Women, Justice and Gender', a survey was commissioned on the conditions of detention of women deprived of their liberty in the Central American countries in 2003, using principles contained in relevant international and regional human rights norms as benchmarks. The report, which also addressed the situation of imprisoned pregnant women and their dependent children, identified gaps in the response to the realization of the rights of women and children . The findings of the surveys were discussed by prison authorities, NGOs and others at a subregional meeting, during which plans of action to address the shortcomings were prepared and recommended. This is a good example of a needs assessment study conducted at the subregional level, which allowed for the discussion of challenges, as well as the exchange on practices by the prison systems and which resulted in concrete strategies.</p> <p>More information: http://www.ilanud.or.cr/</p>

5. Useful resources

Title:	“Handbook and training kit for prison staff: a human rights approach to prison management” by Penal Reform International
Country:	All
Brief description:	<p>PRI has developed a handbook and a training kit for prison staff that contains one section on imprisoned women and mothers. These materials are useful tools for the examination of issues and special needs of imprisoned women, mothers (including juvenile mothers), imprisoned women with children, as well as for the development of skills and techniques to address their special needs. The main international human rights instruments, with particular emphasis on women's rights, are used. These materials are a good example of tools to assess the needs of imprisoned pregnant women and imprisoned mothers. Users should use the Convention on the Rights of the Child when examining the special needs</p>

	<p>of small children residing in the prisons.</p> <p>More information: www.penalreform.org</p>
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Title:	Legal Services for Prisoners with Children
Country:	United States of America
Brief description:	<p>Legal Services for Prisoners with Children, a USA-based organization that advocates for the human rights of incarcerated parents and their children, has produced two useful publications for the use of incarcerated parents – a manual on the legal rights and responsibilities of incarcerated parents in the State of California and an information booklet on the legal rights of incarcerated parents to be present at court hearings affecting their children. These two publications contain practical information on legal and practical questions that incarcerated parents may have, in particular with regard to the custody of their children, during and after the time parents are in prison. They contain samples of forms and letters, as well as lists of useful groups to contact for assistance.</p> <p>Resources: LSPC (2001) <i>"Incarcerated Parents Manual"</i> and LSPC (2002) <i>"Transportation to Courts"</i></p> <p>More information: www.prisonerswithchildren.org</p>

Women in prison and the children of imprisoned mothers

In 2003, the Quaker United Nations Office (Geneva) and the Quaker Council for European Affairs (Brussels), in conjunction with Quaker Peace and Social Witness (UK) and the Friends World Committee for Consultation (Quakers) representatives to the UN Commission on Crime Prevention and Criminal Justice, began research on women in prison. Our aims were to better understand why increasing numbers of women are being imprisoned, identify the conditions in which women prisoners are kept around the world, and draw attention to the particular impact that imprisonment has upon women.

In looking into the situation of women in prison, it rapidly became clear to us that imprisonment of women has an enormous impact upon children. In many countries the vast majority of detained and imprisoned women are mothers, and often the sole or main carer of minor children. These children may be separated from their mother when she is imprisoned, or they may go into prison with their mother.

This paper by Marlene Alejos concerns babies and young children who stay in prison with their mothers. What are the rights of the child in such a situation, and how can they best be protected? In the course of her research, Marlene Alejos has identified strategies and good practices, and developed suggested guidelines for drafting legislation, regulations, policies and programmes regarding babies and small children residing in prisons.

Continuing research

The Quaker United Nations Office's work on women in prison and the children of imprisoned mothers aims to develop practical policy proposals that are grounded in an understanding of the impact of imprisonment upon women and upon their children, and draw upon best practice from around the world.

If you are able to contribute to our further research on this topic, have examples of best practice to share, or would like to comment on this paper or associated issues, please contact us at the address below.



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