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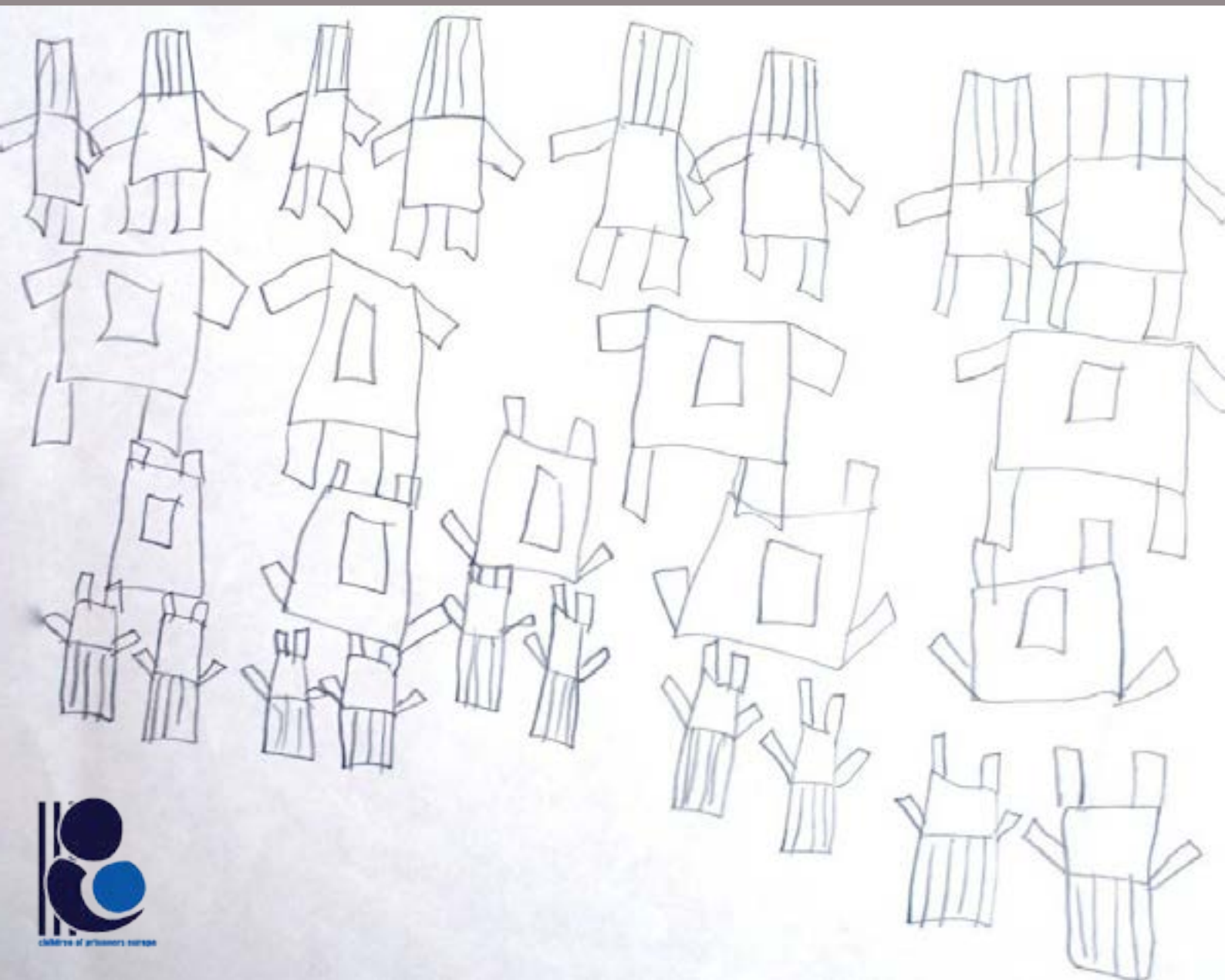
Spring 2015

European Journal of Parental Imprisonment

An evolving child rights agenda



Note from the director

Children of Prisoners Europe: pathways to change

Children of Prisoners Europe (COPE), working alongside other likeminded organisations, has been framing the issue of children of prisoners to maximise resonance with policymakers and public sensibilities for nearly two decades—identifying the problems; highlighting the children's rights; articulating proposed solutions and strategies; and putting forth a "call to arms" to spearhead further collective action across Europe and beyond. As a result of these long-term collective efforts, awareness of the existence of this group of children and their rights has grown. A next step has been for this awareness to be sustained in treaties, conventions, resolutions and organisations; important developments have taken place with respect to this. The European Commission (DG Justice) and UNICEF now include children of prisoners on their lists of vulnerable children, a recent European Parliament resolution specifically recognises children with imprisoned parents.

As emphasised by several contributors in this special issue journal, it is incumbent upon civil society to continue working from a child rights perspective to raise further awareness, underscoring the specific needs of this group of children and helping develop concrete national- and European-level entitlements and policies that protect their rights and meet their needs. Challenges lie ahead. National criminal justice policies and legislation in EU Member States generally do not incorporate a child rights perspective when a parent is imprisoned; most government policies for children do not address the rights and needs of children affected by parental incarceration. The result is a considerable policy gap. Yet the emergence of new mechanisms and advocacy opportunities provide hope for those seeking to advance child rights and translate abstract principles into effective, concrete measures. As they examine how the rights of children of prisoners have evolved since the Treaty of Lisbon, our contributors spotlight pathways to change, ways in which civil society can work together: through the development of child rights protection systems, the use of procedural safeguards, new complaints mechanisms and a strengthened jurisprudence, new avenues for child rights advocacy—highlighting how the rights of the child need to be considered when determining eligibility of a prisoner-parent's transfer to another Member State for purposes of social rehabilitation, for example. COPE realises the complexity of these spheres of action, and the need to move forward using well-discerned action. The rights of children of prisoners are part of an ensemble in which States' rights and the rights of adults interplay. Child rights need to be upheld alongside these other rights. But what is really crucial is working to develop systems whereby the implementation of these rights genuinely meets the needs of each individual child.

Liz Ayre
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Children of Prisoners Europe

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Editor
Hannah Lynn

Children of Prisoners Europe (COPE) is a pan-European network of non-profit organisations working on behalf of children separated from an imprisoned parent. The network encourages innovative perspectives and practices to ensure that children with an imprisoned parent fully enjoy their rights under the UN Convention on the Rights of the Child and the EU Charter of Fundamental Rights, and that action is taken to enable their well-being and development.

The European Journal of Parental Imprisonment is a bi-annual publication that seeks to broaden the study of issues relevant to children affected by parental incarceration and meet a burgeoning interest in the development, implementation and evolution of entitlements, policies and practices that promote their well-being. With a view to fostering new perspectives for children with imprisoned parents, the journal features contributions by eminent scholars and experts in the fields of child rights, child welfare, criminal and social justice, psychology, penal affairs and other disciplines; published articles do not necessarily represent COPE's opinions. Selected articles are editorial screened but not peer-reviewed. The editor is committed to reasoned ideological diversity and welcomes suggestions for special issues and contributions.

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European Journal of Parental Imprisonment

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Introduction

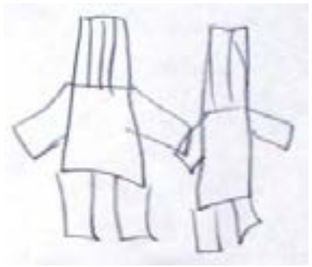
Child rights in post-Lisbon Europe, what about children of imprisoned parents?

Since the Treaty of Lisbon's entry into force in 2009, the role of child protection has expanded in the European Union with respect to a wide range of forms of violence against children. Children of prisoners may well benefit from this, although there could be a risk of victimising those children too much, instead of empowering them in their own development by giving them a position and a voice in the criminal process as soon as their interests are under threat. Maintaining personal relationships and child-parent contact is important, as are procedural guarantees for children to be heard and to have access to justice.

Empirical research results, as delivered in the multinational EU-funded FP7 study "Children of prisoners: Interventions and mitigations to strengthen mental health" (Coping project), provide an increased understanding of what is needed in terms of preventing long-lasting damage, for example in supporting the non-imprisoned parent or caregiver—including socioeconomic support—and in promoting honest age-appropriate communication with the children, their next of kin, peers and teachers. The importance of social support systems for these children needs to be highlighted.

More recently, the European Union has been showing an overarching sustained commitment to mainstream child rights into all areas of EU law and policy-making. This became quite clear in the European Parliament's 2014 resolution to mark the 25th anniversary of the United Nations Convention on the Rights of the Child. This resolution makes specific reference to the children of prisoners in Article 13, which is a big step forward not only in terms of awareness and visibility, but hopefully also in terms of realising a rights-based approach to ensure that concrete measures are taken that impact their lives, both at EU and national levels.

In addition, UN level improvements are also being made with regard to the visibility and rights-based approach of the treatment of children of imprisoned parents. Since the Day of General Discussion focussing on children of imprisoned parents in 2011, the reviewing UN Committee on the Rights of the Child has included multiple questions on this issue and several recommendations have followed. In due course, children of imprisoned parents might even be able to use the individual complaints procedure (Third Optional Protocol, or OP3) introduced in 2014. Lasting support from NGOs like Children of Prisoners Europe, the Child Rights Action Group and the Quaker United Nations Office will however be essential for them to fulfill their rights at local, European and international levels.



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The role (actual and potential) of the EU in enhancing the rights of children of prisoners: legal and policy perspectives

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The European Union has, for some time now, been active in developing child rights laws and policies, investing in child rights-related research and knowledge exchange, and gathering comparative data on the situation of children in various contexts across the Member States. That said, the rights and welfare of children of prisoners have been largely overlooked at EU level, until recently.[1] However, as the scope of EU child rights activity expands (particularly in the areas of criminal justice), and the added value of supra-national intervention becomes more apparent, questions are raised as to the role that the EU could and should play in addressing the distinct and complex challenges facing children with imprisoned parents.

As the scope of EU child rights activity expands and the added value of supra-national intervention becomes more apparent, questions are raised as to the role that the EU could play in addressing the distinct and complex challenges facing children with imprisoned parents.

It is worth noting from the outset that the EU has no general competence when it comes to determining the nature and scope of domestic criminal law or sentencing. It only has competence when such issues straddle national boundaries, as part of the EU's core internal market objectives of ensuring mutual recognition of decisions across Member State borders (including judicial decisions in criminal matters). As such, the EU has adopted a particular piece of legislation—Framework Decision 2008/909—relating to prisoners who may be subject to a transfer to another Member State to complete their sentence (hereafter the Framework Decision on the transfer of prisoners).[2] Such transfers may be aimed at facilitating their social integration, insofar as they are returned to their home country. It may also be aimed at alleviating the pressure on the prison system of certain Member States if, for example, there are problems with overcrowding. Whatever the reason, the Framework Decision ensures that the fundamental rights of prisoners are upheld in the course of issuing an order for transfer.[3]

In considering the actual and potential impact of this legislation on children of imprisoned parents, it is necessary, first of all, to appreciate the status and force of Framework Decisions as legal instruments. It is also important to clarify the nature and scope of child rights under the legislation, not only by reference to the actual content of the legislation, but perhaps more importantly, by reference to the more general developments in relation to child rights that have taken place at EU level since the legislation was enacted.

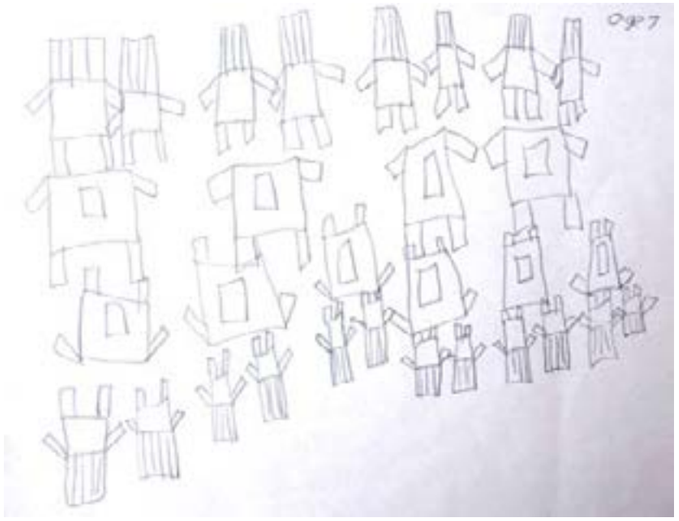
The changing legal status of the Framework Decision on the transfer of prisoners

Framework Decisions used to be the standard form of EU legislation embodying intergovernmental agreements relating to the mutual recognition of decisions between Member States' authorities. These were adopted under what used to be referred to as "pillar three" of the EU, which governed all intergovernmental agreements in the field of "police and judicial cooperation in criminal matters". The difference between Framework Decisions adopted under pillar three and all other legislation (directives and regulations) adopted under the main EU law-making pillar (pillar one) was that the former did not have the same binding force on the Member States

1 Paul F. Nemitz, Director responsible for Fundamental rights and Union citizenship in the Directorate-General Justice of the European Commission, made specific mention of children of prisoners during his plenary talk at the November 2012 European Forum on the Rights of the Child. Children of imprisoned parents now feature on the EU's list of "vulnerable children" (since 2013), and they are spotlighted on the European Platform for Investing in Children (EPIC) website. The European Parliament resolution on the 25th anniversary of the UN Convention on the Rights of the Child explicitly mentions children affected by parental imprisonment in Article 13.

2 Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, OJ L 327/27. See also the related Council Framework Decision 2008/947/JHA on the application of the principle of mutual recognition of probation decisions and alternative sanctions (Probation and Alternative Sanctions) adopted on 27 November 2008 (OJ L 337, 16.12.2008, p.102); and Council Framework Decision 2009/829/JHA on the application of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention (European Supervision Order) adopted on 23 October 2009 (OJ L 294, 11.11.2009, p. 20). For current state of play on Framework Decision 2008/909/JHA see: http://www.europris.org/state-of-play-eu-framework-decisions-909-947-829/

3 Preamble, paragraph 13 and Article 3(4).



and were subject to limited scrutiny by the Court of Justice or the European Commission. Consequently, if Member States failed to implement the Framework Decision on the transfer of prisoners, for example, the Court of Justice and the European Commission had limited powers to hold them to account.

Pillar three was effectively abolished by the Treaty of Lisbon in 2009, and all police and judicial cooperation in criminal matters was integrated into a new Title V (Articles 82-89) of the main lawmaking Treaty of the EU, the Treaty on the Functioning of the European Union (TFEU).[4] Following the coming into force of the Treaty of Lisbon on 1 December 2009, there was a five-year transitional period (which expired on 1 December 2014) by which time all Framework Decisions adopted under the old pillar three regime would be automatically subject to the full scrutiny of the Court of Justice and the European Commission (Article 10 of Protocol 36 to the EU Treaties)[5]. In practice, this means that Member States[6] who have still not transposed the Framework Decision on the transfer of prisoners into their domestic law will be open to infringement proceedings by the European Commission which could lead to a financial penalty.

The Framework Decision on the transfer of prisoners and the evolving EU child rights agenda

So, what does all of this mean for children whose parents are subject to the Framework Decision on the transfer of prisoners? The impact of the legislation (positive or negative) on children is not at all apparent nor is there any evidence that child rights were taken into account by the EU institutions when drafting this legislation. In fact, there is no explicit reference to the rights and welfare of children of prisoners at all, meaning that there is no explicit obligation to consider the impact that a particular order for transfer might have on the children of prisoners subject to such orders. The only aspect of the Framework Decision that could be construed in favour of children is the reference to prisoners' social rehabilitation which requires that Member States take into account the prisoner's family links to the executing State (para. 9 preamble). Specifically, it states:

> *Enforcement of the sentence in the executing State should enhance the possibility of social rehabilitation of the sentenced person. In the context of satisfying itself that the enforcement of the sentence by the executing State will serve the purpose of facilitating the social rehabilitation of the sentenced person, the competent authority of the issuing State should take into account such elements as, for example, the person's attachment to the executing State, whether he or she considers it the place of family, linguistic, cultural, social or economic and other links to the executing State.*

This presumably could be interpreted to take into account whether the prisoner has children in the Member State to which she or he is going to be transferred. Interestingly, there is no explicit reference to the links that the prisoner might have to family in the Member State from which she or he is going to be transferred. So, if an order is being proposed to transfer a prisoner from Member State A, where the prisoner's children live, to Member State B, the prisoner's country of origin where she or he has significant cultural, social and linguistic links, it is unclear whether the "attachments" to Member State B will override any concerns to protect the prisoner's relationship with his or her children by enabling him or her to remain in Member State A. The absence of any explicit obligation in the Framework Decision to protect prisoners' relationships with their children does not necessarily mean that the legislation cannot be interpreted in a manner that is consistent with child rights. As it happens, EU-level protection for child rights has developed considerably since the Framework Decision was enacted. This has been largely in response to two important constitutional developments.

The first was the introduction of the Charter of Fundamental Rights of the European Union in 2000.[7] The Charter contains the first detailed reference to child rights at EU constitutional level, including, most significantly, a dedicated provision on child rights (Art. 24). This articulates three key child rights principles: the right to express their views freely in accordance with their age and maturity (Art. 24(1)); the right to have their best interests taken as a primary consideration in all actions relating to them (Art 24(2)); and **the right to maintain on a regular basis a personal relationship and direct contact with both parents** (Article 24(3)).[8] Article 24(3) is bolstered by Article 7 of the Charter which mirrors Article 8 of the 1950 European Convention on Human Rights in providing that: "Everyone has the right to respect for his or her private and family life, home and communications".

Taken together, these provisions support children's rights to maintain contact with their parents even if the latter are in prison and could be used to prevent any cross-border transfers which would obstruct the practical enjoyment of that relationship. Conversely, they could be used to support a proposed transfer if it would have the effect of bringing a prisoner into closer proximity with his or her children. The Charter now enjoys the same legal status as the EU treaties, and obliges the EU and the Member States to protect the rights it enshrines, including those pertaining to children, when implementing EU law. Moreover, the Court of Justice has demonstrated a willingness to refer to Articles 24 and 7 of the Charter as a guide when interpreting legislation.

The second important development in relation to child rights in the EU which supports a more child-rights-based interpretation of the Framework Decision is the adoption of the Treaty of Lisbon which, as already stated, came into force in December 2009.[9] In addition to the changes made with regard to pillar three, referred to above, the Treaty of Lisbon included the "protection of the rights of the child" as a general stated objective of the European Union (now enshrined in Article 3(3) TEU). Again, this provides an important constitutional foundation for the more general obligation to ensure that child rights are not undermined by any EU measures.

More strategic planning at EU policy level over the last five years in particular has sought to harness these newfound legal powers to address areas of children's rights that are most in need of EU-level intervention. Notably, in 2011, the Commission adopted the EU Agenda for the Rights of the Child[10], setting out key priorities for the development of child rights law and policy across the EU Member States. Additionally, in 2013, the Commission adopted a new plan of action to support Member States in addressing poverty and social exclusion through a range of early years interventions (for children of pre-school and primary school age).[11]

> *The EU has progressed beyond action in prioritised areas and is now showing signs of developing a more overarching, sustained commitment to mainstreaming child rights into all areas of EU law and policy-making.*

Most recently, the EU has progressed beyond action in prioritised areas and is now showing signs of developing a more overarching, sustained commitment to mainstreaming child rights into all areas of EU law and policy-making. This is evidenced in the European Parliament's 2014 resolution to mark the 25th anniversary of the UN Convention on the Rights of the Child. Here, the Parliament declared that "children's rights are at the heart of EU policies" and urged both the EU institutions and the Member States to "take additional measures to ensure respect for the rights of every child everywhere, especially the most vulnerable".[12] Importantly, the resolution makes explicit reference to the children of prisoners. Article 13 of the resolution:

> *[c]alls on the Commission to assess the impact of detention policies and criminal justice systems on children; points out that across the EU children's rights are directly affected in the case of children living in detention facilities with their parents; underlines the fact that an estimated 800,000 children in the EU are separated from*

4 TFEU, *OJ C 115 of 9 May 2008*

5 Consolidated version of the Treaty on European Union - PROTOCOLS - Protocol (No 36) on transitional provisions, OJ 115 , 09/05/2008 pp. 0322 - 0326

6 A 2014 report by the European Commission indicates that 10 Member States have still not implemented the Framework Decision on the transfer of prisoners, despite the fact that the deadline prescribed in the instrument was 5 December 2011. Report from the Commission to the European Parliament and the Council on the implementation by the Member States of the Framework Decisions 2008/909/JHA, 2008/947/JHA and 2009/829/JHA on the mutual recognition of judicial decisions on custodial sentences or measures involving deprivation of liberty, on probation decisions and alternative sanctions and on supervision measures as an alternative to provisional detention. Brussels, 5.2.2014 COM(2014) 57 final

7 2010 OJ C 83/389

8 Emphasis added

9 OJ C 306 of 17 December 2007

10 COM/2011/0060 final, 2011-2014

11 2013/112/EU Commission Recommendation, 'Investing in Children: breaking the cycle of disadvantage', OJ L 59, 2.3.2013, pp.5–16.

12 2014/2919(RSP), para. 1

an imprisoned parent each year, which impacts on the rights of children in multiple ways.

In the same vein, the Council of the European Union adopted its Conclusions on the promotion and protection of the rights of the child on 5th December 2014.[13] The Council of the European Union is the main context within which national ministers from each EU Member State meet to adopt laws and coordinate policies.[14] It also coordinates cooperation between the courts and police forces of the Member States. As such, the Council has an important strategic and practical function in the development and actual enforcement of EU measures affecting children at both the EU and national level. In its Conclusions, the Council invites both the Member States and the Commission to be more effective in their implementation of child rights at the national level and makes explicit reference to the need:

...to continue efforts to strengthen the rights of accused and suspected persons in criminal proceedings; to reinforce the protection of victims and ***to examine the reinforcement of the rights of persons, notably children, in proceedings to facilitate enforcement of judgments in family law and in civil and commercial matters with cross-border implications.***[15]

Interpreting the Framework Decision in the light of child rights: the way forward?

There is every indication that the EU's commitment to mainstreaming child rights into all aspects of law and policy-making will result in a formal mainstreaming strategy at some point in the future.[16] This should, in principle, subject all EU measures to scrutiny to assess their compatibility with child rights, including the Framework Decision on the transfer of prisoners. Until that time comes, the enforcement of child rights depends to a large extent on the willingness and skills of those representing children—particularly civil society organisations—to make full use of existing EU justice mechanisms at their disposal, some of which are now readily available as a result of the changes made by the Treaty of Lisbon: the Commission's infringement proceedings process; parliamentary petitions; the Citizens' Initiative and just old fashioned lobbying at both domestic and EU level.[17] These all provide important channels for drawing attention to the impact of EU laws on the children of prisoners, for highlighting any gaps in legislation (including in the Framework Decision) and for holding Member States to account for failing to implement those laws in a manner that is consistent with the rights and welfare of children.

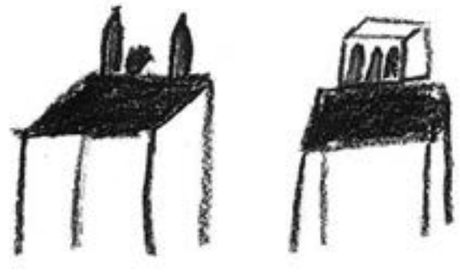
13 Brussels, 17 December 2014, 17016/14

14 The Council of the European Union should not be confused with the European Council where EU leaders meet to discuss the EU's political priorities. Nor should it be confused with the Council of Europe, a distinct non-EU polity, which is composed of 47 Member States and which exercises an explicit human rights mandate (as manifested most famously in the 1950 European Convention on Human Rights).

15 Emphasis added, citation referenced in note 13 above.

16 For a suggested model of what this might look like, see the 7 steps to children's rights mainstreaming developed by the Brussels-based network NGO Eurochild: 'Discussion Paper: Mainstreaming Children's Rights In EU Legislation, Policy And Budget Lessons From Practice', Eurochild, February 2014, available at: www.eurochild.org/fileadmin/public/02_Events/2014/Mainstreaming_Childrens_Rights_Discussion-paper_Feb2014.pdf and discussed in Schuurman, M. 'Developing a model for mainstreaming children's rights into EU law and policy-making' in in Iusmen, I. and Stalford, H. (eds) The EU as a Global Children's Rights Actor: Law, Policy and Structural Dimensions, Berlin: Barbara Budrich Publishers.

17 For a more detailed and critical review of how these mechanisms can be used to promote child rights see Stalford, H. "Journeys to European Justice: (How) Can the EU Enable Children to Enforce their Rights?" in Iusmen, I. and Stalford, H. (eds) The EU as a Global Children's Rights Actor: Law, Policy and Structural Dimensions, Berlin: Barbara Budrich Publishers.



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Protecting children of imprisoned parents against violence: the role of the EU

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Twenty-five years after the adoption of the UN Convention on the Rights of the Child (UNCRC), children continue to be exposed to many different forms of violence, be that as victims or witnesses. Violence affects children from different social and ethnic backgrounds and takes place in various settings, including in places where children should feel safe, such as in the home or in school. In 2006, the UN Secretary-General's Study on Violence against Children concluded that in every part of the world, children are routinely exposed to physical, sexual and psychological violence. Extreme forms of violence include sexual exploitation and trafficking, female genital mutilation, worst forms of child labour and the impact of armed conflict.

Child rights and integrated responses

The UNCRC includes a number of provisions intending to protect children from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment and maltreatment or exploitation, including sexual abuse. States parties to the UNCRC are obliged to take all appropriate legislative, administrative, social and educational measures to protect children from violence while in the care of their parents, legal guardian or caregiver. The Committee on the Rights of the Child (CRC) has provided guidance to assist and encourage States parties and other important actors, including regional organisations, to adopt appropriate measures as set out in Article 19 of the UNCRC. The CRC recognises that children are often exposed to multiple and inter-linked protection problems, which demand holistic and integrated responses. The CRC therefore promotes an integrated response, bringing together crucial elements, such as laws, policies, data, adequate resources, knowhow, services, coordination mechanisms, accountability and stakeholder involvement into a child protection system. Together, these elements form a protective environment around *all* children.

How the EU can promote child protection

There has been an increasing recognition of the EU's potential to prevent and address violence and to contribute to child protection systems. Indeed, since the adoption of the Treaty of Lisbon, the role of the EU in this field has steadily been on the increase, including additional powers for common EU action in fields of crime control, for example in the field of child sexual abuse and trafficking. Many recent EU activities should have a real impact on protecting children from violence, abuse, neglect and exploitation, within and outside Europe.

Within Europe, although the EU has no general competence with regard to child protection systems (as this lies with Member States), EU measures contribute to the architecture and individual elements of more comprehensive national child protection systems. In fact, there is a wealth of EU actions that address child protection. This includes both legislation—to combat sexual abuse, exploitation and child pornography and to support victims of crime, for example—and comprehensive policy frameworks, such as the European Strategy for a Better Internet for Children and the Action Plan on Unaccompanied Minors (2010-2014) (SEC(2010)534).

Transnational mechanisms for inter-State cooperation on children that are of common concern to them have been developed at EU level (such as the EUROPOL Victim Identification Task Force hosted in 2014, aimed at identifying victims of child sexual abuse and at developing measures in relation to international parental child abductions).

The EU also supports data collection and targeted research, such as mapping of Member States' policies to address violence against children and studies of children's experiences in national administrative and judicial proceedings. Each year, the EU funds regional projects on a wide range of issues concerning violence against children, including, for example, on bullying, domestic violence, corporal punishment and sexual abuse through the DAPHNE Programme. In summary, in many different ways and by committing common resources, the EU can help reinforce national measures which prevent and respond to violence against children. The EU's commitment to protecting children from violence has recently been confirmed by the Council Conclusions and the 2014 European Parliament resolution on the 25th anniversary of the UNCRC, which explicitly mentions children with imprisoned parents (Art. 13).

In the past few years, in its annual fora on the rights of the child, the European Commission has consistently and explicitly recognised the need to support national child protection systems. In 2012, the EU Strategy towards the Eradication of Trafficking in Human Beings called for the EU to finance guidance on integrated child

protection systems. Such guidance is currently under development within the European Commission. A public consultation took place in 2014, gathering input from actors across Europe on national child protection systems to inform the guidance. The Fundamental Rights Agency recently carried out a mapping of national child protection systems throughout the EU.

This groundswell of important activities will help support Member States in identifying common challenges and opportunities for further action and research, as well as contributing to building priorities for the actions that might best be taken at EU level. The increasing awareness among Member States, regional actors and national stakeholders of the potential scope of EU measures should ensure they have a significant impact. It is not an easy task, but the EU is uniquely positioned to act both as a champion and a catalyst for regional improvements in protecting children against violence.

Children who have a parent in prison in Europe should benefit from EU action to prevent and address violence against children, and from strengthened EU commitments to support child protection systems.

The EU's role in preventing violence against children with a parent in prison

Children of imprisoned parents in Europe should therefore benefit, on equal terms with other groups, from EU action to prevent and address violence against children and from the strengthened commitments by the EU to support child protection systems. The lives of children separated from a parent in prison in Europe may be affected by violence in a myriad of ways, including through mental trauma, implication in criminal proceedings on some occasions, vulnerability from being separated from the parent, risk of bullying, difficulties associated with alternative care systems and, in some extreme cases, risk of physical and mental violence following the release of the imprisoned parent. In many cases, they may be exposed to multiple and inter-linked protection problems, for example, separation, bullying and inadequate care.

In many different ways and by committing common resources described above, the EU concretely contributes to and reinforces national measures which prevent and respond to these forms of violence against children. EU actions already consider the various groups of children who suffer from these kinds of violations, in a way which increasingly takes into account the best interests of the child, the right to participation and the right to non-discrimination.

The EU is also increasingly concerned with identifying practical measures of support which promote a rights-based approach among those actors with child protection responsibilities. These may include involving law enforcement officials, lawyers and the judiciary, social workers, teachers and health workers. For example, EU funding might be deployed for the training of professionals, or regional projects which provide guidance and practical tools for actors. Such EU measures provide specific opportunities to sensitise professionals and caregivers about the particular risks associated with and the specific vulnerabilities and needs of children of prisoners.

The EU actors, Member States and stakeholders need to work collectively to ensure these actions achieve their potential. In this complex and sensitive area of multiple competences and interwoven initiatives, they face some challenges in doing so. The upcoming EU Guidance on integrated child protection systems, mentioned above, will be a very welcome means to shine a light into this territory.

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The growing momentum of a child rights agenda in the European Union

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The movement to promote child rights in Europe has entered a dynamic and promising phase. The election of a new European Parliament (EP) in May 2014 and the appointment of a new European Commission in November 2014 present rich opportunities for child-focused NGOs like Children of Prisoners Europe and World Vision to advance a stronger child rights agenda across Europe, and globally.

Both organisations actively engage in advocacy at a European level, recognising that to ensure that all and not just a few EU Member States adopt the highest standards when dealing with child rights, the impetus must come from Brussels. Although legal competence for family and child policy still rests primarily with EU Member States, EU institutions have a strong mandate to legislate and to act in the field of human rights, migration, labour and other areas relevant to child welfare. Child rights form an increasingly important part of EU human rights activities, both internally and externally.

The Child Rights Manifesto called for a "permanent mechanism" to be created in the European Parliament with responsibility for protecting and promoting child rights across all policy sectors in EU internal and external affairs.

The growing priority given to child rights by the EU is reflected in the reference to children in the objectives of the Treaty of Lisbon (Art. 3 TEU) and in the Charter of Fundamental Rights (Art. 24). It is also reflected in various EU policy frameworks developed over the past decade, including "Towards an EU Strategy on the Rights of the Child" (2006), the "EU Guidelines for the Promotion and Protection of the Rights of the Child" (2007), "A Special Place for Children in EU External Action" (2008) and "An EU Agenda for the Rights of the Child" (2011). The Court of Justice of the European Union has also invoked the provisions of the UN Convention on the Rights of the Child in its judgments, such as Case C 540/03, Parliament v Council, on the right to family reunification.

Child-focused NGOs have played an important role in Brussels over the years, advocating for many of these recent policy frameworks and pushing child rights up the EU's policy agenda. The Child Rights Action Group (CRAG) is a major network of child-focused NGOs represented in Brussels. CRAG's main focus over recent years has been to strive to achieve the mainstreaming of child rights across the work of major EU institutions, including the European Parliament, the Commission and the Council, as well as the European External Action Service.

CRAG deliberately targeted the European Parliament over the past two-year period, as the EP elections approached. Its members came together to draft a "Child Rights Manifesto" in which its vision of the European Union as a global child rights champion was outlined. The manifesto called for a "permanent mechanism" to be created in the European Parliament with responsibility for protecting and promoting child rights across all policy sectors in EU internal and external affairs. It called for new and more ambitious EU legislation and policy on child rights and for the potential impact on children of all of the Parliament's legislation—direct or indirect—to be monitored and assessed.

The manifesto also encouraged Members of the European Parliament (MEPs) to sign to show their support and become "champions" of child rights. The results of the 2014 EP elections saw ninety-three Child Rights Champions elected. They subsequently formed an Intergroup on Children's Rights consisting of MEPs from across different political groupings. Its members will become focal points for child rights in the parliamentary committees on which they sit. These MEPs will monitor all new legislation, resolutions and other business passing through their committees to ensure that the eventual impact on children has been properly assessed and addressed. This will mean that, for example, if EU extradition procedures are being debated and voted on by a EP committee, the focal point MEP from the Child Rights Intergroup within that committee will draw the attention of other MEPs to the proposed legislation's potential impact on children. They will work to have the legislation amended to ensure that it is child-sensitive.

The Intergroup will host expert meetings on different topics relating to a child rights agenda. It has declared its intention to work closely with child-focused NGOs and to be responsive to their needs and priorities. CRAG is in the process of upgrading its Child Rights Manifesto website at present. This will provide a platform for Child Rights Champions

to inform the public about the activities they are undertaking in the EP to promote child rights, particularly those of vulnerable children. World Vision believes that if the new Intergroup proves effective in advancing the mainstreaming of child rights across the work of the European Parliament, it may be possible in the future to establish a stand-alone EP Committee on Children following the ratification of a new EU Treaty.

The European Commission has also been active on child rights in recent years. The Agenda for the Rights of the Child (2011) set out EU priorities in this area. This agenda includes eleven concrete actions through which the EU can contribute in an effective way to children's well-being and safety. Child-focused NGOs are hopeful that its successor framework will be a robust and comprehensive strategy on the rights of the child, encompassing both EU internal policies and EU external action. The Commission has a Coordinator for the Rights of the Child in DG Justice and promotes inter-agency cooperation with other Directorates General on issues concerning child rights. In 2013, the Commission produced a "Recommendation on Investing in Children", which provides guidelines for Member States on a comprehensive, rights-based approach to investing in children, particularly important in a time of financial and budgetary constraints. One of the ways in which the Commission is monitoring and supporting the Recommendation includes: collecting and disseminating innovative practices through the European Platform for Investing in Children (EPIC). Children with imprisoned parents are currently spotlighted on this platform.

In relation to child rights and EU External Action, the European External Action Service (EEAS) is currently drafting a new Action Plan on Democracy and Human Rights. Child-focused NGOs have recently concentrated on trying to influence the EEAS to make child rights one of the strategic priorities in its new Action Plan. This would enhance the strategic focus and coherence of EU external action, and attract strong public support. The prioritisation of child rights (survival and development, protection and participation rights) in its external action may enable the EU to find more effective entry points for working on human rights issues with partner countries and to lay an important foundation for the development of human rights cultures in those countries.

The Intergroup has declared its intention to work closely with child-focused NGOs and to be responsive to their needs and priorities.

It certainly is an exciting time for European child rights organisations. The potential of the new EP Intergroup to highlight and address the situation of marginalised and vulnerable children in particular is significant. Child rights organisations must remain active in working alongside MEPs to promote the rights and interests of those children with whom they work. NGOs must continue to engage constructively with the institutions of the EU to ensure that their considerable influence is used to improve the prospects and well-being of children everywhere.

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Rights of children of incarcerated parents: towards more procedural safeguards

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In November 2014, the United Nations Convention on the Rights of the Child (UNCRC) celebrated its 25th anniversary. The UNCRC, ratified by 195 States, leaving only South Sudan and the United States behind, recognises the child as a holder of human rights and fundamental freedoms. One of the core principles is that all children are entitled to the rights laid down in this human rights instrument, without discrimination of any kind (Art. 2 UNCRC). Unlike the African Charter on the Rights and Welfare of the Child, the UNCRC does not contain a specific provision on children of incarcerated parents (see Art. 30 ACRWC, which focuses on children of incarcerated mothers). However, based on the non-discrimination principle, in particular the prohibition of distinguishing between children on the basis of the status of their parents (Art. 2(2) UNCRC), children of incarcerated parents are equally entitled to all rights under the UNCRC.

This contribution sheds light on the position of children of incarcerated parents from a child rights perspective. It touches upon the general principles of the UNCRC and their relevance for children who cannot be cared for by their parent(s) because of the incarceration of the latter. Particular attention will be given to procedural safeguards for these children, in particular the child's rights to be heard as laid out in Article 12 of the UNCRC and the right to have access to justice.

General principles of the UNCRC

There are four provisions that, according to the UN Committee on the Rights of the Child[1], serve as the general principles of the UNCRC. The first one concerns the prohibition of discrimination. The second concerns Article 3(1) UNCRC, which embodies the best interests of the child principle (i.e., the best interests of the child must be a primary consideration in all matters affecting them) and the third concerns Article 6 UNCRC recognising the right to life, survival and development. The fourth key principle is the right to be heard (Art. 12 UNCRC). The UNCRC explicitly recognises the responsibility of parents for the upbringing and development of their child (Art. 18 UNCRC). The State should respect this "primary responsibility" of parents and should offer them appropriate assistance (Art. 18(2) UNCRC). It is fair to say that the UNCRC has been built upon the idea that children have the right be cared for by their parents (Art. 7) and not to be separated from them (Art. 9).

1 Committee on the Rights of the Child, General Comment No. 5 (2003) General measures of implementation of the Convention on the Rights of the Child (Arts. 4, 42 and 44, para. 6 and 12), CRC/GC/2003/5.

The principle of the best interests of the child plays a role if a parent is incarcerated, which infringes upon the right of the child to parental care. In the case S v M (2008)[2], the South African Constitutional Court ruled that the best interests of the child have to be taken into account when the imprisonment of a primary caregiver is considered. Although the best interests of the child do not necessarily outweigh the interests of parents or the interests of society, they might imply that in a specific case a non-custodial sentence or measure will be favoured over a custodial intervention. This groundbreaking judgment has been followed by a number of other judgments regarding bail and sentencing decisions in which the court took a similar position.[3] In a recent General Comment on Article 30 of the African Charter on the Rights and Welfare of the Child, the African Committee of Experts on the Rights and Welfare of the Child observed that "a non-custodial sentence should be considered first, before imposing a custodial one, and should a custodial sentence be considered, then it should be appropriate taking the best interests of the child into consideration". The Committee adds that "[t]aking children's best interests into account does not mean that parents and caregivers cannot be detained or imprisoned". Instead, "States [...] must ensure that judicial officers are equipped to be able to weigh the best interests of the child versus the gravity of the offence and public security when considering the incarceration of a mother/parent".[4]

A child who is separated from his parents has the right to maintain personal relations and direct, regular contact with them (Art. 9(3) UNCRC). This is an important right for a child whose parent is incarcerated, which should be distinguished from the right to maintain contact with family if the child himself was deprived of his liberty (Art. 37(c) UNCRC). Where separation results from, for example, detention or imprisonment of one or both parents, the State, in principle, has to provide the parents, the child or, if appropriate, another member

2 S v M (Centre for Child Law as Amicus Curiae) 2008 (3) SA 232 (CC).

3 A. Skelton & M. Courtenay, 'The Impact of Children's Rights on Criminal Justice', SACJ 2012, 1, pp. 180-193.; A. Skelton, 'South Africa', in: T. Liefaard & J.E. Doek (eds.), Litigating the Rights of the Child; The UN Convention on the Rights of the Child in Domestic and International Jurisprudence, Dordrecht: Springer 2015, pp. 13-30.

4 The African Committee of Experts on the Rights and Welfare of the Child, General Comment on Article 30 of the African Charter on the Rights and Welfare of the Child, ACERWC/GC/01 (2013), para. 37 and 39.

of the family with essential information concerning the whereabouts of the absent member of the family upon request (Art. 9(4) UNCRC).

The right to be cared for by one's parents and the right to regular contact with them call for special arrangements for children to visit their parents in the detention centre or prison.[5] These include special visiting arrangements and adequate, child-friendly information on visiting hours and other ways to contact their parents. In addition, the best interests of very young children may require that they live with their parents in prison, for example, if the mother is still breastfeeding. This implies that the State has a special responsibility for these children in terms of basic services, including, for example, nursery care if the parent has to participate in prison activities (rule 36.2 European Prison Rules), special accommodation (rule 36.3 European Prison Rules) and regular assessments of the needs and interests of the children.[6] The European Prison Rules provide that "[i]nfants may stay in prison with a parent only when it is in the best interest of the infants concerned [and that] [t]hey shall not be treated as prisoners" (rule 36.1).

The principle of the best interests of the child plays a role if a parent is incarcerated, which infringes upon the right of the child to parental care.

Procedural safeguards for children of incarcerated parents: the right to be heard and access to justice

Right to be heard

Article 12 of the UNCRC stipulates that a child has the right to be heard in all matters affecting him or her. Since the incarceration of a parent has a direct impact on the child, the right to be heard should be upheld in the decision-making process affecting the incarceration.[7] This raises the question as to what extent criminal proceedings before and after conviction should accommodate the participation of children. The UN Committee on the Rights of the Child (CRC) has taken the position that all children should be considered capable of expressing their views. To what extent decision-makers, such as courts, should take into account these views is dependent on the age and maturity of the child, but they are under the obligation to clarify their decisions in this regard.[8] This is particularly relevant for older and more mature children. However, it is also important that the interests of a young child can be brought forward, for example through a legal representative or guardian ad litem.

It can be argued that domestic law should provide opportunities for children to participate throughout the criminal justice process, particularly when the detention of the child's parent is at stake. However, criminal justice proceedings need to be adjusted in order to enable children to participate effectively. The CRC recommends integration of a number of requirements: the processes in which a child is heard and participates must be transparent and informative, voluntary, respectful, relevant, child-friendly[9], inclusive, supported by training, safe and sensitive to risk and accountable.[10] Children should also be informed about their right to express their views freely and how the participation will take place, including information on its scope, purpose and potential impact. Children should receive help and support to prepare themselves for the hearing. Finally, one should protect children from (unnecessary) exposure to situations that are likely to be traumatic or harmful. One possibility is to conduct the court and other hearings of a child behind closed doors.[11]

Access to justice for children of prisoners

The right to be heard lies at the heart of children's legal status under the UNCRC.[12] Access to justice is another element of this legal status, which has gained significant attention at the international level. Children of incarcerated parents should also have access to justice in case of (alleged) violations of their rights. Like any other child, they should have "the ability to obtain a just and timely remedy for violations of their rights as put forth in national and international norms and standards".[13] In the context of parental incarceration, we are reminded of the right to lodge a formal complaint, similar to the complaints mechanisms for detainees and prisoners (see, for example, rule 70ff of the European Prison Rules). If necessary, children should have the opportunity to seek remedies against decisions of the institution administration affecting them, for example, if they are denied contact with their parent. The remedies should have a basis in law and enable children to approach an independent body with the competence to issue legally binding decisions. However, one could also think of mediation proceedings, complaints mechanisms at national human rights institutions, such as a Children's Ombudsperson, or formal proceedings before a court of law. Since the entry into force of the Third Optional Protocol on a communications procedure in April 2014, an individual communication lodged to the UN Committee on the Rights of the Child might also provide a remedy, although both formal proceedings before a court of law as well as international proceedings are often time consuming and therefore not necessarily effective. (For more information regarding the Third Optional Protocol, see pages 16-18.)

Access to justice for children of incarcerated parents should be embedded in domestic statutory law. Many European countries have some kind of complaints mechanism in place for prisoners, either at the local level (i.e., close to one specific institution) or at the regional or national level. However, these mechanisms are not meant for children of prisoners, let alone are they child-friendly.

More importantly, access to justice for children requires "legal empowerment" (High Commissioner for Human Rights 2013, para. 5), which means that they should have access to relevant information (i.e., on the existence and accessibility of remedies) and should be supported or assisted in accessing justice mechanisms. In this regard, one should develop mechanisms that guarantee legal and other services, including counselling and advice, education, support and representation. These services should be tailored to the capacities of individual children. Young children or those with mental and/or physical disabilities need additional assistance in particular. For very young children, one could consider the appointment of a guardian ad litem, when their parents are incarcerated and no other legal representative is available or capable of offering the required assistance to the child.

The position of children of incarcerated parents has gained significant attention in the past decade. Supported by groundbreaking case law and regional standard setting, much of the attention goes to the best interests of these children and respect for their right to maintain personal relations and contact with their parents. The child rights framework, as it currently exists both at the international and regional level (in Europe and Africa), provides a powerful set of norms and standards that should be applied holistically to children whose parents are detained or imprisoned. This means that we should also focus on procedural guarantees, including the fundamental right to be heard and access to justice for children. Only then can the full potential of child rights be used to actually improve the position of children confronted with the incarceration of their parents.[14]

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5 See also: O. Robertson, Collateral Convicts; Children of Incarcerated Parents: Recommendations and Good Practice from the UN Committee on the Rights of the Child Day of General Discussion, Geneva: Quaker United Nations Office, 2012.

6 *Ibid.*

7 C. Boudin, 'Children of Incarcerated Parents: The Child's Constitutional Right to the Family Relationship', The Journal of Criminal Law & Criminology, 2011, Vol. 101, No. 1, pp. 77-118.

8 Committee on the Rights of the Child, General Comment No. 12 The right of the child to be heard, CRC/G/GC/12. (2009)

9 Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice, 17 November 2010.

10 *Ibid.*, para. 134.

11 CRC/G/GC/12., 2009, *op. cit.*

12 *Ibid.*, para. 1.

13 Report of the United Nations High Commissioner for Human Rights, Access to justice for children, UN Doc. A/HRC/25/35., (2013), para. 4

14 With thanks to Ms. Denise Verkroost for her assistance

Putting access to the United Nations Committee on the Rights of the Child into the hands of children of prisoners

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Although United Nations' (UN) child rights protection systems can seem complex and confusing, and can feel far away and unreachable to anyone, especially to children, they are there to serve, support and protect children, including children of incarcerated parents. Perhaps even especially children of prisoners given the responsibility they have for those least able to speak for themselves. The coming into force of a new instrument in April 2014, the Third Optional Protocol to the Convention on the Rights of the Child, has made these child rights protection systems stronger and more accessible.

Child rights are the concern of all parts of the UN's human rights machinery. Annual resolutions on child rights at the Human Rights Council, the inter-governmental human rights body, reaffirm the importance of child rights and highlight specific concerns. The 2014 resolution on the Rights of the Child contains a specific call to States to ensure the rights of children of prisoners.[1] There is no independent expert of the Human Rights Council on the rights of the child in general, but the thematic and country-specific mandate holders raise concerns about child rights.[2]

The central pillar of the UN's child rights protection systems is the UN Convention on the Rights of the Child (UNCRC), which more countries have signed up to than any other human rights treaty. Of particular relevance for children of prisoners, the UNCRC protects:

> *...their right not to be discriminated against based on the status or activities of their parents (Art. 2(2)); their right to be heard in any judicial and administrative proceedings affecting them (Art. 12(2)); their right to have their best interests be a primary consideration in all actions concerning them (Art. 3(1)); their right, if separated from one or both parents, to maintain personal relations and direct contact with both parents, unless not in the child's best interests (Art. 9(3)).*

1 Human Rights Council resolution on the Rights of the Child A/HRC/RES/19/37 of 19 April 2012, paras. 67-68.

2 For example, the right to education of persons in detention, Report of the Special Rapporteur on the right to education, A/HRC/11/8 of 2 April 2009

By ratifying this treaty, States commit to upholding the rights of the child in their country, as well as to having their progress reviewed by the Committee on the Rights of the Child (CRC), a body of eighteen independent experts from all regions of the world. Their role is to examine whether States are fulfilling their commitments to child rights and to make recommendations where they are not. The CRC examines regular reports from countries and holds a dialogue with them to raise concerns and ask questions. At the end of this process, the CRC makes recommendations. CRC members regularly ask questions about the rights of children of imprisoned parents, and there has been a steady stream of recommendations—such as one made to Hungary in September 2014, for example:

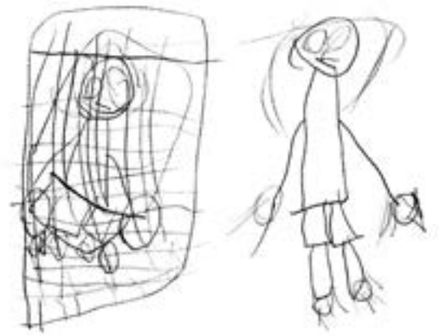
The Committee recommends that the State party take all necessary measures to establish mechanisms to divert the sentences issued to expecting mothers to alternative forms of punishment and take measures to enable children to visit their incarcerated parents.[3]

The CRC recommends that the State take all necessary measures to establish mechanisms to divert sentences issued to expecting mothers to alternative forms of punishment and take measures to enable children to visit their incarcerated parents.

More recent recommendations, from the CRC's session in January 2015, concerned children of imprisoned parents in both Switzerland and Sweden, highlighting the need for facilitation of contact, upholding the principle of closeness, data collection and for protecting the best interests of the child. See feature on pages 18-19 for further details. In addition, each year, the CRC holds a Day of General Discussion to explore an issue in more detail and hear from children and advocates worldwide. In 2011, the CRC focused on children of incarcerated parents.[4]

3 Committee on the Rights of the Child, Concluding observations on the combined third, fourth and fifth periodic reports of Hungary, adopted by the Committee at its sixty-seventh session (1–19 September 2014), CRC/C/HUN/CO/3-5, para. 43.

4 O. Robertson, Collateral Convicts: Children of incarcerated parents - Recommendations and good practice from the UN Committee on the Rights of the Child Day of General Discussion 2011 (Quaker United Nations Office, 2012); Committee on the Rights of the Child, Report and Report and Recommendations of the Day of General Discussion on "Children of Incarcerated Parents" (United Nations, 2011)



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The Third Optional Protocol to the Convention on the Rights of the Child (OP3) means that children can now take cases of rights violations directly to the CRC through the individual complaints procedure. This complaints mechanism, which became live in April 2014 following the tenth ratification of the protocol, gives children (and those working on their behalf) the right to bring cases to the CRC. The CRC will subsequently judge whether the State has violated the rights of the child as enshrined in the UNCRC.

For children to have the right to access the CRC, their government must have ratified OP3. Since the tenth ratification in April 2014 another five countries have ratified.[5] To date, the only European countries to have ratified are: Albania, Andorra, Belgium, Germany, Ireland, Montenegro, Portugal, Slovakia and Spain. There is a long way to go before all 194 States parties to the UNCRC have ratified the protocol, but momentum is building. There have not been any cases yet and there probably will not be for a while, as OP3 only covers events which happen after it came into force for that country. Additionally, anyone making a complaint must show that they have "exhausted domestic remedies", meaning that they have used any complaints mechanisms or legal action available in their own country. In the meantime, it is useful to consider how this new mechanism could be used by children of prisoners or those working on their behalf. Complaints can be brought by one child, a group of children or by someone acting on behalf of one or more children. Applying this to the situation of children of prisoners, potential cases could be foreseen, including:

Closure of or lack of mother-baby units

A case was taken on behalf of two babies born in prison in Canada who had to be separated from their mothers because the only mother and baby unit in the province had been shut down. In 2014, the Supreme Court of British Columbia ruled that closing this facility violated the rights of the mothers and their babies and ordered that a facility be reopened.[6] If facilities are closed or if there are no mother and baby units or not enough places, this might be a possible complaint under UNCRC Articles 9(1) and 3(1), on the right not to be separated from a parent (unless in the best interests of the child) and the need to take their best interests into consideration. It might also be possible to invoke Article 17 on the right to health given the well-documented health benefits of breast feeding and physical bonding for newborns.

No consideration of the best interests of the child in sentencing decisions

As noted above, the CRC has recommended on several occasions that the best interests of the child be taken into account when sentencing their parent. It is possible that a case could be brought by or on behalf of children who are separated from their parent without any consideration being given to their best interests using Articles 9(1) and 3(1) as above. Any case would be strengthened if it were possible to show the harm this had caused, for example, the impact on health, well-being or education.

Frightening or degrading security procedures for children

If security procedures for visitors are degrading, they are in violation of Article 37(a). If fear of the procedures prevents a child from visiting, then violation of Article 9(3) on the right to maintain contact with a separated parent could be argued.

Blanket bans on visiting

If there are no possibilities to visit the detained parent or if they are extremely limited (and this is not based on an individual assessment of the best interests of the child), then a complaint using Article 9(3) on the right to maintain contact with a separated parent could be explored.

Problems with access to education or healthcare or recreation for children living in prison with a parent

Children residing in prison with a parent maintain all the same rights as those in the general community. If they do not have access to all the rights enshrined in the UN Convention on the Rights of the Child, including education and the highest attainable standard of healthcare, then the State may be in breach of its obligations under the UNCRC. If it can be demonstrated that access or

5 For the most up-to-date ratification status see: OP3 Ratifications

6 Inglis v. British Columbia (Minister of Public Safety), 2013 BCSC 2309

quality is worse for the children residing in prison than for those in the general community, then the State may additionally be in violation of the right not to be discriminated against due to the status or activity of their parents (Art. 2(2)).

OP3 allows for inquiries by the CRC into situations of grave or systematic violations of child rights.[7] In other treaty bodies which have inquiry procedures the threshold for prompting such inquiries has been high. However, there are situations in which there are grave or systematic violations of the rights of children of prisoners which could meet this threshold—for example, the dire situation of children who live with their parents in Bolivian prisons in which violence is rife.[8] The first step in increasing the usefulness of this mechanism lies in encouraging further ratifications. Once a State has ratified, the next step is in making public information available to ensure that children and their advocates, families and other child rights defenders are aware of the procedure and how to use it. Then it is a matter of remaining alert to possible cases (bearing in mind the limitations that the rights violations have to have taken place after OP3 came into force or after the State ratified it and that domestic remedies must have been exhausted).

OP3 has the potential to make the CRC more open to children, including children of prisoners. However, it will need the support of educators, activists and advocates to make it truly accessible.

7 OP3 also allows for inter-State complaints. However, similar provisions of other treaties have never been used.

8 Compilation prepared by the Office of the United Nations High Commissioner for Human Rights in accordance with paragraph 15 (b) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21: Plurinational State of Bolivia A/HRC/WG.6/20/BOL/2 of 18 August 2014, para. 36; Summary prepared by the Office of the United Nations High Commissioner for Human Rights in accordance with paragraph 15 (c) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21: Plurinational State of Bolivia A/HRC/WG.6/20/BOL/3 of 25 July 2014, paras. 8, 10, 20, 44, 45.

Children of imprisoned parents: Concluding observations of the Committee on the Rights of the Child (Sweden and Switzerland)

At its January 2015 session, the UN Committee on the Rights of the Child (CRC) included recommendations of actions to improve treatment of children of prisoners in its Concluding Observations on 6 of the 11 countries reviewed, including Sweden and Switzerland. Children of Prisoners Europe members Bryggan Riksorganisation (Sweden) and the Relais Enfants Parents Romands (Switzerland) submitted information to the CRC, which the Committee members used to inform the questions they asked of the governments in advance of and at the review. This led to specific recommendations being made.

In regard to Sweden, the CRC concluded:

> *The Committee appreciates the various measures taken by the State party to facilitate contact between children and their incarcerated parents, including visiting apartments in several prisons. The Committee is however concerned that the "principle of closeness" only constitutes one factor among others to be taken into consideration, instead of being mandatory, which can lead children to travel long journeys to visit their parents, with some families not being able to undertake these journeys because of economic constraints.*
>
> *The Committee is also concerned that having to travel a long journey does not automatically constitute a justification to extend the duration of the visit in some prisons. The Committee recommends that the State party take all necessary measures to ensure that children can maintain personal relations and direct contact with parents in prisons and reintroduce the systematic application of the principle of closeness. The Committee also encourages the State party to continue increasing child-friendly visiting possibilities in prisons.*[1]

1 Committee on the Rights of the Child, Concluding observations on the fifth periodic report of Sweden adopted by the Committee at its 68th session (12 – 30 January 2015), CRC/C/SWE/CO/4, para. 34 + 35

In relation to Switzerland, the CRC concluded:

> *While welcoming the establishment of units where an incarcerated mother and her child can be accommodated together in the canton of Zurich, the Committee is concerned about the lack of data on the number and situation of children of parents in prison and information [on] whether a continued relation[ship] of a child to his or her imprisoned parent [is] sufficiently supported.*
>
> *With reference to the Committee's recommendations during its day of general discussion in 2011 on the "Rights of Children of Incarcerated Parents", the Committee recommends that the State party collect data and undertake a study on the situation of children with parents in prison in the State party, with a view to ensuring personal relations between children and their parents, including regular visits, adequate services and appropriate support in line with article 9 of the Convention, and that the best interests of the child is a primary consideration in all decisions taken.*[1]

Anyone can submit information to the CRC. The Quaker United Nations Office (QUNO) supports and encourages those working with or on behalf of children with imprisoned parents to submit information and suggested recommendations.

1 Committee on the Rights of the Child, Concluding observations on the combined second to fourth periodic reports of Switzerland, CRC/C/CHE/CO/2-4, para. 52 + 53

Mothers in prison: the sentencing of mothers and the rights of the child

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Article 8 of the 1950 European Convention on Human Rights and Fundamental Freedoms (ECHR) states that everyone has the right to respect for private and family life. As imprisonment of a father or mother entails the forcible separation of a child from its parents and therefore impacts on the child's Article 8 rights, sentencing courts are required to obtain information on dependent children and then conduct a "balancing exercise" weighing the Article 8 rights of potentially affected children against the seriousness of the parent's offence. The author has previously conducted research to explore to what extent, if at all, the required balancing exercise is being carried out in the English sentencing courts and whether the courts are complying with the Human Rights Act in this respect.[1] The research covered seventy-five cases of the imposition of custody (suspended and immediate) on mothers who care for a dependent child.[2]

The study found no evidence that the criminal courts have considered the Article 8 rights of children potentially affected by their mother's imprisonment during the sentencing process. An analysis of the sentencing remarks of Crown Court judges, together with the reports of the Court of Appeal and the files of magistrates indicated that practice regarding the required balancing exercise is inconsistent. "A balancing exercise" is a vague phrase with no clearly defined set of procedures. Given the vagueness of the concept, the fact that sentencers have considerable discretion in terms of sentencing generally, and the absence of any guidelines, one can expect a large degree of inconsistency in judicial attitudes and practice in this area.

In a few rare cases where the imprisonment of a mother had caused great suffering to young children, a sentence of imprisonment was appealed, and reduced in length or suspended by the Court of Appeal. For the vast majority of mothers in prison, there will be no sentencing appeal. Those on short sentences will have no opportunity to appeal.

1 Epstein, R, Mothers in Prison, (2012) Criminal Law and Justice Weekly, vol 176, 10 November, pp. 670 – 671, and Epstein, R, Mothers in Prison: The Sentencing of Mothers and the Rights of the Child, (2012) Special Issue: Research Report, Coventry Law Journal.

2 This research was funded partly by Coventry University and partly by The Oakdale Trust. The author is grateful for this support which provided payment for the transcripts of sentencing remarks. She would also like to thank Women in Prison for their help in making this research possible.

The effects on the children

In this study, the mothers in prison reported "devastating" effects on their children. One mother wrote that her children were "distraught". Another reported: "The lives of my children are in disarray. My eldest of 17 years is doing A levels [...] and my youngest daughter, who is in remission from cancer, is in year 6."

A mother of a 3-year-old boy wrote:

> *It's my family who is receiving the biggest punishment as this is a massive burden. The first words that come out of my son's mouth when I see him or speak to him are "When are you coming to pick me up?" or "I want you to take me home mummy" and it is breaking my heart.*

A mother of young children wrote:

> *I was the sole carer of my children and they were already unfortunate enough to have a father in prison. I had always cared for my children and they had never even spent a night away from me. [In prison], I missed birthdays and first days at school and I felt that my sons' emotional well-being was not even taken into consideration. It was my family who received the bigger punishment, as the burden was put on them. I think it has particularly affected my oldest son, as he still constantly talks about police, prisons and mummy being taken away. He is now being seen by our local children's mental health service.*

Perhaps the most serious effects studied were on the child of a mother sentenced to only 90 days in prison: Amanda Aldous's 15-year-old autistic son. While she was in prison, Mrs. Aldous's daughter looked after the boy. She was eight months pregnant at the time and she struggled to cope. When her child was born, she was of low birthweight, and the obstetrician said that this was probably due to stress suffered during the pregnancy. While his mother was in prison, the boy did not want to go to school, and the school wrote letters complaining about his behaviour.

> *When he got home from school he would hide himself in his bedroom and refuse to come out or do anything: he would just stay at home and didn't really want to talk about the situation. He wouldn't let us know how he was feeling; every time we tried to speak to him he just changed the subject or totally avoided us.*

Since his mother returned home, she has reported that he is always frightened and nervous:

> *He will ring me from school just to check that I'm still there. He still worries that his mother will suddenly leave again, and has fears for the future, what lies ahead for him.*[3]

[S]entencing courts are required to obtain information on dependent children and then conduct a "balancing exercise" weighing the Article 8 rights of potentially affected children against the seriousness of the parent's offence.

The rights of the child restated: The case of R v Rosie Lee Petherick [2012] EWCA Crim 2214, 3 October 2012

This decision in the Court of Appeal brought the complex issues of the Article 8 rights of the child in criminal sentencing sharply into focus.

Rosie Petherick pleaded guilty to causing death by dangerous driving and driving with excess alcohol. She was sentenced to four years and nine months imprisonment. She is the sole parent of a two-year-old boy who has had little contact with his father. She appealed against her sentence. The Court of Appeal reduced the length of imprisonment to three years and ten months, and explained in detail the Court's view of the consideration that must be given by a sentencing court to the Article 8 rights of children potentially affected by parental imprisonment.

The Court of Appeal judgment expressed the Court's approach to the proper consideration of the child's Article 8 rights when a parent is to be sentenced. A criminal court ought to be informed about the domestic circumstances of the defendant and where the family life of others, especially children, will be affected, it will take that into consideration. In the case of R v Rosie Lee Petherick, the Court said:

> *[Defence counsel has drawn attention] to the fact that the Article 8 rights to family life of the defendant's infant son were clearly engaged by the sentencing process. (para. 15)*
>
> *[T]he Supreme Court has considered the correct approach to the Article 8 position of dependent children, not in sentencing directly, but in cases where the extradition of one or more parents is sought. (HH v Deputy Prosecutor of the Italian Republic, Genoa [2012] UKSC 25.) (para. 16)*
>
> First, the sentencing of a defendant inevitably engages not only their own Article 8 right to family life but also that of their family and that includes (but is not limited to) any dependent child or children. The same will apply in some cases to an adult for whom a male or female defendant is a carer and whether there is a marital or parental link or not. Almost by definition, imprisonment often severely interferes with the family life not only of the defendant but of those with whom the defendant normally lives and often with others as well. Even without the potentially upsetting effects on children or other dependents, a family is likely to be deprived of its breadwinner, the family home not infrequently has to go, schools may have to be changed. Lives may be heavily disrupted by crime.
>
> Second, the right approach in all Article 8 cases is to ask these questions: A. Is there an interference with family life? B. Is it in accordance with law and in pursuit of a legitimate aim within Article 8(2)? C. Is the interference proportionate given the balance between the various factors? This approach is as true of sentencing as of any other kind of case in which family life is in question. Of course in sentencing, the first two questions will usually be straightforward. There will almost always be some interference with family life and it will be in accordance with law and due to legitimate aims. It is the third question which may call for careful judgment.
>
> Third, long before any question of Article 8 or of the Human Rights Act 1998 was thought of, sentencing practice in England and Wales recognised that where there are dependent children that is a relevant factor to sentencing.
>
> Fourth, it follows that a criminal court ought to enquire as to how the family life of dependent children will be affected. It will ask whether the sentence contemplated is or is not a proportionate way of balancing such effect with the legitimate aims that sentencing must serve.
>
> It will be especially where the case stands on the cusp of custody that the balance is likely to be a fine one. In that kind of case, the interference with the family life of one or more entirely innocent children can sometimes tip the scales and mean that a custodial sentence otherwise proportionate may become disproportionate. [I]t is the balancing which is required by Article 8 in the form that we have endeavoured to set it out which is the effective test for sentencing.

It is a legal requirement that in every case where a mother with a dependent child is at risk of a custodial sentence, the sentencer must acquire information about the dependent children, and must then weigh the Article 8 rights of the children against the seriousness of the offence. Procedures must be developed as to how the balancing exercise should be carried out. Should it be a requirement that this be articulated in the remarks made by judges and magistrates when they pronounce sentence? If there is no clear reference to the balancing exercise how can we be confident that it has taken place?

In the most serious cases, the balance will come down on the side of custody. But in some instances, the court will suspend imprisonment or impose a community order rather than a custodial punishment. The vast majority of women are imprisoned for less serious types of offences and receive short sentences: the balancing exercise should now take centre stage.

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3 Epstein, R., Masson, I., Wise, I. (2011) Imprisonment for debt: a case study 16(2) Coventry Law Journal.

Child rights: some long-term perspectives

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A greatly expanded version of this article, entitled "Children of prisoners: Their situation and role in long-term crime prevention", will be available in Helmut Kury and Slawomir Redo (eds.) "Women and Children as Victims and Offenders: Background – Prevention – Reintegration: Suggestions for succeeding generations" (forthcoming).

Studies suggest that maintaining family ties can help reduce the likelihood of reoffending, and that while parental imprisonment can increase a child's likelihood to offend, positive responses to the situation can aid the children's well-being, attitude and attainment. As research has moved on from small-scale or anecdotal accounts to more robust studies, it has been possible to list with more confidence the ways in which children can be affected. It is also easier to highlight interventions that may not only increase their access to rights and therefore assist them in coping with parental imprisonment, but also reduce crime rates and thereby improve and protect the rights of all citizens in a society.

Research suggests that (at least in some countries) having a parent imprisoned can increase the likelihood of boys going on to exhibit antisocial behaviour later in life.[1] While no research known to the author has yet been completed identifying whether children who cope better with parental imprisonment have a reduced risk of future antisocial behaviour compared to those who do not, many of the behaviours (including anger and truanting) and factors (lack of social ties, as well as having a parent with previous convictions) reported by children of prisoners are recognised risk factors predicting antisocial behaviour and offending.[2] Therefore, helping children of prisoners now may reap benefits in terms of future crime prevention.

Research suggests that protective factors for children's ability to cope with parental imprisonment include: individual differences between children; maintaining frequent contact with the imprisoned parent[3] in child-friendly environments or in the context of interventions designed to support positive parent-child interaction[4]; and support from other family members, particularly caregivers[5], peers and school[6]. The multinational EU-funded (FP7) study "Children of prisoners: Interventions and mitigations to strengthen mental health" (Coping project 2010-2012) on the mental health of children of prisoners across four European countries echoed many of these findings. A majority of children in the Coping project reported being negatively impacted by the imprisonment of a parent (according to parent/carer reporting, 58.6 per cent of children reported bad effects, from a sample of 730), with specific reported impacts including aggressive behaviour, sleeping disorders and nightmares. When children's mental health and well-being was measured using their SDQ[7] scores, approximately one tenth of the sample (by self-reporting) or one quarter of the sample (by parental report) was at heightened risk of experiencing mental health difficulties. Other survey instruments found that children of prisoners reported lower well-being compared to pan-European norms, with psychological health being the lowest. On the other hand, self-esteem was higher than the country norm in Germany and Romania.

Alongside statistical analysis were accounts (primarily through interviews) about children's experiences. Much of this confirmed existing research, including research on peak times of stress and emotion (the arrest and period after arrest, and court appearances at which bail or sentencing were being decided), stigma and responses to it (including turning inwards and not sharing the reality of their situation outside the family), and the importance of being able to see an imprisoned parent frequently and in a non-intimidating environment. The study built on these, finding that telephone contact, where available, could be even more valued by children than in-person visits and was especially important early in the sentence before a visit had occurred. It also contributed to understanding the importance of school as an influence on children. While school performance declined for up to half the children in a country, schools tended to be the next-most important institution in the lives of the children and the first place they would confide in someone outside the family.

The ability of the non-imprisoned parent/carer to cope with the imprisonment was a key factor in children's ability to cope. The caregivers were also found to be key to the children's relationship with their imprisoned parent: in situations where the child/non-imprisoned parent relationship and the non-imprisoned parent/imprisoned parent relationship were good, the child/imprisoned parent relationship was usually good. One clear finding was the importance to children of strong, emotionally capable parents or carers, both inside and outside the prison. Given the importance of their role in helping the child, it seems that additional support to non-imprisoned parents/carers (including both practical and emotional support) would benefit the children and build their resilience. External support for children (from government or voluntary agencies) was often not available and, where it did exist, was not provided at the times children most needed it.

One response that was found to be positive across countries was to have open, honest, age-appropriate communication with the child concerning the situation and what was expected to happen. This helped the children cope. Furthermore, children who chose to tell friends about their imprisoned parent seemed to do well; open discussion helped children handle their situation; and parents who talked openly with schools received sympathetic responses. Having a trusting and caring relationship between children and school staff when discussing parental imprisonment appeared to function as a protective factor against conduct problems. Indeed, one of the key findings from the Coping research highlights the idea of "community resilience", the importance of social support systems, especially of school, teachers and peer support for children.

The general picture from the Coping research is that parental imprisonment can have adverse effects for children in a number of areas, but that these effects can be mitigated by formal or informal support and interventions. It brings validation that for many children with imprisoned parents there are measurable health impacts and reinforces the understanding that for children the best chance of being resilient to the experience of parental incarceration arises when they have: strong, emotionally capable parents; support from schools; the possibility of good contact with their imprisoned parent; inclusion in society at large; and their needs considered at all stages of the process. Secondary or collateral victims of imprisonment, children of prisoners have committed no crime and should not suffer because of the crimes of others. From the standpoint of fairness, they should be assisted when they face ill-effects caused by another's actions. From the standpoint of expediency, they should be supported in whatever way will most reduce the likelihood of future offending, by the child or their imprisoned parent. But whatever the reason, considering and assisting children of prisoners will most likely benefit the children, those around them and society at large.

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1 Murray, J. and Farrington, D. P. (2005), Parental imprisonment: effects on boys' antisocial behaviour and delinquency through the life-course. Journal of Child Psychology and Psychiatry 46(12): 1269-78.

2 See: Mortimer, R. (2010) Risk factors for offending: A developmental approach. Unpublished.; Becroft, A. J. (2006) Youth Offending: Factors that Contribute and how the System Responds. Delivered at Symposium Child and Youth Offenders: What Works.

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4 Sharratt, K. (2014) Children's Experiences of Contact with Imprisoned Parents: A Comparison between Four European Countries. European Journal of Criminology 11(6), pp. 760-775.; Schlafer, R. J. and Poehlmann, J. (2010) Attachment and caregiving relationships in families affected by parental incarceration. Attachment and Human Development 12(4), pp. 395-415.

5 Mackintosh, V. H., Myers, B. J. and Kennon, S. S. (2006) Children of Incarcerated Mothers and Their Caregivers: Factors Affecting the Quality of Their Relationship. Journal of Child and Family Studies 15(5): 581–596.; Poehlmann, J. (2005) *op. cit.*; Wildeman, C., Schnittker and Turney, K. (2012) Despair by association? The Mental Health of Mothers with Children by Recently Incarcerated Fathers. American Sociological Review 77(2), pp. 216-243.; Jones, A. D. and Wainaina-Woźna, A. E. (eds.) (2013) Children of Prisoners. Interventions and mitigations to strengthen mental health. University of Huddersfield, UK.

6 Roberts, S. (2012) The Role of Schools in Supporting Families Affected by Imprisonment. Families Outside: Scotland.

7 SDQ scores refer to Goodman's (1997) Strength and Difficulties Questionnaire, which is a behavioural screening instrument eliciting children and young peoples' perceptions of their conduct, concentration, emotions and social relationships. The SDQ incorporates five different subscales (hyperactivity; emotional symptoms; conduct problems; peer problems; and a prosocial scale) which, when summed, provide a total difficulties score (TDS). It is generally agreed that the SDQ instrument provides one means to measure a child's mental health.

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