



Quaker United Nations Office

**Briefing Paper:**

**Children of Incarcerated Parents**

**Minorities in criminal justice systems**

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**Introduction**

The risks faced by children of incarcerated parents can be compounded by criminal justice and penal systems that do not take notice of their existence or do not see their rights as relevant considerations. The disproportionate criminalization of members of minority groups means that minority children are also disproportionately affected. This briefing outlines how the impact of this can exacerbate risks and exclusion faced by children from minority groups and lays out recommendations to States to ensure that the rights of minority children whose parents are arrested, prosecuted or imprisoned are upheld.

## Children of incarcerated parents and minorities in criminal justice systems

While the need for attention to be paid to the rights of children affected by parental incarceration has been directly acknowledged by several international human rights bodies and instruments,<sup>1</sup> criminal justice systems have often failed to recognise these children as rights holders.

The UN Secretary-General's guidance note on racial discrimination and protection of minorities acknowledges that systemic discriminatory practices against minority groups are frequently reported in criminal justice processes.<sup>2</sup> Similarly, the report of the Special Rapporteur on Minority Issues on minorities in the criminal justice system notes a global pattern of violations of the rights of minority groups in criminal justice processes.<sup>3</sup>

This discriminatory treatment is evident in higher rates of criminalization of members of minority groups, including the over-representation of minority groups in pre-trial detention.<sup>4</sup> There are a variety of possible reasons for this, including: the disproportionate representation of minority groups among poorer socioeconomic groups where patterns of offending may be higher in respect of certain crimes; particular discriminatory provisions in criminal law; police profiling practices; and disproportionate targeting of minority communities leading to higher rates of arrest.<sup>5</sup>

These patterns are further highlighted by the disparities seen at the sentencing stage for members of minority groups. Members of minority groups are more likely to be given prison sentences rather than conditional releases; more likely to be sentenced to longer terms of imprisonment, or life imprisonment without parole; and are more likely to be sentenced to death.<sup>6</sup> These disparities may be due to intentional prejudice and/or indirect discrimination against minority groups in judicial proceedings.<sup>7</sup>

The combination of these issues of discrimination and the effects of parental incarceration means that the children of members of minority groups are subject to disproportionate negative impacts, beyond those otherwise experienced by the children of incarcerated parents.

**General recommendation:** The rights of children of minority groups should be upheld, and their best interests taken into account, whenever their parents are arrested, prosecuted or deprived of their liberty.

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<sup>1</sup> Including the African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990), Art. 30; 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 of 4-8 November 2013; Committee on the Rights of the Child, General Comment No. 7 (2005) Implementing child rights in early childhood, CRC/C/CG/7/Rev.1 of 20 September 2006, para. 31(b); Human Rights Council resolution 19/37 on the Rights of the Child, A/HRC/RES/19/37 of 19 April 2012, para. 69.

<sup>2</sup> Guidance note of the Secretary-General on Racial Discrimination and Protection of Minorities, of March 2013, para. 22.

<sup>3</sup> Report of the Special Rapporteur on minority issues, Rita Izsak, to the seventieth session of the General Assembly, A/70/212 of 30 July 2015, para. 7.

<sup>4</sup> Report of the Special Rapporteur on minority issues, Rita Izsak, to the seventieth session of the General Assembly, A/70/212 of 30 July 2015, para. 29.

<sup>5</sup> Report of the Special Rapporteur on minority issues, Rita Izsak, to the seventieth session of the General Assembly, A/70/212 of 30 July 2015, para. 29.

<sup>6</sup> Report of the Special Rapporteur on minority issues, Rita Izsak, to the seventieth session of the General Assembly, A/70/212 of 30 July 2015, para. 53.

<sup>7</sup> Report of the Special Rapporteur on minority issues, Rita Izsak, to the seventieth session of the General Assembly, A/70/212 of 30 July 2015, para. 53.

## Impacts of parental incarceration

Parental incarceration may impact upon each individual child in different ways. For decision-making in all cases, the best interests of the child should be taken into account as a primary consideration at all stages,<sup>8</sup> including in prosecutorial decision-making<sup>9</sup> and at sentencing.<sup>10</sup>

The incarceration of a parent, or parents, risks damaging parental and family relationships for affected children, potentially leading to emotional harm or relationship breakdown. Parents' absence can lead to the loss of family income, impacting on the standard of living of the child, and on the child's access to education and healthcare, among other services.

Both childrens' mental and physical health can be negatively affected by parental incarceration. Recorded physical health effects can include bed-wetting and sleeping problems, as well as harm due to self-medication with drugs and alcohol. Children of incarcerated parents have an increased risk of mental health problems compared to their peers, and of anti-social and delinquent behavior. Associated behaviour changes have included depression, anxiety, anger and hyperactivity.<sup>11</sup>

The incarceration of a parent or caregiver can also lead to a feeling of alienation from the state, particularly where there is real or perceived discrimination in criminal justice processes and in cases where the parent is sentenced to death or executed.<sup>12</sup>

## Data collection and studies

In addition to the data that the report of the Special Rapporteur on Minority Issues<sup>13</sup> and recommendations of the Forum on Minority Issues<sup>14</sup> state should be collected on minority groups in criminal justice systems, the proper recording of data on the children of incarcerated parents is also necessary. The importance of this data is increasingly recognised by requests made to States under review by the Committee on the Rights of the Child.<sup>15</sup>

In the absence of this data, States are limited in the ability to ensure adequate responses and measures are in place to address the situation of children of incarcerated parents and to ensure their rights are upheld and their well-being protected, or to systematically analyse the ways in which these individuals are affected by issues of discrimination against minorities in criminal justice systems.

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<sup>8</sup> United Nations Convention on the Rights of the Child, General Assembly resolution 44/25 of 20 November 1989, Art. 3(1).

<sup>9</sup> Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul to the twenty-ninth session of the Human Rights Council, A/HRC/29/26 of 1 April 2015, para 75.

<sup>10</sup> S v M [2007] ZACC 18; Human Rights Council Resolution 19/37 on the Rights of the Child, A/HRC/RES/19/37 of 19 April 2012, paras. 69(a) and (d). Human Rights Council Resolution 10/2, Human rights in the administration of justice, in particular juvenile justice, preamble. Committee on the Rights of the Child General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), CRC/C/GC/14 of 29 May 2013, paras. 28 and 69. United Nations Model Strategies and Practical Measures on the Elimination of Violence against Children in the Field of Crime Prevention and Criminal Justice, contained in E/CN.15/2014/L.12/Rev.1 of 15 May 2015, para. 34(l). See Quaker United Nations Office (2015) *Briefing Paper on International Standards and Guidance on Children of Incarcerated Parents* for further references including concluding observations of the Committee on the Rights of the Child.

<sup>11</sup> Jones, A, et al. (2013) *Children of Prisoners: Interventions and mitigations to strengthen mental health*, University of Huddersfield: Huddersfield, p47.

<sup>12</sup> Quaker United Nations Office (2013) *Lightening the Load of the Parental Death Penalty on Children*, p35-6.

<sup>13</sup> Report of the Special Rapporteur on minority issues, Rita Izsak, to the seventieth session of the General Assembly, A/70/212 of 30 July 2015, paras. 9, 75, 93.

<sup>14</sup> UN Human Rights Council, Thirty-first session, 'Recommendations of the Forum on Minority Issues at its eighth session: Minorities and the criminal justice system', A/HRC/31/72 of 4 February 2016, para. 17-27.

<sup>15</sup> Committee on the Rights of the Child, Seventy-second session, List of issues in relation to the combined third and fourth periodic reports of Suriname, CRC/C/SUR/Q/3-4, para. 3(a); Committee on the Rights of the Child, Seventy-first session, List of issues in relation to the fifth period report of France, CRC/C/FRA/Q/5 of 23 July 2015, para. 3(d); Committee on the Rights of the Child, Seventy-first session, List of issues in relation to the combined third to fifth reports of the Republic of Iran, CRC/C/IRN/Q/3-4 of 15 July 2015, para. 2(j); Committee on the Rights of the Child, Seventy-first session, List of issues in relation to the combined third to fifth reports of Senegal, CRC/C/SEN/Q/3-5 of 14 July 2015, para. 5(h).

**Recommendation:** Data should be collected by criminal justice agencies to record the number of prisoners with children and the number of children of each incarcerated parent. This should be disaggregated by minority grouping in order to allow for planning of policy and practice, including services for specific minority groups, if needed.

## 1. Minorities and the exercise of police powers

### *Minorities and policing/police operations*

Minority groups face disproportionate rates of arrest in many places. This was acknowledged in Human Rights Council resolution 31/13, which urged States to: “Taking adequate measures to address the overrepresentation of persons belonging to national or ethnic, religious and linguistic minorities in pretrial detention or prison”.<sup>16</sup>

This leads to a disproportionate number of children from minority groups being affected by parental arrest. The extent to which the best interests of the child are taken into account at the stage of arrest can have a significant impact on the child’s future relationship towards the police, courts and other criminal justice authorities.

**Recommendation:** States should ensure that members of minority groups are not disproportionately represented among those arrested or held in pre-trial detention.

Where the impacts on children are not considered, the arrest of a parent, and particularly the violent arrest and/or arrest without explanation, tends to have a seriously adverse effect on the children. A 2010 US study found that among children of arrested parents, those who had witnessed the arrest were 73% more likely to have elevated post-traumatic stress symptoms than those who had not.<sup>17</sup>

The report of the Special Rapporteur on Minority Issues recommends that police should be trained to understand the social context, cultural practices and values of minority communities.<sup>18</sup> Awareness of the rights of the child should also be included in police training.

In Poland, for example, officers responsible for making arrests are trained to take children into a different room when arresting a parent, in order to partially mitigate the traumatic aspects of this experience.<sup>19</sup>

**Recommendation:** Arrest protocols should be in place which protect the rights and dignity of the children of arrested parents, including ensuring that the parent is not humiliated in front of the child or children. Where necessary, arrangements should be made for the alternative care of affected children. Awareness of these issues should be incorporated in police training. Particular care needs to be taken where there are ongoing tensions between minority groups and police.

**Recommendation:** Children should be informed proactively, in a language they understand, and through a means appropriate to their age, about the processes surrounding the arrest of their parent.<sup>20</sup>

<sup>16</sup> UN Human Rights Council, Thirty-first session, ‘Rights of persons belonging to national or ethnic, religious and linguistic minorities’, A/HRC/31/13 of 19 April 2016, para. 6(g).

<sup>17</sup> Phillips, S. D., & Zhao J. (2010). The relationship between witnessing arrests and elevated symptoms of posttraumatic stress. *Children and Youth Services Review*, 32 (10), 1246-1254.

<sup>18</sup> Report of the Special Rapporteur on minority issues, Rita Izsak, to the seventieth session of the General Assembly, A/70/212 of 30 July 2015, para. 24.

<sup>19</sup> Quaker United Nations Office (2012) *Collateral Convicts: Children of Incarcerated Parents*, p8.

## **2. Challenges of criminal justice systems in addressing the needs and demands of minorities**

### ***Access to justice for minority victims***

As acknowledged by the the report of the Special Rapporteur on Minority Issues, minority groups are entitled to equal access to justice and reparation, and may have special needs to be taken into account in this regard. In practice, however, the rights of minority victims of crime are often not fulfilled.<sup>21</sup>

Members of minority groups may view justice systems as 'alien' and to be avoided,<sup>22</sup> particularly where discrimination and oppression exists within such systems<sup>23</sup> and where the State has failed to make efforts to guarantee effective participation.<sup>24</sup>

These issues of access to justice can be compounded and exacerbated by parental incarceration, which can engender an even greater sense of alienation from the State. Negative experiences with criminal justice processes around parental incarceration may discourage positive engagement with the justice system in future, and so constitute a barrier to accessing justice.

Such limits on access to justice may impact negatively of the safety of affected children if they become reluctant to report crimes to the police after their negative experiences, in combination with other barriers faced by minority groups, including lack of information about justice systems, fears of suspicion or persecution from authorities and fear of lack of protection from reprisals, among other issues.<sup>25</sup>

The report of the Special Rapporteur on Minority Issues also notes the importance of the provision of accessible legal support for members of minority groups, who are more likely to be reliant on legal aid due to existing marginalization, in order to ensure their access to justice.<sup>26</sup>

**Recommendation:** States should ensure that the children of incarcerated members of minority groups are not impeded in their ability to access justice because of discrimination based on their, or their parents', minority status, or due to stigmatisation around the incarceration of their parent.

**Recommendation:** States should ensure that steps are taken to allow inclusive participation of minority groups in public life and state institutions, including those related to justice systems.

### ***Minorities in detention facilities***

Members of minority groups have been found to be statistically over-represented in prison in many countries,<sup>27</sup> as well as among those held in pre-trial detention.<sup>28</sup> While incarcerated, or in pre-trial

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<sup>20</sup> Report of the Special Rapporteur on minority issues, Rita Izsak, to the seventieth session of the General Assembly, A/70/212 of 30 July 2015, para. 12.

<sup>21</sup> Report of the Special Rapporteur on minority issues, Rita Izsak, to the seventieth session of the General Assembly, A/70/212 of 30 July 2015, para. 63.

<sup>22</sup> Report of the Special Rapporteur on minority issues, Rita Izsak, to the seventieth session of the General Assembly, A/70/212 of 30 July 2015, para. 66.

<sup>23</sup> Report of the Special Rapporteur on minority issues, Rita Izsak, to the seventieth session of the General Assembly, A/70/212 of 30 July 2015, para. 32.

<sup>24</sup> Report of the Special Rapporteur on minority issues, Rita Izsak, to the seventieth session of the General Assembly, A/70/212 of 30 July 2015, para. 7.

<sup>25</sup> Report of the Special Rapporteur on minority issues, Rita Izsak, to the seventieth session of the General Assembly, A/70/212 of 30 July 2015, para. 65.

<sup>26</sup> Report of the Special Rapporteur on minority issues, Rita Izsak, to the seventieth session of the General Assembly, A/70/212 of 30 July 2015, para. 40.

<sup>27</sup> Guidance note of the Secretary-General on Racial Discrimination and Protection of Minorities (2013), para. 22.

<sup>28</sup> Report of the Special Rapporteur on minority issues, Rita Izsak, to the seventieth session of the General Assembly, A/70/212 of 30 July 2015, para. 29; Committee on the Elimination of Racial Discrimination, General recommendation XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system, (2005), A/60/18 of 3 October 2015, pp.98-108, para. 26.

detention, members of minority groups may experience further discriminatory treatment due to their minority status.

This discrimination can take direct forms, where members of minority groups are subject to poorer conditions or treatment than other groups, or indirect forms, for example where authorities fail to adequately respect the specific needs of minority groups, such as providing language interpretation, accommodating religious and cultural practices, or supporting the maintenance of relations with families.<sup>29</sup>

Children have a right to a relationship with their parents, where this is in their best interests.<sup>30</sup> When children lack regular and sustained contact with a parent, their attachment to that parent can be damaged.

For children who are separated from an incarcerated parent, this relationship has to be maintained through intermittent in-person contact and indirect contact.<sup>31</sup> The ability to maintain a good parental relationship despite parental incarceration has been found to help towards mitigating some of the negative emotional and psychological impacts for affected children.<sup>32</sup>

**Recommendation:** States should ensure that, where it is in the best interests of the child, children are able to maintain a relationship with their incarcerated parent or parents, including through ensuring rights to visiting and contact,<sup>33</sup> and are not impeded in maintaining such relationships due to discrimination.

**Recommendation:** States should put in place measures to prevent stigmatization and discrimination against children of incarcerated parents,<sup>34</sup> including the impacts of additional discrimination based on minority status.

Incarcerated members of minority groups, and their children, may receive insufficient or inappropriate support from authorities, including due to institutional discrimination and the effect of societal prejudices, where, for example, information about and applications for visiting is only available in a majority language; where dates or times of visits clash with religious ceremonies or times of worship; or where majority religious festivals but not minority festivals are respected in official arrangements.

**Recommendation:** States should ensure that information for children relating to visiting and contact with incarcerated parents is made available in languages appropriate for minority groups, and with sensitivity toward cultural practices.

For members of minority groups, the incarceration of a parent can also impact on the formation of a child's identity. Separation from a parent due to their incarceration can impact on the transmission and maintenance of minority identity, and so risks violating the obligation of States to promote and

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<sup>29</sup> Report of the Special Rapporteur on minority issues, Rita Izsak, to the seventieth session of the General Assembly, A/70/212 of 30 July 2015, para. 54.

<sup>30</sup> United Nations Convention on the Rights of the Child, General Assembly resolution 44/25 of 20 November 1989, Art. 9.

<sup>31</sup> Report of the Special Rapporteur on minority issues, Rita Izsak, to the seventieth session of the General Assembly, A/70/212 of 30 July 2015, para. 54.

<sup>32</sup> Università Cattolica del Sacro Cuore (2011), Written submission to Committee on the Rights of the Child Day of General Discussion on 'Children of Incarcerated Parents', 30 September 2011, p2.

<sup>33</sup> Committee on the Rights of the Child, Report and Recommendations of the Day of General Discussion on "Children of Incarcerated Parents" of 30 September 2011, para. 37.

<sup>34</sup> Human Rights Council resolution 19/37 on the Rights of the Child, A/HRC/RES/19/37 of 19 April 2012, para. 69(d).

protect the identity of minority groups.<sup>35</sup> The consideration of these impacts could be incorporated into assessments of the best interests of the child.

**Recommendation:** States should develop proactive measures to protect and promote the rights of children of minority groups with incarcerated parents, in order to address their specific needs, through consultation with affected minority communities.<sup>36</sup>

In some cases, it may be in the best interests of the child to reside in prison with a parent. In these instances, minority children residing in prison with a parent may be subject to discriminatory treatment due to their or their parents' minority group status, or due to stigmatisation around the incarceration of their parent.

Incarcerated members of minority groups and their children may also face restrictions in accessing specific services, such as mother and baby units and healthcare services, for example where these services are not made available in appropriate minority languages or where facilities are not made culturally appropriate.

The recommendations of the Forum on Minority Issues make reference to the rights of children residing in prison with an incarcerated parent, stating that:

Prison services must provide for the full range of needs of children in prison with their mothers, whether medical, physical or psychological. As these children are not prisoners, they should not be treated as such.<sup>37</sup>

For minority children residing in prison with a parent, the following requirements, as applied to other incarcerated members of minority groups, should be upheld, as recommended by the report of the Special Rapporteur on Minority Issues:

Conditions of detention or imprisonment, and the relevant staff, should reasonably accommodate the cultural, dietary, religious and linguistic characteristics of minority prisoners.<sup>38</sup>

**Recommendation:** States should ensure that the children of incarcerated members of minority groups residing in prison with a parent do not face discrimination and stigmatisation due to their, or their parents', minority status. This includes ensuring that these children are provided with the equivalent services made available to children not living in prison,<sup>39</sup> and that their ability to access such services is not adversely affected by discrimination.

The report of the Special Rapporteur on Minority Issues notes that the failure to accommodate minority prisoners' specific needs may cause so much additional suffering as to render the punishment discriminatory and to potentially constitute cruel, inhuman or degrading punishment, or even torture.<sup>40</sup>

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<sup>35</sup> Report of the Special Rapporteur on minority issues, Rita Izsak, to the seventieth session of the General Assembly, A/70/212 of 30 July 2015, para. 58.

<sup>36</sup> Report of the Special Rapporteur on minority issues, Rita Izsak, to the seventieth session of the General Assembly, A/70/212 of 30 July 2015, para. 56.

<sup>37</sup> UN Human Rights Council, Thirty-first session, 'Recommendations of the Forum on Minority Issues at its eighth session: Minorities and the criminal justice system', A/HRC/31/72 of 4 February 2016, para. 63.

<sup>38</sup> Report of the Special Rapporteur on minority issues, Rita Izsak, to the seventieth session of the General Assembly, A/70/212 of 30 July 2015, para. 100.

<sup>39</sup> 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. 20.

<sup>40</sup> Report of the Special Rapporteur on minority issues, Rita Izsak, to the seventieth session of the General Assembly, A/70/212 of 30 July 2015, para. 57.

This was referenced by the recommendations of the Forum on Minority Issues, which stated:

States are urged to adhere to the Nelson Mandela Rules, paying special attention to the adequate conditions of detention or imprisonment and staff awareness of the need for reasonable accommodation of cultural, dietary, religious and linguistic characteristics of minority prisoners.<sup>41</sup>

This was also acknowledged in Human Rights Council resolution 31/13, which urged States to: “[work] towards detention or imprisonment conditions that take into consideration the needs of prisoners belonging to national or ethnic, religious and linguistic minorities.”<sup>42</sup>

The additional discriminatory treatment experienced by members of minority groups in detention, especially with regard to maintenance of relations with families, can further exacerbate negative impacts on the children of incarcerated parents.

The UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules) includes specific recommendations for prison authorities with regard to their treatment of female members of minority groups in detention, requiring that they:

Recognize that women prisoners from different religious and cultural backgrounds have distinctive needs and may face multiple forms of discrimination in their access to gender- and culture-relevant programmes and services. Accordingly, prison authorities shall provide comprehensive programmes and services that address these needs, in consultation with women prisoners themselves and the relevant groups.<sup>43</sup>

The Bangkok Rules also require that “pre- and post-release services shall be reviewed to ensure that they are appropriate and accessible to indigenous women prisoners and to women prisoners from ethnic and racial groups, in consultation with the relevant groups.”<sup>44</sup>

**Recommendation:** States should ensure that the UN Rules on the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders are implemented, with particular attention to those rules relevant to incarcerated mothers and those who are members of minority groups.<sup>45</sup>

For incarcerated members of minority groups who are foreign nationals, the ability of their children to enjoy parental relationships and the right to a family environment may be best enabled through allowing prisoners to benefit from the provisions of domestic legislation and international or bilateral conventions relating to the transfer of foreign prisoners, including by offering the opportunity to serve prison terms in the prisoner’s country of origin.<sup>46</sup>

**Recommendation:** States should provide assistance to the children of parents incarcerated in another country, in order to allow the maintenance of contact and potentially visiting, and put in

<sup>41</sup> UN Human Rights Council, Thirty-first session, ‘Recommendations of the Forum on Minority Issues at its eighth session: Minorities and the criminal justice system’, A/HRC/31/72 of 4 February 2016, para. 55.

<sup>42</sup> UN Human Rights Council, Thirty-first session, ‘Rights of persons belonging to national or ethnic, religious and linguistic minorities’, A/HRC/31/13 of 19 April 2016, para. 6(h).

<sup>43</sup> United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules), Rule 54.

<sup>44</sup> United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules), Rule 55.

<sup>45</sup> United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules).

<sup>46</sup> Committee on the Elimination of Racial Discrimination, General recommendation XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system, A/60/18 of 3 October 2015, pp.98-108, para 38(d).



place measures which allow incarcerated foreign nationals who are parents to maintain contact with children residing in another country.<sup>47</sup>

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<sup>47</sup> 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. 25.

### 3. Addressing the root causes of discrimination in the administration of justice

#### *Judicial proceedings and sentencing*

Members of minority groups are more likely to be given prison sentences rather than conditional releases; more likely to be sentenced to longer terms of imprisonment, or life imprisonment without parole; and are more likely to be sentenced to death.<sup>48</sup> These disparities may be due to intentional prejudice and/or indirect discrimination against minority groups in judicial proceedings.<sup>49</sup>

The nature of judicial proceedings and decisions at the time of sentencing relating to a parent can have profound impacts on the children of members of minority groups. In many contexts, insufficient consideration is given to the impact on children.

In order to uphold the rights and dignity of affected children, the principle of the best interests of the child should be taken into account as a primary consideration in all decision-making processes,<sup>50</sup> including prosecutorial<sup>51</sup> and sentencing decision-making<sup>52</sup>.

Non-custodial alternatives to incarceration should be considered, particularly where these would better provide for a child's continued parental relationships and enjoyment of a family environment.<sup>53</sup>

In taking into account the principle of the best interests of the child, States should ensure that such decisions are not prejudiced by discriminatory perceptions of the parenting ability of particular minority groups, at any stage of judicial proceedings, including by judges, jury members, judicial personnel and prosecutors.<sup>54</sup>

The report of the Special Rapporteur on Minority Issues notes the importance of the appropriate recognition, respect and accommodation of individuals' cultural backgrounds throughout criminal proceedings.<sup>55</sup>

**Recommendation:** The best interests of the child should be taken into account as a primary consideration in all prosecutorial and sentencing decisions regarding their parents.<sup>56</sup> States should

<sup>48</sup> Report of the Special Rapporteur on minority issues, Rita Izsak, to the seventieth session of the General Assembly, A/70/212 of 30 July 2015, para. 53.

<sup>49</sup> Report of the Special Rapporteur on minority issues, Rita Izsak, to the seventieth session of the General Assembly, A/70/212 of 30 July 2015, para. 53.

<sup>50</sup> Report of the Special Rapporteur on minority issues, Rita Izsak, to the seventieth session of the General Assembly, A/70/212 of 30 July 2015, para. 37; United Nations Convention on the Rights of the Child, General Assembly resolution 44/25 of 20 November 1989, Art. 3(1).

<sup>51</sup> Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaut to the twenty-ninth session of the Human Rights Council, A/HRC/29/26 of 1 April 2015, para 75.

<sup>52</sup> S v M [2007] ZACC 18; Human Rights Council Resolution 19/37 on the Rights of the Child, A/HRC/RES/19/37 of 19 April 2012, paras. 69(a) and (d). Human Rights Council Resolution 10/2, Human rights in the administration of justice, in particular juvenile justice, preamble. Committee on the Rights of the Child General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), CRC/C/GC/14 of 29 May 2013, paras. 28 and 69. United Nations Model Strategies and Practical Measures on the Elimination of Violence against Children in the Field of Crime Prevention and Criminal Justice, contained in E/CN.15/2014/L.12/Rev.1 of 15 May 2015, para. 34(l). See Quaker United Nations Office (2015) *Briefing Paper on International Standards and Guidance on Children of Incarcerated Parents* for further references including concluding observations of the Committee on the Rights of the Child.

<sup>53</sup> Committee on the Elimination of Racial Discrimination, General recommendation XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system, A/60/18 of 3 October 2015, pp.98-108, para. 34;

<sup>54</sup> Committee on the Elimination of Racial Discrimination, General recommendation XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system, A/60/18 of 3 October 2015, pp.98-108, para. 46-52.

<sup>55</sup> Report of the Special Rapporteur on minority issues, Rita Izsak, to the seventieth session of the General Assembly, A/70/212 of 30 July 2015, para. 37.

<sup>56</sup> Human Rights Council Resolution 19/37 on the Rights of the Child, A/HRC/RES/19/37 of 19 April 2012, paras. 69(a) and (d). Human Rights Council Resolution 10/2, Human rights in the administration of justice, in particular juvenile justice, preamble. Committee on the Rights of the Child General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (Art. 3, para. 1), CRC/C/GC/14 of 29 May 2013, paras. 28 and 69. Salvador Declaration on Comprehensive Strategies for Global Challenges: Crime Prevention and Criminal Justice Systems and Their Development in a Changing World, para. 26. Council of Europe, Committee of Ministers, Recommendation Rec (2006) 2 of the Committee of Ministers to Member States on the European Prison Rules, Rule 36.1. United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules) A/Res/65/229 of 21 December 2010. Committee on the Rights of the Child, Concluding

implement measures to ensure that considerations of the best interests of the child in decision-making are made independently of societal prejudices about the parenting ability of members of minority groups. Rates of separation should not be disproportionately higher among minority groups on this basis.

As with other members of minority groups, the children of incarcerated parents may struggle to find adequate legal representation, including due to language issues, which can impede the representation of their best interests during judicial proceedings.<sup>57</sup>

**Recommendation:** States should ensure that where required, children receive legal assistance and support, including legal aid, to ensure that their best interests are considered.

Mandatory sentences prevent the consideration of any aspect of the best interests of the child at the point of sentencing. Given that certain minority groups can be disproportionately affected by mandatory sentencing, this can lead on to a disproportionate impact on minority children.<sup>58</sup>

Where the child and/or their parent belongs to a linguistic minority, or where courts use a language that the child and/or parent does not read or speak during judicial proceedings, children of accused parents can be prevented from fully understanding proceedings.<sup>59</sup> This could constitute an additional barrier to the consideration of the best interests of the child during such proceedings.

**Recommendation:** States should ensure that all information made available to children is language appropriate, including support and legal assistance during judicial proceedings.

Members of minority groups are at greater risk of statelessness due to discrimination in accessing civil registration and identity documentation.<sup>60</sup> Foreign nationals and stateless people in particular may be subject to additional punishments such as deportation, expulsion, or banning from the country.<sup>61</sup> As a result, the children of foreign nationals or stateless people in criminal justice processes may face further negative impacts due to the increased criminalization of their parents.

**Recommendation:** States should ensure that courts do not apply harsh sentences solely because of an accused person's membership of a specific minority group or nationality status.<sup>62</sup>

The imposition of the death penalty has multiple negative impacts on the children of those sentenced to death or executed, which are often not taken into account at sentencing. Among other negative

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observations: Thailand, CRC/C/THA/CO/2 of 17 March 2006, para. 48; Committee on the Rights of the Child, Concluding Observations: The Plurinational State of Bolivia, CRC/C/BOL/CO/4 of 16 October 2009, para. 66; Committee on the Rights of the Child, Concluding observations: Philippines, CRC/C/15/Add.259 of 21 September 2005, para. 54; Committee on the Rights of the Child, Concluding observations: Sudan, CRC/C/SDN/CO/3-4 of 22 October 2010, para. 63(c). United Nations Model Strategies and Practical Measures on the Elimination of Violence against Children in the Field of Crime Prevention and Criminal Justice, contained in E/CN.15/2014/L.12/Rev.1 of 15 May 2015, para. 34(l). Human Rights Committee, Concluding observations on the third periodic report of the Plurinational State of Bolivia, CCPR/C/BOL/CO/3 of 6 December 2013, para. 20; Declaration on women's health in prison: correcting gender inequity in prison health (Kyiv Declaration) World Health Organization Regional Office for Europe & United Nations Office on Drugs and Crime, 2009, para. 4.2

<sup>57</sup> Report of the Special Rapporteur on minority issues, Rita Izsak, to the seventieth session of the General Assembly, A/70/212 of 30 July 2015, para. 40.

<sup>58</sup> Committee on the Elimination of Racial Discrimination, General recommendation XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system, A/60/18 of 3 October 2015, pp.98-108, para. 35.

<sup>59</sup> Report of the Special Rapporteur on minority issues, Rita Izsak, to the seventieth session of the General Assembly, A/70/212 of 30 July 2015, para. 31.

<sup>60</sup> Guidance note of the Secretary-General on Racial Discrimination and Protection of Minorities (2013), para. 22.

<sup>61</sup> Committee on the Elimination of Racial Discrimination, General recommendation XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system, A/60/18 of 3 October 2015, pp.98-108, para. 4(b).

<sup>62</sup> Committee on the Elimination of Racial Discrimination, General recommendation XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system, A/60/18 of 3 October 2015, pp.98-108, para. 34.

impacts, the execution of a parent severs the parental relationship, and has been found to induce specific traumas for affected children.<sup>63</sup>

The report of the Special Rapporteur on Minority Issues acknowledges research findings that those sentenced to death come disproportionately from minority backgrounds.<sup>64</sup> These disparities in the imposition of the death penalty can lead to a disproportionate number of children of minority parents being affected.

**Recommendations:** In criminal justice systems where the death penalty is retained, States should ensure that this sentence is not mandatory for any crime. The mandatory imposition of the death penalty is prohibited under international human rights law,<sup>65</sup> and furthermore prevents any consideration of the best interests of the child at sentencing.<sup>66</sup>

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<sup>63</sup> Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, para. 309.81, referred to in Beck, E., Britto, S., and Andrews, A. (2007) *In the Shadow of Death: Restorative Justice and Death Row Families*, Oxford University Press: Oxford, p125; Long, W., (2011) 'Trauma therapy for death row families' in *Journal of Trauma and Dissociation*, 12, pp. 482-494.

<sup>64</sup> Report of the Special Rapporteur on minority issues, Rita Izsak, to the seventieth session of the General Assembly, A/70/212 of 30 July 2015, para. 53.

<sup>65</sup> Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, to the fifth session of the Human Rights Council, A/HRC/4/20 of 29 January 2007, para. 54.

<sup>66</sup> 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. 23.



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