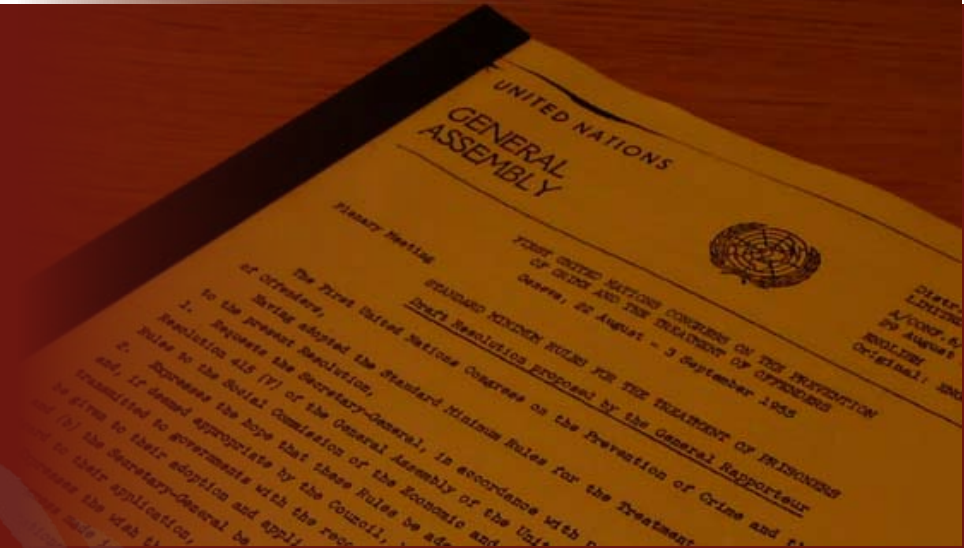


June 2008



Quaker United Nations Office

*Human Rights
& Refugees
Publications*



Women in prison

A commentary on the UN Standard Minimum Rules for the Treatment of Prisoners

*by Megan Bastick
and Laurel Townhead*

Foreword by Rachel Brett

English Français Español

June 2008

Quaker United Nations Office



Human Rights & Refugees Publications

**Women in Prison:
A Commentary on the
UN Standard Minimum
Rules for the Treatment
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By Megan Bastick
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The Quaker United Nations Office

The Quaker United Nations Offices located in Geneva and New York represent Friends World Committee for Consultation (Quakers), an international non-governmental organisation with General Consultative Status at the United Nations.

The Quaker United Nations Offices work to promote the peace and justice concerns of Friends (Quakers) from around the world at the United Nations and other global institutions. They are supported by the American Friends Service Committee, Britain Yearly Meeting, the worldwide community of Friends, and other groups and individuals.

The Quaker United Nations Office, Geneva, has been undertaking research on Women in Prison and the Children of Imprisoned Mothers as part of a joint project with the Quaker Council for European Affairs (Brussels), Quaker Peace and Social Witness (United Kingdom) and the Friends World Committee for Consultation representation to the United Nations Commission on Crime Prevention and Criminal Justice and the United Nations Crime Congresses.

The Quaker UN Office's work on the Women in Prison Project is funded by Irish Aid.

Women in Prison and Children of Imprisoned Mothers – Project Background

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Other publications in this series

Oliver Robertson (2008) *Children Imprisoned by Circumstance*

Oliver Robertson (2007) *The Impact of Parental Imprisonment on Children*

Laurel Townhead (2007) *Pre-trial Detention of Women and its impact on their children*

Laurel Townhead (2006) *Women in Prison and Children of Imprisoned Mothers: Recent Developments in the United Nations Human Rights Systems*

Marlene Alejos (2005) *Babies and Small Children Residing in Prisons*

Rachel Taylor (2004) *Women in Prison and Children of Imprisoned Mothers: Preliminary Research Paper*


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Foreword

In 2003, the Quaker United Nations Office (QUNO), Geneva, began research on women in prison. The aims were to better understand why increasing numbers of women are being imprisoned, identify the conditions in which women prisoners are kept around the world, and draw attention to the particular impact that imprisonment has on women as opposed to men, with a view to encouraging greater understanding and the development of appropriate responses.

In July 2004, QUNO published a preliminary paper, *Women in Prison and Children of Imprisoned Mothers*. This identifies many difficulties particular to women who are imprisoned, and illustrates that they are not limited to certain regions, or to “Developed” or “Developing” countries. All over the world, women in prison suffer from intersecting discriminations, and are largely ignored in prison systems designed for men. Important elements of the increasing UN attention to women prisoners were drawn together in QUNO’s publication *Women in Prison & Children of Imprisoned Mothers: Recent Developments in the United Nations Human Rights System* (April 2006). In February 2007, QUNO addressed the issue of *Pre-Trial Detention of Women & its impact on their children*.

One of the significant differences between male and female prisoners is the issue of children. Many female prisoners are the sole or main carer of children. In March 2005, QUNO published a study by Marlene Alejos, *Babies and Small Children Residing in Prisons*. This examines the international human rights framework applicable to young children living in prison with their mothers, identifies some good practices, and proposes draft ‘*Suggested guidelines for drafting legislation, regulations, policies and programmes regarding babies and small children residing in prisons*’. In April 2007, QUNO produced a paper exploring *The Impact of Parental Imprisonment on Children* more generally, identifying the issues which arise at different stages in the criminal justice process; and in April 2008 presented a more specific exploration relating to children being permitted to live in prisons, and recommendations to ensure that the needs and best interests of the children are considered, in *Children Imprisoned by Circumstance*.

These publications and others are available on our website (www.quno.org); most in French and Spanish as well as English.

Throughout 2004 and 2005, in collaboration with the Quaker Council for European Affairs, the Quaker United Nations Office, Geneva, distributed questionnaires concerning women’s imprisonment to governments, prison workers, non-governmental organisations, prisoners and former prisoners all around the world. The responses we received inform this commentary, and are extracted to illustrate both common problems and good practices. A draft version of this commentary was produced in July 2005; comments and responses to it were encouraged and have been taken into account when updating and finalising it.

This commentary:

- identifies a number of the key problems for women prisoners, based on QUNO’s primary research - including what women prisoners have told us - and on secondary sources;
- highlights how the United Nations Standard Minimum Rules for the Treatment of Prisoners, the key reference in management of prison systems, apply to these problems;
- identifies other human rights instruments and standards applicable to women’s imprisonment; and
- examines what measures these human rights standards require.

QUNO hopes through this work to promote more vigorous attention to the needs of imprisoned women, and better implementation of their human rights, as articulated in a wealth of international Conventions, Declarations and other standards. The UN Office on Drugs and Crime's *Handbook on Women in Prison* provides an excellent tool for governments and prison authorities seeking to achieve the application of these standards and complements this commentary.

QUNO owes a huge debt to Megan Bastick and Laurel Townhead, two of our former Programme Assistants, for preparing this commentary, as well as their work on other publications for this Project, and also to our other Programme Assistants, Oliver Robertson and Rachel Taylor for their work and publications. Without these talented and committed people, QUNO would not have been able to make the contribution it has in this field.

Rachel Brett

Representative, Human Rights & Refugees Programme
Quaker United Nations Office, Geneva

I. Introduction: Why there is an urgent need to give attention to women in prison

Women prisoners are in systems designed for men

In most countries, women constitute a minority of the prison population: usually between 2% and 8%.¹ Prison systems and prison regimes are almost invariably designed for the majority male prison population – from the architecture of prisons, to security procedures, to facilities for healthcare, family contact, work and training. Women's prisons are an adaptation of prisons for men. As a consequence, prisons tend not to meet the needs of women prisoners, and women in prison are affected by imprisonment in a particularly harsh way. All too often, the human rights and basic dignity of women in prison are systematically violated.

More and more women are being sent to prison

In many countries, in all regions, the female prison population has increased dramatically over the last ten years. Furthermore, the rate of increase in the number of women prisoners is much greater than that for men.² Already, in eleven countries women comprise more than one in ten prisoners.³

The increase in the number of women in prison is, in some countries, primarily due to the increased use of imprisonment to punish offences that were previously punished by non-custodial sentences. This is particularly the case in relation to drug offences and non-violent theft.

In Barbados, Mexico, Bolivia, Colombia, Kenya, Australia, England and Wales, New Zealand, the USA and Kyrgyzstan, between 1994 and 2004 the female prison population increased at a far faster rate than the male prison population. For example: in Mexico, a 235% increase in female, compared to 134% increase in male prison population; in Kenya, a 100% increase in female, compared to 24% increase in male prison population. In Australia, between 1984 and 2003, there was a 75% increase in the imprisonment rate for men, whereas the equivalent rate for women soared by 209%.

Women's offending and imprisonment is closely related to women's poverty. Women are particularly vulnerable to being detained because of their inability to pay fines for petty offences and/or to pay bail. Women on remand constitute a large percentage of the women's prison population in many countries. Women offenders typically come from economically and socially disadvantaged segments of society. Typically, they are young, unemployed, have low levels of education and have dependent children.⁴ Many have histories of alcohol and substance abuse. A high proportion of women offenders have experienced violence or sexual abuse. At the same time, there tends to be greater stigma attached to women's imprisonment than men's, and women who have been in prison may be ostracized by their families and communities.

1 Coyle, A. (2002) *A Human Rights Approach to Prison Management: Handbook for prison staff* (International Centre for Prison Studies) p. 131.
 2 Box: based on information provided to the Quaker UN Office by the respective Governments, and published by the Australian Institute of Criminology, <http://www.aic.gov.au/topics/women/stats/corrections.html> (accessed 7 July 2005).
 3 In Bahrain (18.5%), Ecuador (10.7%), Kuwait (14.9%), Laos (10.5%), Maldives (21.6%), Monaco (29.7%), Myanmar (17.8%), Singapore (10%), Thailand (15.1%), United Arab Emirates (11.4%) and Vietnam (12.3). <http://www.kcl.ac.uk/depsta/law/research/icps/worldbrief/> (accessed 17 May 2008)
 4 *Women in the criminal justice system (A/Conf.187/12)* – Background paper for the workshop on women in the criminal justice system, Tenth UN Congress on the Prevention of Crime and the Treatment of Offenders, 2000, para. 8.

Women prisoners have different needs

The needs and concerns of women prisoners are different from those of men prisoners. Women prisoners are very often the sole or primary carer of young children, and have other family responsibilities. They may be particularly vulnerable to abuse in prison. Women prisoners have different health needs, including those related to sexual and reproductive health. In some countries, women may be pregnant in prison and may give birth in prison. Women prisoners suffer from very high rates of mental illness.

Whilst problems such as overcrowding, poor hygiene, and inadequate visiting facilities affect both men and women prisoners, there are many concerns that are specific to women, or which affect women prisoners in a different or particularly harsh way. Particular groups of women, such as female juvenile prisoners, women with disabilities, women who are foreign nationals, and indigenous and other minority women, have further needs specific to them as women. These are discussed throughout this commentary.

There is increasing recognition that the needs of women prisoners are not being met

The United Nations (UN) *Standard Minimum Rules for the Treatment of Prisoners* were adopted by the First UN Congress on the Prevention of Crime and the Treatment of Offenders in 1955, and approved by the UN Economic and Social Council in 1957.⁵ They remain the key point of reference in designing and evaluating prison conditions.

Since 1955, the needs and nature of prison populations have altered, and further international guidelines concerning imprisonment have been developed. Two of the most important of these are the 1988 *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* and the 1990 *Basic Principles for the Treatment of Prisoners*,⁶ both adopted by the UN General Assembly. These instruments, with the *Standard Minimum Rules*, affirm that all prisoners must be treated with respect for their human dignity with regard to the conditions of their detention. They reinforce the notion that the purpose of imprisonment is rehabilitation of the prisoner. They set down minimum standards for matters such as prisoner classification and discipline, contact with the outside world, healthcare, complaints, work and recreation, and religion and culture.

Further provisions have been agreed to address detention of children, namely the 1985 *Standard Minimum Rules for the Administration of Juvenile Justice* and the 1990 *Rules for the Protection of Juveniles Deprived of their Liberty*.⁷

However, these rules and principles contain only a handful of provisions specifically directed to women and girl prisoners. There is growing concern regarding the rights and treatment of women prisoners, at national, regional and international levels. A range of international fora have emphasised the need to review prison systems and the norms and standards regarding imprisonment with women's needs in mind.

The Sixth UN Congress on the Prevention of Crime and the Treatment of Offenders (1980) adopted a resolution on the *Specific needs of women prisoners* highlighting, amongst other things, that:

- because of the small number of women offenders, they often do not receive the same attention and consideration as do male offenders;

5 Resolution 663 C (XXIV) of 31 July 1957, and amended by Resolution 2076 (LXII) of 13 May 1977.

6 Adopted by General Assembly resolution 43/173 of 9 December 1988, and General Assembly resolution 45/111 of 14 December 1990, respectively.

7 The 'Beijing Rules', adopted by General Assembly resolution 40/33 of 29 November 1985, and the 'Havana Rules', adopted by General Assembly resolution 45/113 of 14 December 1990, respectively.

- this inattention often results in limited access for women to the necessary programmes and services, including placement in detention facilities far from their families and home communities; and
- that women most of the time have major responsibilities for children.

The Congress recommended that States give recognition to the specific problems of women offenders and the need to provide the means for their solution.⁸

Twenty years later, in the 2000 Vienna Declaration on Crime and Justice: Meeting the Challenges of the Twenty-first Century, States committed themselves to:

- take into account and address, within national crime prevention and criminal justice strategies as well as within the UN Crime Prevention and Criminal Justice Programme, any disparate impact of programmes and policies on women and men; and
- develop action-oriented policy recommendations based on the special needs of women as prisoners and offenders.⁹

The UN General Assembly's *Plans of action* for the implementation of this Vienna Declaration, in 2002, recommended that States "... endeavour, as appropriate, to support the following actions:

- (a) Reviewing, evaluating and, if necessary, modifying their legislation, policies, procedures and practices relating to criminal matters, in a manner consistent with their legal systems, in order to ensure that women are treated fairly by the criminal justice system;
- (b) Developing national and international crime prevention and criminal justice strategies that take into account the special needs of women as ... prisoners and offenders...¹⁰

The concern about women prisoners has broadened to include the children of imprisoned women. The General Assembly's 2003 resolution on *Human rights in the administration of justice* invited:

... Governments, relevant international and regional bodies, national human rights institutions and non-governmental organizations to devote increased attention to the issue of women in prison, including the children of women in prison, with a view to identifying the key problems and ways in which they can be addressed...¹¹

More recently, the Human Rights Council adopted, without a vote, a resolution on the *Rights of the Child* which recognised the impact upon and particular needs of children affected by parental imprisonment.¹²

Previously, the 2004 Commission on Human Rights¹³ resolution on *Human rights in the administration of justice, in particular juvenile justice* highlighted "... the need for special vigilance with regard to the specific situation of children, juveniles and women in the administration of justice, in particular while deprived of their liberty, and their vulnerability to various forms of violence, abuse, injustice and humiliation..."¹⁴ Similarly, in 2005 the Commission highlighted "particular targeting and vulnerability to violence of girls and some groups of women, such as ... women in institutions of detention..."¹⁵

8 Report of the Sixth UN Congress on the Prevention of Crime and the Treatment of Offenders, 1980, A/CONF.87/14/Rev.1, Resolution 9, *Specific needs of women prisoners*, p. 12-13.

9 Adopted by the Tenth UN Congress on the Prevention of Crime and the Treatment of Offenders, 2000; and endorsed by General Assembly resolution 55/59 of 4 December 2000.

10 General Assembly resolution 56/261 of 31st January 2002, Annex, p

11 A/RES/58/183, adopted 22 December 2003, para. 15.

12 Rights of the Child, A/HRC/7/29, para. 31

13 The Commission on Human Rights was replaced by the Human Rights Council in June 2006.

14 E/CN.4/2004/L.66.

15 Elimination of violence against women, DOCUMENT E/CN.4/2005/L.11/Add.6

The UN Office on Drugs and Crime (UNODC) has developed a Handbook on Women in Prison due for release in mid-2008. The Handbook sets out the special needs of female prisoners, the management of women's prisons and suggested measures to reduce the female prison population.¹⁶

The specific problems faced by women are also recognised in the UNODC's criminal justice system assessment toolkit. This guidance for those monitoring criminal justice systems includes recommended questions such as "What is the percentage of sentenced women and women with accompanying children?"¹⁷ and "Do [women prisoners] have the same access as male detainees to all available activities?"¹⁸ The UNODC draws attention to the importance of maintaining family contact. Moreover, they state that: "Pregnant women and nursing mothers have particular problems relating to their condition and should not be imprisoned unless exceptional circumstances exist."¹⁹

International human rights standards apply to the imprisonment of women

Whilst the *UN Standard Minimum Rules for the Treatment of Prisoners* are still relevant and important, they are only *one part* of the framework of international human rights standards that must be applied to imprisoned women. Understanding of issues such as gender, violence against women and child rights has progressed a great deal since the *UN Standard Minimum Rules* were agreed in 1955.

A person does not lose their human rights when they are imprisoned. As stated in the 1948 *Universal Declaration of Human Rights*, the State may only limit the exercise of a person's rights and freedoms - including the rights and freedoms of a person who is a prisoner - "for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society".²⁰

The application of this principle in relation to imprisonment is set out in the *Basic Principles for the Treatment of Prisoners*: "Except for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the *Universal Declaration of Human Rights*" and any other UN human rights treaties to which their State is a party.²¹

The UN Human Rights Committee has elaborated on the meaning of this in relation to the *International Covenant on Civil and Political Rights*. Persons who are in prison must not "... be subjected to any hardship or constraint other than that resulting from the deprivation of liberty ... Persons deprived of their liberty enjoy all the rights set forth in the Covenant, subject to the restrictions that are unavoidable in a closed environment."²²

In reviewing the treatment of women in prison, it must always be asked whether the restrictions upon their rights are "demonstrably necessitated by the fact of their incarceration" and "unavoidable in a closed environment".

16 UN Office on Drugs and Crime (2008) *Handbook on Women in Prison*

17 UN Office on Drugs and Crime and the Organisation for Security and Cooperation in Europe (2006) *Criminal Justice Assessment Toolkit, Non Custodial and Custodial Measures: I The Prison System*, p.6

18 *Ibid*, p.28

19 *Ibid*, p.27

20 Article 29(2).

21 Principle 5, adopted by General Assembly resolution 45/111 of 14 December 1990.

22 Human Rights Committee, Forty-fourth session, 1992: General Comment 21 on the rights of persons deprived of their liberty, para 3, U.N. Doc. HRI/GEN/1/Rev.7 at 153 (2004).

The treatment of women in prison must be guided by not only the *UN Standard Minimum Rules for the Treatment of Prisoners* and other prison-specific guidelines, but by all applicable human rights (and, where relevant, International Humanitarian Law) instruments.²³ These include the:

- *Universal Declaration of Human Rights*;
- *International Covenant on Civil and Political Rights*;
- *International Covenant on Economic, Social and Cultural Rights*;
- *Convention on the Rights of the Child*;
- *Convention on the Elimination of All Forms of Discrimination against Women*;
- *Convention on the Elimination of Racial Discrimination*; and
- *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and its Optional Protocol*.²⁴

In addition to the international standards that have global applicability a State may also be bound by relevant **regional standards**. These standards must be applied to women detained in the countries to which they apply. These standards include the *European Prison Rules*, the *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas* and the work of the Special Rapporteur on Prisoners and Conditions of Detention of the African Commission on Human and Peoples' Rights and of the Inter-American Commission on Human Rights' Rapporteur on the Rights of Persons Deprived of their Liberty.²⁵

This commentary examines what measures States should take to implement these human rights standards for women in prison.

²³ The universal human rights instruments extracted in this commentary can be accessed through the webpage of the Office of the High Commissioner for Human Rights, at <http://www.ohchr.org/english/law/index.htm>.

²⁴ Reference to the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* has not been included, although it might have relevance in particular to the situation of women prisoners who are foreign nationals, since at the time of writing only 37 States have ratified it.

²⁵ The Organisation of American States is mandated under Resolution AG/RES 2283 (XXXVII-0/07) to draft an *Inter-American Declaration on the rights, duties, and care of persons under any form of detention or imprisonment* is underway, the *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas* are, according to the preamble, intended to input into this process.

2. Basic principles: Human dignity

All aspects of the treatment of women prisoners must accord with article 10 of the *International Covenant on Civil and Political Rights*: “All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”

This is mirrored in Article 1 of the *Basic Principles for the Treatment of Prisoners*: “All prisoners shall be treated with the respect due to their inherent dignity and value as human beings.” The *UN Standard Minimum Rules for the Treatment of Prisoners* specify that: “The regime of the institution should seek to minimize any differences between prison life and life at liberty which tend to lessen the responsibility of the prisoners or the respect due to their dignity as human beings.”²⁶

The Human Rights Committee has issued a General Comment on *Humane treatment of persons deprived of liberty* in which it spells out the obligation to ensure humane treatment of prisoners and respect for their inherent dignity, clarifying that States have:

... a positive obligation towards persons who are particularly vulnerable because of their status as persons deprived of liberty... Treating all persons deprived of their liberty with humanity and with respect for their dignity is a fundamental and universally applicable rule. Consequently, the application of this rule, as a minimum, cannot be dependent on the material resources available in the State party.²⁷

Humane treatment must be interpreted in the context of the obligation to prevent violence against women. The *UN Declaration on the Elimination of Violence Against Women* makes clear that violence against women includes physical, sexual and psychological violence that is perpetrated or condoned by the State.²⁸

Closely related to human dignity is the **freedom to practice one’s religion and observe one’s cultural practices**. Women (and men) in prison should be able to practice their religion freely, have access to a place of worship and religious texts, and to observe specific cultural practices. Such religious and cultural practices may include: wearing a head covering, washing or cleansing rituals, avoidance of certain foods and observance of fasts. Where clothing is issued to prisoners, it must comply with religious and cultural dictates, such as wearing veils or floor-length dresses.²⁹

Principle I of the *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, entitled “Humane Treatment”, notes the “special position of the States as guarantors regarding persons deprived of liberty, their life and personal integrity shall be respected and ensured, and they shall be afforded minimum conditions compatible with their dignity.”³⁰

26 Rule 60(1).

27 Para 3-4, U.N. Doc. HRI/GEN/1/Rev.7 at 153 (2004).

28 General Assembly resolution 48/104 of 20 December 1993.

29 ICRC (2004) *Addressing the Needs of Women Affected by Armed Conflict*, p. 151-152.

30 Inter-American Commission on Human Rights, Resolution 1/08: Principles and Best Practices on the Protections of Persons Deprived of Liberty in the Americas, adopted on 31 March 2008

3. Basic principles: Non-discrimination between male and female prisoners

UN Standard Minimum Rules for the Treatment of Prisoners

Basic principle

6. (1) The following rules shall be applied impartially. There shall be no discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
- (2) On the other hand, it is necessary to respect the religious beliefs and moral precepts of the group to which a prisoner belongs.

Despite this basic principle of the *UN Standard Minimum Rules*, discrimination against women in prison is systemic.

In many countries, women in prison and other places of detention are victims of gender-based violence, which is a form of discrimination. This is discussed in Part 8.

In most countries, even where prison conditions are not physically violent, women prisoners are discriminated against as compared to male prisoners in almost every aspect of prison life - including decisions made as to pre-trial detention,³¹ opportunities for education and employment, healthcare, and in the exercise of marital and parental rights. In many cases this discrimination is not intended by the prison authorities, but is the effect of the prison system being designed for men.

Louise Arbour (currently UN High Commissioner for Human Rights), on conducting an inquiry into Kingston Prison for Women in Canada, summarised many of the key problems in women's imprisonment:

Women ... [serve] their sentences in harsher conditions than men because of their small numbers. They have suffered greater family dislocation than men, because there are so few options for the imprisonment of women. They have been over-classified or, in any event, they have been detained in a facility that does not correspond to their classification. For the same reasons, they have been offered fewer programs than men, particularly in the case of women detained under protective custody arrangements... They have had no significant vocational training opportunities... few opportunities for transfer, and very little access to a true minimum security institution.³²

The equality of rights between men and women is a fundamental norm reaffirmed in all major human rights instruments. Women and girl children who are imprisoned are entitled to equal enjoyment and protection of all their human rights, without any discrimination.

31 Issues relating to women's pre-trial detention are explored further in Townhead, L (2007) *Pre-Trial Detention of Women and Its Impact on Their Children* (Quaker United Nations Office).

32 Arbour, L. (1996) *Commission of Inquiry into certain events at the Prison for Women in Kingston* (Public Works and Government Services Canada) p. 180.

International human rights standards

Universal Declaration of Human Rights, Article 2

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

International Covenant on Civil and Political Rights, Article 3

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

International Covenant on Economic, Social and Cultural Rights, Article 3

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.

Convention on the Elimination of All Forms of Discrimination against Women:

Article 1:

... the term “discrimination against women” shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Article 2:

States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake: ...

- (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;
- (e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;
- (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;
- (g) To repeal all national penal provisions which constitute discrimination against women.

*Human Rights Committee, General Comment 21 concerning humane treatment of persons deprived of liberty*³³

Treating all persons deprived of their liberty with humanity and with respect for their dignity is a fundamental and universally applicable rule. ... This rule must be applied without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

33 Para 4, U.N. Doc. HRI/GEN/I/Rev.7 at 153 (2004).

Basic Principles for the Treatment of Prisoners, Principle 2

There shall be no discrimination on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 5(2):

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

Regional Standards on Detention

*European Prison Rules,***Rule 13**

These rules shall be applied impartially, without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Rule 34.1

In addition to the specific provisions in these rules dealing with women prisoners, the authorities shall pay particular attention to the requirements of women such as their physical, vocational, social and psychological needs when making decisions that affect any aspect of their detention.

*Inter-American Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas***Preamble**

OBSERVING WITH CONCERN the critical situation of violence, overcrowding, and inhumane living conditions in several places of deprivation of liberty in the Americas; as well as the particular situation of vulnerability of persons with mental disabilities deprived of liberty in psychiatric hospitals and prisons; and the serious risks to children, women, and seniors confined to other public and private institutions, migrants, refugee or asylum seekers, stateless and undocumented persons, and persons deprived of liberty in the context of armed conflicts;

Principle II

Under no circumstances shall persons deprived of liberty be discriminated against for reasons of race ethnic origin, nationality, color, sex, age, language, religion, political or other opinion, national or social origin, economic status, birth, physical, mental or sensory disability, gender, sexual orientation, or any other social condition.

Measures designed exclusively to protect the rights of women, particularly the rights of pregnant women and nursing mothers; of children; of the elderly; of those who are sick or suffering from infections such as HIV-AIDS; of persons with a physical, mental, or sensory disability; as well as of indigenous peoples, afro-descendants, and minorities shall not be considered discriminatory. These measures shall be applied in accordance with the law and international human rights law, and shall always be subject to review by a judge or other competent, independent, and impartial authority.

Application

The right to non-discrimination and equality must be the touchstone for evaluating and reforming prison conditions and systems for women. Discrimination follows from male-orientated programming: a failure to properly assess, understand and address the particular needs of women prisoners. Non-discrimination and equality require an understanding of the different ways in which prison affects men and women, and a different approach to male and female prisoners. The UK's 2006 Equality Act, which came into force in April 2007, introduces a Duty of Gender Equality. This duty requires any person or organisation carrying out public functions, such as penal and criminal justice functions, to positively promote gender equality. Therefore, the onus is now on prisons to ensure that their services do not discriminate against women rather than on women to show that they do.³⁴

Formal equality between male and female prisoners alone is not enough to meet the rights of women. Principle 5(2) of the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* makes clear that special measures to address the particular needs of women prisoners are not in themselves discriminatory. A similar provision is contained in Principle II of the *Inter-American Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*. Moreover, Rule 34.1 of the *European Prison Rules* requires prison authorities to ensure that the prison regime for women is designed with them in mind and is not merely an adaptation of the men's prison regime.

The Human Rights Committee's General Comment 28 on *The equality of rights between men and women* emphasises that States must ensure "that the rights of persons deprived of their liberty are protected on equal terms for men and women".³⁵ The Human Rights Committee has given some guidance as to what is required for a State to meet its obligation under the *International Covenant on Civil and Political Rights* not to discriminate against women in prison:

... States parties should report on whether men and women are separated in prisons and whether women are guarded only by female guards. States parties should also report about compliance with the rule that accused juvenile females shall be separated from adults and on any difference in treatment between male and female persons deprived of liberty, such as, for example, access to rehabilitation and education programmes and to conjugal and family visits. Pregnant women who are deprived of their liberty should receive humane treatment and respect for their inherent dignity at all times surrounding the birth and while caring for their newly-born children; States parties should report on facilities to ensure this and on medical and health care for such mothers and their babies.³⁶

Key areas of discrimination against women in prison and relevant international provisions addressing them are discussed in more detail throughout this commentary.

34 Equal Opportunity Commission (2007) *Gender Equality Duty: Code of Practice* (Equal Opportunities Commission). The Fawcett Society website contains a number of documents explaining the Gender Equality Duty and the impact it will have: www.fawcettsociety.org.uk (accessed 30 May 2007).

35 Para. 15, U.N. Doc. HRI/GEN/1/Rev.7 at 180 (2004).

36 Para. 15, U.N. Doc. HRI/GEN/1/Rev.7 at 180 (2004).

4. Security classification

UN Standard Minimum Rules for the Treatment of Prisoners

Separation of categories

8. The different categories of prisoners shall be kept in separate institutions or parts of institutions taking account of their sex, age, criminal record, the legal reason for their detention and the necessities of their treatment. Thus, ...

(b) Untried prisoners shall be kept separate from convicted prisoners;

(c) Persons imprisoned for debt and other civil prisoners shall be kept separate from persons imprisoned by reason of a criminal offence;

Discipline and punishment

27. Discipline and order shall be maintained with firmness, but with no more restriction than is necessary for safe custody and well-ordered community life.

A. PRISONERS UNDER SENTENCE

Guiding principles ...

57. Imprisonment and other measures which result in cutting off an offender from the outside world are afflictive by the very fact of taking from the person the right of self-determination by depriving him of his liberty. Therefore the prison system shall not, except as incidental to justifiable segregation or the maintenance of discipline, aggravate the suffering inherent in such a situation.

...

63. (1) The fulfilment of these principles requires individualization of treatment and for this purpose a flexible system of classifying prisoners in groups; it is therefore desirable that such groups should be distributed in separate institutions suitable for the treatment of each group.

(2) These institutions need not provide the same degree of security for every group. It is desirable to provide varying degrees of security according to the needs of different groups. Open institutions, by the very fact that they provide no physical security against escape but rely on the self-discipline of the inmates, provide the conditions most favourable to rehabilitation for carefully selected prisoners.

...

Classification and individualization

67. The purposes of classification shall be:

(a) To separate from others those prisoners who, by reason of their criminal records or bad characters, are likely to exercise a bad influence;

(b) To divide the prisoners into classes in order to facilitate their treatment with a view to their social rehabilitation.

68. So far as possible separate institutions or separate sections of an institution shall be used for the treatment of the different classes of prisoners.

A prisoner's security classification determines the parameters of their liberty. Prisons are operated pursuant to rules that determine the degree of supervision and control imposed on prisoners, according to their security classification. Security classifications direct decisions such as the granting of leave from the prison, access to visitors and access to work programmes.

*"You are in constant fear
of breaking rules."
Former prisoner*

There are three key ways in which women prisoners tend to be discriminated against in relation to security classification:

Not being classified

The comparatively small number of prisons for women, coupled with the rapidly growing female prison population, means that there is often limited accommodation for women prisoners compared to male prisoners. Importantly, the type of available accommodation for women prisoners tends to be limited. For example, in a region where there might be four men's prisons of different security classifications, there may be just one women's prison. Where this is the case, that one prison's regime will be determined by the maximum security requirement.

This means that women prisoners are particularly likely to be held according to a security classification that is stricter than could be justified by any assessment of the risk that they pose. Untried prisoners are often held with convicted prisoners, and those sentenced for civil and criminal offences are often held together.

Being housed at a higher security level than one's classification

Prisoners should be housed in accommodation appropriate to the security classification assigned to them. However, very often there are far too few low security places for women, so even when women have been classified as low security, they are accommodated within a high security regime.

Australian researchers have observed:

...Low and open prisoners should have access to work release and unescorted Leaves of Absence. If a low or open security prisoner is in a maximum security prison, then they do not have the same access to the entitlements of a low security prisoner. Women regularly serve their sentences in maximum security regardless of their security classification.³⁷

Discrimination in risk assessment

These problems are exacerbated by the fact that security classification assessments often assess 'needs' as risk factors, discriminating against women on the basis of their social and economic disadvantage. A prisoner who suffers from a mental or cognitive disability is often seen as requiring a higher level of security classification. The conditions of isolation and the lack of appropriate services that follow high-security classification may then exacerbate existing mental health conditions.³⁸

This mis-classification of women prisoners impacts upon every aspect of their prison experience, including their freedom of movement, the frequency and type of contact they have with their children and other family members, and the educational and vocational opportunities available to them.

37 Beyond Bars Alliance NSW (2005) *Submission to the Anti Discrimination Commissioner for an Inquiry into the Discrimination Experienced by Women Within the Criminal Justice System in New South Wales*, at <http://www.sistersinside.com.au/media/NSWADCreport.pdf> (accessed 20 July 2005) p.19.

38 *Ibid.*, p.18-19.

International human rights standards

Universal Declaration of Human Rights, Article 29(2)

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

Regional Standards on Detention

European Prison Rules, Rule 18.10

Accommodation of all prisoners shall be in conditions with the least restrictive security arrangements compatible with the risk of their escaping or harming themselves or others.

Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, Principle XIX

Under no circumstances shall the separation of persons deprived of liberty based on categories be used to justify discrimination, the use of torture, cruel, inhuman, or degrading treatment or punishment, or the imposition of harsher or less adequate conditions on a particular group. The same criteria shall be observed during transfers of persons deprived of liberty.

Application

The *UN Standard Minimum Rules for the Treatment of Prisoners* make clear that the purpose of security classification is to facilitate the rehabilitation of prisoners, and that conditions in prison should be only as restrictive as is necessary for safe custody of prisoners and a well-ordered community life in the prison. It follows that women prisoners should be classified so as to facilitate them being held in the most open prison conditions that are appropriate.

The *UN Standard Minimum Rules for the Treatment of Prisoners* promote the use of open institutions as most favourable to rehabilitation. The use of open institutions is more likely to be appropriate for women prisoners, who are less likely than men to have been convicted of violent acts.

The *European Prison Rules* establish a principle of minimum restriction. The risk posed by the prisoner to themselves and others and the risk of their escaping must be assessed on a case by case basis. They must then be accommodated in line with the least restrictive procedures appropriate on the basis of this assessment.

Classification systems applied to women prisoners must be reviewed to ensure that women's vulnerability, including mental and physical disability, is not unjustifiably assessed as a security risk. **Women must not be punished for their disadvantage.**

The UNODC *Handbook on Women in Prison* highlights the importance of using the concept of dynamic security when addressing prison security. This model aims to create a "positive climate which encourages the cooperation of prisoners"; the *Handbook* lays out the key components of dynamic security:

- Developing positive relationships with prisoners
- Diverting prisoners' energy into constructive work and activity
- Providing a decent and balanced regime with individualised programmes for prisoners³⁹

39 UNODC (2008) *Handbook on Women in Prison*, Chapter 2, section 4

5. Strip searching

UN Standard Minimum Rules for the Treatment of Prisoners

27. Discipline and order shall be maintained with firmness, but with no more restriction than is necessary for safe custody and well-ordered community life.

One aspect of unnecessarily harsh security regimes is routine strip-searching of women prisoners.

Women prisoners experience strip-searching in a discriminatory manner - the effect on women prisoners is disproportionately greater than the effect on men. Women prisoners, as a group, have a **higher incidence as victims of previous sexual assault** than the general community and than male prisoners. Research in Australia indicates that 89% of women prisoners had been sexually abused at some point in their lives, and 70-80% of women in prison were survivors of incest.⁴⁰ Further, "Significant numbers of these women were abused as children by people in a position of authority or trust."⁴¹ Being strip-searched is thus especially traumatic for women prisoners.

Sisters Inside, an Australian community organisation working with prisoners, explains that women prisoners "often experience strip searching as a new assault", which re-victimises and re-traumatises already traumatised women.⁴² The *Corston Report* from the UK condemns strip searching, citing the humiliation for all women, the reminder of victimisation for women who have been previously abused and the negative impact on staff-inmate relationships.⁴³

Prisoners and former prisoners describe strip-searching as "embarrassing – sometimes degrading", "inhumane and unnecessary", "absolutely humiliating", "demeaning" and "punitive and abusive".

The *Corston Report* also undermines the argument of necessity:

In Tyrer v United Kingdom the European Court of Human Rights noted that "a punishment does not lose its degrading character just because it is believed to be, or is, an effective aid to crime control." Absence of publicity will not necessarily prevent a given punishment from being degrading: it may well suffice that the victim is humiliated in their own eyes, even if not in the eyes of others.

[*Tyrer v. The United Kingdom* (5856/72) [1978] ECHR 2 (25 April 1978) para. 31-32

I well understand that drugs and other contraband must be kept out of prison and that there may be an argument for routine strip searching on first reception into prison. But even this procedure is dubious for women given that drugs can be secreted internally, rendering strip-searching ineffective in any event, as routine internal searching is seen as unacceptable. ...I was told that it is very rare indeed for anything illicit to be found as a result of strip searching women.⁴⁴

40 Kilroy, D. "When Will You See the Real Us? Women in Prison" *Women in Prison Journal*, October 2001.

41 Sisters Inside (2004) *Submission to the Anti Discrimination Commissioner for the Inquiry into the Discrimination on the Basis of Sex, Race and Disability Experienced by Women Prisoners In Queensland*, at <http://www.sistersinside.com.au/media/adccsubmission.pdf> (accessed 20 July 2005) p. 27.

42 *Ibid.*, p. 5.

43 Corston, J. (2007) *The Corston Report: A report by Baroness Jean Corston of a review of women with particular vulnerabilities in the criminal justice system* (Home Office), p.31.

44 *Ibid.*, p. 31

Women with **cultural or religious practices** that emphasise modesty may also find strip-searching particularly degrading and traumatic.

Strip-searching may constitute cruel, inhuman or degrading treatment.

Many States have policies of mandatory strip-searching: for example, before and after any visit or at periodic intervals. This makes a strip-search the “price” the woman prisoner must pay to get a visit from her children, her partner or other family members. This can lead to women being “... reluctant to receive visits because the feelings of powerlessness and degradation experienced during the strip search and the reminder of previous sexual abuse are too much to take.”⁴⁵ Strip-searching, as well as being traumatic in itself, may thus impede a woman maintaining family relationships.

International human rights standards

Universal Declaration of Human Rights, Article 5 & International Covenant on Civil and Political Rights,

Article 7

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment

Article 16(1)

Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment ... when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

*Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*⁴⁶

Article 2

Any act of torture or other cruel, inhuman or degrading treatment or punishment is an offence to human dignity and shall be condemned as a denial of the purposes of the Charter of the United Nations and as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights.

Article 4

Each State shall, in accordance with the provisions of this Declaration, take effective measures to prevent torture and other cruel, inhuman or degrading treatment or punishment from being practised within its jurisdiction.

Article 5

The training of law enforcement personnel and of other public officials who may be responsible for persons deprived of their liberty shall ensure that full account is taken of the prohibition against torture and other cruel, inhuman or degrading treatment or punishment. This prohibition shall also, where appropriate, be included in such general rules or instructions as are issued in regard to the duties and functions of anyone who may be involved in the custody or treatment of such persons.

⁴⁵ *Ibid.*, p. 27.

⁴⁶ Adopted by General Assembly resolution 3452 (XXX) of 9 December 1975.

Article 6

Each State shall keep under systematic review interrogation methods and practices as well as arrangements for the custody and treatment of persons deprived of their liberty in its territory, with a view to preventing any cases of torture or other cruel, inhuman or degrading treatment or punishment.

Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment,

Principle 6

No person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment.

*UN Declaration on the Elimination of Violence against Women*⁴⁷

Article 2:

Violence against women shall be understood to encompass, but not be limited to, the following:
...Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.

Article 4:

...States should pursue by all appropriate means and without delay a policy of eliminating violence against women and, to this end, should:

- ...(b) Refrain from engaging in violence against women;
- (c) Exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons;
- ...(f) Develop, in a comprehensive way, preventive approaches and all those measures of a legal, political, administrative and cultural nature that promote the protection of women against any form of violence, and ensure that the re-victimization of women does not occur because of laws insensitive to gender considerations, enforcement practices or other interventions;
- ...(l) Adopt measures directed towards the elimination of violence against women who are especially vulnerable to violence...

*Committee on the Elimination of All Forms of Discrimination Against Women, General Recommendation No. 19, Violence against women*⁴⁸

The Convention in article 1 defines discrimination against women. The definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. Gender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence.

⁴⁷ General Assembly resolution 48/104 of 20 December 1993.

⁴⁸ Para 6, U.N. Doc. HRI/GEN/1/Rev.7 at 246 (2004).

Regional Standards on Detention

European Prison Rules

Rule 25.4

Particular attention shall be paid to the needs of prisoners who have experienced physical, mental or sexual abuse.

Rule 34.2

Particular efforts shall be made to give access to special services for women prisoners who have needs as referred to in Rule 25.4.

Rule 54.1

There shall be detailed procedures which staff have to follow when searching:

b. prisoners

Rule 54.2

The situations in which such searches are necessary and their nature shall be defined by national law.

Rule 54.3

Staff shall be trained to carry out these searches in such a way as to detect and prevent any attempt to escape or to hide contraband, **while at the same time respecting the dignity of those being searched** and their personal possessions. [Emphasis added]

Rule 54.4

Persons being searched shall not be humiliated by the searching process.

Rule 54.5

Persons shall only be searched by staff of the same gender

Rule 54.6

There shall be no internal physical searches of prisoners' bodies by staff.

Rule 54.7

An intimate examination related to a search may be conducted by a medical practitioner only.

Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas

Principle I

All persons subject to the jurisdiction of any Member State of the Organization of American States shall be treated humanely, with unconditional respect for their inherent dignity, fundamental rights and guarantees, and strictly in accordance with international human rights instruments.

In particular, and taking into account the special position of the States as guarantors regarding persons deprived of liberty, their life and personal integrity shall be respected and ensured, and they shall be afforded minimum conditions compatible with their dignity.

They shall be protected from any kind of threats and acts of torture, execution, forced disappearance, cruel, inhuman, or degrading treatment or punishment, sexual violence, corporal punishment, collective punishment, forced intervention or coercive treatment, from any method intended to obliterate their personality or to diminish their physical or mental capacities.

Principle XXI

Whenever bodily searches, inspections of installations and organizational measures of places of deprivation of liberty are permitted by law, they shall comply with criteria of necessity, reasonableness and proportionality.

Bodily searches of persons deprived of liberty and visitors to places of deprivation of liberty shall be carried out under adequate sanitary conditions by qualified personnel of the same sex, and shall be compatible with human dignity and respect for fundamental rights. In line with the foregoing, Member States shall employ alternative means through technological equipment and procedures, or other appropriate methods.

Intrusive vaginal or anal searches shall be forbidden by law.

The inspections or searches in units or installations of places of deprivation of liberty shall be carried out by the competent authorities, in accordance with a properly established procedure and with respect for the rights of persons deprived of liberty.

Application

Strip searches of women should be exceptional, not routine. Because women experience strip searches particularly harshly, policies regarding strip-searching should be separately and carefully formulated as regards women prisoners. Any decision to strip-search a woman should be taken on a case-by-case basis. No woman should be strip-searched unless, in the specific circumstances, it is reasonable and justifiable to do so. For example, if the officer responsible has a reasonable suspicion that the woman is hiding contraband that can be confiscated *only* through strip-searching. Strip-searching must never be used as a punishment.

Where a strip-search is deemed justified in the particular circumstances, male members of staff should never be present. Male staff members should not conduct pat searches of women. The *European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) Standards* specify that: “persons deprived of their liberty should only be searched by staff of the same gender and that any search which requires an inmate to undress should be conducted out of the sight of custodial staff of the opposite gender.”⁴⁹

In Jordan v Gardner 986 F. 2d 9th Cir 1993 a United States Court of Appeal declared that “pat searches” of women prisoners by male guards amounted to cruel and unusual punishment. The Court said that intrusive probing searches by men in positions of ultimate authority constitute and reinforce gender subordination and offend our concepts of human dignity whether or not the woman prisoner had been sexually abused prior to imprisonment.

Staff should be trained to be sensitive to the likelihood that the women with whom they are working have suffered violent and/or sexual assault. Even female staff should do all possible to maintain the woman’s dignity and privacy whilst any search is performed. They should “observe common decency, for example, by not requiring a prisoner to strip completely naked in the course of a body search”.⁵⁰ The *European Prison Rules* codify the need for prison staff to be aware of a prisoner’s history of abuse and to modify prison regimes to take account of their needs arising from this.

49 The CPT Standards, CPT/Inf/E (2002) I - Rev. 2003, VII. *Women deprived of their liberty*, para 23.

50 A. Coyle (2002) *A Human Rights Approach to Prison Management: Handbook for prison staff* (International Centre for Prison Studies) p. 136.

The European Prison Rules and the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas state clearly that searching must be justified on a basis defined in legislation, searches must not be used at the whim of the guards. Similarly both sets of regional standards are clear that searches must not humiliate the person being searched. Searches must only be used when necessary and in line with legal criteria and they must be carried out in such a way as to maintain the dignity of the person being searched. Implementing these measures should make searching a less traumatic experience.

Internal physical searches degrade all prisoners but have particularly harsh ramifications for female prisoners who have experienced abuse. It has been documented that the traumatic effect of searches imposed on prisoners before and after visits have caused some female prisoners to stop receiving visitors, including their children. The implementation of Rule 54.6 of the European Prison Rules is therefore of great importance, within Europe and beyond. The Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas require that States legislate to forbid internal vaginal or anal searches, the Principles also oblige States to use “alternative means”, including technological equipment to end the perceived need for bodily searches. Authorities should develop more humane and less discriminatory ways to detect drugs and other contraband than strip-searches. States should share information on technologies and searching techniques that avoid the need for strip-searching.

“A woman who was seven months pregnant was strip-searched next to me in a cold tool room. I thought it was shameful.”
Former prisoner

6. Supervision of women prisoners by women

UN Standard Minimum Rules for the Treatment of Prisoners

53. (1) In an institution for both men and women, the part of the institution set aside for women shall be under the authority of a responsible woman officer who shall have the custody of the keys of all that part of the institution.
- (2) No male member of the staff shall enter the part of the institution set aside for women unless accompanied by a woman officer.
- (3) Women prisoners shall be attended and supervised only by women officers. This does not, however, preclude male members of the staff, particularly doctors and teachers, from carrying out their professional duties in institutions or parts set aside for women.

Women in prisons all around the world are at risk of rape, sexual assault and torture. In some countries, gender-based violence is endemic in places of detention. Sexual violence against women in prisons has received attention from the Human Rights Committee, the Committee on the Elimination of Discrimination against Women⁵¹ and the Committee Against Torture. The Special Rapporteur on Violence Against Women and the Special Representative of the Secretary-General on Human Rights Defenders have documented scores of incidents of ill-treatment of women in prisons.⁵² Female juvenile prisoners are often detained in adult prisons (discussed in Part 17), where they are particularly vulnerable to violence.

Women are placed at particular risk of sexual and physical abuse when male staff are employed in inappropriate capacities in women’s prisons.

In less overtly violent prison environments, improper touching during searches, being watched when dressing, showering or using the toilet – what the Special Rapporteur on Violence Against Women describes as ‘sanctioned sexual harassment’ - is often prevalent. The presence of male corrections officers in housing units and elsewhere creates a situation in which sexual misconduct is more pervasive than if women are guarded by female officers.⁵³

“Male guards were visually intrusive during night bed checks and had the sanction to stop women for pat-down searches (not a strip search) at any time, any place. When I refused to submit I was sent to the psychiatrist.” Former prisoner

51 The Committee for the Elimination of Discrimination against Women has highlighted violence against women in prisons and detention centres in a number of its Concluding Observations, for example: Peru, A/50/38 (1995) 79 at para. 445; Bangladesh, A/52/38/Rev. I part II (1997) 117 at para. 443; India, A/55/38 part I (2000) 7 at para. 72; Egypt, A/56/38 part I (2001) 33 at para. 344; Russian Federation, A/57/38 part I (2002) 40 at paras. 391 and 392; Tunisia, A/57/38 part II (2002) 102 at para. 194. In its General Recommendations to Turkey, the Committee ‘noted with the gravest concern the practice of forced gynaecological examinations of women in the investigation of allegations of sexual assault, including of women prisoners while in custody... The Committee emphasized that such coercive practices were degrading, discriminatory and unsafe and constituted a violation by state authorities of the bodily integrity, person and dignity of women’.

52 For example: *Report of the Special Rapporteur on violence against women, its causes and consequences: Addendum, Communications to and from Governments*, E/CN.4/2005/72/Add.1, para 21 (Bangladesh), para 44 (Burundi), para 61-77 (China), para 137-142 (Egypt), para 184 (India), para 132 (Pakistan), para 413 (Sudan), para 452-459 (Turkey); *Mission to Guatemala*, E/CN.4/2005/72/Add.3; *Mission to Occupied Palestinian Territory*, E/CN.4/2005/72/Add.4; *Report of the Special Representative of the Secretary-General, Addendum, Summary of cases transmitted to Governments and replies received*, E/CN.4/2005/101/Add.1.

53 *Report of the Special Rapporteur on violence against women of the mission to the United States of America on the issue of violence against women in state and federal prisons*, E/CN.4/1999/68/Add.2, paras. 55, 58.

In testimony to a District Court in Michigan psychologist Terry Kupers stated that:

When male officers treat women with disrespect it has a different impact than having women officers act disrespectfully to male prisoners. Disrespect towards women by male officers is more likely to be sexual in content or implication, and in women who were traumatized by sexual abuse perpetrated by males, it is more likely to be experienced as a “retraumatization.”⁵⁴

Further, the dependency of prisoners upon prison staff leads to increased vulnerability to sexual exploitation, as it pushes them to ‘willingly’ trade sex for favours. The Special Rapporteur on Violence against Women has observed that: “Given the power imbalance inherent in prison/prisoner relationships and the hierarchy within the prison, relationships between prison guards and prisoners corrupt the prison environment and tend to exploit the women.”⁵⁵

“Some officers have been walked or relocated to a different prison for having an affair with the inmates.”
Prisoner

Prisoners who are abused or exploited by prison staff have little opportunity of escaping from their abuser. Those who file a complaint or take legal action are at risk of retaliation.

International human rights standards

UN Declaration on the Elimination of Violence against Women ⁵⁶

Article 2:

Violence against women shall be understood to encompass, but not be limited to, the following: ...

(c) Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.

Article 4:

States should pursue by all appropriate means and without delay a policy of eliminating violence against women and, to this end, should: ... (i) Take measures to ensure that law enforcement officers and public officials responsible for implementing policies to prevent, investigate and punish violence against women receive training to sensitise them to the needs of women.

Human Rights Committee, General Comment 28 on the equality of rights between men and women ⁵⁷

... States parties should report on whether men and women are separated in prisons and whether women are guarded only by female guards.

54 Human Rights Watch and the American Civil Liberties Union (2006) *Custody and Control: Conditions of Confinement in New York's Juvenile Prisons for Girls*, p. 69

55 *Ibid.*, paras. 55, 58.

56 General Assembly resolution 48/104 of 20 December 1993.

57 Para 15, U.N. Doc. HRI/GEN/1/Rev.7 at 153 (2004).

Regional Standards on Detention

Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (Convention of Belem Do Para)

Article 1

For the purposes of this Convention, violence against women shall be understood as any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or the private sphere.

Article 2

Violence against women shall be understood to include physical, sexual and psychological violence:

...

c. that is perpetrated or condoned by the state or its agents regardless of where it occurs.

Article 8

The States Parties agree to undertake progressively specific measures, including programs ...

c. to promote the education and training of all those involved in the administration of justice, police and other law enforcement officers as well as other personnel responsible for implementing policies of the prevention, punishment and eradication of violence against women;

Article 9

With respect to the adoption of the measures in this Chapter, the States Parties shall take special account of the vulnerability of women to violence by reason of among others, their race or ethnic background or their status as migrants, refugees or displaced persons. Similar consideration shall be given to women subjected to violence while ... deprived of their freedom.

European Prison Rules, Rule 85

Men and women shall be represented in a balanced manner on the prison staff.

Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas

Principle IX

The transfers shall not be carried out in order to punish, repress, or discriminate against persons deprived of liberty, their families or representatives; nor shall they be conducted under conditions that cause physical or mental suffering, are humiliating or facilitate public exhibition.

Principle XX

Places of deprivation of liberty for women, or the women's sections in mixed institutions shall be under the direction of female personnel. The custody and surveillance of women deprived of liberty shall be performed exclusively by female personnel, although staff with other capacities or skills, such as doctors, teachers, or administrative personnel may be male.

Application

The importance of Standard Minimum Rule 53 (3) - that "Women prisoners shall be attended and supervised only by women officers" - has been reaffirmed by the Human Rights Committee (in General Comment 28, extracted above) and the Special Rapporteur on Violence against Women

and the African Commission on Human and Peoples' Rights⁵⁸ and reiterated in the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas. The Human Rights Committee has emphasised the importance of this rule in its recommendation "that male officers should not be granted access to women's quarters, or at least be accompanied by women officers."⁵⁹ Concerns about the lack of appropriate staffing have also been raised by the UN Special Rapporteur on torture, the UN Special Rapporteur on trafficking and the UN Special Rapporteur on violence against women.⁶⁰

The UNODC Handbook on Women in Prison contains guidance on how States can increase the number of women working as prison guards and ensure that female prison guards receive the support they need to perform the role in a manner that enables the protection both of themselves and the women they are guarding.⁶¹

Some States and regions have moved away from strict application of this, however. Germany and New Zealand, for example, employ men in women's prisons to facilitate a more 'normal' environment. The *European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) Standards* suggest that, "The presence of both male and female staff can have a beneficial effect in terms of both the custodial ethos and in fostering a degree of normality in a place of detention", with the proviso that "persons deprived of their liberty should only be searched by staff of the same gender and that any search which requires an inmate to undress should be conducted out of the sight of custodial staff of the opposite gender."⁶² The suggestions of the *European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) Standards* may have helped to shape the provision in the *European Prison Rules* quoted above. This regional standard is at odds with the international standards and should only be applied on the basis that any policy that allows male staff to have contact with female prisoners must take into account the considerations listed below. **Female prisoner safety must be the primary consideration not attempts to provide gender equality in the workforce.**

To protect women from ill-treatment, male staff should only have access to facilities where women are accommodated when supervised by a female member of staff. To protect women's privacy, male staff should not have access to bathroom areas, or perform roles where women might be seen undressed by them.

Attention should be paid to arrangements for transport of women prisoners, as this is a time when they often come into contact with male staff (and male prisoners) and are vulnerable to abuse. Female prisoners should always be accompanied by a female staff member during transfers. The Principle XI part 4 of the *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas* emphasises that transfers must not be humiliating or "facilitate public exhibition" in addition to requiring that they not cause physical or mental suffering.

58 Report of the Special Rapporteur on violence against women on the mission to Haiti, E/CN.4/2000/68/Add.3, 27 January 2000, para 84; Report of the Special Rapporteur on violence against women of the mission to the United States of America on the issue of violence against women in state and federal prisons, E/CN.4/1999/68/Add.2, paras. 57, 58; Report of the Special Rapporteur on violence against women on international, regional and national developments in the area of violence against women (1994-2003), Addendum 1, E/CN.4/2003/75/Add.1, 27 February 2003, 1656 (Greece); *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, DOC/OS(XXX)247, para M (c).

59 Concluding Observations of the Human Rights Committee: United States of America, 18 December 2006, CCPR/C/USA/CO/3/Rev.1, paragraph 33.

60 Report of the Special Rapporteur on Torture: mission to Georgia, E/CN.4/2006/6/Add.3, paragraph 54; Report of the Special Rapporteur on Trafficking: mission to Lebanon, E/CN.4/2006/62/Add.3, paragraph 49; Report of the Special Rapporteur on Violence against Women: mission to the Russian Federation.

61 UNODC (2008) *Handbook on Women in Prison*, Chapter 2, section 2

62 The CPT Standards, CPT/Inf/E (2002) 1 - Rev. 2003, VII. *Women deprived of their liberty*, para. 26.

Any decision to allow male staff, whether guards, doctors, teachers or in any other role, to have contact with female prisoners must be made only after:

- consideration of the vulnerability of women prisoners to abuse;
- implementation of safeguards to prevent any abuse and to protect the privacy of women prisoners; and
- establishment of procedures for women to report any abuse, and to be protected from its recurrence or retaliation if they do so.

More generally, the prison must have in place policies to prevent, investigate and provide for effective redress for any physical, sexual or psychological violence.

Staff training must incorporate sensitisation to the vulnerability of women prisoners to abuse, and the policies and procedures for preventing and responding to it. As required by the *Convention of Belem Do Para*, States should recognise when they have a problem with violence by staff in detention facilities and work to eradicate the violence and the culture of acceptability and impunity surrounding it.

7. Complaint mechanisms

UN Standard Minimum Rules for the Treatment of Prisoners

Information to and complaints by prisoners

35. (1) Every prisoner on admission shall be provided with written information about the regulations governing the treatment of prisoners of his category, the disciplinary requirements of the institution, the authorized methods of seeking information and making complaints, and all such other matters as are necessary to enable him to understand both his rights and his obligations and to adapt himself to the life of the institution.
- (2) If a prisoner is illiterate, the aforesaid information shall be conveyed to him orally.
36. (1) Every prisoner shall have the opportunity each week day of making requests or complaints to the director of the institution or the officer authorized to represent him.
- (2) It shall be possible to make requests or complaints to the inspector of prisons during his inspection. The prisoner shall have the opportunity to talk to the inspector or to any other inspecting officer without the director or other members of the staff being present.
- (3) Every prisoner shall be allowed to make a request or complaint, without censorship as to substance but in proper authorities through approved channels.
- (4) Unless it is evidently frivolous or groundless, every request or complaint shall be promptly dealt with and replied to without undue delay.

Policy and legislation alone will not ensure that the rights of women prisoners are realised. Responsive complaints mechanisms as required by the Standard Minimum Rules can help to ensure that the required policies and legislation are implemented.

Caution must be exercised when considering if a complaint is “evidently frivolous or groundless”; it must be remembered that women in prison, particularly those who have previously been the victims of sexual abuse, may experience actions very differently than those whose job it is to consider complaints. If complaints are not taken seriously the entire complaints system is undermined in the eyes of the prison population and redundant in ensuring protection from violence and discrimination.

International Standards

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

Principle 7

1. States should prohibit by law any act contrary to the rights and duties contained in these principles, make any such act subject to appropriate sanctions and conduct impartial investigations upon complaints.
2. Officials who have reason to believe that a violation of this Body of Principles has occurred or is about to occur shall report the matter to their superior authorities and, where necessary, to other appropriate authorities or organs vested with reviewing or remedial powers.

3. Any other person who has ground to believe that a violation of this Body of Principles has occurred or is about to occur shall have the right to report the matter to the superiors of the officials involved as well as to other appropriate authorities or organs vested with reviewing or remedial powers.

Principle 29

1. In order to supervise the strict observance of relevant laws and regulations, places of detention shall be visited regularly by qualified and experienced persons appointed by, and responsible to, a competent authority distinct from the authority directly in charge of the administration of the place of detention or imprisonment.
2. A detained or imprisoned person shall have the right to communicate freely and in full confidentiality with the persons who visit the places of detention or imprisonment in accordance with paragraph 1 of the present principle, subject to reasonable conditions to ensure security and good order in such places.

Principle 33

1. A detained or imprisoned person or his counsel shall have the right to make a request or complaint regarding his treatment, in particular in case of torture or other cruel, inhuman or degrading treatment, to the authorities responsible for the administration of the place of detention and to higher authorities and, when necessary, to appropriate authorities vested with reviewing or remedial powers.
2. In those cases where neither the detained or imprisoned person nor his counsel has the possibility to exercise his rights under paragraph 1 of the present principle, a member of the family of the detained or imprisoned person or any other person who has knowledge of the case may exercise such rights.
3. Confidentiality concerning the request or complaint shall be maintained if so requested by the complainant.
4. Every request or complaint shall be promptly dealt with and replied to without undue delay. If the request or complaint is rejected or, in case of inordinate delay, the complainant shall be entitled to bring it before a judicial or other authority. Neither the detained or imprisoned person nor any complainant under paragraph 1 of the present principle shall suffer prejudice for making a request or complaint.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 13

Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.

Regional Standards on Detention

European Prison Rules, Rule 70

Requests and complaints

- 70.1 Prisoners, individually or as a group, shall have ample opportunity to make requests or complaints to the director of the prison or to any other competent authority.

- 70.2 If mediation seems appropriate this should be tried first.
- 70.3 If a request is denied or a complaint is rejected, reasons shall be provided to the prisoner and the prisoner shall have the right to appeal to an independent authority.
- 70.4 Prisoners shall not be punished because of having made a request or lodged a complaint.
- 70.5 The competent authority shall take into account any written complaints from relatives of a prisoner when they have reason to believe that a prisoner's rights have been violated.
- 70.6 No complaint by a legal representative or organisation concerned with the welfare of prisoners may be brought on behalf of a prisoner if the prisoner concerned does not consent to it being brought.
- 70.7 Prisoners are entitled to seek legal advice about complaints and appeals procedures and to legal assistance when the interests of justice require.

Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas,

Preamble

All persons deprived of liberty shall have the right, exercised by themselves or by others, to present a simple, prompt, and effective recourse before the competent, independent, and impartial authorities, against acts or omissions that violate or threaten to violate their human rights. In particular, persons deprived of liberty shall have the right to lodge complaints or claims about acts of torture, prison violence, corporal punishment, cruel, inhuman, or degrading treatment or punishment, as well as concerning prison or internment conditions, the lack of appropriate medical or psychological care, and of adequate food.

Principle VII

Petition and response

Persons deprived of liberty shall have the right of individual and collective petition and the right to a response before judicial, administrative, or other authorities. This right may be exercised by third parties or organizations, in accordance with the law.

This right comprises, amongst others, the right to lodge petitions, claims, or complaints before the competent authorities, and to receive a prompt response within a reasonable time. It also comprises the right to opportunely request and receive information concerning their procedural status and the remaining time of deprivation of liberty, if applicable.

Persons deprived of liberty shall also have the right to lodge communications, petitions or complaints with the national human rights institutions; with the Inter-American Commission on Human Rights; and with the other competent international bodies, in conformity with the requirements established by domestic law and international law.

Application

As is recognised in the *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas* prisoners should have access to regional and international oversight mechanisms. Whilst international oversight mechanisms may be the only recourse available to some prisoners they offer no substitute for fully functioning, easily accessible and rapidly responsive domestic mechanisms to address the complaints of women prisoners.

The need for effective complaints and inspection mechanisms is highlighted in *Penal Reform and Gender* by the International Centre for Prison Studies which outlines the following measures to ensure that complaints procedures are effective and take gender into account:

- It should be possible to make confidential complaints.
- Prisoners must be protected from reprisals for complaining and the system should not contain disincentives to complain, such as punishment for making complaints that are not proven or are deemed to be ‘false and malicious’.
- The existence of the complaints system and the way to access it should be publicised and known to all prisoners. Many systems have notices pinned up around the prison giving details of how to communicate with the complaints investigator or ombudsman’s office.
- Prisoners should have easy access to the complaints machinery, both orally and in writing. Where the prison population is diverse, the information should be available in the relevant languages. Measures must be taken to ensure that non-literate prisoners understand and can access complaint mechanisms.⁶³

63 International Centre for Prison Studies (2008) “Penal Reform and Gender” in Bastick, M. And Valasek, K. (eds.) *Gender and Security Sector Reform Toolkit* (DCAF, OSCE/ODIHR, UN-INSTRAW), pp. 5-7

8. Separation of female and male prisoners

UN Standard Minimum Rules for the Treatment of Prisoners

8. (a) Men and women shall so far as possible be detained in separate institutions; in an institution which receives both men and women the whole of the premises allocated to women shall be entirely separate...

Rule 8 of the *UN Standard Minimum Rules for the Treatment of Prisoners* is clear in requiring that men and women be detained separately. However, as a result of the lack of facilities for women's detention, women and girls in many countries are imprisoned in places where men and women share facilities, such as cooking and recreational space. Whilst formally male and female prisoners may be held separately, in practice they are not. This places women at an unacceptable **risk of assault by male prisoners**.

One study in Mexico showed that in 95% of prisons the separation between men and women does not take place and mentions reports of prostitution 'schemes' organised within Mexican prisons.⁶⁴

International human rights standards

*UN Declaration on the Elimination of Violence against Women*⁶⁵

Article 2:

Violence against women shall be understood to encompass, but not be limited to, the following: ...
(c) Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.

Article 4:

States should pursue by all appropriate means and without delay a policy of eliminating violence against women and, to this end, should: ... (i) Take measures to ensure that law enforcement officers and public officials responsible for implementing policies to prevent, investigate and punish violence against women receive training to sensitise them to the needs of women.

*Human Rights Committee, General Comment 28 on the equality of rights between men and women*⁶⁶

... States parties should report on whether men and women are separated in prisons and whether women are guarded only by female guards.

⁶⁴ M. Esparza, *Discrimination against indigenous people in the justice system, Background paper presented at the Expert Seminar on Indigenous Peoples and the Administration of Justice*, Madrid 12-14 November 2003, HR/MADRID/IP/SEM/2003/BP.20 p. 3.

⁶⁵ General Assembly resolution 48/104 of 20 December 1993.

⁶⁶ Para 15, U.N. Doc. HRI/GEN/1/Rev.7 at 153 (2004).

Regional Standards on Detention

Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (Convention of Belem Do Para), Article 1

For the purposes of this Convention, violence against women shall be understood as any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or the private sphere.

European Prison Rules

Rule 18.8

In deciding to accommodate prisoners in particular prisons or particular sections of a prison due account shall be taken of the need to detain: ...

- b. male prisoners separately from female prisoners;

Rule 18.9

Exceptions can be made to the requirements for separate detention in terms of paragraph 8 in order to allow prisoners to participate jointly in organised activities. But these groups shall always be separated at night unless they consent to be detained together and the prison authorities judge that it would be in the best interest of all the prisoners concerned.

Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, Principle XIX

The different categories of persons deprived of freedom shall be kept in separate places of deprivation of liberty or in different sections within the same institution, taking account of their sex, age, the reason for their deprivation of liberty, the need to protect the life and integrity of persons deprived of liberty or personnel, special needs of attention, or other circumstances relating to internal security.

In particular, arrangements shall be made to separate men and women; ...

Application

Women must be accommodated in a place physically separate from accommodation for male prisoners. Where male and female sections in a prison adjoin each other, or share facilities, at no time should male prisoners have physical access to women prisoners. To prevent verbal harassment, male and female prisoners should not be able to see or hear each other.

The prison must have in place policies to prevent, investigate and provide effective redress for any physical, sexual or psychological violence between prisoners.

With careful safeguards, it might be possible to accommodate together male and female prisoners who are family members or otherwise in a close relationship. The *European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) Standards* note that:

As a matter of principle, women deprived of their liberty should be held in accommodation which is physically separate from that occupied by any men being held at the same establishment. That said, some States have begun to make arrangements for couples (both of whom are deprived of their liberty) to be accommodated together, and/or for some degree of mixed gender association in prisons. The CPT welcomes such progressive arrangements, provided that the prisoners involved agree to participate, and are carefully selected and adequately supervised.⁶⁷

⁶⁷ The CPT Standards, CPT/Inf/E (2002) I - Rev. 2003, *Women deprived of their liberty*, para. 24.

As with the issue of mixed-gender staffing, any such arrangements should be introduced only after:

- consideration of the vulnerability of women prisoners to abuse;
- implementation of safeguards to prevent any abuse and to protect the privacy of women prisoners; and
- establishment of procedures for women to report any abuse, and to be protected from its recurrence or retaliation if they do so
- use only when full, free and informed consent is given by all prisoners affected by the arrangement.

It is often the case that women prisoners held in a mixed prison (i.e. a prison with men's and women's wings) have less access to education and work programmes than the male prisoners in the same institution. In some cases the need to keep prisoners separate is the reason that women have fewer possibilities to use exercise equipment and areas set aside for training and work. Whilst the provisions in the *European Prison Rules* present the possibility of offering these activities as mixed activities they are clear that such a policy can only be implemented with a number of important safeguards. **Allowing women prisoners increased access to education, work and recreational programmes must not come at the cost of putting them at risk.** Work and education programmes are considered further in Part 16 below.

9. Family and social contact

UN Standard Minimum Rules for the Treatment of Prisoners

37. Prisoners shall be allowed under necessary supervision to communicate with their family and reputable friends at regular intervals, both by correspondence and by receiving visits.
44. (2) A prisoner shall be informed at once of the death or serious illness of any near relative. In case of the critical illness of a near relative, the prisoner should be authorized, whenever circumstances allow, to go to his bedside either under escort or alone.

A. PRISONERS UNDER SENTENCE ...

Social relations and after-care

79. Special attention shall be paid to the maintenance and improvement of such relations between a prisoner and his family as are desirable in the best interests of both.
80. From the beginning of a prisoner's sentence consideration shall be given to his future after release and he shall be encouraged and assisted to maintain or establish such relations with persons or agencies outside the institution as may promote the best interests of his family and his own social rehabilitation.

C. PRISONERS UNDER ARREST OR AWAITING TRIAL ...

92. An untried prisoner shall be allowed to inform immediately his family of his detention and shall be given all reasonable facilities for communicating with his family and friends, and for receiving visits from them, subject only to restrictions and supervision as are necessary in the interests of the administration of justice and of the security and good order of the institution.

Family responsibilities

In most societies, women have primary responsibility for the family. Women prisoners are more likely than men prisoners to have been the sole or primary carer for young children and other family members, such as older relatives, prior to imprisonment. When a woman is sent to prison the consequences for her family are often very significant.

There are particular concerns and consequences and further applicable human rights standards when a woman has children under the age of 18. These are discussed in more detail in Parts 10 and 11.

Difficulties in maintaining contact when imprisoned far from home

Visits are crucial to a woman maintaining family contact. Because there are far fewer women's prisons, women tend to be imprisoned further away from their homes and families than are male prisoners. This makes it more difficult for people to visit women in prison and in general women prisoners receive fewer family visits than do male prisoners.

Statistics from the USA show that "more than 60% of all women are incarcerated more than one hundred miles from their child's place of residence."⁶⁸ The negative effects of such geographical

⁶⁸ Human Rights Watch (1996) *All Too Familiar: Sexual Abuse of Women in U.S. State Prisons* p. 22.

isolation have been recognised by a Canadian court: in considering living conditions in the federal penitentiary for women in 1991, the court found that incarcerating the defendant there would constitute cruel and unusual punishment because of its geographical distance from her home.⁶⁹

There may be other reasons why women receive fewer visitors. In some societies, bringing food to a partner in prison is seen as a “woman’s duty”, which husbands are reluctant to perform. In others, husbands of women who are imprisoned find it easier to remarry and start a new life when severed from their spouse, which results in the women being abandoned.⁷⁰

Where visits are possible, often the conditions make them traumatic for all parties, involving extended waits in inhospitable waiting areas, restrictions on the length of visit and number of people permitted, and intrusive searches, even of children. In some cases physical contact between the prisoner and visitors is prohibited.

Phone calls to family from prison are often restricted in length or frequency and can be prohibitively expensive, sometimes costing twenty times a standard phone call.⁷¹

“To make a telephone call was no easy matter. There were certain times. You had to have enough money in your account. You had to remember certain numbers. Of the six phones, usually two or three did not even work. You had to wait in line. You had little time to talk and your call was interrupted by the voice saying ‘This is a call from a federal prison.’” Former prisoner

Visits and phone calls are sometimes restricted or prohibited for prison disciplinary reasons.

The geographical isolation of women’s prisons causes particular problems for **indigenous women**. Researchers in Canada stressed that, “The dislocation and isolation of imprisonment is worsened by the difficulties encountered by relatives who have to travel from distant, often remote communities, to visit.”⁷² (Indigenous and minority women in prison are discussed in Part 19.)

Maintaining contact with children is also particularly difficult for women who are imprisoned outside their own country, **non-resident foreign nationals**. The particular needs of foreign national women prisoners are discussed in Part 18.

The difficulty in maintaining contact causes both the woman and her family to suffer. It aggravates the damage to family ties caused by imprisonment and has a particularly harsh impact on young children. Research shows that lack of adequate contact with children and family members is a key source of anxiety for female prisoners.

This dislocation of carer relationships also makes a woman’s reintegration into society after prison more difficult. Prisoners who maintain family ties while in prison display fewer disciplinary problems and have better physical and mental health while in prison, and have been shown to be more likely to reintegrate successfully into the community upon release and less likely to re-offend.⁷³

69 R. v. Daniels, [1990] 4 C.N.L.R. 51 (Sask.Q.B.), referred to in Arbour, L. (1996) *Commission of Inquiry into certain events at the Prison for Women in Kingston* (Public Works and Government Services Canada) p. 216.

70 ICRC (2004) *Addressing the Needs of Women Affected by Armed Conflict*, p. 144.

71 Nell Bernstein (2005) *All Alone in the World: Children of the Incarcerated* (The New Press) p.85.

72 Arbour, L. (1996) *Commission of Inquiry into certain events at the Prison for Women in Kingston* (Public Works and Government Services Canada) p. 198.

73 Harrison (1997) cited in Stanley, E and Byrne, S: *Mothers in Prison: Coping with Separation from Children*, paper presented at the Women in Corrections: Staff and Clients Conference, Adelaide, 31 October – 1 November 2000, p. 3.

Restrictions on contact

Particular problems can arise from how the authorities judge ‘reputable friends’. Relatives and close friends may be judged as disreputable, particularly where the prisoner is considered to be such a risk and their friends and relatives are also deemed to present a security risk. Such classifications further alienate women prisoners from their families and can prevent them from maintaining contact with their children either directly because their children are prohibited from visiting them or indirectly because other relatives are prohibited from visiting and there is no one to accompany the child on visits.⁷⁴

This is a more widespread problem for women in pre-trial detention than for sentenced women prisoners because the prosecution can seek to impose restrictions on whom the woman detainee can have contact with in the interests of pursuing the case. In these circumstances the security or interference threshold used to decide who can and cannot be in contact with the detainee will be lower.

Conjugal visits

Women prisoners may face more restrictions on conjugal visits than male prisoners. Evidence from Venezuela and Brazil shows that whilst male prisoners enjoy fairly ready access to conjugal visits, women do not. For a female prisoner to be allowed such a visit (in the few facilities which allow them at all) they must comply with numerous requirements (such as having an excellent conduct record), both partners must submit to various medical and psychological tests, and the man must be the prisoner’s husband or long-term ‘stable’ partner. These conditions are not required for male prisoners to receive visits.⁷⁵

International human rights standards

Universal Declaration of Human Rights, Article 16(3)

The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

International Covenant on Economic, Social and Cultural Rights, Article 10

The States Parties to the present Covenant recognize that:

1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children...

International Covenant on Civil and Political Rights, Article 17

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence...
2. Everyone has the right to the protection of the law against such interference or attacks.

⁷⁴ A. Wright, *Journal Letter from Israel/Palestine* May 2006, from <http://www.quaker.org.uk/Templates/Internal.asp?NodelD=92324> (accessed 4 April 2007)

⁷⁵ Human Rights Watch (1997) *Punishment Before Trial: Prison Conditions in Venezuela*; Human Rights Watch (1998) *Behind Bars in Brazil*.

Convention on the Elimination of All Forms of Discrimination against Women, Article 16

States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women ... (c) The same rights and responsibilities during marriage and at its dissolution;

*Convention on the Rights of the Child***Article 3(1)**

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

Article 9(3)

States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

*Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment***Principle 15**

Notwithstanding the exceptions contained in principle 16, paragraph 4, and principle 18, paragraph 3, communication of the detained or imprisoned person with the outside world, and in particular his family or counsel, shall not be denied for more than a matter of days

Principle 19

A detained or imprisoned person shall have the right to be visited by and to correspond with, in particular, members of his family and shall be given adequate opportunity to communicate with the outside world, subject to reasonable conditions and restrictions as specified by law or lawful regulations.

Principle 20

If a detained or imprisoned person so requests, he shall if possible be kept in a place of detention or imprisonment reasonably near his usual place of residence.

*Sixth UN Congress on the Prevention of Crime and the Treatment of Offenders, Resolution 9, Specific needs of women prisoners*⁷⁶

Bearing in mind that women most of the time have major responsibilities for children and considering that deinstitutionalization is an appropriate disposition for most women offenders to enable them to discharge their family responsibilities...

3. Recommends further that the United Nations, the governmental and non-governmental organizations in consultative status with it, and all other international organizations, should make continuing efforts to ensure that the woman offender is treated fairly and equally during arrest, trial, sentence and imprisonment, particular attention being paid to the special problems which women offenders encounter, such as pregnancy and child care...

⁷⁶ A/CONF.87/14/Rev.1, p. 12-13.

Human Rights Committee, General Comment 28 on the equality of rights between men and women ⁷⁷

... States parties should also report ... on any difference in treatment between male and female persons deprived of liberty, such as, for example, access to rehabilitation and education programmes and to conjugal and family visits.

Regional Standards on Detention

European Prison Rules

Rule 17.1

Prisoners shall be allocated, as far as possible, to prisons close to their home or places of social rehabilitation.

Rule 24.1

Prisoners shall be allowed to communicate as often as possible by letter, telephone or other forms of communication with their families, other persons and representatives of outside organisations and to receive visits from these persons.

Rule 24.2

Communication and visits may be subject to restrictions and monitoring for the requirements of continuing criminal investigations, maintenance of good order, safety and security, prevention of criminal offences and protection of victims of crime, but such restrictions, including specific restrictions ordered by a judicial authority, shall nevertheless allow an acceptable minimum level of contact.

Rule 24.4

The arrangements for visits shall be such as to allow prisoners to maintain and develop family relationships in as normal a manner as possible.

Rule 24.5

Prison authorities shall assist prisoners in maintaining adequate contact with the outside world and provide them with the appropriate welfare support to do so.

Rule 60.4

Punishment shall not include the total prohibition on family contact.

Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas

Preamble

BEARING IN MIND that punishments consisting of deprivation of liberty shall have as an essential aim the reform, social readaptation and personal rehabilitation of those convicted; the reintegration into society and family life; as well as the protection of both the victims and society.

Principle V

Persons deprived of liberty shall have the right to be promptly informed in a language they understand of the reasons for their deprivation of liberty and of the charges against them, as well as to be informed of their rights and guarantees; to have access to a translator or interpreter during the proceedings; and to communicate with their family.

⁷⁷ Para. 15, U.N. Doc. HRI/GEN/1/Rev.7 at 180 (2004).

Principle IX

2. Registration

The personal data of persons admitted to places of deprivation of liberty shall be recorded into an official register, which shall be made available to the person deprived of liberty, his or her representative, and the competent authorities. The register shall include, as a minimum the following information:

- a. Personal information including, at least, the following: name, age, sex, nationality, address and name of parents, family members, legal representatives or defense counsel if applicable, or other relevant data of the persons deprived of liberty;

4. Transfers

The transfers of persons deprived of liberty shall be authorized and supervised by the competent authorities, who shall, in all circumstances, respect the dignity and fundamental rights of persons deprived of liberty, and shall take into account the need of persons to be deprived of liberty in places near their family, community, their defense counsel or legal representative, and the tribunal or other State body that may be in charge of their case.

The transfers shall not be carried out in order to punish, repress, or discriminate against persons deprived of liberty, their families or representatives; nor shall they be conducted under conditions that cause physical or mental suffering, are humiliating or facilitate public exhibition.

Principle XIII

Persons deprived of liberty shall have the right to take part in cultural, sporting, and social activities, and shall have opportunities for healthy and constructive recreation. Member States shall encourage the participation of the family, the community, and non-governmental organizations in these activities, in order to promote the reform, social readaptation, and rehabilitation of persons deprived of liberty.

Principle XVIII

Persons deprived of liberty shall have the right to receive and dispatch correspondence, subject to such limitations as are consistent with international law; and to maintain direct and personal contact through regular visits with members of their family, legal representatives, especially their parents, sons and daughters, and their respective partners.

African Charter on the Rights and Welfare of the Child, Article 30: Children of Imprisoned Mothers

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

Application

Prison systems must be designed to give the “widest possible protection and assistance” to the family that can be accommodated within necessary security measures. Two key ways in which this can be done are by:

- where it is necessary to imprison a woman, accommodating her close to her family (and providing a means where she can be transferred to another location, should her family relocate);
- facilitating as much contact between the woman and her family as possible, through leave from prison, prison visits (including conjugal visits), telephone contact, letters, and other appropriate means.

Keeping women close to home

The importance of being imprisoned close to home is embodied in *Principle 20* of the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*. In some countries, such as Poland, legislation specifies that a woman has the right to serve her sentence close to her home. Prison facilities for women must be planned to assist their maintenance of family life, and recognising the rights and needs of their children to a relationship with their mother as a foremost priority.

This will usually mean providing more, smaller units for women prisoners. The challenge for prison systems is to do this whilst maintaining a high level of facilities for education, recreation and healthcare, and a prison regime of an appropriate security level. The *Corston Report* from the UK proposes that women’s prisons be replaced with “small local custodial units” this proposal is examined further in Part 23 on Alternatives to Imprisonment for Women.⁷⁸

The *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas* recognises the importance of proximity to family and community and explicitly prohibits the use of transfers away from family and community as a means of punishing either the prisoners or the family.

Leave, visits and other ways of maintaining family contact

Provisions for maintaining contact with children under 18 are discussed in detail in Part 10 below.

The UN Special Rapporteur on Violence against Women has insisted that authorities must ensure that “female prisoners have access to their basic rights, including the right to family visits.”⁷⁹ It is important that family visits are understood as a right and that as such the authorities cannot deny family contact as a punitive measure. The UNODC *Handbook on Women in Prison* highlights that it is essential that visitors not be charged for visits.⁸⁰ Similarly, the means by which women prisoners can stay in touch with their families, including letters and phone calls, must be affordable.

Women should be allowed to leave prison for short periods to be with their families, unless there is a specific reason in a woman’s individual case why this should not occur.

78 Corston, J. (2007) *The Corston Report: A report by Baroness Jean Corston of a review of women with particular vulnerabilities in the criminal justice system* (Home Office), p.86.

79 *Report of the Special Rapporteur on Violence against Women: mission to Russian Federation*, E/CN.4/2006/61/Add.2, Recommendations.

80 *UN Office on Drugs and Crime (2008) Handbook on Women in Prison*

Opportunities to visit women prisoners should be as extensive and flexible as possible. No restriction should be put on visits unless there is a compelling reason for the restriction in the circumstances. All visits must take place with the consent of the woman prisoner. The reference in Rule 79 of the *Standard Minimum Rules* to the “best interests of both [prisoner and visitor]” recognises that there are situations in which it may not be in the prisoner’s best interest to receive visits or maintain contact with certain family members. Given the high rates of domestic and familial abuse experienced by female prisoners no assumptions can be made as to who should visit the prisoner.

Visits and other forms of family contact should never be restricted for prison disciplinary reasons. This is recognised explicitly in the *European Prison Rules* as has the requirement that any restrictions on contact must still permit a minimum acceptable level of contact.

Prison authorities need to recognise that maintaining contact can be difficult and that women prisoners may need support to help them communicate with their families.

There should be no form of screen or physical barrier separating women and their visitors, again unless there is a compelling reason for this in the particular prisoner’s circumstances.

Prisons should ensure that visiting conditions enable visiting to be as calm and enjoyable a time as possible for prisoners and their visitors. Physically, visiting facilities should be comfortable, welcoming and allow for privacy. It should be possible for the prisoner and the visitor to participate in positive activities together, such as sports, crafts and singing. Such relaxed time together builds a prisoner’s capacity to interact in ‘normal’ social settings, which is important preparation for release. The Council of Europe’s Parliamentary Assembly has recognised the importance of quality visiting facilities in continuing family contact. They recommended that the Committee of Ministers invite Member States:

to improve conditions for prison visits by families, in particular by providing places where prisoners can be alone with family visitors⁸¹

Similarly, the importance of the family in the reintegration process is noted and protected in the *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas* in Principle XIII.

Conjugal visits are clearly a matter “relating to marriage and family relations”, as referred to in Article 16 of the *Convention on the Elimination of All Forms of Discrimination against Women*. Prison authorities must make sure that women prisoners have access to conjugal visits equal to that of men prisoners. Appropriate facilities, including condoms and other means for the woman to protect herself from sexually transmitted disease or unwanted pregnancy, should be provided. The World Health Organisation recommends that condoms be made available for family visits in prison “without a complicated or demeaning procedure to obtain them, such as having to request them from staff. Condoms could be made available in the visiting room for all users, whether or not they are requested.”⁸²

The Decision to Imprison

The UN Committee on the Rights of the Child has initiated the process of drafting Guidelines for the Appropriate Use and Conditions of Alternative Care for Children which are expected to be adopted by the UN General Assembly. The draft guidelines make explicit reference to the issue of children of prisoners. Under the *Convention on the Rights of the Child* States have a duty to consider the best interests of any children affected by the decisions it takes. Therefore the courts should

81 Council of Europe, Parliamentary Assembly, Recommendation 1340 (1997)I on the social and family effects of detention, paragraph 6.vi.

82 Reyes, H. (2001) ‘Women in prison and HIV’ in *HIV in Prisons* (World Health Organisation) p. 199.

take the impact of maternal imprisonment on children into account when deciding whether or not to imprison a woman. This has been explicitly recognised by the Human Rights Council in its 2008 resolution on the rights of the child, in which the Council:

Calls upon all States to give attention to the impact of parental detention and imprisonment on children and, in particular:

- (a) to give priority to non-custodial measures, when sentencing or deciding on pre-trial measures for a child's sole or primary carer, subject to the need to protect the public and the child;⁸³

Section 28(2) of the South African Constitution states that '[a] child's best interests are of paramount importance in every matter concerning the child.' In September 2007 the South African Constitutional Court considered the implementation of this provision in decisions regarding the imprisonment of children's primary caregivers. The Court demonstrated how the provision should be applied, and set out guidelines to 'promote uniformity of principle, consistency of treatment and individualisation of outcome':

1. The sentencing court should find out whether a convicted person is a primary caregiver whenever there are indications that this might be so.
2. The court should also ascertain the effect on the children of a custodial sentence if such a sentence is being considered.
3. If the appropriate sentence is clearly custodial and the convicted person is a primary caregiver, the court must apply its mind to whether it is necessary to take steps to ensure that the children will be adequately cared for while the caregiver is incarcerated.
4. If the appropriate sentence is clearly non-custodial, the court must determine the appropriate sentence, bearing in mind the interests of the children.
5. Finally, if there is a range of appropriate sentences, then the court must use the paramountcy principle concerning the interests of the child as an important guide in deciding which sentence to impose.⁸⁴

The specific provision in the *African Charter on the Rights and Welfare of the Child* relating to the children of imprisoned parents should not only be applied by States members of the African Union but should also be looked to by other States as a series of steps to be applied in order to better protect such children.

(This is explored further in Part 23 on Alternatives to Imprisonment for Women.)

⁸³ Rights of the Child, A/HRC/7/29, para. 31

⁸⁴ South Africa: Constitutional Court, *S v M* (CCT53/06) [2007] ZACC 18 (26 September 2007), para. 36

10. Mothers of children under 18 years of age

This section should be read alongside the discussion of maintaining family contact in Part 9 above, and of children living in prison with their mothers in Part 11 below.

The need for family contact, and the impact of a woman's imprisonment on her family, is exacerbated when she is the mother of children under 18 years of age. Most women prisoners are mothers, and many are the primary or sole carer of young children. This is rarely taken into account in their sentencing: the best interests of their children are not considered. In many countries, when a person is being sentenced or is imprisoned, no record is made as to whether they have children.

- In Brazil's largest women's prison, 87% of women prisoners are mothers.
- In the USA, 75% of women in prison are mothers, two-thirds with children under the age of 18.
- In the Russian Federation, 80% of convicted women are mothers.
- In the UK, 66% of women prisoners are mothers, 55% have at least one child under 16 years of age, and 34% were single parents before going into prison.
- In Lebanon, 49% of female inmates have children under 16, including 13% with children under 10 plus a further 19% with children under 5 years of age.
- In Rwanda, 45% of female prisoners have children under 16 years of age, including 15% with children under 10 plus a further 10% with children under 5 years of age.¹

¹ Information provided to the Quaker United Nations Office by the Rwandan Ministry of Internal Security, November 2004.

Distress caused by separation from children

It is well documented that imprisoned mothers experience a high degree of emotional distress as a consequence of concern for their children, exhibiting "anger, anxiety, sadness, depression, shame, guilt, decreased self-esteem and a sense of loss".⁸⁵ Women prisoners themselves frequently cite concern for their children as their biggest problem or worry in prison.

Interviews in the British women's prison, Holloway, found that forty-two of the women inmates had no idea who was looking after their children. Nineteen children under 16 years of age were looking after themselves.⁸⁶ Other research in the UK found that "only half the women who had lived with their children or been in contact with them before imprisonment had seen them since coming into prison."⁸⁷

⁸⁵ Stanley, E and Byrne, S: *Mothers in Prison: Coping with Separation from Children*, paper presented at the Women in Corrections: Staff and Clients Conference, Adelaide, 31 October – 1 November 2000, p. 3. See also, Robertson, O. (2007) *The Impact of Parental Imprisonment on Children* (Quaker United Nations Office).

⁸⁶ Revolving Doors Agency, cited in Rickford, D. (2003) *Troubled Inside: Responding to the mental health needs of women in prison* (Prison Reform Trust) p. 8.

⁸⁷ Wedderburn, D. (2000) *Justice for Women: The Need for Reform* (Prison Reform Trust) p. 11, citing Caddle and Crisp (1997).

Disruption to the child's living arrangements

Although imprisonment of either parent is traumatic for a child, the adverse effects are aggravated when it is their mother who is imprisoned. When fathers are imprisoned, typically the mother cares (or continues to care) for the children. In contrast, when a mother is imprisoned, there is a high likelihood of family break-up and a child is far more likely to be placed in the care of state social services. (However, it is important to also consider the impact of paternal imprisonment, in particular, where the father is the sole or main carer of children.)

A study of the children of imprisoned parents in New York, for example, showed that:

- 88.8% of children of imprisoned fathers lived with their mother or step-parent;
- 0.7% of children of imprisoned fathers went into state care;
- 20.4% of children of imprisoned mothers lived with their father or step-parent;
- 18.1% of children of imprisoned mothers went into a foster home or state agency.⁸⁸

Research in the UK with children of imprisoned mothers found that only 5% were able to remain in their own home during their mother's prison sentence.⁸⁹ When their mother is imprisoned, it is not unusual for children to be moved around between different carers and, to ease the burden on the new carers, to be separated from their brothers and sisters.

A mother's imprisonment seriously disrupts the lives of her children in all circumstances, and results in large numbers of children being institutionalised. This leads to cycles of institutionalisation. The Wedderburn report on women's imprisonment in the UK noted, "more than a quarter of the women [prisoners] themselves had been in care as a child."⁹⁰

The effects of imprisonment of their mother on a child's development

Research indicates that children of incarcerated mothers, in particular, suffer immediate and enduring adverse effects on their relationships with their peers, irreparable harm to their relationship with their mother, and may be at greater risk of future incarceration themselves.⁹¹ Whilst the type and severity of problem experienced by individual children varies, the extent of the problem is widespread. A 1994 survey of 1,766 women prisoners in the UK reported that:

Following imprisonment problems with their children's behaviour were reported by 44% of the mothers and 30% said their children had become withdrawn. (Such problems were more common amongst older children, those who had been separated from their siblings or placed in care.) This confirms other research ... which found that the children of women prisoners tended to have quite serious emotional and behavioural problems whereas the children of male prisoners tended to have relatively minor problems.⁹²

88 Human Rights Watch (2002) *Collateral Casualties: Children of incarcerated drug offenders in New York*, p. 6.

89 Gampell, L. (2003) Submission in response to the Green Paper Consultation 'Every Child Matters' (Action for Prisoners' Families) p. 4.

90 Wedderburn, D. (2000) *Justice for Women: The Need for Reform* (Prison Reform Trust) p. 10.

91 Human Rights Watch (1996) *All Too Familiar: Sexual Abuse of Women in U.S. State Prisons* p. 20 (referring to an unpublished doctoral study conducted at Brandeis University which estimated that the children of inmates were five to six times more likely than their peers to be incarcerated).

92 Caddle, D. and Crisp, D. (1997) *Mothers in Prison* (Home Office Research, Development and Statistics Directorate) p. 2.

A UK study found that the distress caused to children by separation due to parental imprisonment was different to that caused by separation due to family breakdown or bereavement. Certain behaviours, in particular the increased likelihood of the child getting a criminal record, were noticeably more pronounced in this group.⁹³ The study focussed on paternal imprisonment, but there is good reason to believe that the impacts would be similar if not more severe in the case of maternal imprisonment.

Difficulties in maintaining a relationship with a mother in prison

Lack of facilities for children's visits can make visiting difficult for both child and mother. Children find it harder to comply with rules requiring them to sit still at a table, talking. The presence of uniformed officers can be frightening. Rules forbidding physical contact are particularly distressing for children and mothers. The opportunity for a mother to physically comfort and express affection and play with her children is essential to the children's well being and to the mother/child relationship.⁹⁴

[My son] didn't sleep, he just cried all night he kept asking where mummy was and couldn't understand why mummy's car was there but mummy wasn't. Apparently he went off his food for the week, didn't eat for a week, they took him to the doctors to see if they could give him anything to help him, but he just kept crying. Apparently, he was walking around with a photo of me, saying "mummy back soon, mummy back soon."

Maintaining contact with children through phone calls and letters is likely to be particularly problematic. Restrictions on the time at which phone calls can be made may make it difficult to speak with children. A mother with several children may find it hard to share out 'phone-time' between them so that they all get an equal chance to speak with her. Children may be too young to read or write letters.⁹⁵

International human rights standards

Universal Declaration of Human Rights, Article 25(2)

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

International Covenant on Civil and Political Rights, Article 24(1)

Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

93 Murray, J. and Farrington, D.P. *Journal of Child Psychology and Psychiatry* 2005; 46, 12: 1269-1278

94 Guransky, D. et al (1998) *Who's Minding the Kids? Developing coordinated services for children whose mothers are imprisoned* (Social Policy Research Group, University of South Australia) p. 34.

95 Box: Nellis, M. (2001) *Kids Are The Issue: Sentence deferral and the use of custody for women offenders*, p. 3 – 4.

International Covenant on Economic, Social and Cultural Rights, Article 10

The States Parties to the present Covenant recognize that:

1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. ...

*Convention on the Rights of the Child**Article 2*

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.
2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

Article 3

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents ...

Article 6(2)

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

Article 9

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child...
2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.
3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests...

Article 12

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Article 18(1)

States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.

Article 20(1)

A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.

Convention on the Elimination of All Forms of Discrimination against Women, Article 16(1)

States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women ... (d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;

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

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

*Human Rights Committee, General Comment 17, Rights of the child*⁹⁶

Responsibility for guaranteeing children the necessary protection lies with the family, society and the State... it is primarily incumbent on the family, which is interpreted broadly to include all persons composing it in the society of the State party concerned, and particularly on the parents, to create conditions to promote the harmonious development of the child's personality and his enjoyment of the rights recognized in the Covenant... reports by States parties should provide information on the special measures of protection adopted to protect children who are abandoned or deprived of their family environment in order to enable them to develop in conditions that most closely resemble those characterizing the family environment.

Application

Considering the best interests of the child in sentencing mothers

The decision to imprison a parent is of its nature an action that concerns any minor children that the person may have. Article 3(1) of the *Convention on the Rights of the Child* establishes that the best interests of the child shall be a primary consideration in any decision concerning him or her. The Committee on the Rights of the Child has stressed that every legislative, administrative and judicial body or institution is required to apply the principle of the best interests of the child by systematically considering how children's rights and interests are or will be affected by their decisions and actions.

⁹⁶ Para. 6, U.N. Doc. HRI/GEN/I/Rev.7 at 144 (2004).

More specifically, the *Convention on the Rights of the Child* requires that a child not be separated from his or her parents unless it is necessary for the best interests of the child. Article 18 stipulates that States “shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child... The best interests of the child will be their basic concern.”

Article 2(2) of the Convention requires that a child be “protected against all forms of discrimination or punishment on the basis of the status, activities ... of the child’s parents, legal guardians, or family members.”

The *Universal Declaration of Human Rights* requires that motherhood be given special protection and assistance.

This confluence of human rights obligations necessitates that when a court is considering the sentence of a convicted mother of a child under 18 years, or whether to detain such a mother pre-trial, a primary consideration be what impact any decision or sentence will have on the child, and whether separation of the child from the mother by imprisonment is necessary. Further, the Court must ensure that the child is not punished on the basis of the accusation against or conviction of their mother.

In R. v. Mills, the UK Court of Appeal ruled that in sentencing “a mother who is the sole support of two young children ... the judge has to bear in mind the consequences to those children if the sole carer is sent to prison.”

([2002] 2 Cr.App. R. (S.) 52, para. 15)

Applying this framework to decision making – taking into account the rights of the child and the special protection of motherhood – a court should first consider non-custodial sentencing options. Article 30 of the *African Charter on the Rights and Welfare of the Child* specifically provides that States Parties shall ensure that a non-custodial sentence will always be first considered when sentencing expectant mothers and mothers of infants or young children, and establish and promote measures alternative to institutional confinement for such mothers.⁹⁷

The judgment of the South African Constitutional Court in *S v M* (quoted above in Part 9 on Family and Social Contact) provides useful guidelines on how to implement a best interests approach to the sentencing of children’s primary caregivers requiring that the State give consideration not only to the impact of imprisonment of the caregiver on his/her children but also to how to ensure adequate care for the children.⁹⁸

Ensuring the realisation of the rights of the children of imprisoned mothers

For the State to meet its obligations toward children of imprisoned mothers, it must establish processes to record the existence of such children, and to monitor their welfare and development.

Children with a mother who is in prison often see the exercise and fulfilment of all their basic rights under the *Convention on the Rights of the Child* undermined, including:

- their right not to be punished or discriminated against on the basis of their parent’s status (Article 2(2));
- their right to survival and development (Article 6);
- their right not to be separated from their parents against their will, unless such separation is necessary for their best interests (Article 9);

⁹⁷ The Council of Europe Parliamentary Assembly Recommendation 1469 (2000), later adopted by the Committee of Ministers (Decision CM 2001/15), recommends the use of imprisonment of mothers with babies or young children as a last resort and encourages the use of community-based penalties instead.

⁹⁸ South Africa: Constitutional Court, *S v M* (CCT53/06) [2007] ZACC 18 (26 September 2007), para. 36

- their right to be protected from all forms of violence (Article 19);
- their right to special protection and assistance by the State when temporarily or permanently deprived of their family environment (Article 20);
- their right to enjoy the highest attainable standard of health (Article 24); and
- their right to a standard of living adequate for their physical, mental, spiritual, moral and social development and the right to conditions of living necessary for their development (Article 27).

States Parties to the *Convention on the Rights of the Child* have committed themselves to ensure the realisation of all the rights in the Convention for all children within their jurisdiction, without discrimination of any kind and independently of the child's or parents' status. As interpreted by the Committee on the Rights of the Child and the Human Rights Committee, the non-discrimination obligation in both the *Convention on the Rights of the Child* and *International Covenant on Civil and Political Rights* requires that States actively identify individual children and groups of children for whom recognition and realisation of their rights may demand special measures in order to diminish or eliminate conditions that cause discrimination.⁹⁹ The vulnerability of children whose mother is in prison to discrimination in the realisation of their rights under the Convention requires that States address special measures to these children as individuals and as a group.

The Committee on the Rights of the Child regularly raises concerns about the realisation of the rights of children of imprisoned mothers. For example in relation to the periodical report from Thailand the Committee stated:

Furthermore, [the Committee] recommends that the State party continue to ensure that alternative care allows the child to maintain personal relations and direct contact with the mother who remains in prison.¹⁰⁰

Maintaining a relationship between a child and imprisoned mother

The *UN Standard Minimum Rules for the Treatment of Prisoners*, whilst emphasising the importance of maintaining family relationships and visits by family members, do not take account of the particular need and rights of children to maintain contact with their mother. However, a child's right to maintain personal relations and direct contact with both parents on a regular basis is enshrined in the *Convention on the Rights of the Child*. Article 16 of the *Convention on the Elimination of All Forms of Discrimination against Women* requires that male prisoners and female prisoners have the same rights to maintain contact with and maintain a relationship with their children.

Leave, visits and other ways for a woman to maintain general family contact are discussed in Part 9 above. Particular provision must be made, however, to ensure that women prisoners and their children can maintain a relationship.

Visits to a mother who is imprisoned are very important in maintaining the child's relationship with her. Visiting programmes for children should wherever possible include provisions for long visits, such as over a weekend or during school holidays. The Bedford Hills facility in the USA has summer week-long programmes for inmates' children, who are housed with local families and spend the day with their mothers on the premises.¹⁰¹ Illinois has facilities to allow for video conferencing between imprisoned mothers and their children; this is particularly useful when the woman is detained a great

⁹⁹ Committee on the Rights of the Child, General Comment 5, General measures of implementation of the Convention on the Rights of the Child, U.N. Doc. HRI/GEN/1/Rev.7 at 332 (2004); Human Rights Committee, General Comment 18, Non-discrimination, U.N. Doc. HRI/GEN/1/Rev.7 at 146 (2004).

¹⁰⁰ Consideration of the Reports Submitted by States Parties under Article 44 of the Convention on the Rights of the Child, Concluding observations: Thailand, CRC/C/THA/CO/2, paragraph 48. See also Consideration of the Reports Submitted by States Parties under Article 44 of the Convention on the Rights of the Child, Concluding observations: Philippines, CRC/C/15/Add.259, paragraphs 53-54.

¹⁰¹ Human Rights Watch (1991) *Prison Conditions in the United States* p. 61.

distance from her family.¹⁰² Some prisons allow extended visits and have special accommodation where family members can spend time together for a number of days.¹⁰³

Visits between mothers and children should allow unlimited physical contact unless there are reasons why this would not be in the child's best interests (assessed on a case-by-case basis). Any arrangements for searching visitors and visible security measures during visits should be minimal. Special places for children's visits should be set aside, with play facilities and room to run about.

Many countries are developing creative ways to make children's visits more relaxed and intimate for both mother and child, and to promote the mother-child relationship between visits. Examples include:

- setting up a 'homely' corner in the prison where photos of the mother and child can be taken, of which both can have copies;
- allowing imprisoned mothers to record bed-time stories onto cassettes and mail them to their children.

Prisons should offer mothers support to help them maintain and develop their relationship with their children, whilst managing the trauma of separation. This might include parenting classes or counselling.

These issues are explored in greater depth in *Children Imprisoned by Circumstance* by Oliver Robertson, published by QUNO in April 2008.

¹⁰² Information from QUNO correspondence with the International Corrections and Prisons Association, July 2005.

¹⁰³ Robertson, O. (2007) *The Impact of Parental Imprisonment on Children* (Quaker United Nations Office) contains details of such facilities.

11. Children living in prison with their mothers

This section should be read alongside the discussion of maintaining family contact in Part 9 and of mothers of children under 18 years of age in Part 10, above. Issues concerning childbirth in prison are discussed in Part 12, below.

More detailed analysis and recommendations regarding babies and young children residing in prisons have been published separately by the Quaker United Nations Office, Geneva.¹⁰⁴

UN Standard Minimum Rules for the Treatment of Prisoners

7. (1) In every place where persons are imprisoned there shall be kept a bound registration book with numbered pages in which shall be entered in respect of each prisoner received:
 - (a) Information concerning his identity;
 - (b) The reasons for his commitment and the authority therefore;
 - (c) The day and hour of his admission and release.
- (2) No person shall be received in an institution without a valid commitment order of which the details shall have been previously entered in the register.
23. (1) In women's institutions there shall be special accommodation for all necessary pre-natal and post-natal care and treatment...
- (2) Where nursing infants are allowed to remain in the institution with their mothers, provision shall be made for a nursery staffed by qualified persons, where the infants shall be placed when they are not in the care of their mothers.

One of the most complex issues relating to the imprisonment of women is deciding whether young children and babies should be allowed to remain with their mother in prison.

In many countries, babies born to women in prison stay in prison with their mother and young children may accompany their mothers into prison. Facilities vary widely between and within countries. Some countries have 'mother and baby units', with special facilities to support the mother and the child's development. In others, babies live in the prisons without their presence being registered or monitored by the State and/or without any special provision being made for them.

In prison, facilities to ensure the safety, health and development of a child are often lacking or inadequate. Whilst a number of countries have 'open' prisons for mothers with young children, in most cases children in prison are unable to interact regularly with the outside community and other family members. There is a dearth of research on the effects of living in prison on a child's early development, but it is likely that children living in prison often do not receive adequate stimuli to

¹⁰⁴ Alejos, M. (2005) *Babies and Small Children Residing in Prisons* (Quaker United Nations Office, Geneva); Robertson, O. (2007) *Impact of Parental Imprisonment on Children*; and Robertson, O. (2008) *Children Imprisoned by Circumstance*. All available from the Quaker United Nations Office, Geneva, or from its website: www.quno.org.

develop normally.¹⁰⁵ During its 2004 Discussion Day on Early Childhood Development, the Committee on the Rights of the Child identified “children living with mothers in prisons” as being among the most vulnerable children. The Committee is now regularly highlighting the concerns it has about children living in prison with a parent, including in its Concluding Observations regarding Iran, Bolivia, the Philippines and Nepal.¹⁰⁶

On the other hand, studies have shown that young children who are forcibly separated from their mothers suffer long-term developmental and emotional damage. These psychological and developmental problems tend to stay with children throughout their lives.

Both allowing babies to live in prison and separating babies from their mothers are problematic.

Most prison systems that allow young children to live in prison set an upper age limit, after which the child is removed. This reflects a policy that the adverse effects of a prison environment on a child’s development from a certain age outweigh the benefits of the child being with its mother. There is little consensus on the ‘right age’ and by its nature this will vary between cultures. Some countries allow mothers to keep their babies with them only whilst breastfeeding, others to 3, 4, 6 or even 12 years (see Table 1). The child is then removed and generally placed into the care either of other relatives or a state institution.

105 One study comparing prison unit babies with babies separated from their imprisoned mothers and cared for in the community found, somewhat equivocally, that:

Both groups of babies showed normal, healthy physical growth and their overall development fell within accepted norms. However, the babies who stayed in the units for four months or more, showed a slight and gradual decline in locomotor and cognitive scores. Once they started to sit up, crawl and walk there was less opportunity for the unit babies to explore and to make use of these skills... When babies left the units, there was a significant increase in their general development scores.

See Caddle, D. (1998) *Age limits for babies in prison: Some lessons from abroad* (Home Office Research, Development and Statistics Directorate) p. 2.

106 CRC/C/15/Add.254, para. 50-51; CRC/C/15/Add.256 para. 39-40.

Table 1: Babies living in prison: age limits

State	Maximum age
Australia	2 - 5 years
Bahrain	3 years
Bangladesh	6 years
Belgium	3 years
Bolivia	Whilst breastfeeding
Cambodia	6 years
Canada	4 years fulltime, 12 years during weekends and holidays
Chile	2 years
Colombia	3 years
Denmark	3 years
Egypt	2 years (policy is whilst breastfeeding but this has been set at 2 years)
Estonia	3 years
Finland	2 years
France	18 months
Germany	3, 4 or 6 years (depending upon whether closed or open prison)
Ghana	Whilst breastfeeding
Greece	4 years
Hong Kong	3 years
Hungary	6 - 12 months
Iceland	Whilst breastfeeding
India	6 years
Ireland	12 months
Italy	3 years (although pregnant women should not be imprisoned)
Japan	1 year
Kazakhstan	3 years
Kenya	4 years
Kyrgyzstan	3 years
Latvia	4 years
Malta	1 year
Mexico	6 years
Netherlands	6 months, 9 months or 4 years (depending upon whether closed or open prison)
New Zealand	6 months
Nigeria	18 months
Norway	0 months (babies are not allowed to reside in prison)
Pakistan	6 years
Poland	3 years
Portugal	3 years
Romania	1 year
Russia	3 years
Rwanda	5 years
Sierra Leone	2 years
Sweden	1 year
Switzerland	3 years
Spain	3 years
United Kingdom	9 or 18 months
USA	Varies from state-to-state, the lowest being 30 days
Venezuela	3 years

International human rights standards

The human rights provisions listed in Part 10 above apply. Further:

International Covenant on Economic, Social and Cultural Rights

Article 10

The States Parties to the present Covenant recognize that: ...

2. Special protection should be accorded to mothers during a reasonable period before and after childbirth.

Article 12

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for: ...
 - (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child...

*Human Rights Committee, General Comment 28 on the equality of rights between men and women*¹⁰⁷

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

*8th UN Congress on the Prevention of Crime and the Treatment of Offenders, Resolution 19 "Management of criminal justice and development of sentencing policies"*¹⁰⁸

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

*General Assembly Resolution 59/26. Rights of the child*¹⁰⁹

Calls upon States:

- (a) To take all appropriate measures to prevent and protect children from all forms of violence, including physical, mental and sexual violence, torture, child abuse, domestic violence, and abuse by police, other law enforcement authorities and employees and officials in detention centres or welfare institutions, including orphanages...

¹⁰⁷ Para. 15, U.N. Doc. HRI/GEN/1/Rev.7 at 180 (2004).

¹⁰⁸ Report of the 8th UN Congress on the Prevention of Crime and Treatment of Offenders, 1990, UN Doc. A/Conf.144/28/Rev. 1, p. 164.

¹⁰⁹ Para. 24, adopted 24 February 2005.

Regional Standards on Detention

European Prison Rules

Rule 36.1

Infants may stay in prison with a parent only when it is in the best interest of the infants concerned. They shall not be treated as prisoners.

Rule 36.2

Where such infants are allowed to stay in prison with a parent special provision shall be made for a nursery, staffed by qualified persons, where the infants shall be placed when the parent is involved in activities where the infant cannot be present.

Rule 36.3

Special accommodation shall be set aside to protect the welfare of such infants.

Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas *Principle X*

Where children of parents deprived of their liberty are allowed to remain in the place of deprivation of liberty, the necessary provisions shall be made for a nursery staffed by qualified persons, and with the appropriate educational, pediatric, and nutritional services, in order to protect the best interest of the child.

Principle XII

I. Accommodation

Persons deprived of liberty shall have adequate floor space, daily exposure to natural light, appropriate ventilation and heating, according to the climatic conditions of their place of deprivation of liberty. They shall be provided with a separate bed, suitable bed clothing, and all other conditions that are indispensable for nocturnal rest. The installations shall take into account the special needs of the sick, persons with disabilities, children, pregnant women or breastfeeding mothers, and the elderly, amongst others.

Principle XXII

3. Measures of solitary confinement

It shall be strictly forbidden to impose solitary confinement to pregnant women; mothers who are living with their children in the place of deprivation of liberty; and children deprived of liberty.

Application

The very minimal provisions of the *UN Standard Minimum Rules for the Treatment of Prisoners* with regard to infants in prison must today be read in light of our increased understanding of the rights of the child, and taking into account the obligations to provide special protection for mothers caring for newborn children.

Decision-making

In all decisions made concerning a child of an imprisoned woman, the best interests of the child must be a primary consideration. Decisions must be made with regard to the responsibility of the

State to ensure the child special protection and assistance. An infant child may only be separated from its parents when determined by competent authorities that such separation is necessary for the best interests of the child. Decisions as to whether or not a small child lives in prison with his/her mother must be made on a case-by-case basis, examining the particular circumstances of each child to arrive at a judgment as to what is in that child's best interests.

The decision-making process must take due consideration of the rights of all persons directly affected – mothers, fathers and children – and establish mechanisms to allow all those concerned to actively participate in the decision-making process. Other factors to be considered are the prison conditions and the availability of alternative carers.

The decision as to whether the child will stay in prison after birth or be cared for elsewhere should be made early in the woman's pregnancy. An expectant mother's uncertainty as to whether her baby will be taken away (and fear that if the baby is taken, she will lose custody permanently) leads to increased anxiety, and may disrupt a mother's bonding with the baby before as well as after birth.

Provisions for children living in prison with their mother

Where children do live in prison with their mother, special provisions must be in place to ensure that the child's rights are promoted and protected whilst in prison, and during any separation from the mother that may follow.

The reception of children into the prison should be recorded, and monitoring mechanisms should be in place to supervise their welfare. Child welfare, rather than prison authorities, should have primary responsibility for making decisions regarding children in prison, and specialists in social work and child development should supervise their care.

It should be possible for children to leave the prison at any time should circumstances alter such that this would be in their best interests.

Mechanisms must be in place to protect children residing in prisons from all forms of physical or mental violence, including sexual abuse, neglect or negligent treatment whilst in the care of their parent or any other person.

Young children in prison with their mother should be housed in specially created mother and child units, separate from the general prison population. These units should have all the facilities that a nursing mother would normally have in the community, and should provide the children with a stimulating and safe environment. Mothers should have access to facilities to prepare food for their children.¹¹⁰

In The Netherlands "children up to the age of four are accommodated at Ter Peel...set in 25 acres of wooded land with no high wall and minimal security. Because of this, most of the 102 mothers who used the unit in its first two years were convinced that their children did not realise they were staying in a prison... A great deal of effort has been made to provide the children with a home-like environment. At Ter Peel, ten rooms were converted to provide a purpose built, self contained unit suitable for babies and toddlers. Mother and baby are accommodated in two adjoining rooms, one for the mother, one for the child. There is also a communal dining room and living area with kitchen and well equipped indoor and outdoor play areas."

Children in prison must be given appropriate medical treatment and immunisation, and have access to specialist child health services, comparable to a child outside prison.

¹¹⁰ Box: Caddle, D. (1998) *Age limits for babies in prison: Some lessons from abroad* (Home Office Research, Development and Statistics Directorate) p. 3.

States must pay particular attention to promoting the development of children living in prison, given their obvious vulnerability. The *European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) Standards* advise that:

The goal should be to produce a child-centred environment, free from the visible trappings of incarceration, such as uniforms and jangling keys.

Arrangements should also be made to ensure that the movement and cognitive skills of babies held in prison develop normally. In particular, they should have adequate play and exercise facilities within the prison and, wherever possible, the opportunity to leave the establishment and experience ordinary life outside its walls.¹¹¹

Nursery care should be available to allow mothers to participate in educational, sports and income generating activities.

Children living in prison with their mother must not themselves be treated as prisoners. They should not be subject to the penitentiary regime or disciplinary punishments applicable to prisoners.¹¹² States should prohibit and provide effective redress for the use of physical disciplinary measures and corporal punishment of children residing in prisons.

Children must be permitted to leave the prison, and should be given as many opportunities as possible to do so, to allow them to participate in ordinary life outside. For example, older children should regularly have access facilities, such as nurseries and pre-schools, to provide space for normal personal and social development. Time spent outside prison helps children to acclimatise and is beneficial in to their adjustment when they leave permanently.¹¹³

There should be a suitable number of places in mother and child units. Mothers and children should not be prevented from being accommodated appropriately purely because the State has failed to provide the required number of places.

Both mothers and children should be able to have regular contact with other family members. Children should, in particular, also have an opportunity to have a relationship with their father.

Removing the child from prison

As with the decision to allow a child to live in prison, any decision to remove a child from prison must be based on the best interests of the child, determined on a case-by-case basis. Age limits should not be applied inflexibly. Consideration must be given to how much longer the mother is likely to be in prison, and what alternative care options are available.

If a decision is made to remove a child from prison, the authorities (preferably led by child welfare authorities) must take responsibility for ensuring that good alternative arrangements for the care of the child are made. All decisions on the arrangements for the child must be taken on the basis of the child's best interests. The mother, other family members, child welfare specialists, all relevant State welfare agencies and the child him/herself if old enough, should participate in this decision making. Counselling should be provided for parents and children.

If a child is to leave the prison, special transitional arrangements, such as overnight or weekend visits or allowing the mother temporary leave with her child, might ease the difficulty of separation for mother and child, and allow the child to settle gradually into their alternative care situation. When the child is living outside the prison, every effort should be made to encourage continued, regular and quality contact with the mother. Beyond the measures to encourage and support visits discussed in Part 10, special visiting facilities for babies and toddlers should be provided.

111 The CPT Standards, CPT/Inf/E (2002) 1 - Rev. 2003, Women deprived of their liberty, para. 29

112 International Commission of Jurists (2004) Human rights of women in conflict with the criminal justice system: submission to the Committee on the Elimination of Discrimination against Women, p. 26.

113 See further Robertson, O. (2008) *Children Imprisoned by Circumstance* (Quaker United Nations Office), pp. 28-29

Deferral of sentence and non-custodial sentences

During the UN Congress on the Prevention of Crime and the Treatment of Offenders in 1990, States declared that imprisonment of mothers with infants or small children should be “restricted” and that “a special effort” be made to avoid the extended use of imprisonment of mothers with infants or small children.¹¹⁴ The UN Office on Drugs and Crime has noted “Pregnant women and nursing mothers have particular problems relating to their condition and should not be imprisoned unless exceptional circumstances exist.”¹¹⁵

The Special Rapporteur on Prisons and Conditions of Detention in Africa has said:

Prison is not a safe place for pregnant women, babies and young children and it is not advisable to separate babies and young children from their mothers. However, it is possible to find solutions so that these women are not imprisoned: use of bail for remand prisoners, non-custodial sentences or conditional/early release, parole, probation, suspended sentences for convicted prisoners.¹¹⁶

Around the world, the vast majority of imprisoned mothers have been, if convicted at all, convicted of petty, non-violent offences, including theft and drug offences. Whatever the arrangements made for mothers in prison who have young children, the mother/child relationship and the child’s development will most certainly be damaged by the fact of the mother’s imprisonment. These women, their children, and their communities would be better served if mothers received non-custodial sentences, such as community service, parole or suspended sentences; if restorative justice processes were more widely used; and if women who needed it received drug treatment.

Alternative sentencing is further discussed in Part 22.

States have clearly acknowledged the benefits of non-custodial measures for mothers, but wider implementation is urgently needed.

The Russian penal code allows for mothers who are convicted of a less serious offence, that is, one for which a prison sentence of five years or less may be imposed, to have their sentence deferred until their youngest child reaches the age of fourteen. At that stage the sentence will be reviewed to determine whether it should be implemented.

114 Report of the 8th UN Congress on the Prevention of Crime and Treatment of Offenders (1990), UN Doc.A/Conf.144/28/Rev. 1, p. 164.

115 UN Office on Drugs and Crime and the Organisation for Security and Cooperation in Europe (2006) Criminal Justice Assessment Toolkit, Non Custodial and Custodial Measures: I The Prison System, p.27

116 Chirwa, V: *Report of the Special Rapporteur on Prisons and Conditions of Detention in Africa: Prisons in Malawi* 17-28 June 2001 p 36.

12. Pregnancy, birth and post-natal care

UN Standard Minimum Rules for the Treatment of Prisoners

23. (1) In women's institutions there shall be special accommodation for all necessary pre-natal and post-natal care and treatment. Arrangements shall be made wherever practicable for children to be born in a hospital outside the institution. If a child is born in prison, this fact shall not be mentioned in the birth certificate.
- (2) Where nursing infants are allowed to remain in the institution with their mothers, provision shall be made for a nursery staffed by qualified persons, where the infants shall be placed when they are not in the care of their mothers.

Pregnancy

In the USA, it is estimated that between 4% and 9% of women in prison are pregnant.¹¹⁷ One would expect this figure to be even higher in countries with a higher birth rate.

Women who are pregnant whilst in prison have particular health and nutrition needs. They require appropriate facilities and medical care to monitor their pregnancies. They need proper exercise, and to be issued with appropriate clothing. Many will need to be educated about pregnancy, and require counselling and support throughout. Such provisions are often unavailable or sorely inadequate.

In some cases, pregnant women are held separately from the rest of the prison population, which may lead to their suffering from isolation and lacking access to facilities. Where pregnant women are integrated with the rest of the prison population, they may be at greater risk of disease, violence, or of having their needs overlooked.

Poor prison conditions and lack of proper care and facilities may place at risk both the health of the woman, and the health - or even life - of her unborn child. The high level of stress that accompanies incarceration in itself has the potential to adversely affect pregnancy. A specialist on pregnancy in prison has noted that "...pregnancy during incarceration must be understood as a high-risk situation, both medically and psychologically, for inmate mothers and their children...."¹¹⁸

HIV and pregnancy

In prison, it is not uncommon for a woman to discover she is pregnant at the same time that she discovers that she is HIV positive (refer to Part 13 for a more detailed discussion on HIV/AIDS): "The psychological burden of being in prison, leaving behind her family, a new pregnancy and discovering her HIV status can be devastating for women who are often fragile and vulnerable."¹¹⁹ The anxieties shared by most pregnant prisoners about their baby being taken from them are heightened by fear of infecting their baby with HIV.

Women with HIV who are pregnant have additional nutritional requirements. For example, vitamin A deficiency has been associated with greater transmission of HIV to the newborn.¹²⁰

117 Owen, B: "Understanding Women in Prison" in Ross & Richards, Stephen (eds) (2003) *Convict Criminology* (Thomson Wadsworth), p. 240.

118 Acoca (1998), quoted in Owen, B: "Understanding Women in Prison" in Ross & Richards, Stephen (eds) (2003) *Convict Criminology* (Thomson Wadsworth), p. 240.

119 Reyes, H. (2001) 'Women in prison and HIV' in HIV in Prisons (World Health Organisation) p. 210.

120 *Ibid.*, p.211.

Birth

Adequate medical attention during birth is clearly essential for mother and child.

Women in prison often do not have access to any education in breathing and birthing techniques to help prepare them for the birth.

Depending upon the country and the prisoner, women may give birth either in prison or at a public hospital. In some countries women prisoners are shackled during childbirth. A woman prisoner in the USA reported that when she went into labour, she was placed in leg irons and belly chains to go to the hospital. Once at the hospital, the doctor told her to walk to assist her labour. She was required to do so by the guards while still in leg irons.¹²¹

Post-natal care and breastfeeding

Once born, the child requires immunisation and regular health checks. As during pregnancy, breastfeeding women have particular health and nutrition needs that are often unmet in prison. Mothers require health checks to ensure that their body is recovering from birth healthily, and to ensure, for example, that they do not have any infection that they might transmit to the child through breastfeeding. Often women in prison are discouraged from breastfeeding, as it is perceived as interfering with prison routines.

A prison worker in Brazil has noted that there is “No clear policy on post-natal care. Disorganisation ensures women may be separated from their babies soon after the birth until a nursery bed is found.”¹²²

International human rights standards

International Covenant on Civil and Political Rights, Article 24(2)

Every child shall be registered immediately after birth and shall have a name.

International Covenant on Economic, Social and Cultural Rights

Article 10(2)

Special protection should be accorded to mothers during a reasonable period before and after childbirth...

Article 12

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:
 - (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child...

¹²¹ Human Rights Watch (1996) *All Too Familiar: Sexual Abuse of Women in U.S. State Prisons* p. 286.

¹²² Howard, C: *Main issues facing Brazil's women prisoners* (unpublished, 2003).

*Convention on the Rights of the Child***Article 7(1)**

The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.

Article 24

1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.
2. States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures:
 - (a) To diminish infant and child mortality;
 - (b) To ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care...
 - (d) To ensure appropriate pre-natal and post-natal health care for mothers;
 - (e) To ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of accidents...

Convention on the Elimination of All Forms of Discrimination against Women, Article 12 (2)

States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.

*Body of Principles for the Protection of All Persons under Any Form of Detention or****Imprisonment, Principle 5 (2):***

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

*Human Rights Committee, General Comment 28 on the equality of rights between men and women*¹²³

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

*Sixth UN Congress on the Prevention of Crime and the Treatment of Offenders, Resolution 9, Specific needs of women prisoners*¹²⁴

Bearing in mind that women most of the time have major responsibilities for children and considering that deinstitutionalization is an appropriate disposition for most women offenders to enable them to discharge their family responsibilities...

¹²³ Para 15, U.N. Doc. HRI/GEN/1/Rev.7 at 153 (2004).

¹²⁴ A/CONF87/14/Rev.1, p. 12-13.

3. Recommends further that the United Nations, the governmental and non-governmental organizations in consultative status with it, and all other international organizations, should make continuing efforts to ensure that the woman offender is treated fairly and equally during arrest, trial, sentence and imprisonment, particular attention being paid to the special problems which women offenders encounter, such as pregnancy and child care...

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

...the use of imprisonment for certain categories of offenders, such as pregnant women or mothers with infants or small children, should be restricted and a special effort made to avoid the extended use of imprisonment as a sanction for these categories.¹²⁵

Regional Standards on Detention

European Prison Rules, Rule 34.3

Prisoners shall be allowed to give birth outside prison, but where a child is born in prison the authorities shall provide all necessary support and facilities.

Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas

Principle II

Measures designed exclusively to protect the rights of women, particularly the rights of pregnant women and nursing mothers; of children; of the elderly; of those who are sick or suffering from infections such as HIV-AIDS; of persons with a physical, mental, or sensory disability; as well as of indigenous peoples, afro-descendants, and minorities shall not be considered discriminatory. These measures shall be applied in accordance with the law and international human rights law, and shall always be subject to review by a judge or other competent, independent, and impartial authority.

Principle X

Women and girls deprived of liberty shall be entitled to access to specialized medical care that corresponds to their physical and biological characteristics, and adequately meets their reproductive health needs. In particular, they shall have access to gynecological and pediatric care, before, during, and after giving birth, which shall not take place, as far as possible, inside the place of deprivation of liberty, but at hospitals or appropriate institutions. If a child is born in a place of deprivation of liberty, this fact shall not be mentioned in the birth certificate.

Principle XI

I. Food

Persons deprived of liberty shall have the right to food in such a quantity, quality, and hygienic condition so as to ensure adequate and sufficient nutrition, with due consideration to their cultural and religious concerns, as well as to any special needs or diet determined by medical criteria. Such food shall be provided at regular intervals, and its suspension or restriction as a disciplinary measure shall be prohibited by law.

Principle XII

I. Accommodation

Persons deprived of liberty shall have adequate floor space, daily exposure to natural light, appropriate ventilation and heating, according to the climatic conditions of their place of deprivation of liberty. They shall be provided with a separate bed, suitable bed clothing, and all other conditions that are

¹²⁵ Report of the 8th UN Congress on the Prevention of Crime and Treatment of Offenders (1990), UN Doc.A/Conf.144/28/Rev. 1, p. 164.

indispensable for nocturnal rest. The installations shall take into account the special needs of the sick, persons with disabilities, children, pregnant women or breastfeeding mothers, and the elderly, amongst others.

Principle XXII

3. Measures of solitary confinement

It shall be strictly forbidden to impose solitary confinement to pregnant women; mothers who are living with their children in the place of deprivation of liberty; and children deprived of liberty.

Application

Presumption against imprisonment of women who are pregnant

As acknowledged by the 8th UN Crime Congress in 1990, imprisonment of pregnant women should be ‘restricted’. The International Centre for Prison Studies advises, “Pregnant women should only be held in prison in the most extreme circumstances.”¹²⁶ A recent UN Office on Drugs and Crime publication states: “Pregnant women and nursing mothers have particular problems relating to their condition and should not be imprisoned unless exceptional circumstances exist.”¹²⁷

In order to protect the health of the mother and of the newborn child, pregnancy should in principle be an obstacle to incarceration, both pre-trial and post-conviction, and pregnant women should not be sent to prison unless there are absolutely compelling reasons to do so. The International Commission of Jurists suggests that for pre-trial detention such reasons might be a real risk of absconding or the concrete threat of a violent crime. Non-violent crimes should always carry non-custodial sentences for pregnant women.¹²⁸

States might consider imposing non-custodial sentences, or deferring the sentences of pregnant women, although this merely postpones the problems of imprisonment to when the woman has a young child, unless the sentence is then subject to review or suspension in the light of the woman’s behaviour in the interim.

When women become pregnant during their incarceration, the need for their imprisonment should immediately be reviewed, and continue to be reviewed throughout the pregnancy. They should be considered for non-custodial measures instead of the remainder of their prison term.

Arrangements for pregnant women

In any case where a pregnant woman, despite the above presumption, is imprisoned, special arrangements need to be made both throughout the pregnancy and after the birth. The *UN Standard Minimum Rules for the Treatment of Prisoners* specify only that there be “special accommodation for all necessary pre-natal and post-natal care and treatment.” In terms of what special accommodations are necessary, one must consider what is needed to address the human rights of both the mother and the child.

In all arrangements concerning pregnancy, birth and post-natal care, the prison administration should ensure that full consideration is given to any cultural or religious issues surrounding childbirth, including rituals, food, dress and worship.

Pregnant women should be ensured a nutritious diet, a healthy environment and regular exercise. The *European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*

¹²⁶ A. Coyle (2002) *A Human Rights Approach to Prison Management: Handbook for prison staff* (International Centre for Prison Studies) p.

¹²⁷ UN Office on Drugs and Crime and the Organisation for Security and Cooperation in Europe (2006) *Criminal Justice Assessment Toolkit, Non Custodial and Custodial Measures: I The Prison System*, p.27

¹²⁸ International Commission of Jurists (2004) *Human rights of women in conflict with the criminal justice system: submission to the Committee on the Elimination of Discrimination against Women*, p. 23.

recommends a high protein diet, rich in fresh fruit and vegetables.¹²⁹ The International Committee of the Red Cross suggests vitamin and mineral supplements, such as calcium, iron and folic acid.¹³⁰ Current guidelines for healthy eating and nutrition during pregnancy should be followed.

Pregnant prisoners should be provided with the same level of health care as is provided to women not in prison, including access to obstetricians, gynaecologists, if required, and midwives or birthing practitioners appropriate to their culture. If required, interpreters must be arranged during antenatal care, around birth and post-natally to ensure proper provision of health care. Midwives (or other staff) from the hospital where the woman is to give birth should provide antenatal care. This offers the advantage of continuity, and the midwives are more likely to view the mothers as pregnant women rather than prisoners.¹³¹

Specialists recommend having a pregnancy-only unit in prison. This is important in putting in place structures to support the emotional and physical well-being of the mother and baby. Mixed units can lead to a lack of flexibility in the regime and lack of focused facilities.¹³²

There should be 24-hour access to advice from midwives on whether the woman needs to go to hospital. This can be done via a mobile phone, with a direct link to the labour ward which can be handed to women in their cells at any time (this operates in Holloway Prison in the UK).

There should be an appropriate degree of flexibility in the prison regime for pregnant women and mothers. They should have opportunities to make up missed sleep and meals. They should not be forced to take part in activities if feeling unwell. Food allocations should reflect the needs of the growing baby, for example, by making available additional snacks in situations where meals have been missed or where there is a long gap between meals.¹³³

Measures of physical restraint, such as shackles or straitjackets, should never be used on a pregnant woman unless there is a compelling reason to do so. **Advice on restraining pregnant women should always be sought from midwifery staff.**

The woman's confidentiality in medical treatment should not be waived on the pretext that she is a prisoner. However, if she has an infectious disease, some informed disclosure may be necessary to ensure appropriate medical care (for example, in planning a caesarean section for an HIV positive mother).¹³⁴

Pregnant women are likely to have particular counselling and support needs in coming to terms with having a baby and the transition to motherhood whilst in prison. This is particularly so if a pregnant woman is told that she will not be able to keep her baby with her. Terminology used within the prison and the hospital should be positive, referring to 'women', 'pregnant women' and 'mothers', rather than 'prisoners'.¹³⁵

Pregnant women and mothers who have been given a custodial sentence should automatically be considered for a place with their baby, and should not have to apply. They should have access to legal representation and decisions should be made as early as possible to avoid stress to the pregnant mother and unborn child and unnecessary periods of separation.

129 The CPT Standards, CPT/Inf/E (2002) I - Rev. 2003, Women deprived of their liberty, para. 26.

130 ICRC (2004) *Addressing the Needs of Women Affected by Armed Conflict*, p. 121.

131 *Birth in Prison - Recommendations by the Birth Companions working in Holloway Prison* provided to the Quaker United Nations Office by Sheila Kitzinger, June 2005.

132 *Ibid.*

133 *Ibid.*

134 Reyes, H. (2001) 'Women in prison and HIV' in *HIV in Prisons* (World Health Organisation) p. 210.

135 *Birth in Prison - Recommendations by the Birth Companions working in Holloway Prison* provided to the Quaker United Nations Office by Sheila Kitzinger, June 2005.

Arrangements for birth

It should be recognised that, in the words of a group of birth companions who work with women in a UK prison:

The birth of a baby affords an opportunity for the mother to alter her lifestyle and behaviour and women in detention should also be afforded this opportunity (provided this is also in the best interests of the baby). Sometimes the detention of the mother will have removed her from the influence of a violent partner or peer group and this life changing experience should not be undervalued for its contribution towards her rehabilitation.¹³⁶

Imprisoned women who give birth should have the same options and the same support as other women giving birth. As directed by the *UN Standard Minimum Rules for the Treatment of Prisoners*, the presumption should always be that no expectant mother will give birth inside a prison, but will be transferred to a civilian hospital, or other appropriate birthing place. A woman should not be forced to give birth in a hospital, if her choice is to give birth in an appropriate non-hospital environment. She should be allowed the birth companion(s) of her choice, and the prison must ensure that the person(s) she has requested are contacted as soon as the transfer to the birthplace has been arranged so that they can support her during labour and the transfer, if desired.¹³⁷

Measures of physical restraint should never be used on women in labour, during transport to hospital or during delivery unless there are compelling reasons for believing that she is dangerous or likely to abscond *at that time*. In cases where a woman poses a significant and realistic threat to the safety of others, all other methods of ensuring security shall be attempted before physical restraints are used.¹³⁸ The *European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* has described pregnant women being shackled or otherwise restrained to beds or other items of furniture during gynaecological examinations and/or delivery as “completely unacceptable, and could certainly be qualified as inhuman and degrading treatment.”¹³⁹ Both the Human Rights Committee and the Committee Against Torture have expressed concern about the shackling of women during childbirth. The Committee Against Torture considered this a violation of article 16 of the Convention Against Torture, which requires States to prevent acts of cruel, inhuman or degrading treatment or punishment that do not amount to torture and which are committed by or acquiesced to by a public official. The Human Rights Committee recommended that the State party in question “**prohibit the shackling of detained women during childbirth.**”¹⁴⁰ The use of any physical restraints should be continually assessed throughout, and discussed with the responsible medical staff.

Any security restrictions that are necessary during this period should be as discreet as possible.¹⁴¹ Male prison staff should not be present during intimate examinations or during birth.

The child must be registered immediately after birth, as required by Article 24(2) of the *International Covenant on Civil and Political Rights* and Article 7(1) of the *Convention on the Rights of the Child*. As specified by the *UN Standard Minimum Rules for the Treatment of Prisoners*, if a child is born in prison, this fact should not be mentioned on the birth certificate, while ensuring that birth registration takes place.

¹³⁶ *Ibid*

¹³⁷ *Ibid*

¹³⁸ *Human Rights and Vulnerable Prisoners* (Penal Reform International) p. 70.

¹³⁹ The CPT Standards, CPT/Inf (2000) 13, 10th General Report, para. 27

¹⁴⁰ Concluding Observations of the Human Rights Committee: United States of America, 18 December 2006, CCPR/C/USA/CO/3/Rev.1, paragraph 33; Concluding observations of the Committee Against Torture: United States of America, 25 July 2006, CAT/C/USA/CO/2, paragraph 33.

¹⁴¹ Coyle, A. (2002) *A Human Rights Approach to Prison Management: Handbook for prison staff* (International Centre for Prison Studies) p.

Post-natal care and breastfeeding

As with pregnancy, a woman who is breastfeeding should only be imprisoned where there are compelling reasons why this is necessary in her particular circumstances. This flows from the obligation in the *International Covenant on Economic, Social and Cultural Rights* to accord a mother with 'special protection' for a reasonable period before and after childbirth. It was recognised by the resolution of the 8th UN Congress on the Prevention of Crime and the Treatment of Offenders that imprisonment of "mothers with infants or small children, should be restricted and a special effort made to avoid the extended use of imprisonment as a sanction for these categories."¹⁴² A mother whose baby is being cared for in a specialist hospital unit should not be held in restraints while staying in or visiting her baby in hospital.

Following the birth, if the mother is to return to prison, this should occur only once her doctor or midwife has determined that this would not compromise the health of the mother or the baby.¹⁴³ The mother and child should be provided with all appropriate post-natal health care, including immunisation of the child, and the mother should have an appropriately enriched or supplemented diet for feeding.

Breastfeeding mothers should be supported and encouraged. Facilities should be provided to enable the mother to breastfeed in a relaxed environment, and prison routines should not be allowed to interfere with breastfeeding. Many women require assistance to start breastfeeding successfully, which is absent in most prisons. If a nursing mother is unwilling or unable to breastfeed, an alternative must be provided. Where milk powder is given, precautions must be taken to ensure that the water, preparation and dilution of milk powder and feeding materials are hygienic.¹⁴⁴

A mother should not be separated from her baby against her wishes unless there are child protection issues or other reasons why the welfare of the baby may be at risk.

The decision to breast or bottle-feed will profoundly affect the future health of the mother and her baby, and women should be provided with appropriate information on this issue.

Post-natally, the privacy of mother and baby and family visitors must be respected so as to provide a good environment for family bonding and feeding. Babies and their mothers should be able to attend classes such as baby massage, post-natal discussion groups and singing and craft activities to promote bonding. Whilst no woman should be pressured into putting her child into a prison crèche, nursery facilities must be available. Mothers, particularly those breastfeeding, should not be required to attend activities where they are separated from their babies unless absolutely necessary. Where possible, crèches should be provided close by so that mothers can return to feed or comfort their babies.

After giving birth, women should receive counselling and support and be monitored for depression. Leave should be given for the mother and baby in order to promote family bonding (with siblings and other family members where appropriate). Special arrangements need to be made for baby photos because of security issues, but this should be recognised as the baby's right.

¹⁴² Report of the 8th UN Congress on the Prevention of Crime and Treatment of Offenders (1990), UN Doc.A/Conf.144/28/Rev.1, p. 164.

¹⁴³ *Human Rights and Vulnerable Prisoners* (Penal Reform International) p. 71.

¹⁴⁴ ICRC (2004) *Addressing the Needs of Women Affected by Armed Conflict*, p. 121.

I 3. Hygiene, healthcare and HIV/AIDS

UN Standard Minimum Rules for the Treatment of Prisoners

Accommodation

12. The sanitary installations shall be adequate to enable every prisoner to comply with the needs of nature when necessary and in a clean and decent manner.
13. Adequate bathing and shower installations shall be provided so that every prisoner may be enabled and required to have a bath or shower, at a temperature suitable to the climate, as frequently as necessary for general hygiene according to season and geographical region, but at least once a week in a temperate climate.

Personal hygiene

15. Prisoners shall be required to keep their persons clean, and to this end they shall be provided with water and with such toilet articles as are necessary for health and cleanliness.

Clothing and bedding

17. (2) All clothing shall be clean and kept in proper condition. Underclothing shall be changed and washed as often as necessary for the maintenance of hygiene.

Medical services

22. (1) At every institution there shall be available the services of at least one qualified medical officer who should have some knowledge of psychiatry. The medical services should be organized in close relationship to the general health administration of the community or nation. They shall include a psychiatric service for the diagnosis and, in proper cases, the treatment of states of mental abnormality.

(2) Sick prisoners who require specialist treatment shall be transferred to specialized institutions or to civil hospitals....

...

24. The medical officer shall see and examine every prisoner as soon as possible after his admission and thereafter as necessary, with a view particularly to the discovery of physical or mental illness and the taking of all necessary measures; the segregation of prisoners suspected of infectious or contagious conditions; the noting of physical or mental defects which might hamper rehabilitation, and the determination of the physical capacity of every prisoner for work.
25. (1) The medical officer shall have the care of the physical and mental health of the prisoners and should daily see all sick prisoners, all who complain of illness, and any prisoner to whom his attention is specially directed.
(2) The medical officer shall report to the director whenever he considers that a prisoner's physical or mental health has been or will be injuriously affected by continued imprisonment or by any condition of imprisonment.

A. PRISONERS UNDER SENTENCE

Guiding principles ...

62. The medical services of the institution shall seek to detect and shall treat any physical or mental illnesses or defects which may hamper a prisoner's rehabilitation. All necessary medical, surgical and psychiatric services shall be provided to that end.

Standards of medical care within prisons vary greatly, both from country to country and from prison to prison, but are often inadequate.

Hygiene provisions are often modelled on men’s needs, and little or no attention paid to menstruation, menopause and women’s sexual health.

“We are given undergarments once a year.” Prisoner

Women prisoners suffer poor physical health, often at rates and with a severity far exceeding those of male prisoners or of women in the general population. For example, recent Australian research examining the health of incarcerated parents found that 68% of all mothers in prison are infected with Hepatitis C, as compared to 42% of fathers.¹⁴⁵ (The mental health of women prisoners is discussed in Part 15.)

Penal Reform International has highlighted the need to consider the impact of menopause in caring for women prisoners:

For those in detention, the arrival of the end of childbearing years can add an additional, sometimes traumatic aspect to already difficult conditions. Not only may imprisonment have deprived a woman of her opportunity to bear children, but dealing with the emotional stress of menopause, without the support of family and loved ones, can be very difficult in a prison setting. In some cases, the stress of imprisonment can accelerate the onset of menopause. These problems may be of particular concern in countries where great emphasis is placed on women’s role as bearers of children.¹⁴⁶

HIV/AIDS and other sexually transmitted diseases

In many countries, a significant percentage of women prisoners are infected with sexually transmitted diseases, including HIV. It is estimated that in Russia “between one third and one half of women arrive at institutions of confinement infected with venereal diseases, syphilis in particular.”¹⁴⁷

Women have a considerably higher risk of contracting HIV from sexual activity than men, and injecting drug users may contract HIV through sharing needles. Women arrested for drug-related offences or for prostitution are thus at high risk of already being infected with HIV when they enter the prison system. Further, the risk of HIV transmission is increased where a woman’s genital tract is torn or bleeding during sex, such as when a woman is violently raped, or otherwise subjected to rough sex. As discussed in Part 5, a large proportion of women in prison have been victims of sexual abuse, which may have exposed them to a heightened risk of HIV infection. In many countries, many or most women in prison will not know their HIV status.¹⁴⁸

Research in women’s prisons in Brazil has found that HIV/AIDS affects a higher percentage of incarcerated women than men. Twenty percent of the women prisoners tested for the AIDS virus at the Women’s Penitentiary in São Paulo were found to be HIV positive.¹⁴⁹

Women may also be at particular risk of contracting HIV and other sexually transmitted diseases whilst in prison, in part due to their vulnerability to sexual violence.

145 NSW Corrections Health Service; Inmate Health Survey Report; 2003, quoted in correspondence from Simon Quilty (MB BS, MPhilPH) on behalf of Defence for Children International, Australia, December 2004.

146 *Human Rights and Vulnerable Prisoners* (Penal Reform International) p. 72.

147 Alpern, L. *Women and the System of Criminal Justice in Russia: 2000-2002* at <http://www.mhg.ru/english/1F4FF6D> (accessed 20 July 2005).

148 Reyes, H. (2001) ‘Women in prison and HIV’ in *HIV in Prisons* (World Health Organisation) p. 194

149 Human Rights Watch (1998) *Behind Bars in Brazil*, p. 2.

International human rights standards

International Covenant on Economic, Social and Cultural Rights, Article 12

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for: ... (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

Convention on the Elimination of All Forms of Discrimination against Women, Article 12

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.
2. Notwithstanding the provisions of paragraph 1 of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.

Convention on the Elimination of All Forms of Racism, Racial Discrimination and Xenophobia, Article 5

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: ...

- (e) Economic, social and cultural rights, in particular: ...
- (iv) The right to public health, medical care, social security and social services;

Convention on the Rights of the Child, Article 24

States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.

Basic Principles for the Treatment of Prisoners, Principle 9

Prisoners shall have access to the health services available in the country without discrimination on the grounds of their legal situation.

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

Principle 5(2)

Measures applied under the law and designed solely to protect the rights and special status of ... aged, sick or handicapped persons shall not be deemed to be discriminatory...

Principle 24

A proper medical examination shall be offered to a detained or imprisoned person as promptly as possible after his admission to the place of detention or imprisonment, and thereafter medical care and treatment shall be provided whenever necessary. This care and treatment shall be provided free of charge.

Regional Standards on Detention

European Prison Rules,

Rule 15.1

At admission the following details shall be recorded immediately concerning each prisoner: ..

- f. subject to the requirements of medical confidentiality, any information about the prisoner's health that is relevant to the physical and mental well-being of the prisoner or others.

Rule 16

As soon as possible after admission:

- a. information about the health of the prisoner on admission shall be supplemented by a medical examination...

Rule 18.1

The accommodation provided for prisoners, and in particular all sleeping accommodation, shall respect human dignity and, as far as possible, privacy, and meet the requirements of health and hygiene, due regard being paid to climatic conditions and especially floor space, cubic content of air, lighting, heating and ventilation.

Rule 19.2

When prisoners are admitted to prison the cells or other accommodation to which they are allocated shall be clean.

Rule 19.3

Prisoners shall have ready access to sanitary facilities that are hygienic and respect privacy.

Rule 19.4

Adequate facilities shall be provided so that every prisoner may have a bath or shower, at a temperature suitable to the climate, if possible daily but at least twice a week (or more frequently if necessary) in the interest of general hygiene.

Rule 19.7

Special provision shall be made for the sanitary needs of women.

Rule 20.3

All clothing shall be maintained in good condition and replaced when necessary.

Rule 21.

Every prisoner shall be provided with a separate bed and separate and appropriate bedding, which shall be kept in good order and changed often enough to ensure its cleanliness.

Rule 22.1

Prisoners shall be provided with a nutritious diet that takes into account their age, health, physical condition, religion, culture and the nature of their work.

Rule 22.5

Clean drinking water shall be available to prisoners at all times.

Rule 22.6

The medical practitioner or a qualified nurse shall order a change in diet for a particular prisoner when it is needed on medical grounds.

Rule 39.

Prison authorities shall safeguard the health of all prisoners in their care.

Rule 41.1

Every prison shall have the services of at least one qualified general medical practitioner.

Rule 41.2

Arrangements shall be made to ensure at all times that a qualified medical practitioner is available without delay in cases of urgency.

Rule 42.3

When examining a prisoner the medical practitioner or a qualified nurse reporting to such a medical practitioner shall pay particular attention to: ...

- g. ensuring that prisoners carrying the HIV virus are not isolated for that reason alone;

Rule 43.1

The medical practitioner shall have the care of the physical and mental health of the prisoners and shall see, under the conditions and with a frequency consistent with health care standards in the community, all sick prisoners, all who report illness or injury and any prisoner to whom attention is specially directed.

Rule 43.3

The medical practitioner shall report to the director whenever it is considered that a prisoner's physical or mental health is being put seriously at risk by continued imprisonment or by any condition of imprisonment, including conditions of solitary confinement.

*Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas**Principle IX*

2. Registration

The personal data of persons admitted to places of deprivation of liberty shall be recorded into an official register, which shall be made available to the person deprived of liberty, his or her representative, and the competent authorities. The register shall include, as a minimum the following information: ...

- b. Information concerning the personal integrity and the state of health of the persons deprived of liberty;

3. Medical examination

All persons deprived of liberty shall be entitled to an impartial and confidential medical or psychological examination, carried out by idoneous [appropriate] medical personnel immediately following their admission to the place of imprisonment or commitment, in order to verify their state of physical or mental health and the existence of any mental or physical injury or damage; to ensure the diagnosis and treatment of any relevant health problem; or to investigate complaints of possible ill-treatment or torture.

The medical or psychological information shall be entered into the respective official register, and when necessary taking into account the gravity of the findings, it shall be immediately transmitted to the competent authority.

Principle X

Persons deprived of liberty shall have the right to health, understood to mean the enjoyment of the highest possible level of physical, mental, and social well-being, including amongst other aspects, adequate medical, psychiatric, and dental care; permanent availability of suitable and impartial medical personnel; access to free and appropriate treatment and medication; implementation of programs for health education and promotion, immunization, prevention and treatment of infectious, endemic, and other diseases; and special measures to meet the particular health needs of persons deprived of liberty belonging to vulnerable or high risk groups, such as: the elderly, women, children, persons with disabilities, people living with HIV-AIDS, tuberculosis, and persons with terminal diseases. Treatment shall be based on scientific principles and apply the best practices.

The provision of health services shall, in all circumstances, respect the following principles: medical confidentiality; patient autonomy; and informed consent to medical treatment in the physician-patient relationship.

The State shall ensure that the health services provided in places of deprivation of liberty operate in close coordination with the public health system so that public health policies and practices are also applied in places of deprivation of liberty.

Women and girls deprived of liberty shall be entitled to access to specialized medical care that corresponds to their physical and biological characteristics, and adequately meets their reproductive health needs. In particular, they shall have access to gynecological and pediatric care, before, during, and after giving birth, which shall not take place, as far as possible, inside the place of deprivation of liberty, but at hospitals or appropriate institutions. If a child is born in a place of deprivation of liberty, this fact shall not be mentioned in the birth certificate.

In women's or girls' institutions there shall be special accommodation, as well as adequate personnel and resources for pre-natal and post-natal care and treatment of women and girls.

Where children of parents deprived of their liberty are allowed to remain in the place of deprivation of liberty, the necessary provisions shall be made for a nursery staffed by qualified persons, and with the appropriate educational, pediatric, and nutritional services, in order to protect the best interest of the child.

Principle XI

I. Food

Persons deprived of liberty shall have the right to food in such a quantity, quality, and hygienic condition so as to ensure adequate and sufficient nutrition, with due consideration to their cultural and religious concerns, as well as to any special needs or diet determined by medical criteria. Such food shall be provided at regular intervals, and its suspension or restriction as a disciplinary measure shall be prohibited by law.

2. Drinking water

Every person deprived of liberty shall have access at all times to sufficient drinking water suitable for consumption. Its suspension or restriction as a disciplinary measure shall be prohibited by law.

Principle XII

1. Accommodation

Persons deprived of liberty shall have adequate floor space, daily exposure to natural light, appropriate ventilation and heating, according to the climatic conditions of their place of deprivation of liberty. They shall be provided with a separate bed, suitable bed clothing, and all other conditions that are indispensable for nocturnal rest. The installations shall take into account the special needs of the sick, persons with disabilities, children, pregnant women or breastfeeding mothers, and the elderly, amongst others.

2. Hygiene

Persons deprived of liberty shall have access to clean and sufficient sanitary installations that ensure their privacy and dignity. They shall also have access to basic personal hygiene products and water for bathing or shower, according to the climatic conditions.

Women and girls deprived of their liberty shall regularly be provided with those articles that are indispensable to the specific sanitary needs of their sex.

3. Clothing

The clothing to be used by persons deprived of liberty shall be sufficient and adequate to the climatic conditions, with due consideration to their cultural and religious identity. Such clothing shall never be degrading or humiliating.

Principle XVII

The occupation of an institution over its maximum capacity shall be prohibited by law. In cases where such overcrowding results in human rights violations, it shall be considered cruel, inhuman or degrading treatment or punishment. The law shall establish remedies intended to immediately address any situation of overcrowding. The competent judicial authorities shall adopt adequate measures in the absence of an effective legal regulation.

Application

States are responsible for ensuring health care to prisoners at least to the standard available to those at liberty. For women in prison, this requires health care by nurses and medical practitioners trained in women's health, including in gynaecology. Women prisoners should always have the option to be attended by women nurses and doctors. The health of all prisoners should be assessed before or at admission. The UN Special Rapporteur on Torture has expressed concern about the lack of access to medical specialists, such as gynaecologists, for women prisoners.¹⁵⁰

Women must have adequate and culturally appropriate sanitary and washing facilities, in particular for menstruation, if pregnant or nursing. Women must have a way to safely dispose of bloodstained articles, and they should be able to obtain new underwear as required. The UN Office on Drugs and Crime spelled out some of women's particular hygiene needs in their *Criminal Justice Assessment Toolkit*:

Dormitories and rooms used for accommodation of female prisoners must have facilities and materials required to meet women's special hygiene needs. Hot water should be available for the

¹⁵⁰ Report of the Special Rapporteur on Torture: mission to Georgia, E/CN.4/2006/6/Add.3, paragraph 52.

daily personal care of children and women, in particular women involved in cooking, those who are pregnant, breast feeding and menstruating. European Committee for the Prevention of Torture considers ready access to sanitary and washing facilities, as well as provision of hygiene items, of particular importance. These should be available to women under conditions in which they do not need to be embarrassed asking for them, for example, either dispensed by other women or, better yet, accessible whenever needed. European Committee for the Prevention of Torture considers that the failure to provide such basic necessities can amount to degrading treatment.¹⁵¹

Prison staff should be aware of the intense stress that menopause may place upon a woman in prison.

Where they are available to the general community, preventive health care measures, such as screening for breast and cervical cancer, should be offered to imprisoned women. The *European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* states that equivalency of care means that “where the so-called “morning after” pill and/or other forms of abortion at later stages of a pregnancy are available to women who are free, they should be available under the same conditions to women deprived of their liberty.”¹⁵²

During medical examinations or the provision of treatment, women should not be handcuffed or shackled. In cases where a woman poses a significant and realistic threat to the safety of others, all other methods of ensuring security shall be attempted before physical restraints are used.¹⁵³ Male staff should not be present during women’s health consultations or examinations. Care should be taken to ensure that women being transported for medical treatment are cared for by female staff.

HIV/AIDS and other sexually transmitted diseases

Women going through the prison system – whether they have HIV or not – have a unique opportunity to receive education on HIV and other sexually transmitted diseases. Education for women prisoners on HIV should specifically include and cater for women who engage in commercial sex or use drugs intravenously.

Women should be offered free testing for HIV and other diseases, and counselling on testing provided. At the same time, prisoners should be protected from involuntary testing of their blood: there should be provision for the consent of the person tested and for confidentiality.¹⁵⁴

Young adolescent women are increasingly at risk for HIV, and the rate of HIV infection is growing faster among adolescent women than in any other group.¹⁵⁵ HIV screening and education should thus be a particular priority with juvenile detainees.

As with all health care, such treatment for HIV/AIDS as is available to women in the outside community should be made available for women prisoners.¹⁵⁶

151 UN Office on Drugs and Crime and the Organisation for Security and Cooperation in Europe (2006) *Criminal Justice Assessment Toolkit, Non Custodial and Custodial Measures: I The Prison System*, p.28

152 *Ibid.*, para.32.

153 *Human Rights and Vulnerable Prisoners* (Penal Reform International) p. 70.

154 ICRC [http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/p0840/\\$File/ICRC_002_0840.PDF!Open](http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/p0840/$File/ICRC_002_0840.PDF!Open) p134

155 Reyes, H. (2001) ‘Women in prison and HIV’ in *HIV in Prisons* (World Health Organisation) p. 199.

156 Particular issues in relation to pregnant women in prison with HIV are discussed in Part 12.

14. Women with disabilities

UN Standard Minimum Rules for the Treatment of Prisoners

Medical services ...

24. The medical officer shall see and examine every prisoner as soon as possible after his admission and thereafter as necessary, with a view particularly to the discovery of physical or mental illness and the taking of all necessary measures; the segregation of prisoners suspected of infectious or contagious conditions; the noting of physical or mental defects which might hamper rehabilitation, and the determination of the physical capacity of every prisoner for work.

In many countries, recent years have seen dramatic increases in the numbers of physically or developmentally disabled women in prison.¹⁵⁷ This may be a result of the de-institutionalisation of people with disabilities without proper services to support them living in the community. This is part of a wider problem, where lack of proper care and institutions sees vulnerable people inappropriately diverted to the prison system. In India, prisons are used to house "... the mentally disabled, the vagrant or the destitute, the runaway or abandoned girl and the prostitute... The inter-changeability of punitive and protective or curative institutions has led to prison cells being regarded as places of 'safe custody'."¹⁵⁸

Women with physical disabilities may need particular attention paid to their housing and other conditions of detention, for example, if they cannot walk up stairs. They face added discrimination in prisons, such as being excluded from recreational programmes because they cannot physically access them, and being paid lower rates for prison work.

Women in prison who are developmentally disabled are particularly vulnerable to exploitation and abuse, both by other prisoners and prison staff. They are at risk of being raped if their attackers believe that they will be unlikely to complain. They may be manipulated by other prisoners to violate prison rules, for example by carrying drugs.¹⁵⁹

"I was housed on 2nd floor for about 3 months here... I can barely walk let alone do 2 flights of stairs. I was told by the sergeant that the prison could care less if I fell down the stairs and broke my neck."
Prisoner

The stress caused by living in prison and any mistreatment can make some types of developmental difficulties more pronounced. People with developmental difficulties may also find it more difficult to comply with the rules imposed in prison, and to negotiate formal and informal prison procedures.

International human rights standards

Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 5(2)

Measures applied under the law and designed solely to protect the rights and special status of ... aged, sick or handicapped persons shall not be deemed to be discriminatory...

¹⁵⁷ 'Mental illness', as opposed to developmental disability, is discussed in Part 15.

¹⁵⁸ Shankardass, R, Roy, H and Seshadri, V (2000) *Workshop on new models of accessible justice: The India experience* (Penal Reform and Justice Association and Penal Reform International), p. 7.

¹⁵⁹ *Human Rights and Vulnerable Prisoners* (Penal Reform International) p. 86-87.

*General Assembly Resolution 59/26. Rights of the child*¹⁶⁰

Calls upon:...(b) All States to ensure that no child in detention is sentenced to forced labour or corporal punishment or deprived of access to and provision of health-care services, hygiene and environmental sanitation, education, basic instruction and vocational training, taking into consideration the special needs of children with disabilities in detention, in accordance with their obligations under the Convention;

Application

Prison is rarely the most appropriate place for a person with developmental disabilities. There should be alternative sentencing options available, such as to non-custodial accommodation. There should also be processes to transfer a person already in prison to more appropriate accommodation if they are diagnosed as having a developmental disability.

Admission procedures should include assessment of all prisoners' particular needs. Prison authorities must ensure that prisoners with physical or developmental disabilities do not suffer discrimination in their access to healthcare, facilities and programmes.

Prison officers must be trained to recognise, understand and respond to the needs of women with disabilities. They have an obligation to protect them from abuse, in particular, sexual abuse and exploitation, and to ensure that the prison environment meets their needs.

15. Mental health and drug problems

UN Standard Minimum Rules for the Treatment of Prisoners

Medical services

22. (2) Sick prisoners who require specialist treatment shall be transferred to specialized institutions or to civil hospitals....

...

24. The medical officer shall see and examine every prisoner as soon as possible after his admission and thereafter as necessary, with a view particularly to the discovery of physical or mental illness and the taking of all necessary measures; the segregation of prisoners suspected of infectious or contagious conditions; the noting of physical or mental defects which might hamper rehabilitation ...

25. (2) The medical officer shall report to the director whenever he considers that a prisoner's physical or mental health has been or will be injuriously affected by continued imprisonment or by any condition of imprisonment.

...

B. INSANE AND MENTALLY ABNORMAL PRISONERS

82. (1) Persons who are found to be insane shall not be detained in prisons and arrangements shall be made to remove them to mental institutions as soon as possible.

(2) Prisoners who suffer from other mental diseases or abnormalities shall be observed and treated in specialized institutions under medical management.

(3) During their stay in a prison, such prisoners shall be placed under the special supervision of a medical officer.

(4) The medical or psychiatric service of the penal institutions shall provide for the psychiatric treatment of all other prisoners who are in need of such treatment.

83. It is desirable that steps should be taken, by arrangement with the appropriate agencies, to ensure if necessary the continuation of psychiatric treatment after release and the provision of social-psychiatric after-care.

Mental health problems

In many countries, women in prison suffer mental health problems, such as depression, anxiety, phobias, neuroses, self-mutilation, and suicide, at alarmingly high rates. Research indicates that women prisoners suffer mental health problems to a much higher degree than both the general population and the male prison population.

In Colombia, 60% of women prisoners suffer from depression, 50% from other mental illness, 9% from schizophrenia and 7% from psychosis.¹⁶¹

¹⁶¹ Information provided to the Quaker United Nations Office by the Mission of Colombia to the United Nations, Geneva, December 2004.

In Kazakhstan, authorities report that 79% of women prisoners have an anti-social personality disorder, and 43% suffer from psychosis.¹⁶²

Australian research with imprisoned parents found that 81% of imprisoned mothers suffered from mental illness, compared to 60% of fathers. Sixty-two percent of the mothers had drug and alcohol use disorders. Twenty-nine percent of mothers had previously attempted suicide, compared to 23% of fathers. Nineteen percent of mothers had self-harmed.¹⁶³

Research in UK prisons concluded that:

A large proportion of all prisoners were found to have several mental disorders but the prevalence of functional psychosis, such as schizophrenia and manic depression, and neurotic symptoms and disorders was notably higher for female than male prisoners.¹⁶⁴

The reasons for the very high incidence of mental illness amongst women prisoners are no doubt complex, and may be related to the higher proportion of women imprisoned for drug-related crime, and higher rates of past physical, sexual and mental abuse. Women's roles as carers and the extreme stress resulting from separation from children and loved ones exacerbate the mental trauma of imprisonment. The Revolving Doors Agency, a UK charity concerned with mental health and the criminal justice system, has stated that, "Mental health can be further damaged by women's anxiety over the safety of their children."¹⁶⁵ A former prisoner in Britain testifies:

I believe women are in far more danger of becoming mentally ill during their incarceration: especially those that are family carers and have close family ties. The prison system is not prepared properly for this, for the complexity of women and their issues that do affect them deeply, mentally rather than physically.¹⁶⁶

Drug problems

Women may be more likely than men to enter prison with drug problems. Research in the UK found that:

A larger proportion of women than men were dependent on opiates (i.e. heroin and non-prescribed methadone) ... 41% of the women in the remand group and 23% of those in the sentenced group compared with 26% of the male remand and 18% of the male sentenced group.¹⁶⁷

A survey of lifetime drug use amongst women prisoners in New Zealand found that 43.3% reported cannabis abuse/dependence, 69.1% alcohol abuse/dependence, and 46.2% used other drugs.¹⁶⁸ In Kazakhstan, 21% of women prisoners are receiving treatment for drug addiction, and 13% for alcohol addiction.¹⁶⁹

"My depression has kept me a prisoner within myself for years and I truly believe that it has ruined my life. My memory seems to be going. I can't remember at times. The stress of being here I believe causes it." Prisoner

162 Information provided to the Quaker United Nations Office by the Ministry of Justice of the Republic of Kazakhstan, March 2005.

163 NSW Corrections Health Service; Inmate Health Survey Report; 2003, quoted in correspondence from Simon Quilty (MB BS, MPhilPH) on behalf of Defence for Children International, Australia, December 2004.

164 Wedderburn, D. (2000) *Justice for Women: The Need for Reform* (Prison Reform Trust) p. 11.

165 Revolving Doors Agency, cited in Rickford, D. (2003) *Troubled Inside: Responding to the mental health needs of women in prison* (Prison Reform Trust) p. 8.

166 Rickford, D. (2003) *Troubled Inside: Responding to the mental health needs of women in prison* (Prison Reform Trust) p. 1.

167 *Statistics on Women and the Criminal Justice System: A Home Office publication under Section 95 of the Criminal Justice Act 1991* (2002), p. 36.

168 Information provided to the Quaker United Nations Office by a New Zealand NGO working with prisoners and their families, December 2004.

169 Information provided to the Quaker United Nations Office by the Ministry of Justice of the Republic of Kazakhstan, March 2005.

Lack of proper treatment and rehabilitation programmes

In many women's prisons the only treatment offered for mental illness is medication. Whilst medication clearly may have a place, there is a need for counselling, rehabilitation programmes and specialist nursing for prisoners with mental health difficulties and/or drug use problems.

In some countries, women are excluded from programmes for drug and alcohol problems if they are in pre-trial detention, despite the fact that this detention may last for long periods. Women might also be given access to drug treatment programmes only when their release date is near, meaning they may wait years for treatment.

Women suffering from mental illness or at risk of self-harming or suicide are often perceived as problems for prison discipline, rather than sick prisoners. They are often confined in exactly the same way as women who are being punished for disciplinary infringements, such as by being put in an isolation cell. Prison staff are often inadequately trained and proper resources are not available to ensure treatment.¹⁷⁰

"I have seen a lot of women drugged to the point of being basically non-functional... I stay depressed a lot, but will not seek help in here because I do not want to become a zombie on meds in here." Prisoner

International human rights standards

*UN Principles for the Protection of Persons with Mental Illnesses and the Improvement of Mental Health Care*¹⁷¹

Principle 1.1

All persons have the right to the best available mental health care, which shall be part of the health and social care system.

Principle 20

Criminal offenders

1. This Principle applies to persons serving sentences of imprisonment for criminal offences, or who are otherwise detained in the course of criminal proceedings or investigations against them, and who are determined to have a mental illness or who it is believed may have such an illness.
2. All such persons should receive the best available mental health care as provided in Principle 1. These Principles shall apply to them to the fullest extent possible, with only such limited modifications and exceptions as are necessary in the circumstances. No such modifications and exceptions shall prejudice the persons' rights under the instruments noted in paragraph 5 of Principle 1.
3. Domestic law may authorize a court or other competent authority, acting on the basis of competent and independent medical advice, to order that such persons be admitted to a mental health facility.
4. Treatment of persons determined to have a mental illness shall in all circumstances be consistent with Principle 11 [*Consent to treatment*].

¹⁷⁰ Beyond Bars Alliance NSW (2005) *Submission to the Anti Discrimination Commissioner for an Inquiry into the Discrimination Experienced by Women Within the Criminal Justice System in New South Wales*, at <http://www.sistersinside.com.au/media/NSWADCreport.pdf> (accessed 20 July 2005) p.19.

¹⁷¹ Adopted by General Assembly resolution 46/119 of 17 December 1991.

Regional Standards on Detention

European Prison Rules

Rule 25.4

Particular attention shall be paid to the needs of prisoners who have experienced physical, mental or sexual abuse.

Rule 42.3

When examining a prisoner the medical practitioner or a qualified nurse reporting to such a medical practitioner shall pay particular attention to: ...

- b. diagnosing physical or mental illness and taking all measures necessary for its treatment and for the continuation of existing medical treatment; ...
- d. dealing with withdrawal symptoms resulting from use of drugs, medication or alcohol;
- e. identifying any psychological or other stress brought on by the fact of deprivation of liberty; ...
- h. noting physical or mental defects that might impede resettlement after release; ...
- j. making arrangements with community agencies for the continuation of any necessary medical and psychiatric treatment after release, if prisoners give their consent to such arrangements.

Rule 47.2

The prison medical service shall provide for the psychiatric treatment of all prisoners who are in need of such treatment and pay special attention to suicide prevention.

Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas,

Principle IX

3. Medical examination

All persons deprived of liberty shall be entitled to an impartial and confidential medical or psychological examination, carried out by idoneous medical personnel immediately following their admission to the place of imprisonment or commitment, in order to verify their state of physical or mental health and the existence of any mental or physical injury or damage; to ensure the diagnosis and treatment of any relevant health problem; or to investigate complaints of possible ill-treatment or torture.

The medical or psychological information shall be entered into the respective official register, and when necessary taking into account the gravity of the findings, it shall be immediately transmitted to the competent authority.

Principle X

Persons deprived of liberty shall have the right to health, understood to mean the enjoyment of the highest possible level of physical, mental, and social well-being, including amongst other aspects, adequate medical, psychiatric, and dental care; permanent availability of suitable and impartial medical personnel; access to free and appropriate treatment and medication; implementation of programs for health education and promotion, immunization, prevention and treatment of infectious, endemic, and other diseases; and special measures to meet the particular health needs of persons deprived

of liberty belonging to vulnerable or high risk groups, such as: the elderly, women, children, persons with disabilities, people living with HIV-AIDS, tuberculosis, and persons with terminal diseases. Treatment shall be based on scientific principles and apply the best practices

Principle XX

Sufficient and qualified personnel shall be available to ensure security, surveillance, and custody, as well as to attend to medical, psychological, educational, labor, and other needs.

Application

States are responsible for ensuring health care at least to the standard available to those at liberty in the country. When it comes to mental health, there is a strong argument that the very high levels of mental illness in women's prisons oblige the State to provide a higher-than-standard level of mental health services.

The most common time for women to experience mental health problems is just following their admission to prison or pre-trial detention, a period of great anxiety and stress.¹⁷² Qualified mental health personnel should assess all incoming prisoners for existing and potential mental health problems.

It should be acknowledged that prison may cause or exacerbate mental health problems. Rule 25.2 of the *UN Standard Minimum Rules for the Treatment of Prisoners* should be actively applied: prison medical services should assess and report on whether a prisoner's "physical or mental health has been or will be injuriously affected by continued imprisonment or by any condition of imprisonment" and action be taken if this is the case. Mental health personnel should monitor the health of all prisoners on an ongoing basis. Prison staff should receive training to enable them to recognise and respond appropriately to signs of mental health problems.

Women identified as at risk of mental health problems should receive immediate and ongoing counselling and support. Women with existing mental health problems should have access to counselling and the same range of holistic treatments that women at liberty have – not just medication. Any woman who requests counselling and support services should be able to access them.

Women's self-harm and suicide attempts need to be understood in the context of the other problems, pressures and anxieties in their lives rather than treated as a disciplinary matter. It is essential that prisons respond in a therapeutic, caring and supportive manner, in particular:

- prisons, who are responsible for the welfare of prisoners, should always treat self-injury incidents as urgent, and their response should be based on a systematic approach which includes team-work (multi-disciplinary co-ordination), primary attention to the women's needs, involving the woman in decisions about what should be done, and a plan for follow-up
- training of all staff in contact with women prisoners is essential to ensure that they understand the behaviour and are confident about referring the woman to access the therapeutic response set out above.

The UK's National Institute for Health and Clinical Excellence (NICE) produced guidelines on the treatment of those who self-harm these state:

All people who have self harmed should be offered an assessment of needs, which should be comprehensive and include evaluation of the social, psychological and motivational factors specific to the act of self harm, current suicidal intent and hopelessness, as well as a full mental health and social needs assessment.¹⁷³

¹⁷² Human Rights and Vulnerable Prisoners (Penal Reform International) p. 72.

¹⁷³ National Institute for Health and Clinical Excellence (2004) *2004/031 New guideline to standardise care for people who self-harm*, quoted in Rickford, D. And Edgar, K. (2005) *Troubled Inside: Responding to the Mental Health Needs of Men in Prison* (Prison Reform Trust), page 71

In the UK steps to implement this guidance are being taken through the ACCT Plan (Assessment, Care in Custody and Teamwork), according to the Prison Service '[t]he plan encourages staff to work together to provide individual care to prisoners in distress, to help defuse a potentially suicidal crisis or to help individuals with long-term needs (such as those with a pattern of repetitive self-injury) to better manage and reduce their distress.'¹⁷⁴ The Prison Reform Trust state that the ACCT Plan 'marks a significant step forward, because it highlights the importance of teamwork, involves the patient in decisions, and encourages staff to interact, not merely observe, the person at risk.'¹⁷⁵

The inclusion of the provision on recognising that particular needs of prisoners who have experienced physical, mental or sexual abuse is perhaps the biggest step forward made in the *European Prison Rules*.¹⁷⁶ Given the large proportion of women prisoners who have experienced one or more of these forms of abuse it is essential that mental health services in women's prisons are equipped to deal with these problems. It is also important that the psychological damage done by such harm be taken into account in the way that guards interact with prisoners.

174 HM Prison Service, *Self Harm*, http://www.hmprisonservice.gov.uk/adviceandsupport/prison_life/selfharm/ (accessed 27 May 2008)

175 Rickford, D. And Edgar, K. (2005) *Troubled Inside: Responding to the Mental Health Needs of Men in Prison* (Prison Reform Trust), page 71

176 Further analysis of the European Prison Rules is provided in Wetton, C. (2006) *The European Prison Rules: A Gender Critique* (Quaker Council for European Affairs) and Townhead, L. (2006) *Women in Prison: A Commentary on the European Prison Rules* (Quaker United Nations Office)

I 6. Rehabilitation programmes, education and work

UN Standard Minimum Rules for the Treatment of Prisoners

A. PRISONERS UNDER SENTENCE

Guiding principles ...

58. The purpose and justification of a sentence of imprisonment or a similar measure deprivative of liberty is ultimately to protect society against crime. This end can only be achieved if the period of imprisonment is used to ensure, so far as possible, that upon his return to society the offender is not only willing but able to lead a law-abiding and self-supporting life.
59. To this end, the institution should utilize all the remedial, educational, moral, spiritual and other forces and forms of assistance which are appropriate and available, and should seek to apply them according to the individual treatment needs of the prisoners.

...

Treatment

65. The treatment of persons sentenced to imprisonment or a similar measure shall have as its purpose, so far as the length of the sentence permits, to establish in them the will to lead law-abiding and self-supporting lives after their release and to fit them to do so. The treatment shall be such as will encourage their self-respect and develop their sense of responsibility.
66. (1) To these ends, all appropriate means shall be used, including religious care in the countries where this is possible, education, vocational guidance and training, social casework, employment counselling, physical development and strengthening of moral character, in accordance with the individual needs of each prisoner, taking account of his social and criminal history, his physical and mental capacities and aptitudes, his personal temperament, the length of his sentence and his prospects after release.

...

Work

71. (3) Sufficient work of a useful nature shall be provided to keep prisoners actively employed for a normal working day.
- (4) So far as possible the work provided shall be such as will maintain or increase the prisoners' ability to earn an honest living after release.
- (5) Vocational training in useful trades shall be provided for prisoners able to profit thereby and especially for young prisoners.
- (6) Within the limits compatible with proper vocational selection and with the requirements of institutional administration and discipline, the prisoners shall be able to choose the type of work they wish to perform.

...

Education and recreation

77. (1) Provision shall be made for the further education of all prisoners capable of profiting thereby, including religious instruction in the countries where this is possible. The education of illiterates and young prisoners shall be compulsory and special attention shall be paid to it by the administration.
- (2) So far as practicable, the education of prisoners shall be integrated with the educational system of the country so that after their release they may continue their education without difficulty.
78. Recreational and cultural activities shall be provided in all institutions for the benefit of the mental and physical health of prisoners.

Prison should have a reformatory, restorative and rehabilitative function. Its purpose and justification is, as the *UN Standard Minimum Rules for the Treatment of Prisoners* state, to equip each prisoner to lead a law-abiding and self-supporting life. The main way that this is done is by giving prisoners the opportunity to be educated, gain skills for future employment, and address any drug or substance abuse problems that they have.

Women's prisons, compared to men's prisons, tend to provide less access to educational or vocational training, drug/alcohol dependency programmes, and work programmes.

In some countries, this is because places in programmes have not been increased to meet the accelerated growth of the female prison population. In others, because women prison populations are smaller than men's, programmes designed or adapted specifically for women have simply been overlooked. When programmes for women are available, they are often of lesser quality and relevance than those offered to men. This is particularly the case when programmes for female juvenile prisoners are compared to those for male juveniles. The *European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* has observed that female detainees are all too often "offered activities which have been stereotyped as "appropriate" for them (such as sewing or handicrafts), whilst male juveniles are offered training of a far more vocational nature."¹⁷⁷

A Human Rights Watch report concerning prisons in the USA detailed that:

Female prisoners sued the department alleging they were provided substantially inferior educational and vocational programming, compared with those provided to male prisoners, and were being paid lower wages for similar work... Women incarcerated in Illinois have historically been allocated fewer resources, educational services and been provided with vocational training for the low-paying jobs traditionally held by women. For example, college courses for women leading to a bachelor's degree were not offered until 1985, more than a decade after similar programs were instituted for men.¹⁷⁸

Where women have their children in prison with them, a lack of childcare facilities may exclude the women from participation in educational and work programmes, either because of the difficulties of looking after the baby/child at the same time as participating, or because babies are not allowed in the classes or at work.¹⁷⁹

Women who are foreign nationals and indigenous women, in particular, tend not to be provided with appropriate programmes.

International human rights standards

Universal Declaration of Human Rights

Article 23.

- (1) Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
- (2) Everyone, without any discrimination, has the right to equal pay for equal work...

Article 26

- (1) Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

¹⁷⁷ The CPT Standards, CPT/Inf/E (2002) 1 - Rev. 2003, Women deprived of their liberty, p. 65.

¹⁷⁸ Human Rights Watch (1996) *All Too Familiar: Sexual Abuse of Women in U.S. State Prisons* p. 271.

¹⁷⁹ Prison Services Working Group (1999) *Report of a Review of Principles, Policies and Procedures for Mothers and Babies/Children in Prison*, p 74.

- (2) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

International Covenant on Civil and Political Rights, Article 10

The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.

International Covenant on Economic, Social and Cultural Rights

Article 6(1)

The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

Article 7

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

- (a) Remuneration which provides all workers, as a minimum, with:
 - (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work ...

Article 13

- 1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.
- 2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:
 - (a) Primary education shall be compulsory and available free to all;
 - (b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;
 - (c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education ...

Basic Principles for the Treatment of Prisoners

Principle 6

All prisoners shall have the right to take part in cultural activities and education aimed at the full development of the human personality.

Principle 8

Conditions shall be created enabling prisoners to undertake meaningful remunerated employment which will facilitate their reintegration into the country's labour market and permit them to contribute to their own financial support and to that of their families.

Principle 10

With the participation and help of the community and social institutions, and with due regard to the interests of victims, favourable conditions shall be created for the reintegration of the ex-prisoner into society under the best possible conditions.

Principle 11

The above Principles shall be applied impartially.

Human Rights Committee, General Comment 28 on the equality of rights between men and women ¹⁸⁰

... States parties should also report ... on any difference in treatment between male and female persons deprived of liberty, such as, for example, access to rehabilitation and education programmes ...

Regional Standards on Detention

European Prison Rules,

Rule 26.1

Prison work shall be approached as a positive element of the prison regime and shall never be used as a punishment.

Rule 26.4

In conformity with Rule 13 there shall be no discrimination on the basis of gender in the type of work provided.

Rule 26.5

Work that encompasses vocational training shall be provided for prisoners able to benefit from it and especially for young prisoners.

Rule 26.11

Prisoners shall be allowed to spend at least a part of their earnings on approved articles for their own use and to allocate a part of their earnings to their families.

Rule 28.1

Every prison shall seek to provide all prisoners with access to educational programmes which are as comprehensive as possible and which meet their individual needs while taking into account their aspirations.

Rule 36.2

Where such infants are allowed to stay in prison with a parent special provision shall be made for a nursery, staffed by qualified persons, where the infants shall be placed when the parent is involved in activities where the infant cannot be present.

¹⁸⁰ Para 15, U.N. Doc. HRI/GEN/1/Rev.7 at 153 (2004).

Rule 100.1

Untried prisoners shall be offered the opportunity to work but shall not be required to work.

Rule 105.1

A systematic programme of work shall seek to contribute to meeting the objective of the regime for sentenced prisoners.

Rule 106.1

A systematic programme of education, including skills training, with the objective of improving prisoners' overall level of education as well as their prospects of leading a responsible and crime-free life, shall be a key part of regimes for sentenced prisoners.

Rule 106.3

Educational programmes for sentenced prisoners shall be tailored to the projected length of their stay in prison.

*Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas**Principle XIII*

Persons deprived of liberty shall have the right to education, which shall be accessible to all, without any discrimination, with due consideration to cultural diversity and special needs.

Primary or basic education shall be free for persons deprived of liberty, particularly for children, and for adults who have not received or completed the whole cycle of primary instruction.

Member States of the Organization of American States shall promote, progressively and to the maximum of their available resources, secondary, technical, vocational, and higher education in places of deprivation of liberty, and shall make them accessible to all, on the basis of individual capacity and skills.

Member States shall ensure that educational services provided in places of deprivation of liberty operate in close coordination and integration with the public education system; and shall promote cooperation with society through the participation of civil associations, non-governmental organizations, and private educational institutions.

Places of deprivation of liberty shall have libraries with sufficient books, newspapers, and educational magazines, with the appropriate equipment and technology, according to available resources.

Persons deprived of liberty shall have the right to take part in cultural, sporting, and social activities, and shall have opportunities for healthy and constructive recreation. Member States shall encourage the participation of the family, the community, and non-governmental organizations in these activities, in order to promote the reform, social readaptation, and rehabilitation of persons deprived of liberty.

Principle XIV

All persons deprived of liberty shall have the right to work, to have effective opportunities of work, and to receive a fair and equitable remuneration, in accordance with their physical and mental capacities, in order to promote the reform, rehabilitation and social readaptation of convicted persons, to stimulate and encourage the culture of work, and to combat idleness in places of deprivation of liberty. Such labor shall never be of an afflictive nature.

Member States of the Organization of American States shall apply all protective national and international standards applicable to child labor, particularly in order to prevent exploitative labor practices and to ensure the best interest of the child.

Member States shall promote, progressively and to the maximum of their available resources, vocational orientation and the development of projects of technical or professional training in places of deprivation of liberty. They shall also ensure the implementation of permanent,

sufficient and suitable labor workshops while promoting the participation and the cooperation with society and private enterprises.

Application

The prison administration must make sure that women have access to education, vocational and other training, rehabilitation programmes, opportunities to work, and other facilities that is equal to those of male prisoners.

In accordance with the requirement in Rule 58 of the *Standard Minimum Rules* that rehabilitation programmes be developed “according to the individual treatment needs of the prisoners”, activities and programmes for women prisoners should be designed for them and content and delivery should suit their needs, rather than be adaptations of programmes designed for men. Programmes should further be designed specifically for foreign national women, and for indigenous and other minority women, where present in the prison population (discussed in Parts 18 and 19). The women themselves should be able to suggest what sort of activities they prefer. Educational programmes must take into consideration that women may require basic literacy instruction in order to be able to fully benefit from them (and that literacy lessons are a necessity in order to be able to understand written prison regulations and facilitate communication with family members outside the prison).¹⁸¹ Income generation projects, such as the use of micro-credit facilities and community-based skills training, can be a way to teach women useful skills in preparation for their release.

In Rwanda, for example, 40% of women prisoners are enrolled in some type of vocational training programme, including tailoring and carpentry. The Government has embarked on training programmes for female prisoners that teach them how to manage micro-projects. This aims to rehabilitate women by providing them with means to generate income, and to bring about women’s empowerment.¹⁸²

The *Corston Report* has recommended that educational programmes should help women to develop their life skills and emotional literacy, although the report is clear that qualifications and vocational training should also be on offer.¹⁸³ The report also strongly advocates for individual assessment of educational needs.

Training and education must be offered in such a way as to permit participation by all women, including foreign national women and women with disabilities. Women whose children are with them in prison should also be given the possibility to participate, as envisaged by the *European Prison Rules*, in Rule 36.2, this will require prisons to provide safe and appropriate care for children. In some countries the average sentences women serve are relatively short. This should not preclude them from accessing rehabilitation, education and work programmes. Short sentences can do as much damage to a woman’s life as a long sentence: it is essential that this damage is balanced by access to the rehabilitative aspects of the prison regime.

Whilst the recognition in Principle XIII of the *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas* of the important role family can play in rehabilitation is to be welcomed, the woman’s consent should be sought before any programme involving family members is agreed upon. Given the high level of domestic violence experienced by women prior to imprisonment it should not be assumed that all family contact will provide support.

The ILO Forced Labour Convention (No. 29) exempts work required of prisoners from forced labour. However, this only applies to the work of convicted prisoners, therefore it is prohibited to require labour of remand prisoners.¹⁸⁴ Notwithstanding this prohibition, remand prisoners should be given the opportunity to work if they choose.

181 ICRC (2004) *Addressing the Needs of Women Affected by Armed Conflict*, p. 149.

182 Information provided to the Quaker United Nations Office by the Rwandan Ministry of Internal Security, November 2004.

183 Corston, J. (2007) *The Corston Report: A report by Baroness Jean Corston of a review of women with particular vulnerabilities in the criminal justice system* (Home Office), p.44.

184 International Labour Organisation Convention 29 on the Prohibition of Forced Labour, Article art 2(2)(c).

17. Girl prisoners

UN Standard Minimum Rules for the Treatment of Prisoners

Separation of categories

8. The different categories of prisoners shall be kept in separate institutions or parts of institutions taking account of their sex, age, criminal record, the legal reason for their detention and the necessities of their treatment. Thus,
- (a) Men and women shall so far as possible be detained in separate institutions; in an institution which receives both men and women the whole of the premises allocated to women shall be entirely separate; ...
 - (d) Young prisoners shall be kept separate from adults.

Work

71. (5) Vocational training in useful trades shall be provided for prisoners able to profit thereby and especially for young prisoners.

Education and recreation

77. (1)...The education of illiterates and young prisoners shall be compulsory and special attention shall be paid to it by the administration.
- (2) So far as practicable, the education of prisoners shall be integrated with the educational system of the country so that after their release they may continue their education without difficulty.

C. PRISONERS UNDER ARREST OR AWAITING TRIAL ...

85. (1) Untried prisoners shall be kept separate from convicted prisoners.
- (2) Young untried prisoners shall be kept separate from adults and shall in principle be detained in separate institutions.

In many societies, girls (females who are under 18 years of age) who contravene legal or social codes are treated with particular harshness. Research in the USA indicates that girls are detained for far less serious offences than boys, such as loitering, curfew violations, being a 'runaway' or being 'ungovernable'. Imprisonment of girls is part of a long practice of social control of defiant, sexual or unruly girls.¹⁸⁵

Girls may be treated as adults for criminal purposes at a younger age than are boys. In Pakistan, a girl accused of fornication is considered an adult at the age of 16, or earlier if she reaches puberty before her sixteenth birthday, while a male is not considered an adult until he is 18 years old.¹⁸⁶ In some countries, juveniles are treated as adults because their lack of birth registration makes it impossible for them to prove their age.¹⁸⁷

¹⁸⁵ Dohrn, B. (2004) "All Ellas: Girls Locked Up" 30(2) *Feminist Studies* p. 311.

¹⁸⁶ Amnesty International (2003) *Pakistan: Denial of Basic Rights for Child Prisoners*, ASA Index: 33/011/2003.

¹⁸⁷ *Report of the High Commissioner for Human Rights on assistance to Sierra Leone in the field of human rights*, para. 60 (E/CN.4/2005/113).

Girls who are imprisoned are likely to have suffered traumatic physical and sexual abuse. A California study reported that 92% of imprisoned girls said that they had been subjected to some form of emotional, physical or sexual abuse. In another study from the USA, over half the girls in prison had been victims of sexual abuse that began at nine years of age or younger.¹⁸⁸

While women in prison normally receive less attention than men in prison and suffer the effects of discriminatory policies and practices in the administration of justice, this situation is far more pronounced in the case of young female offenders. The small number of women's prisons and of female prisoners is even more marked in relation to detention facilities for juvenile females. It has long been established that juveniles should not be held in custody with adults (unless, exceptionally, it is in their best interests). However, it is not unusual for girls to be housed in adult prisons. Girls' vulnerability to violence in such a situation is manifest.

Where there are juvenile detention facilities for girls, they are usually modelled on institutions for boys. Juvenile girls often cannot access appropriate health services, and there is little recognition of the physical and sexual violence they are likely to have suffered before imprisonment. (The vulnerability of female juvenile detainees to HIV/AIDS was discussed in Part 13 above.)¹⁸⁹

“For years people assumed that all you have to do to make a program designed for boys work for girls is to paint the walls pink and take out the urinals.”
Director of prison programmes for girls

Female juveniles generally receive fewer opportunities for education or vocational training, or less appropriate provision, because it is designed for adult women or for juvenile males.

The international community has recognised that “the special needs and problems of young female offenders in custody deserve much greater attention”, leading to the special provision for female juvenile offenders, Rule 26.4, in the *UN Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules)*.¹⁹⁰

Juvenile girl prisoners may also be pregnant or mothers. Few programmes for juveniles or programmes for mothers in prison acknowledge the particular needs and vulnerabilities of juvenile mothers and their babies. Juvenile mothers may be more likely to have their babies taken from them because juvenile facilities do not make provision for babies and/or because of an assumption that their mother or another female relative will care for the child.

In addition to the general problems faced by girls in prisons, particular problems are likely to arise for girls with additional minority status, such as indigenous or Roma girls or foreign nationals, as well as for girls with physical or mental disabilities.

International human rights standards

International Covenant on Civil and Political Rights

Article 6(5)

Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

188 Dohrn, B. (2004) “All Ellas: Girls Locked Up” 30(2) *Feminist Studies* p. 305.

189 Box: Marion Daniel of the Baltimore Female Intervention Team, quoted in Dohrn, B. (2004) “All Ellas: Girls Locked Up” 30(2) *Feminist Studies* p. 320.

190 Youth, Crime and Justice – Working paper prepared by the Secretariat, Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders, 1985 (A/Conf.121/7), para. 53.

Article 10

2. ... (b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.
3. ... Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

Convention on the Rights of the Child

Article 37

States Parties shall ensure that: ...

- (b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;
- (c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances...

Article 40(1)

States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

Committee on the Rights of the Child, General Comment No. 10, Children's rights in Juvenile Justice (excerpts referring to female juvenile offenders)

- 4a. *Non-discrimination (art. 2)*. States Parties have to take all necessary measures to ensure that all children in conflict with the law are treated equally. Particular attention must be paid to de facto discrimination and disparities, which may be the result of a lack of a consistent policy and involve vulnerable groups of children, such as street children, children belonging to racial, ethnic, religious or linguistic minorities, children who are indigenous, girl children, children with disabilities and children who are repeatedly in conflict with the law (recidivists). In this regard, training of all professionals involved in the administration of juvenile justice is important (see below para. 33), as well as the establishment of rules, regulations or protocols which enhance equal treatment of child offenders and provide redress, remedies and compensation.

...

It is quite common that criminal codes contain provisions criminalizing behavioural problems of children, such as vagrancy, truancy, runaways and other acts, which often are the result of psychological or socio-economic problems. It is particularly a matter of concern that girls and street children are often the victim of this criminalization. These acts, also known as Status Offences, are not considered to be an offence if committed by adults. The Committee recommends the States Parties to abolish the provisions on Status Offences in order to establish an equal treatment under the law for children and adults.

22. ...Since girls in the juvenile justice system may be easily overlooked because they represent only a small group, special attention must be devoted to the particular needs of the girl child, e.g. in relation to prior abuse and special health needs. ...
33. It is essential for the quality of the administration of juvenile justice that all the professionals involved, including in law enforcement and judiciary, receive appropriate training to inform them about the content and the meaning of the provisions of the CRC in general and those directly relevant for their daily practice in particular. The training should be organised in a systematic and ongoing manner and not be limited to information about the relevant national and international legal provisions. It should include information on inter alia the social and other causes of juvenile delinquency, the psychological and other aspects of the development of children [with special attention to girls and children belonging to minorities or indigenous peoples], the culture and the trends in the world of young people, the dynamics of group activities, and the available measures to deal with children in conflict with the penal law, in particular measures without resorting to judicial proceedings (see above Section IV, Part B).

The UN Rules for the Protection of Juveniles Deprived of their Liberty (Havana Rules) and UN Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) contain extensive provisions for the treatment of prisoners under 18 years of age. The *UN Rules for the Protection of Juveniles Deprived of the Liberty* do not contain any specific provisions directed to treatment of female juveniles.

UN Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), Rule 26.4

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

Commentary to UN Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules)

Rule 26.4 addresses the fact that female offenders normally receive less attention than their male counterparts, as pointed out by the Sixth Congress. In particular, resolution 9 of the Sixth Congress calls for the fair treatment of female offenders at every stage of criminal justice processes and for special attention to their particular problems and needs while in custody. Moreover, this rule should also be considered in the light of the Caracas Declaration of the Sixth Congress, which, inter alia, calls for equal treatment in criminal justice administration, and against the background of the Declaration on the Elimination of Discrimination against Women and the Convention on the Elimination of All Forms of Discrimination against Women.

*General Assembly Resolution 59/26. Rights of the child*¹⁹¹

Calls upon: ... (b) All States to ensure that no child in detention is sentenced to forced labour or corporal punishment or deprived of access to and provision of health-care services, hygiene and environmental sanitation, education, basic instruction and vocational training, taking into consideration the special needs of children with disabilities in detention, in accordance with their obligations under the Convention;

¹⁹¹ Para.38, adopted 24 February 2005.

*Human Rights Committee, General Comment 17, Rights of the child*¹⁹²

...if lawfully deprived of their liberty, accused juvenile persons shall be separated from adults and are entitled to be brought as speedily as possible for adjudication; in turn, convicted juvenile offenders shall be subject to a penitentiary system that involves segregation from adults and is appropriate to their age and legal status, the aim being to foster reformation and social rehabilitation...

*Human Rights Committee, General Comment 21 on the rights of persons deprived of liberty*¹⁹³

... Article 10, paragraph 2(b), provides that accused juvenile persons shall be separated from adults. The information given in reports shows that some States parties are not paying the necessary attention to the fact that this is a mandatory provision of the Covenant. ... [U]nder article 10, paragraph 3, juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status in so far as conditions of detention are concerned, such as shorter working hours and contact with relatives, with the aim of furthering their reformation and rehabilitation. Article 10 does not indicate any limits of juvenile age. While this is to be determined by each State party in the light of relevant social, cultural and other conditions, the Committee is of the opinion that article 6, paragraph 5, suggests that all persons under the age of 18 should be treated as juveniles, at least in matters relating to criminal justice...

*Human Rights Committee, General Comment 28 on the equality of rights between men and women*¹⁹⁴

... States parties should also report about compliance with the rule that accused juvenile females shall be separated from adults ...

Regional Standards on Detention

*European Prison Rules***Rule 35.1**

Where exceptionally children under the age of 18 years are detained in a prison for adults the authorities shall ensure that, in addition to the services available to all prisoners, prisoners who are children have access to the social, psychological and educational services, religious care and recreational programmes or equivalents to them that are available to children in the community.

Rule 35.2

Every prisoner who is a child and is subject to compulsory education shall have access to such education.

Rule 35.3

Additional assistance shall be provided to children who are released from prison.

Rule 35.4

Where children are detained in a prison they shall be kept in a part of the prison that is separate from that used by adults unless it is considered that this is against the best interests of the child.

¹⁹² Para. 2, U.N. Doc. HRI/GEN/1/Rev.7 at 144 (2004).

¹⁹³ Para. 13, U.N. Doc. HRI/GEN/1/Rev.7 at 153 (2004).

¹⁹⁴ Para. 15, U.N. Doc. HRI/GEN/1/Rev.7 at 180 (2004).

Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas

Principle III

Deprivation of liberty of children shall be applied as a measure of last resort and for the minimum necessary period, and shall be limited to strictly exceptional cases.

Principle X

Persons deprived of liberty shall have the right to health, understood to mean the enjoyment of the highest possible level of physical, mental, and social well-being, including amongst other aspects, adequate medical, psychiatric, and dental care; permanent availability of suitable and impartial medical personnel; access to free and appropriate treatment and medication; implementation of programs for health education and promotion, immunization, prevention and treatment of infectious, endemic, and other diseases; and special measures to meet the particular health needs of persons deprived of liberty belonging to vulnerable or high risk groups, such as: the elderly, women, children, persons with disabilities, people living with HIV-AIDS, tuberculosis, and persons with terminal diseases. Treatment shall be based on scientific principles and apply the best practices.

In women's or girls' institutions there shall be special accommodation, as well as adequate personnel and resources for pre-natal and post-natal care and treatment of women and girls.

Principle XII

1. Accommodation

Persons deprived of liberty shall have adequate floor space, daily exposure to natural light, appropriate ventilation and heating, according to the climatic conditions of their place of deprivation of liberty. They shall be provided with a separate bed, suitable bed clothing, and all other conditions that are indispensable for nocturnal rest. The installations shall take into account the special needs of the sick, persons with disabilities, children, pregnant women or breastfeeding mothers, and the elderly, amongst others.

2. Hygiene

Women and girls deprived of their liberty shall regularly be provided with those articles that are indispensable to the specific sanitary needs of their sex.

Principle XIII

Primary or basic education shall be free for persons deprived of liberty, particularly for children, and for adults who have not received or completed the whole cycle of primary instruction.

Principle XIV

Member States of the Organization of American States shall apply all protective national and international standards applicable to child labor, particularly in order to prevent exploitative labor practices and to ensure the best interest of the child.

Principle XIX

The different categories of persons deprived of freedom shall be kept in separate places of deprivation of liberty or in different sections within the same institution, taking account of their sex, age, the reason for their deprivation of liberty, the need to protect the life and integrity of persons deprived of liberty or personnel, special needs of attention, or other circumstances relating to internal security.

In particular, arrangements shall be made to separate men and women; children and adults; the elderly; accused and convicted; persons deprived of liberty for civil reasons and those deprived of liberty on criminal charges. In cases of deprivation of liberty of asylum or refugee status seekers,

and in other similar cases, children shall not be separated from their parents. Asylum or refugee status seekers and persons deprived of liberty due to migration issues shall not be deprived of liberty in institutions designed to hold persons deprived of liberty on criminal charges.

Principle XXII

3. Measures of solitary confinement

It shall be strictly forbidden to impose solitary confinement to pregnant women; mothers who are living with their children in the place of deprivation of liberty; and children deprived of liberty.

Application

As stated by the Human Rights Committee, any person under the age of 18 years should be treated as a juvenile in matters relating to criminal justice.

States must develop and implement policies and programmes concerning girls under 18 convicted of criminal offences that conform with international human rights standards, in particular, the Convention on the Rights of the Child, the *UN Rules for the Protection of Juveniles Deprived of their Liberty (Havana Rules)* and the *UN Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules)*.

States should examine the reasons for which girls are being imprisoned: are girls being imprisoned for ‘delinquency’, and could better measures be taken to address the needs of girls who are coming into contact with the criminal justice system?

Female juveniles should only be detained ‘as a measure of last resort and for the shortest appropriate period of time’ (Article 37 of the *Convention on the Rights of the Child*). If detained, they must be prioritised in being brought ‘as speedily as possible for adjudication’ (Article 10 of the *International Covenant on Civil and Political Rights*). Uganda’s *Children Statute 1996* demonstrates alternatives to imprisonment of juveniles. Where a case has been proved against a child aged 12-17, a Village Court may make the following orders:

- (i) *Reconciliation*: a peaceful settlement of the case is encouraged and may include advising the child to ask for pardon from the person reporting him/her;
- (ii) *Compensation*: a child is ordered to give a suitable payment for the loss, damage he/she has caused to somebody else;
- (iii) *Restitution*: a child is ordered to replace or return something lost or stolen to its owner and may include payment for any damage;
- (iv) *Apology*: a child is ordered to make a statement expressing that he/she is sorry for having done something wrong or for causing pain and trouble;
- (v) *Caution*: a child is warned not to repeat the wrong he/she has done with a threat of future punishment if repeated;
- (vi) *Guidance Order*: The Village Court will appoint a person who will be responsible for guiding, advising, assisting and supervising the child for a set period of not more than six months.¹⁹⁵

Where detained, **girl detainees must be held separately from adult detainees and from male juvenile detainees**. However, as foreseen by the *Convention on the Rights of the Child*, there may be a situation where it is in the best interests of a child to be detained with an adult – for example, if a girl’s mother were also incarcerated and they could be housed together. Policies should leave open the possibility that such a decision be made, but it would clearly be exceptional. The girl should participate in any discussion about her best interests in these circumstances.

¹⁹⁵ Ministry of Gender and Community Development, Republic of Uganda (1997) *The Children Statute 1996: The simplified version: English* p. 51-52.

Girl detainees should be consulted about what **facilities** they need. In particular, given the high numbers of girl detainees who have been subject to physical and sexual assault, they should be individually involved in any decisions regarding who may visit them in prison. However, to the extent appropriate after taking into account the girl's protection needs and her wishes, girl detainees should have special arrangements to maximize their contact with their family and any other support networks. Girl detainees must be provided with educational facilities at least equivalent to those available for children outside prison. If they work, they should have shorter working hours, as appropriate to their age.

Juvenile mothers in prison need very close attention and care. They may be at greater health risk during their pregnancy. Separated from female family members and the other traditional sources of guidance during a woman's first pregnancy, juvenile mothers are likely to be in particular need of support and assistance during pregnancy and in caring for their baby. Facilities for mothers in juvenile detention centres should at least equal those for adult mothers; for example, in ensuring that the young mothers can keep their babies with them. Juvenile mothers should be given as much access to support from their families and other members of the community as possible.

18. Women who are foreign nationals

UN Standard Minimum Rules for the Treatment of Prisoners

38. (1) Prisoners who are foreign nationals shall be allowed reasonable facilities to communicate with the diplomatic and consular representatives of the State to which they belong.
41. (3) Access to a qualified representative of any religion shall not be refused to any prisoner.

Foreign national women constitute a disproportionately high and growing percentage of the prison population. The proportion of foreign nationals varies widely, but in some countries foreign women are the largest part of the female prison population: for example, in Bahrain 99%, and in Barbados 80% of the female prison population are foreign nationals.¹⁹⁶

Foreign national women in prison have varying degrees of connection with the State in which they are imprisoned. They may be long-term residents, or they may be arrested on entry or shortly after, and their vulnerability and needs will vary accordingly. In countries such as the UK, the increasing numbers of foreign women imprisoned reflects harsh anti-drug legislation. Women who are arrested as drug mules receive average sentences of between five and eight years imprisonment for a first offence.¹⁹⁷ In other countries, foreign women are commonly imprisoned for being illegal immigrants or for prostitution.

Foreign women in prison generally come from extremely impoverished backgrounds, are likely to be linguistically and culturally isolated in prison, and have difficulties negotiating an unfamiliar legal and penitentiary system.

Family contact is a particular problem for detainees who are non-resident foreign nationals. Women imprisoned abroad rarely, if ever, receive family visits. UK data records that only 11% of foreign national women in prison had received a visit from their children, compared to 60% of the British prisoners.¹⁹⁸ The cost of sending letters or making long-distance telephone calls is often prohibitive, and permitted call times may fail to take account of time differences. In some countries, women trying to stay in touch with relatives (or even lawyers) by post may face lengthy delays, aggravated if prison censors take their letters away for translation. This makes maintaining family ties harder still, increases the likelihood of family break-up, and causes additional psychological and emotional suffering for the prisoner.

Imprisoning a mother from another country may also devastate her **family at home**. Discussing the long sentences given to Jamaican women caught smuggling drugs into the UK, an advocate for female prisoners commented:

The majority of these women ... were the main carers - for both the mothers and grandmothers, and the junior members - they were the main providers for the household ... Therefore once they are taken out of that, the situation is that the elderly mothers end up with extended families, the children are all over the streets and become street children because there's no-one there to care for them.¹⁹⁹

¹⁹⁶ Information provided to the Quaker United Nations Office by the respective Governments.

¹⁹⁷ BBC News Online (13/09/2003) "Jamaica's women drug mules fill UK jails".

¹⁹⁸ Caddle, D. and Crisp, D. (1997) *Mothers in Prison* (Home Office Research, Development and Statistics Directorate) p. 3.

¹⁹⁹ BBC News Online (13/09/2003) "Jamaica's women drug mules fill UK jails".

In many countries foreign nationals who are imprisoned are subject to deportation orders that take effect when their sentence is complete. For this reason, they will be classified as a high security prisoner, where this classification would not be otherwise warranted. Such high security classification is a further impediment to contact with the outside world during imprisonment.

The use of automatic deportation on completion of sentence is a particular problem for resident foreign nationals, i.e. those who have been living in the State for some time prior to their imprisonment. Resident foreign nationals may have family in the country in which they are imprisoned. They may not have the same problems as non-resident foreign nationals with respect to family contact but their deportation at the end of the sentence may separate the family indefinitely or force all family members to move abroad. This is particularly problematic if different family members hold different nationalities (for example, if the woman's children are citizens of the country of imprisonment).

There is the additional question of provision for foreign women who are pregnant or have young children with them when they are arrested. Can the child remain with the mother? If not, will the child be deported? Into whose care? In the UK, for example, despite there being thousands of foreign female prisoners, there is no specific provision for female foreign national women with children.²⁰⁰

Foreign women in prison routinely face more **day-to-day difficulties**. They may be unable to access, or are not offered, educational and other services in prison. In Bahrain, no educational programmes are provided for women prisoners 'as they speak different languages and stay for a short time'.²⁰¹ They may not be provided with appropriate facilities and food to observe religious practices.

Foreign prisoners may struggle simply to subsist in prison. In many countries, prisoners rely upon family members to bring them food and necessary goods such as clothing, blankets, hygiene products and medicine. A *Human Rights Watch* report on Egyptian prisoners noted that: "women prisoners from other countries who lack means of support are forced to 'work' for their Egyptian counterparts, to obtain needed medicine and other items".²⁰² This puts female foreign national prisoners at particular risk of sexual exploitation.

International human rights standards

Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 14

A person who does not adequately understand or speak the language used by the authorities responsible for his arrest, detention or imprisonment is entitled to receive promptly in a language which he understands the information referred to in principle 10, principle 11, paragraph 2, principle 12, paragraph 1, and principle 13 [charges against them, rights etc.] and to have the assistance, free of charge, if necessary, of an interpreter in connection with legal proceedings subsequent to his arrest.

200 Prison Services Working Group (1999) *Report of a Review of Principles, Policies and Procedures for Mothers and Babies/Children in Prison*, p 21.

201 Information provided to the Quaker United Nations Office by the Permanent Mission of the Kingdom of Bahrain, January 2005.

202 Human Rights Watch/Middle East Watch (1993) *Prison Conditions in Egypt* p. 150.

The Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders Annex II Recommendations on The Treatment of Foreign Prisoners ²⁰³

2. Foreign prisoners should have the same access as national prisoners to education, work and vocational training.
3. Foreign prisoners should in principle be eligible for measures alternative to imprisonment, as well as for prison leave and other authorized exits from prison according to the same principles as nationals.
4. Foreign prisoners should be informed promptly after reception into prison, in a language which they understand and generally in writing, of the main features of the prison regime, including relevant rules and regulations.
5. The religious precepts and customs of foreign prisoners should be respected ...
7. Foreign prisoners should be given proper assistance, in a language they can understand, when dealing with medical or programme staff and in such matters as complaints, special accommodation, special diets and religious representation and counselling.
8. Contacts of foreign prisoners with families and community agencies should be facilitated by providing all necessary opportunities for visits and correspondence with the consent of the prisoner ...

Regional Standards on Detention

European Prison Rules

Rule 37.1

Prisoners who are foreign nationals shall be informed, without delay, of their right to request contact and be allowed reasonable facilities to communicate with the diplomatic or consular representative of their state.

Rule 37.2

Prisoners who are nationals of states without diplomatic or consular representation in the country, and refugees or stateless persons, shall be allowed similar facilities to communicate with the diplomatic representative of the state which takes charge of their interests or the national or international authority whose task it is to serve the interests of such persons.

Rule 37.3

In the interests of foreign nationals in prison who may have special needs, prison authorities shall co-operate fully with diplomatic or consular officials representing prisoners.

Rule 37.4

Specific information about legal assistance shall be provided to prisoners who are foreign nationals.

Rule 37.5

Prisoners who are foreign nationals shall be informed of the possibility of requesting that the execution of their sentence be transferred to another country.

²⁰³ *Model Agreement on the Transfer of Foreign Prisoners and Recommendations on the Treatment of Foreign Prisoners*, adopted by the Seventh UN Crime Congress (1985) A/CONF.121/22/Rev.1; endorsed by the UN General Assembly in resolution 40/32.

Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, Principle V

Persons deprived of liberty in a Member State of the Organization of American States of which they are not nationals, shall be informed, without delay, and in any case before they make any statement to the competent authorities, of their right to consular or diplomatic assistance, and to request that consular or diplomatic authorities be notified of their deprivation of liberty immediately. Furthermore, they shall have the right to communicate with their diplomatic and consular authorities freely and in private.

Application

International provisions dealing with imprisonment do not address the deep isolation of imprisonment overseas, and the impact of imprisoning a foreign national woman on her relationship with her children and her family.

Prison policies must recognise the particular needs of foreign national women in a range of practical ways. The British Chief Inspector of Prisons, for example, has said that prisons that receive foreign national prisoners should carry out a needs analysis to identify which languages they speak and provide reception packs and/or language tapes in those languages.²⁰⁴ Provision should be made for prisoners to make inexpensive phone calls home, at times appropriate to the destination. The dietary needs of foreign nationals should be examined and, to the extent possible, catered for. Women from warmer climates may require more clothing to ensure they are warm. It is necessary to train prison staff to identify and address the needs of foreign women.²⁰⁵

One partial solution to these problems is to put in place agreements providing for foreign prisoners who meet certain criteria to serve their sentences in their home country. Criteria for transferral, as well as being linked to the seriousness of the crime, should include family responsibilities. Canada has introduced legislation that makes family and social ties in the home country part of the criteria for transfer.²⁰⁶ All such transfers should be only with the consent of the prisoner concerned. The question of whether the conditions of imprisonment in the 'home country' meet the human rights standards of the transferring country would have to be examined.

A more substantive solution would be a re-examination of prosecution and sentencing practices with regard to foreign nationals, particularly women with family responsibilities. Some have urged, for example, that female drug traffickers arriving in the UK should not be prosecuted, but simply deported.²⁰⁷ Any such policy would need to include examination of what risks a deported drug trafficker might face. However, such suggestions are examples of more comprehensive approaches to addressing the problems encountered by women imprisoned overseas.

204 Edgar, K. (2004) *Lacking Conviction: The rise of the women's remand population* (Prison Reform Trust), p. 15.

205 Her Majesty's Prison Service, "Hibiscus helps cater for foreign national needs" Prison Service News, at <http://www.hmprisonservice.gov.uk/prisoninformation/prisonservicemagazine/index.asp?id=1442,18,3,18,0,0> (accessed 4 July 2005).

206 Information from QUNO correspondence with the International Corrections and Prisons Association, July 2005.

207 Gillan, A: (30/09/2003) "Bursting Point: the drugs mules filling up UK prisons" *The Guardian Online*.

19. Indigenous and minority women

In countries with indigenous populations, indigenous peoples tend to be disproportionately represented in the prison population. In Canada, Aboriginal women make up less than 2% of the population, but 21% of federally convicted women in prison.²⁰⁸ In Australia's most populous state, New South Wales, Aboriginal women constitute 2% of the female population but 32% of the women's prison population. In 2001, the rate of imprisonment of Aboriginal women aged 20 - 24 years was 18 times higher than the general rate of imprisonment of women of that age.²⁰⁹

The numbers of indigenous women in prison are increasing at a particularly rapid rate compared to non-indigenous women, as well as to both indigenous and non-indigenous men. The UN Division for the Advancement of Women has noted that, "in many countries, racialized women, including indigenous women, represent the fastest growing segment of the prison population."²¹⁰ In Australia, between 1991 and 1999, the rate of incarceration of indigenous women increased by 262%, compared to an increase of 185% in the rate of incarceration of the non-indigenous female population.²¹¹

Indigenous women in prison often suffer compound and intersecting disadvantages of being both women and indigenous in a discriminatory correctional system. They are likely to be from severely disadvantaged circumstances. For example, as a group, Australian Aboriginal women enter prison at a younger age than non-Aboriginal women, they generally have lower levels of education and employment; alcohol, drug abuse and violence are a greater problem for them and reportedly play a greater role in their offending; and they also suffer from a greater incidence of past physical and sexual abuse.²¹² A Mexican researcher notes that: "Illiteracy, language barriers and working in the agricultural sector create the socioeconomic, cultural, and political conditions for the incarceration of the poor, or minority groups."²¹³ In prison, indigenous women have specific needs and suffer from particular problems. These, of course, vary between indigenous peoples, but a number of problems are likely to be shared.

Women from **minority groups** in many countries are also massively over represented in the prison population, and suffer comparable forms of discrimination. In the USA, African American women are eight times more likely, and Latina women three times more likely, to be imprisoned than white women. Two thirds of women in state and federal prisons are African American or Latina.²¹⁴ In Spain, Roma women, who comprise 1.4% of the Spanish population, represent 25% of women prisoners.²¹⁵

The **geographical isolation** of women's prisons may cause particular problems for indigenous women. Researchers in Canada stressed that, "The dislocation and isolation of imprisonment is worsened by the difficulties encountered by relatives who have to travel from distant, often remote

208 Correctional Service Canada, *Profile Of Incarcerated Women Offenders*: September 1999, at http://www.csc-scc.gc.ca/text/prgrm/fsw/profiles/incar_e.shtml#Race (accessed 20 July 2005).

209 Beyond Bars Alliance NSW (2005) *Submission to the Anti Discrimination Commissioner for an Inquiry into the Discrimination Experienced by Women Within the Criminal Justice System in New South Wales*, at <http://www.sistersinside.com.au/media/NSWADCreport.pdf> (accessed 20 July 2005) p. 7 - 8.

210 UN Division for the Advancement of Women, Report of the Expert Group Meeting Gender and Racial Discrimination", 21-24 November 2000, Zagreb, Croatia.

211 Jonas, B. *Discrimination against indigenous people in the justice system - Background paper presented at the Expert Seminar on Indigenous Peoples and the Administration of Justice*, Madrid 12-14 November 2003, HR/MADRID/IP/SEM/2003/BP24, p. 5.

212 Beyond Bars Alliance NSW (2005) *Submission to the Anti Discrimination Commissioner for an Inquiry into the Discrimination Experienced by Women Within the Criminal Justice System in New South Wales*, at <http://www.sistersinside.com.au/media/NSWADCreport.pdf> (accessed 20 July 2005) p. 8.

213 Esparza, M. *Discrimination against indigenous people in the justice system - Background paper presented at the Expert Seminar on Indigenous Peoples and the Administration of Justice*, Madrid 12-14 November 2003, 0HR/MADRID/IP/SEM/2003/BP20, p. 4.

214 Stanford, A.F. (2004) "More than just words: women's poetry and resistance at Cook County Jail" 30(2) *Feminist Studies*, p. 278.

215 Cruz Blanco: "Las cárceles se llenan de mujeres" in *El Pais.es* (21/10/01), quoted in Taylor, R. (2004) *Women in prison and children of imprisoned mothers* (Quaker United Nations Office, Geneva) p. 15.

communities, to visit.”²¹⁶ In Mexico, indigenous women are unlikely to receive either family visits or phone calls because of the prohibitive costs these impose on impoverished communities living at great distance from the prison. Researchers found that 24% of indigenous women were visited by their family just once a year, and concluded that this abandonment impedes rehabilitation.²¹⁷

Indigenous women may be discriminated against in **security classification** where the assessment of a prisoner’s ‘security risk’ draws upon social and economic indicators:

... Since disadvantage will invariably equate to ‘risk’, the ‘individual’ risk categories used in the classification scheme reflect the experience of the entire Aboriginal population, resulting in the over-classification of the majority of Aboriginal women in the high risk, maximum classification. A higher classification for Aboriginal women results in them not being eligible for a range of opportunities.²¹⁸

For reasons related to their security classification, indigenous women may be granted conditional or community release at a lower rate than other women in prison.²¹⁹

Language barriers may prevent indigenous women accessing services in prison, and isolate them from the prisoners around them. Research amongst indigenous women prisoners in Mexico found that many did not know why they were in prison or when/if they would be released.²²⁰ One Mexican prisoner remarked, “I didn’t know castellano, I speak tzotzil, I have nobody here, it’s been 8 years of being far away and alone”.²²¹

Indigenous women in prison may also lack access to **appropriate services**, programmes or courses, that take into consideration their linguistic, cultural and spiritual traditions and customs. An Australian inquiry observed that Aboriginal women had to use either services for indigenous men or mainstream services for women: neither of which were appropriate.²²² The *Beyond Bars Alliance* argues that “Programs that fail to consider Aboriginal culture and their current social and economic disadvantage will similarly fail to prepare Aboriginal women for release or support them in coping with the day to day stress, boredom and loneliness of prison life.”²²³

An Australian researcher describes how **racism and assumptions about indigenous culture** lead decision-makers to exclude indigenous women from programmes:

Access to ‘mothers and babies’ programs for indigenous Australians varies from state to state, however this program is very inaccessible to indigenous Australians mainly as a result of institutionalised racism. Indigenous mothers are all too often denied the opportunity to take their babies to prison with them on the premise that “aboriginal women have a good kinship care system, the relatives are better off looking after the baby”. This is often not the case, and when over 20% of all indigenous children experience parental incarceration at some point in their lives, this creates a significant burden on the kinship care system.²²⁴

Juvenile indigenous offenders require special consideration. The Australian Human Rights and Equal Opportunities Commission advises that indigenous juvenile offenders are often excluded from programmes to divert young people from imprisonment:

216 Arbour, L. (1996) *Commission of Inquiry into certain events at the Prison for Women in Kingston* (Public Works and Government Services Canada) p. 198.

217 Taylor, R. (2004) *Women in prison and children of imprisoned mothers* (Quaker United Nations Office, Geneva) p. 19.

218 Beyond Bars Alliance NSW (2005) *Submission to the Anti Discrimination Commissioner for an Inquiry into the Discrimination Experienced by Women Within the Criminal Justice System in New South Wales*, at <http://www.sistersinside.com.au/media/NSWADCreport.pdf> (accessed 20 July 2005) p. 19.

219 *Ibid.*, p. 15.

220 Taylor, R. (2004) *Women in prison and children of imprisoned mothers* (Quaker United Nations Office, Geneva) p. 19.

221 Edgar, S. (15/04/03) “Nadie escucha a las indígenas presas en Tabasco”, quoted in Taylor, R. (2004) *Women in prison and children of imprisoned mothers* (Quaker United Nations Office, Geneva) p. 19.

222 Jonas, W. (2003) *Social Justice Report 2002* (Aboriginal and Torres Strait Islander Social Justice Commissioner) p. 168.

223 Beyond Bars Alliance NSW (2005) *Submission to the Anti Discrimination Commissioner for an Inquiry into the Discrimination Experienced by Women Within the Criminal Justice System in New South Wales*, at <http://www.sistersinside.com.au/media/NSWADCreport.pdf> (accessed 20 July 2005) p. 14.

224 Correspondence from Simon Quilty (MB BS, MPhilPH) to the Quaker United Nations Office, Geneva, 26 June 2005.

Indigenous juveniles are particularly vulnerable to being trapped in a cycle of contact with criminal justice processes. Yet studies show that Indigenous juveniles are less likely than non-Indigenous youth to benefit from mechanisms, such as conferencing, to divert juveniles from custody.... Similarly, there is evidence that Indigenous children have not received the benefit of police cautioning at the same rate as the general youth population.²²⁵

Upon **release**, indigenous women may face particular difficulties, and are often more likely to be imprisoned again. Stigmatisation of women who have been in prison may be particularly strong. For example, in Canada, “Aboriginal communities tend to experience difficulty in supporting women offenders and have rejected or ignored the women.”²²⁶ The public services and support that are essential in adjusting to post-release life - such as secure housing, employment assistance and counselling - are often sorely lacking in indigenous communities.

International human rights standards

Universal Declaration of Human Rights

Article 2:

Everyone is entitled to all the rights and freedoms set forth in this Declaration without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

International Covenant on Civil and Political Rights, Article 27

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

International Convention on the Elimination of All Forms of Racial Discrimination, Article 5

In compliance with the fundamental obligations laid down in Article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

- (a) The right to equal treatment before the tribunals and all other organs administering justice;
- (b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual, group or institution.

*International Labour Organisation Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries*²²⁷

Article 3(1)

Indigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination. The provisions of the Convention shall be applied without discrimination to male and female members of these peoples.

225 Australian Human Rights and Equal Opportunities Commission, *Human Rights Brief No.5 Best practice principles for the diversion of juvenile offenders* [references omitted]: at http://www.hreoc.gov.au/human_rights/briefs/brief_5.html (accessed 4 July 2005).

226 Arbour, L. (1996) *Commission of Inquiry into certain events at the Prison for Women in Kingston* (Public Works and overnment Services Canada) p. 199.

227 Adopted on 27 June 1989 by the General Conference of the International Labour Organisation. Ratified by 17 countries, as of 5 July 2005.

Article 10

1. In imposing penalties laid down by general law on members of these peoples account shall be taken of their economic, social and cultural characteristics.
2. Preference shall be given to methods of punishment other than confinement in prison.

Regional Standards on Detention

*European Prison Rules***Rule 38.1**

Special arrangements shall be made to meet the needs of prisoners who belong to ethnic or linguistic minorities.

Rule 38.2

As far as practicable the cultural practices of different groups shall be allowed to continue in prison.

Rule 38.3

Linguistic needs shall be met by using competent interpreters and by providing written material in the range of languages used in a particular prison.

*Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas***Principle II**

Measures designed exclusively to protect the rights of women, particularly the rights of pregnant women and nursing mothers; of children; of the elderly; of those who are sick or suffering from infections such as HIV-AIDS; of persons with a physical, mental, or sensory disability; as well as of indigenous peoples, afro-descendants, and minorities shall not be considered discriminatory. These measures shall be applied in accordance with the law and international human rights law, and shall always be subject to review by a judge or other competent, independent, and impartial authority.

Principle III

In imposing penalties laid down by general law on members of indigenous peoples preference shall be given to methods of punishment other than confinement in prison, in conformity with their customs or customary laws, where these are compatible with the legal system in force.

Application

States should make every endeavour to divert indigenous people from imprisonment, whether or not they are party to *International Labour Organisation Convention 169*. Particular emphasis should be placed on stemming the increasing flow of indigenous women entering prison. Non-custodial alternatives to imprisonment, including to pre-trial detention, should be developed, with indigenous community representatives. As stated in the *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas* States must give priority to customary justice procedures over imprisonment, on the proviso that such customary systems are compatible with the legal system as well as with international law. It is essential that deferral to customary systems only be undertaken where such systems are not discriminatory toward women. In imposing criminal penalties on indigenous women, the decision maker should be guided to understand the economic, social and cultural context of the woman's actions.

Within prisons, specific programmes for indigenous women should be designed, in consultation with indigenous women, which support and promote indigenous identities, languages and cultural practices. As regards general prison services, indigenous women should be involved and/or consulted, to ensure that issues of cultural appropriateness are identified.

States should guard against direct and indirect discrimination against indigenous people within prisons. The Committee on the Elimination of Racial Discrimination recognised the multiple discrimination faced by indigenous and minority women in the justice system.²²⁸ They highlighted the risk that women, in particular, in such groups may be discriminated against in the remand decisions in light of their “insecure situation”.²²⁹ (The situation of women in pre-trial detention is considered further in Part 21.) They go on to state:

... with regard to women and children belonging to the [racial and ethnic] groups referred to in the last paragraph of the preamble, States parties should pay the greatest attention possible with a view to ensuring that such persons benefit from the special regime to which they are entitled in relation to the execution of sentences, bearing in mind the particular difficulties faced by mothers of families and women belonging to certain communities, particularly indigenous communities.

States should actively monitor the proportion of indigenous prisoners who are classified as high security, are allocated particular jobs, access education and rehabilitation programmes in prison, receive visitors, use medical services, and are subject to prison disciplinary measures. Disproportionate over- or under-representation of indigenous people in such categories helps to identify systemic discrimination. Indigenous people should be involved in developing solutions to any such problems identified.

Post-release services must be reviewed to ensure that they are appropriate and accessible to indigenous women. They may need to, for example, address and support the additional stresses that kinship obligations particular to indigenous communities place on indigenous women when they return home.²³⁰

States should endeavour to recruit indigenous women and men into prison staff at all levels.

228 Committee on the Elimination of Racial Discrimination, General Comment 31 on the elimination of racial discrimination in the administration and functioning of the criminal justice system, A/60/18, pp. 98-108

229 CERD, General Comment 31, paragraph III.2.3

230 Jonas, B. *Discrimination against indigenous people in the justice system - Background paper presented at the Expert Seminar on Indigenous Peoples and the Administration of Justice*, Madrid 12-14 November 2003, HR/MADRID/IP/SEM/2003/BP.24, p. 6.

20. Women detained in armed conflict

The International Committee of the Red Cross visits women who are prisoners of war or civilians detained in armed conflict all over the world. Their guidance documents highlight that women detained in armed conflict face many of the challenges of women in prison in other circumstances:

... their conditions are not necessarily better because they are fewer in number. On the contrary, it is often the case that places of detention are less able to cater for women's needs, being primarily designed to house men... Women may be held in detention facilities that deny them adequate conditions of privacy, safety and access to health care. Detention facilities exclusively for women may be few in number and so may entail women being transferred far from their family or from the court in charge of their trial.²³¹

In situations of armed conflict, persons detained in relation to the conflict, in addition to being protected by national laws and international human rights law, are protected by International Humanitarian Law.²³²

International Humanitarian Law contains a great number of special protections for women and for children, which apply also to women and girl detainees.²³³ For example, the *Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War* specifies that:

- “expectant mothers, shall be the object of particular protection and respect” (*Article 16*);
- “The Parties to the conflict shall take the necessary measures to ensure that children under fifteen, who are orphaned or are separated from their families as a result of the war, are not left to their own resources, and that their maintenance, the exercise of their religion and their education are facilitated in all circumstances” (*Article 24*);
- “The Occupying Power may not compel protected persons to work unless they are over eighteen years of age” (*Article 51*).

Provisions specifically directed to the treatment of women and children who are deprived of their liberty are contained in the:

- *Third Geneva Convention relative to the Treatment of Prisoners of War, 1949* (applicable in international armed conflicts);
- *Fourth Geneva Convention relative to the Treatment of Civilian Persons in Time of War, 1949* (applicable in international armed conflicts);
- *Additional Protocol I to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts, 1977*; and
- *Additional Protocol II to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of Non-International Armed Conflicts, 1977*.

231 ICRC (2004) *Addressing the Needs of Women Affected by Armed Conflict*, p. 119.

232 International human rights law, in principle, applies at all times, including in situations of armed conflict. Some international human rights law treaties permit governments to derogate from certain rights in situations of public emergency threatening the life of the nation. Derogations must, however, be proportional to the crisis at hand, must not be introduced on a discriminatory basis and must not contravene other rules of international law – including rules of International Humanitarian Law. Certain human rights are never derogable, including the right to life; the prohibition of torture or cruel, inhuman or degrading treatment or punishment; and the prohibition of slavery. For further discussion refer to the website of the International Committee of the Red Cross, www.icrc.org, and to Human Rights Committee, General Comment 29 on derogations during states of emergency, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001).

233 The International other provisions of international law specifically applicable to women and children in war: www.icrc.org.

Key International Humanitarian Law provisions

Third Geneva Convention relative to the Treatment of Prisoners of War

Article 14

Prisoners of war are entitled in all circumstances to respect for their persons and their honour. Women shall be treated with all the regard due to their sex and shall in all cases benefit by treatment as favourable as that granted to men ...

Article 25(4)

In any camps in which women prisoners of war, as well as men, are accommodated, separate dormitories shall be provided for them.

Article 29

... Prisoners of war shall have for their use, day and night, conveniences which conform to the rules of hygiene and are maintained in a constant state of cleanliness. In any camps in which women prisoners of war are accommodated, separate conveniences shall be provided for them.

Article 49

The Detaining Power may utilize the labour of prisoners of war who are physically fit, taking into account their age, sex ...

Article 97

Women prisoners of war undergoing disciplinary punishment shall be confined in separate quarters from male prisoners of war and shall be under the immediate supervision of women.

Fourth Geneva Convention relative to the Treatment of Civilian Persons in Time of War

Article 68

... the death penalty may not be pronounced on a protected person who was under eighteen years of age at the time of the offence.

Article 76

Protected persons accused of offences shall be detained in the occupied country ... Women shall be confined in separate quarters and shall be under the direct supervision of women. Proper regard shall be paid to the special treatment due to minors.

Article 82

Throughout the duration of their internment, members of the same family, and in particular parents and children, shall be lodged together in the same place of internment ... Internees may request that their children who are left at liberty without parental care shall be interned with them. Wherever possible, interned members of the same family shall be housed in the same premises and given separate accommodation from other internees, together with facilities for leading a proper family life.

Article 85

... Whenever it is necessary, as an exceptional and temporary measure, to accommodate women internees who are not members of a family unit in the same place of internment as men, the provision of separate sleeping quarters and sanitary conveniences for the use of such women internees shall be obligatory.

Article 89

Expectant and nursing mothers and children under fifteen years of age, shall be given additional food, in proportion to their physiological needs.

Article 91

... Maternity cases ... must be admitted to any institution where adequate treatment can be given and shall receive care not inferior to that provided for the general population.

Article 94

The education of children and young people shall be ensured; they shall be allowed to attend schools either within the place of internment or outside. Special playgrounds shall be reserved for children and young people.

Article 97

... A woman internee shall not be searched except by a woman.

Article 119

In no case shall disciplinary penalties be inhuman, brutal or dangerous for the health of internees. Account shall be taken of the internee's age, sex and state of health.

Article 124

... Women internees undergoing disciplinary punishment shall be confined in separate quarters from male internees and shall be under the immediate supervision of women.

Article 132 (Release, Repatriation and Accommodation in Neutral Countries)

... The Parties to the conflict shall, moreover, endeavour during the course of hostilities, to conclude agreements for the release, the repatriation, the return to places of residence or the accommodation in a neutral country of certain classes of internees, in particular children, pregnant women and mothers with infants and young children ...

Additional Protocol I to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts**Article 75(5)**

Women whose liberty has been restricted for reasons related to the armed conflict shall be held in quarters separated from men's quarters. They shall be under the immediate supervision of women. Nevertheless, in cases where families are detained or interned, they shall, whenever possible, be held in the same place and accommodated as family units.

Article 76 - Protection of women

1. Women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault.
2. Pregnant women and mothers having dependent infants who are arrested, detained or interned for reasons related to the armed conflict, shall have their cases considered with the utmost priority.
3. To the maximum extent feasible, the Parties to the conflict shall endeavour to avoid the pronouncement of the death penalty on pregnant women or mothers having dependent infants, for an offence related to the armed conflict. The death penalty for such offences shall not be executed on such women.

Article 77 - Protection of children

1. Children shall be the object of special respect and shall be protected against any form of indecent assault. The Parties to the conflict shall provide them with the care and aid they require, because of their age or for any other reason.
2. The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities ...
3. If, in exceptional cases, despite the provisions of paragraph 2, children who have not attained the age of fifteen years take a direct part in hostilities and fall into the power of an adverse Party, they shall continue to benefit from the special protection accorded by this Article, whether or not they are prisoners of war.
4. If arrested, detained or interned for reasons related to the armed conflict, children shall be held in quarters separate from the quarters of adults, except where families are accommodated as family units as provided in Article 75, paragraph 5.
5. The death penalty for an offence related to the armed conflict shall not be executed on persons who had not attained the age of eighteen years at the time the offence was committed.

*Additional Protocol II to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of Non-International Armed Conflicts**Article 4(3)*

3. Children shall be provided with the care and aid they require, and in particular:
 - (a) they shall receive an education, including religious and moral education, in keeping with the wishes of their parents, or in the absence of parents, of those responsible for their care;
 - (b) all appropriate steps shall be taken to facilitate the reunion of families temporarily separated;
 - (c) children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities;
 - (d) the special protection provided by this Article to children who have not attained the age of fifteen years shall remain applicable to them if they take a direct part in hostilities despite the provisions of subparagraph (c) and are captured;...

Article 5(2)

...(a) Except when men and women of a family are accommodated together, women shall be held in quarters separated from those of men and shall be under the immediate supervision of women ...

Article 6(4)

The death penalty shall not be pronounced on persons who were under the age of eighteen years at the time of the offence and shall not be carried out on pregnant women or mothers of young children.

Regional Standards on Detention

Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, Principle II

Persons deprived of liberty in the context of an armed conflict shall be afforded special protection and attention in conformity with the special juridical regimen established by the norms of international humanitarian law, complemented by the norms of international human rights law.

Application

In armed conflicts, women and girls who are deprived of their liberty for reasons related to the conflict are entitled to the same protection as men, without any discrimination, and benefit also from the additional protections noted above.

As in non-conflict situations, women must be held in separate quarters from men under the immediate supervision of women (unless they are housed as a family). The right of children to receive an education, and the prohibition against the juvenile death penalty are strongly reinforced.

The International Committee of the Red Cross's guidance document, *Addressing the Needs of Women Affected by Armed Conflict*, provides examples of the types of special provision that women detainees may require in armed conflict situations:

- Women may require additional water during menstruation or after giving birth or for their baby.²³⁴
- Women may be pregnant as a result of rape upon arrest or in detention. Sensitivity and delicacy is needed when trying to ascertain whether this is the case. A detainee will require support in coping with pregnancy in difficult conditions, especially if the pregnancy is the result of sexual violence... A multidisciplinary team (comprising physicians, counsellors, psychologists, lawyers etc) should be formed where feasible.²³⁵
- Women in detention frequently lack contact with husbands held in other prisons, thus particular attention should be paid to the exchange of family news between persons detained in different prisons and in different countries.²³⁶
- One reason that women detainees receive fewer family visits than men may be that security reasons deter male relatives from visiting places of detention for fear of arrest.²³⁷

The needs of female detainees in armed conflict situations are in some ways specific, but in many ways are shared by women in prison all over the world, and especially in developing countries.

234 ICRC (2004) *Addressing the Needs of Women Affected by Armed Conflict*, p. 122.

235 *Ibid.*, p 125.

236 *Ibid.*, p 143.

237 *Ibid.*, p 143.

21. Pre-trial detention

UN Standard Minimum Rules for the Treatment of Prisoners

8. The different categories of prisoners shall be kept in separate institutions or parts of institutions taking account of their sex, age, criminal record, the legal reason for their detention and the necessities of their treatment. Thus ... (b) Untried prisoners shall be kept separate from convicted prisoners...

C. PRISONERS UNDER ARREST OR AWAITING TRIAL

84. (2) Unconvicted prisoners are presumed to be innocent and shall be treated as such.
(3) Without prejudice to legal rules for the protection of individual liberty or prescribing the procedure to be observed in respect of untried prisoners, these prisoners shall benefit by a special regime which is described in the following rules in its essential requirements only.
85. (1) Untried prisoners shall be kept separate from convicted prisoners.
(2) Young untried prisoners shall be kept separate from adults and shall in principle be detained in separate institutions.
86. Untried prisoners shall sleep singly in separate rooms, with the reservation of different local custom in respect of the climate.
87. Within the limits compatible with the good order of the institution, untried prisoners may, if they so desire, have their food procured at their own expense from the outside, either through the administration or through their family or friends. Otherwise, the administration shall provide their food.
88. (1) An untried prisoner shall be allowed to wear his own clothing if it is clean and suitable.
(2) If he wears prison dress, it shall be different from that supplied to convicted prisoners.
89. An untried prisoner shall always be offered opportunity to work, but shall not be required to work. If he chooses to work, he shall be paid for it.
90. An untried prisoner shall be allowed to procure at his own expense or at the expense of a third party such books, newspapers, writing materials and other means of occupation as are compatible with the interests of the administration of justice and the security and good order of the institution.
91. An untried prisoner shall be allowed to be visited and treated by his own doctor or dentist if there is reasonable ground for his application and he is able to pay any expenses incurred.
92. An untried prisoner shall be allowed to inform immediately his family of his detention and shall be given all reasonable facilities for communicating with his family and friends, and for receiving visits from them, subject only to restrictions and supervision as are necessary in the interests of the administration of justice and of the security and good order of the institution.

High numbers of women are imprisoned before trial²³⁸

Whilst the International Covenant on Civil and Political Rights makes clear that detention of a person before their trial “shall not be the general rule”, in many countries it is. In 39 countries, over half the prison population is awaiting trial. In 125 countries at least one in five prisoners is awaiting trial²³⁹

A large proportion of women in prison are in pre-trial detention. For example:

- in Bolivia, 77% of women in prison are in pre-trial detention;
- in Bahrain, between 55 and 95 % of women in prison are in pre-trial detention;
- in Colombia, 53.5% of women in prison are in pre-trial detention;
- in Rwanda, 50-75% of women in prison are in pre-trial detention;
- in Kenya’s Shimo-la-tewa Women’s Prison, 47.3% of women in prison are in pre-trial detention;
- in Mexico’s federal prisons, 44.6% of women in prison are in pre-trial detention;
- in Lebanon, 30% of women in prison are in pre-trial detention.²⁴⁰

In the UK, around 20% of women in prison are pre-trial and “...one in five women on remand are eventually acquitted and around 60% received a non-custodial sentence.”²⁴¹

Further, in many countries, **the proportion of imprisoned women who are awaiting trial is much higher than in the male prison population and/or increasing faster.** For example:

- in the state of New South Wales, in Australia, 30% of women in prison are pre-trial, compared to 18% of men, despite the fact that women are charged with fewer serious and violent crimes than men;²⁴²
- in the UK, between 1992 and 2002, there was a 196% increase in women entering prison on remand, compared to a 52% increase for men;²⁴³
- in the USA, this trend is even more marked when comparing the juvenile female and male prison population: between 1988 and 1997, pre-trial detention of girls increased 65%, as compared to 30% for boys.²⁴⁴

Criteria for deciding whether to imprison before trial

A decision to detain a person before trial is generally made on the basis of a decision that there is a substantial risk that they will, if granted bail:

- fail to attend trial;
- re-offend;
- interfere with witnesses or otherwise obstruct the course of justice; or
- cause a disturbance to public order.²⁴⁵

238 Specific consideration is given to this issue in Townhead, L. (2007) *Pre-Trial Detention of Women and the Impact on Their Children* (Quaker United Nations Office).

239 International Centre for Prison Studies, *World Prison Brief* at http://www.kcl.ac.uk/depsta/rel/icps/worldbrief/highest_to_lowest_rates.php (accessed 6 July 2005).

240 Based on information provided to the Quaker United Nations Office, Geneva, by the respective Governments.

241 Fawcett Society Commission on Women and the Criminal Justice System (2003) *Interim Report on Women and Offending*, p. 9.

242 The Prison Census (2003) quoted in: Beyond Bars Alliance NSW (2005) *Submission to the Anti Discrimination Commissioner for an Inquiry into the Discrimination Experienced by Women Within the Criminal Justice System in New South Wales*, at <http://www.sistersinside.com.au/media/NSWADCreport.pdf> (accessed 20 July 2005) p. 8.

243 Women’s Offending Reduction Programme, 2004, quoted in Edgar, K. (2004) *Lacking Conviction: The rise of the women’s remand population* (Prison Reform Trust), p. 14.

244 Dohrn, B. (2004) “All Ellas: Girls Locked Up” 30(2) *Feminist Studies* p. 305.

245 These are, for example, the conditions laid down by the European Court of Human Rights, quoted in Edgar, K. (2004) *Lacking Conviction: The rise of the women’s remand population* (Prison Reform Trust), p. 3.

In some countries women can be held in pre-trial detention on the grounds that such detention is for the defendant's own protection. The UK's Prison Reform Trust highlights the problem with such decisions: "courts trade on the possibility that a defendant might be harmed if she were released on bail against the certainty that she will be damaged by placing her in custody."²⁴⁶

Whilst policies regarding pre-trial detention may appear to be based on gender-neutral criteria, they are likely to impact disproportionately harshly upon women. As noted by the International Commission of Jurists, pre-trial detention:

... may have a significantly more severe effect on women because they are, on average, poorer than men. Indeed, women frequently have financial difficulties to secure bail, surety or release, have no access to legal advice and are unaware of the possibility of bail.²⁴⁷

Where decisions as to pre-trial detention are made according to perceived links with mainstream society, women are likely to be disadvantaged because they are less likely to have secure full-time work and are less likely to own property in their own name. A study of bail decisions in the UK found that the courts perceived that the risks of further offending were increased by factors including homelessness, substance abuse, no job, an unsupportive family and criminal associates.²⁴⁸

The practice of remanding people in custody for so-called 'protective purposes' is particularly likely to discriminate against women in its application. Women accused of crimes are often those whom a court sees as a risk to themselves – those who suffer from social exclusion through mental health problems, drug dependency, unstable accommodation or financial pressure.²⁴⁹

Decisions about pre-trial detention often fail to take into account whether the woman is a carer of young children.

Detaining victims of crime

In some countries, 'protective custody' is used in a different manner: women may be held in prison as a means of 'protection' either in the aftermath of a criminal offence being committed against them or simply when the threat of such action is present. This is particularly the case for women who have been the victims of rape, or are otherwise at risk of so-called honour killing.²⁵⁰

The imprisonment of juvenile females for non-criminal acts such as running away was discussed in Part 17 above.

Because of the stigma that an Indian woman suffers if she has been raped, the authorities apparently fear that the victim will not show up in court to testify against her rapist. Accordingly, she is imprisoned to make certain that she is available to testify at trial... While not ostensibly designed to punish the victims, this is the effect of confinement in protective custody, which may last for two, three or four years.

Lack of a special treatment regime

The *UN Standard Minimum Rules for the Treatment of Prisoners* make clear that pre-trial detainees should be detained separately from convicted prisoners, and be subject to a special and far less strict prison regime.

²⁴⁶ Edgar, K. (2004) *Lacking Conviction* (Prison Reform Trust), p.7

²⁴⁷ International Commission of Jurists (2004) Human rights of women in conflict with the criminal justice system: submission to the Committee on the Elimination of Discrimination against Women, p. 11.

²⁴⁸ Morgan & Henderson (1998), quoted in Edgar, K. (2004) *Lacking Conviction: The rise of the women's remand population* (Prison Reform Trust), p. 8.

²⁴⁹ Edgar, K. (2004) *Lacking Conviction: The rise of the women's remand population* (Prison Reform Trust), p. 8.

²⁵⁰ Box: Asia Watch (1991) *Prison Conditions in India*, p. 26.

However, because of the limited accommodation and facilities for women prisoners, women detained pre-trial are particularly likely to be **accommodated with convicted prisoners**, and subject to the same security regime, and may even be automatically **classified as high risk prisoners**. In the state of New South Wales in Australia, individuals on remand are automatically classified as ‘maximum security’ prisoners, with high levels of security, restrictions on personal property, visit entitlements and other “privileges”, despite the fact they have not been found guilty. This then impacts on the sentenced women with whom they are housed: “the presence of remand prisoners effectively means that medium and minimum security prisoners may serve their sentence in an environment that is more onerous than is necessary for their classification status.”²⁵¹

Because pre-trial detention is often assumed to be for a short period, there tends to be a **lack of services, programmes and facilities** for pre-trial detainees. However, in many countries pre-trial detention lasts for years. Researchers in India report: “more than 70 % of the female jail population in the country consists of under-trial women. They languish for 4 to 5 years in jail for offences for which the sentence would have been far less if they had been convicted.”²⁵² Women detained pre-trial are often excluded from prison drug and alcohol rehabilitation, education and vocational programmes.

The severe impact of pre-trial imprisonment on women

The effects of even a relatively short period of custody are often devastating for a woman who is detained pre-trial, particularly if she is the sole carer of children. A woman living in insecure or rented accommodation will often lose this when she enters prison. If she has a job, she will most likely lose it. On release, obtaining secure accommodation is often problematic. A mother whose children have been placed in the care of the State or of another person often cannot reclaim custody of them unless she has accommodation and means to support her children. Therefore, **even a short prison term may lead to lasting or permanent dislocation of families, reduced capacity to find work and aggravated financial problems**.

People who are detained before trial are at a particularly high risk of self-harm and suicide. In 2000, the Australian Institute of Criminology reported that the proportion of remand prisoners who died in custody was almost double that of post-conviction prisoners.²⁵³ In the UK, 21% of women in pre-trial detention were identified as suffering from a psychosis, compared to 10% of sentenced women, starkly illustrating the particular vulnerability of the remand population.²⁵⁴

International human rights standards

Universal Declaration of Human Rights, Article 9

No one shall be subjected to arbitrary arrest, detention or exile.

251 Beyond Bars Alliance NSW (2005) *Submission to the Anti Discrimination Commissioner for an Inquiry into the Discrimination Experienced by Women Within the Criminal Justice System in New South Wales*, at <http://www.sistersinside.com.au/media/NSWADCreport.pdf> (accessed 20 July 2005) p. 8 - 9.

252 Shankardass, R., Roy, H. and Seshadri, V. (2000) *Workshop on new models of accessible justice: The India experience* (Penal Reform and Justice Association and Penal Reform International), p. 5.

253 Beyond Bars Alliance NSW (2005) *Submission to the Anti Discrimination Commissioner for an Inquiry into the Discrimination Experienced by Women Within the Criminal Justice System in New South Wales*, at <http://www.sistersinside.com.au/media/NSWADCreport.pdf> (accessed 20 July 2005) p. 9.

254 Edgar, K. (2004) *Lacking Conviction: The rise of the women's remand population* (Prison Reform Trust), p. 10.

*International Covenant on Civil and Political Rights***Article 9**

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law ...
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement ...

Article 10

2. (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons ...

UN Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules) ²⁵⁵**6. Avoidance of pre-trial detention**

- 6.1 Pre-trial detention shall be used as a means of last resort in criminal proceedings, with due regard for the investigation of the alleged offence and for the protection of society and the victim.
- 6.2 Alternatives to pre-trial detention shall be employed at as early a stage as possible. Pre-trial detention shall last no longer than necessary to achieve the objectives stated under rule 5.1 [the protection of society, crime prevention or the promotion of respect for the law and the rights of victims] and shall be administered humanely and with respect for the inherent dignity of human beings.

Human Rights Committee, General Comment 21 on the rights of persons deprived of their liberty ²⁵⁶

Article 10, paragraph 2(a), provides for the segregation, save in exceptional circumstances, of accused persons from convicted ones. Such segregation is required in order to emphasize their status as unconvicted persons who at the same time enjoy the right to be presumed innocent as stated in article 14, paragraph 2. The reports of States parties should indicate how the separation of accused persons from convicted persons is effected and explain how the treatment of accused persons differs from that of convicted persons.

Regional Standards on Detention*European Prison Rules***Rule 94.1**

For the purposes of these rules, untried prisoners are prisoners who have been remanded in custody by a judicial authority prior to trial, conviction or sentence.

²⁵⁵ Adopted by General Assembly resolution 45/110 of 14 December 1990.

²⁵⁶ Para 9, U.N. Doc. HRI/GEN/I/Rev.7 at 153 (2004).

Rule 94.2

A state may elect to regard prisoners who have been convicted and sentenced as untried prisoners if their appeals have not been disposed of finally.

Rule 95.1

The regime for untried prisoners may not be influenced by the possibility that they may be convicted of a criminal offence in the future.

Rule 95.2

The rules in this part provide additional safeguards for untried prisoners.

Rule 95.3

In dealing with untried prisoners prison authorities shall be guided by the rules that apply to all prisoners and allow untried prisoners to participate in various activities for which these rules provide.

Rule 96

As far as possible untried prisoners shall be given the option of accommodation in single cells, unless they may benefit from sharing accommodation with other untried prisoners or unless a court has made a specific order on how a specific untried prisoner should be accommodated.

Rule 97.1

Untried prisoners shall be allowed to wear their own clothing if it is suitable for wearing in prison.

Rule 97.2

Untried prisoners who do not have suitable clothing of their own shall be provided with clothing that shall not be the same as any uniforms that may be worn by sentenced prisoners.

Rule 98.1

Untried prisoners shall be informed explicitly of their right to legal advice.

Rule 98.2

All necessary facilities shall be provided to assist untried prisoners to prepare their defence and to meet with their legal representatives.

Rule 99

Unless there is a specific prohibition for a specified period by a judicial authority in an individual case, untried prisoners:

- a. shall receive visits and be allowed to communicate with family and other persons in the same way as convicted prisoners;
- b. may receive additional visits and have additional access to other forms of communication; and
- c. shall have access to books, newspapers and other news media.

Rule 100.1

Untried prisoners shall be offered the opportunity to work but shall not be required to work.

Rule 100.2

If untried prisoners elect to work, all the provisions of Rule 26 shall apply to them, including those relating to remuneration.

Rule 101

If an untried prisoner requests to be allowed to follow the regime for sentenced prisoners, the prison authorities shall as far as possible accede to this request.

Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, Principle III

2. Exceptional use of preventive deprivation of liberty

The law shall ensure that personal liberty is the general rule in judicial and administrative procedures, and that preventive deprivation of liberty is applied as an exception, in accordance with international human rights instruments.

In the context of criminal proceedings, there shall be sufficient evidentiary elements that associate the accused with the facts of the case, in order to justify an order of preventive deprivation of liberty. The foregoing is a demand or a condition sine qua non for imposing any precautionary measure; nevertheless, after a certain lapse of time it no longer suffices.

Preventive deprivation of liberty is a precautionary measure, not a punitive one, which shall additionally comply with the principles of legality, the presumption of innocence, need, and proportionality, to the extent strictly necessary in a democratic society. It shall only be applied within the strictly necessary limits to ensure that the person will not impede the efficient development of the investigations nor will evade justice, provided that the competent authority examines the facts and demonstrates that the aforesaid requirements have been met in the concrete case.

Application

Criteria for deciding whether to imprison before trial

In considering any 'protective' function of pre-trial detention, courts must be informed of and take into account the particular risks of pre-trial detention on women: the high rates of self-harm, and the likelihood of loss of accommodation, family separation, and increased social exclusion and vulnerability. Courts should have and use a range of options other than detention, such as referral of a woman to psychiatric services and community bail facilities, and other services that can help them to address underlying problems of drug dependency and debt.

The criteria for deciding whether to imprison before trial must not discriminate against women either directly or indirectly. The Committee on the Elimination of Racial Discrimination and the Working Group on Arbitrary Detention have noted the potential for discrimination in basing such decisions on assessments of stability and community ties.²⁵⁷ Women offenders typically come from economically and socially disadvantaged segments of society. They are often young, unemployed, have low levels of education and have dependent children. Many have histories of alcohol and substance abuse. A high proportion of women offenders have experienced violence or sexual abuse. They are likely to have mental health problems. Therefore, the majority of women facing pre-trial detention will present one or more characteristics likely to undermine an assessment of their stability.

²⁵⁷ Committee on the Elimination of Racial Discrimination, General Comment 31 on the Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System, paragraph III.2.3; Working Group on Arbitrary Detention (2006) Report of the Working Group on Arbitrary Detention (E/CN.4/2006/7), paragraph 66

Where a woman is the mother of a child under 18 years, as with decisions about sentencing after conviction (discussed in Part 10 above), any decision regarding her imprisonment before trial should be required to take into account, as a primary consideration, the child's best interests. For example, the court could be required to consider a social services report assessing how the mother's detention would impact on her children.

Keeping the family together

If a mother is, in an extraordinary case, detained pre-trial, programmes must be in place to ensure that pre-trial detention does not lead to the breakdown of the family unit. This is important both to protect the woman's right to family life, and to prevent institutionalisation of children. Support and services must be in place to ensure that any children are properly cared for, and that the family's accommodation is secure. Whilst the right of a woman on remand to maintain contact with her family is subject to "restrictions necessary in the administration of justice", a child's right to maintain contact with her/his parent can only be limited if the restriction is in the best interests of the child. This right is protected by the Convention on the Rights of the Child:

States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.²⁵⁸

Apply the *UN Standard Minimum Rules for the Treatment of Prisoners to the treatment of women imprisoned pre-trial*

The provisions of the *UN Standard Minimum Rules for the Treatment of Prisoners* as regards 'untried prisoners' should be properly implemented. The regime governing them should not be any more strict than can be shown to be required and, in particular, it should be ensured that women in pre-trial detention are able to maintain good contact with their family, where appropriate.

258 Convention on the Rights of the Child, Article 9(3)

22. Preparation for release and support after release

UN Standard Minimum Rules for the Treatment of Prisoners

A. PRISONERS UNDER SENTENCE ...

60. (2) Before the completion of the sentence, it is desirable that the necessary steps be taken to ensure for the prisoner a gradual return to life in society. This aim may be achieved, depending on the case, by a pre-release regime organized in the same institution or in another appropriate institution, or by release on trial under some kind of supervision which must not be entrusted to the police but should be combined with effective social aid.

...

64. The duty of society does not end with a prisoner's release. There should, therefore, be governmental or private agencies capable of lending the released prisoner efficient after-care directed towards the lessening of prejudice against him and towards his social rehabilitation.

...

81. (1) Services and agencies, governmental or otherwise, which assist released prisoners to re-establish themselves in society shall ensure, so far as is possible and necessary, that released prisoners be provided with appropriate documents and identification papers, have suitable homes and work to go to, are suitably and adequately clothed having regard to the climate and season, and have sufficient means to reach their destination and maintain themselves in the period immediately following their release.

(2) The approved representatives of such agencies shall have all necessary access to the institution and to prisoners and shall be taken into consultation as to the future of a prisoner from the beginning of his sentence....

B. INSANE AND MENTALLY ABNORMAL PRISONERS ...

83. It is desirable that steps should be taken, by arrangement with the appropriate agencies, to ensure if necessary the continuation of psychiatric treatment after release and the provision of social-psychiatric after-care.

As with other programmes for prisoners, women often receive less pre-release preparation and post-release support than do male prisoners, or programmes are not targeted to their needs and fail to address the particular family and other dimensions of women's release.

In some countries, women return to prison after release significantly faster and in greater numbers than men. This suggests that women prisoners face greater barriers to social integration after prison. On release, women prisoners often face greater stigmatization and rejection by their communities than do male prisoners. Many experience ongoing mental illness after prison.

Finding safe and secure accommodation is often difficult. One UK study found that: "half the mothers nearing release were not expecting to return to their previous accommodation, almost four out of 10 had lost their homes and there was an increase in the number expecting to be homeless."²⁵⁹ Secure housing is essential for a woman to be able to reintegrate into society, and lack of suitable housing may prevent her from reuniting her family.

²⁵⁹ Wedderburn, D. (2000) *Justice for Women: The Need for Reform* (Prison Reform Trust) p. 9.

If a mother is able to regain custody of her children, she will have to re-build her relationships with children who have been growing up without her, and may feel resentful towards her.

It is essential that women are given options about where they are offered post-release support. Effectively supported release from prison can offer women a chance to break with violent or destructive relationships that may have contributed to their offending.

International human rights standards

Universal Declaration of Human Rights, Article 25(1)

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

Basic Principles for the Treatment of Prisoners, Principle 10

With the participation and help of the community and social institutions, and with due regard to the interests of victims, favourable conditions shall be created for the reintegration of the ex-prisoner into society under the best possible conditions.

Regional Standards on Detention

European Prison Rules

Rules 107.1

Sentenced prisoners shall be assisted in good time prior to release by procedures and special programmes enabling them to make the transition from life in prison to a law-abiding life in the community.

Rules 107.2

In the case of those prisoners with longer sentences in particular, steps shall be taken to ensure a gradual return to life in free society.

Rules 107.3

This aim may be achieved by a pre-release programme in prison or by partial or conditional release under supervision combined with effective social support.

Rules 107.4

Prison authorities shall work closely with services and agencies that supervise and assist released prisoners to enable all sentenced prisoners to re-establish themselves in the community, in particular with regard to family life and employment.

Rules 107.5

Representatives of such social services or agencies shall be afforded all necessary access to the prison and to prisoners to allow them to assist with preparations for release and the planning of after-care programmes.

Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, Preamble

BEARING IN MIND that punishments consisting of deprivation of liberty shall have as an essential aim the reform, social readaptation and personal rehabilitation of those convicted; the reintegration into society and family life; as well as the protection of both the victims and society.

Application

Release of women prisoners requires specific planning and support, with emphasis on secure housing and support for family reunification. The UN Special Rapporteur on the Right to Adequate Housing has commented on the impact of previous imprisonment on women's ability to find secure housing. The Rapporteur recommended that Governments "ensure that homeless women are not discriminated against in accessing adequate housing on the grounds of a criminal record."²⁶⁰

Before they are released, women should have access to programmes to help them to make the transition to life outside prison. These will vary between cultures, but might include courses in life skills, parenting and healthcare, and places where women can discuss their questions and concerns about their children and acceptance by their community.

On release, consistent with the *Universal Declaration of Human Rights*, all women must have access to adequate food, clothing, housing and medical care, and other necessary social services. Prison authorities should arrange for post-release housing for women prisoners, especially those with children. Given the particular stigma women prisoners may face, a woman may prefer to settle in a new community. If her children have been placed in alternative care, a woman should receive assistance to meet the conditions to regain custody of them, including, for example, housing. The whole family should be offered counselling and support in re-establishing their relationships.

As foreseen by the *UN Standard Minimum Rules for the Treatment of Prisoners*, after release a prisoner may require on-going psychiatric services. This is of particular importance for female prisoners, given their high rates of mental illness.

The prison authorities should work closely with government social services and community-based agencies to ensure that former women prisoners are supported to integrate into life outside prison. Given the high rates of abuse previously experienced by women in prison, it should not be assumed that a former place of residence is a safe place for a prisoner to be released to. Women should be helped to avoid patterns of drug misuse, involvement in abusive relationships, and debt, which might lead them to re-offend. Post-release treatment, housing and integration plans should be drawn up in full consultation with the woman prisoner.

²⁶⁰ Study by the Special Rapporteur on the Right to Housing on women and adequate housing, E/CN.4/2006/118. Recommendations, paragraph h.

23. Alternatives to imprisonment for women

When decisions are made as to whether to detain a woman, either pre-trial or after conviction, the decision-maker should be required to take account of the harsh ways in which prison impacts upon women and, in particular, upon mothers and children.

In *R. v. Mills*, the Lord Chief Justice of the UK Court of Appeal delivered a judgement setting out three factors that should be considered in sentencing women:

1. That the ability of the prison service to achieve anything positive in the case of a short prison sentence is very limited.
2. With a mother who is the sole support of two young children, the consequences to those children if the sole carer is sent to prison.
3. The recent remarkable increase in the female prison population: “Females currently comprise 5.9% of the total prison population. The proportion has increased from an average of 4.4% in 1997, to 5% in 1999, and 5.2% in the year 2000. Between November 2000 and November 2001 the number of females held increased by 19%, from 3,380 to 4,020. That 19% increase in the female prison population has to be compared with an increase of six % in the male prison population...Because of the smaller percentage of the prison population, the ability to imprison mothers close to their homes in the community is difficult.”²⁶¹

Prison should be a place of last resort. The many possible alternatives to imprisonment should be more widely employed.

In the *Vienna Declaration on Crime and Justice: Meeting the Challenges of the Twenty-first Century* (2000), States re-affirmed their commitment to “according priority to containing the growth and overcrowding of pre-trial and detention prison populations, as appropriate, by promoting safe and effective alternatives to incarceration.”²⁶² The Plans of Action recommend action to reduce pre-trial detention as far as possible, and to introduce appropriate alternatives to imprisonment.

Use of alternatives to detention should be prioritised for women. As stated by the *Sixth UN Congress on the Prevention of Crime and the Treatment of Offenders*, because “women most of the time have major responsibilities for children ... deinstitutionalization is an appropriate disposition for most women offenders to enable them to discharge their family responsibilities...”²⁶³ Despite this recognition, implementation is sorely lacking, as the recent massive increase of the global female prison population testifies.

One problem may be that the criteria for alternative sentences are established with male prisoners in mind. The vulnerability of many women prisoners (discussed in relation to decisions to detain them before trial, in Part 21) may be seen to exclude them from alternative sentencing programmes. Further, the types of crimes that women tend to be imprisoned for – in particular drug-related crimes – may be automatically excluded from alternative sentencing programmes, having a disproportionate impact upon women. The *Sixth UN Congress on the Prevention of Crime and the Treatment of Offenders* urged that “programmes and services used as alternatives to imprisonment should be made available to women offenders on an equal basis with male offenders.”²⁶⁴

261 [2002] 2 Cr.App. R. (S.) 52.

262 Para. 26, adopted by the Tenth UN Congress on the Prevention of Crime and the Treatment of Offenders, 2000; and endorsed by General Assembly resolution 55/59 of 4 December 2000.

263 Resolution 9, *Specific needs of women prisoners*, A/CONF.87/14/Rev.1, p. 12-13.

264 *Ibid.*, p. 12-13.

In the *UN Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules)* States committed themselves to avoid unnecessary use of imprisonment by providing “a wide range of non-custodial measures, from pre-trial to post-sentencing dispositions”. The Rules give guidance as regards the types of non-custodial alternatives that should be available, and appropriate structures in implementing them. Alternatives to prison sentences include conditional discharge, suspended or deferred sentences, probation, community orders, parole and restorative justice processes.

Schemes to implement alternatives to detention must be designed specifically for women offenders. This is necessary for them to address the distinctive nature of women’s offending, and the social and economic vulnerabilities of women offenders. Many of the factors that make women’s offending and imprisonment different from men’s were identified in the *Corston Report* published by the Home Office in the UK. The report observes that prison is not an appropriate response for the majority of the women who serve custodial sentences or are detained pending trial. The report recommends a complete overhaul of the way that women’s offending is dealt with by the State and the engendering of a “women-centred approach”. In identifying the need for a proportionate response Jean Corston observes:

Problems leading to offending – drug addiction, unemployment, unsuitable accommodation, debt – are all far more likely to be resolved through casework, support and treatment than by being incarcerated in prison. The vast majority of women offenders are not dangerous. Because most women do not commit crime there is no deterrence value and the cost to society is enormous, not only simply the cost of keeping women in prison ... but also the indirect cost of family disruption, damage to childcare and substitute care, lost employment and subsequent mental health problems. **The continued use of prison for women appears to offer no advantages at huge financial and social cost.**²⁶⁵

The report contains a number of alternatives to imprisonment and recommends that custodial sentences must only be used as a last resort and even then should be served not in prisons as they are today in the UK but in small local custodial units:

For those women for whom a custodial sentence is necessary, small custodial units should gradually replace the system of women’s prisons which should be dismantled and incorporated into the male estate. The new units should be easily accessible for visitors, for example, in city centres. Over time they should be removed from the Prison Service and run by specialists in working with women, under the direction of the [proposed] Commission for Women who offend or are at risk of offending... Units should house 20-30 women. The target group of women offenders would be those who have been given custodial sentences of over two years.²⁶⁶

Legislative provision of alternative sentences needs to be coupled with alternative sentencing models, i.e. those where the sentencer understands and has confidence in the alternatives at their disposal. In light of the damage that imprisonment can cause to women The *Corston Report* suggests that sentencers should require evidence that a defendant is “**fit for custody**”.²⁶⁷ This shift in focus for the sentencer could ensure that the defendant’s vulnerabilities are properly considered and that non-custodial alternatives are used for the large proportion of women for whom imprisonment is not appropriate. Recognising the problem of lack of confidence in alternatives, the *Corston Report* recommends that sentencers regularly visit the places where non-custodial sentences are performed or supervised.²⁶⁸ The report highlights the work of the Liverpool Community Justice Centre where the Judge is personally responsible for overseeing the offender throughout their sentence.²⁶⁹

265 Corston, J. (2007) *The Corston Report: Executive summary* (Home Office), p.8. For a detailed exploration of the effect on a child of imprisoning his/her parent see Robertson, O. (2007) *The Impact of Parental Imprisonment on Children*

266 Corston, J. (2007) *The Corston Report: A report by Baroness Jean Corston of a review of women with particular vulnerabilities in the criminal justice system* (Home Office), p.86.

267 Corston, J. (2007) *The Corston Report: Executive summary* (Home Office), p.9.

268 Corston, J. (2007) *The Corston Report: A report by Baroness Jean Corston of a review of women with particular vulnerabilities in the criminal justice system* (Home Office), pp. 50-51.

269 *Ibid.* p. 54.

States should examine how **restorative justice processes** may provide a more appropriate response to women's offending. By enabling victims, women offenders, their families and the community to meet and agree both on how best to repair the harm and on how to re-integrate the offenders into society and support their children, the outcomes are more likely to stop further offending. Such non-custodial alternatives increase the likelihood of the family staying together, where this is in the best interests of the child or children.

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Women in prison

This commentary examines the particular needs of women prisoners, and what provision is made for women in the Standard Minimum Rules for the Treatment of Prisoners. Going beyond the Standard Minimum Rules, it analyses the standards set out in international human rights law, international humanitarian law and other relevant international rules and guidelines, including regional standards, regarding the treatment of women in prisons.

This analysis is designed to assist legislators, prison administrators, United Nations bodies and human rights advocates to recognise the particular needs of women prisoners, and to use a human rights approach in meeting those needs.

