

TO PRISON, WITH MOM: INTERNATIONAL DUE PROCESS ISSUES FOR CHILDREN AND MOTHERS POSED BY PRISON NURSERIES

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Abstract

Some jurisdictions automatically permit infants born in custody to stay with their mothers, while others enforce immediate separation. Both practices contradict the United Nations Convention on the Rights of the Child's best interests standard and violate general notions of due process. By comparing automatic actions in Mexico, India, and Canada with the United Kingdom's multi-agency admissions boards and Australia's Living with Mum Program, this Article demonstrates how transparent, case-by-case decision-making upholds the human rights of both mother and child. We recommend that each case be thoroughly assessed by an interdisciplinary team to ensure the child's voice is heard and their best interests are prioritized. Decision-makers must weigh the risks and benefits of placing a child in prison with a parent, considering factors such as the child's age, maturity, and the conditions of both the prison and alternative placements. The decision-making process should be transparent, with written findings and an opportunity for judicial review. Meanwhile, governments must systematically collect data and support longitudinal research to ensure policies truly prioritize the human rights of both mother and child.

INTRODUCTION

The term "prison nursery" is something like an oxymoron, merging the stigma-laden environment of incarceration with the innocence of new life. For an incarcerated mother, a prison nursery can mean the difference between getting to be with her child or enduring

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separation.¹ However, few countries have implemented due process to assess whether such a placement is in the child's best interest or for how long it should last.²

A child may live in custody with their mother under multiple circumstances:³ in “prison nurseries,” in “mother and baby units” within or adjacent to prisons (units that house mothers and infants separately from the general population), or even in arrangements where mothers and children live among the general population, sometimes with access to a separate childcare center or “crèche.”⁴ In the United States, prison nurseries are relatively unknown to the general public, as only eight states have such programs,⁵ and the federal program is small.⁶ Across the country, these programs tend to be underutilized,⁷ most likely due to women's lack of awareness and strict eligibility criteria.⁸ The best estimate of the

1 See Mary W. Byrne, Lorie Goshin & Barbara Blanchard-Lewis, *Maternal Separations During the Reentry Years for 100 Infants Raised in a Prison Nursery*, 50 FAM. CT. REV. 77, 83 (2012).

2 See discussion *infra* Parts III.A, III.C.

3 In this issue area, gender-neutral language like “caregiver” over “mother” is typically preferable to promote inclusivity and reduce stigma. However, this Article explicitly focuses on how due process surrounding prison nurseries poses unique issues for women as mothers in this situation. It is also true that in nearly all cases, a child residing with a parent in prison is almost always with the mother; baby-father programs are exceedingly rare. See Emily Bauer, *Infant Inmates: An Analysis of International Policy on Children Accompanying Parents to Prison*, 27 MICH. STATE INT'L. L. REV. 93, 97 (2018). The use of “mother” or “woman” also reflects the phrasing of existing laws, policies, and cultural narratives, but is not meant to exclude or erase people outside the gender binary.

4 See, e.g., Jennifer Warner, *Infants in Orange: An International Model-Based Approach to Prison Nurseries*, 26 HASTINGS WOMEN'S L.J. 65, 66 (2015); PRISONERS' ADVICE SERVICE, MOTHER AND BABY UNITS (MBUs) 3 (2017), [<https://perma.cc/Y63Y-2EXX>]; Diana Mellow, *Inside Pollsmoor's Special Baby Mother Unit*, GROUNDUP (Oct. 10, 2016), <https://groundup.org.za/article/babies-prison/> [<https://perma.cc/PNN5-A5PP>]; STUTI SHAH, 2024 INDIA PRISON NURSERY REPORT 6 (2024), [<https://perma.cc/44RP-YSC5>].

5 See Joseph R. Carlson, *Prison Nurseries: A Way to Reduce Recidivism*, 98 PRISON J. 760, 762 (2018). The eight states are Illinois, Indiana, Ohio, Nebraska, New York, South Dakota, West Virginia, and Washington. See *id.*

6 See U.S. OFF. OF THE INSPECTOR GEN., REVIEW OF THE FEDERAL BUREAU OF PRISONS' MANAGEMENT OF ITS FEMALE INMATE POPULATION 26 (2018), [<https://perma.cc/HJA5-39ZB>].

7 See *id.* at 28 (explaining that low participation is “likely due to BOP staff members' failure to fully communicate program opportunities and eligibility criteria to staff and pregnant inmates and to collect relevant data to assess pregnant inmates' interest and participation in the MINT program and the Residential Parenting Program”).

8 See *id.*

number of children living with a parent in prison worldwide is around 19,000,⁹ though this is likely an underestimate since some countries' prisons do not accurately report on the number of children living inside.¹⁰ Approximately ninety-seven countries allow young children to live with an incarcerated parent.¹¹

In some countries, having a baby in prison results in no official review procedure, and the child remains with the mother by default.¹² In other countries, children are separated from their mothers immediately after birth despite the availability of prison nurseries in certain regions.¹³ Both practices contradict the United Nations Convention on the Rights of the Child ("CRC" or the "Convention"), which mandates that any state action affecting a child must prioritize the child's best interests.¹⁴ One potential reason for the disconnect between this mandate and practice is the vague language of the CRC,¹⁵ which makes the best interests standard open to interpretation and difficult to apply. Given the significant number of children and mothers affected, the lack of process for considering the child's best interests is alarming.¹⁶

Deciding whether a child should reside in prison with their mother raises complex questions about the human rights of both the mother and the child. Ensuring due process

9 *Children of Imprisoned Parents*, PENAL REFORM INT'L, <https://www.penalreform.org/issues/children/what-were-doing/children-incarcerated-parents/> [https://perma.cc/33ZB-TXEV] [hereinafter PENAL REFORM INT'L].

10 Marie Claire Van Hout et al., *Children Living with Incarcerated Mothers: Invisible, Undocumented, and Neglected*, 8 THE LANCET 317, 317 (2024) ("Global data on the number of pregnant women in prison or on children born or living in prison with their mother are unreliable.").

11 The best index of how many countries have some sort of prison nursery or mother-baby unit ("MBU") program comes from LIBR. OF CONG., LAWS ON CHILDREN RESIDING WITH PARENTS IN PRISON (2014), [https://perma.cc/8PCK-Y9SE]. However, more up-to-date research is needed.

12 See discussion *infra* Part III.

13 See discussion *infra* Part III.

14 G.A. Res. 44/25, Convention on the Rights of the Child, art. 3 (Nov. 20, 1989) [hereinafter CRC].

15 Many scholars have opined on the generality of the "best interests" standards as articulated by the CRC. See generally Wouter Vandenhoe & Gamze Erdem Türkelli, *The Best Interests of the Child*, in THE OXFORD HANDBOOK OF CHILDREN'S RIGHTS LAW 204–21 (Jonathan Todres & Shani M. King eds., 2020); Jean Zermatten, *Best Interests of the Child*, in CHILD-FRIENDLY JUSTICE: A QUARTER OF A CENTURY OF THE UN CONVENTION ON THE RIGHTS OF THE CHILD 30–42 (Said Mahmoudi et. al. eds., 2015).

16 See PENAL REFORM INT'L, *supra* note 9.

for the child is closely tied to ensuring due process for the mother.¹⁷ In some cases this is literally true, as certain countries consider the child's best interests during the mother's sentencing process.¹⁸ The absence of a legal or administrative process for deciding the child's placement affects the human rights of both mother and child.¹⁹

Ensuring the rights and welfare of children in cases involving parental incarceration requires a careful and individualized approach.²⁰ First and foremost, countries must prioritize preserving the family unit by developing and using community-based alternatives to incarceration—when it is in the best interests of the child. When a non-custodial alternative is impossible, governments must afford due process to children when deciding if they will reside in prison with a parent. We recommend that each case be thoroughly assessed by an interdisciplinary team to ensure the child's voice is heard and their best interests are prioritized. Decision-makers must weigh the risks and benefits of placing a child in prison with a parent, considering factors such as the child's age, maturity, and the conditions of both the prison and alternative placements. The decision-making process should be transparent, with written findings and an opportunity for judicial review.

17 See, e.g., Rona Epstein, *Mothers in Prison: The Sentencing of Mothers and the Rights of the Child*, 2012 COVENTRY L.J. 1 (2012) (arguing that the rights of the child must be explicitly considered in judicial decisions regarding the imprisonment of mothers, underscoring the interconnected nature of the rights of both mother and child).

18 See discussion *infra* Part III.B.

19 See M. A. Mitchell, S. K. Yeturu & J. M. Appel, *Incarceration Postpartum: Is There a Right to Prison Nurseries?*, J. BIOETHICAL INQUIRY 1 (2024) (arguing that the lack of standardized legal or administrative frameworks governing prison nurseries creates arbitrary and inconsistent decision-making, which can undermine the human rights of both incarcerated mothers and their children by failing to protect the child's best interests or the mother's parental autonomy).

20 See, e.g., Committee on the Rights of the Child, General Comment No. 14 on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration, Art. 3, ¶ 76, (May 29, 2013) [hereinafter CRC General Comment No. 14] (explaining that a best interests assessment for “a child in a specific situation of vulnerability will not be the same as those of all the children in the same vulnerable situation,” which mandates “individualized assessment of each child's history . . . with regular reviews by a multidisciplinary team and recommended reasonable accommodation throughout the child's development process”).

I. Moms and Kids in Prison

A. Incarcerating Mothers

Globally, the number of women incarcerated has risen by an alarming 60% since 2000.²¹ About 740,000 women and girls are currently incarcerated worldwide.²² The United States, which incarcerates more women than any other country, had roughly 190,000 to 200,000 women incarcerated as of 2024.²³ As the number of *women* incarcerated rises, more *mothers* are locked up; around 60% of women incarcerated in prisons in the U.S. are mothers to a child under the age of eighteen.²⁴

Children are at serious risk of harm from a parent's incarceration, including psychological effects of separation, damage to family relationships, financial difficulties, higher likelihood of facing neglect or abuse, and vulnerability to stigma.²⁵ Parental incarceration has the potential to pass criminality intergenerationally, as a child of an incarcerated parent is much more likely to be charged with a crime in their lifetime.²⁶ Meta-analyses indicate a strong correlation between parental incarceration and the development of antisocial behavior in children.²⁷

21 *World Female Prison Population Up by 60% Since 2000*, INST. FOR CRIM. POL'Y RSCH. (Oct. 19, 2022) <https://www.icpr.org.uk/news-events/2022/world-female-prison-population-60-2000> [<https://perma.cc/45FA-VJGK>].

22 HELEN FAIR & ROY WALMSLEY, *WORLD FEMALE IMPRISONMENT LIST 2* (5th ed. 2022), [<https://perma.cc/BDE8-DU99>].

23 Aleks Kajstura & Wendy Sawyer, *Women's Mass Incarceration: The Whole Pie*, PRISON POL'Y INITIATIVE (Mar. 5, 2024), <https://www.prisonpolicy.org/reports/pie2024women.html> [<https://perma.cc/CM7F-EH8D>].

24 LAURA M. MARUSCHAK, JENNIFER BRONSON & MARIEL ALPER, *PARENTS IN PRISON AND THEIR MINOR CHILDREN: SURVEY OF PRISON INMATES, 2016* 3 (2021), [<https://perma.cc/DGH4-2NCQ>].

25 *See* COMM. ON THE RTS. OF THE CHILD, *REPORT AND RECOMMENDATIONS OF THE DAY OF GENERAL DISCUSSION ON "CHILDREN OF INCARCERATED PARENTS" 2* (2011), [<https://perma.cc/R2H3-XT7V>] [hereinafter *CRC REPORT ON CHILDREN OF INCARCERATED PARENTS*].

26 *See* Christopher Wildeman & Bruce Western, *Incarceration in Fragile Families*, 20 *FUTURE CHILD* 157, 168 (2010).

27 *See* Joseph Murray et al., *Children's Antisocial Behavior, Mental Health, Drug Use, and Educational Performance After Parental Incarceration: A Systematic Review and Meta-Analysis*, 138 *PSYCH. BULL.* 175, 177 (2012).

B. Children in Prison with Their Mothers

Given the negative impacts of parental incarceration,²⁸ the existence of prison nurseries can seemingly make sense—but no broad consensus has been reached on whether prison nurseries are a net good.²⁹ Proponents of prison nurseries would advocate that maintaining the bond between mother and child can foster secure attachment, which is critical for children to grow into healthy, independent, and resilient adults.³⁰ Additionally, prison nurseries have been shown to have positive effects on the mothers who participate in them, improving parenting skills and reducing recidivism rates.³¹

On the other hand, there is no demonstrated consensus regarding the impacts on the development and well-being of children who have lived in prison.³² Most human rights advocates would agree that prisons are not appropriate environments for children and can result in trauma and stigmatization.³³ Yet forced separation of a baby or child from their incarcerated mother has the potential to lead to worse outcomes for the child if the community care arrangement is inadequate.³⁴ One longitudinal study did indicate that a child who previously resided in a prison nursery as an infant/toddler will have better mental health outcomes at the preschool age than their counterpart who was separated from

28 See *id.*; Wildeman & Western, *supra* note 26, at 168; CRC Report on the Children of Incarcerated Parents, *supra* note 25, at 2.

29 See MANFRED NOWAK, THE UNITED NATIONS GLOBAL STUDY ON CHILDREN DEPRIVED OF LIBERTY 344 (2019) (expressing that the “scope, extent, rationale and possible benefits and/or adverse effects” of prison nurseries “are not well documented”).

30 See Robert Winston & Rebecca Chicot, *The Importance of Early Bonding on the Long-Term Mental Health and Resilience of Children*, 8 LONDON J. PRIMARY CARE 12, 12–14 (2016).

31 See Mary W. Byrne, Lorie S. Goshin & Sarah S. Joestl, *Intergenerational Transmission of Attachment for Infants Raised in a Prison Nursery*, 12 ATTACHMENT HUM. DEV. 375, 377 (2010).

32 See Jo Taylor et al., *Are Custodial-Based Mothers and Children’s Units Evaluated, Effective and Aligned with a Human Rights-Based Approach? – A Systematic Review of the Evidence*, 69 eCLINICALMEDICINE. 1, 9 (2024).

33 See, e.g., Marie Claire Van Hout et al., “*Children in the Prison Nursery*”: *Global Progress in Adopting the Convention on the Rights of the Child in Alignment with United Nations Minimum Standards of Care in Prisons*, 134 CHILD ABUSE & NEGLECT 1, 15 (2022) [hereinafter Van Hout et al., *Children in the Prison Nursery*].

34 See COUNCIL OF EUR., RECOMMENDATION CM/REC(2018)5 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES CONCERNING CHILDREN WITH IMPRISONED PARENTS (2018) 1, 22 (“A transnational psychological study of children separated from a parent in prison in four European countries found that 25 per cent of prisoners’ children are at greater risk of mental health difficulties.”).

their incarcerated mother.³⁵ Overall, more research is needed across a variety of contexts and disciplines to better inform the implementation of prison nurseries.

More complicated still is the situation when a child will age out of the prison nursery program prior to the end of their mother's incarceration and be separated from her some months or years after bonding together.³⁶ Concerns about such separation after bonding have led some jurisdictions to only allow a child to reside with their mother in prison when the mother's term of incarceration is of short enough duration that she and the child can leave the prison together.³⁷

II. Existing Framework in International Human Rights Law

The human rights norm that is most relevant to this issue area comes from Article 3 of the CRC.³⁸ The CRC is considered "universally adopted," as only one country has failed to ratify it—the United States.³⁹

Article 3 of the CRC is also referred to as the best interests of the child standard (abbreviated henceforth as "BIC").⁴⁰ Article 3 states, "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*."⁴¹ In simpler terms, action taken by the government involving a child must have *someone* consider the child's best interests.⁴² However, there is no

35 See Lorie S. Goshin, Mary W. Byrne & Barbara Blanchard-Lewis, *Preschool Outcomes of Children Who Lived as Infants in a Prison Nursery*, 94 PRISON J. 139, 147 (2014).

36 See Byrne et al., *supra* note 1, at 80.

37 E.g., S.D. DEP'T OF CORR., POL'Y NO. 300-25, MOTHER-INFANT PROGRAM (2024), [<https://perma.cc/37DN-ZT99>] (establishing that only mothers whose initial parole eligibility date or next review date is within 30 months of their child's birth are eligible for program participation, ensuring the mother can care for the child post-incarceration).

38 CRC, *supra* note 14, art. 3.

39 See *View the Ratification Status by Country or by Treaty*, U.N. HUM. RTS. TREATY BODIES, https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CRC [<https://perma.cc/27VB-4V4B>].

40 CRC, *supra* note 14, art. 3.

41 *Id.* at art. 3 (emphasis added).

42 *Id.*; see also G.A. Res. 65/229, at 17 (Dec. 21, 2010) ("Decisions to allow children to stay with their mothers in prison shall be based on the best interests of the children.").

universal definition of BIC to guide this consideration.⁴³ The Committee describes BIC as a “dynamic concept that requires an assessment appropriate to the specific context,”⁴⁴ indicating that it is an adaptable concept determined on a case-by-case basis. Essentially, the core understanding of BIC relies on common sense;⁴⁵ the human rights or liberty of a child should not be altered by the government without a meaningful opportunity to consider what is best for the child.

Article 3 also requires that all signatories to the Convention ensure children receive the necessary “protection and care as is necessary for his or her well-being” and “take all appropriate legislative and administrative measures” to achieve this goal.⁴⁶ The combination of prioritizing BIC and taking all appropriate legislative and administrative measures to ensure necessary protection and care of the child underscores the importance of children’s rights in any decision affecting their welfare. Conversely, Article 3(2) of the CRC stipulates that countries must also respect “the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her.”⁴⁷ This means that while the child’s best interests are a “primary consideration,”⁴⁸ the rights of caregivers must also be factored into any decision concerning a child. Thus, there should be significant overlap in considering the rights of the child and the mother when determining if the child will live with her in prison. Other elements of the CRC—outside of Article 3—layer on top of the BIC standard. Article 7 of the Convention states that every child has “the right to know and be cared for by his or her parents,”⁴⁹ which provides some amount of support for arranging for the child to stay with the mother in prison if a community-based alternative to incarcerating the mother is not available.⁵⁰

43 See CRC General Comment No. 14, *supra* note 20, at ¶ 6 (explaining that the “best interests of the child” standard is context-dependent, flexible, and requires case-by-case evaluation, thus lacking a universally fixed definition).

44 *Id.* at ¶ 1.

45 Because of the context-dependent nature of a best interests assessment, decision-makers require judgment akin to “common sense” in determining what is literally best for the child. See *id.* at ¶ 6.

46 CRC, *supra* note 14, at art. 3.

47 *Id.*

48 *Id.*

49 CRC, *supra* note 14, art. 7.

50 *Id.*

The governing body of the treaty, the Committee on the Rights of the Child (“Committee”), has also previously set out minimum obligations for countries to ensure the rights of a child to live with an incarcerated parent.⁵¹ In assessing the best interests of the child, the Committee has previously recommended the involvement of a multidisciplinary team,⁵² as well as that the decision-maker consult a non-exhaustive, non-hierarchical list of elements, including the child’s views; the child’s identity; preservation of the family and maintaining relations; care, protection, and safety of the child; the situation of vulnerability; the child’s right to health; and the child’s right to education.⁵³

Another useful piece of human rights law is the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the “Bangkok Rules”), which derive from a United Nations General Assembly Resolution and are designed to inform countries of the minimally acceptable standards for women as prisoners.⁵⁴ As a General Assembly Resolution, the Bangkok Rules only have the status of soft law and do not bind any governments—yet they are still persuasive. Bangkok Rule 64 sets out, “Non-custodial sentences for pregnant women and women with dependent children shall be preferred where possible and appropriate.”⁵⁵ If a custodial sentence is necessary, the best interests of the child must then be taken into account by the government, “ensuring that appropriate provision has been made for the care of such children.”⁵⁶ Contact being preserved between mothers and their children is also articulated clearly as a substantive right by the Bangkok Rules.⁵⁷ Rule 26 provides that communication between a mother and her child “shall be encouraged and facilitated by all reasonable means.”⁵⁸

In summary, the international legal framework for protecting the rights of children who reside with their mother in prison is primarily rooted in the CRC, with the BIC standard

51 See Van Hout et al., *Children in the Prison Nursery*, *supra* note 33, at 3.

52 See CRC General Comment No. 14, *supra* note 20, ¶ 47.

53 See *id.* ¶¶ 52–79.

54 GA Res. 65/229, *supra* note 42, at 1–3.

55 *Id.* at 19.

56 *Id.*

57 See *id.* at 13.

58 *Id.*

serving as a key guiding principle.⁵⁹ Although the CRC does not define BIC explicitly, it requires that decisions involving children prioritize their well-being and care while also considering the rights of caregivers.⁶⁰ The Bangkok Rules further reinforce this framework by advocating for non-custodial alternatives for mothers with dependent children and emphasizing the importance of maintaining contact between incarcerated mothers and their children, ensuring that children's rights to care, protection, and family unity are upheld in all decisions.⁶¹

III. Examples of Country Practices

In certain countries, laws presume that children will stay with their mothers in prison (e.g., Mexico and India), while other countries enforce automatic separation (e.g., Canada, China, and Slovakia).⁶² Some countries, such as the United Kingdom, have implemented more robust procedures that afford children and their mothers due process for this crucial decision.⁶³ In the U.K., mothers must apply to an admissions board for placement, and the decision is designed to involve a thorough, multi-agency review process.⁶⁴ The program in Melbourne, Australia offers cottage-style units for mothers and their children, with assessments involving input from Child Protection and other relevant agencies.⁶⁵

A. Automatic Actions

In Mexico, the National Law of Criminal Enforcement addresses the rights of incarcerated women, including their right to live with their child born in prison until the

59 See CRC, *supra* note 14, art. 3.

60 See *id.* at arts. 3, 7.

61 See G.A. Res. 65/229, *supra* note 42, at 1–3, 13, 19.

62 See discussion *infra* Part III.A.

63 See MINISTRY OF JUST. & HM PRISON & PROB. SERV., PREGNANCY, MOTHER AND BABY UNITS (MBUs), AND MATERNAL SEPARATION FROM CHILDREN UP TO THE AGE OF TWO IN WOMEN'S PRISONS (2023) (UK), [<https://perma.cc/5DFP-HULF>].

64 See *id.*

65 See *Pregnancy and Childcare in Prison*, CORR. VICT. (Austl.), <https://www.corrections.vic.gov.au/prisons/going-to-prison/pregnancy-and-childcare-in-prison> [<https://perma.cc/M9LD-VSBF>].

child reaches the age of three,⁶⁶ or, in one Mexican state, the age of six.⁶⁷ On the other hand, children not born in prison are not allowed to reside with their mother.⁶⁸ This can lead to a somewhat arbitrary result when an infant born a day before a mother goes to prison is not allowed to live with their mother, but an infant born the day after a mother enters prison is allowed to stay with her. When a child has been born in prison, the Mexican government generally takes no action, and the interests of the child are not considered; they simply stay there.⁶⁹

In India, incarcerated mothers are presumed to be the caretakers of any young children, and they are thus allowed to decide whether to take their children with them to prison.⁷⁰ Children may stay with their mothers in prison until they are six years old.⁷¹ There is no process for assessing alternative placements for children.⁷²

In other countries, children are separated, de facto or de jure, from their mothers with no individualized process for determining their best interests: at the provincial level in Canada, the lack of process results in de facto separation of mother and child wherein infants are taken from a mother after their birth in detention;⁷³ in China and Slovakia, children are prohibited de jure from living with their incarcerated mothers and are placed in orphanages, with other families, or in foster care.⁷⁴

66 See Ley Nacional de Ejecución Penal [LNEP] [National Criminal Execution Law], Artículos 10 y 36, Diario Oficial de la Federación [DOF] 16-06-2016 (Mex.).

67 See Zoom Interview with Isabella Sánchez Di Egidio, Operational Coordinator, Plataforma NNAPES Reinserta México (Oct. 11, 2024).

68 See *id.*

69 See *id.*

70 See R.D. Upadhyay v. State of A.P. & Ors., AIR 2006 SC 1946 (2006) (India).

71 See *id.*; see also SHAH, *supra* note 4, at 2.

72 See *id.*

73 British Columbia and the Northwest Territories have documented that they do not participate in this practice. See Robin Hansen, Associate Professor, Univ. of Saskatchewan College of Law, Lecture on IL and Birth in Prison June 2024 (Jun. 13, 2024), <https://usask.cloud.panopto.eu/Panopto/Pages/Viewer.aspx?id=1ffecac7-e5b9-4e9c-994b-b18e0145bdf5> [<https://perma.cc/GE9Y-XFJW>].

74 See Marie Claire Van Hout et al., *Children Living in Prison with a Primary Caregiver: A Global Mapping of Age Restrictions and Duration of Stay*, 7 LANCET 809, 810 (2023) [hereinafter Van Hout et al., *Children Living in Prison*].

B. Process During Maternal Sentencing

The South African case of *M v. State* is the most notable example of the judiciary considering a child's best interests in the context of maternal sentencing.⁷⁵ The underpinning concern in this case was the significant emotional and developmental consequences for children when their primary caregiver is imprisoned.⁷⁶ The court opined that the best interests of the child must be a primary consideration when the court decides on sentencing the mother, as it acknowledges the profound effect incarceration can have on a child's welfare.⁷⁷

Overall, this case stands for the proposition that a sentencing approach must consider not only the crime and the defendant but also the profound impact on any dependent children to preserve the human rights of both mother and child.⁷⁸ The ruling encouraged exploring alternative sentencing options that would mitigate the adverse effects on the child while still addressing the legal ramifications for the mother; *M v. State* reflects a judicial commitment to integrating children's rights into sentencing decisions, recognizing the way that incarceration has overlapping effects on a mother and her children, too.⁷⁹

C. Examples of More Robust Procedural Safeguards

The United Kingdom offers a set of practices designed to ensure due process for children living with an incarcerated parent.⁸⁰ The mother must submit a written application to an admissions board at her prison to be considered for a mother-baby unit (MBU).⁸¹ The board, composed of an independent chair, the MBU manager, and a community offender manager, gives recommendations to the prison governors/directors who make the final decisions, as well as oversees the "multi-agency" that operates MBUs.⁸² The best interest

75 Also referred to as *S v. M. M v. State* 2007 CC 53/06 ZACC 18 (S. Afr.).

76 See *id.* at 42.

77 See *id.* at 14–16.

78 See *id.*

79 See *id.*

80 See The Prison Rules 1999, c. 12 (Eng.).

81 See MINISTRY OF JUST. & HM PRISON & PROB. SERV., *supra* note 63, at 25.

82 See *id.* at 1, 3.

of the child is the primary—but not only—consideration for the board.⁸³ It is considered alongside the health and safety of other children and women living in an MBU.⁸⁴ Social workers serve as representatives for children and conduct assessments for the boards to consider.⁸⁵ After a mother is approved, a “care plan” will be made for her child within the first few days after admission,⁸⁶ with the placement reviewed no less than every eight weeks.⁸⁷ Mothers whose applications have been denied can appeal their decision to the Head of the Women’s Team in Prison and Probation Services.⁸⁸

In Melbourne, Australia, the Living with Mum (“LWM”) Program allows certain caregivers to live in cottage-style units in two of its prisons.⁸⁹ The program is offered to pregnant women entering custody and to all women in custody—both those sentenced and in pretrial—who are the parent of an infant or preschool-aged child/children before incarceration.⁹⁰ An LWM Program Support Worker conducts a thorough assessment focusing on the mother’s reasons for wanting her child with her in prison, her psychosocial history, prison adjustment, and involvement in rehabilitation programs.⁹¹ The assessment also examines the child’s background, care arrangements, medical conditions, and development.⁹² Input from relevant individuals and agencies, including Child Protection, is incorporated; the mother’s feedback is considered, and the mother may appeal to the Deputy Commissioner for reconsideration of a denial of admission to the program.⁹³ The

83 *See id.* at 25.

84 *See id.* (describing the decision to admit a mother and their child as driven by the “necessity to maintain good order and self-discipline within the prison”).

85 *See id.* at 26.

86 *See id.* at 42.

87 *See* MINISTRY OF JUST. & HM PRISON & PROB. SERV., *supra* note 63, at 45.

88 *See id.* at 37.

89 *See* CORR. VICT., *supra* note 65.

90 *See id.*

91 *See id.*

92 *See id.*

93 *See id.*

Deputy Commissioner may also direct that the child be removed from the prison if it is demonstrated that it is no longer in the child's best interest to reside there.⁹⁴

IV. Discussion

International standards can—and should—be developed to ensure a process for evaluating a child's best interests before placement in prison with their mother. The developmental risks to children living in prisons, ranging from psychological harm, disrupted family relationships, and stigma,⁹⁵ underscore the need for rigorous procedures that determine whether living in a prison nursery is truly in the child's best interest. However, the international community has been relatively silent on this issue thus far,⁹⁶ which begs the question of what its role should be in addressing the rights of this vulnerable population.

Because of the potential developmental impacts of placing children with their mothers in a carceral setting,⁹⁷ countries must establish procedural guarantees for determining the child's best interest on an individualized basis and ensure that such determinations are subject to review. We argue that children are denied access to justice when countries place them in a prison setting without an adequate process to determine whether such a placement would be in their best interest and without a right to administrative or judicial review of this determination. Furthermore, women are denied their rights when, for example, a child is taken away from them without due process, when the child is placed in foster care without due process, or when children are removed from the care of a mother and no lines of

94 See *id.* (“This is most likely to occur if the mother is involved in a serious prison offence, is moved to a hospital, or is transferred to a unit which is not considered suitable for accommodating a child.”).

95 See CRC Report on Children of Incarcerated Parents, *supra* note 25, at 2; Wildeman & Western, *supra* note 26, at 168; Murray et al., *supra* note 27, at 177.

96 The closest an international authority has come to speaking directly on lack of due process for this population comes from the CRC REPORT ON CHILDREN OF INCARCERATED PARENTS, *supra* note 25, at 1, which refers to the “difficulties faced in many countries where the rights of babies and children living with their incarcerated parents have neither been taken into consideration nor respected.” However, this mere mention, not an authoritative source of international law nor interpretive guidance, is potentially the one and only time that this issue has been referenced.

97 See Emily Bauer, *supra* note 3, at 102; Mia van Schalkwyk et al., *An Occupational Perspective on Infants Behind Bars*, 26 J. OCCUPATIONAL SCI. 426, 434–35 (2019).

communication are preserved between mother and child without justification.⁹⁸ It is of vital importance to respect the human rights of both mother and child in these scenarios, yet they could be in tension. When it is not in the best interests of the child to live in prison, where it has been determined through due process that a better alternative exists, the child should not be placed in prison even if it might be preferable for the mother.⁹⁹

A. Challenges in Legal and Administrative Frameworks

While the flexibility of the BIC can be beneficial in some legal frameworks,¹⁰⁰ it often leads to challenges, as there is no clear standard for determining the best interests of a particular child or group of children even if they are in similar circumstances.¹⁰¹ Moreover, the critical notion that children have valid insights about their own well-being, as well as valid solutions to their own problems, is frequently overlooked by government actors.¹⁰² The flexible framework of the BIC standard can arguably be molded to manipulate outcomes; it is difficult to reconcile paternalistic control by parents or the government with the very idea of rights for children.¹⁰³

There are many reasons why a country might have a system that does not include a moment of process to consider the human rights implications of placing a child in prison with their mother, such as the diversity of prison contexts, the variability of countries' policies on placement and duration, the lack of a consensus framework for decision-making (including practice-oriented checklists), and the lack of data.¹⁰⁴ However, in a matter of such vital importance, countries must not let such barriers stand in their way.

98 See G.A. Res. 34/180, Convention on the Elimination of All Forms of Discrimination Against Women, art. 16 (Dec. 18, 1979) [hereinafter CEDAW].

99 CRC General Comment No. 14, *supra* note 20 ¶ 38 (explaining that a child's best interests are "not simply to be 'a primary consideration' but 'the paramount consideration'").

100 See Caroline Simon, *The "Best Interests of the Child" in a Multicultural Context: A Case Study*, 47 J. LEGAL PLURALISM & UNOFFICIAL L. 175, 176–77 (2015).

101 See Jean Zermatten, *Best Interests of the Child*, in CHILD-FRIENDLY JUSTICE: A QUARTER CENTURY OF THE UN CONVENTION ON THE RIGHTS OF THE CHILD 30 (Said Mahmoudi et al. eds., 2015).

102 See GERISON LANSDOWN, THE EVOLVING CAPACITIES OF THE CHILD 32 (UNICEF Innocenti Rsch. Ctr. ed., 2005).

103 See John Tobin, *Judging the Judges: Are They Adopting the Rights Approach in Matters Involving Children?*, 33 MELB. UNIV. L. REV. 579, 590 (2009).

104 See Van Hout et al., *Children Living in Prison*, *supra* note 74, at 812–13.

B. The Need for Adequate Due Process

As highlighted *supra* Part III.A, there are instances where children are placed in prisons with their mothers automatically or, conversely, separated from them without adequate process to assess the child's well-being.¹⁰⁵ Such decisions are made without considering the specific needs and circumstances of each child.¹⁰⁶ This lack of procedural guarantees is a violation of a child's human rights under the CRC.¹⁰⁷ And when children are placed in prisons or removed from their mothers without a transparent, individualized process, *both* the child's and the mother's rights may be violated.¹⁰⁸ One factual scenario is a baby is taken from their mother shortly after birth, without due process, and placed in foster care.¹⁰⁹ In a situation like that, the child's right to maintain a relationship with their mother is not respected, while the mother's right to be a parent is taken from her.¹¹⁰

When children are automatically placed with their mothers or automatically separated, there can be an underlying assumption about the mother that has influenced the law or practice. In situations globally where the mother automatically has her child taken with her to prison, the law arguably presumes that the mother is the only one fit to take care of the child and that the father is incapable.¹¹¹ In situations where the child is automatically separated from their mother (and not for the reason that an alternate caregiver lives in the community), the assumption may be that the mother is unfit to take care of her child because she is a criminal.¹¹² These blanket approaches fail to consider the specific circumstances

105 See discussion *supra* Part III.A.

106 See discussion *supra* Part III.A.

107 Any state action affecting a child's life must involve a best interests assessment. See CRC, *supra* note 14, at art. 3 § 1.

108 See CRC, *supra* note 14, at art. 3 § 1, art. 7 §§ 1, 2; CEDAW, *supra* note 98, at art. 16, § 1(d).

109 See generally Christina Scotti, *Generating Trauma: How the United States Violates the Human Rights of Incarcerated Mothers and Their Children*, 23 CUNY L. REV. 38, 65–67 (2020) (explaining that, under the Adoption and Safe Families Act, parents have had their parental rights *expressly* terminated simply because of their imprisonment) (emphasis added).

110 See CRC, *supra* note 14, art. 7 §§ 1, 2; CEDAW, *supra* note 98, at art. 16 § 1(d).

111 See generally Jane C. Murphy, *Legal Images of Motherhood: Conflicting Definitions from Welfare Reform Family and Criminal Law*, 83 CORNELL L. REV. 688 (1998) (analyzing presumptions about women as “good” or “bad” mothers based on the ways in which they come into contact with the courts).

112 See, e.g., ROBIN HANSEN, PRISON BORN: INCARCERATION AND MOTHERHOOD IN THE COLONIAL SHADOW 30 (2024) (expressing the observation that many people assume “a woman sentenced for a crime ha[s] no value

and needs of individual mothers and children, an approach essential for safeguarding their human rights.

In some countries, such as South Africa, due process is afforded to children and their mothers by considering the existence of the relationship while the mother is receiving her sentence.¹¹³ This presents another challenge. While this provides the mother with a sentencing regime that considers her holistically, as an individual, this practice could risk artificially “considering” the best interests of a child, as the proceeding is centered around the mother, not the child.¹¹⁴ On the other hand, community-based alternatives to incarceration, as recommended by the Bangkok Rules,¹¹⁵ can only be considered in the context of maternal sentencing.

C. Persuasive Practices and Sources of Authority

Countries with more robust procedural safeguards, like the United Kingdom and Australia, offer models of more nuanced approaches that better balance the rights of both the mother and the child.¹¹⁶ These systems employ judicial review, multi-agency assessments, and opportunities for appeal, which help ensure that the child’s best interests are given due consideration.¹¹⁷ In the U.K., decisions about whether a child can live with their mother in prison are made by a board that considers a range of factors, including the child’s welfare and the conditions of the mother’s imprisonment.¹¹⁸

In establishing the procedural norms concerning the decision about the child’s placement, the Committee would benefit from considering the African Union’s (“AU”)

as a mother”).

113 See discussion *infra* Part III.B.

114 “The very expansiveness of the paramountcy principle appears to ‘promise everything but deliver little in particular’ . . . A truly child-centered approach requires an in-depth consideration of the needs and rights of the particular child in the ‘precise real-life situation’ he or she is in.” Ann Skelton, *Too Much of a Good Thing? Best Interests of the Child in South African Jurisprudence*, 52 DE JURE 557, 565 (2019) (quoting *S v. M. M v. State* 2007 CC 53/06 ZACC 18 ¶ 23 (S. Afr.)).

115 See G.A. Res. 65/229, *supra* note 42, at 19.

116 See discussion *infra* Part III.C.

117 See discussion *infra* Part III.C.

118 See discussion *infra* Part III.C.

approach to this process.¹¹⁹ According to the African Committee of Experts on the Rights and Welfare of the Child's ("ACERWC") General Comment on Children of Incarcerated and Imprisoned Parents and Primary Caregivers, countries "should put in place legislative and administrative mechanisms to ensure that a decision for a child to live in prison with his/her mother or caregiver is subject to judicial review."¹²⁰ "Criteria for taking such a decision should be developed and include consideration of the individual characteristics of the child such as age, sex, level of maturity, quality of relationship with the mother, and existence of quality alternatives available to the family."¹²¹ The ACERWC further recommended that the process be characterized by an "individualized, qualitative approach that is nuanced and based on actual information about incarcerated parents/caregivers and children, rather than a quantitative, categorical approach based on generalized and simplistic assumptions."¹²²

Regional jurisprudence from Africa and Europe, as well as scholarship, supports the following core elements: the administrative procedure for determining whether a child should be incarcerated with a parent should (a) take place on a case-by-case basis;¹²³ (b) include the voice of the child;¹²⁴ (c) be documented in writing; and (d) be subject to judicial review.¹²⁵ Lastly, the procedure must overall take the child's views into account—participating on their own or through representation—at all stages affecting their placement.¹²⁶

D. The Need for More Research and Clear Guidelines

The debate surrounding whether children should live in prison with their incarcerated mothers is complicated by a significant gap in comprehensive research on the long-term

119 See Van Hout et al., *supra* note 33, at 3.

120 African Committee of Experts on the Rights and Welfare of the Child, General Comment No. 1, ¶ 24 [hereinafter ACERWC General Comment No. 1].

121 *Id.*

122 *Id.* ¶ 15.

123 See COUNCIL OF EUR., *supra* note 34, at 39.

124 See CRC General Comment No. 14, *supra* note 20 ¶¶ 43–45; African Charter on the Rights and Welfare of the Child, Art. 4(1).

125 See ACERWC General Comment No. 1, *supra* note 120 ¶ 24.

126 See CRC REPORT ON CHILDREN OF INCARCERATED PARENTS, *supra* note 25 ¶ 41; ACERWC General Comment No. 1, *supra* note 120, at ¶ 31.

outcomes of such placements. While some studies suggest potential benefits, such as improved maternal bonding, mental health, and reduced antisocial behavior in children,¹²⁷ not enough research has been done to demonstrate conclusive results.¹²⁸ This lack of definitive research creates a challenging environment for policymakers, who are left without clear data to guide decisions that genuinely reflect the best interests of the child. More rigorous, longitudinal studies are urgently needed to better understand the developmental and psychological impacts of having a child reside with their mother in prison, as well as to inform evidence-based policy decisions.

In parallel, the current international legal framework, although providing important general principles and recommendations,¹²⁹ falls short in offering specific, standardized criteria for determining the best interests of the child in cases involving incarcerated parents. While instruments like the CRC and the Bangkok Rules advocate for the consideration of children's well-being in such circumstances,¹³⁰ there is no universally agreed-upon process or set of criteria for evaluating these cases in a consistent and transparent manner.¹³¹ To address this gap, there is a pressing need for clearer guidelines to ensure decisions are made based on comprehensive, individualized assessments rather than generalized assumptions.¹³²

These guidelines should mandate assessment by multidisciplinary teams—such as social workers, child psychologists, and legal experts—to provide a holistic assessment of each child's needs. Additionally, judicial oversight must be embedded within the process to guarantee that decisions are subject to review and that both the rights of the child and the incarcerated mother are respected.

127 See Goshin et al., *supra* note 35, at 147. Cf. Murray et al., *supra* note 27, at 177.

128 Goshin et al., *supra* note 35, is one of the only studies that has actually examined longitudinal effects of prison nursery placements.

129 See, e.g., CRC Rep. on Children of Incarcerated Parents, *supra* note 25.

130 See CRC, *supra* note 14, art. 3; G.A. Res. 65/229, *supra* note 42, at 19.

131 See NOWAK, *supra* note 29, at 344.

132 While the Committee has made it clear that the best interests of the child should be considered on a case-by-case basis, this is not so specific that countries are bound to provide a robust, individualized process in the prison nursery context. See CRC General Comment No. 14, *supra* note 20, at ¶ 32.

CONCLUSION

To ensure the rights of the child in these cases, a comprehensive and methodical approach is essential. We recommend that each case undergo an individualized assessment conducted by a multidisciplinary team,¹³³ including a neutral representative (such as a social worker, child welfare representative, guardian ad litem, or similar) to ensure the child's voice is heard. Decision-makers should apply a consistent balancing test to evaluate the potential harms and benefits of such placements versus the potential harms and benefits of available alternatives, considering factors like the child's views, the child's identity, preservation of the family/maintaining relations, care/protection/safety of the child, the situation of vulnerability, the child's right to health, and the child's right to education.¹³⁴

Written findings detailing the factors considered should be documented, and the decision must be subject to timely administrative reconsideration and judicial review. Additionally, ongoing monitoring by child protection agencies is crucial, given that circumstances such as prison conditions and the child's development are dynamic. Extensions should be considered if necessary to find appropriate alternative arrangements when age limits impose separation. Lastly, governments must systematically collect and maintain data on both children residing in prison with parents and those denied such placements, including records of decisions, monitoring efforts, and reentry circumstances. This structured approach ensures that each decision prioritizes the child's welfare and adapts to changing conditions. A mother's rights can also be upheld through the process by recognizing her rights when it comes to any government action involving her child. Prioritizing community-based alternatives to incarceration—so that mothers and children can stay together outside of prisons—may be the best way to promote the human rights of both.

133 See *id.* ¶ 47.

134 See *id.* ¶¶ 52–79.