



## International Law on Parental Sentencing

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### INTERNATIONAL

#### **The United Nations supports the rights of children of incarcerated parents, and has:**

- Stated that, in all proceedings concerning children, the best interests of the child shall be a primary consideration.<sup>1</sup>
- Recognized the impact of parental detention and imprisonment on children, and specifically recommended that member States “give priority consideration to non-custodial measures” when sentencing a primary caretaker.<sup>2</sup>
- Encouraged inquiry into parental status at sentencing and alternatives to incarceration for caregivers.<sup>3</sup>

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### REGIONAL

- The Committee of Ministers of the Council of Europe encourages states to consider parental status at the time of sentencing.<sup>6</sup>
- The African Charter on the Rights and Welfare of the Child encourages states to consider non-custodial punishments for mothers.<sup>7</sup>
- The European Parliament encourages alternatives to prison for mothers.<sup>8</sup>

### OTHER NATIONS

- South Africa: *M v. The State* holds that the court shall consider the impact on the best interests of the child when sentencing a parent.<sup>9</sup>
- Australia’s legislature requires courts to consider the probable effect of any sentence on family and dependents.<sup>10</sup>
- England and Wales consider a child’s European Convention on Human Rights Article 8 right to family life in a criminal court proceeding of a parent, and the “care of dependent children” is a well-established mitigating factor in sentencing.<sup>11</sup>

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### APPLICATION TO U.S.

- United States courts are not required to consider international law in their analysis. However, courts, including the Supreme Court, have looked to international law in assessing the appropriateness of criminal punishments.<sup>4</sup>
- In *Graham v. Florida*, for example, the Supreme Court considered international law in interpreting the Eighth Amendment to determine whether sentencing a minor to life in prison without the possibility of parole constitutes cruel and unusual punishment.<sup>5</sup>

## CITATIONS

- <sup>1</sup> G.A. Res. 44/25, art. 3, Convention on the Rights of the Child (Nov. 20, 1989).
- <sup>2</sup> G. A. Res. 63/241, at 12, Rights of the Child (Dec. 24, 2008).
- <sup>3</sup> G.A. Res. 65/229, United Nations’ Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (the Bangkok Rules) (Dec. 21, 2010).
- <sup>4</sup> Coker v. Georgia, 433 U.S. 584, 596 n.10 (1977) (explaining that “the climate of international opinion concerning the acceptability of a particular punishment” is “not irrelevant” to Eighth Amendment analysis).
- <sup>5</sup> Graham v. Florida, 560 U.S. 48, 80, 130 S. Ct. 2011, 2032 (2010).
- <sup>6</sup> Eur. Council Comm. of Ministers, Explanatory Memorandum to Recommendation CM/Rec(2018)5 concerning children with imprisoned parents, 1312th meeting (April 4, 2018).
- <sup>7</sup> African Charter on the Rights and Welfare of the Child art. 30, Jul. 1, 1990, OAU Doc. CAB/LEG/24.9/49.
- <sup>8</sup> The particular situation of women in prison and the impact of the imprisonment of parents on social and family life, Eur. Parl. Doc. T6-0102/2008, Article 19 (Mar. 13, 2008).
- <sup>9</sup> M v. The State 2007 (3) SA 232 (CC) at 32-33 (S. Afr.).
- <sup>10</sup> Crimes Act 1914 s 16A(2)(p) (Austl.).
- <sup>11</sup> Hayli Millar & Yvon Dandurand, The Impact of Sentencing and Other Judicial Decisions on the Children of Parents in Conflict with the Law 22-24 (Univ. of the Fraser Valley & Int’l Ctr. Criminal Law Reform & Criminal Justice Policy 2017) (an analysis submitted to the Department of Justice Canada).

