

## **Criminal Justice for Adults: the big factory of children without parental or alternative care.**

My name is Silvia Zega, and I am from Argentina, a very distant country. Exactly ten years ago, I had the honour of participating<sup>1</sup> in the Day of General Discussion: “Children of incarcerated parents.”<sup>2</sup>

On that occasion, I brought a resolution from the Argentine Federal Court of Appeals in and for San Martín<sup>3</sup>, which is still in full force and effect and guarantees **alternative care** to children whose caregivers have been incarcerated **from the very moment of detention**. The resolution further provides that the appointment of the alternate caregiver will be respectful of the rights of the detainee and of the child, including the right to be heard. I have never thought that ten years later I would be saying, regretfully, we have not made much progress in this regard.

Fortunately, the protection of children without parental care is drawing the attention of multiple agencies and bodies. And this Discussion is the proof. In my country, the situation of children under alternative care programmes has been surveyed, with a view to strengthening public policies of deinstitutionalization and making the necessary adjustments to care facilities. Laws have also been enacted to prevent violence against children resulting from their institutionalization. The issue of migrant children without parental care has acquired visibility worldwide. **But there is a problem that has not yet been adequately included in the political and legislative agendas as a situation that leaves children without alternative care: the lack of protection existing when a person who has children in their exclusive care is deprived of liberty. Children who not only need alternative care, but who are also off the radar of state protection and, thus, will hardly receive that care.**

Regarding children without parental care, today we will seek for ways to mitigate the damage that their institutionalization and institutional care can cause to their growth and development. And we will aim, among other objectives, to identify and discuss whether it is necessary that they be separated from the caregivers and the solutions which are more respectful of their rights when such separation cannot be avoided.

We can be guided by General Comment No. 14 of this Committee<sup>4</sup>, which imposes the duty to take the child’s best interests as a primary consideration upon entering criminal judgment against parents or caregivers who have committed an offence.

---

<sup>1</sup> Committee on the Rights of the Child -Day of General Discussion “Children of incarcerated parents” 30 September 2011 <https://www.ohchr.org/EN/HRBodies/CRC/Pages/Discussion2011.aspx>

<sup>2</sup> Day of General Discussion “Children of incarcerated parents” – Written Submissions for the 2011 CRC DGD – S. Zega. <https://www.ohchr.org/EN/HRBodies/CRC/Pages/WSDGD2011.aspx>

<sup>3</sup>Court Regulation No. 40/1997, Federal Court of Appeals in and for San Martín and Guidelines for the implementation of Court Resolution No. 40/97 of the Federal Court of Appeals in and for San Martín (Action Protocol – Good Practices). <https://drive.google.com/drive/u/4/folders/1rcAlto4-Ys4ok0pJhZ1ctre7p6hbDTHg>

<sup>4</sup> General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1). [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f14&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f14&Lang=en)

**But in order to achieve this objective, we must first be aware that these children, who have been left without parental care and, perhaps, without alternative care, do exist and have survived; and we must also know where and with whom they are... This cannot be possibly done if these children are not noticed, taken into consideration and, mainly, protected at the very moment of their caregivers' detention.**

When a child is in the exclusive care of a detainee or detainees, even in cases of a very careful process, **detention** is the moment of highest subjective impact (children are unexpectedly and forcefully separated from their caregivers), but mostly, **the moment of higher risk**. Many children are neglected, perhaps unaccompanied or in charge of a sibling who is also a minor; perhaps sheltered by someone from the neighbourhood who learned of the parental incarceration; perhaps, if not present at the time of detention, they find themselves totally helpless when they return home... Naturally, there are criminal judges who, at the time of the detention of parents or caregivers do enforce children's right to alternative care. Fortunately, there are also children who are rapidly found and sheltered by relatives or persons close to the family. But the right of children without parental care to be cared for by other persons cannot be left to the good will of relatives or judges.

Today, nobody knows how many or where children who have lost parental care and have been afforded no alternative care are... Neither do we know how many of them were taken in by other family members, or how many were abandoned to their worst fate.

The detention of those exclusively responsible for children opens the door to the possibility of all kinds of subsequent violation of their rights. The actions then taken – or not – will to a great extent define the course of their lives. And this cannot be left to luck.

The regional recommendations of the EU Committee of Ministers also light the way, as they consider different situations, environments and procedural acts in which the rights of the child might be affected. According to these recommendations, when a person is admitted to prison, the prison administration should record the number of children a prisoner has, their ages, and their current primary caregiver. Likewise, prior to or on admission, individuals with caregiving responsibilities for children shall be enabled to make arrangements for those children<sup>5</sup>. Although this is of utmost importance, it is not enough.

In many of our countries – which are not reached by these recommendations – not just hours but days or even weeks may pass between detention and actual admission to a penitentiary unit. Even if the gap was only hours, it is enough for us to lose sight of children. In many cases, we will have been too late. If we want to ensure these children the right to alternative care, we must act at the moment of detention. And we must hold liable those who are responsible for detention and can act from that very moment: criminal judges (or public prosecutors when the judicial system assigns responsibility for adult detention to them).

**Why, when we speak of the right of children to alternative care, should we focus our attention on the children whose caregivers are deprived of liberty?**

---

<sup>5</sup> Recommendation CM/Rec(2018)5 of the Committee of Ministers to member States concerning children with imprisoned parents (paragraphs 12 and 13).

<https://edoc.coe.int/en/children-s-rights/7802-recommendation-cmrec20185-of-the-committee-of-ministers-to-member-states-concerning-children-with-imprisoned-parents.html>

According to two investigations conducted recently in Argentina<sup>6</sup> – where there are around 110,000 people in prison<sup>7</sup> –, between 132,000 and 143,000 children have one or both of their caregivers deprived of their liberty. In 2001, this figure was 217,000 children<sup>8</sup>.

Neither of the two investigations disaggregate **how many of these children were in the exclusive care of the imprisoned person(s)**, either because it was a single-parent home or because both caregivers were detained. That is, how many children were left unaccompanied at the time of detention. **Nobody knows...** Such information has not been obtained in Argentina by any organization, and as far as we know, it is not available in other parts of the world, either.

There are some indicators that may give us a hint on the magnitude of the problem.

According to the latest population census in Argentina, over 35% of households were female headed, and such figure increased by almost 83% in single-parent homes<sup>9</sup>. Some investigations in Argentina and Latin America showed that around 87% of imprisoned women were mothers (two thirds of them of minors), over 60% were household heads, and near 40% had a partner who was also detained<sup>10</sup>.

Due to the patriarchal system still prevailing in our region regarding parental responsibility, it is the woman who is usually directly in the care of children. This, together with all the foregoing, allows us to conclude that a large portion of those 217,000 children whose caregivers were detained were under their exclusive responsibility, and, therefore, at the time of their detention, were left unprotected and unaccompanied.

International studies show that in 2018, the prison population, including pre-trial detainees or those serving a sentence, was approximately 11 million people.<sup>11</sup> From 2000 to 2017, the world prison population grew by approximately 24%. In Europe, it decreased by 22% in that period, while in the rest of the world increases ranged from 175% (South America) to 29%

---

<sup>6</sup> Cadoni, L. Rival, J.M., Tuñón: "Infancia y Encarcelamiento. Condiciones de Niñas, Niños y Adolescentes cuyos padres o familiares están privados de libertad en la Argentina", published at *Barómetro de la Deuda Social de la Infancia. Informe especial 2019*, Universidad Católica Argentina, Observatorio de la Deuda Social Argentina and Church World Service Latin America and the Caribbean Regional Office.

<http://wadmin.uca.edu.ar/public/ckeditor/Observatorio%20Deuda%20Social/Presentaciones/2019/2019-BDSI-Informe-Especial-Infancias-y-Encarcelamiento.pdf>  
Argentine Criminal Prosecutor's Office, World Church Service Latin America and the Caribbean Regional OFFICE, ACIFAD (Asociación Civil de Familiares de Detenidos) and UNICEF (United Nations International Children's Emergency Fund) (2019): "Más allá de la prisión. Paternidades, maternidades e infancias atravesadas por el encierro".  
<https://www.ppn.gov.ar/mas-alla-de-la-prision.pdf>

<sup>7</sup> National System of Statistics on Execution of Sentence: 2019 Argentina Report, National Office of Criminal Policy on Criminal Justice and Legislation, Undersecretariat of Criminal Policy, Secretariat of Justice, Ministry of Justice and Human Rights.  
<https://www.argentina.gob.ar/justicia/politicacriminal/estadisticas/sneep/2019>

<sup>8</sup> Cadoni, L., Sánchez, M.E. and Tuñón, I: "Las múltiples vulnerabilidades que afectan especialmente a NNAPES", published at *Barómetro de la Deuda Social de la Infancia. Informe especial. Marzo 2021*, Universidad Católica Argentina, Observatorio de la Deuda Social Argentina and Church World Service Latin America and the Caribbean Regional Office.  
<http://wadmin.uca.edu.ar/public/ckeditor/Observatorio%20Deuda%20Social/Documentos/2021/2021-OBSERVATORIO-Informe%20Especial-Vulnerabilidades-afectan-NNAPES-VE.pdf>

<sup>9</sup> Argentine Institute of Statistics and Censuses (INDEC): 2010 National Population Census.  
<https://www.indec.gov.ar/indec/web/Nivel4-CensoNacional-2-3-Censo-2010>

<sup>10</sup> Legal and Social Studies Centre (CELS), Ministry of Defence, Argentine Criminal Prosecutor's Office (2011): *Mujeres en Prisión. Los alcances del Castigo*. <https://www.cels.org.ar/web/wp-content/uploads/2011/04/Mujeres-en-prision.pdf>  
Centre of Latin American Studies on Insecurity and Violence, Universidad Nacional de Tres de Febrero (2015): "Condiciones de vida en la cárcel: Resultados de la encuesta de detenidos condenados".  
<http://celiv.untref.edu.ar/contenidos/CELIV%20Informe%20Nro.%202.pdf>

<sup>11</sup> Roy Walmsley: "World Prison Population List, twelfth edition", World Prison Brief. Institute for Crime and Justice Policy Research (ICPR) at Birkbeck, University of London. [www.icpr.org.uk](http://www.icpr.org.uk).  
[https://www.prisonstudies.org/sites/default/files/resources/downloads/wppl\\_12.pdf](https://www.prisonstudies.org/sites/default/files/resources/downloads/wppl_12.pdf)

(Africa). This shows that incarceration is increasing worldwide, with the exception of Europe; and in some regions, such as South America, at a disproportionate rate compared with the increase in population.

The number of women in prison grew by 53%<sup>12</sup>, which represents a significant rise compared to male prison population rates, which have increased by 20% in the same period.<sup>13</sup>

There are no signs that those global trends will reverse. On the contrary, year after year more people, including more women, alone or with their partners, are imprisoned, leaving more and more children without care. And, so far, the state has not provided those children with alternative care.

### **What do those children have in common?**

All of them, without exception, are under that situation due to a lawful action by a criminal judge or public prosecutor, as appropriate. A judge or public prosecutor who did not take such action against those children, but who did not take accountability for the consequences, either. And this is possibly because it is not among the expected, much less regulated, functions of criminal judges or prosecutors to look after children when detaining the adults who care for them.

In that vein, the Argentine Federal Court of Appeals in and for San Martín issued the resolution which I brought to the Day of General Discussion in 2011, and which was taken as a good practice<sup>14</sup>.

The rule simply imposes on the judges within its jurisdiction the **duty to find out whether the detainee has children in their exclusive care**. If they do, it also imposes the duty to adopt the measures necessary for the immediate protection of children, particularly, **placing children in the care of an adult appointed by the detainee**, and the duty to give subsequent cognizance to the competent child protection authorities.

This guarantees a **fundamental right of children: the right to be placed in the alternative care of an adult** after having faced the critical situation of losing parental care, respecting their right to be heard and ensuring they maintain the linkage with the detainee. The rule does not “invent” anything new. Criminal judges with jurisdiction over adult matters provide basic protection mechanisms (fundamentally ensuring the alternative care of children by a person trusted by detainees), which mechanisms they were not obliged to operate, because they were not obliged to find out whether there were children who were left unaccompanied due to the detention ordered by them.

**What this rule does, indeed, is to recognize the need for the alternative care of those children, because it forces the judge to be aware of such need.** Something so simple

---

<sup>12</sup> Penal Reform International, Thailand Institute of Justice (TIJ) “Global Prison Trends 2018.”  
[https://cdn.penalreform.org/wp-content/uploads/2018/04/PRI\\_Global-Prison-Trends-2018\\_EN\\_WEB.pdf](https://cdn.penalreform.org/wp-content/uploads/2018/04/PRI_Global-Prison-Trends-2018_EN_WEB.pdf)

<sup>13</sup> [https://www.prisonstudies.org/sites/default/files/resources/downloads/wpp1\\_12.pdf](https://www.prisonstudies.org/sites/default/files/resources/downloads/wpp1_12.pdf)  
Roy Walmsley -World Female Imprisonment List - World Prison Brief -The Institute for Criminal Policy Research (ICPR) at Birkbeck, University of London ([www.icpr.org.uk](http://www.icpr.org.uk)) 2018.  
[http://filesERVER.idpc.net/library/world\\_female\\_prison\\_4th\\_edn\\_v4\\_web.pdf](http://filesERVER.idpc.net/library/world_female_prison_4th_edn_v4_web.pdf)

<sup>14</sup> Quaker United Nations Office *Collateral Convicts: Children of incarcerated parents Recommendations and good practice from the UN Committee on the Rights of the Child Day of General Discussion 2011* - page 10.  
[https://www.uno.org/sites/default/files/resources/ENGLISH\\_Collateral%20Convicts\\_Recommendations%20and%20good%20practice.pdf](https://www.uno.org/sites/default/files/resources/ENGLISH_Collateral%20Convicts_Recommendations%20and%20good%20practice.pdf)

and at the same time so alien to the criminal prosecution of adults, and so necessary to protect all the children of incarcerated parents worldwide.

In 2005, the Day of General Discussion: “Children without Parental Care” draw attention to several groups of children in need of special support measures, such as children with disabilities, children associated with drug abuse, street children, refugee children, asylum-seeking children, children affected by HIV/AIDS, and children of migrant workers<sup>15</sup>. A similar recommendation was made by the UN General Assembly in 2009, through Resolution 64/142, particularly regarding the protection and well-being of children who are deprived of parental care or who are at risk of being so, extending the category of “vulnerable children” to “unaccompanied and separated children”<sup>16</sup>, among others. Two years earlier, in its Resolution 62/141, regarding “the protection and well-being of children who are in need of alternative care or who are at risk of becoming so”, the General Assembly had encouraged states to “adopt and enforce laws and improve the implementation of policies and programmes to protect children growing up without parents or caregivers”<sup>17</sup>.

In 2009, in its Resolution 74/133 on “The Rights of the Child”, the General Assembly urged states to take “measures to ensure that all children who are separated from their parents in accordance with applicable law and procedures (...) are promptly referred to child protection authorities and provided with appropriate and quality alternative care, *inter alia*, family and community-based care”<sup>18</sup>. And in this historic Resolution, specifically focusing on the rights of “children without parental care”, after recognizing that they “are more likely than their peers to experience human rights violations, such as exclusion, violence, abuse, neglect and exploitation”<sup>19</sup>, the General Assembly also urges states to promote “the implementation of international frameworks, and the Guidelines for the Alternative Care of Children” by adopting measures such as, among others, “strengthening national legislation, regulations and policies to protect the rights of children without parental care”<sup>20</sup>. In the Discussion held in 2005, it had already noted that “State parties must enact domestic laws and adopt policies in this regard involving both public and private sectors in child protection”<sup>21</sup>.

---

<sup>15</sup> Day of General Discussion - “Children without Parental Care”, Fortieth session, Geneva, September 2005 (paragraph 670). <https://webcache.googleusercontent.com/search?q=cache:cFfK8mACKt4J:https://www.ohchr.org/Documents/HRBodies/CRC/Discussions/Recommendations/Recommendations2005.doc+&cd=5&hl=es-419&ct=clnk&gl=ar>

<sup>16</sup> Resolution adopted by the General Assembly on 18 December 2009, 64/142. Guidelines for the Alternative Care of Children (paragraph 9.b). <https://undocs.org/ot/A/RES/64/142>

<sup>17</sup> Resolution adopted by the General Assembly on 18 December 2007, 62/141. Rights of the child (paragraph 16). <https://undocs.org/A/RES/62/141>

<sup>18</sup> Resolution adopted by the General Assembly on 18 December 2009, 74/395. Rights of the child (paragraph 35.q). <https://undocs.org/es/A/RES/74/133>

<sup>19</sup> Ibid (paragraph 26).

<sup>20</sup> Ibid (paragraph 35.a).

<sup>21</sup> Day of General Discussion - “Children without Parental Care”, Fortieth session, Geneva, September 2005 (paragraph 651). <https://webcache.googleusercontent.com/search?q=cache:cFfK8mACKt4J:https://www.ohchr.org/Documents/HRBodies/CRC/Discussions/Recommendations/Recommendations2005.doc+&cd=5&hl=es-419&ct=clnk&gl=ar>

Today it is essential that among those children deprived of care, who therefore deserve the special attention of the states, we decisively include those who, due to the action of the states themselves upon the detention of their parents lose parental care and are left to their own devices in pursuit of alternative care. And it is also essential that we promote the standards necessary to afford such protection.

But the truth is that the issue of children who are deprived of parental care due to the detention of their parents has not so far been a matter of specific concern neither of the states nor of the bodies responsible for controlling and interpreting international Human Rights. Or it has been to an extent which is not commensurate with the seriousness of the risks faced by children under such a situation.

That is why **we need the Committee on the Rights of the Child to promote the right of children to alternative care from the moment of parental detention.** And as in its General Comment No. 6 (2005)<sup>22</sup> it drew attention to unaccompanied children who were taken outside their country of origin, we need that today –through another General Comment or the instrument it deems appropriate – it draws attention to those children who at the time of detention of their exclusive caregivers are devoid of all parental or alternative care. Only if they are noticed from that very moment can the future of these children be defined by placing responsibility for them on those who are in the best position to assume it due to their early intervention: the judges or prosecutors who ordered the detention of their caregivers. Finally, we need the Committee to emphatically recommend that all the necessary standards be issued so that upon detention, those judges or prosecutors, as appropriate, be under the obligation to verify if the detainee has children in their exclusive care, keep record of them, ensure they are placed in the care of the person appointed by the detainee to that end, and give cognizance to the competent child protection authorities.

If the state is responsible for the protection of all children who need alternative care, it is much more so for those who are deprived of care – parental and alternative – due to state criminal action against their exclusive caregivers. Therefore, the state must take every effort to protect those children from the very moment of its intervention. And the Committee on the Rights of the Child can do a lot to make that happen. In the future, many children whose exclusive caregivers are incarcerated will be grateful.

---

<sup>22</sup> General Comment No. 6 (2005) "Treatment of unaccompanied and separated children outside their country of origin." <https://www2.ohchr.org/english/bodies/crc/docs/GC6.pdf>