



**UNODC**

United Nations Office on Drugs and Crime



# Handbook on strategies to reduce overcrowding in prisons

**CRIMINAL JUSTICE HANDBOOK SERIES**

In cooperation with the  
INTERNATIONAL COMMITTEE OF THE RED CROSS

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UNITED NATIONS OFFICE ON DRUGS AND CRIME  
Vienna

# **HANDBOOK ON STRATEGIES TO REDUCE OVERCROWDING IN PRISONS**

CRIMINAL JUSTICE HANDBOOK SERIES



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# Foreword by the International Committee of the Red Cross (ICRC)

The work in favour of detainees has been a central feature of the ICRC throughout the 150 years of its existence. The first activities on behalf of prisoners were carried out as early as 1870 and the organization is well known for its work of visiting people detained in relation to armed conflicts, for which it has a specific monitoring mandate under international humanitarian law. It also acts on behalf of people deprived of their liberty in other contexts characterized by violence, social tension and unrest. In each context, the ICRC's priority is to ensure that detainees are treated humanely and with respect for their dignity, regardless of the reason for their detention. It works to reunite families and to ensure respect for due process.

In 2011 the ICRC undertook detention-related activities in some 90 countries. In the same year, ICRC staff members conducted over 5,000 visits to more than 1,800 places of detention all over the world and were therefore in daily contact with thousands of detainees.

In very diverse environments and over many years, the ICRC has witnessed first-hand the consequences of overcrowding on detainees and on the authorities. Indeed, overcrowding is an increasingly widespread problem in a number of countries and places of detention. In itself, it is a very serious humanitarian concern, as it automatically generates substandard and often inhumane conditions of detention. Tens of thousands of people are forced to live for extended periods in congested accommodation, with insufficient space to move, sit or sleep. This seriously compromises the ability of the administration to fulfil detainees' basic needs in terms of living conditions, medical care, legal aid and family visits. Being squeezed into cramped living quarters, often in appalling hygiene conditions and with no privacy, makes the experience of being deprived of freedom—already stressful in normal circumstances—exponentially worse. It erodes human dignity and undermines detainees' physical and mental health, as well as their reintegration prospects. In addition to putting excessive strain on infrastructures, it heightens the potential for tensions and conflicts among detainees and with staff. It quickly leads to difficulties in maintaining good order within the prison, resulting in potentially severe consequences in terms of safety for the detainees, as well as in terms of supervision and security.

While the consequences are particularly grave for the men, women and children deprived of their liberty, they also affect the frontline staff whose job it is to protect and meet the needs of the detainees. Overwhelmed by excessive numbers and directly exposed to the frustration of the detainees without the resources needed to guarantee security or access to the most basic services, detention staff work in difficult conditions and are exposed to constant pressure and risk.

ICRC knows from experience that situations of overcrowding, once established, trigger a downward spiral which has a negative impact on the entire criminal justice system as a result of increasing congestion, staff demotivation and the development of parallel coping mechanisms or corruption.

Overcrowding is not an inevitability. Even if it is widespread and long-lasting, it should never become commonplace. From a humanitarian point of view, it is vital

to address the issue of overcrowding in places of detention. This is a difficult and challenging undertaking, as overcrowding has multiple and cumulative causes, largely external to the prison system itself. It therefore cannot be addressed only at the level of prisons but requires a holistic and coordinated response from a broad range of authorities, including at the policy level and in society at large.

The ICRC has observed over the years the difficulties experienced by many states in their efforts to improve the complex interactions between different actors, such as the legislature, judiciary, police, prosecutors, court administrations and oversight bodies, which are essential if the cycle of overcrowding is to be broken. Questioning criminal policies, embarking on legislative or procedural changes and altering long-standing judicial practices are anything but straightforward matters. Considerable sensitivity is also called for when confronting commonly held perceptions or investing in diversion from detention while reassuring the public that measures are being taken to fight crime.

Despite the plethora of information about prison overcrowding, the ICRC recognizes the need for holistic and practical guidance on how to avoid the phenomenon, to address it where it already exists and to alleviate its humanitarian consequences.

That is the aim of this *Handbook*. It brings together the various causes and consequences of overcrowding and emphasizes the wide range of strategies that may be applicable across the prison system itself and across broader criminal justice and governance systems, depending on the particulars of a given situation. It illustrates the various strategies with cases drawn from operational experience and examples of practical measures which have achieved effective results and could be a source of inspiration for other countries.

The *Handbook* has been designed to appeal to a broad readership ranging from policymakers to practitioners. The intention is to promote a common understanding of the different interests, concerns and perspectives with regard to overcrowding, to advance the establishment of common conceptual frameworks and, as a result, to pave the way for coherent and applicable strategies that are designed to address overcrowding in a comprehensive manner. In the ICRC's experience, small but coordinated steps by a range of actors can make a real difference to the resolution of complex problems.

For all those reasons the ICRC is pleased to have contributed to the publication of this *Handbook*, in partnership with UNODC. We believe that our different perspectives have strengthened and enriched its content. In the spirit of cooperation that has characterized its development, we recommend it not only to all ICRC teams in the field, but also to all those whose decisions can have an impact on overcrowding in prisons and thus ensure that detainees may live in decent and safe conditions, receiving treatment that is respectful of their dignity.

The ICRC looks forward to working alongside all those who are inspired by this *Handbook* to take steps, large and small, that can lead to sustainable solutions.

Geneva, January 2013  
Yves Daccord  
ICRC Director-General

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# Acronyms

ADR	Alternative Dispute Resolution
AIDS	Acquired immune deficiency syndrome
CCR	Correction and Rehabilitation Centre
CDT	Commission for the Discussion of Drug Addiction
CHRI	Commonwealth Human Rights Initiative
CPT	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment
CRC	United Nations Convention on the Rights of the Child
HIV	Human immunodeficiency virus
HCV	Hepatitis C virus
HRC	Human Rights Council (of the United Nations)
ICCPR	International Covenant on Civil and Political Rights
ICPS	International Centre for Prison Studies
ICRC	International Committee of the Red Cross
ILANUD	United Nations Latin American Institute for the Prevention of Crime and the Treatment of Offenders
LWOP	Life without parole
MCC	Model Criminal Code for Post-Conflict Countries
NGO	Non-governmental organization
NPM	National Preventive Mechanism
OAS	Organization of American States
OECD	Organisation for Economic Co-operation and Development
OPCAT	Optional Protocol to the Convention against Torture
OSI	Open Society Institute
PASI	Paralegal Advisory Service Institute
PRI	Penal Reform International
REPLACE	Rights Enforcement and Public Law Centre
SMR	Standard Minimum Rules for the Treatment of Prisoners
TB	Tuberculosis
UNICEF	United Nations Children's Fund
UNODC	United Nations Office on Drugs and Crime
USIP	United States Institute of Peace
WHO	World Health Organization

# INTRODUCTION

## CHAPTER A. WHO THE *HANDBOOK* IS FOR

This *Handbook* is one of a series of tools developed by UNODC to support countries in the implementation of the rule of law and the development of criminal justice reform. It is designed to be used by all actors involved in the criminal justice system, including policymakers, legislators, prison managers, prison staff, members of non-governmental organizations and other individuals interested or active in the field of criminal justice and prison reform. It also addresses health and related professionals involved in the provision of services in the penitentiary system. It can be used in a variety of contexts, both as a reference document and as a training tool.

## CHAPTER B. THE SCOPE AND LIMITATIONS OF THE *HANDBOOK*

The topic of overcrowding in prisons is multidimensional. There are a large number of mutually reinforcing reasons that may lead to prison overcrowding, which vary significantly from one country to the other, as well as within each country. The causes of prison overcrowding are not confined to the limits of criminal justice, but extend to other spheres of State responsibility, such as social welfare policies, access to health services, education and employment, among others. It would not be feasible to cover such a vast topic in a comprehensive and useful manner in one publication, the primary aim of which is to provide practical guidance to its readers, rather than offering an in-depth discussion of the diverse political, social and economic factors relating to the topic of overcrowding in prisons around the world. As such, this *Handbook's* scope is limited to offering an overview of some key criminal justice centred aspects of overcrowding. Within the framework of criminal justice policies and programmes, it aims to provide some guidance for strategy and policy development, illustrate good practice examples and encourage further thinking and research.

## CHAPTER C. WHAT THE *HANDBOOK* COVERS

The *Handbook* is made up of two parts.

Part I provides the background.

Chapter A provides an overview of prison overcrowding worldwide and its impact.

Chapter B offers an overview of the range of possible causes of prison overcrowding, which vary significantly, from one jurisdiction to the other.

Part II is comprised of nine chapters which altogether aim to assist readers in developing strategies, policies and programmes to reduce overcrowding in prison facilities.

Chapter A discusses the need to develop comprehensive and evidence-based criminal justice reform strategies, in order for them to be effective and sustainable, and the importance of harnessing public support for their implementation.

Chapter B focuses on measures which may be taken to reduce the scope of imprisonment and develop fair sentencing policies. While the chapter includes both legislative and practical suggestions, the focus is on legislative reforms to provide the requisite legal basis, lacking in many countries, to initiate practical programmes.

Chapter C makes a series of suggestions on how to improve the efficiency of the criminal justice system. It is based on the understanding that a functioning criminal justice system, where institutions cooperate with each other and where accurate data is generated to develop effective policies and programmes, is essential to ensure that legislation is implemented properly to achieve its intended aims of delivering justice, promoting public safety and reducing the unnecessary use of imprisonment at the same time.

Chapter D offers an overview and suggestions on how to improve prisoners' access to legal assistance and legal aid, based on evidence that suggests that access to legal assistance can be crucial to reducing pre-trial detention, the duration of pre-trial detention, imprisonment and lengths of sentences.

Chapter E focuses exclusively on pre-trial detention, from the moment of arrest by the police to a final conviction by a court. It is based on the recognition that the size of the pre-trial prisoner population is one of the most pressing challenges faced in countries worldwide and that the impact of overcrowding on human dignity and health is generally experienced most severely in pre-trial detention facilities.

Chapter F covers non-custodial measures and sanctions as alternatives to imprisonment, in addition to those covered in the previous chapter, in relation to pre-trial detention (e.g. diversion). It does not include a comprehensive discussion of all alternatives to imprisonment used in countries worldwide, due to space limitations, and particularly as a more comprehensive discussion of alternatives and restorative justice can be found in other handbooks published by UNODC: *Handbook of basic principles and promising practices on Alternatives to Imprisonment* and *Handbook on Restorative Justice Programmes*. Instead it discusses how alternatives may be used to reduce prison overcrowding and focuses on

those alternatives which are least costly and simplest to implement, as well as those which address the needs of a number of special groups.

Chapter G covers measures that can be taken in overcrowded prisons to reduce the harmful impact of overcrowding on the health and social reintegration of prisoners and offers limited advice on measures to promote the social reintegration of prisoners as a long-term strategy to reduce overcrowding. A more comprehensive discussion of the topic is provided in another handbook published by UNODC: *Introductory Handbook on the Prevention of Recidivism and the Social Reintegration of Offenders*.

Chapter H is based on the understanding that expanding prison capacity may be needed as a costly short-term strategy to reduce overcrowding in prisons, but that an increase in prison space will not provide a long-term solution to prison overcrowding unless it is placed within a broader criminal justice reform framework. It provides an overview of issues to take into account when considering an expansion of prison capacity, as well as measures which can be taken to make better use of existing prison capacity.

Chapter I provides a summary of the key recommendations and suggestions made in the *Handbook* to develop short, medium and long-term strategies and policies to reduce overcrowding in prisons. It aims to help readers to review possible strategies, to refer to the relevant sections in the *Handbook* for further suggestions in relation to initiatives considered, and develop their own strategies and programmes, depending on the challenges faced and opportunities offered in their own jurisdictions.

Examples provided in boxes to demonstrate the successful or promising implementation of some of the recommended measures in countries worldwide are not meant to suggest that the prison systems in those countries are considered to be examples of good practice as a whole. Sometimes, good practices can be identified in systems or prisons which continue to have severe challenges to address.

## CHAPTER D. WHY A HANDBOOK?

Internationally, there is a growing recognition that one of the key obstacles to implementing the provisions of the *Standard Minimum Rules for the Treatment of Prisoners (SMR)* is overcrowding in prisons. Indeed, “overcrowding in penal institutions had become a global human rights, health and security issue for offenders, their families and their communities”, according to the conclusion reached by the thematic discussion on “penal reform and the reduction of prison overcrowding, including the provision of legal aid in criminal justice systems”, held during the Eighteenth Commission on Crime Prevention and Criminal Justice on 16-24 April 2009,<sup>1</sup> which put forward a series of recommendations to address the challenge of prison overcrowding worldwide.

<sup>1</sup>See Commission on Crime Prevention and Criminal Justice, Report on the eighteenth session (18 April 2008 and 16-24 April 2009), E/2009/30 E/CN.15/2009/20, Official Records, 2009, Supplement 10, page 46, para. 57.

Prison overcrowding was also the focus of one of the five official workshops organized during the Twelfth Congress on Crime Prevention and Criminal Justice, held in Salvador, Brazil in 2010, entitled, “Strategies and Best Practices against Overcrowding in Correctional Facilities”.

That workshop resulted in a series of conclusions and recommendations, as follows<sup>2</sup>:

(a) Overcrowding in correctional facilities was one of the most serious impediments to compliance by Member States of relevant United Nations instruments and standards and norms and violated the human rights of inmates; (b) Crime was a social problem to which criminal justice systems could provide only part of the solution. Taking action against poverty and social marginalization was key to preventing crime and violence and, in turn, reducing prison overcrowding; (c) Member States should define prison overcrowding as an unacceptable violation of human rights and consider establishing a legal limit of their prison capacity; (d) Member States should consider reviewing, evaluating and updating their policies, laws and practices to ensure the development of a comprehensive criminal justice strategy to address the problem of prison overcrowding, which should include reducing the use of imprisonment and increasing the use of alternatives to prison, including restorative justice programmes; (e) Policies and strategies to address prison overcrowding should be evidence-based; (f) Member States should implement reforms and strategies to reduce overcrowding in a manner that is gender-sensitive and that effectively responds to the needs of the most vulnerable groups; (g) Member States are encouraged to review the adequacy of legal aid and other measures, including the use of trained paralegals, with a view to strengthening access to justice and public defence mechanisms to review of the necessity of pre-trial detention; (h) Member States are invited to conduct a system-wide review to identify inefficiencies in the criminal justice process that contribute to prolonged periods of custody during the pre-trial and trial processes, and to develop strategies to improve the efficiency of the criminal justice process, which includes measures to reduce case backlogs, and to consider introducing time limits on detention; (i) Member States should be encouraged to introduce measures providing for the early release of prisoners from correctional institutions, such as referral to halfway houses, electronic monitoring and reduction of sentences for good behaviour. Member States should consider reviewing their revocation procedures to prevent the unnecessary return to prison; (j) Member States are invited to develop parole and probation systems; (k) Member States should ensure effective implementation of alternatives to imprisonment by providing necessary infrastructure and resources; (l) Member States should promote the participation of civil society organizations and local communities in implementing alternatives to prison; (m) Member States should raise awareness and encourage comprehensive consultative processes, involving the participation of all relevant sectors of government, civil society, in particular victims’ associations, and other stakeholders in the development and implementation of national strategies, including action plans, to address overcrowding; (n) Member States should ensure that evidence-based information on crime and criminal justice is communicated to legislators, politicians, decision makers, criminal justice practitioners, the public and the media. For this purpose, Member States should be encouraged to continue research on factors contributing to prison overcrowding.

<sup>2</sup>Report of the Committee I: agenda items 4,7 and 9 and Workshops 1, 4 and 5, 17 April 2010, A/CONF.213/L.3/Add.4

The *Salvador Declaration on Comprehensive Strategies for Global Challenges: Crime Prevention and Criminal Justice Systems and Their Development in a Changing World*, included statements on the need to reinforce alternatives to imprisonment, and recommended that Member States endeavour to reduce pre-trial detention, where appropriate, and promote increased access to justice and legal defence mechanisms.<sup>3</sup>

The current *Handbook* constitutes a practical follow-up to the recommendations put forward at the Eighteenth Crime Commission on Crime Prevention and Criminal Justice and the Twelfth Congress on Crime Prevention and Criminal Justice, as well as the recommendations of previous United Nations congresses, which, since 2000 have recognized the importance of containing the growth of prison populations. The *Handbook* represents, in particular, a follow up to the recommendation which mandates UNODC to continue to provide assistance and support to countries to address prison overcrowding, and serves as a basis for further initiatives, including technical assistance in this area.

This *Handbook* has been developed in cooperation with the International Committee of the Red Cross (ICRC) from whom the UNODC has received valuable contributions reflecting the ICRC experience over many a years. Currently working in detention in more than 90 countries, the ICRC has observed first-hand the effects of prison overcrowding on prisoners, prison staff, prison managers as well as families of prisoners and their communities and the broader criminal justice system including the courts and judicial system and police. Much of the work of ICRC is directed toward ameliorating the negative effects of the continual growth of prison populations and ensuring the basic needs of prisoners are met—in particular, with regard to the health, water and sanitation, nutrition and the management of prisoners.

While individual topics related to relieving overcrowding in prisons have been covered in publications of UNODC, within its criminal justice reform handbook series, this *Handbook* is the first publication that brings together all of these issues, and many others, in one document. As such, it is hoped that it will provide the much needed, comprehensive guidance to its readers, based on international standards and examples of successful measures adopted in countries around the world, while also encouraging further research and thinking in this key and complex area of penal reform.

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<sup>3</sup>Salvador Declaration, paras. 51-52



# PART I. BACKGROUND

## CHAPTER A. PRISON OVERCROWDING WORLDWIDE

### 1. Overview

The size of the prison population throughout the world is growing, placing an enormous financial burden on governments and at a great cost to the social cohesion of societies. It is estimated that more than 10.1 million people, including sentenced and pre-trial prisoners, were held in penal institutions worldwide in May 2011.<sup>4</sup> This means that 146 out of every 100,000 people of the world were in prison at that time.<sup>5</sup> Prison populations grew in 78 per cent of countries between 2008 and 2011, and in 71 per cent of countries in the previous two years.<sup>6</sup>

#### DEFINITIONS

*Prison:* The term “prison” has been used to refer to all authorized places of detention within a criminal justice system, holding all prisoners, including those who are held during the investigation of a crime, while awaiting trial, after conviction and before and after sentencing. The term does not cover detention centres holding people detained due to their irregular migration status.

*Prisoner:* The term “prisoner” has been used to describe all those who are held in places of detention, as described above, including adults and juveniles, during the investigation of a crime, while awaiting trial, after conviction and before and after sentencing.

*Pre-trial detainee or detainee:* These terms are used when the legal status of a prisoner, who has not yet been convicted and sentenced, needs to be underlined.

*Imprisonment:* In this *Handbook* the term “imprisonment” has been used to refer to deprivation of liberty in all places of detention, including in pre-trial detention facilities and prisons.

<sup>4</sup>World Prison Population List, Ninth Edition, International Centre for Prison Studies. ([http://www.prisonstudies.org/images/news\\_events/wpp19.pdf](http://www.prisonstudies.org/images/news_events/wpp19.pdf)).

<sup>5</sup>Ibid.

<sup>6</sup>Ibid., and World Prison Population List, Eighth Edition (2008). The countries referred to are those covered by the World Prison Population List of the International Centre for Prison Studies, which includes all but 6 countries of the world. The information provided for each country does not relate to the same date. They were the most recent figures available at the time the World Prison Population Lists were compiled in December 2008 and May 2011.

*Pre-trial detention:* In this *Handbook* this term is used to refer to the period during which a person is deprived of liberty prior to adjudication, including detention by the police, through to the conclusion of the criminal trial, including appeal. The term is used when there is a need to underline this specific period of imprisonment.

*Imprisonment rate:* The number of prisoners per 100,000 of the general population.

*Official capacity or design capacity of a prison:* The total number of prisoners a prison can accommodate while respecting minimum requirements, specified beforehand, in terms of floor space per prisoner or group of prisoners including the accommodation space. The official capacity is generally determined at the time the prison is constructed.<sup>a</sup>

*Occupancy rate,* also known as population density, is determined by calculating the ratio of the number of prisoners present on a given day to the number of places specified by the official capacity.<sup>b</sup>

*Operational capacity* refers to the total number of persons who can be safely and humanely accommodated in a prison at any time. This figure may alter over time as changes are made to the prison and as resources fluctuate.<sup>c</sup>

<sup>a</sup>ICRC, Water, Sanitation, Hygiene and Habitat in Prisons (2005).

<sup>b</sup>ICRC, Water, Sanitation, Hygiene and Habitat in Prisons (2005).

<sup>c</sup>ICRC, Water, Sanitation, Hygiene and Habitat in Prisons 'Supplementary Guidance', 2012.

Imprisonment rates vary considerably between different regions of the world and between different parts of the same region. For example, the median rate for western African countries is 47.5 whereas for southern African countries it is 219; the median rate for south American countries is 175, and for Caribbean countries it is 357.5; for south central Asian countries (mainly the Indian subcontinent) it is 42, whereas for eastern Asian countries it is 155.5; for western European countries it is 96 and for countries spanning Europe and Asia it is 228. In Oceania the median rate is 135.<sup>7</sup>

There may also be varying degrees of overcrowding in the prisons of one country. Sometimes, a few prisons located in central or urban areas, or close to the courts, have high levels of overcrowding, while the country imprisonment rate may be comparatively low, masking the actual situation on the ground. Often pre-trial detention facilities have the highest levels of overcrowding. In some countries where different prison systems exist, such as federal and state prisons, there are very different occupancy rates and overcrowding in the two systems.

Overcrowding is generally defined with reference to the occupancy rate and the official capacity of prisons. Using this simple formula, overcrowding refers to the situation where the number of prisoners exceeds the official prison capacity. The rate of overcrowding is defined as that part of the occupancy rate above 100 per cent.

It must be noted that this measure is not a comparable figure, as prison capacity is measured differently in different countries, varying according to the space allocated

<sup>7</sup>World Prison Population List (ninth edition) World Prison Brief, ICPS, ([http://www.prisonstudies.org/images/news\\_events/wpp19.pdf](http://www.prisonstudies.org/images/news_events/wpp19.pdf)).

for each prisoner in national legislation and rules or other references. In addition, the rate of overcrowding has no clear value as an indicator of the conditions in which prisoners are housed or of the severity of the problems they may face. Thus, the comparison of overcrowding levels can be misleading. Nevertheless, this remains the only quantifiable measure currently available to provide some understanding of the level of overcrowding and the dynamics of it within one country, as well as comparisons between countries. On this basis, out of 194 jurisdictions for which data had been collected by the World Prison Brief of the International Centre for Prison Studies, 118 had a rate of prison occupancy above 100 per cent (overcrowding). Out of these, 15 jurisdictions had rates of overcrowding above 200 per cent, 33 had rates between 150 and 200 per cent.<sup>8</sup>

While high imprisonment rates cannot automatically be equated to overcrowding in prisons, in the majority of countries a high rate of imprisonment does lead to overcrowding. Although the pressure put on prisons by the overuse of imprisonment can be temporarily alleviated by an expansion of the prison estate, if the root causes of high imprisonment rates remain unchanged, new prisons will rapidly be filled, and the prison building programme will need to be expanded on a regular basis.

On the other hand, low imprisonment rates do not necessarily indicate that prisons are not overcrowded. In a number of countries, prisons are acutely overcrowded, despite low imprisonment rates. This may be due to the lack of adequate prison space or infrastructure, or because the geographical distribution of prisons does not meet the current requirements, with prisoners being concentrated in a few prisons, where overcrowding can be well above the national average.<sup>9</sup> These prisons are generally those which hold pre-trial detainees, caused by the overuse and prolonged period of pre-trial detention, rather than the overuse of imprisonment in general. In fact, conviction rates in such countries can be low, which is evidenced by the small proportion of sentenced prisoners. A number of deductions can be made, subject to further analysis and research, to identify the challenges faced in the criminal justice system of such countries. However what is clear is that pre-trial detention is often used excessively, and that, if this were not to be the case, perhaps prison infrastructure would be adequate in terms of space, though not necessarily of conditions and services offered.

In discussing and comparing overcrowding levels in different countries it is also important to note that there is no internationally accepted standard for the minimum space requirement for each prisoner. The *Standard Minimum Rules for the Treatment of Prisoners (SMR)* provide that “accommodation provided for the use of prisoners and in particular all sleeping accommodation shall meet all requirements of health, due regard being paid to climatic conditions and particularly to cubic content of air, minimum floor space, lighting, heating and ventilation”.<sup>10</sup>

<sup>8</sup><http://www.prisonstudies.org/info/worldbrief/> (accessed on 13 June 2011).

<sup>9</sup>For example, in Pakistan while the imprisonment rate was only 40 in 2010, the average national occupancy rate was 177.4 per cent, based on official capacity. India had an imprisonment rate of 31 in 2009, but an occupancy rate of 123 per cent; Mali had an imprisonment rate of 32, but an occupancy rate of 223.3 per cent. In all three countries, the proportion of pre-trial detainees was very high, with 70.7 per cent in Pakistan, 66.4 per cent in India and 88.7 per cent in Mali. (See International Centre for Prison Studies, World Prison Brief (<http://www.prisonstudies.org/info/worldbrief/>)).

<sup>10</sup>SMR, Rule 10.

Among regional standards, the commentary to Rule 18 of the European Prison Rules indicates that the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) considers 4 square meters per person as a minimum requirement in shared accommodation and 6 square meters for a single occupancy prison cell. It notes that, although CPT has never laid down such a norm directly, indications are that it would consider 9 to 10 square meters as a desirable size for a cell for one prisoner.<sup>11</sup>

In the absence of a universal standard, the International Committee of the Red Cross (ICRC), based on its experience in many countries worldwide, has developed specifications concerning space requirements. These are detailed in the handbook *Water, Sanitation, Hygiene and Habitat, 2004* and are further refined in its companion handbook: *Water, Sanitation, Hygiene and Habitat in Prisons 'Supplementary Guidance' 2012*. These recommendations are shown in the box.

#### ICRC Technical Specifications FOR SPACE

The ICRC recommends the following specifications as the minimum space needed for a prisoner to sleep undisturbed, store personal property and move around. The ICRC does not set minimum standards. Instead it establishes recommended specifications on the basis of its experience. These specifications include 1.6 sqm for sleeping space but do not include space for toilets and showers.

- 5.4 sqm per person in single cell accommodation;
- 3.4 sqm per person in shared or dormitory accommodation, including where bunk-beds are used.

In setting these specifications, the ICRC is clear in stating that the appropriate amount of space cannot be assessed by a simple measure of space alone. The application of these specifications is dependent on the actual situation in a given context. Factors that may be relevant in any given detention situation include:

- Condition of the building;
- Amount of time prisoners spend in the sleeping area;
- Number of people in that area;
- Other activities occurring in the space;
- Ventilation and light;
- Facilities and services available in the prison;
- Extent of supervision available.

This more comprehensive approach provides a more accurate picture of the reality for prisoners and staff. It serves to underline the fact that all aspects of space and its use are interrelated and a variation in one factor will impact on other factors and on the quality of the individual prisoner's experience.

Source: International Committee of the Red Cross (ICRC), *Water, Sanitation, Hygiene and Habitat in Prisons 'Supplementary Guidance', 2012*.

<sup>11</sup>See Commentary to Rule 18 of the European Prison Rules (2006).

### 1.1 Increasing number of prisoners with special needs

In tandem with the growth of the prison population, the number of prisoners with special needs is also increasing in many countries worldwide. Such groups include women prisoners, prisoners with mental health care needs, drug-dependent prisoners, foreign national prisoners, racial and ethnic minorities, older prisoners and prisoners with disabilities. Children are imprisoned and often held with adults, contrary to the provisions of international instruments.

Currently some of these groups constitute a large part of the worldwide prison population. Foreign prisoners, for example, make up over 20 per cent of the prison population in European Union countries and a few countries of South Asia and the Middle East.<sup>12</sup> 50 to 80 per cent of prisoners have some form of mental disability according to studies undertaken in a number of countries; racial and ethnic minorities represent over 50 per cent of the prison population in some jurisdictions.<sup>13</sup> While women still form a small minority in prisons around the world, their numbers are increasing at a faster rate than men in a number of jurisdictions. Various studies have indicated that the percentage of people in prison who have a drug problem ranges from 40 to 80 per cent and drug use amongst offenders entering prison is on the increase.<sup>14</sup>

The special treatment requirements of these groups are rarely met in prisons, especially in facilities that are overcrowded and under-resourced.

## 2. The impact of overcrowding in prisons

The reality in many prison systems is that prisoners do not have even the minimum space requirements referred to above and very large numbers spend up to 23 (sometimes 24) hours in overcrowded, cramped accommodation. In some systems the level of overcrowding may be so acute that prisoners are forced to sleep in shifts, sleep on top of each other, share beds or tie themselves to window bars so that they can sleep while standing. Paradoxically, the level of overcrowding is often much worse in pre-trial detention facilities in most countries worldwide, and the prison conditions are correspondingly much poorer, despite the fact that pre-trial prisoners should be presumed innocent until proven guilty by a court of law and special privileges should be provided to them, reflecting their non-convicted status, according to international law.<sup>15</sup>

The lack of adequate space is only one of the numerous problems that are experienced as a consequence of overcrowding in prisons. Overcrowding impacts also on the quality of nutrition, sanitation, prisoner activities, health services and the care for vulnerable groups. It affects the physical and mental well-being of all prisoners, generates prisoner tension and violence, exacerbates existing mental and physical health problems, increases the risk of transmission of communicable diseases and poses immense management challenges, as summarized below.

<sup>12</sup>UNODC *Handbook on Prisoners with Special Needs*, 2009, p. 4.

<sup>13</sup>Ibid.

<sup>14</sup>UNODC, *Drug Dependence Treatment: Interventions for Drug Users in Prison*, Treatnet, p. 11. ([http://www.unodc.org/docs/treatment/111\\_PRISON.pdf](http://www.unodc.org/docs/treatment/111_PRISON.pdf)).

<sup>15</sup>See ICCPR, Article 14 (2) and SMR, Rules 84 to 93.

## 2.1 Staffing

The growth of prisoner numbers requires a reassessment of staff numbers and their deployment, most often necessitating an increase in staffing levels to supervise and manage prisoners. However, staff resources do not usually keep pace with prisoner numbers. As a result, the ratio of staff per prisoner declines. Secondly, the quality and experience of staff may suffer, due to hasty recruitment of inappropriate and inexperienced additional personnel and insufficient training being provided prior to deployment. Challenges presented by overcrowding can have a profound impact on staff performance and attitudes, with a negative impact on their ability to fulfil their duties professionally. In such circumstances staff will often take on a more authoritarian and less positive role.

## 2.2 Separation and classification

Classifying and separating prisoners according to their age, gender and the risk they pose to others becomes difficult. This violates one of the most basic principles relating to the treatment of prisoners, provided both in the *SMR and the International Covenant on Civil and Political Rights (ICCPR)* (Article 10 (2)), and lays the ground for a series of other violations. It may also lead to the further criminalization of prisoners held for minor offences, as a result of being accommodated, for extended periods, with more serious and violent offenders.

## 2.3 Safety and security

Overcrowding has a major impact on the safety and security of prisoners and staff, where the prisoner to staff ratio increases, tensions can be high and prisoners angry and frustrated about the conditions in which they are held. Experience in many countries has shown that the risk of violence, prisoner protests and other disturbances in overcrowded prisons is acute. Prison suicides have increased in a number of countries as a result of overcrowding.<sup>16</sup>

In many prison systems the lack of staff to supervise the growing number of prisoners has led to selected prisoners being given supervisory and disciplinary roles to keep order and maintain security in prisons. This violates a basic principle contained in the *SMR*,<sup>17</sup> and increases the risk of abuse of vulnerable prisoners by those who are stronger, as well as of corrupt practices.

<sup>16</sup>For example the Chief Inspector of Prisons expressed concern in 2007 that suicides in prisons had risen significantly in England and Wales to two a week, as a result of overcrowding. June 13, 2007. (<http://www.guardian.co.uk/prisons/story/0,,2101641,00>). In France, which has one of the highest prisoner numbers in Europe, over a hundred prisoners committed suicide in 2010. NGOs say one prisoner tries to commit suicide every three days and the chances of a suicide are 10 times higher inside a prison than outside. The EU has repeatedly warned France that its prisons are overcrowded, prisoners are denied some basic rights and hygiene and eventually suicide cases will rise. (Anustup Roy, Press TV, Paris, Wed Mar 16, 2011 (<http://www.presstv.ir/detail/170279.html>)); In Italy, overcrowding is held at least partly responsible for the high suicide rates in prisons, which is 15-17 times higher than on the outside. Italy's prison population was at a post-war high with over 65,000 prisoners in a system designed to accommodate 43,000 in 2009. An association representing prison doctors, AMAPI, said that overcrowding in Italy's prisons had created a "time bomb ready to explode," while police and guard associations have warned that "we are at the limits of the respect of human rights". (ANSA) - Rome, 23 December 2010, (<http://www.lifeinitaly.com/node/15684>).

<sup>17</sup>*SMR*, Rule 28.

Vulnerable groups, such as children, young prisoners, women, prisoners with mental health care needs, with disabilities and older prisoners are at particular risk of being bullied and abused in overcrowded conditions, where different categories of prisoners are not separated and in an environment where the control of the prison administration will have been weakened.

#### *2.4 Prisoner rehabilitation*

Meaningful activities, such as education, work and other programmes are at the heart of creating a positive prison environment, channelling prisoners' energy into constructive occupations and assisting with their preparation for release and subsequent re-entry into society. Such activities are also important from the security perspective, as prisoners who are engaged in meaningful activities are less likely to initiate disturbances than those who are bored and frustrated. However, when prisoner numbers increase: (a) the necessary resources to ensure all prisoners are engaged in activities outside of their accommodation are most often not made available; and (b) prisoners are held in their dormitories and cells for extended periods due to the challenges faced in supervising the movements of large groups. Such circumstances reduce or eliminate the prospects of assisting prisoners with their rehabilitation.

#### *2.5 Contact with the outside world*

Contact with the outside world, especially with families, is recognized as being one of the key factors that contributes to the chances of successful resettlement of prisoners. As the number of prisoners increase, additional infrastructure and opportunities, such as more visiting rooms, extended visiting times and more telephones, must be provided if prisoners are to maintain communication with their families. At times of financial constraint associated with overcrowded prisons, such investments are unlikely to be forthcoming.

#### *2.6 Nutrition*

The budget for feeding prisoners will rarely increase sufficiently to meet the nutritional requirements of the growing number of prisoners. Indeed especially in low-resource countries there will be no change in the budget allocated for food, thus prisoners will need to rely on additional food from their families and/or suffer the consequences of inadequate and low quality food. This will severely compromise prisoners' health. In the worst cases it can lead to prison deaths due to malnutrition.

#### *2.7 Water, sanitation, sewage, ventilation—heating and cooling*

As the number of prisoners increase beyond that which the water, sewage, sanitation and heating systems were designed to provide for, these systems come under stress and struggle to meet the basic needs of prisoners and protect their health and well-being. In overcrowded cells and dormitories, access to fresh air is severely curtailed, especially when the overpopulation is accompanied by less frequent opportunities to spend time outside. This can have a very significant negative impact on prisoners' health.

## 2.8 Health services

Prisons have very serious health implications. Prisoners are likely to have existing health problems on entry to prison, as they are predominantly from poorly educated and socio-economically deprived sectors of the general population, with minimal access to adequate health services. Their health conditions further deteriorate in prisons which are overcrowded, where nutrition is poor, sanitation inadequate and access to fresh air and exercise often unavailable—all factors which increase the risk for epidemics of communicable diseases. Tuberculosis (TB), hepatitis, sexually transmitted infections (STIs) and blood borne diseases, as well as mental illnesses are widespread in prisons around the world. In countries with a high prevalence of TB in the outside community, prevalence of TB can be up to 100 times higher inside the prisons. Large proportions of people who enter prisons have a history of drug use. In the vast number of countries there is ineffective or no treatment, while poor conditions, overcrowding and lack of activities may induce drug use. In most countries, the prevalence of HIV infection in the prison population is significantly higher than within the population outside of prison, especially where drug addiction and risk behaviour, such as the sharing of needles, is prevalent. Overcrowding can severely damage the mental health of all prisoners, especially those who are vulnerable to bullying and abuse, and those who have existing mental health care needs.

Such risks are usually exacerbated by a shortage of health care staff and medication and access to specialist care in community hospitals. Consequently, one of the most fundamental rights of human beings to “the enjoyment of the highest attainable standard of physical and mental health” enshrined in the International Covenant on Economic, Social and Cultural Rights, cannot be met for prisoners.

Thus, overcrowding is the root cause of a range of challenges and human rights violations in prison systems worldwide, threatening, at best, the social reintegration prospects, and at worst, the life of prisoners.

In a number of cases, the Human Rights Committee has ruled that poor prison conditions which seriously violated the requirements of the *SMR*, and which had been clearly aggravated by the level of overcrowding, amounted to a violation of article 10 (1) of the *ICCPR*.<sup>18</sup>

## 3. Broader consequences of excessive imprisonment

The impact of overcrowding does not remain within the prison walls. It can have a detrimental impact on public health. The cost of the excessive use of imprisonment, which is a fundamental reason for prison overcrowding in countries worldwide (see chapter B), can be significant, increasing the poverty levels and socio-economic marginalization of certain groups of people and reducing funds available for other spheres of government expenditure.

<sup>18</sup>For example, in the case of *Lantsova v Russian Federation*, where the authorities conceded poor conditions and that detention centres at the time held twice the intended number of inmates, the Committee noted information indicating that the actual population was five times the allowed capacity, with poor ventilation and inadequate food and hygiene. It concluded that holding the prison in such conditions constituted a violation of article 10 (1) of the *ICCPR*. In another case, *Mulezi v Democratic Republic of Congo*, the prisoner had complained in addition to being subjected to torture and ill-treatment, that while he was badly injured, he was confined in crowded cells (at one point for some 16 to 20 months with 20 others in a cockroach-infested 3 by 5 metre cell), with little or no access to medical care, inadequate food and sanitation. The Committee held that the conditions of his detention constituted a violation of article 10 (1) of *ICCPR*. (Nigel Rodley and Matt Pollard, *The Treatment of Prisoners under International Law* (2011), p. 390).

### 3.1 *The cost of imprisonment*

Numerous studies have shown that imprisonment disproportionately affects people living in poverty. When an income generating member of the family is imprisoned, the sudden loss of income can have a severe impact on the economic status of the rest of the family—especially so in low resource countries where the state does not usually provide financial assistance to the poor and where it is not unusual for one person to financially support an extended family network. When released, often with no prospects for employment due to their criminal record, former prisoners are generally subjected to socio-economic exclusion and are vulnerable to an endless cycle of poverty, marginalization, criminality and imprisonment. Thus, imprisonment contributes directly to the impoverishment of the prisoner and his or her family. Studies have also shown that children of parents who have been imprisoned are more likely to come into conflict with the law and that once detained, they are likely to be further criminalized. Thus the cycle is expanded, creating future victims and reducing future potential economic performance.

Not knowing how to read or write, the woman prisoner in Ecuador says she considered two options: “becoming a prostitute or selling drugs.” She was arrested in 2003 and sentenced to eight years in prison. She says: “When they sentenced me, and it’s the same for every woman they sentence, they not only sentence the person who committed the crime, they also sentence their family, they also sentence their children. [...] [Authorities] don’t realize that they want to get rid of crime, but they are the ones promoting it because if they [the children] are left alone... what can they do? Go and steal... my daughter would become a prostitute, my son would become a drug addict, deal drugs, sell drugs.”

Source: *Transnational Institute, Drug Laws and Prison in Ecuador*. <http://www.druglawreform.info/en/publications/the-human-face/item/384-drug-laws-and-prison-in-ecuador>

This is only one aspect of how imprisonment contributes to poverty of communities. Imprisoning large segments of society puts a significant burden on State budgets. In developing countries where budgets rarely meet the needs of all citizens, the additional burden of a large prison population further reduces the funds available for health, social services, housing and education. Thus, when considering the cost of imprisonment, account needs to be taken not only of the actual funds spent on the upkeep of each prisoner, which is usually significantly higher than what is spent on a person sentenced to non-custodial sanctions, but also of the collateral costs, such as the impact of these costs on the social, economic and health care services, which are not always easy to measure, but which are immense and long-term.

The figures in the box below illustrate the comparative cost of imprisonment has gone far beyond what most citizens of the countries referred to, and others, would probably readily accept. But this comparative data is not always readily available. They also demonstrate the lack of connection and joined up thinking between the different sectors of government institutions. For example, while on the one hand there is convincing research which shows that improving education levels can reduce offending (see chapter G), on the other, expenditure on education is reduced in favour of imprisonment.

### The cost of imprisonment

- A report released in January 2010 noted that California (United States) spent over \$48,000 annually to imprison one person, more than four times the tuition cost of University of California, Los Angeles (UCLA) for a California resident. In 1980, California spent more of its state budget on higher education than on prisons, but that had reversed by 2010, with more of that state's budget going for prisons than for higher education.<sup>a</sup>
- Between 1987 and 1995 spending on corrections in the United States rose by 30 per cent, while spending on elementary and secondary education fell by 1.2 per cent and on higher education by 18.2 per cent.<sup>b</sup>
- The total budget of the South African Department of Correctional Services for the 2005-06 financial year had amounted to R 9.2 billion and was estimated to top R 10 billion per annum thereafter. It was estimated that an additional R 10 billion would permit the South African treasury to more than double its expenditure on social development and provision of housing.<sup>c</sup>
- In the United Kingdom the annual cost of keeping an individual in prison was £37,500 in 2008. Research by the United Kingdom-based Centre for Crime and Justice Studies found that considering the impact on families and wider society, the estimated annual cost of imprisonment for an individual rose by almost a third to nearly £50,000 and that a high level of spending on incarceration generated opportunity costs to other areas of public expenditure.<sup>d</sup>
- The estimated 2005 expenditure on pre-trial detention by European states was slightly more than the combined cost to the World Food Organization to feed 90 million people for one year, the Global Fund's 2002–06 disbursements, the biennial 2006–07 budget of the World Health Organization (WHO), and the United Nations' 2006 budget.<sup>e</sup>
- A study of pre-trial detention costs in Mexico compared the total costs of pre-trial detention to other government expenditures (social programmes and security) to illustrate the disconnection between government policies. The total spent on pre-trial detention was half a billion pesos more than the 2006 federal budget for public safety, and equal to just over a quarter of the budget for Mexico's social assistance programme *Oportunidades*, which reaches 27 million people.<sup>f</sup>

<sup>a</sup>Mass Incarceration Creates Costly Disaster Across America, Mon, 04/04/2011, Linn Washington Jr. (<http://www.thiscantbehappening.net/node/545>).

<sup>b</sup>Stern, V., *A Sin Against the Future: Imprisonment in the World*, 1998.

<sup>c</sup>Schoenteich, M., "The Scale and Consequences of Pretrial Detention around the World", in *Justice Initiatives, Pretrial Detention*, Open Society Institute, 2008, p. 33.

<sup>d</sup>Bewley-Taylor, D., Hallam, C., Allen, R., *The Incarceration of Drug Offenders, An Overview*, The Beckley Foundation Drug Policy Programme, March 2009.

<sup>e</sup>Schoenteich, M., "The Scale and Consequences of Pretrial Detention around the World", in *Justice Initiatives, Pretrial Detention*, Open Society Institute, 2008, p. 34.

<sup>f</sup>The Socioeconomic Impact of Pre-trial Detention, Open Society Justice Initiative, Open Society Foundations, UNDP 2011, p. 37.

### 3.2 Imprisonment and public health

Prisons have been referred to as incubators of disease as the detrimental impact imprisonment has on health is not confined to within the prison walls. Prisoners spread disease to the outside community via staff and visitors. The large majority of prisoners are eventually released and are likely to spread any diseases contracted in prisons to the community.

For example, a study based on longitudinal TB data from 26 countries in Eastern Europe and Central Asia concluded that the rate of growth of prison populations was the most important determinant of differences in the TB infection rates in these countries.<sup>19</sup> The AIDS rate is six times higher in state and federal prisons than in the United States general population, with 20-26 per cent of people living with HIV/AIDS in the United States having spent time in the prison system.<sup>20</sup>

The overuse of pre-trial detention poses a particularly high risk to the spread of disease among prisoners and in the community, as pre-trial detainees are even less likely than sentenced prisoners to access adequate health care or be part of health care programmes implemented in prisons. During their detention in often overcrowded and unsanitary conditions, pre-trial detainees are at a high risk of contracting infectious diseases, such as Hepatitis C, TB and HIV/AIDS, which they will take with them to prisons or to the community.<sup>21</sup> Pre-trial detainees are often held long enough to contract TB but not long enough to ensure the disease is detected and treated.<sup>22</sup> Management of TB is particularly difficult in pre-trial detention due to detainee turnover, and the movement of detainees to other institutions within the criminal justice system.<sup>23</sup> Taking into account that around 10 million people are admitted into pre-trial detention during the course of an average year,<sup>24</sup> many of whom are released into the community without any medical treatment and without having been sentenced, the implications for public health are evident.

#### KEY POINTS

- The size of the prison population throughout the world is growing at an alarming rate, placing an enormous financial burden on governments and at a great cost to the social cohesion of societies.
- In tandem with the growth of the prison population, the number of vulnerable prisoners is also increasing in many countries worldwide. Such groups include women, prisoners with mental-health care needs, drug-dependent prisoners, foreign national prisoners, racial and ethnic minorities, older prisoners, prisoners with disabilities and children. Their special needs cannot be met in overcrowded prisons, where their situation deteriorates in the harmful closed environment.
- The lack of adequate space is only one of the numerous problems that are experienced as a consequence of overcrowding in prisons. Overcrowding impacts also on the quality of nutrition, sanitation, prisoner activities and programmes, health services, and the care for vulnerable groups. It affects the physical and mental well-being of all prisoners, generates prisoner tension and violence, exacerbates existing mental and physical health problems and poses immense management challenges.

<sup>19</sup>OSI, Global Campaign for Pretrial Justice, Pretrial detention and public health: unintended consequences, deadly results, with reference to D. Stuckler, S. Basu, M. McKee, and L. King, "Mass incarceration can explain population increases in TB and multidrug-resistant TB in European and central Asian countries," Proceedings of the National Academy of Sciences 105(36): 13280-285 ([http://www.soros.org/initiatives/justice/articles\\_publications/publications/pretrial-detention-health/summary-pretrial-detention-health-20100409.pdf](http://www.soros.org/initiatives/justice/articles_publications/publications/pretrial-detention-health/summary-pretrial-detention-health-20100409.pdf)).

<sup>20</sup>Bewley-Taylor, D., Hallam, C., Allen, R., The Incarceration of Drug Offenders, An Overview, The Beckley Foundation Drug Policy Programme, March 2009, p. 14.

<sup>21</sup>OSI, Global Campaign for Pretrial Justice, Pretrial detention and public health: unintended consequences, deadly results, op. cit.

<sup>22</sup>Ibid.

<sup>23</sup>Ibid.

<sup>24</sup>Schoenteich, M., The Scale and Consequences of Pretrial Detention around the World, in Justice Initiatives, Pretrial Detention, Open Society Institute, Spring 2008, pp. 11-43, p. 11.

- The impact of overcrowding does not remain within the prison walls. High rates of imprisonment have a detrimental impact on the economy, on public health and on the social cohesion of societies.
- When discussing the cost of imprisonment, account needs to be taken not only of the actual funds spent on the upkeep of each prisoner, but also of the collateral costs, such as the impact of these costs on the social, economic and health care services, which are not always easy to measure, but which are immense and long-term.

## CHAPTER B. CAUSES OF OVERCROWDING IN PRISONS

### 1. Imprisonment rates and crime trends

Looking at the worldwide trend, it might be assumed that the increase in imprisonment rates and overcrowding in prisons are a direct consequence of increasing criminal activity worldwide. In fact, this is not always the case. Studies have shown that rates of imprisonment and crime may evolve independent of each other, or that rising crime may impact on rates of imprisonment but not constitute the main factor that fuels ever increasing rates of incarceration. The increase in criminality may itself be due to the fact that acts that were not defined as criminal previously have been added to the list of acts that have come to be considered as offences. Also, some offences may have been reclassified to become more serious and accorded a minimum fixed prison term.

A comprehensive recent study, which reviewed the statistical associations between imprisonment rates and crime rates, using the United Nations survey data for total recorded crime in 44 countries, health statistics data, data for completed homicide in 192 countries, data from victimization studies in assault worldwide (68 countries) and for 10 crimes in the EU (29 countries), as well as the impact of crime on imprisonment, using conviction statistics both from the United Nations surveys and the European Sourcebook, found that neither reported crime nor victimization is systematically reflected in the levels of incarceration.<sup>25</sup> It also demonstrated that trends in the use of imprisonment and trends in crime may differ without a seemingly constant pattern.<sup>26</sup>

The study shows that, for example, in Finland, total reported crime went up between 1980 and 2005, when imprisonment trends were declining in the same years. In England and Wales both crime trends and prison rates were going up (but not simultaneously) in the same years. In the United States crime trends remained first stable and then declined, as imprisonment increased over the same period.<sup>27</sup> In 1975 the United States held 21 prisoners for every 10,000 “index crimes”; thirty years later it imprisoned 125 prisoners for every 10,000 crimes. This means that the country rate of imprisonment had increased six-fold.<sup>28</sup> The Canadian crime trend is similar to that of the United States, but the imprisonment curve is totally different.<sup>29</sup> In Australia imprisonment rates have grown, while the national crime rate has actually declined.<sup>30</sup> Singapore and Japan are ‘low crime’ countries according to official crime statistics. However, Singapore has a high imprisonment rate whereas Japan has a low imprisonment rate.<sup>31</sup> These and other similar studies indicate that general crime trends do not explain the overall use of imprisonment.

<sup>25</sup>Tapio Lappi-Seppala, Causes of Prison Overcrowding, paper submitted to the Workshop on Strategies to Reduce Overcrowding in Correctional Facilities, Twelfth United Nations Congress on Crime Prevention and Criminal Justice (Salvador, Brazil, 12-19 April 2010).

<sup>26</sup>Ibid.

<sup>27</sup>Ibid.

<sup>28</sup>Loic Wacquant, The Punitive Regulation of Poverty in the Neoliberal Age. ([http://www.isn.ethz.ch/isn/Current-Affairs/ISN\\_Insights/Detail?lng=en&id=131575&contextid734=131575&contextid735=131574&tabid=131574&dynrel=0c54e3b3-1e9c-be1e-2c24-a6a8c7060233](http://www.isn.ethz.ch/isn/Current-Affairs/ISN_Insights/Detail?lng=en&id=131575&contextid734=131575&contextid735=131574&tabid=131574&dynrel=0c54e3b3-1e9c-be1e-2c24-a6a8c7060233)).

<sup>29</sup>Lappi-Seppala, T., Causes of Prison Overcrowding, op. cit.

<sup>30</sup>Roberts, J., Stalans, L. J., Indermaur, D & Hough, M. (2002) Penal Populism and Public Opinion: Lessons from Five Countries, Oxford University Press.

<sup>31</sup>Neil Morgan, Overcrowding: Causes, Consequences and Reduction Strategies, in Resource Material Series No. 80, UNAFEI, March 2010.

One explanation offered for these differences is that different systems react differently to trends in crime. Some systems have responded by altering their penal policies, in response to changing realities, while other systems have been more rigid and less prone to change.<sup>32</sup> Another explanation is that the level of imprisonment is affected by other factors, which relate to social, economic and political structures, as well as the individual countries' specific histories and local circumstances.<sup>33</sup>

Thus, the answer to the question of why an increasing proportion of people are being deprived of their liberty worldwide is complex. The reasons are multiple, varying from region to region and country to country. Those who wish to embark on a process to reduce overcrowding in their country's prison system need to begin with a thorough assessment to identify the precise reasons for prison overcrowding in their particular jurisdiction, including an assessment of the entire criminal justice system, in order to develop policies and programmes that are relevant and effective.

Obviously in considering the increase in the size of the prison population, account needs to be taken of the natural demographic growth in a country. However, the increase in imprisonment rates, rather than merely in the number of people held in prisons, in countries worldwide, indicates that in most countries many other factors, in addition to demographic growth, need to be considered as causes of overcrowding, which are likely to include some of those outlined below.

## 2. Underlying causes: socio-economic and political factors

The majority of prisoners worldwide come from economically and socially disadvantaged backgrounds. Most live in poverty, are illiterate or have limited education and will have experienced unemployment and lack of housing, which in turn may have contributed to the breaking up of their families, drug and alcohol abuse, among other destructive consequences of their socio-economic marginalization. Such circumstances and dependencies can contribute to individuals' confrontation with the criminal justice system, unless sufficient support systems are in place. These may include social welfare assistance, support for housing, employment and treatment for substance dependencies and mental healthcare needs, among others, to help people to overcome such challenges and live positive, self-supporting lives.

Research indicates that income distribution inequality measured by the Gini coefficient<sup>34</sup> has a significant impact on the increase in the rates of crimes committed against both individuals and property.<sup>35</sup> Research has also found a correlation between income inequality and the size of the prison population.<sup>36</sup> Other indicators measuring

<sup>32</sup>Tapio Lappi-Seppala, *Causes of Prison Overcrowding*, op. cit.

<sup>33</sup>Ibid.

<sup>34</sup>The Gini coefficient is a measure of the inequality of a distribution, a value of 0 expressing total equality and a value of 1 maximal inequality. It has found application in the study of inequalities in disciplines as diverse as sociology, economics, health science, ecology, chemistry, engineering and agriculture. It is commonly used as a measure of inequality of income and wealth.

<sup>35</sup>Carranza, E., *Penal Reform and Prison Overcrowding in Latin America and the Caribbean: What to do, what not to do - The Good Examples of Costa Rica and the Dominican Republic*, paper submitted to the Workshop on Strategies to Reduce Overcrowding in Correctional Facilities, Twelfth United Nations Congress on Crime Prevention and Criminal Justice (Salvador, Brazil, 12-19 April 2010).

<sup>36</sup>Lappi-Seppala, T, *What social, political and cultural factors characterise countries with a lower use of imprisonment? Background draft 26.4.2009 (unpublished)*, cited in ICPS "A Review of international trends and explanations in use of prison, and prison populations", pp. 8-9; O'Donovan, M. and Redpath, J., *The Impact of Minimum Sentencing in South Africa*, Report 2, Open Society Foundation, 2006, p. 30.

social security and social justice cohere with less use of imprisonment. Comparative data is available mainly from the countries of the Organisation for Economic Co-operation and Development (OECD), indicating that increased investment in social welfare is associated with lower imprisonment rates.<sup>37</sup> There is clear evidence that the root causes for many offences can be found in economic and social inequalities and the perpetrators' socio-economic status.

Some experts have also found strong correlations between imprisonment rates and different economic models. They argue that the general increase in prison populations is linked to the rise in neo-liberalism in some western societies, and the penal system is increasingly used as an instrument for managing social insecurity and containing social disorders created by neo-liberal policies and economic deregulation.<sup>38</sup> They assert that in the neoliberal age prisons are being used to confine and control the poor and “disruptive elements” of society.<sup>39</sup> Some argue that conservative corporatist market economies tend to have medium levels of imprisonment, while social democratic market economies have the lowest levels of imprisonment.<sup>40</sup>

### 3. Obstacles and delays in accessing justice

A number of international instruments establish principles and minimum rules for the administration of justice and offer detailed guidance to states to ensure equal access to justice for all those who come in contact with the criminal justice machinery.<sup>41</sup> However, in many countries minimum guarantees set out in international treaties and standards are not provided to those who come in contact with the criminal justice system, which can lead to arbitrary arrests, prolonged pre-trial detention and unfair trials that result in the imprisonment of innocent people or to excessively harsh sentences. Socially and economically marginalized groups, rural populations in developing countries and particular groups who experience multiple layers of discrimination in all spheres of life, such as minority groups and women, are those most affected.

Problems relating to access to justice in crisis and post-conflict countries are usually more pronounced and pervasive than in non-crisis contexts. The criminal justice system may have collapsed or be severely reduced in capacity due to destruction of

<sup>37</sup>Tapio Lappi-Seppala, Causes of Prison Overcrowding, paper submitted to the Workshop on Strategies to Reduce Overcrowding in Correctional Facilities, Twelfth United Nations Congress on Crime Prevention and Criminal Justice (Salvador, Brazil, 12-19 April 2010).

<sup>38</sup>See for example Loic Wacquant, The Penalisation of Poverty and the Rise of Neo-Liberalism, *European Journal on Criminal Policy and Research* 9; 401-412, 2001 and David Garland, *The Culture of Control, Crime and Social Order* in Contemporary Society, 2001.

<sup>39</sup>Loic Wacquant, The Punitive Regulation of Poverty in the Neoliberal Age, 2 August 2011, (<http://www.isn.ethz.ch/isn/Current-Affairs/ISN-Insights/Detail?lng=en&id=131575&contextid734=131575&contextid735=131574&tabid=131574&dynrel=0c54e3b3-1e9c-be1e-2c24-a6a8c7060233>).

<sup>40</sup>ICPS “A Review of international trends and explanations in use of prison, and prison populations”, p. 8, with reference to Sutton, J.R. (2004) “The Political Economy of Imprisonment in Affluent Western Democracies 1960-1990” in *American Sociological Review*, Vol. 69, part 2, pp170-189. Washington: American Sociological Association.

<sup>41</sup>Such as the *International Covenant on Civil and Political Rights* (ICCPR), which enshrines the principles of equality before the law and the presumption of innocence and includes guarantees of freedom from arbitrary arrest and detention and the right to a fair and public hearing by a competent, independent and impartial tribunal established by law; the *Basic Principles on the Independence of the Judiciary*, which require that the independence of the judiciary be guaranteed by national law and prohibit the inappropriate and unwarranted interference with the judicial process; the *Guidelines on the Role of Prosecutors* which identify the responsibility of prosecutors in protecting human dignity and upholding human rights and ensuring due process; the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* (*Body of Principles*) and the *Basic Principles on the Role of Lawyers*, among others, which guarantee a detainee's right to prompt access to legal counsel on arrest.

infrastructure and flight of qualified criminal justice personnel leaving key positions vacant. Police and other judicial institutions might themselves be a source of public insecurity, intimidation or violence, or they may be mistrusted because of abuses by previous regimes. Corruption is likely to be rife. Judicial guarantees and procedural safeguards are not respected. Law enforcement activities are often uncoordinated. In armed conflict situations, these challenges are often severe with few resources available.

Improving people's access to justice is essential to ensure fairness and equality before the law in each individual case, as well as to strengthen trust and confidence in the justice system and people's cooperation with it. Trust in the justice system itself has been identified as a factor that can help reduce crime and imprisonment, because a system that is perceived to be legitimate "may get by with less severe sanctions, while a system in crisis may wish to uphold its credibility by increasing penalties. And a legal system whose norms and procedures are experienced as fair and legitimate may be complied with by the people because the system is felt to be worth following."<sup>42</sup>

Improving poor and vulnerable people's access to justice is also an essential element of ensuring that prisons are not filled with people who, were the police and court systems functioning as they should, would not be in detention, be that either prolonged pre-trial detention or following unfair convictions and sentencing.

Delays and obstacles encountered in accessing justice is a cross-cutting cause for high levels of imprisonment, and is relevant to most other issues discussed below and in subsequent chapters—in particular in part II, chapter D which focuses on access to legal counsel and legal aid mechanisms, which can have a direct and tangible impact on levels of overcrowding in prisons, and chapter E, which focuses on the reduction of pre-trial detention.

#### 4. Excessive pre-trial detention

Despite provisions in international law, which restrict the use of pre-trial detention to narrowly prescribed circumstances (see part II, chapter E), the overuse and long periods of pre-trial detention is endemic in many countries. Two and a quarter million people were known to be held in pre-trial detention and other forms of remand imprisonment throughout the world in 2008. It was estimated that a further quarter of a million were so held in the countries for which such information was not available.<sup>43</sup> During the course of an average year, at least 10 million people are admitted into pre-trial detention.<sup>44</sup> The high proportion of pre-trial detainees is a particularly serious problem in Africa, Latin America and South Asia, where, in some countries, the proportion of pre-trial prisoners is as high as 70–90 per cent.

Pre-trial detention can have a devastating effect on defendants' ability to prepare for trial. Inhumane prison conditions mean that defendants concentrate on surviving their time in pre-trial detention or considering plea-bargains, rather than on preparing their defence.<sup>45</sup> Access to a lawyer and information about their case are often much

<sup>42</sup>Tapio Lappi-Seppälä, *Causes of Prison Overcrowding*, op. cit., p. 13.

<sup>43</sup>Walmsley, R., *World Pre-trial/Remand Imprisonment List (2008)*, International Centre for Prison Studies.

<sup>44</sup>Schoenteich, M., "The Scale and Consequences of Pretrial Detention around the World", op. cit. p. 11.

<sup>45</sup>Detained without trial: Fair Trials International's response to the European Commission's Green Paper on detention, Fair Trials International, October 2011, p. 10.

more limited if the defendant is detained.<sup>46</sup> It is therefore not surprising that, as the United Nations Working Group on Arbitrary Detention has noted, those in pre-trial detention have a lower likelihood of obtaining an acquittal than those who remain at liberty before their trial.<sup>47</sup> This finding is confirmed also by numerous other research studies.<sup>48</sup>

While the overuse of pre-trial detention is one of the major factors contributing to prison overcrowding in many countries worldwide, it is also one of the most complex challenges to address, due to the number of criminal justice institutions involved, the acute need for but shortage of legal assistance at this particular stage of the criminal justice process, as well as the widespread problem of corruption encountered at this entry point to the prison system.

The key reasons for high rates of pre-trial detention have been identified as follows:

#### 4.1 *Delays in the criminal justice process*

Delays encountered in the processing of cases before a final sentence is passed, have a significant impact on the size of the pre-trial prison population in many countries. While in some countries detainees will spend only short periods in pre-trial detention, in many others pre-trial detention periods can extend to months and years. In capital cases in particular, prisoners may spend up to ten years or more awaiting trial.

These long delays can be due to a combination of many factors, usually mutually reinforcing, which include:

- Delays in investigation by police or prosecutors, which may be due to a lack of training and resources, combined with the high number of arrests;
- Lack of cooperation between criminal justice agencies, such as the police, prosecutors and courts, which may be further compounded if there are various levels of administration and legislation—such as at federal and state levels, and where cooperation and exchange of information between them is poor. In such situations it is not unusual for the files of detainees to be lost in the system;
- Cumbersome criminal justice procedures and the bureaucracy of the court administration, often due to outdated rules and regulations, compounded by corrupt practices;

<sup>46</sup> Ibid., p. 10.

<sup>47</sup> Working Group on Arbitrary Detention, Report of the Working Group on Arbitrary Detention, United Nations Commission on Human Rights, E/CN.4/2006/7, 2006), para. 66.

<sup>48</sup> See Schoenteich, M., “The Scale and Consequences of Pretrial Detention around the World”, op. cit. p. 27; with reference to John Clark, D. Alan Henry *The Pretrial Release Decision Making Process: Goals, Current Practices, and Challenges*, November 1996, with references to Anne Rankin, “The Effect of Pretrial Detention,” *New York University Law Review*, Volume 39, 1964; Patricia Wald, “The Right to Bail Revisited: A Decade of Promise Without Fulfillment,” in Stuart S. Nagel, ed. *The Rights of the Accused*, (Beverly Hills, California: Sage Publications, 1972); William M. Landes, “Legality and Reality: Some Evidence on Criminal Procedure,” *Journal of Legal Studies*, Volume 3, 1974; Hans Zeisel, “Bail Revisited,” *American Bar Foundation Research Journal*, 1979; Stevens H. Clarke and Susan T. Kurtz, “The Importance of Interim Decisions to Felony Trial Court Dispositions,” *Journal of Criminal Law and Criminology*, Volume 74, 1983; and Michael R. Gottfredson and Don M. Gottfredson, *Decision Making in Criminal Justice: Toward a Rational Exercise of Discretion*, (New York, New York: Plenum Press, 1988).

- The frequent postponement of trials for reasons such as case overload at the courts, shortage of judges, absence of witnesses, lack of transport to take defendants to court, lack of security for transport (particularly in crisis countries) and lack of proper filing and tracking systems in prisons to ensure that pre-trial detainees are taken to court on dates fixed by the court system. In conflict and post-conflict situations, prisoner records facilities and archives may be inaccessible or may have been destroyed;
- Frequent and indiscriminate extension of pre-trial detention periods, sometimes in contravention of domestic legislation;
- In the aftermath of a crisis, the government may have other more pressing priorities than tackling a rising and daunting judicial caseload, particularly when overall resources available to government are too few.

#### 4.2 *The overuse of pre-trial detention*

The many, but not exhaustive, reasons for the overuse of pre-trial detention may be summarized as follows:

- *Arbitrary arrests:* The police often arrest first and investigate later, resulting in the defendants being in detention for prolonged periods. Police may be prompted to take such action by the pressures to “resolve” pending cases and sometimes to fulfil arrest quotas for certain offences (e.g. drug offences). The requirement to meet arrest targets can lead to the framing of innocent people.
- *Detainees’ lack of access to legal counsel:* The lack of access to legal counsel may be due to the lack of legislation that guarantees defendants’ right to lawyers, lack of a functioning, effective legal aid system, along with a shortage of lawyers in many countries.
- *Corruption throughout the system:* In criminal justice systems where corruption is pervasive, defendants are likely to be released while awaiting trial only when they have sufficient resources to bribe the police, the prosecutor, or the judicial officer dealing with their application for pretrial release.<sup>49</sup>
- *Legislation:*
  - Legislation may include mandatory pre-trial detention for certain categories of crimes, contrary to international standards which require that pre-trial detention be used in exceptional and narrowly defined circumstances only.
  - Legislation may have no or limited alternatives to pre-trial detention;
  - Where an alternative to pre-trial detention is available in legislation, this is usually limited to monetary bail, which requires the defendant to provide a certain amount of funds (or another form of material guarantee, such as land or a house) as surety in order to be released. In such cases it is the poor who have the greatest difficulty complying with such conditions. In Malawi, for example, a key reason for overcrowding of the prison system was that “prisoners cannot pay bail or provide any surety.”<sup>50</sup>

<sup>49</sup>Schoenteich, M., op. cit. , p. 30.

<sup>50</sup>Ibid., p. 29.

In South Africa, approximately 40 per cent of pre-trial detainees are remanded due to an inability to pay bail demands of as little as US\$7, deprivation of liberty resulting not from any relevant factor in criminal justice but rather as a consequence of poverty.<sup>51</sup>

- *Public opinion:* In many countries the public do not understand bail and feel that the courts act too leniently if a defendant is released pending his or her trial. Judges are afraid of being regarded as too soft and are hesitant to take the risk of a suspect offending or absconding if released during the pre-trial period. Sometimes judges are also afraid that the release of a defendant on bail may be attributed to a bribe and thus choose the safer option of detention.

Measures to reduce pre-trial detention are discussed in part II, chapter E, Reducing pre-trial detention.

## 5. Punitive criminal justice policies

When poverty and lack of social support to the disadvantaged are combined with a “tough on crime” rhetoric and policies which call for stricter law enforcement and sentencing, the result is invariably a significant increase in the prison population. Sometimes described as warehousing, the increased population typically comprises an overrepresentation of the poor and marginalized, charged with petty and non-violent offences. Although unrelated to crime rates this situation is fuelled by media stories which promote tough action to combat crime despite the absence of evidence to demonstrate the link between rates of imprisonment and crime rates.

Indeed, punitive criminal justice policies have had an impact on the growth of the prison population and overcrowding in prisons in a significant number of countries. Courts in many countries today are more likely to sentence offenders to imprisonment and impose longer sentences than they did a decade ago.<sup>52</sup> In many countries, non-violent offenders who have committed minor crimes are increasingly likely to be imprisoned, rather than being dealt with at the first stage of the criminal justice process by way of a caution, fine, suspended sentence, or restorative justice measure. Community-based non-custodial alternatives are often overlooked in favour of the deprivation of liberty.<sup>53</sup>

### 5.1 Mandatory minimum sentencing laws

Mandatory minimum sentencing laws, which have gained popularity with the toughening of criminal justice policies, are being used for a range of offences in many countries. Such laws allow no or very limited discretion to judges, who are thus prevented from taking into account the circumstances of the offence or the vulnerability of the offender in passing a sentence. This can often lead to minor offenders being sentenced to long, disproportionate prison terms. “Three-strikes laws” in particular, require judges to pass a prescribed prison sentence on a third

<sup>51</sup>Penal Reform International, Newsletter 55, p. 5.

<sup>52</sup>Ibid., p. 5.

<sup>53</sup>Penal Reform International, Newsletter 55, p. 5.

offence committed by the same person. This can violate very significantly the principle of proportionality in sentencing.<sup>54</sup>

Mandatory minimum penalties and “three-strikes laws”, have had a dramatic impact on the growth of prison population in some countries or have constituted one of the obstacles to reducing the size of the prison population.<sup>55</sup> Two examples, which are most frequently referred to are South Africa and the United States. In the case of South Africa, while many commentators have attributed the significant growth in the prison population and severe overcrowding in prisons to the coming into force of mandatory minimum sentencing laws, it has also been argued that the full impact has not yet been felt and is to be expected in years to come due to the increase in the length of sentences and the longer periods prisoners must now spend in prison, before being released on parole.<sup>56</sup> This research suggests that the increase in the jurisdiction of the magistrates’ courts played an important role in contributing to the rapid growth of the prison population from 1998 onwards, due to the longer sentences which district, and, in particular, regional courts were passing as a result of public and political pressure.<sup>57</sup> Research also suggests that the short-term impact of mandatory minimum sentencing in South Africa has been to increase, substantially, the time which elapses between the commission of an offence and a sentence—thus longer case cycles and fewer convictions each year resulting in increasing case backlogs in the courts.<sup>58</sup>

Mandatory sentencing laws are frequently used in relation to drug-related offences, which are covered in section 6.

<sup>54</sup>“Three Strikes laws” in the United States mandate that a heavy sentence be imposed on persons who are convicted of a third “felony”. The minimum prison sentence required by such laws is typically between 25 years and life. While they were meant to be used against offenders who committed serious offences, statistics in the United States demonstrated that many defendants’ third-strike offences had been for drug possession or petty theft. (See Free Online Legal Dictionary (<http://legal-dictionary.thefreedictionary.com/Three+Strikes+Laws>)).

<sup>55</sup>For example, in the United States, the combination of harsh drug laws, mandatory sentencing and “three-strikes laws” has had an unprecedented impact on the imprisonment rate. While until the 1970s the imprisonment rate was relatively stable with an average rate of around 100 per 100,000, in the following years a consistent steep rise was experienced, reaching 743 per 100,000 today. Between 1973 and 2009, the nation’s prison population grew by 705 per cent, resulting in more than one in 100 adults behind bars. (See The Pew Center on the States, *State of Recidivism, Revolving Door of America’s Prisons*, April 2011). Experts have noted that the impact of the new sentencing policies on the size of the prison populations far outweighed any change in crime rates as a contributing factor. (Mauer, M., “The causes and consequences of prison growth in the United States”, in Garland, D (ed) *Mass Imprisonment, Social Causes and Consequences*, 2001). In South Africa, minimum sentencing was introduced into law in 1997. Several commentators, including the inspecting judge of prisons, ascribed worsening prison overcrowding to the impact of mandatory minimum sentences. See (Sloth-Nielsen, J & Ehlers, L, A. *Pyrrhic Victory? Mandatory and Minimum Sentences in South Africa*, Institute of Security Studies, Occasional Paper 111, July 2005). The existence of minimum terms of imprisonment for most crimes is a very common feature in Latin American Penal legislation. For example in Brazil, which has a very high rate of imprisonment of 261 per 100,000 and a prison occupancy rate of 165.7 per cent, 96 per cent of 1688 existing crimes have minimum sentences. (Prof. M. R. Machado, comments for the UNODC/ICRC Expert Group Meeting on Prison Overcrowding).

<sup>56</sup>Giffard, C. and Muntingh, L., *The Effect of Sentencing on the Size of the South African Prison Population*, Report 3, Open Society Foundation for South Africa, 2006, p. v.

<sup>57</sup>Ibid.

<sup>58</sup>See O’Donovan, M. and Redpath, J., *The Impact of Minimum Sentencing in South Africa*, Open Society Foundation for South Africa, 2006 for a full analysis.

## 5.2 Increase in longer sentences and life sentences

### Life sentence

The following are the three main types of life sentences.<sup>a</sup>

- “Life” or long-term sentence for a determinate number of years, after which the prisoner is released with no further restriction.
- “Life” sentence for a minimum number of years, after which, at a certain defined point, the prisoner may be considered for release.
- Imprisonment until (natural) death, with no possibility of release and/or with a possibility (theoretical or realisable) of a pardon.

Long-term sentence: While there is no international definition of a long-term sentence, according to the Council of Europe the threshold of a long-term sentence is five years or more.<sup>b</sup>

<sup>a</sup>As defined in Penal Reform International, *Alternative Sanctions to the Death Penalty Information Pack*, April 2011, p. 8 ([http://www.penalreform.org/files/PRI\\_Lifers\\_Info\\_Pack.pdf](http://www.penalreform.org/files/PRI_Lifers_Info_Pack.pdf)).

<sup>b</sup>Council of Europe, *Committee of Ministers Recommendation Rec (2003) 23 on the management by prison administrations of life sentence and other long-term prisoners*, (Adopted by the Committee of Ministers on 9 October 2003 at the 855th meeting of the Ministers’ Deputies).

Consistent with the toughening of sentencing regimes in many countries worldwide, there has been an increase in longer prison terms and life sentences, including the use of life sentences without the possibility of parole (LWOP). In addition, life sentences, usually without the possibility of parole, have been introduced in a number of countries following the abolition of the death penalty.

For example, in the United States, it has been noted that while in the 1980s and early 1990s the number of people sent to prison grew mainly because of tougher criminal justice policies applied to drug-related offences, since then longer prison terms rather than new prison sentences have fuelled the prison population expansion.<sup>59</sup> In 2004, one in every eleven offenders in state and federal prisons was reported to be serving a life sentence.<sup>60</sup> By 2009, of the 2.3 million being held in prisons across the United States, 140,610 were serving “life”, among them 6,807 juveniles.<sup>61</sup>

The Committee for the Prevention of Torture of the Council of Europe (CPT) has noted that: “[i]n many European countries the number of life-sentenced and other long-term prisoners is on the increase.”<sup>62</sup> The CPT has also criticized the unjustified special restrictions applied to such prisoners, which was likely to exacerbate the harmful effects inherent in long-term imprisonment.<sup>63</sup> In England and Wales, for example, the prison population serving life sentences increased from 3,192 in 1994 to 6,741 in 2008.<sup>64</sup> The Special Rapporteur on Prisons and Conditions of Detention

<sup>59</sup>Marc Mauer and David Cole, ([http://www.washingtonpost.com/opinions/five-myths-about-incarceration/2011/06/13/AGfIWvYH\\_story.html](http://www.washingtonpost.com/opinions/five-myths-about-incarceration/2011/06/13/AGfIWvYH_story.html)), published 17 June 2011.

<sup>60</sup>Penal Reform International, *Alternative Sanctions to the Death Penalty Information Pack*, April 2011, op. cit., p. 12.

<sup>61</sup>ibid., p. 12.

<sup>62</sup>CPT Standards 2006, Extract from the 11th General Report [CPT/Inf (2001) 16], para. 33.

<sup>63</sup>CPT Standards 2006 ibid.

<sup>64</sup>Penal Reform International, *Alternative Sanctions to the Death Penalty Information Pack*, April 2011, p. 12.

in Africa observed in 2004 that in South Africa life sentences alone had risen from 500 in 1995 to 5,000 in 2004, noting that prison terms that gave the offender no real hope of release jeopardized the whole process of rehabilitation and reintegration.<sup>65</sup> The population of offenders serving longer than 15 years (including life sentences) increased by 32 per cent from 2004/05 to 2010/11.<sup>66</sup> The increasing use of longer sentences in South Africa has been identified as one of the key causes of the prison overcrowding crisis in this country.<sup>67</sup> In Uganda, the number of lifers has grown from 37 in 2008 to 329 in 2010.<sup>68</sup> A similar trend has been noted in a number of countries in South Asia.<sup>69</sup>

In most countries, it is only the most serious offences, which carry the sentence of life imprisonment. However, life imprisonment is increasingly being used for less serious and non-violent offences.

In countries which have abolished the death penalty and replaced it with life imprisonment, sentencing tendencies indicate that courts are imposing an increasing number of life sentences—more than the number of death penalties they would have imposed in the past. In some of these countries the number of offences that carry the life sentence in legislation has been increased relative to the number of offences that carried the death penalty. Furthermore the length of time served in prison by life-sentenced prisoners also appears to be rising in some countries.<sup>70</sup>

A long, determinate prison sentence, or a number of sentences served consecutively, might be considered a de facto life sentence, depending on the age and health of the prisoner.<sup>71</sup> In South Africa, multiple, determinate sentences can amount to the same or even longer prison terms than life imprisonment.<sup>72</sup> In Uganda, legislation sets the tariff for life imprisonment at 20 years however following the abolition of the mandatory death penalty, multiple life sentences have been passed and in a few cases, sentences for the natural life of the prisoner.<sup>73</sup> In states in the United States that do not use LWOP sentences, the same outcome has been achieved de facto through the use of consecutive life sentencing.<sup>74</sup>

The United Nations recommendations in relation to the use of life sentences and prison regimes for life sentenced prisoners<sup>75</sup> include the establishment of a penal

<sup>65</sup>Report of the Special Rapporteur on Prisons and Conditions of Detention in Africa Mission to the Republic of South Africa. 14 – 30 June 2004, p. 40.

<sup>66</sup>Information from the Department of Correctional Services of South Africa, provided to UNODC (July 2011).

<sup>67</sup>D. van Zyl Smit “Swimming against the Tide: Controlling the size of the prison population in the new South Africa” in B Dixon and E van der Spuy (eds.) *Justice Gained? Crime and Crime Control in South Africa’s Transition*, Juta, Cape Town, 2004, 227-258.

<sup>68</sup>Penal Reform International, *Alternative Sanctions to the Death Penalty Information Pack*, April 2011, p. 12.

<sup>69</sup>Andrew Coyle, *Management of Long-Term and Life-Sentenced Prisoners Internationally in the context of a Human Rights Strategy* ([http://www.westminster.ac.uk/\\_\\_data/assets/pdf\\_file/0015/43422/v.3\\_4.pdf](http://www.westminster.ac.uk/__data/assets/pdf_file/0015/43422/v.3_4.pdf)).

<sup>70</sup>In the US, for example, the average length of time served in prison by lifers increased from 21.2 years to 29 years between 1991 and 1997; in England and Wales for those given a mandatory life sentence the average length of time served in prison increased from 13 years in 1999 to 17.5 years in 2009. See Penal Reform International, *Alternative Sanctions to the Death Penalty Information Pack*, April 2011, p. 12.

<sup>71</sup>*Ibid.* p. 10.

<sup>72</sup>*Ibid.* p. 10.

<sup>73</sup>*Ibid.* p. 10.

<sup>74</sup>*Ibid.* p. 10.

<sup>75</sup>United Nations (1996) *The Life Sentence*, Report of the Criminal Justice Branch of UNOV, United Nations Publication Geneva.

policy which ensures that life sentences are only imposed on offenders who have committed the most serious crimes and only when strictly necessary for the protection of society. Such sentencing must provide each prisoner with the possibility of release, upon the fulfilment of certain conditions framed by law. Further reference is made to these recommendations in part II, chapter B.

### 5.3 *Changes in eligibility for early release*

In a number of jurisdictions the length of time that a prisoner must serve to gain eligibility for early conditional release has been lengthened within the framework of tougher criminal justice policies. In other countries, prisoners who have been convicted of certain offences (regarded as serious offences, often drug-related) or who have been sentenced to longer prison terms become eligible for release after they have served a longer proportion of their sentences than those who have received shorter sentences. Thus, as the length of sentences increase in many countries, so does the proportion of the prison terms that must be served.

## 6. Drug control policies

In many countries, drug offenders make up a large part (or a majority) of the prison population. While the United Nations drug control conventions<sup>76</sup>, in particular the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988, clearly target the most serious offences, including the organization, management and financing of drug trafficking as well as laundering of its proceeds, imprisoned drug offenders tend to be those easiest to arrest—consumers, street-level dealers, “mules”<sup>77</sup>, including people who are subsequently found to be innocent,<sup>78</sup> a situation sometimes exacerbated by the adoption of arrest quotas.

Often, drug laws do not provide or make very limited provision for alternatives to imprisonment even for cases of a minor nature. In some, pre-trial detention is mandatory for drug offences, independent of whether the offences in question are minor or major. Such detention may be drawn out for years without any resolution of the prisoner’s status.<sup>79</sup> Sentences are often mandatory and are comparable to, or even longer than, sentences applicable for very serious and violent crimes, such as murder or rape.

In certain regions, a high percentage of imprisoned drug offenders are in prison for possession, purchase or cultivation of drugs for personal consumption.<sup>80</sup> Research however points to the fact that punishment has an extremely limited impact upon deterring all types of illicit drug use, especially with regard to drug dependent users.<sup>81</sup> In fact, the approach of countries that have imposed more severe penalties

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<sup>76</sup>The Single Convention on Narcotic Drugs (1961) as amended by its Protocol of 1972; the Convention on Psychotropic Substances (1971), and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988).

<sup>77</sup>The term “mules” or “drug mules” refers to people, usually women, who agree to transport drugs within the borders of a country or from one country to the other for small amounts of money.

<sup>78</sup>See for example, *Systems Overload, Drug Laws and Prisons in Latin America*, Transnational Institute, Washington Office on Latin America, March 2011.

<sup>79</sup>See for example, *Systems Overload, Drug Laws and Prisons in Latin America*, Transnational Institute, Washington Office on Latin America, March 2011.

<sup>80</sup>Ibid.

<sup>81</sup>Bewley-Taylor, et al, *op. cit.*, pp. 11-12.

for possession and personal consumption of drugs does not appear to have a deterrent effect on drug use in the community in comparison to countries imposing less severe sanctions.<sup>82</sup> There is increasing evidence that a health-oriented approach is the most effective in reducing illicit drug use and the social harm that it causes.<sup>83</sup>

In many countries, despite the fact that drug users constitute a large proportion of the prison population, the prison system lacks appropriate treatment and rehabilitation programmes, including treatment of the concurrent psychiatric disorders that affect a high proportion of drug dependent prisoners. Evidence demonstrates that there is a high rate of relapse to drug use, drug overdose and recidivism among drug dependent individuals after they are released from prison, especially if there are no linkages to community services and continuum of care.<sup>84</sup>

The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment noted that contemporary drug policies have diverted attention, and much-needed resources, from the public health sphere.<sup>85</sup> The Special Rapporteur, in the course of several country visits, noted the challenges posed to criminal justice systems by punitive drug policies, in terms of sheer number as well as the special needs of drug users in detention and has also referred to other United Nations human rights mechanisms that have expressed concerns about the severity of penalties relating to narcotics offences.<sup>86</sup>

The well documented harms and costs associated with the widespread imprisonment of drug dependent offenders encourage the application of evidence-based policies to achieve a more effective use of resources, as suggested by the United Nations drug control conventions, with respect to human rights principles, treating drug use as a public health issue and reducing the use of imprisonment.

Good practice examples of new, evidence-based, policies to respond to the drug-related offending, are also emerging. These are discussed in part II, chapter B, section 8.

## 7. The inappropriate use of imprisonment

In a number of jurisdictions, groups of vulnerable people are imprisoned alongside prisoners charged with or convicted of committing criminal offences, and others whose imprisonment is not the most appropriate response to the offence committed. While their impact on global levels of overcrowding may be relatively low, such practices influence levels of overcrowding significantly in some jurisdictions and in individual prisons.

For example, in some countries persons with mental illnesses, who have committed no offence, are placed in prisons, due to the lack of suitable mental health

<sup>82</sup>UNODC, *From Coercion to Cohesion*, p. 5.

<sup>83</sup>UNODC, *From coercion to cohesion: Treating drug dependence through health care, not punishment*, Discussion Paper, New York, 2010. ([http://www.unodc.org/docs/treatment/Coercion/From\\_coercion\\_to\\_cohesion.pdf](http://www.unodc.org/docs/treatment/Coercion/From_coercion_to_cohesion.pdf)), p.2.

<sup>84</sup>Ibid., p. 3.

<sup>85</sup>Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, A/HRC/10/44, 14 January 2009, para. 50.

<sup>86</sup>Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, A/HRC/10/44, 14 January 2009, para. 55 (referring to A/HRC/4/40/Add.3, paras. 85-88; E/CN.4/1999/68/Add.2, paras. 817, 18 and 83; CCPR/CO/83/MUS, paras. 15 and 85-88; A/55/40, paras. 422-451; CCPR/CO/70/PER, para. 13.)

institutions.<sup>87</sup> In others, persons acquitted of criminal offences on the basis of their mental disability at the time of the commission of such offences are still detained in prisons.<sup>88</sup> This is likely to be the case in countries where the appropriate staff and structures are lacking. Both of these practices contravene the provisions of international law.<sup>89</sup> In addition, numerous statistics and studies have shown that a disproportionately large number of prisoners in many countries around the world have mental health care needs. A significant number of such prisoners, who have committed minor, non-violent offences, could be better treated in the community, avoiding the harmful impact of overcrowded prisons, where they constitute a vulnerable category, at risk of abuse and further harm to their mental health. See part II, chapter B, section 9 and chapter F, section 6 for a discussion of possible strategies.

In some countries all fine defaulters are imprisoned automatically, without consideration having been given to their individual circumstances or other non-custodial options. These offenders who rarely pose a danger to the public and were therefore not given a prison sentence for the original offence may contribute significantly to overcrowding in some countries.<sup>90</sup> Debt defaulters may also be imprisoned in some jurisdictions thereby contributing to prisoner numbers.

Other offences, which may fall into this category, include public order offences and traffic offences, among others. See Part II, chapter B, section 1 for an overview of possible responses.

## 8. Inadequate use of alternatives to imprisonment

The *United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules)*<sup>91</sup> Rule 2 (3) provides that “In order to provide greater flexibility consistent with the nature and gravity of the offence, with the personality and background of the offender and with the protection of society and to avoid unnecessary use of imprisonment, the criminal justice system should provide a wide range of non-custodial measures, from pre-trial to post-sentencing dispositions. The number and types of non-custodial measures available should be determined in such a way so that consistent sentencing remains possible.” Rule 2 (4) states that “The development of new non-custodial measures should be encouraged and closely monitored and their use systematically evaluated.”

In many countries legislation includes a limited range of alternatives. As a result courts do not have many options at their disposal, appropriate to the seriousness and nature of the offence. Alternatives, which take into account the socio-economic status of the offender and his or her rehabilitative requirements, are most often lacking.

<sup>87</sup>Sometimes referred to as “lunatics”, for example, in a number of countries in Africa.

<sup>88</sup>See for example, Boyd-Caine, T., and Chappell, D, *The Forensic Patient Population in New South Wales, Current Issues in Criminal Justice*, Volume 17 (1), July 2005, pp. 5-29.

<sup>89</sup>E.g. ICCPR, Article 9 (1), SMR, Rule 82 (1).

<sup>90</sup>For example, in Ireland, according to prison service figures, fine defaulters made up 39 per cent of all committals in 2010. This was despite the introduction of laws 18 months previously which were supposed to stop the imprisonment of fine defaulters. But a key part of that act—allowing the payment of fines by instalment—had not been introduced because funding was not provided to update the Courts Service computer system. (<http://www.irishexaminer.com/ireland/almost-7000-people-jailed-for-failing-to-pay-fines-177775.html>); in Sri Lanka, where nearly 31,000 prisoners are held in prisons with a total capacity of 11,000, resulting in severe levels of overcrowding, UNODC reported that around 50 per cent of prisoners have been imprisoned for non-payment of fines. (<http://english.aljazeera.net/indepth/features/2011/07/2011725142452794174.html>).

<sup>91</sup>General Assembly resolution 45/110 of 14 December 1990.

However, more often the problem is not the lack of legislation but reluctance to apply non-custodial options provided in existing legislation. Alternatives may not be used due to: (1) the lack of confidence in their effectiveness; (2) the lack of the necessary infrastructure and organizational mechanism for cooperation between criminal justice agencies to enable their use; (3) the requirement for supervision of the offender by a special administrative body, such as a probation system, the lack of funding, staff and training; and (4) the lack of public support as well as sentencing authorities' and politicians' fear of being perceived as soft on crime.

It is also important to note that perverse outcomes occur as a result of "alternatives to imprisonment" being used not as alternatives to prison, but as alternatives to other non-custodial sanctions. They may even be imposed as an alternative to liberty, for example, where a caution would have been issued to a minor offender with no further action, had an alternative not been available.

When appropriately developed, based on a thorough analysis of the composition of the prison population, when adequate investment is made in the structures and services necessary for the effective implementation of non-custodial sanctions and measures, when the support and input of the community is harnessed and effective legislative measures are taken to avoid an increase in the volume of sanctions imposed, alternatives to imprisonment can be effective in contributing to the reduction of the prison population, as will be discussed in part II, chapter F.

## 9. Inefficient measures to promote social reintegration

International standards prescribe that the principle of assisting with prisoner social reintegration in order to prevent reoffending should be at the heart of prison management strategies and policies.<sup>92</sup> A range of rules included in international instruments are based on this understanding.

Where detaining authorities place more weight on punishment and deterrence as objectives of imprisonment than on the rehabilitation of individuals, there is a reduced likelihood that the necessary services and facilities that support effective social reintegration will be provided. In practice, a large proportion of the budget of prison systems is used to provide security, safety and order, with a small and typically inadequate amount being invested in prison workshops, skills training, educational facilities, sports and recreation. This stems from the mistaken belief that security can be achieved by using more restrictions and disciplinary measures, rather than by improving the prison environment by providing constructive training and occupations for prisoners, treatment for substance dependence and/or mental health disorders, education, recreation and a prison regime that increases the potential for prisoners to lead law-abiding lives on release. Such shortcomings are all the more acute when prisons are overcrowded.

Post-release care is frequently a low priority within the provision of public services. In some countries former prisoners confront new restrictions to employment and education due to their criminal record, hindering the process of reintegration and potentially contributing to reoffending. A related problem often encountered is the lack of coordination between pre-release preparation programmes and the services

<sup>92</sup>ICCPR, Article 10 (3), SMR, Rules 58, 59.

provided in the community. These problems are more evident in the absence of an overall reintegration strategy being adopted by relevant authorities (e.g. Ministry of Justice, Health, Labour and Social Services).

These factors in various combinations typically result in high rates of recidivism (re-offending)—varying between 40 and 70 per cent in the case of adult prisoners in countries where reliable data is available. Higher rates of reoffending have been recorded in the cases of juveniles. This contributes to an increase in imprisonment rates and overcrowding in prisons.

Promoting the effective social reintegration of all released prisoners as a long-term strategy to reduce overcrowding and mitigating the negative consequences of overcrowding on the rehabilitation of prisoners are topics discussed in part II, chapter G.

### 10. Breaches of early conditional release and probation orders

A key factor that needs to be considered in understanding high imprisonment rates and overcrowding in some jurisdictions is the way in which the system responds to breaches of conditional orders such as parole, probation and other community-based sentences. In some countries parole revocations have made a significant contribution to overcrowding in prisons.

Sometimes breaches occur because of reoffending but more often because the person has failed to comply with the conditions of the order itself, such as reporting conditions.<sup>93</sup>

The increase in the number of offenders being returned to prisons due to having failed to complete their period of conditional release not only impacts on the size of the prison population, but also on the credibility of the conditional release system. As early conditional release can contribute significantly both to the reduction of the prison population and to the social reintegration of offenders, it is of great importance to focus research and resources to determine the reasons for failure to comply, for any increase in non-compliance and what can be done to revert this trend, as discussed in part II, chapter F.

### 11. Crisis overcrowding

While all the causes listed above relate to structural causes of overcrowding, which result in a steady growth in the size of the prison population, sometimes a sudden and rapid increase in overcrowding levels may be experienced due to a crisis situation. This growth may be caused by: the introduction of a policy of law enforcement based on increased repression with a corresponding increase in arrests either directly or indirectly linked to a crisis or conflict. It may also be caused by emergency

<sup>93</sup>For example, in the United States in 2001, 37 per cent of all admissions to prison nationwide were the result of parole revocations—not the result of new convictions. That was up from 17 per cent in 1980 and 30 per cent in 1990 and probably significantly understated the rate at that time. (Burke, P. and Tonry, M., *Successful Transition and Re-entry for Safer Communities: A Call to Action for Parole*, 2006, p. 14); The number of offenders being recalled back to prison in England and Wales has more than trebled between 2000 and 2005, in many cases believed to be due to technical violations of conditions of release. (Dandurand, Y., Christian J., Murdoch, D., Brown, R.E., Chin, V., *The International Centre for Criminal Law Reform and Criminal Justice Policy, Conditional Release Violations, Suspensions and Revocations, A Comparative Analysis*, November 2008).

legislation which typically extends the powers and discretion of the police and police powers relative to other government bodies, broadens the criteria normally required for arrest and pre-trial detention, lengthens certain stages of legal proceedings (giving the courts a longer period in which to act) or authorizes detention on administrative grounds.

Such changes to law enforcement practices and legislation usually exacerbate existing structural challenges, thus increasing case backlogs and prolonging further the duration of pre-trial detention. As crisis overcrowding which results from the above-mentioned causes reflects a political choice, strategies to address such overcrowding are also to be found in the political domain.

Prison authorities have limited options within their prisons, to alleviate the impact of overcrowding, which are discussed in part II, chapters G and H.

## 12. Inadequate prison infrastructure and capacity

As the number of prisoners grows and no additional space for their accommodation is provided, obviously overcrowding in prisons occurs. As appealing as it may seem, building additional accommodation and supporting facilities has proved to be a generally ineffective strategy for addressing overcrowding. Evidence shows that as long as the shortcomings in the criminal justice system and in criminal justice policies are not addressed to rationalize the inflow of prisoners, and crime prevention measures are not implemented, new prisons will rapidly fill and will not provide a sustainable solution to the challenge of prison overcrowding. Therefore the lack of prison infrastructure should not be regarded as the principal “cause” of overcrowding, but often as a symptom of dysfunction within the criminal justice system.

Building new capacity can be necessary to replace aging infrastructure and provide adequate space and standards of living, in line with national and international law. Many prisons in use today are old, with inadequate facilities and services. As ICRC has noted,<sup>94</sup> some prisons have accommodation blocks with few buildings other than a kitchen and gate entry area, with no or limited visiting facilities, health clinics, workshops, classrooms and other necessary services. As prison populations continue to increase it is common to find classrooms, workshops and other buildings and outside space converted to provide additional accommodation. Facilities built as temporary structures often continue to be used years later. Some facilities which are used as prisons were built for quite different purposes or for very different categories of prisoners than those currently accommodated. In some, no modification will have been made and even where building alterations have been undertaken, many facilities will continue to present significant challenges for prison management.

During conflict or in post-conflict situations, or because of natural disasters, prison systems may have totally collapsed and be in need of re-establishment. As a result prisoners may be crowded into small spaces at a time when arrests may be carried out in mass and the criminal justice system not be functional. During the reconstruction stage, while the criminal justice system is in the process of being restored or developed, arbitrary arrests and prolonged detention are likely to be common. Any prison building programme, hindered by many challenges, including security

<sup>94</sup>ICRC, Water, Sanitation, Hygiene and Habitat in Prisons ‘Supplementary Guidance’ 2012. p. 15.

and logistical difficulties, is unlikely to keep pace, leading to acute overcrowding and human rights concerns.<sup>95</sup>

Often the impact of overcrowding is felt not only because of the lack of space but because of the inefficient management of available space, or regimes which provide for minimal hours out of accommodation areas.

Planning for prison refurbishment or construction, key factors to take into account when considering an expansion of prison capacity and mitigating the impact of overcrowding are discussed in part II, chapter H, Managing prison capacity.

#### KEY POINTS

- Studies have shown that crime trends alone have a marginal impact on imprisonment rates. Imprisonment rates and crime rates may evolve independent of each other. Rising crime may impact on rates of imprisonment, but not, in itself, be the main factor that fuels increasing rates of incarceration. The way in which governments respond to crime is key to understanding the dramatic growth in imprisonment rates in many countries.

#### *Socio-economic and political factors*

- The root causes for many offences can be found in economic and social inequalities and the offenders' socio-economic marginalization, with higher levels of social security and social justice cohering with less use of imprisonment.

#### *Access to justice*

- In many countries a large number of people do not enjoy the rights, in practice, which guarantee their access to justice, and are subjected to arbitrary arrests, prolonged pre-trial detention and unfair trials, all of which contribute to the growing number of prisoners, many of whom have been imprisoned due to their poverty or other vulnerability.

#### *The overuse of pre-trial detention*

- The overuse and long periods of pre-trial detention is endemic in many countries, despite the provisions of international law which limit pre-trial detention. This has had a dramatic impact on the size and composition of the prison population in many countries.

<sup>95</sup>This is what happened in Afghanistan, for example, where the number of prisoners in June 2011 was over 20,000, including almost 600 women and over 290 dependent children (official figures from the Afghanistan Central Prison Department, obtained from UNODC, Kabul), compared to a total of 600 in 2001 (UNODC, Afghanistan: Female Prisoners and their Social Reintegration, Atabay, T., March 2007, p. 5), representing more than a thirty-fold increase in ten years. A UNODC analysis of the trend of imprisonment indicates that at the current growth, the prison population will be at approximately 30,000 people in five years from now. The prison system has a capacity of 10,000 and although a prison construction programme is underway, it cannot keep pace with the rapidly growing prison population. Already in December 2007 it had been reported that prison overcrowding was as high as 1000 per cent in some cases and in November 2006, the prison authorities reported that they were unable to provide indoor sleeping accommodation for nearly 1000 prisoners in eleven of their facilities. (UNODC, Afghanistan, Implementing Alternatives to Imprisonment, in line with International Standards and National Legislation, Atabay, T and English, P. (2008), p. 54).

*Punitive criminal justice policies*

- Punitive criminal justice policies have had an impact on the growth of the prison population and overcrowding in prisons in many countries. Courts in many countries today are more likely to sentence offenders to imprisonment and impose longer sentences than they did a decade ago. Non-violent offenders who have committed minor crimes are increasingly likely to be imprisoned, rather than being dealt by way of a caution, fine, suspended sentence, or restorative justice measure. Community-based non-custodial alternatives are often overlooked in favour of the deprivation of liberty.

*Drugs laws and drug-related crime*

- Drug laws and law enforcement policies which centre on imprisonment, even for offences of a minor nature, have had an unprecedented impact on the size of the prison populations worldwide.
- In many countries, despite the fact that drug users constitute a large part of the prison population, there is a lack of appropriate treatment and rehabilitation programmes for them.

*Inappropriate use of imprisonment*

- In some countries, persons with mental health disorders are held in prisons, due to the lack of adequate mental health care institutions in the community. In others, prisons are used too frequently in response to offences committed by persons with mental health care needs.
- Fine and/or debt defaulters are imprisoned automatically in some countries contributing to prison overcrowding.

*Alternatives to imprisonment*

- In many countries legislation provides for a very limited range of alternatives. As a result courts have few options at their disposal, appropriate to the seriousness and nature of the offence.
- More often the problem is not the legislation but reluctance to apply existing legislation. Alternatives may not be used because of: (1) the lack of confidence in their effectiveness; (2) the lack of the necessary infrastructure and organizational mechanism for cooperation between criminal justice agencies; (3) the lack of funding, staff and training for a supervising body; and (4) the lack of public support.

*Prisoner rehabilitation and preventing reoffending*

- A large proportion of the budgets of prison systems is typically used to improve security, safety and order, with an inadequate amount available for investment in the rehabilitation of prisoners. Challenges are all the more acute when prisons are overcrowded.
- The high rates of recidivism by ex-prisoners is a significant challenge throughout the world, contributing to an increase in imprisonment rates and overcrowding in prisons.

*Crisis overcrowding*

- Sometimes a sudden increase in overcrowding levels may be experienced due to a crisis situation when arrests are carried out en masse and the criminal justice system is incapacitated. This may be caused by the introduction of a policy of law enforcement based on repression, emergency legislation, which extends the powers and discretion of the police and police powers relative to other government bodies, broadens the criteria normally required for arrest and pre-trial detention, lengthens certain stages of legal proceedings or authorizes detention on administrative grounds.

*Breaches of early release conditions*

- In some countries parole revocations have had a significant contribution to overcrowding in prisons. Most of these are due to technical violations rather than a result of new offences.

*Prison capacity*

- While building new prison capacity may be necessary to provide adequate space and standards of living, this measure cannot be regarded as a long-term solution to the problem of prison overcrowding.



# PART II. STRATEGIES TO REDUCE OVERCROWDING IN PRISONS

## CHAPTER A. Developing comprehensive, evidence based strategies and gaining public support

### 1. Fair social policies and crime prevention

The root causes of high rates of imprisonment and overcrowding in prisons can only be sustainably addressed if accurately and comprehensively analysed and understood and if public policies concerning crime and criminal justice are truly comprehensive, addressing all relevant aspects, rather than only the “criminal justice” related factors of the problem. Comprehensively analysing the specific causes of overcrowding in any context and addressing the underlying causes of crime and imprisonment is fundamental to the long-term success of strategies which aim to reduce overcrowding and imprisonment rates. This factor was recognized by the Workshop on Strategies to Reduce Overcrowding in Correctional Facilities, Twelfth United Nations Congress on Crime Prevention and Criminal Justice held in Salvador, Brazil in April 2010. It concluded that “Crime was a social problem to which criminal justice systems could provide only part of the solution. Taking action against poverty and social marginalization was key to preventing crime and violence and, in turn, reducing prison overcrowding”.<sup>96</sup>

Governments are encouraged to develop comprehensive national strategies that are evidence based, respond to local circumstances and needs, and which foresee an alternative response to crime, with imprisonment being seen as a measure of last resort in line with international standards. Access to education, fair and supportive social policies, strategies to increase employment, crime prevention measures and support to vulnerable groups in the community are recognized as relevant elements of such strategies. Good practice also includes collaboration and cooperation between relevant ministries and departments, other key state agencies and civil society groups. The success of such strategies requires political will to implement and sustain the reforms, backed up by investment in the necessary services. In parallel, good practice also encourages evidence-based public information and education activities promoting recognition that punitive measures are likely to be unsuccessful in reducing crime and to gain support for the use of alternatives to imprisonment.

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<sup>96</sup>A/CONF.213/L.3/Add.4, 17 April 2010

While the scope of this *Handbook* does not extend to a discussion of socio-economic policies and crime prevention measures which could be considered to reduce rates of imprisonment, it is important to recognize these factors and the importance of politicians and other decision makers assessing the situation in their countries from this holistic and comprehensive perspective.

## 2. Political will and comprehensive criminal justice reform strategies

As has been noted by many commentators, the first prerogative for achieving success in reducing overcrowding in prisons is the existence of political will. Without the will and courage to introduce policies and programmes that may challenge punitive approaches or which may need significant investment initially, as well as the will to sustain such policies over a period sufficient to establish a strong basis for a long-lasting reduction in prison overcrowding, it is extremely challenging, if not impossible, to achieve real change.

The second important principle of any strategy that aims to reduce prison overcrowding in a sustainable manner is the need to adopt comprehensive criminal justice reform policies and programmes, responding to the causes and needs in a coherent and holistic manner. As we have seen, the causes of prison overcrowding are complex, and reforming only one part of the criminal justice system or applying emergency measures, while disregarding other factors, is unlikely to lead to a sustainable and long term reduction of the prison population.

This argument does not, however, mean that small scale initiatives and creative pilot projects are of no value in addressing overcrowding. On the contrary, such initiatives can demonstrate how some simple measures—such as improving coordination between criminal justice agencies at the local level—can impact significantly on the rate of overcrowding and size of the prison population in one prison or one locality, or help determine the causes for overcrowding in one prison, thereby helping to inform policy and strategy development at a national level. Creative new ideas are sometimes best tested on a small scale first to enable the assessment of relevance and impact, before being implemented on a broader scale.

### **Honduras—a combination of measures to reduce the size of the prison population**

In Honduras the imprisonment rate was reduced from 183 per 100,000 in 2002 to 154 per 100,000 in 2010. The proportion of pre-trial prisoners was reduced from 79 per cent in 2000/2002 to 50 per cent in 2010. These successful results are deemed to be directly related to the entering into force of the new Penal Procedure Code, in February 2002, which introduced oral and public proceedings, and with the introduction of the office of the penalty enforcement judge and the appointment of the first thirteen penalty enforcement judges in June 2003. In addition, a decree issued in 2005 amended two articles in the penal code, to allow commutation of sentences of less than 5 years to community work or the payment of 10 *lempiras* per day, and a law was introduced providing for the release of persons with terminal illness or with certain medical diagnoses.

*Sources: ILANUD, Crime Criminal Justice and Prison in Latin America and the Caribbean, Elias Carranza (coordinator), 2010, with recent country figures from the World Prison Brief, International Centre for Prison Studies.*

### 3. Evidence-based policies responding to individual country needs

Thirdly, in order to be relevant and effective, criminal justice reform policies need to respond to the realities and specific circumstances in the society in which they are to be implemented, while drawing on international experience and good practice examples from other countries. Policies need to be founded on a careful analysis of the precise reasons behind overcrowding in the particular jurisdiction. An assessment of the criminal justice system, including from the legislative and practical perspective, the profile of prisoners and trends in pre-trial detention and sentencing should be included in the initial comprehensive assessment. Depending on the causes of overcrowding and assessed needs, criminal justice reform may include legislative reforms, revision of sentencing policies, improvement of practical and organizational coordination and support systems, investment in the capacity building of criminal justice actors, in education, vocational training and other programmes in prisons to improve prisoner social reintegration prospects and measures to improve support to former prisoners so that they can lead crime-free lives.

Unfortunately, precisely in the sphere of criminal justice, which can have a dramatic impact on the lives of millions of people around the world, policies are not always based on reliable research and data. They are often formed in response to real or perceived public opinion, by politicians who are often primarily concerned about their support and popularity among their electorate, but based on limited accurate information. The result is usually more severe criminal justice policies and more imprisonment, without adequate consideration being given to long-term outcomes and costs.

In making policy decisions, it is important that governments have access to contemporary and comprehensive information about all aspects of an issue including the possible outcomes of different alternatives in responding to crime. Information should be accessed from a wide range of sources to ensure a good understanding of what imprisonment and other alternatives can be expected to achieve and what these various options will cost. Governments should be equipped to explain to the public why they are deciding to take certain policy decisions and what the outcomes of such decisions will be in terms of reducing crime, promoting social reintegration, improving safety and the financial implications.

In order to ensure evidence-based planning and policy development, mechanisms need to be built into the criminal justice system for the collection and analysis of data and statistics relating to the use of pre-trial detention, sentencing practices, the impact of non-custodial measures and sanctions, prisoner rehabilitation programmes and outcomes, early release schemes, parole revocations, rates of reoffending among many others, so that data is produced and analysed on a regular basis, thereby accurately informing strategic plans and decision making.

Monitoring and regular evaluations need to be carried out, with a view to measuring and analysing the impact of criminal justice policies and promoting policies that aim to reduce prison overcrowding.

### 4. Gaining public support

Public opinion has a major role to play in the way in which policymakers decide on how to respond to crime. Politicians often refer to the need to respond to public

demand for harsher penalties to justify punitive criminal justice policies. However the public is not a uniform entity with one single, static viewpoint. It is made up of many differing and changing opinions. A number of commentators have pointed out that, whilst a majority of people may think that the courts are generally too soft, they also tend to recognize that prison is expensive and damaging.<sup>97</sup> If given the opportunity in surveys, people tend to support alternative, non-punitive responses, particularly when questions provide sufficient details about individual cases, rather than being of a general nature.<sup>98</sup> Research also shows that the higher the level of ignorance about crime and crime control, the stronger are fears and higher the demands for harsh punishments.<sup>99</sup>

When the public is given sufficient information on who is imprisoned, the consequences of imprisonment and what the alternatives are, together with statistical data and research results that demonstrate that non-punitive responses to crime are very often the best way in which to achieve the social reintegration of the offender and public safety, as well as the costs of imprisonment relative to costs of alternatives, education and social welfare, there is likely to be more understanding and support for initiatives to reduce the use of imprisonment. Similarly the public needs to have accurate information about the trends in sentencing to understand that their perception that courts are too soft on crime are most often not justified. The availability of reliable data and research is an essential basis for arguments to address overcrowding, including to demonstrate the links between social injustice and imprisonment, imprisonment and high rates of reoffending, non-custodial measures and better chances of social reintegration, among others covered in this *Handbook*.

The media has a key role to play in informing the public and forming public opinion. Therefore, the strategies to develop a better informed public have to include cooperation with the media. Such collaboration may be established by selected representatives of the media, who may be regularly provided with data and research results relating to criminal justice reform topics. Sensational and inaccurate coverage of crime and imprisonment by the media may be challenged only if adequate and reliable data is available to back up counter-arguments.

Governmental research agencies play a key role in serving the media with accurate information. In some countries national bodies publish detailed yearly statistics on crime and sentencing, which are also made available on the internet.<sup>100</sup> Other useful means may include appointing press officers, improving media access to statisticians and academics, and using new technology to communicate statistical information to the press.<sup>101</sup>

The raising of public awareness needs to be an ongoing activity. It requires energy and persistence. Immediate results are not always measurable, but will be felt in the reduction of public opposition when new measures are introduced to reduce the prison population.

<sup>97</sup>Tapio Lappi-Seppala, *Enhancing the Community Alternatives – Getting the Measures Accepted and Implemented*, pp. 94, 95.

<sup>98</sup>Ibid. p. 94.

<sup>99</sup>Tapio Lappi-Seppala, *Enhancing the Community Alternatives – Getting the Measures Accepted and Implemented*, p. 95.

<sup>100</sup>Ibid. p. 96.

<sup>101</sup>Ibid. p. 96.

**KEY RECOMMENDATIONS*****FAIR SOCIAL POLICIES AND CRIME PREVENTION*****To policymakers and legislators**

- To develop comprehensive national strategies that are evidence-based, respond to local circumstances and needs, and which foresee an alternative response to crime, with imprisonment being seen as a measure of last resort, in accordance with international standards. Access to education, fair and supportive social policies, strategies to increase employment, crime prevention measures and support to vulnerable groups in the community are typically elements of such strategies, developed jointly by all the relevant ministries, other key state agencies and civil society groups.

***COMPREHENSIVE CRIMINAL JUSTICE REFORM STRATEGIES*****To policymakers, legislators and criminal justice institutions**

- To adopt comprehensive criminal justice reform policies and programmes, responding to the needs in a coherent and holistic manner, while encouraging the development of small-scale pilot initiatives and creative projects to inform policy development.

***EVIDENCE BASED POLICIES RESPONDING TO INDIVIDUAL COUNTRY NEEDS*****To policymakers, legislators and criminal justice institutions**

- To ensure that policies are founded on a careful analysis of the precise reasons behind overcrowding in a particular jurisdiction.

***GAINING PUBLIC SUPPORT*****To policymakers and criminal justice institutions**

- To put in place practical measures to ensure that the public is given sufficient information on who is imprisoned, the consequences of imprisonment, its cost and what the alternatives are, together with statistical data and research results that demonstrate that non-punitive responses to crime are very often the best way to achieve the social reintegration of the offender and public safety.
- To consider developing strategies of cooperation with the media to ensure that the public is better informed about relevant criminal justice topics.

***RESEARCH AND DATA COLLECTION*****To policymakers, criminal justice institutions and relevant research bodies**

- To build mechanisms into the criminal justice system for the collection and analysis of data and statistics relating to the use of pre-trial detention, sentencing practices, non-custodial measures and sanctions, access to legal aid and its quality and effectiveness, the profile of the prisoner population, prisoner rehabilitation programmes and outcomes, early release schemes, parole revocations, and rates of reoffending among others, so that data is produced and analysed on a regular basis, thereby accurately informing strategic plans and decision-making.
- To generate relevant information also on crime prevention, social welfare, health care, employment, education and housing policies and outcomes, and to analyse the connections between these different domains on crime and imprisonment rates, in order for decision makers to have a holistic understanding on which to base new policies.

## CHAPTER B. REDUCING THE SCOPE OF IMPRISONMENT AND DEVELOPING FAIR SENTENCING POLICIES

The starting point for reform is most often a legislative review to ensure that domestic legislation complies with international standards, and in particular with principles in those standards and norms that encourage the use of imprisonment sparingly and recommend the use of non-custodial measures and sanctions, instead of deprivation of liberty, as far as possible.

*The Tokyo Rules* recommend that states rationalize criminal justice policies, taking into account the observance of human rights, the requirements of social justice and the rehabilitation needs of the offender.<sup>102</sup> They provide that “The use of non-custodial measures should be part of the movement towards depenalization and decriminalization instead of interfering with or delaying efforts in that direction.”<sup>103</sup>

In the case of juveniles, international instruments recommend that deprivation of liberty should be a disposition of last resort and for the minimum necessary period and should be limited to exceptional cases.<sup>104</sup> Alternatives to prison are encouraged in the cases of women, especially where they have caretaking responsibilities, taking into account their background and mitigating circumstances of the offence.<sup>105</sup>

Rule 1.4 provides that, when implementing the Rules, there should be an endeavour to ensure a proper balance between the rights of individual offenders, the rights of victims, and the concern of society for public safety and crime prevention. Rule 2.3, underlines that, “In order to provide greater flexibility consistent with the nature and gravity of the offence, with the personality and background of the offender and with the protection of society and to avoid unnecessary use of imprisonment, the criminal justice system should provide a wide range of non-custodial measures, from pre-trial to post-sentencing dispositions. The number and types of non-custodial measures available should be determined in such a way so that consistent sentencing remains possible.”

While detailed provisions directly regulating sentencing and punishment are not provided by international human rights instruments, the implementation of the principles expressed in the *Tokyo Rules*, *the Convention on the Rights of the Child*, *the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules)*<sup>106</sup> and *the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)*<sup>107</sup> encourage the development of sentencing policies, which:

- Move towards depenalization and decriminalization in appropriate cases;
- Individualize sentencing, taking into account the background of the offender and circumstances of the offence;

<sup>102</sup> Tokyo Rules, Rule 1.5.

<sup>103</sup> Tokyo Rules, Rule 2.7.

<sup>104</sup> Convention on the Rights of the Child, Article 37 (b); United Nations Rules for the Protection of Juveniles Deprived of their Liberty, Rules 1, 2; Beijing Rules, 13.1, 17.1 (b) and (c) and 19.1.

<sup>105</sup> Bangkok Rules, Rules 58 and 61.

<sup>106</sup> General Assembly resolution 65/229 of 21 December 2010.

<sup>107</sup> General Assembly resolution 40/33, annex.

- Balance the need to penalize the offender and protect the public with the need to facilitate rehabilitation and thus prevent reoffending;
- Provide a range of sentences in legislation in order to enable courts to apply flexibility in sentencing;
- Take into account the specific circumstances of women who have committed offences, including mitigating factors and their caring responsibilities, and give preference to non-custodial measures and sanctions instead of imprisonment; and
- Provide a separate framework for the sentencing of children, within a juvenile justice system, which avoids the institutionalization of children to the maximum possible extent, giving preference to alternatives which assist the development and rehabilitation of children in conflict with the law.

Among regional bodies the Council of Europe Committee of Ministers' Recommendation Concerning Consistency of Sentencing<sup>108</sup> provides useful guidelines to states who wish to reform their sentencing policies to ensure consistency, as well as to avoid the unnecessary and excessive use of imprisonment. The recommendations are consistent with the principles expressed above. They are considered to be a midpoint approach between two approaches, which are characteristic of different legal systems—maximum discretion provided to judges and no or limited discretion with a rigid system of determining sentences.<sup>109</sup> The approach recommended by the Council of Europe has been termed “structured discretion”, which blends consistency and flexibility, rejecting the rigid approach that might create inconsistency through treating different cases as if they were alike.<sup>110</sup>

Based on the provisions of United Nations standards and norms in crime prevention and criminal justice, as well as recommendations referred to above, the components of sentencing reforms, which aim to reduce the prison population, while ensuring fairness in sentencing and the rehabilitation of offenders, may include measures outlined below.

## 1. Decriminalization and depenalization

*Decriminalization:* The removal of a conduct or activity from the sphere of criminal law. Decriminalization may include either the imposition of sanctions of a different kind (administrative) or the abolition of all sanctions. Other (non-criminal) laws may then regulate the conduct or activity that has been decriminalized.

*Depenalization:* A relaxation of the penal sanction exacted by law for a specific offence or offences.

<sup>108</sup>Council of Europe, Committee of Ministers, Recommendation No. R (92) 17, Concerning Consistency in Sentencing, (Adopted by the Committee of Ministers on 19 October 1992 at the 482nd meeting of the Ministers' Deputies).

<sup>109</sup>MCC, Section 12: Penalties, General Commentary, p. 99.

<sup>110</sup>Ibid, p. 99.

### *Socially undesirable behaviour and petty offences*

In considering the use of imprisonment, one of the key starting points is to consider how far the criminal law is being used as a means of social control. Not all socially undesirable actions should be subject to the criminal law. The response to many undesirable actions may better fall within the scope of social or health-care policies, rather than criminal justice.<sup>111</sup>

For example, in various societies, vagrancy has been decriminalized in whole or in part, with significant impact on rates of imprisonment.<sup>112</sup> In addition, many petty offences have been decriminalized and turned into administrative infractions punishable by payment of a fine. These include traffic offences and public order offences.

### *Non-payment of fines and debts*

Imprisonment of fine defaulters exacerbates overcrowding amongst other negative consequences. Best practice indicates that fine defaulters should not be imprisoned automatically.<sup>113</sup> Consideration should be given to other non-custodial options to deal with defaulters, taking into account their particular circumstances. Such options may include providing them with remunerated work by the state, so that the proceeds of their labour can be used to pay their fines.<sup>114</sup>

In some countries people who have been unable to pay their debts are imprisoned. The ICCPR explicitly prohibits the imprisonment of people merely on the ground of inability to fulfil a contractual obligation.<sup>115</sup> As with fine defaulters, the proportionate response in such circumstances would be the imposition of non-custodial measures, which take into account the individual's financial circumstances, and bearing in mind that imprisonment has no constructive contribution to make towards the payment of debts. On the contrary imprisonment is likely to mean that persons so imprisoned, lose their jobs, and their chances of gaining employment following release is reduced, leading to their and their family's further impoverishment.

#### **Finland decriminalized public drunkenness and reduced default imprisonment for non-payment of fines**

In the 1950s and 1960s in Finland public drunkenness was punishable by fines, and as these people were often unable to pay their fines, fines were converted to imprisonment. In 1969 public drunkenness was decriminalized (removed from the criminal law), and the use of default imprisonment was also reduced. These reforms reduced the prison population by almost one third.

*Source: Tapio Lappi-Seppala, Causes of Prison Overcrowding, Workshop on Strategies to Reduce Overcrowding in Correctional Facilities, Twelfth United Nations Congress on Crime Prevention and Criminal Justice (Salvador, Brazil, 12-19 April 2010).*

<sup>111</sup>UNODC *Handbook of basic principles and promising practices on Alternatives to Imprisonment*, p.13.

<sup>112</sup>Ibid. p.13.

<sup>113</sup>Ibid. p. 30.

<sup>114</sup>Ibid. p. 30.

<sup>115</sup>ICCPR, Article 11.

### *Reviewing and re-categorizing offences*

One of the fundamental principles in sentencing is that punishments should be proportionate to the seriousness of the offence. However, this principle may be undermined when legislation is not re-evaluated in light of changing economic and social realities and the changing perception of the “seriousness” of an offence. Such a re-evaluation and re-categorization could include cases of petty theft, public order offences (if not decriminalized), small-scale fraud and other minor economic offences, among others. A re-categorization would give the courts the possibility of imposing non-custodial sanctions and measures or shorter prison terms for a larger number of offences.

The re-categorization and depenalization of certain offences may have a secondary, but important, impact of enabling such cases to be tried at lower courts, thereby speeding up the trial process or allowing for bail to be used more frequently.<sup>116</sup> This should not, of course, be confused with the increase in the jurisdiction of lower courts to pass longer sentences, referred to in part I, chapter B, section 5.1, which can have a totally different impact on sentencing, as it did in some countries.<sup>117</sup>

## **2. Imprisonment of children as a measure of last resort**

The Convention on the Rights of the Child defines a child as a person under the age of 18. Other United Nations instruments use the term “juvenile”. This *Handbook* uses that term interchangeably with “child”.

The *Convention on the Rights of the Child*, Article 37 (b) provides that “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”. The Beijing Rules include detailed rules on how to deal with children in conflict with the law. They provide that the age of criminal responsibility should not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity.<sup>118</sup> They encourage the diversion of children in conflict with the law from the criminal justice system<sup>119</sup> and avoiding institutionalization to the greatest possible extent.<sup>120</sup>

The minimum age of criminal responsibility varies significantly between countries. The monitoring body for the Convention on the Rights of the Child (CRC) considers a minimum age of criminal responsibility below 10 years as being too low, and has regularly requested countries to consider raising the minimum age of criminal

<sup>116</sup>In Uganda for example the defilement law was reformed in 2007 which meant that most defilement cases are no longer punishable by death and may therefore now be tried in the Magistrates Court, rather than the High Court. This reform has the potential to enable significant decongestion of prisons as detainees awaiting Magistrates Court trials have a constitutional entitlement to be released on bail after they have been held for 60 days (unlike detainees who have been committed to the High Court for trial for whom there is no mandatory bail). As of June 2009, 23 per cent of prisoners held on remand were charged with defilement. (Evaluation: Uganda Paralegal Advisory Services 2007-2010, The Law and Development Partnership, 24 March 2011).

<sup>117</sup>Giffard, C. and Muntingth, L., *The Effect of Sentencing on the Size of the South African Prison Population*, Report 3, Open Society Foundation for South Africa, 2006, p. v.

<sup>118</sup>Beijing Rules, Rule 4.1.

<sup>119</sup>Beijing Rules, Rule 11.

<sup>120</sup>Beijing Rules, Rule 18.1.

capacity to 12 years or higher.<sup>121</sup> Research indicates that the longer juveniles are kept out of the formal justice system the less likely they are to continue with criminal activity and, in particular, that high rates of recidivism are encountered among juveniles who have been imprisoned.<sup>122</sup>

Where systems of birth registration are not in place, this can hinder the determination of the age of young persons who are alleged to have committed an offence and could lead to treating those below the age of 18 as adults and the criminal prosecution of those who are below the age of criminal responsibility.<sup>123</sup>

The following measures may be considered to reduce the imprisonment of children in conflict with the law.

- Reviewing the age of criminal responsibility in legislation, and where appropriate increasing it.
- Improving birth registration programmes and ensuring that effective measures are put in place to determine the age of young offenders by an independent and qualified body.
- Decriminalizing status offences, such as truancy from school, running away from home or “anti-social behaviour”, which could be subject to measures outside criminal law, while addressing the underlying causes of such behaviour within a rehabilitative framework.
- Never penalizing child victims.
- Decriminalizing other types of behaviour, considered to be minor offences, so that children who commit such acts are not subjected to a criminal justice process, but to an administrative procedure or diversion to a suitable programme.
- Developing juvenile justice systems and sentencing policies that aim to respond to children who commit offences constructively, addressing the causes of the crime committed and rehabilitation needs, with full respect for the principle of promoting the best interests of the child.

More is said on diversion and alternatives to imprisonment for children in conflict with the law in chapter F, Alternatives to imprisonment.

### 3. Removing mandatory minimum sentencing provisions

Rule 3.3 of the *Tokyo Rules* states that: “Discretion by the judicial or other competent independent authority shall be exercised at all stages of the proceedings by ensuring full accountability and only in accordance with the rule of law.” The Human Rights Committee of the United Nations has expressed concern that mandatory minimum sentencing can lead to the imposition of punishments that are disproportionate to the seriousness of the crimes committed, raising issues of compliance with various

<sup>121</sup>Penal Reform International, Making Law and Policy Work, op. cit. p. 60.

<sup>122</sup>ICPS, op. cit., p. 6; Tapio Lappi-Seppala, op.cit.

<sup>123</sup>United Nations Guidelines for Action on Children, Recommended by Economic and Social Council Resolution 1997/30 of 21 July 1997, Guideline 12.

articles of the ICCPR.<sup>124</sup> Studies have found that mandatory minimum sentences are not an effective sentencing tool; rather, they constrain judicial discretion without offering any increased crime prevention benefits.<sup>125</sup>

In order to bring perpetrators to justice based on principles of fairness and proportionality, courts need to have some discretion to individualize sentencing, taking into account the background and vulnerabilities of the offender and the circumstances of the offence, while also giving attention the rehabilitative needs of the offender. Consideration needs to be given to ensuring that such discretion allows courts to decide not only the length of a prison term, but also to select an appropriate type of sentence, such as a non-custodial sanction, where it deems it to be more appropriate to the case.

Legislators and policymakers are encouraged to consider repealing mandatory minimum sentencing provisions that do not allow for any discretion during sentencing.

#### **Russian Federation: Mandatory minimum sentences removed for 68 offences**

In the Russian Federation a law was passed in March 2011 banning minimum prison sentences for 68 offences, including hooliganism, fraud and robbery. The law does not cancel maximum prison sentences, which leaves it to a judge's discretion whether to put an offender behind bars. Previously, jail terms in these cases were mandatory. The law also gives judges a greater say on types of punishment for certain crimes, allowing fines and community service work instead of prison terms. It was hoped that the change in the law may reduce the prison population by one third.

Source: *The Moscow Times*, 9 March 2011

<http://www.themoscowtimes.com/news/article/no-jail-possible-for-thieves-managers/432203.html>

#### **4. Restricting the use of life sentences**

International and regional bodies encourage the restriction of life imprisonment. A Criminal Justice Branch (UNOV) report on Life Imprisonment<sup>126</sup> recommended that states establish a penal policy which, inter alia:

- Ensures that life sentences are only imposed on offenders who have committed the most serious crimes and only when strictly necessary for the protection of society;
- Undertakes not to impose life sentences on juveniles under the age of 18; and
- Guarantees that any individual sentenced to life shall have the right to an appeal to a court of a higher jurisdiction, and to seek commutation of sentence.

<sup>124</sup>Concluding observations of the Human Rights Committee: Australia. 24/07/2000. A/55/40, paras.498-528. (Concluding Observations/Comments).

<sup>125</sup>UNODC *Handbook on Prisoners with Special Needs*, p. 66; O'Donovan, M. and Redpath, J, *The Impact of Minimum Sentencing in South Africa*, Report 2, Open Society Foundation for South Africa, 2006, p. 1 and pp. 22-33.

<sup>126</sup>United Nations (1996), *The Life Sentence*, Report of the Criminal Justice Branch of UNOV, United Nations Publication Geneva.

International law does not explicitly prohibit the use of life sentences without the possibility of parole in the case of adults, but the *ICCPR* underlines that the essential aim of the penitentiary system is the reformation and social rehabilitation of the prisoner, which would imply that the elimination of the possibility of release would contravene this principle. Furthermore, measures contained in the Rome Statute of the International Criminal Court ensure that life imprisonment without parole is not available as a punishment even for the gravest crimes, and provides that sentences of life imprisonment should be reviewed after 25 years.<sup>127</sup> The Convention on the Rights of the Child specifically prohibits the use of LWOP on children below the age of 18.<sup>128</sup>

The European Court of Human Rights has recognized that a life sentence without any hope of release could in principle constitute inhuman or degrading treatment in violation of article 3 of the European Convention.<sup>129</sup> National jurisdictions, such as the Mexican Supreme Court, and the constitutional courts of France, Germany, Italy and South Africa have ruled that sentencing without the possibility of release is an affront to human dignity and recognized that those subject to life imprisonment have a fundamental right to be released.<sup>130</sup>

In reviewing their legislation to bring it in line with international standards, states are encouraged to consider the following measures:

- Limiting the use of life imprisonment to the most serious offences, and ensuring that all life sentenced prisoners have a possibility of release;
- Developing prison regimes for life sentence prisoners which, while taking into account the length of their imprisonment, are similar in range and availability to all other prisoners, assume the possibility of eventual release and recognize the need to maintain physical and mental health, regardless of whether release to the community would occur in the future;
- Ensuring that all life sentenced prisoners have the possibility of release, after serving a specified fixed term. The decision to release on parole should be based on objective risks assessments by a qualified body, such as a parole board, rather on the nature of the offence committed or political and public pressure to be tough on crime;
- Putting in place the necessary legal provisions and measures to ensure that the abolition of the death penalty does not result in the automatic commutation of all death sentences to life imprisonment. Courts should be given the authority to review all cases, including the fairness of the trial procedures, and have discretion to impose other prison terms proportionate to the offence.

<sup>127</sup>Article 110(3) of the Rome Statute of the International Criminal Court.

<sup>128</sup>CRC, Article 37(a).

<sup>129</sup>Nigel Rodley, et al., *Treatment of Prisoners under International Law*, op. cit., p. 382, footnote 10.

<sup>130</sup>Penal Reform International, *Alternative Sanctions to the Death Penalty Information Pack*, April 2010, p. 19.

## 5. Rationalizing other sentences

### 5.1 Reducing the length of sentences

The increasing length of sentences, often resulting in prison terms grossly disproportionate to the crime committed, is another concern that could be addressed in many countries worldwide. Sometimes such sentences are an outcome of mandatory minimum sentencing laws, discussed above, and overall an outcome of the mistaken belief that longer prison terms are an effective crime control policy.

While longer prison terms naturally serve to incapacitate the offender who has been imprisoned for a long period, there is no evidence that they represent an effective deterrent to crime.<sup>131</sup> As has been noted, “To take an extreme example, locking up all shoplifters for life would reduce any recidivism on their part, but would obviously represent an inefficient use of public resources.”<sup>132</sup> Using imprisonment unnecessarily is a poor use of resources which could be utilized in other ways, for example, to prevent crime and to provide better rehabilitation programmes in prisons, to prevent recidivism. Shortening prison sentences in appropriate cases is one of the simplest ways of reducing the size of the prison population, while also enabling substantial financial savings.

### 5.2 Reducing the influence of previous convictions on sentencing

Taking into account previous convictions automatically, as an aggravating factor in sentencing, can lead to sentences disproportionate to the crime committed, which violates the principle of proportionality in sentencing.<sup>133</sup> Although it is justifiable to take account of the offender’s previous criminal record within the declared rationales for sentencing, the effect of previous convictions should depend on the particular characteristics of the offender’s prior criminal record. Factors to take into account may include the period between the previous conviction and the current offence, the nature of the offences (e.g. whether the previous offences were minor or whether the current offence is minor), the age of the offender and the circumstances of the offences.<sup>134</sup>

In Finland, for example, up till the mid-1970s there existed recidivism rules which led to an almost automatic aggravation of sentences after a certain number of previous convictions. By allowing the court more discretion and by restricting the role of reoffending in sentencing, prison sentences for property offences (where reoffending is most common) were reduced.<sup>135</sup>

<sup>131</sup>Wright, V., “Deterrence in Criminal Justice”, The Sentencing Project, November 2010.

<sup>132</sup>Mauer, M., Ryan S.K., Young, M.C., The Meaning of “Life”: Long Prison Sentences in Context, May 2004, The Sentencing Project, p. 26.

<sup>133</sup>Council of Europe, Committee of Ministers, Recommendation No. R (92) 17, Concerning Consistency in Sentencing, (Adopted by the Committee of Ministers on 19 October 1992 at the 482nd meeting of the Ministers’ Deputies) Part D, paragraph 2.

<sup>134</sup>Ibid. Part D, para. 3.

<sup>135</sup>Tapio Lappi-Seppala, Causes of Prison Overcrowding, Paper submitted to the Workshop on Strategies to Reduce Overcrowding in Correctional Facilities, Twelfth United Nations Congress on Crime Prevention and Criminal Justice (Salvador, Brazil, 12-19 April 2010), p. 17.

## 6. Introducing alternatives to imprisonment

Consistent with the provisions of international standards, referred to above, authorities may give consideration to reviewing their legislation to ensure that it includes a sufficient number and variety of non-custodial measures and sanctions available to the courts. Such measures may include ensuring that police and prosecutors have sufficient discretion to divert suitable cases away from the criminal justice system, diversifying the number of alternatives available at the pre-trial stage and restricting by law, the use of pre-trial detention, providing non-custodial sanctions instead of short prison terms for petty and non-violent offences, and providing alternatives to imprisonment as a sentencing option in other suitable cases. Legislation should take account of the rehabilitative aim of punishment and provide for non-custodial measures and sanctions that respond to the treatment requirements of some offenders, such as those who have substance dependencies and mental health care needs.

See chapters E and F for a more detailed discussion of non-custodial measures and sanctions.

## 7. Taking prison capacity into account in the enforcement of pre-trial detention or prison sentences

The *SMR* do not cover the issue of prison overcrowding, although they set out the minimum acceptable conditions of imprisonment, which would imply that people should not be detained in conditions that do not meet these standards. States are obliged by international law to protect the human rights of prisoners in their care, including by ensuring that they are treated with humanity and with respect for the inherent dignity of the human person.<sup>136</sup> *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas* are very clear about the need to keep prison occupancy levels within parameters that ensure compliance with international standards.<sup>137</sup> *The Ouagadougou Declaration and Plan of Action on Accelerating Prisons and Penal Reforms in Africa* recommends consideration to be given to prison capacity when determining decisions to imprison and the length and terms of imprisonment.<sup>138</sup>

A prisoner's right to be held in conditions that comply with human dignity is enshrined in many countries' domestic legislation, which includes the right to adequate space. Thus the state must guarantee that prison accommodation levels are in line with a facility's actual capacity. Both the Human Rights Committee and the European Court of Human Rights have, in a number of cases, ruled in favour of applicants who had been held in prisons, where the requirement of being held in conditions that comply with human dignity had been breached, as a consequence of

<sup>136</sup>ICCPR, Article 10 (1).

<sup>137</sup>Principle XVII.

<sup>138</sup>Plan of Action, 2, Strategies for reducing the numbers of sentenced prisoners.

overcrowding.<sup>139</sup> When these international, regional and often constitutional obligations cannot be fulfilled, there is clear legal justification to take practical measures to prohibit the imprisonment of accused or sentenced persons until these rights can be guaranteed.

The following measures may be considered:

- The prohibition in law and practice of the imprisonment of people (pre-trial or sentenced) in prisons where internationally and nationally acceptable standards for their accommodation and care cannot be provided due to overcrowding;

#### **European Court of Human Rights orders the Russian Federation to establish maximum capacity for pre-trial detention facilities<sup>a</sup>**

In January 2012 the European Court of Human Rights ordered that the Russian Federation establishes maximum capacity for each pre-trial detention facility, corresponding at least to the national penitentiary standards, and that this be periodically reviewed to reflect the evolving norms. It recommended that the governors of pre-trial detention facilities should be allowed to refuse to accept prisoners beyond the prison's capacity.

The court also ordered that preventive and compensatory remedies be introduced, making it possible for detainees to obtain a rapid and effective examination of their complaints about inadequate conditions of detention.

<sup>a</sup>Case of Ananyev and Others v. Russia, 42525/07; 60800/08, Pilot judgment, Violation of Article 3 & Article 13, 10/01/2012.

- Pre-trial detention decisions or prison sentences may be replaced with an alternative measure, in appropriate cases, or sentences deferred until such time when prison space becomes available. In some countries waiting lists have been created for prison places, similar to any other state service, and prisoners admitted only when places become available;<sup>140</sup>

<sup>139</sup>For example, in the case of *Lantsova v Russian Federation*, where the authorities conceded poor conditions and that detention centres at the time held twice the intended number of inmates, the Committee noted information indicating that the actual population was five times the allowed capacity and that there was poor ventilation and inadequate food and hygiene. It concluded that holding the prison in such conditions constituted a violation of article 10 (1) of the ICCPR. In another case, *Mulezi v Democratic Republic of Congo*, the prisoner had complained, in addition to complaints of torture and ill-treatment, that while he was badly injured, he was confined in crowded cells (at one point for some 16 to 20 months with 20 others in a cockroach-infested 3 by 5 metre cell), little or no access to medical care, and inadequate food and sanitation. The Committee held that the conditions of his detention constituted a violation of article 10 (1) of ICCPR. (Nigel Rodley and Matt Pollard, *The Treatment of Prisoners under International Law* (2011), p. 390). The European Court of Human Rights ruled, for example, in two cases in October 2009: *Orchowski v Poland* and *Norbert Sikorski v Poland* (<http://www.irishtimes.com/newspaper/ireland/2009/1109/1224258391371.html>); and previously in 2001 and 2002: *Dougoz v Greece* (March 2001), *Peers v Greece* (April 2001) and *Kalashnikov v Russia* (July 2002). Dirk van Zyl Smit and Sonja Snacken, *Principles of European Prison Law and Policy*, 2009, p. 88.

<sup>140</sup>Van Zyl Smit, D., in *Swimming against the Tide: Controlling the size of the prison population in the new South Africa* in B Dixon and E van der Spuy (eds.) *Justice Gained? Crime and Crime Control in South Africa's Transition*, Juta, Cape Town, 2004, 227-258., p. 250.

- Courts may be obliged to ensure that the international and, in most countries, constitutional right of prisoners to accommodation which complies with the requirements of human dignity is respected at all stages of the judicial process.<sup>141</sup> As upholders of the constitution, the courts would thus be obliged to face the reality of prison conditions and ensure that the accommodation in which detainees are to be held complies with the requirement of international and national standards;<sup>142</sup>

#### **United States Supreme Court orders the release of prisoners to ease overcrowding**

In May 2011 the United States Supreme Court upheld an order for California to free thousands of prisoners because of overcrowding. Federal judges had ordered 40,000 prisoners be released within two years. The state had 148,000 prisoners in prisons designed for 80,000 people.

California appealed to the Supreme Court, arguing that the prisoners could pose a risk to public safety. But the court ruled the limit was necessary “to remedy the violation of prisoners’ constitutional rights”.

Source: <http://www.bbc.co.uk/news/world-us-canada-13508182>

- Policies may be developed to oblige criminal justice agencies other than the prison service to take responsibility for the cost of imprisonment pending trial, by, for example, sharing the cost of pre-trial detainees.<sup>143</sup> Such a measure would create a strong financial incentive for those institutions which are most responsible for processing cases through the courts to ensure that trials are not delayed unduly.<sup>144</sup>

#### **Legislative provisions in South Africa to reduce pre-trial detention**

According to Section 63A of the Criminal Procedure Act, No. 51 of 1977, a Head of Correctional Centre may apply to a court to release certain Awaiting Trial Detainees if the conditions in the prison will result in a material threat to the human dignity, physical health or safety of the accused, the accused is charged with an offence in which a police official may grant bail and the accused was granted bail by the court but could not afford to pay the bail amount.

#### **Argentina—controlling adherence to legal prison capacity**

Within the context of reforms initiated by the Argentinean Supreme Court of Justice, a bill was prepared by a group of individuals,<sup>a</sup> aiming to keep under control the occupation rate of prisons by a collective habeas corpus. The project proposed the nomination of a commission to determine the capacity of each penitentiary institution, focusing especially on the “minimum area for each prisoner” in line with the requirements of the United Nations Standard Minimum Rules for the Treatment of Prisoners.

<sup>141</sup>As suggested by Van Zyl Smit, D. in *ibid.*, p. 250.

<sup>142</sup>*Ibid.*, p. 250.

<sup>143</sup>*Ibid.*, p. 251.

<sup>144</sup>*Ibid.*, p 251.

The bill places responsibility for the implementation of this legislation not only to the executive but also on the judicial authorities, which are in charge of ensuring the fulfilment of constitutional guarantees, by allocating persons deprived of their liberty only to those institutions that have sufficient prison capacity.

The proposed commission will be composed of representatives of the Ministries of Justice, Public Health, Infrastructure and the Secretariat for Human Rights. Its function shall be to determine the total number of available spaces in each institution of the penitentiary service in Buenos Aires, as well as to assess the number of prisoners exceeding the capacity.

It is proposed that the Ministry of Justice elaborates every four months, following pre-established rules (time spent in preventive detention, age of the person, state of health, conduct, and personality traits, reintegration capacity), a list of persons that may be eligible for some kind of legal mitigation of their sentences or alternatives, indicating the proposed respective measures for each case. The Judiciary will decide on the application of the proposed measures.

*Source: María Noel Rodríguez, ILANUD, Strategies and best practices to reduce overcrowding in penal institutions, Paper submitted to the Workshop on Strategies to Reduce Overcrowding in Correctional Facilities, Twelfth United Nations Congress on Crime Prevention and Criminal Justice (Salvador, Brazil, 12-19 April 2010).*

<sup>a</sup>Led by Dr. Mario Coriolano cassation legal counsel in the Province of Buenos Aires, Argentina and member of the Subcommittee for the Prevention of Torture.

## 8. Reforming legislation and policies relating to drug offences

Given the impact of drug-related crime on the growth of the prison population worldwide, which has been outlined in part I, chapter B, and taking into account that policies which rely primarily on imprisonment have not been effective in changing the rate of recidivism among drug-using offenders, developing more comprehensive ways of responding to crimes committed by drug users should be considered as a key element of policies that aim to improve public health and safety while at the same time reducing imprisonment.

Such reforms should be based on the principle of considering drug dependence as a health care problem, recognizing the diversity of people involved in the drugs trade, taking into account the vulnerability and social circumstances of a large majority and promoting education, prevention and treatment. Many offenders held in prisons on drug-related crimes are not major players in the drugs trade, and are often dependent on these drugs themselves. Alternatives to criminal justice sanctions, such as educational interventions and treatment, targeted at drug-using offenders,<sup>145</sup> could address more effectively their social reintegration needs. The major international instruments, including the 1988 *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*<sup>146</sup> and the *Guiding Principles on Drug Demand Reduction of the General Assembly of the United Nations*,<sup>147</sup> recognize this. The focus of these instruments is the protection of people from the health and social consequences of

<sup>145</sup>UNODC, *From Coercion to Cohesion*, p. 2.

<sup>146</sup>United Nations Doc. E/CONF.82.15.

<sup>147</sup>A/RES/S-20/3 of 8 September 1998.

the uncontrolled use of psychoactive substances and they call on governments to take multidisciplinary initiatives, including the use of alternatives to imprisonment “in appropriate cases of a minor nature”.<sup>148</sup>

In the UNODC Discussion Paper, “From coercion to cohesion: Treating drug dependence through health care, not punishment”,<sup>149</sup> UNODC underlines that moving from a sanction-oriented approach to a health-oriented one is consistent with the international drug control conventions. It notes that it is also in agreement with a large body of scientific evidence.<sup>150</sup>

The Commission on Narcotic Drugs (CND) in its resolution 55/12 of 16 March 2012, entitled “Alternatives to imprisonment for certain offences as demand reduction strategies that promote public health and public safety”<sup>151</sup>, took note, inter alia, that: “some Member States have adopted measures as alternatives to prosecution and imprisonment for drug-using offenders, and that such measures have included, among other things, specific legal procedures, community service and drug-use monitoring with consequences for non-compliance”, and noted that “such measures have been shown to reduce recidivism rates, facilitate rehabilitation and, at the same time, conserve human and financial resources, rebuild families and help to reconstitute the social fabric.”

That resolution encouraged Member States to, inter alia “...consider allowing the full implementation of drug-dependence treatment and care options for offenders, in particular, when appropriate, providing treatment as an alternative to incarceration, in order to help strengthen drug demand reduction policies while promoting both public health and public safety”.

In line with the recommendations of the CND, as well as the approach of the major international drug control treaties, the development of a national strategy should be considered, which, while retaining the criminal sanctioning of serious drug-related offences, introduces legislative reform providing a more humane and fair legal framework relating to drug using offenders and other minor drug offenders, together with the expansion of policies and resources across the areas of prevention, harm reduction, treatment and care, including rehabilitation and social reintegration measures.

In this framework:

- Consideration may be given to the depenalization of certain drug offences, such as possession, purchase or cultivation for personal consumption,<sup>152</sup>

<sup>148</sup>The 1988 Convention, Article 3 entitled “Offences and sanctions” provides under paragraph 4, subparagraph (c): “Notwithstanding the preceding subparagraphs, in appropriate cases of a minor nature the Parties may provide, as alternatives to conviction or punishment, measures such as education, rehabilitation or social reintegration, as well as, when the offender is a drug abuser, treatment and aftercare.” The Convention also proposes alternatives to imprisonment for offenders convicted of possession, purchase or cultivation of narcotic drugs or psychotropic substances for personal consumption. (See Article 3, para. 4 (d) and Article 3, para. 2, to which the former refers). Non-custodial sanctions suggested include education, rehabilitation and social reintegration for those who are not addicts themselves, treatment, aftercare rehabilitation and social reintegration in the case of those who are drug abusers. See also Neil Boister, *Penal Aspects of the United Nations Drug Conventions*, Kluwer, The Hague 2001.

<sup>149</sup>UNODC, *From coercion to cohesion: Treating drug dependence through health care, not punishment*, Discussion Paper, New York, 2010. ([http://www.unodc.org/docs/treatment/Coercion/From\\_coercion\\_to\\_cohesion.pdf](http://www.unodc.org/docs/treatment/Coercion/From_coercion_to_cohesion.pdf)).

<sup>150</sup>Ibid.

<sup>151</sup>E/2012/28, E/CN.7/2012.18.

<sup>152</sup>Recommended also in the context of HIV/AIDS control strategies in prisons. See UNODC, WHO, UNAIDS, *HIV/AIDS Prevention, Care, Treatment and Support in Prison Settings, A Framework for an Effective National Response*, Lines, R. and Stöver, H., 2006, p. 16.

- Diversion of certain drug offenders from the criminal justice system to services and treatment in the community may be introduced in law and practice;
- Legislation may be reviewed to make a clear distinction between the different actors in the drug market, including those involved in large-scale drug trafficking, street corner dealing, and different levels of participation in drug production and trafficking, and in this context consideration may be given to reducing the severity of sanctions for minor drug offences not covered by diversion. Constructive alternatives may be introduced in certain cases, so that imprisonment is used more sparingly;
- Investment in the provision of evidence-based and accessible drug dependence treatment in the community, provided within national health care services, should be increased, in order to ensure that those diverted from the criminal justice system receive effective treatment and care. The increase in number and accessibility of such treatment options would also prevent many individuals' contact with the criminal justice system in the first place, thereby avoiding the stigmatizing and harmful consequences of such contact;<sup>153</sup>
- Other alternatives in the community, for small scale street dealers and other minor actors in the drug market could be developed, such as vocational training and education, to improve their chances of living crime and drug-free lives;
- In order to ensure that people with drug dependencies are aware of the risks associated with drug use and seek treatment, such investment needs to be accompanied by information and awareness-raising activities on a wide scale in the community, with information on where to access assistance.

A discussion of alternatives to imprisonment for drug offences is included in chapter F, Alternatives to imprisonment.

## 9. Reducing the imprisonment of people with mental health care needs

As has been discussed in part I, chapter B, section 7, prisons are frequently used, and in some countries increasingly, to house people with mental health care needs. Prisoners with mental disabilities are ill-equipped to survive in prisons, and their condition most often deteriorates in the absence of adequate health care and appropriate psychosocial support. *Principles for the protection of persons with mental illness and the improvement of mental health care (Mental Illness Principles)* make clear that persons with mental health care needs should have the right to be treated and cared for, as far as possible, in the community in which they live.<sup>154</sup> WHO recommends that mental health services be based in the community and integrated as far as possible to general health services, in accordance with the vital principle of the least restrictive environment.<sup>155</sup>

<sup>153</sup>UNODC launched a new strategy on the treatment of drug dependence to promote and support evidence-based and ethical treatment policies worldwide. Treatnet, which began in 2005, promotes diversified, effective and quality drug dependence treatment and rehabilitation services, including HIV/AIDS prevention and care. Treatnet is currently active around the world with drug dependence treatment service improvement projects in 27 countries in Africa, Central Asia, the Middle East, South America and South-East Asia.

<sup>154</sup>Principles for the protection of persons with mental illness and the improvement of mental health care, Principle 7.1.

<sup>155</sup>Referred to in United Nations Doc. E/CN.4/2005/51, para 14.

The objectives of social reintegration and the prevention of reoffending can be better achieved with treatment and care, rather than punitive measures in the case of many offenders with mental disabilities, and especially those who have committed non-violent offences.

Suggested key measures:

- In most countries, there is an urgent need to address problems relating to adequate health care in the general population and to improve access to health care services by people with mental disabilities, as a first step towards reducing the unnecessary and harmful imprisonment of offenders with mental health care needs, thereby relieving pressure on the scarce resources of prison health services;
- Punitive sentencing policies, which lead to the increasing imprisonment of disadvantaged groups, such as offenders with mental disabilities, for non-violent offences, need to be reassessed to reverse the significant increase of offenders with mental disabilities in institutions which were not designed to cater for the social reintegration needs of this vulnerable group;
- The lack of public mental health services alone should never be used to justify the imprisonment of people with mental disabilities, and should be strictly prohibited by law.<sup>156</sup>

See also part II, chapter F, section 6.2 for a discussion of non-custodial measures and sanctions for offender with mental health care needs.

## 10. Compassionate release and national pardoning mechanisms

*Compassionate release:* Prisons are generally not suitable for the accommodation and care of prisoners who have serious health problems or disabilities, who are elderly and therefore have special needs, or who have been diagnosed with a terminal illness. In addition, accommodating such people in prison and providing suitable services are extremely costly to the state. Release on compassionate grounds should be considered for those who do not pose a threat to society and whose age, disability or health condition lead to serious challenges for them to cope with prison conditions, thus increasing the severity of the sentence.

Many legal systems make provisions for either alternatives to imprisonment or compassionate release for prisoners with a terminal illness in general and advanced AIDS in particular, with a variety of modalities and processes being adopted.<sup>157</sup> Eligibility criteria for compassionate release on grounds of terminal illness should not be unjustifiably restrictive and procedures should be accessible to prevent the unnecessary prolongation of the waiting period, resulting in the death of patients in prison, while a decision on release is still being considered.

<sup>156</sup>WHO and ICRC, Information Sheet, Mental Health and Prisons ([www.euro.who.int/Document/MNH/WHO\\_ICRC\\_InfoSht\\_MNH\\_Prisons.pdf](http://www.euro.who.int/Document/MNH/WHO_ICRC_InfoSht_MNH_Prisons.pdf)).

<sup>157</sup>United Nations Economic and Social Council, Commission on Crime Prevention and Criminal Justice, Fifteenth Session, Vienna, 24-28 April 2006, Item 8 (c) of the provisional agenda, Use and application of United Nations standards and norms in crime prevention and criminal justice: combating the spread of HIV/AIDS in criminal justice pre-trial and correctional facilities, Report of the Secretary General, E/CN.15/2006/15, 10 February 2006.

Effective cooperation between prison and community medical services should ensure that patients released from prison receive all the necessary medical care, including palliative care, in community medical institutions. Cooperation should extend to establishing links with appropriate hospices, where available, which provide specialized care for patients with terminal illness.

*Presidential or national pardons:* In many countries mechanisms for pardoning individual prisoners exist. In addition in some countries groups of prisoners may be pardoned and released on the basis of a specific law targeting selected categories of prisoners or offences.<sup>158</sup> Usually pardons are individual acts of clemency granted by a president, a monarch, acting on the recommendation of a committee or commission, ministry or other body responsible for reviewing applications for pardon. Pardons may result in a release of the prisoner concerned after a certain—often large—proportion of a sentence has been served (usually applicable in the cases of minor offences) or in the commutation of the sentence, which is often applicable in the case of death sentences. In order to be effective, rules and procedures relating to applications for pardon need to be clear and prisoners need to have access to legal counsel and, where appropriate, legal aid, to enable them to complete their applications.

## 11. Amnesties

Amnesty is an act by which the legislative power eliminates the penal consequences of certain punishable offences, stops prosecution and quashes convictions. Amnesties may be granted as part of a reconciliation or transition process of countries emerging from conflict and oppressive political regimes. Amnesties should however be distinguished from the release of all persons held in relation to an armed conflict, such as prisoners of war and civilian internees, without delay once hostilities have ended, unless they are serving a sentence for a criminal offence.<sup>159</sup>

Specific provisions providing for amnesties exist under international humanitarian law (IHL) with regards to non-international armed conflicts (NIAC), but these amnesties do not extend to war crimes or crimes against humanity committed during the conflict. Article 6(5) of the *Additional Protocol to the Geneva Conventions* of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflict (Protocol II), 8 June 1977, states: “At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.” This amnesty does not extend to war crimes or crimes against humanity committed during the conflict.

<sup>158</sup>For example, in Ecuador, based on a law approved in July 2008, a national pardon was introduced for all persons who had been sentenced for trafficking, transport, acquisition or possession of illegal substances and met the following criteria: that the prisoner had already received his or her sentence, that the sentence was his or her first offense, that the amount of the illegal substance involved in the conviction offense was two kilograms or less, and that the prisoner had completed at least 10 per cent (or at least a year) of his or her sentence. According to the Public Defender’s Office 2,300 persons who had been imprisoned under Law 108, which was adopted to implement a new law enforcement oriented policy on drugs in 1989, were ultimately pardoned. (See: Sandra G. Edwards and Coletta A. Youngers, “Drug Law Reform in Ecuador: Building Momentum for a More Effective, Balanced and Realistic Approach”, May 2010, Transnational Institute. (<http://www.druglawreform.info/en/publications/legislative-reform-series-/item/368-drug-law-reform-in-ecuador>).

<sup>159</sup>See Article 118, the Third Geneva Convention relative to the Treatment of Prisoners of War (12 August 1949); Article 133, the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War (12 August 1949).

Amnesties are primarily designed to facilitate reconciliation but may be used to improve the conditions in prisons by reducing overcrowding in the short term, while a longer-term strategy for a sustainable reduction in the prison population is being developed.

While amnesties do have short-term value, they also pose various challenges:

- The public's trust and confidence in the justice system may be undermined due to the perception that people regarded primarily as "criminals" are regularly released from prisons, despite sentences they have received;<sup>160</sup>
- This negative perception by society complicates the social reintegration of prisoners, thus released;
- Prisoners can be released from prison with no preparation or social support, so may quickly return to prison;<sup>161</sup>
- The release of prisoners suffering from infectious diseases, such as TB and HIV/AIDS without proper follow-up poses a risk to public health;<sup>162</sup>
- Prisoners are often released because they fall into a certain category with no individual risk assessment;<sup>163</sup>
- The use of periodic general amnesties as a means to respond to prison overcrowding may significantly delay progress on discussing, adopting and implementing longer-term measures such as developing alternatives to imprisonment in law and practice and reforming sentencing policies.

These concerns should be taken into account when amnesties are considered. The following measures may be considered:

- The selection of those eligible should be made carefully, based on individual assessments;
- The public must be fully informed about the categories/characteristics of prisoners who are being released and how the selection has been made;
- Measures must be taken to ensure that those who need continued medical treatment are referred to services in the community and that those services are informed about the names and addresses of such people to follow up; and
- Amnesties should never delay the development and implementation of long-term strategies to address the problem of overcrowding prisons.

<sup>160</sup>ICPS, Guidance Note 4, Dealing with Prison Overcrowding. (<http://www.prisonstudies.org/info/downloads/gn4-prison-overcrowding.pdf>).

<sup>161</sup>Ibid.

<sup>162</sup>Ibid.

<sup>163</sup>Ibid.

**KEY RECOMMENDATIONS*****SENTENCING: GENERAL*****To legislators, policymakers and sentencing authorities**

- To individualize sentencing, taking into account the background of the offender and circumstances of the offence.
- To balance the need to penalize the offender and protect the public with the need to facilitate rehabilitation, and thus prevent reoffending.
- To provide a range of sentences in legislation in order to enable courts to apply flexibility in sentencing.

***DECRIMINALIZATION AND DEPENALIZATION*****To legislators and policymakers**

- To consider decriminalizing acts that should fall within the scope of social or health care policies, rather than criminal law, and to consider reclassifying petty offences as administrative infractions.
- To consider non-custodial options in response to fine defaulting and the non-payment of debts, rather than using imprisonment automatically.
- To review crime categories with a view to re-evaluating their seriousness.

***THE IMPRISONMENT OF CHILDREN AS A LAST RESORT*****To legislators and policymakers**

- To give consideration to reviewing the age of criminal responsibility in legislation, and where appropriate to increase it to ensure that it is, as a minimum, not below the age of 12. To ensure that effective measures are put in place to determine the age of young offenders by an independent and qualified body, where necessary, to avoid the treatment of those below the age of 18 as adults and to avoid the criminal prosecution of those who are below the age of criminal responsibility.
- To decriminalize status offences and never to penalize child victims. To develop a juvenile justice system and sentencing policies that aim to avoid the institutionalization of children and which respond constructively to children who commit offences, addressing the causes of the crime committed and rehabilitation needs, with full respect to the principle of promoting the best interests of the child.

***RESTRICTING THE USE OF LIFE SENTENCES*****To legislators and policymakers**

- To ensure that life sentences are only imposed on offenders who have committed the most serious crimes and only when strictly necessary for the protection of society.
- Not to impose life sentences on juveniles under the age of 18.
- To ensure that all life sentenced prisoners have the possibility of release at some point, after a fixed term of the prison sentence has been served, and to put in place measures which enable the decision on such release to be based on objective risk assessments by a qualified body, such as a parole board.
- To put in place the necessary legal provisions and measures to ensure that, following the abolition of the death penalty, courts are given the authority to review all cases, including the fairness of the trial procedures, and have discretion to impose prison terms proportionate to the offence.

***RATIONALIZING OTHER SENTENCES*****To legislators, policymakers and sentencing authorities**

- To pursue a criminal policy under which long-term sentences are imposed only if they are justifiably necessary for the protection of society.
- Not to automatically use previous convictions as an aggravating factor in sentencing.

***INTRODUCING ALTERNATIVES TO IMPRISONMENT*****To legislators and policymakers**

- To review legislation to ensure that it includes a sufficient number and variety of non-custodial measures and sanctions available to the courts, in order to reduce the use of pre-trial detention and imprisonment.

See more detailed recommendations in chapter F.

***TAKING PRISON CAPACITY INTO ACCOUNT IN THE ENFORCEMENT OF DETENTION*****To legislators and policymakers**

- To prohibit the imprisonment of people in prisons where internationally and nationally acceptable standards for their accommodation and care cannot be provided due to overcrowding. In this context, to consider replacing pre-trial detention decisions or prison sentences with an alternative measure or to defer sentences until such time when prison space becomes available.
- To consider giving courts the responsibility to ensure that the international and, in most countries, constitutional right of prisoners to accommodation which complies with the requirements of human dignity is respected at all stages of the judicial process.

***REFORMING LEGISLATION AND POLICIES RELATING TO DRUG OFFENCES*****To legislators and policymakers**

- To develop a national strategy, including legislative reform which provides a humane and fair legal framework relating to drug-related offences, and the expansion of policies and resources across the areas of prevention, harm reduction, treatment and social reintegration.
- To consider reducing the criminalization of certain drug offences, such as use and possession for personal consumption.
- To introduce, in law and practice, the diversion of certain drug offenders from the criminal justice system to services and treatment in the community.
- To review legislation to make a clear distinction between the different actors in the drug market and in this context consider reducing the severity of sanctions for minor drug offences. Introduce constructive alternatives, such as vocational training and education, in the case of minor offences, so that imprisonment is used more sparingly.
- To invest in the provision of adequate and accessible drug dependence treatment in the community, provided within national health care services, in order to ensure that those diverted from the criminal justice system receive the treatment and care to which they are entitled.
- To invest in evidence-based drug prevention programmes, such as wide-scale information and awareness-raising activities on drug use and risks associated with drug use, with information on where to access assistance.

***OFFENDERS WITH MENTAL HEALTH CARE NEEDS*****To legislators, policymakers and criminal justice actors**

- To address problems relating to adequate health care in the general population and to improve access to health care services by the poor, homeless, unemployed and people with mental disabilities, as a first step towards reducing the unnecessary and harmful imprisonment of offenders with mental health care needs.
- Never to use the lack of public mental health services alone to justify the imprisonment of people with mental disabilities and strictly prohibit such imprisonment by law.
- To reassess punitive sentencing policies, which lead to the increasing imprisonment of disadvantaged groups, such as offenders with mental disabilities, for non-violent offences, in institutions which were not designed to cater for the social reintegration needs of this vulnerable group.

***COMPASSIONATE RELEASE AND PRESIDENTIAL/NATIONAL PARDONING MECHANISMS*****To legislators and policymakers**

- To consider increasing the use of compassionate release on grounds of age, health, disability or terminal illness and to simplify the procedures for applying for compassionate release, where necessary.
- To review rules for other exceptional pardoning mechanisms to ensure that they are accessible and are applied in a consistent and fair manner.

***AMNESTIES*****To legislators and policymakers**

- To consider using amnesties to reduce overcrowding in the short-term.
- To ensure that the selection of those eligible is made carefully, by a suitably qualified body, based on individual risk assessments.
- To put in place rules and mechanisms to ensure the follow up of those who need continued medical treatment in the community.
- To ensure that amnesties do not delay the development and implementation of long-term strategies to address the problem of overcrowding in prisons.

## CHAPTER C. IMPROVING THE EFFICIENCY OF THE CRIMINAL JUSTICE SYSTEM

While legislative reforms are important to ensure that criminal justice actors have the requisite legislative basis to take decisions and implement measures that can reduce the use of imprisonment, legislation can only be useful if the institutions of the criminal justice system function properly. An inefficient criminal justice system can give rise to significant delays in delivering justice, resulting in people—including those who will eventually be found innocent—being held in detention for months or years, before being brought before a court, and the trial process itself can be prolonged excessively, before a final verdict is passed.

As discussed in part I, chapter B there may be many mutually reinforcing reasons for inefficiencies.

Key underlying factors may include:

- An inadequate number and training of criminal justice actors, such as police, prosecutors, judges and prison staff;
- A lack of resources and technical capacities of criminal justice institutions and actors;
- A lack of cooperation between criminal justice institutions, such as the police, prosecution, courts and prison administrations;
- Cumbersome and complicated criminal justice processes, with excessive bureaucracy, which create systemic delays;
- A lack of reliable data about prisoners held in pre-trial detention and prisons;
- A lack of transparency and accountability.

When these underlying factors are not addressed in a comprehensive manner, case overload in courts occurs, often resulting in overcrowding in prisons.

### 1. Building the capacity of criminal justice actors

The efficiency and effectiveness of the system to deliver justice in accordance with established international and regional standards will largely depend on the main actors in the system. These are the judges, prosecutors, defence lawyers, police and prison staff. All of these criminal justice actors are involved and responsible for decisions taken throughout the system that impact on the size of the prison population. By taking decisions that promote justice with the minimal use of imprisonment, they can contribute to reducing the inflow into prisons. By fulfilling their responsibilities fairly and efficiently, they can reduce unnecessary delays, unfair sentencing and improve the social reintegration prospects of prisoners. Their qualifications and ethical conduct for the discharge of their duties with integrity and free of corruption are essential for the system to deliver. International and regional standards have been developed to provide guidance for the recruitment and training of criminal justice personnel.<sup>164</sup>

<sup>164</sup>For example, United Nations Basic Principles on the Independence of the Judiciary; Basic Principles on the Role of Lawyers; Guidelines on the Role of Prosecutors; Code of Conduct for Law Enforcement Officials; Bangalore Principles on Judicial Conduct, among others.

### *1.1 Recruitment procedures and training*

One of the key requirements is to put in place mechanisms to attract the highest calibre of individuals to serve in the criminal justice system, through transparent and merit-based recruitment procedures. Areas of capacity building and training should include: the human rights of detainees and prisoners, including their right to legal counsel on arrest; criteria for decision-making on arrest and prosecution; guidance on diversion from the criminal justice system; investigation techniques that comply with the requirements of international standards; fair trials and sentencing; social reintegration of prisoners and early release decisions. Training should emphasize ethical conduct and the prohibition of all forms of corruption.

### *1.2 Evaluation of performance*

The evaluation of the performance of criminal justice actors may need to be reviewed, so that it is not based on the number of arrests and convictions, but on criteria that measure the efficiency of criminal justice activities, in terms of their compliance with international human rights standards, which, inter alia, rule that imprisonment should be used sparingly, and on the appropriateness of criminal justice responses to the offence committed, as well as the characteristics of the suspects or offenders involved.

In order to be effective, consideration should be given to accompanying such a review by other measures, such as the removal of “arrest targets” (see chapter E, section 1), and increasing the discretion of police and prosecutors to divert suitable cases away from formal proceedings in the criminal justice system, for example, to an alternative dispute resolution mechanisms (see chapter E, section 3).

### *1.3 Adequate resources and investment*

There is a need to ensure that criminal justice actors can exercise their roles effectively, and in accordance with international standards. This requires an adequate budgetary allocation for the administration of criminal justice for the system to function efficiently and effectively. By investing in the criminal justice apparatus, savings can be made in the long run, by the reduction of delays in the criminal justice process, the use of imprisonment, and the collateral costs of imprisonment, while trust in the criminal justice system can be improved.

## **2. Improving cooperation mechanisms between criminal justice agencies**

One of the key causes of case overload at the courts and overcrowding in prisons is the lack of information exchange between criminal justice actors who take decisions (or fail to take them) without sufficient knowledge about individual cases, as well as the overall situation. Causes for the delays in the criminal justice process need to be addressed together so that case backlogs can be approached in a systematic manner and pressure on prisons relieved by the joint action of the police, prosecution and courts. Establishing mechanisms of cooperation between criminal justice agencies can help reduce, in particular, the pre-trial prison population significantly by speeding up the processing of cases, ensuring that defendants are brought before the court on time, and that those who have overstayed time-limits are released.

Some good practice examples have emerged. For example, within the framework of the Chain Linked Initiative, cooperation between courts, prosecutors and prisons, as well as with social services, local community leaders and NGOs, were established/improved in Kenya, Malawi, Uganda and the United Republic of Tanzania with regular meetings, joint prison visits, development and distribution of agreed performance standards, which were successful in speeding up the processing of cases and release of detainees who were found to be imprisoned unlawfully.<sup>165</sup> Other examples, such as Case Co-ordination Committees in Bangladesh and Court User Committees in Southern Africa have also demonstrated how coordination between justice actors at local level can resolve problems of overcrowding at very low or no cost.

#### **Cambodia—Dialogue amongst different stakeholders takes place with ICRC support as a means of finding solutions to prison overcrowding**

ICRC has a decades-long history of humanitarian engagement in Cambodia, and has been visiting prisons for over 20 years. In the early 2000s, the institution began to work with the Cambodian authorities in an attempt to mitigate the combined effects on prisoners' lives of long-term lack of investment in facilities and steadily rising numbers of prisoners. Access to safe drinking water, ventilation, sewage systems and kitchens were all improved. It became clear, however, that there was a need to identify and respond to root causes of prison overcrowding if ICRC's efforts, and those of the Cambodian authorities, were to continue to deliver any benefit to the prisoners.

In 2010, in collaboration with the Cambodian authorities, the ICRC assessed the causes of significant and steady growth in the prisoner population, to propose means of containing or reversing this trend. In a number of Cambodian prisons, provisional systems were set up to collect and analyse data on the prison population.

Following delivery of the resulting report, during 2011 and 2012 ICRC supported a series of high-level, inter-ministerial and inter-agency discussions. The Ministries of Interior, Justice, Economy and Finance, and the judicial, prison, police and gendarmerie authorities discussed the challenges they face and possible solutions, reaching consensus on a number of areas.

Such an inter-ministerial and inter-agency coordination mechanism has facilitated the development of a common understanding of the problems, developed a sense of joint responsibility and has set the ground for more comprehensive and coordinated measures.

*Source: Based on material from the ICRC delegation in Bangkok*

#### **Philippines—Representatives from criminal justice agencies gather as part of a Call for Action (CfA) initiative to tackle overcrowding in the Philippines**

For over half a century, ICRC has been visiting jails and prisons in the Philippines to ensure they afforded decent and humane conditions of detention. In 2007, the ICRC supported a "Call for Action" initiative with the objective of tackling the problem of overcrowding.

The authorities and key government agencies at central and local level pursued efforts to improve prison facilities and health care services and tackle overcrowding through the allocation of more resources, mobilized within the framework of this "Call for Action" process. Three working groups continued to address shortcomings in the criminal justice system, in particular procedural delays (one of the major causes of overcrowding), TB in places of detention, and prison infrastructure problems.

<sup>165</sup>Index of good practices in reducing pre-trial detention, Penal Reform International ([www.penalreform.org](http://www.penalreform.org)) and UNODC *Handbook on improving access to Legal Aid in Africa*, p. 66.

Two pilot working groups discussed concerns stemming from procedural delays in the cases of inmates at Manila and Tacloban City Jails and ways to improve cooperation between criminal justice agencies. Their findings and recommendations, combined with the results of an ICRC evaluation of the achievements of the “Call for Action” initiative, fed into discussions with the Supreme Court, executive judges, the Public Attorney’s Office, the Office of the Chief Prosecutor and the Bureau of Jail Management and Penology (BJMP) on concrete measures to address jail congestion.

As a result, with ICRC support, a taskforce was mandated by the Supreme Court to expedite the cases of inmates at Manila City Jail, and extra human and material resources were provided to improve records management there. The Senate received an ICRC position paper on detention-related bills focusing on good conduct time allowance and preventive imprisonment.

*Source: ICRC Annual Report 2011*

Prison visiting programmes can have an important role to play in activating inter-agency coordination and encouraging public debate on reforms to reduce the prison population, as the example in India demonstrates.

#### **India—establishing cooperation between criminal justice actors**

In India, a comprehensive project, which started with prison visits organized by the Commonwealth Human Rights Initiative (CHRI), an international NGO, had an impact on the size of the pre-trial prison population. CHRI, which undertook prison visits in Madhya Pradesh, Chhattisgarh, and Rajasthan, realized that it was necessary to make available a common platform for functionaries of criminal justice agencies to find ways of improving interdisciplinary coordination. As a result, regional workshops for the orientation of non-official prison visitors were organized and higher officials of the judiciary, police, prisons, prosecution, and probation services were invited to chair different sessions. As a part of the strategy to involve a wide array of criminal justice officials, the cooperation of constitutional bodies such as the State Human Rights Commissions and the State Commissions for Women was also solicited.

CHRI organized 11 such regional workshops in three states. The repeated emphasis on coordination at the local level, as well as at the policy-making level, resulted in the restriction of detention, with more use made of alternative measures, and more rapid judicial procedures. The programme had an impact on the pre-trial prison population in the three states in which the programme was carried out. In Madhya Pradesh, for example, the size of the pre-trial prison population declined during the years 2001 to 2003, from 16,837 to 13,993. Similarly, in Chhattisgarh the trend was generally downward, from 4,921 to 4,128. In Rajasthan, the pre-trial population receded continuously, from 8,737 in 2001 to 6,584 in 2003.

*Source: Saxena, R. K., “Catalyst for Change: The Effect of Prison Visits on Pre-trial Detention in India”, in Justice Initiatives, Open Society Institute, Pre-trial Detention (2008), pp. 57-69*

Interagency cooperation may be formalized with the establishment of an advisory body made up of representatives of key criminal justice institutions. Such a body may also include independent experts and representatives of civil society, thereby expanding and diversifying the expertise of the body and involving civil society actively in the reform process. See the example of Panama in the box.

### Prison Policy Council in Panama

The “Prison Policy Council” in Panama, brings together the Ministry of Governance, the Court of Justice, Attorney General, the Ombudsman, the prison administration, the Congress, churches, lawyers, the University, the police and human rights NGOs, among others, with the objective of defining prison policy, presenting recommendations about infrastructure, counselling programmes and training, as well as analysing the situation in prisons, and trying to find coordinated solutions to challenges faced.

*Source: UNODC Regional Office for Central America and the Caribbean in Panama (ROPAN)*

See chapter D for a discussion on how non-State legal aid providers have been successful in encouraging and facilitating regular cooperation mechanisms between criminal justice actors.

### 3. Simplifying and speeding up the criminal justice process

In many countries the criminal justice and court administration processes are cumbersome and complicated, often due to outdated rules and procedures. This may include excessive documentation or the multiplicity of agencies/officials that must be involved to initiate one simple action, compounded by the loss of forms, lack of information exchange between agencies and the inaccurate recording of data. In addition, the challenges encountered by many defendants and their families, in navigating their way in this complicated and alien bureaucratic world could provide fertile ground for police, prosecutors and court staff to elicit bribes to deliver the services required to move a case forward. A thorough review of the operation of the criminal justice process, including court administration procedures, can help identify how they may be simplified.

For example:

- Procedural laws may be simplified to allow courts to spend less time on processing minor cases and freeing up time to process serious and complicated cases. For example, the number of agencies or officials who need to be involved in taking simple decisions and the number of forms and documents that must be used may be reviewed and reduced, if no longer justified (e.g. procedures which are a legacy of colonial rule with its levels of hierarchy no longer relevant in the current context);
- Where resources allow, time and effort may be saved and efficiency enhanced with better use of contemporary technology, (e.g. computer-based case tracking systems);
- Measures may be put in place to ensure that cases are screened at an early stage to ensure that minor cases which would not be provable at trial are dismissed; that early consideration is given to the diversion of eligible cases from the criminal justice system; and that the cases of those who are in detention are dealt with as a priority;

- The process may be speeded up by ensuring that the agencies involved are brought together via regular meetings to share information, as members of case management bodies or prison policy councils, as discussed in section 2 above.

Plea-bargaining, which can conclude a criminal case without a trial as a result of a plea agreement, is often suggested as a practical and effective solution to reduce the caseloads of courts, and may be considered as an option. However, the practice of plea-bargaining has raised a number of concerns among criminal justice experts, including that it may be considered a coercive practice, when the “bargaining” is conducted in secret, especially in countries where ill-treatment and forced confessions are not uncommon, that it may infringe on the right of presumption of innocence and that it may lead to net-widening, as all guilty pleas, which are the essence of plea bargaining, always lead to a conviction and sentence.<sup>166</sup> The risk of an excessive period of pre-trial detention can also lead to defendants to enter inappropriate guilty pleas in order to expedite the trial process and their eventual release, which can be exacerbated by lack of effective legal advice.<sup>167</sup>

It is a practice which must be considered with caution, with safeguards in place to reduce the possibilities of abusing the system and opportunities for corrupt practices, such as exchange of bribes as part of the negotiating process. Such measures may include the following:<sup>168</sup>

- Ensuring that, before a plea-bargaining can take place, all facts upon which sentencing is predicated are proven beyond a reasonable doubt;
- Providing a public hearing in every case so as to eliminate the public accountability deficiencies which a plea bargaining system may have—though this hearing need not be a full-blown trial (e.g. a pre-trial conference);
- Ensuring mandatory participation of legal counsel in all plea-bargaining procedures and providing free legal aid, where necessary;
- Considering using plea-bargaining only in cases where the potential prison term for the offence is short (e.g. one year).

Paralegals have been instrumental in assisting in speeding up the criminal justice process by taking responsibility for some of the suggested tasks listed above in a number of countries, as discussed in chapter D.

<sup>166</sup>See for example McCoy, Candice, “Plea Bargaining as Coercion: The Trial Penalty and Plea Bargaining Reform”, in *Criminal Law Quarterly*, Volume 50, issue 1-2, pp. 128-147; Langbein, J. “Torture and Plea Bargaining”.

The University of Chicago Law Review, Vol. 46, No. 1 (Autumn, 1978), pp. 3-22 and Schulhofer, S., “Plea Bargaining as Disaster” (1992), 101 *Yale Law Journal* 1979 and Expert Forum on Criminal Justice for Central Asia, OSCE/ODIHR, 17-18 June 2010, Dushanbe, Tajikistan, p. 5, which recommended, among other things, that “Expedited proceedings, especially plea bargaining agreements, should not be used in criminal justice systems where pre-trial proceedings are plagued by ill-treatment and forced confessions, and where access to professional legal aid is limited.”

<sup>167</sup>Detained without trial: Fair Trials International’s response to the European Commission’s Green Paper on detention, Fair Trials International, October 2011, p. 10.

<sup>168</sup>McCoy, C. op. cit., p. 40 and Expert Forum on Criminal Justice for Central Asia, OSCE/ODIHR, 17-18 June 2010, Dushanbe, Tajikistan, p. 5.

#### 4. Improving prisoner data management systems

The accurate registration of the details of all prisoners is a requirement of international law.<sup>169</sup> In addition, creating and maintaining prisoner files is an essential component of effective prison management and plays an important part in improving the transparency and accountability of prison administrations. The total number of people held in custody, their classification, along with their health and rehabilitative needs provides important information for prison managers to identify resource requirements, set budgets, manage health and safety, and develop appropriate rehabilitative and treatment programmes. Accurate information about those held in prisons is also essential to improve the protection of prisoners and their access to justice—including the prevention of disappearances, torture and ill-treatment, monitoring of their cases, trial dates, sentences, eligibility for early release and release dates.

In practice, in many prison systems accurate prisoner information is lacking. This significantly undermines the possibility of following the cases of individual prisoners on a systematic basis and accurately and comprehensively identifying the major contributors to the growth of prisoner numbers and subsequent identification of relevant and appropriate measures to be agreed and coordinated across relevant agencies.

In order to ensure that an accurate information base is available to underpin strategies to reduce overcrowding in prisons:

- Prison administrations should develop prisoner file management systems and keep the files up-to-date in accordance with accepted good practice and international standards;
- Prison administrations and courts are advised to establish effective channels of information exchange, particularly on the cases of pre-trial detainees; and
- Prison administrations should ensure that a mechanism for regular monitoring of such files is established to facilitate detainees' timely transport to courts on the trial dates or to alert courts to overstay in prisons, as well as to ensure that prisoners are released on termination of their sentences.

##### **Developing a prisoner data management system and inter-agency cooperation in Lebanon**

Within the framework of the UNODC technical assistance programme to the Ministry of Justice (MoJ) in Lebanon, a pilot project on data management systems in prisons has been implemented in Roumieh prison in Beirut through the design of specialized software for prisoners in line with international standards and norms. The structure of the software was based on the newly-adopted individual prisoner files which are filled out on admission by social workers, in addition to the data collected during detention such as the number of visits, rehabilitation programmes and behaviour of prisoner, among others.

The data management system is considered to be an important monitoring tool for the individual files of prisoners. It also allows for the generation of detention-tracking reports that are considered as vital tools for the Commission responsible for decisions on early release in Roumieh prison.

<sup>169</sup>Principles on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions, Article 6; Declaration on the Protection of All Persons from Enforced Disappearance, Article 10; SMR, Rule 7; Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 12.

In order to prepare the ground for a smooth transfer of the prisons management from the Ministry of Interior to the Ministry of Justice (MoJ), this data management system has been directly linked to the central prison administration at the MoJ. This linkage allows the MoJ to track individual cases and deal efficiently with delays in the judicial procedure. The software also permits the MoJ to access detailed information concerning individual cases, including court and judge in charge, type of offence, length of pre-trial detention, etc. Thus the MOJ can undertake a case-by-case follow up, identify cases where relevant legislation is not being applied properly and issue regulations/administrative notes to avoid such violations, for example, in connection to non-compliance with the maximum pre-trial detention periods allowed by law.

Reports produced in July 2011 showed a clear decrease in the total number of inmates in Roumieh prison from 3,757 inmates in January to 2,633 in July 2011. These reports also reflect a small but encouraging impact of the data management system on the length of the judicial procedure: In January 2011 43.77 per cent of prisoners were sentenced and 56.23 per cent were in pre-trial detention; in July, 57.54 per cent prisoners were sentenced and 42.38 per cent were in pre-trial detention.

This analysis highlighted the importance of:

- (1) an up-to-date and functional prisoner file system;
- (2) the linkage of the data in individual prisons to a central point within the ministry responsible for prisons; and
- (3) the direct involvement of the judicial authorities in monitoring detention and imprisonment.

Source: UNODC Programme Office, Lebanon, 2011

See *UNODC Handbook on Prisoner File Management* for further guidance.

## 5. Improving transparency and accountability

### 5.1 Oversight of prisons

The existence of effective oversight mechanisms is important to ensure, inter alia, that the senior level hierarchy in prison administrations and state authorities are made aware, on a regular basis, of the challenges encountered in prisons, including the scale and impact of overcrowding.

#### Internal prison inspections

Internal prison inspections are those carried out on individual prisons by staff appointed by central prison administrations. Such inspections are common in all prison systems and may cover a wide range of issues, such as security, finance, prisoner rehabilitation and staff training. In many administrations these procedures will be measured against standards which have been developed centrally so as to ensure consistency between prisons.<sup>170</sup> Such inspections provide an excellent opportunity to assess levels of overcrowding, the impact of overcrowding on prison management and the prison regime, including any significant differences in levels of overcrowding in prison facilities, and to consider various options to reduce overcrowding levels nationally and in individual

<sup>170</sup>Coyle, A., *A Human Rights Approach to Prison Management*, p. 122.

prisons. The findings of prison inspections may also be used as a basis on which to make recommendations to legislators and policy-makers to take legislative measures to reduce the use of pre-trial detention or imprisonment.

### The external oversight of prisons

The types of external prison monitoring systems vary considerably from country to country. In many, judges have a prison oversight role, while in others the public prosecutor is required to ensure the legality and conditions of detention. In some jurisdictions chief inspectors of prisons visit prisons, while in others human rights commissions, ombudsmen, visitors' boards or other national monitoring bodies have the power to investigate and report on prison conditions. Non-governmental organizations are often permitted to visit prisons for monitoring purposes.

Countries which have ratified the *Optional Protocol to the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)* are required to set up National Preventive Mechanisms (NPMs)—special monitoring bodies—which have access to all places of detention. On the international level, the Subcommittee of the United Nations Committee Against Torture has the authority to visit all places of detention in such countries.

The International Committee of the Red Cross (ICRC) visits places of detention in more than 90 countries. The ICRC aims to secure humane treatment and conditions of detention for all persons deprived of their liberty, regardless of the reasons for their arrest and detention. In 2011, ICRC delegates visited 1,869 places of detention, enabling them to reach more than 540,000 people deprived of liberty, many of whom were living in overcrowded conditions.

In addition to direct support to prisoners and their families, places of detention and to detention management, the ICRC's activities may include:

- Support to the authorities for setting up prisoners file management systems, addressing excessive periods of pre-trial-detention, ensuring that prisoners are released on completion of their sentences;
- Facilitation of exchange of information and cooperation mechanisms between the various concerned criminal justice authorities and agencies;
- Support to the authorities for setting up complaints mechanisms, encouraging the establishment of NPMs in accordance with OPCAT.

On the regional level, the Special Rapporteur on Prison Conditions in Africa works under the African Commission on Human and Peoples' Rights and the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) is a body of the Council of Europe. Both have the right to visit places of detention and report to the government of the country on their findings. The Inter-American Commission on Human Rights can investigate abuses in individual countries and receive petitions from individuals

The reports and recommendations of these national and international bodies can shed light, from an independent perspective, on the situation in prisons, including the conditions in which prisoners live, their treatment and the level and impact of

overcrowding. Their recommendations can help governments to address challenges and give them a persuasive basis on which to undertake reforms, where they are required. The external monitoring of prisons by national bodies can also be key to identifying those who should be released from prisons, due to a variety of reasons.

Bearing in mind the positive input prison inspections can have on identifying challenges and bringing them to the attention of other criminal justice authorities, as well as the public:

- Prison authorities are encouraged to ensure that internal prison inspections are used as an opportunity to assess levels of overcrowding, as well as the possible causes of such overcrowding, in the prison system and individual prisons, and take appropriate measures to resolve the problems faced, which may include practical measures at field level and recommendations for legislative and policy reviews to relevant authorities;
- Authorities are also encouraged to cooperate with international, regional and national bodies responsible for monitoring prisons;
- It is also recommended that they ratify OPCAT, where they have not already done so, and to facilitate the setting up of NPMs.

**The Subcommittee on the Prevention of Torture draws attention to overcrowding in pre-trial detention facilities**

“It is evident to the Subcommittee that the overuse—and misuse—of pre-trial detention is a general problem that needs to be tackled as a matter of priority. It creates or contributes to the problem of endemic overcrowding, which is known to be rife in many States parties. The Subcommittee continues to be bemused by the complacency which seems to surround the routine use of pre-trial detention for prolonged periods and the resulting chronic overcrowding, and all its associated problems. It is no secret that this is a problem in many States party to the Optional Protocol. It ought not to require a visit by the Subcommittee (or by its NPM) for States parties to begin the process of addressing these problems, as they are in any case bound to do as a consequence of their pre-existing human rights commitment ... ”

*Source: Fourth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, April-December 2010, 3 February 2011 (United Nations Ref: CAT/C/46/2)*

- Governments may also consider establishing a system of monitoring, for example by inspecting judges, to undertake regular reviews of the legal status of prisoners. Such judicial inspections can help identify those who may have overstayed the maximum pre-trial detention period, those who should be released on bail, those eligible for alternative sanctions, those who have been held in detention longer than the sentence they would have received had they been convicted, those whose sentences have been completed, but have not been released or vulnerable prisoners such as juveniles and women with small children, whose pre-trial detention should be avoided as far as possible.

### Judicial oversight of prisons in Kenya

In Kenya a practice has developed in which judges are informed - by paralegals and prison officers—of cases of prisoners who would have been eligible for community service but for whom—for whatever reason - this was not considered. An assessment is undertaken by the probation service and in suitable cases the offenders can be released to complete their sentences on community service. One High Court Judge who is the Chairman of the National CSO Committee Secretariat has, in particular, been visiting prisons and converting short prison sentences to community service in appropriate cases. During 2010 requests for assessments were made in respect of 939 prisoners serving sentences. Of these 713 reports were prepared and in 292 cases the sentence was in effect commuted to community service. It is planned that up to 25 judges might be able to undertake a similar role in this so-called decongestion programme in the future.

Source: *Feedback Probation Service 2005-10, Kenya Probation Service*

## 5.2 Eliminating corruption

Perhaps one of the most challenging, but crucial tasks that must be dealt with to improve the fairness and efficiency of the criminal justice system is to eliminate corruption among criminal justice actors. Corruption can have a significant impact on the number of people who are arrested, detained and imprisoned. There is particular risk of bribes being required during the initial period of arrest when decisions are being taken to detain, caution or divert by law enforcement officials.

The *Code of Conduct for Law Enforcement Officials* is very clear that corruption in all its forms, as well as attempted corruption is prohibited.<sup>171</sup> The *Basic Principles on the Independence of the Judiciary* set out the principles of independence, recruitment and training of the judiciary to ensure that they conduct their duties independent of political and other pressures, with integrity and impartiality. The *Guidelines on the Role of Prosecutors* include similar principles and underline the need for prosecutors to have appropriate education and training on the ideals and ethical duties of their office.<sup>172</sup> The *Bangalore Principles of Judicial Conduct*<sup>173</sup> emphasize that “integrity is essential to the proper discharge of the judicial office.”<sup>174</sup> Principle 4.14 provides that “A judge and members of the judge’s family, shall neither ask for, nor accept, any gift, bequest, loan or favour in relation to anything done or to be done or omitted to be done by the judge in connection with the performance of judicial duties.”

There are a variety measures that can be taken to reduce and eliminate corruption in the criminal justice system. The following are some key areas that need focus:

- The recruitment procedures and training of criminal justice officials are of great importance. Recruitment should be based on personal qualifications and merit; persons selected should be individuals of integrity; and the recruitment procedures should be transparent, objective and non-discriminatory;

<sup>171</sup>Code of Conduct for Law Enforcement Officials, Article 7.

<sup>172</sup>Guidelines on the Role of Prosecutors, Guideline 1 and 2 (b).

<sup>173</sup>The Bangalore Draft Code of Judicial Conduct 2001 adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, November 25-26, 2002.

<sup>174</sup>Value 3: Integrity; Principle.

- Training needs to be based on the fundamental values of the rule of law and the protection of human rights, and include training on compliance with ethical standards for criminal justice officials;
- Adequate remuneration for criminal justice officials is also a key safeguard against corruption of all kinds;
- Safeguards against corruption should include measures to ensure transparency and accountability, such as rules that require the careful recording of all decisions to arrest, with justification, the circumstances of the arrest and the name of the arresting officer;
- There is a need to ensure strict supervision, including a clear chain of command, of all law enforcement officials responsible for arrests and detentions;
- Corruption cannot be sustainably reduced and eradicated in a piecemeal manner. Efforts to combat corruption among all criminal justice actors should be placed within an overall comprehensive strategy, in line with the *United Nations Convention against Corruption*. Tools and publications developed by UNODC may assist states in implementing the provision of the Convention.

## KEY RECOMMENDATIONS

### IMPROVING THE EFFICIENCY OF THE CRIMINAL JUSTICE PROCESS

#### ***Building the capacity of criminal justice actors***

To legislators and policymakers

- To develop and implement capacity building and training programmes for criminal justice actors, which include the human rights of detainees and prisoners; criteria for decision making on arrest and prosecution; guidance on diversion from the criminal justice system; investigation techniques that comply with the requirements of international standards; fair trials and sentencing; social reintegration of prisoners and early release decisions.
- To review the evaluation of the performance of criminal justice actors to ensure that it is based on criteria that measure the efficiency of criminal justice activities, in terms of their compliance with international human rights standards.
- To ensure that there is adequate budgetary allocation for the administration of criminal justice.

#### ***Improving cooperation mechanisms between criminal justice agencies***

To all criminal justice actors—the police and prosecution services, courts and prison administrations

- To establish mechanisms of cooperation to address the causes for the delays in the criminal justice process, so that case backlogs can be approached in a systematic manner and pressure on prisons relieved by joint action.

#### ***Simplifying and speeding up the criminal justice process***

- To undertake a thorough review of the operation of the criminal justice process, including court administration procedures, to identify how they may be simplified, in order to speed up the criminal justice process.

**Improving prisoner data management systems****To prison administrators**

- To develop prisoner file management systems and keep the files up-to-date.
- To establish effective channels of information exchange with courts, particularly on the cases of pre-trial detainees.
- To ensure that a mechanism for regular monitoring of such files is established to facilitate the timely transport of detainees to courts on the dates set for trial or to alert courts to overstays of detainees in prisons, as well as to ensure that prisoners are released on termination of their sentences.

**Improving transparency and accountability****To policy and decision makers**

- To ensure that internal prison inspections are used as an opportunity to assess levels of overcrowding in the prison system and individual prisons, as well as the possible causes of such overcrowding, and take appropriate measures to resolve the problems faced.
- To consider establishing a system of monitoring, for example by inspecting judges, to undertake regular reviews of the legal status of prisoners.
- To cooperate with international, regional and national bodies responsible for monitoring prisons.
- To ratify OPCAT and to facilitate the setting up of National Preventive Mechanisms.
- To ensure that the recruitment of criminal justice officials is based on personal qualifications and merit; persons selected are individuals of integrity; and that the recruitment procedures are transparent, objective and non-discriminatory.
- To ensure that training of criminal justice officials is based on the fundamental values of the rule of law and the protection of human rights, and includes training on compliance with ethical standards and the prohibition of all forms of corruption.
- To provide adequate remuneration for criminal justice officials to safeguard against corruption of all kinds;
- To put in place mechanisms for the strict supervision, including a clear chain of command, of all law enforcement officials responsible for arrests and detentions.
- To ensure that efforts to combat corruption among all criminal justice actors should be placed within an overall comprehensive strategy, in line with the *United Nations Convention against Corruption*.

## CHAPTER D. ACCESS TO LEGAL ASSISTANCE AND LEGAL AID

Ensuring that prisoners are able to benefit from the assistance of legal counsel during criminal proceedings is not only a key requirement of international law, but also an effective way in which to reduce detention, the duration of detention, unfair sentencing and imprisonment.

Defendants enjoy the right to have counsel assigned under Article 14(3)(d) of the ICCPR, when the interests of justice require it. Such assistance is to be free-of-charge when the accused is unable to pay due to insufficient means. It is generally recognized that the interests of justice require legal assistance, at least, whenever the person is in detention, the case can result in imprisonment or the death penalty. *The Basic Principles on the Role of Lawyers* provide that, in order to ensure that all citizens have equal access to justice, governments are required to provide sufficient funding and other resources to provide legal counsel for the poor and disadvantaged.<sup>175</sup>

Article 6(3) of the *European Convention on Human Rights* includes similar provisions. Access to legal counsel is an inalienable right according to the *American Convention on Human Rights*, which the state should provide.<sup>176</sup> The *American Convention on Human Rights* does not limit state-funded legal assistance to cases where the interest of justice so require. Nor does it mention the inability of the accused to pay for a lawyer, as a condition for eligibility for state-funded legal aid. The *African Charter on Human and People's Rights* does not provide for state-funded legal aid when an accused cannot afford to pay for legal assistance, but the resolution on *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa* of the African Commission on Human and Peoples Rights provides that an accused has the "right to have legal assistance assigned to him or her in any case where the interests of justice so require, and without payment by the accused... if he or she does not have sufficient means to pay for it".<sup>177</sup>

In 2003, the European Commission issued a statement which said that "whilst all the rights that make up the concept of 'fair trial rights' were important, some rights were so fundamental that they should be given priority at this stage. First of all among these was the right to legal advice and assistance. If an accused person has no lawyer, they are less likely to be aware of their other rights and therefore to have those rights respected. The Commission sees this right as the foundation of all other rights."<sup>178</sup>

With the adoption of resolution 2007/24 of 26 July 2007 on international cooperation for the improvement of access to legal aid in criminal justice systems, particularly in Africa, the Economic and Social Council requested UNODC to study ways and means of strengthening access to legal aid in criminal justice systems, as well as the possibility of developing an instrument such as a declaration of basic principles or

<sup>175</sup>Principle 3, the Basic Principles on the Role of Lawyers.

<sup>176</sup>American Convention on Human Rights, O.A.S.Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force July 18, 1978, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992), Article 8, para. 2, d and e.

<sup>177</sup>Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principle H (a).

<sup>178</sup>European Commission, Procedural Safeguards for Suspects and Defendants in Criminal Proceedings Throughout the European Union, Green Paper from the Commission, Brussels, 19 February 2003, COM(2003) 75 final, para. 2.5.

a set of guidelines for improving access to legal aid in criminal justice systems, taking into account the *Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa* (the Lilongwe Declaration)<sup>179</sup> and other relevant materials. In May 2012 the United Nations Commission on Crime Prevention and Criminal Justice adopted the *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*, which were subsequently adopted by the General Assembly in its resolution 67/187 of 20 December 2012.

This new instrument will provide guidance to states on the fundamental principles and specific elements on which a national legal aid system in criminal justice should be based.

A suspect's and prisoner's right to legal assistance applies to all stages of the criminal proceedings, including during the preliminary investigation, before and during trial, following conviction and sentencing and during imprisonment.

### 1. Access to legal counsel during pre-trial detention

In addition to the above-mentioned international and regional standards, the *United Nations Basic Principles on the Role of Lawyers* provide that governments must ensure that all persons arrested or detained, with or without criminal charge, must have prompt access to a lawyer, and in any case not later than forty-eight hours from the time of arrest or detention.<sup>180</sup>

The right to prompt legal assistance upon arrest and detention is essential both in order to guarantee the right to an efficient defence and for the purpose of protecting the physical and mental integrity of the person deprived of his or her liberty. The right to be defended by counsel includes the right to notification of the right to counsel, the right of access to and confidential communications with counsel and the right to assistance by counsel of choice or by qualified appointed counsel.

During the pre-trial stage, lawyers and other legal aid providers (see Section 4.1) can assist their clients and contribute to the reduction of the pre-trial prison population in many ways, including by ensuring that defendants are dismissed where arrests are arbitrary, by arranging diversion where appropriate and arguing for bail.<sup>181</sup> They can gather and provide information to the police and/or the court which is relevant to the decision as to whether they fulfil legal criteria for release.<sup>182</sup> They can also ensure that the case does not get "lost" among hundreds of others, thereby avoiding delays in prosecution.

<sup>179</sup>The Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa was adopted by the Conference on Legal Aid in Criminal Justice: the Role of Lawyers, Non-Lawyers and Other Service Providers in Africa, held in Lilongwe from 22 to 24 November 2004. The text of the Declaration is available in *Official Records of the Economic and Social Council, 2007, Supplement No. 10 (E/2007/30)*, chap.I, sect.B, draft resolution VI, annexes I and II.

<sup>180</sup>United Nations Basic Principles on the Role of Lawyers, Principle 7.

<sup>181</sup>For example, according to independent evaluations of two pilot programmes in Washington State, where additional support staff and lawyers were made available to public defender offices in three courts, the time required to resolve cases was shortened, incarceration rates were reduced and deferred prosecutions increased. See Luchansky, B., "The Public Defense Pilot Projects, Washington State Office of Public Defense", Looking Glass Analytics, Washington State Office of Public Defense, June 2010.

<sup>182</sup>Open Society Foundations, Open Society Justice Initiative, *Improving Pretrial Justice: The Roles of Lawyers and Paralegals* (2012), p. 45; see also *ibid*.

A key requirement for access to effective legal assistance at the investigative stage of the criminal process is the availability of a lawyer without delay. It is at this time that the police will interview the suspect and take decisions about whether to initiate formal legal proceedings, and whether to detain the person.<sup>183</sup> Decisions made at this stage will influence subsequent developments.

The *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems* acknowledge that gaining access to effective legal assistance at the investigative stage of the criminal process requires an effective mechanism for ensuring, as a minimum, that:<sup>184</sup>

- Suspects are informed of their right to legal assistance and legal aid;
- Suspects are provided opportunities and facilities for contacting a suitably qualified lawyer or other legal aid provider without delay; and
- Facilities are provided for legal representatives to consult with suspects in private.

In order to enable such measures to be effectively implemented, the following need to be ensured<sup>185</sup>:

- Law enforcement officials' training to include information on the rights of suspects to have access to legal counsel, and where necessary, legal aid, promptly following arrest;
- There needs to be a legal obligation for law enforcement officials to inform suspects of this right;
- Law enforcement officials need to provide suspects with the means and assist them with making contacts with lawyers and legal aid institutions;
- Information on and contact details of legal aid providers need to be available to law enforcement officials for them to fulfil their obligations;
- Consideration should be given to providing preliminary legal aid to persons urgently requiring legal aid at police stations, detention centres or courts while their eligibility is being determined.

In order to prevent delays in providing access to legal assistance at this crucial time, various types of advice and assistance schemes at police stations, which may combine private lawyers, public defenders and paralegals, have been established in a number of countries.<sup>186</sup> In some countries duty lawyer schemes have been established to ensure that a lawyer or paralegal is always available. (See Box for an example).

<sup>183</sup>Ibid., p. 43.

<sup>184</sup>United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, guidelines 2 (Right to be informed on legal aid), 3 (Other rights of persons detained, arrested, suspected or accused of, or charged with a criminal offence) and 4 (Legal aid at the pretrial stage).

<sup>185</sup>See Open Society Foundations, Open Society Justice Initiative, *Improving Pretrial Justice: The Roles of Lawyers and Paralegals* (2012), pp. 43, 44 for these and additional requirements.

<sup>186</sup>Ibid. p. 64.

### **Nigeria—duty solicitors and national youth volunteers help reduce the number of pre-trial detainees and the length of their detention in Nigeria**

Nigeria's prison population is low in relation to its overall population. Many of Nigeria's prisons however are overcrowded and pre-trial detention is a severe problem. In 2009, 69 per cent of detainees were in pre-trial custody and the average period of detention was 3.7 years. Studies show that it is not uncommon for those accused of capital offences to spend over 10 years in pre-trial detention.

In 2005, REPLACE launched a project in four states—Imo, Kaduna, Ondo and Sokoto—with support from the Open Society Institute Justice Initiative. Using a duty solicitor model the project sought to:

- Reduce the number of pre-trial detainees as a proportion of the overall prison population;
- Reduce the average length of pre-trial detention;
- Test a low-cost model of pre-trial legal assistance supporting a duty solicitor scheme with volunteers from the national youth service corps; and
- Contribute to a national level consultation on access to legal aid.

#### ***Duty solicitor scheme***

The duty solicitor scheme engages four lawyers who work with the Legal Aid Council and are responsible for the supervision of a group of national youth service corps volunteers. The volunteers are recent law graduates, expected to provide 'on-call' legal assistance at designated police stations 24 hours a day, 7 days a week. They intervene promptly in cases where the criminal suspect does not have a private lawyer. They provide basic legal advice and follow-up and conduct specific actions such as bail applications. In total, four lawyers and 24 volunteers are engaged to work with the project.

#### ***Results***

During the first nine months of the project, an average 72 per cent reduction in the duration of pre-trial detention was recorded in the pilot states. The remand population also declined by nearly 20 per cent, representing a total of 611 detainees who were assisted and released. In 2007, a total of 1,188 pre-trial detainees were released from police and prison detention. In 2008, a total of 2,579 detainees were released and between January and June 2009 1,704 detainees were released.

The majority of detainees released spent a matter of days in detention rather than the national average of 3.7 years.

#### ***Policy implications***

Advocacy efforts by REPLACE have invigorated the debate about pre-trial detention in Nigeria and have led to a number of initiatives.

*Mandatory review of cases:* REPLACE was successful in its request for the implementation of a systematic and mandatory review process of all remand orders.

*Review of legal aid delivery:* Lawyers involved in the pilot collaborated with government officials to draft the Legal Aid Amendment Bill and the Administration of Criminal Justice Bill. These bills were still pending at the time of writing but it is hoped that—when adopted—they will contribute to the creation of a fairer criminal justice process.

*Source: Open Society Justice Initiative, Duty Solicitors and National Youth Volunteers, Rights Enforcement and Public Law Centre (REPLACE) - Nigeria.*

## 2. Access to legal counsel during trials

During the trial process lawyers play a key role in contributing to the fairness of hearings, thereby helping defendants who are innocent to be released, and avoiding harsh sentencing, where they are not justified.

International instruments are very clear that authorities need to ensure that every person charged with a crime for which imprisonment or the death penalty may be imposed has access to legal aid in all proceedings at court, including on appeal.

In order to ensure that the right to defence is meaningful, anyone accused of a criminal offence and their lawyer must have adequate time and facilities to prepare the defence.<sup>187</sup>

The nature of the proceedings (whether preliminary, trial or appeal) and the factual circumstances of each case will impact on what may be considered as adequate time. Factors include the complexity of the case, a suspect's access to evidence and to legal representation as well as the time limits prescribed within national law.<sup>188</sup> The right to trial within a reasonable time may be balanced against the right to have adequate time to prepare a defence.

The right to adequate facilities to prepare a defence requires that the accused and their counsel must be granted access to appropriate information, including documents, information and other evidence that might help the accused prepare their case.<sup>189</sup> The Human Rights Committee has stated that the information to be given to a person charged with a criminal offence must indicate “both the law and the alleged facts on which [the charge] is based.”<sup>190</sup>

### Afghanistan—legal aid services help ensure fair trials

Da Qanoon Ghush-tonky, an NGO in Afghanistan has been providing legal aid services to women, children and indigent men in criminal and family cases since 2006 and has achieved considerable success in achieving the release of its clients from prison or ensuring fair trials.

In 2007 Da Qanoon Ghush-tonky reported that since 2006 they had covered 4,000 criminal cases. Fifty per cent were released. Sixteen per cent were convicted, but 80 per cent had received a much lesser sentence than they almost certainly would have done if they had been without a lawyer. Other cases were in progress. When provided with legal representation, a number of persons sentenced to the death penalty at the primary court level were released or received very short prison terms at the final stage.

*Source: UNODC Implementing Alternatives to Imprisonment in Afghanistan, in line with International Standards and National Legislation, 2008, p. 53*

<sup>187</sup>Article 14(3)(b) of the ICCPR, Article 8(2)(c) of the American Convention, Article 6(3)(b) of the European Convention.

<sup>188</sup>See Human Rights Committee General Comment 13, para. 9.

<sup>189</sup>Principle 21 of the Basic Principles on the Role of Lawyers.

<sup>190</sup>Human Rights Committee General Comment 13, para. 8.

In addition to their main role of defending their clients during trial, lawyers can provide crucial assistance to ensure that the appropriate people are at court on the right date and at the right time, and make sure that the information necessary for the hearing to proceed and the appropriate decision to be made is available and presented to the court.<sup>191</sup> A further function that can be performed by lawyers and other legal aid providers is to ensure that the accused understands the purpose of the hearing. They can also provide information to defendants so that they can make an informed decision to plead guilty, where this is appropriate, at an early hearing.<sup>192</sup> This can help reduce the time spent in custody and for credit to be given for the purpose of sentencing.

### 3. Access to legal counsel post-sentencing

Ensuring that prisoners have access to legal counsel following conviction and sentencing is key to enabling prisoners to enjoy their right to legal assistance during complaints procedures, appeals, applications for pardon or clemency. In the context of overcrowding, access to legal counsel is of particular importance to enable prisoners to prepare their appeals, as well as to apply for early conditional release in a timely and legally informed manner, in countries where prisoners themselves need to act in order to be considered for early release.

Prison authorities have an important role to play in enabling prisoners to enjoy their right to have access to legal counsel, for example, by:

- Informing all prisoners on admission, orally and in writing, about their right to confidential legal assistance during their imprisonment, including their right to legal aid;
- Providing such information in a manner that corresponds to the needs of illiterate persons, minorities, persons with disabilities and children and in a language they understand;
- Assisting those who do not have their own lawyers with information about lawyers and legal aid providers;
- Providing facilities for contact with lawyers and legal aid providers;
- Ensuring that meetings with legal counsel are not hindered or delayed, and that prison policies and facilities enable such meetings to take place in private—out of hearing of prison staff.

In addition, authorities may consider encouraging bar and legal associations and other legal aid providers to draw up rosters of lawyers and other legal aid providers to visit prisons to provide legal advice and assistance, free of charge, to prisoners.<sup>193</sup>

<sup>191</sup>Open Society Foundations, Open Society Justice Initiative, *Improving Pretrial Justice: The Roles of Lawyers and Paralegals* (2012), p. 50.

<sup>192</sup>Ibid. p. 51.

<sup>193</sup>United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, Guideline 6 (Legal aid at the post-trial stage).

In some countries legal assistance services have been set up in prisons to monitor the legality of detention, as well as to ensure access to lawyers and legal aid services where necessary. This has proved to be an effective and practical model which could be replicated.

#### 4. Strengthening access to legal aid mechanisms

Legal aid, in its conventional definition is the provision of free or inexpensive legal services to those who cannot afford to pay the full cost. The Lilongwe Declaration describes legal aid as including “legal advice, assistance, representation, education, and mechanisms for alternative dispute resolution; and to include a wide range of stakeholders, such as non-governmental organizations, community-based organizations, religious and non-religious charitable organizations, professional bodies and associations, and academic institutions.”<sup>194</sup>

The *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems* establish that states should consider the provision of legal aid as their responsibility and should put in place a comprehensive legal aid system that is accessible and effective, has a nationwide reach and is available to all without discrimination. In addition to “legal advice, assistance and representation” legal aid is intended to include legal education, access to legal information and other services provided through alternative dispute resolution mechanisms and restorative justice processes.

The guidelines set out issues that should be addressed by legislators and policymakers in order to ensure that all persons, notwithstanding their financial means, ethnicity, nationality or other status, as well as their geographical location, enjoy equal access to legal counsel. These include:

- Enacting specific legislation on legal aid; and
- Taking measures to ensure that a comprehensive legal aid system is in place that is accessible, effective and sustainable.

Relevant ministries and authorities should:

- Make adequate budgetary provisions for legal aid in their planning processes, including providing dedicated and sustainable funding mechanisms; and
- Put in place the requisite administrative and organizational structures to ensure that the legal aid system functions effectively and is accessible throughout the country.

##### 4.1. Models of legal aid provision

There are various models of legal aid provision:

*Public defender schemes:* legal assistance is provided by lawyers who work in specialist offices, funded by national or federal governments, or by NGOs.<sup>195</sup> In some countries there is a national public defender service, in other countries the schemes are more localized.<sup>196</sup>

<sup>194</sup>The Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa, para. 1.

<sup>195</sup>Open Society Foundations, Open Society Justice Initiative, *Improving Pretrial Justice: The Roles of Lawyers and Paralegals* (2012), p. 66.

<sup>196</sup>*Ibid*, p. 67.

*Private lawyers:* These include *contract* schemes, *ex officio* schemes and *pro bono* schemes, where lawyers are contracted, appointed to take up individual cases or have a professional obligation to undertake a number of cases per annum, in exchange for fees or unpaid, depending on the scheme.<sup>197</sup>

*Paralegals* may fulfil a range of functions relating to criminal defence. In some schemes, paralegals work for organizations where the majority of legal advisers are fully qualified lawyers.<sup>198</sup> In others, they work for organizations where paralegals make up the majority of the advisers employed. In some schemes paralegals perform functions that lawyers would otherwise provide. In others, they do work that lawyers would not otherwise do, or work for which they are better qualified or suited.<sup>199</sup>

*Law students* may perform some of the same functions as paralegals, with appropriate training, supervision and organization. There are many examples of legal aid clinics where students work under the supervision of a lawyer or law lecturer on various aspects of criminal cases.<sup>200</sup>

Authorities will need to assess and decide the suitability of different models in their particular jurisdictions.

To ensure the effective implementation of their nationwide legal aid schemes, authorities may consider establishing a legal aid body or authority to provide, administer, coordinate and monitor legal aid services. Such a body would need to be independent of the government, due to the conflicts inherent in providing state-funded legal services for those who are suspected or accused of committing criminal offences.<sup>201</sup> It would need to have the authority and means to provide legal aid, including, but not limited to, the appointment of staff, the designation of legal aid services to individuals, the setting of criteria and accreditation of legal aid providers, including training requirements, the oversight of legal aid providers and the establishment of independent bodies to handle complaints against them.

The legal aid body would need to develop, in consultation with key justice sector stakeholders and civil society organizations, a long-term strategy to guide the provision of legal aid and its sustainability.

#### **Non-state legal assistance provider in Guinea supported by ICRC**

In parallel with persuasion activities to promote respect for judicial guarantees in Guinea, the ICRC provided the NGO *Même Droits pour Tous* (MDT) with equipment for its offices and information systems in 2007. MDT runs a legal assistance programme for detainees in the Central Prison of Conakry through which detainees' judicial circumstances are systematically checked for irregularities, and interventions are made as needed. On occasion, MDT takes action in favour of individual detainees identified by the ICRC.

Source: ICRC Delegation, Guinea

<sup>197</sup>Ibid., pp. 68-69.

<sup>198</sup>Ibid., pp. 70-71.

<sup>199</sup>Ibid., p. 71.

<sup>200</sup>Ibid., p. 72.

<sup>201</sup>Ibid. p. 62.

#### 4.2 *Child-friendly legal aid*

As discussed earlier, the detention and imprisonment of children can often lead to a criminal career, with repeated returns to prison, for increasingly more serious offences, influencing levels of prison overcrowding in the long term. One of the means of ensuring that imprisonment is used as a last resort in the case of children, would be to ensure that all accused, detained and imprisoned children have access to legal aid<sup>202</sup> and that such legal aid is “child-friendly”. “Child-friendly” legal aid is the provision of legal assistance to children in criminal, civil and administrative proceedings that is accessible, age appropriate, multi-disciplinary, effective and responsive to the range of legal and social needs faced by children and youth. “Child-friendly” legal aid is delivered by lawyers and other professionals who are trained in children’s law and child and adolescent development and who are able to communicate effectively with children and their caretakers.<sup>203</sup>

Measures to be taken may include, among others:<sup>204</sup>

- The provision of information to children about their legal rights, in a manner appropriate to their age and maturity and in a language that a child can understand;
- The provision of such information to parents or guardians in addition to that given to the child;
- Adoption of legal aid legislation, policies and regulations that take into account the child’s rights and special developmental needs;
- The establishment of child-friendly legal aid service standards and professional codes of conduct and vetting procedures;
- Ensuring that legal aid providers representing children receive initial and ongoing training in children’s rights and related issues;
- The establishment of close cooperation and referral systems between legal aid providers and different professionals to obtain a comprehensive understanding of the child, as well as an assessment of his or her legal, psychological, social, emotional, physical and cognitive situation and needs.

#### 4.3 *Working with non-State legal aid providers*

Even when legislation is put in place for the provision of legal aid, the effectiveness of the system is influenced by the availability of a sufficient number of competent lawyers, the quality of their education and training, the caseload carried by each lawyer, the cooperation of other criminal justice actors, the level of awareness of the accused about their rights and the funding available to enable the institution of legal aid to function. In order for legal aid to be effective and sustainable states should

<sup>202</sup>See Art. 37 of the CRC and the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, Principle 11 (Legal aid in the best interests of the child).

<sup>203</sup>United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, Principle 11 (Legal aid in the best interests of the child) and Guideline 10 (Special measures for children). See also UNODC, UNICEF, UNDP, Child Friendly Legal Aid in Africa, p. iv ([http://www.unodc.org/pdf/criminal\\_justice/Child-Friendly\\_Legal\\_Aid\\_in\\_Africa.pdf](http://www.unodc.org/pdf/criminal_justice/Child-Friendly_Legal_Aid_in_Africa.pdf)).

<sup>204</sup>United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, Guideline 10 (Special measures for children).

consider strengthening the institutions which provide legal aid, as well as encouraging and facilitating partnerships with non-state legal aid providers, to reach the widest possible number of people.<sup>205</sup>

In the absence of lawyers and legal aid services in some countries, non-State legal aid providers, such as paralegals, universities and non-governmental legal aid clinics, have had considerable success in filling the gap by assisting suspects, prisoners and their families.

The advantage of legal aid provision by some non-State legal aid providers, such as paralegals, is that in many respects their services may go far beyond the narrower functions of specialist legal aid. In some countries paralegals have brought about important systemic changes in the way the criminal justice system functions, thereby providing a sustainable response to blockages in the criminal justice process.

To this end, paralegals can undertake the following tasks:<sup>206</sup>

- Assist, at police stations, with the screening of cases and identifying those that are suitable for diversion from the criminal justice system;
- Ensure that those in police custody do not overstay the statutory time limits and are processed more speedily;
- Inform the accused about the charges, the law, and the possibilities and implications of plea-bargaining, where appropriate;
- Facilitate the flow of information between different criminal justice agencies;
- Undertake a prison census, identify the profile of the pre-trial prison population and prepare actionable lists of prisoners to be presented to prison authorities, prosecutors and courts;
- Be trained to interview and draft affidavits and can assist lawyers in the presentation of cases;
- Assist in tracing witnesses and alerting parties to forthcoming trial dates;
- Attend courts to assist people navigate their way through the justice process.

At the same time, while working with paralegals and other legal aid providers who are not qualified lawyers, it is important to recognize the limits of their qualifications and expertise. The process should ensure that they can refer cases that fall beyond the scope of their expertise to lawyers and that their performance is subject to oversight.

The success achieved by the Paralegal Advisory Service Institute (PASI) in Malawi, which addressed the delays in the criminal justice process in a comprehensive, practical and systematic manner, responding to the needs encountered during its grass-roots work with prisoners and their families, has had a considerable impact in reducing the number of those held in pre-trial detention in Malawi, and has been referred

<sup>205</sup>In line with the Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa, para. 7 and the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, Principle 14 (Partnerships).

<sup>206</sup>United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, Guideline 14 (Paralegals), but also guidelines 4 (Legal aid at the pre-trial stage), 5 (Legal aid during court proceedings) and 6 (Legal aid at the post-trial stage).

to frequently in literature.<sup>207</sup> The PASI model has been replicated and adapted to similar circumstances in other countries, such as Benin, Kenya, Niger and Uganda, and on a pilot basis in Bangladesh.<sup>208</sup> Invitations to start a similar scheme have been received from Lesotho, Liberia, United Republic of Tanzania and Zambia.<sup>209</sup> (See Box for further details).

### Malawi—Paralegal Advisory Service Institute

In Malawi, paralegals in the Paralegal Advisory Service Institute engaged in an innovative experiment in public/private partnership, whereby independent, trained non-lawyers from four civil society organizations submitted to codes of conduct to work in prisons and police stations to provide front-line advice and assistance to people in conflict with the law.

The scheme comprises four pillars:

- Legal advice and assistance to those in conflict with the law in prison, in police custody and at court;
- Legal empowerment of prisoners so that they can represent themselves through conducting paralegal aid clinics inside the prisons on a daily basis;
- Linking up the criminal justice system by facilitating communication and better coordination among police, prisons, courts and the community; and
- Informing policy on legal aid.

The advice and assistance offered by paralegals is appropriate to the needs of the individual in the early stages of the criminal justice process. Paralegals work with groups of prisoners in prison and family members, or with the accused at court. They do not offer the confidential service provided by a lawyer to his or her client as they are not lawyers. At the police station, they interview children in conflict with the law with a view to screening them for possible diversion from the criminal justice system and attend (where they are admitted) at police interrogations of adult suspects.

In prison, paralegals employ interactive learning techniques and forum theatre skills to empower pre-trial prisoners in particular to understand the law and procedure and to apply it in their own cases. Paralegals aim to work with justice agencies and assist individuals in applying their legal rights and the protection offered under the Constitution. They discuss cases with prosecutors, draw up lists for magistrates and assist them in visiting prisons and conduct “camp courts”. They also assist the police, both in tracing parents (of children in conflict with the law), sureties and witnesses (to attend court) and at formal interviews with a suspect. Finally, they service monthly meetings of justice agencies and refer cases to lawyers. In short, they act as the link in the chain.

One of the key outcomes of PASI’s work has been to reduce the overall pre-trial prison population from 40–45 per cent of the overall population to 17.3 per cent in 2007. Since 2004 the mean average pre-trial population in Malawi has consistently been under 25 per cent.<sup>a</sup>

In terms of policy development, the Law Commission in Malawi formally recognized a role for paralegals in a legal aid bill and the Government is considering a strategy for legal aid based on the extensive use of paralegals (under the supervision of a lawyer).

<sup>207</sup>See for example, UNODC *Handbook on improving access to legal aid in Africa*, pp. 31-34; Stapleton, A., *Empowering the Poor to Access Criminal Justice – a Grass-Roots Perspective*, Legal Empowerment Papers, IDLO; Penal Reform International, *Making Law and Policy Work, A Handbook for Law and Policy Makers on Reforming Criminal Justice and Penal Legislation*, Policy and Practice, 2010, p. 45.

<sup>208</sup>Stapleton, A., *Empowering the Poor to Access Criminal Justice – a Grass-Roots Perspective*, Legal Empowerment Papers, IDLO, p. 4.

<sup>209</sup>*Ibid.*, p. 4.

An independent evaluation of the Paralegal Advisory Service Institute noted that its impact had extended beyond the changes it had made to the lives of prisoners and the workings of the criminal justice system.

Source: UNODC *Handbook on improving access to legal aid in Africa*, pp. 31-32 and Stapleton, A. *Empowering the Poor to Access Criminal Justice – a Grass-Roots Perspective*.

<sup>a</sup>Stapleton, A. *Empowering the Poor to Access Criminal Justice – a Grass-Roots Perspective*, p. 5.

In order to improve the accessibility and geographical coverage of legal aid, authorities may engage in partnerships with non-state legal service providers. The following measures may be taken to enable the establishment, as well as the efficient and effective functioning of such partnerships and the strengthening of legal aid mechanisms:

- Recognizing in the state’s legal system the role to be played by non-State legal aid services;
- Diversifying legal aid service providers by adopting a comprehensive approach, for example by encouraging the establishment of centres to provide legal aid services that are staffed by lawyers and paralegals, and by entering into agreements with law societies and bar associations, university law clinics, and non-governmental and other organizations to provide legal aid services;
- Setting quality standards for legal aid services and supporting the development of standardized training programmes for non-State legal aid providers;
- Establishing monitoring and evaluation mechanisms to ensure the quality of legal aid services provided by non-State legal aid providers; and
- Working with all legal aid providers to increase outreach, quality and impact and facilitate access to legal aid in all parts of the country and in all communities, especially in rural and economically and socially disadvantaged areas and groups.

#### 4.4 Funding

Most legal aid providers face serious funding challenges, resulting in the shortage of lawyers available to provide the services required, resulting in an overload of cases that each lawyer is responsible to process and the lowering of the quality of legal aid provided. While initial investment in developing legal aid provision is likely to require substantial funding, long-term savings that will be made in reducing detention, the duration of detention and imprisonment/length of prison sentences, as well as collateral costs, will most probably save costs to the State.<sup>210</sup>

<sup>210</sup>For example, according to a randomized controlled experiment conducted in Baltimore, Maryland, United States, it was found that for every person given a lawyer at the bail hearing, compared to those who had not had access to lawyers, 10 bed days were saved, due to the reduced duration of detention, and 6 bed days were saved for people who ultimately had their cases dropped. Further, it was estimated that if Baltimore guaranteed representation at bail, it would save \$4.5 million annually. Roger Bowles, *Pre-Trial Legal Aid for Criminal Defendants: A Cost-Benefit Approach* (Centre for Criminal Justice Economics and Psychology, University of York, UK) & Mark Cohen (Vanderbilt University, Nashville, Tennessee, USA), DFID London, UK & OSJI, New York, p. 12.

Measures to improve the financial basis for legal aid provision may include the establishment of a legal aid fund to finance legal aid schemes, support legal aid providers such as bar associations, university law clinics and sponsor non-governmental organizations and other organizations to provide legal aid services throughout the country.

They may also include identifying fiscal mechanisms for channelling funds to the legal aid fund such as:

- Fixing a percentage of the state's criminal justice budget to be allocated to legal aid services commensurate with the needs of effective legal aid provision;
- Using funds recovered from criminal activities by seizure or fines to cover legal aid services. Such measures could be accompanied by increasing the offences which may carry a fine, instead of a prison term (see chapter F), and allocating a percentage of fines received to contribute to the establishment and management of legal aid schemes.

In addition, consideration may be given to identifying and putting in place incentives for lawyers to work in rural and economically and socially disadvantaged areas (i.e. tax exemptions or reductions, reduction in student loan payments, etc.).

#### *4.5 Quality of legal aid*

In order for legal aid provision to be effective, it is essential not only that it is accessible to the largest possible number of people, but also that it is not of poor quality. To this end, it is crucial to make adequate provisions for staffing and ensure that professionals working for the national legal aid system possess the qualifications and training appropriate for the services to be provided. Appropriate accreditation and systems of monitoring need to be put in place to ensure that lawyers have the necessary knowledge and skills.

### **5. Legal awareness and legal empowerment**

One of the most important aspects of making legal aid accessible to everyone is to ensure that those who face criminal charges are aware of their rights, including to legal aid. This aspect of the concept of legal aid should not be underestimated as it can have a very significant impact on access to justice and levels of detention and imprisonment. It is also important to confront misconceptions in some societies where using the services of a lawyer implies guilt.

Legal awareness and education may be provided in schools, as part of the national curriculum, via the media, as well as by specific legal clinics for those who are involved in the criminal justice system as suspects/detainees, or victims or their families.

The legal empowerment of prisoners can be an effective means by which to enable them to understand their cases and consequences of possible courses of action, as well as to represent themselves in courts. The example of paralegal aid clinics conducted inside the prisons on a daily basis by PASI in Malawi, referred to earlier, is one example of how this may be achieved.

**KEY RECOMMENDATIONS*****ACCESS TO LEGAL COUNSEL DURING PRE-TRIAL DETENTION*****To legislators, policymakers and law enforcement officials**

- To include in the training of law enforcement officials issues relating to the right of suspects to legal counsel and legal aid promptly following arrest and to ensure that there is a legal obligation for law enforcement officials to inform those arrested of this right.
- To ensure that law enforcement officials assist detainees to make contacts with lawyers and legal aid institutions and to provide law enforcement officials with the information on and contact details of legal aid providers.
- To give consideration to providing preliminary legal aid to persons urgently requiring legal aid at police stations, detention centres or courts while their eligibility is being determined.

***ACCESS TO LEGAL COUNSEL DURING TRIALS*****To legislators, policymakers, the prosecution service and the judiciary**

- To ensure that every person charged with a crime for which imprisonment or the death penalty may be imposed has access to effective legal aid in all proceedings at court, including on appeal.
- To put in place legislative and practical measures that ensure that anyone accused of a criminal offence and their lawyer have adequate time and facilities to prepare the defence, and within this context, ensure that the accused and their counsel are granted access to relevant documents, information and other evidence that might help the accused prepare their case.

***ACCESS TO LEGAL COUNSEL POST-SENTENCING*****To prison administrations**

- To inform all prisoners on admission, orally and in writing, of their right to confidential legal assistance during imprisonment, including their right to legal aid and to provide such information in a manner that corresponds to the needs of illiterate persons, minorities, persons with disabilities and children and in a language they understand.
- To assist those who do not have their own lawyers with information about lawyers and legal aid providers.
- To provide facilities for contact with lawyers and legal aid providers, to ensure that meetings with legal counsel are not hindered or delayed and that prison policies and facilities enable such meetings to take place in private.

***STRENGTHENING ACCESS TO LEGAL AID MECHANISMS*****To legislators and policymakers**

- To consider enacting specific legislation on legal aid, where necessary, so that all suspects and prisoners, notwithstanding their financial means, ethnicity, nationality or other status, as well as their geographical location, enjoy equal access to legal counsel.
- To consider establishing a legal aid body or authority to provide, administer, coordinate and monitor legal aid services.

- To make adequate and specific provisions for staffing the national legal aid system commensurate with the needs—and to ensure that professionals working for the national legal aid system possess the qualifications and training appropriate for the services they provide.
- To work with all legal aid providers to increase outreach, quality and impact and facilitate access to legal aid in all parts of the country and in all communities, especially in rural and economically and socially disadvantaged areas and groups.
- To put in place appropriate accreditation and systems of monitoring to ensure that lawyers have the necessary knowledge and skills to advise their clients in an effective manner.

**To policymakers, including relevant ministries, such as the Ministry of Justice and Ministry of Finance**

- To ensure that adequate budgetary provisions for legal aid are included in the planning processes, including providing dedicated and sustainable funding mechanisms.
- To put in place the requisite administrative and organizational structures to ensure that the legal aid system functions effectively and is accessible throughout the country.

***CHILD-FRIENDLY LEGAL AID***

**To legislators and policymakers**

- To put in place legislation and practical measures to ensure that children who come in contact with the criminal justice system can enjoy the right to child-friendly legal aid services.

***WORKING WITH NON-STATE LEGAL AID PROVIDERS***

**To legislators, policymakers and legal aid providers**

- To recognize in the state's legal system the role to be played by non-state legal aid services.
- To diversify legal aid service providers by adopting a comprehensive approach for example by encouraging the establishment of centres to provide legal aid services that are staffed by lawyers and paralegals and by entering into agreements with law societies and bar associations, university law clinics and non-governmental and other organizations to provide legal aid services.
- To set up quality standards for legal aid services and to support the development of standardized training programmes for non-state legal aid providers.
- To establish monitoring and evaluation mechanisms to ensure the quality of legal aid services provided by non-state legal aid providers.

***LEGAL AWARENESS AND LEGAL EMPOWERMENT***

**To policymakers and relevant ministries**

- To provide legal awareness and education in schools, as part of the national curriculum, via the media, as well as specific legal clinics for those who are involved in the criminal justice system as suspects/detainees, victims or their families.

**To prison authorities**

- To enable the legal empowerment of prisoners, by working together with legal aid providers, so that they can understand their cases and the consequences of possible courses of action, as well as representing themselves in courts.

## CHAPTER E. REDUCING PRE-TRIAL DETENTION

As has been discussed in part I, chapter A, in many countries the proportion of people being held in pre-trial detention facilities is extremely high and the periods of their detention is often prolonged well beyond any legal limits. Even in countries with low imprisonment rates, severe levels of overcrowding can be experienced in institutions holding pre-trial prisoners. Policies which relate to the initial stages of the criminal justice process, including arrest and pre-trial detention, can have an immense impact on the number of people being held in prisons and levels of overcrowding.

Therefore when policies are being developed to reduce levels of overcrowding in prisons, consideration should be given to assessing whether arrest and pre-trial detention are being used excessively and inappropriately. Depending on the findings of such an assessment, developing strategies and policies to reduce pre-trial detention with reference to relevant international standards could be appropriate.

### 1. Reducing pre-trial detention: pre-charge

Pre-charge detention refers to the period of time that an individual can be held and questioned by police, prior to being charged with an offence. The laws of many countries recognize the vulnerability of the accused during the period immediately after arrest, by requiring police to produce a suspect before a court ‘promptly’ or at least within 48 hours.<sup>211</sup> The understanding is that once a decision has been made by the court, the suspect will either be released (discharged, diverted or released on bail) or transferred to a pre-trial detention facility designed for a longer-term stay. In practice, in many countries the time that a suspect is held in police custody, before any charges are made, may last months or longer.

Suspects will sometimes be held in police or pre-trial detention facilities without being charged for months or even years, or will be held on the basis of a so called “holding charge”, which can be repeatedly renewed while an investigation is, apparently, undertaken.<sup>212</sup> In Nigeria for example, in 2009 the National Human Rights Commission reported that a large number of pre-trial detainees were held for prolonged periods on “holding charges” and that the delay in charging offenders to appropriate courts, contributed substantially to prison congestion.<sup>213</sup>

<sup>211</sup>Manfred Nowak, United Nations Covenant on Civil and Political Rights – ICCPR Commentary, 2nd edition, Kehl/Strasbourg/Arlington 2005, p. 231; see also HRC, General Comment No. 8 (30 June 1982), where the HRC limits the time period to no more than “a few days”; and HRC, *Borisenko v Hungary*, Communication No. 852/1999 (14 October 2002), at para. 7.4 (period of three days too long).

<sup>212</sup>For example, in Nigeria, many individuals suspected of capital offences are held in detention for lengthy periods on the basis of so called “holding charges” issued by magistrates courts, which do not have authority over capital cases. It is reported that the Nigerian police systematically sends suspects of capital offences to a Magistrate Court instead of following the statutory procedure of sending the case to the prosecutor of the Ministry of Justice for a decision about whether or not to take the case to the High Court, in order to obtain a holding charge from the Magistrate Courts, pending a police investigation. (UNODC, Prison Staff Training Needs Assessment, March 2009, Atabay, T., p. 14).

<sup>213</sup>NHRC reports that in most prisons, no accurate records were kept of prisoners on holding charge. The worst cases recorded, were in Ikoyi where out of the population of 1977, about 1308 were on holding charge; Kaduna Convict Prison – 201 out of 889; Oko Prison – 349 out of 523; Onitsha – 411 out of 670. (National Human Rights Commission, in collaboration with UNDP and NORAD, National Prison Audit, 2007-2008, February 2009, p. 8).

### 1.1 Preventing arbitrary arrests and reducing the pre-charge detention period

Arrest represents the entry point to the criminal justice system. Why, and how frequently decisions to arrest are taken, have a chain effect on the whole criminal justice process. The greater the number of people arrested, the greater the workload of the courts will be, the longer the delays, and the higher the likelihood of injustices due to reduced capacity and compliance with due process.

According to international law everyone has the right to personal liberty. States may deprive people of their liberty only in certain prescribed circumstances, in line with Article 3 of the *Universal Declaration of Human Rights* and Article 9 (1) of the *ICCPR*. An arrest must be based on a reasonable, lawful suspicion that a person has committed an offence defined as such by law. The arrest must be in compliance with the basic principles of proportionality, legality and necessity. Procedures for arrest must conform not only to domestic law, but also to international standards.<sup>214</sup>

In addition, an arrest or detention which is lawful under domestic law may be arbitrary according to international law if the law under which the person is detained is vague, over-broad, or is in violation of other fundamental standards.

With regard to the meaning of the words “arbitrary arrest” in article 9 (1) of the ICCPR, the Human Rights Committee has explained that “‘arbitrariness’ is not to be equated with ‘against the law’, but must be interpreted more broadly to include elements of *inappropriateness, injustice, lack of predictability and due process of law*. ... [T]his means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in the circumstances. Remand in custody must further be necessary in all the circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime”.<sup>a</sup>

<sup>a</sup>Communication No. 458/1991, A. W. Mukong v. Cameroon (Views adopted on 21 July 1994), in United Nations doc. GAOR, A/49/40 (vol. II), p. 181, para. 9.8.

Arbitrary arrest violates some of the most fundamental principles of international law and in a large majority of cases discriminates against those who are poor, illiterate, belong to an ethnic or racial minority or are vulnerable in other ways.

Preventing arbitrary arrests and prolonged detention before a suspect is brought before a court requires political will and clear policies which discourage law enforcement agencies from using their authority to arrest unlawfully and excessively, while not hindering them performing their legitimate duties effectively.

<sup>214</sup>For example, Article 9(1) of the ICCPR, Article 6 of the African Charter on Human and Peoples’ Rights (ACHPR); Articles 7(2) and 7(3) of the American Convention on Human Rights (ACHR), Article 5(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights - ECHR).

The following steps may be taken:

- As a starting point, legislation governing arrests by law enforcement officials may be reviewed and revisions made to ensure that it complies with international standards. These may include revising domestic law to ensure that arbitrary arrests (as described above) are prohibited, as well as introducing safeguards such as ensuring that the detained person has the right to inform a close relative or someone else of his/her situation immediately<sup>215</sup> and the right to have immediate access to a lawyer,<sup>216</sup> among others;
- In this context it is essential to consider repealing any arrest targets established for specific offences which put pressure on law enforcement officials to carry out arrests, whether justified or not;
- Putting in place measures to ensure transparency and accountability, requiring law enforcement officials to keep a custody register of all suspects detained,<sup>217</sup> including the time of and reason for arrest, among other details;
- Setting strict custody time limits and putting in place measures to ensure that those arrested and detained are brought before a judicial authority, without delay, in order for the judicial authority to decide the legality of detention and to release the person, when detention is not based on legal criteria;<sup>218</sup>
- Improving the training provided to law enforcement officials on relevant international standards and domestic legislation, in order to put such legislation into practice;
- Reviewing the criteria used to evaluate the performance of law enforcement officials, ensuring that the number of arrests in themselves do not constitute a positive factor in the evaluation and that arbitrary arrests are discouraged;
- Setting up an independent monitoring system to monitor whether, and to what extent, custody time limits are being complied with; to identify problems encountered; and to make recommendations (e.g. in countries which have ratified OPCAT, this could be one of the responsibilities of National Prevention Mechanisms);
- Training prison staff on the management of pre-trial prisoners to: keep accurate and up-to-date records of all relevant data relating to pre-trial detainees, including the status of their cases, whether or not they have been charged and their access to legal counsel; be proactive in keeping courts informed of detainees held without charge for prolonged periods; and facilitate detainees' access to legal counsel.

<sup>215</sup>SMR, Rule 92, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 16.

<sup>216</sup>Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 17.

<sup>217</sup>Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment, Principle 12; United Nations Declaration on the Protection of all Persons from Enforced Disappearance, Articles 10 and 11.

<sup>218</sup>Body of Principles, Principle 11.

## 2. Reducing pre-trial detention: post-charge

When a suspect is brought before a court, or in some countries a prosecutor, the judge or prosecutor may charge the suspect and order that he or she be detained (or continue to be detained) while awaiting trial. Many definitions of pre-trial detention refer to the detention ordered by a court or prosecutor, while the defendant awaits trial.

The general rule in international standards is that a person is presumed innocent until found otherwise by a competent court and must be afforded his or her personal liberty and not be held in detention pending trial.<sup>219</sup>

The United Nations Human Rights Committee (HRC) has stated that detention before trial should be used only where it is lawful, reasonable and necessary. According to the HRC, detention may be necessary in the following circumstances:<sup>220</sup>

- To prevent flight;
- To prevent interference with evidence;
- To prevent the recurrence of crime;
- Where the person concerned constitutes a clear and serious threat to society which cannot be contained in any other manner.

In 1990 the Eighth United Nations Congress on the Prevention of Crime and Treatment of Offenders established that pre-trial detention may be ordered only if there are reasonable grounds to believe that the persons concerned have been involved in the commission of the alleged offences and there is a danger of their absconding or committing further serious offences, or a danger that the course of justice will be seriously interfered with if they are let free.<sup>221</sup>

The mere absence of a fixed residence should not be regarded automatically as a danger of flight, according to the European Court of Human Rights. The Court has also ruled that, when release pending trial is refused on the basis that the defendant may commit further offences prior to trial, the national court must be satisfied that the risk is substantiated and that there must be evidence of the propensity to reoffend.<sup>222</sup>

A number of measures or a combination of measures can be taken to reduce the number of those who are unnecessarily detained during the pre-trial period.

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<sup>219</sup>ICCPR, Article 9 (3); Tokyo Rules Rule 6.1; *Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment*, Principle 39.

<sup>220</sup>Human Rights and Pre-Trial Detention. A *Handbook* of International Standards relating to Pre-Trial Detention, Professional Training Series no. 3 (New York: United Nations, 1994), 14–15.

<sup>221</sup>The Socioeconomic Impact of Pretrial Detention, Open Society Justice Initiative, Open Society Foundations and UNDP, 2011, p. 52.

<sup>222</sup>See Detained without trial: Fair Trials International's response to the European Commission's Green Paper on detention, Fair Trials International, October 2011, p. 31 for case references.

These may include:

- Removing the obligation for pre-trial detention for any offence, ensuring that pre-trial detention decisions are not based on the offence committed, but on an objective evaluation of factors, which may justify pre-trial detention, referred to above;
- Prohibiting the use of pre-trial detention for certain offences, which carry short prison sentences;
- Requiring the judicial authority to give reasons for its decision regarding detention, based on the facts of each individual case;
- Increasing possibilities for bail and setting fairer bail amounts;
- Introducing other alternatives to pre-trial detention, such as release on personal recognizance supervision, house arrest or other restrictions.

#### **Burundi—Improving respect for judicial guarantees and supporting stakeholders working together**

Ongoing confidential dialogue with penitentiary and judicial authorities in Burundi on respect for judicial guarantees as part of efforts to address overcrowding was backed up in 2008 by the production of an in-depth ICRC study on this topic for both central prisons and places of temporary detention. To disseminate the recommendations contained in this study and to facilitate their implementation, over 100 personnel and other civil servants and actors of the civil society responsible for and involved with judicial processes have so far attended seminars organized in 2008 by the ICRC in Bujumbura, Gitega and Ngozi. The ICRC worked alongside the authorities to develop a strategy and plan of action for the implementation of the recommendations in the ICRC's study as discussed during these seminars.

In 2011, the ICRC, the Belgian Development Agency (BTC) and the prison administration in Burundi (DGAP) sought to promote sharing of knowledge and experience and to enhance cooperation amongst different actors involved in the penitentiary field at the provincial, national and international levels. This was in response to the identification of similar problems common in various prisons, regardless of size, population or location, and some positive initiatives leading to the mitigation or resolution of such problems in some institutions.

In May 2011, a two-day workshop was held for stakeholders in the management and operation of prisons, at which small groups discussed various broad themes and specific questions, including detention conditions, protection of vulnerable prisoners and resource management. Overcrowding was identified as a cause of many of the issues raised. At the end of the workshop, the staff of each prison defined three objectives to implement within their own facility. These objectives will be monitored by DGAP and by the General Inspectorate of Justice (Ministry of Justice) and the ICRC and the BTC will be available as supporting partners. Alongside measures aiming at improving the judicial process, rehabilitation and construction works were undertaken by the authorities with the support of the ICRC in several prisons and *cachots* (local lock ups), with a view to alleviating the promiscuity caused by overcrowding.

*Source: ICRC Improving detainees living conditions : Helping authorities fulfil their responsibilities, Geneva, 4 September 2009*

### **Brazil takes steps to reduce pre-trial detention**

The Brazilian Congress passed a new law on alternative measures to pre-trial detention on 4 July 2011. The law seeks to ensure that fewer people enter the prison system in the first place.

The law underscores the principle that pre-trial detention should be the exception not the rule. It puts forth nine alternatives to pre-trial detention, such as bail and electronic monitoring. For first-time offenders who are accused of non-violent crimes, which if convicted could carry up to four years in prison, the judge cannot impose pre-trial detention. The law requires that pre-trial detention be used as a last resort, and even then only in very specific instances.

*Source: Universal Periodic Review Submission Brazil UNODC 2011 OHCHR*

## **2.1 Bail**

Bail is a legal mechanism used to enable the release from detention of a person accused of a crime prior to the conclusion of their case if certain conditions are met. These conditions are designed to ensure that the accused returns to court for trial. They usually involve placing an amount of money as security with the court, which can be forfeited to the state should the accused fail to return to court at the appointed time and place. Bail is usually posted either by the suspect or accused or a family member, though this is not necessarily a requirement.

In many countries a large number of pre-trial detainees are in prison because they are unable to provide the required money or securities set out in their bail conditions. This results in people being imprisoned not because they pose a security risk to the public, but because they are poor.

It is therefore important that bail amounts set are affordable, taking into account the economic means of the offender.

It is equally important that there are other alternatives that may be imposed, which do not require the accused to have a certain economic status. Such possible alternatives include releasing an accused person and ordering such a person to do one or more of the following:

- To appear in court on a specified day (release on personal recognizance);
- To remain at a specific address;
- To report on a daily or periodic basis to a court, the police or other authority;
- To surrender passports or other identification papers;
- To accept supervision by an agency appointed by the court;
- To submit to electronic monitoring.

## **2.2 Release on personal recognizance/unconditional bail**

Under unconditional release, also known as personal recognizance, the accused promises to appear in court as ordered (and, in some jurisdictions, to obey all laws).

In cases where a person is known in the community, has a job, a family to support, and is a first offender, authorities may consider unconditional bail. In all cases where the offence is not serious, unconditional release should be an option.<sup>223</sup>

In many jurisdictions, especially in countries with vast rural areas with poor access to the major urban settlements, release on personal recognizance is rarely used due to the challenges encountered in knowing where people live and tracing them, if necessary.

In such circumstances consideration may be given to developing cooperation with key people in the community, such as tribal leaders or other community representatives, in order to improve the compliance of those released on personal recognizance with the conditions of their release.

Such cooperation should be accompanied by awareness-raising in the community on the subject of bail, in order to ensure that such release is not considered to be an acquittal. In some countries, such misunderstanding has led to violent action against the person released, as a form of justice administration by the people.

#### Release on personal recognizance in Costa Rica

Costa Rica is one of the countries in Latin America where legislation includes the possibility of release on personal recognizance during the pre-trial period. According to a study conducted by ILANUD in 1980, personal recognizance was hardly ever used, the main reason for which, explained by 81 per cent of judges, was the fear that the accused would abscond. In 1989 ILANUD conducted further research to see whether these fears were justified. The study compared the degree of compliance with the conditions of release, between two groups: (1) those released on monetary bail (with material, monetary guarantees); and (2) those released on personal recognizance. The study was conducted over a 6 year period and covered 468 cases in total. It found that in trials that were conducted in the courts of first and second instance, the compliance level was the same for both groups. In courts of third instance, 15.6 per cent of those who had been released on personal recognizance did not turn up at court, compared to 2.9 per cent of those who were released on monetary bail. The researchers found that the reason for this significant difference in the courts of third instance was that “the methodological requirements for the process are complied with to a much lesser extent, [...] and less rigor [in third instance courts than in first or second instances]”.

ILANUD made the following recommendations, based on the results of its study:

1. Increase the use of release on own recognizance in Costa Rica;
2. Organize workshops with judges to transfer knowledge acquired in this study;
3. This form of release should be carefully implemented with the introduction of a few practical measures:
  - a. Informing detainees of their status and obligations: The accused needs to receive a clear explanation about the implications of his/her release and the conditions that must be complied with, so that the released person grasps the importance of complying with his or her obligations;

<sup>223</sup>UNODC *Handbook on Alternatives*, p. 12.

- b. Maintaining a system of periodic control, but not more than once a month, as the previous requirement of once per week was very difficult to comply with due to practical reasons (e.g. people living and working in remote rural areas);
  - c. Obtaining the address and phone number of the accused, as well as the one of a relative or 'trustee';
  - d. In case of failure of the accused to present him/herself: to call, offer a second opportunity to meet, or use the 'trustee';
  - e. Upholding the principle of humanity and trying to avoid pre-trial detention as suspects are presumed innocent;
4. Establish a periodic evaluation to determine the level of use of release on personal recognizance;
  5. Initiate similar projects in other countries of the region, with similar systems.

*Source: E. Carranza, M. Houed, N. J. O. Liverpool, L.P. Mora, L. R. Manzanera, "Sistemas Penitenciarios y Alternativas a la Prisión en América Latina y el Caribe", ILANUD, 1992, pp 97-136*

In some countries "Pre-trial release services" have been introduced which have helped reduce the number of people held in pre-trial detention. Pre-trial services emerged in the United States in response to the inequities of the monetary bail system as well as the need of judicial officers for reliable information to make bail decisions.<sup>224</sup> Pre-trial services programmes serve as providers of the information necessary for judicial officers to make the most appropriate bail decision. They also provide monitoring and supervision of defendants released with conditions pending trial.<sup>225</sup> Pre-trial services programmes have been developed in many parts of the United States and have been introduced in some other countries around the world, with some success.<sup>226</sup>

### 2.3 Restrictive measures

The Tokyo Rules, Rule 6.2 provides for a range of restrictive measures as an alternative to pre-trial detention. Restrictive measures may confine the suspect or the accused to a specified location (e.g. his or her home, an institution, or a specified geographical area), restrict his or her access to a location (e.g. the family home), or prohibit the suspect or the accused from appearing at an identified place or meeting with identified persons. In terms of securing the presence of the suspect or the accuser at trial, a regime of periodic visits to an agency or authority appointed by the court, or the confiscation of his or her passport, may suffice instead of detention or bail. If restrictive measures are chosen, the judge should choose the options that are most necessary and proportionate in the circumstances.<sup>227</sup>

<sup>224</sup>National Institute of Justice, *Pretrial Services Programs: Responsibilities and Potentials* (Washington, D.C.: United States Department of Justice, United States Government Printing Office, 2001), pp. 7-13 and Appendix A.

<sup>225</sup>See VanNostrand, M., *Legal and Evidence Based Practices: Application of Legal Principles, Laws and Research to the Field of Pretrial Services*, The Crime and Justice Institute and the National Institute of Corrections, April 2007 for further detailed information.

<sup>226</sup>See Karth, V., "Between a Rock and a Hard Place", Open Society Foundation for South Africa, in particular, pp. 10-13 and *Presumption of Innocence – Pretrial Services Program, State of Morelos Juvenile Justice System – Mexico*, Open Society Justice Initiative, (<http://presunciondeinocencia.insyde.org.mx/>).

<sup>227</sup>See *Model Code of Criminal Procedure*, Chapter 9, Part 3, p. 300-301 Article 184 and commentary.

The availability of such measures in legislation and practice can help reduce the use of detention pending trial, as judges will have more confidence that, with the restrictions, the defendant can be prevented from absconding, interfering with witnesses or tampering with evidence.

#### **Russian Federation—Encouraging trends in pre-trial detention in the Russian Federation**

The number of people in remand facilities (SIZOs) in the Russian Federation declined every year between 2005 and 2010 and the rate of decrease appears to be accelerating. Most, if not all, of the reduction in the SIZO population appears to be the result of the marked and sustained decrease in the number of defendants remanded into custody before trial. The scale of this reduction could probably have been greater were it not for an increase in the duration of detention, represented by the growth in the number of extensions of custody.

Much of the reduction in the amount of pre-trial detention may be attributed to the declining number of suspects charged with serious offences. Police investigators, accordingly, have identified a smaller number of suspects each year and prosecutors have submitted far fewer applications for pre-trial detention. It also appears, however, that prosecutors have become more discriminating in their assessment of the need for detention. Between 2005 and 2010, when the total number of suspects “identified” by the police fell by 36 per cent, the number of applications for detention fell by 45 per cent, from 277,208 to 165,323.

Furthermore, since 2005 the proportion of all convicted defendants that spent time in pre-trial detention has continuously declined. Of the 903,928 defendants convicted in 2005, 246,243 (or 27 per cent) were in detention at the moment of their sentencing. Of the 870,082 defendants convicted of a criminal offence in 2010, only 174,855 (20 per cent) were in detention at the time of sentence. While further research is required to understand these figures, these data are signs that courts in the Russian Federation may be taking a more cautious approach to pre-trial detention.

The main “alternative” to pretrial detention in the Russian Federation is release on personal recognizance, which is used in 75-80 per cent of all prosecutions. More complicated alternatives are rarely used, with only 629 instances of monetary bail and 668 instances of home confinement used in 2010.

*Source: Todd Foglesong, Senior Research Associate, Program in Criminal Justice Policy and Management, Harvard Kennedy School of Government, June 2011.*

[http://www.hks.harvard.edu/var/ezp\\_site/storage/fckeditor/file/pdfs/centers-programs/programs/criminal-justice/SafetyJusticeResearchinBrief-Pretrial\\_Detention\\_in\\_Russia\\_2001-2010.pdf](http://www.hks.harvard.edu/var/ezp_site/storage/fckeditor/file/pdfs/centers-programs/programs/criminal-justice/SafetyJusticeResearchinBrief-Pretrial_Detention_in_Russia_2001-2010.pdf)

*See also: “Fewer Russians ending up in pre-trial cells – officials”, 1 November 2011 <http://rt.com/news/prime-time/prisons-inmates-death-russia-311/>*

### **3. Diversion from the criminal justice system**

The Tokyo Rules provide that, where appropriate, the police, the prosecution service or other agencies dealing with criminal cases should be empowered to discharge the offender if they consider that it is not necessary to proceed with the case. They also express the need to develop a set of criteria for the purpose of deciding upon the appropriateness of discharge or determination of proceedings. They provide for the prosecutor to have the possibility to impose suitable non-custodial measures, as appropriate, for minor cases.<sup>228</sup>

<sup>228</sup> Tokyo Rules, Rule 5.1.

Police and prosecutorial discretion to divert suitable cases away from the criminal justice system can be a powerful mechanism to address issues ranging from reducing excessive caseloads that challenge prison systems to avoiding the stigmatization and social costs of criminal prosecution and conviction. Diversion may occur at different stages in different systems and for different classes of offenders. In its classic form, it occurs prior to the trial and avoids the trial process altogether.

Diversion may be premised on an acknowledgment of responsibility for the offence and an agreement to make amends for the crime usually by performing community service or compensating the victim. Sometimes the offender is sent to a programme to deal with a specific problem, such as alcohol or drug dependence or a mental health care need.

### 3.1 *Diversion to an alternative dispute resolution process*

In some systems the referral for diversion is to an alternative dispute resolution (ADR) process, where the victim and the offender (and in some models, other members of the community) meet and a plan is made about how the offender will put the wrong right. This kind of interaction between victims and offenders is the basis of restorative justice, an approach that has gained in popularity in many systems throughout the world in the past few decades.

There are various forms of ADR, which may include:

- Negotiation is characterized by the fact that the parties come to an agreement without involvement of a third party.
- Mediation, sometimes also known as conciliation, provides a forum in which parties can resolve their own disputes, with the help of a neutral third party.<sup>229</sup> Conciliation differs from mediation in the sense that the conciliator suggests solutions. What the mediator has to achieve is a constructive communication between the parties to the point where they themselves can find a solution.<sup>230</sup>
- Arbitration more closely resembles traditional litigation in that a neutral third party hears the disputants' arguments and imposes a final and binding decision that is enforceable by the courts.<sup>231</sup>
- Community-based ADR (or informal dispute resolution) is often independent of the formal legal system, though in some systems formal links have been formed with community based ADR systems. Community-based ADR processes play an important role in a number of countries in Africa, Latin America and South Asia. They are more affordable and accessible to the poor, and allow for the resolution of conflicts without going through a long, formal criminal justice process, thereby reducing the burden on courts. However, they also have their drawbacks, such as lack of adequate accountability, possible discrimination based on social status, gender and wealth, as well as lack

<sup>229</sup><http://legal-dictionary.thefreedictionary.com/alternative+dispute+resolution>.

<sup>230</sup> Alvarez and Highton, "La mediación en el panorama latinoamericano", in *Revista Sistemas Judiciales*, no. 1, June 2001, cited in S. Westerland, M. Widenbadh, *The Rural Judicial Facilitators Program in Nicaragua*, p. 13.

<sup>231</sup><http://legal-dictionary.thefreedictionary.com/alternative+dispute+resolution>.

of human rights safeguards. Therefore possible human rights implications need to always be taken into account and vulnerable groups, such as women, children and the poor, protected from abuse or discrimination if linkages with non-state justice systems are to be forged.

Any strategy that considers building the capacity of, and forming links with non-state justice systems to help reduce the number of cases processed through the courts, should be preceded by an assessment of the customary justice system, in order to understand the socio-cultural context in which it operates; the manner in which it resolves criminal cases and the types of settlements it reaches; the types of cases it is capable of solving; the nature of practices that violate international norms and the relationship between the customary and formal systems from a historical and political perspective.<sup>232</sup> On the basis of such an assessment measures will need to be taken to address concerns and shortcomings, while not harming the informal and accessible nature of the system.

It should be emphasized that, generally, only minor criminal cases would be suitable for settlement by customary or non-State systems of justice, similar to most cases that may be considered for diversion from the criminal justice system.<sup>233</sup>

- Restorative justice, which has emerged in the past 30 years, has a lot in common with the underlying philosophy of ancient processes of conflict resolution. Today, over 80 countries use some kind of restorative approach to deal with crime.<sup>234</sup> Restorative justice programmes may be used at any stage of the criminal justice system, subject to national law. When used before a case comes to trial, or during the trial process, they can lead to the diversion of the case from criminal procedure, provided that an agreement is reached between victim and offender. Restorative justice processes can be adapted to various cultural contexts and the needs of different communities. A comprehensive approach to the implementation of restorative justice programmes within a national system should result in the creation of a range of programmes to which persons can be referred from different points within the criminal justice process.

There are many advantages inherent in the process of diversion. For the offender, he or she may avoid a criminal record and its negative consequences, benefit educationally particularly from the programmes designed to prevent reoffending, or be able to make direct amends to the victim and, through this, may develop empathy and a sense of social responsibility. In restorative justice processes, victims often express higher levels of satisfaction with the results. The prosecution service and courts benefit as well, since resources are freed to address more serious or complex cases and, where diversion programmes are effective, the likelihood that the defendant will offend in the future is reduced.

<sup>232</sup>UNODC *Handbook on criminal justice reform in post conflict states*, p. 110.

<sup>233</sup>For a more detailed discussion of customary and non-State systems of justice, see UNODC *Handbook on Criminal Justice Reform in Post-conflict States*, pp. 103 – 113 ([http://www.unodc.org/documents/justice-and-prison-reform/11-83015\\_Ebook.pdf](http://www.unodc.org/documents/justice-and-prison-reform/11-83015_Ebook.pdf)).

<sup>234</sup>Van Ness, *An overview of restorative justice around the world*, 2005, p. 2.

### 3.2 *Police and prosecutorial discretion*

The margins for the police and prosecution service to act with discretion are dependent upon the legal system in a given country, their level of professionalism, in how far they are trained to find alternative solutions and/or refer to alternative agencies, or to what degree alternative solutions or agencies are available to them.

In the common law system, the prosecution has wide discretion as to whether to prosecute a case and this discretion is generally not subjected to judicial review.<sup>235</sup> The prosecution may decide to withdraw the charges, or engage in pre-trial bargaining, on either the charge or plea, in order to encourage the efficient resolution of the case.<sup>236</sup> Some civil law countries uphold the principle of full, or mandatory, prosecution.<sup>237</sup> Nonetheless in practice, prosecutors exercise at least some discretion in the pre-trial phase.<sup>238</sup>

In order to be effective and implemented in a fair and consistent manner, the police and prosecutors need clear guidelines as to the extent of their discretionary powers, when they may use their discretion to discharge a case, when they may divert suitable cases to a programme in the community and when to proceed with the criminal process.<sup>239</sup> For example, certain categories of offences may be included in guidelines (e.g. property crimes, where financial restitution may be more suitable) or certain categories of offenders may be priorities (e.g. offenders with mental health care needs, women with dependent children).

Penal reform strategies that aim to reduce pre-trial detention may consider:

Increasing the discretion the police and prosecutors enjoy to divert suitable cases away from the criminal justice system;

Introducing guidelines and enhancing the training of the police and prosecutors to exercise their discretionary powers appropriately, in a consistent and fair manner, and raise their awareness about the needs of vulnerable groups (e.g. children, people with mental health care needs; foreign nationals);

Developing tools for the police and prosecution services to assess suitability for diversion;

Providing guidance and information to police and prosecutors on programmes in the community to which offenders may be diverted and investing in the development of such programmes;

Establishing mechanisms of cooperation between the police and prosecutors and such services.

<sup>235</sup>Cumaraswamy, D. P. and Nowak, M., “Human Rights in Criminal Justice Systems”, Strasbourg, France, 18–20 February 2009, 9th Informal Asia-Europe Meeting (ASEM) Seminar on Human Rights, Background Paper, p. 11.

<sup>236</sup>Ibid.

<sup>237</sup>Ibid.

<sup>238</sup>Ibid.

<sup>239</sup>United Nations Guidelines on the Role of Prosecutors, Guideline 17.

### 3.3 Promoting accountability

Wherever a criminal justice institution is given discretion and authority to take decisions themselves, there is a need to ensure that actors and agencies responsible are held accountable for the decisions that they make. It is important that measures are put in place to avoid arbitrary decisions, diversion on the basis of bribes or other favours. Such measures should include, at least, the careful recording of decisions and monitoring by independent bodies.

In societies where corruption represents a major challenge in all spheres of life, it may be very difficult to ensure accountability, which must be taken into account when deciding on the extent of police and prosecutorial discretion.

#### Reduction in the prison population in Nicaragua and the role of mediation

Mediation has gained in importance in Latin America, being included in the reform strategies of practically all the countries in the region.

Nicaragua's prison population decreased from 131 per 100,000 in 2002 to 119 in 2008. This is deemed to be the result of the granting of legal benefits to prisoners and to an agreement reached between the Judicial Branch and the National Police which allowed for those who committed police faults not to be referred to the prison system, but instead to be diverted to alternative measures.

In addition, according to the Code of Criminal Procedure the parties in minor criminal cases can choose mediation instead of a regular court process. The Rural Judicial Facilitator is one body authorized to practice mediation (*Facilitador Judicial Rural*, RJF) as part of a programme covering most of the rural parts of the country to provide facilitators to assist in solving minor conflicts and crimes in remote areas where access to the formal justice system is limited or nearly non-existent. The facilitators have been part of the judicial branch since 2002, and together with, for example, the Public Defender's Office (*Defensoría Pública*), they are recognized in Nicaraguan law as auxiliary staff in the justice administration.

The Organization of American States in Nicaragua, responsible for the execution of the Rural Judicial Facilitators Programme, states that the programme has proved to be very successful. It has not only increased access to justice and provided a judicial service to poor citizens, but has also had other positive effects such as making people aware of their rights and, on a long-term basis, to help to reduce poverty. The system and its features share common principles with the restorative justice movement.

Source: Sources: ILANUD, *Crime Criminal Justice and Prison in Latin America and the Caribbean*, Elias Carranza (Co-ordinator), 2010 and Sara Westerlund, Marlene Midenbladh, *The Rural Judicial Facilitators Program in Nicaragua – an Exemplary Model of Restorative Justice?* (2007)

Diversion of drug dependent offenders, offenders with mental health care needs, women and children are covered in chapter F, section 6, Special categories.

## 4. Reducing the duration of pre-trial detention

The *ICCPR*, Article 9.3 provides that “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.” In addition to the requirement of prompt judicial review, Art. 9.4 provides that “Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.” *ICCPR*, Article 14 (c) provides that suspects have the right to be tried without undue delay.

Based on these provisions in international law, a number of measures may be taken to reduce the excessive duration of pre-trial detention, such as:

- Statutory time limits on pre-trial detention may be set in law;
- If not already established by law, detainees should have the right for their detention to be reviewed at regular intervals by an independent judicial authority, to determine whether their continued detention is necessary and to be released should the pre-trial detention appear excessively long;
- A system of judicial inspection may be established to monitor the implementation of laws;

#### **Detention centres in Buenos Aires Province, Argentina**

In Buenos Aires province of Argentina, public defenders and prosecutors offices have been established within detention centres. Persons arrested are immediately brought to the detention centres, rather than police stations, to avoid delays in processing cases and to ensure that all suspects have immediate access to the public defender. This practice has had a positive impact on reducing the number of people in pre-trial detention.

*Source: Alejandro Enrique Marambio Avaria, former General Director of the Argentine Federal Prison Service and Elias Carranza, Director ILANUD.*

- Additional measures may be taken, such as employing cost orders against courts in case of unjustified and frequent adjournments;
- The same measure can be used against lawyers who fail repeatedly to turn up at court hearings, as recommended in the *Ouagadougou Declaration and Plan of Action on Accelerating Prisons and Penal Reforms in Africa*;
- A critical review of the procedures and bureaucracy relating to court administration may be undertaken to improve efficiency, by enhancing the capacity of staff, and reducing unnecessary or unjustified procedural requirements (see also chapter C, section 3);
- A court scheduling system may be introduced prioritizing the cases of people who are held in custody;
- There are also ways in which to bring courts to the people, to ensure that pre-trial prisoners are “tried without undue delay”. Such mobile courts have proven to be effective in providing short-term relief in overcrowded pre-trial detention facilities.

### Mobile courts in the Democratic Republic of Congo

In countries where the courts have been devastated by conflict or are unable to reach remote rural locations, the mobile court, or *chambre foraine* as it is known in the Democratic Republic of the Congo, operates like any other court and is staffed by judicial officers, administrative personnel and lawyers. Their arrival is announced in advance, an open-air court is established and proceeds to deal with the cases brought before it.

Between 2004 and 2006, *Avocats sans frontières* piloted a mobile court programme in three provinces in the Democratic Republic of the Congo with United Kingdom Department for International Development funding. In a period of 18 months, they conducted 16 mobile courts, targeting those areas where there were no courts (or *tribunaux de grande instance*) and heard over 1,000 cases (40 per cent of them old cases, some of which had been waiting for years to come to trial; 70 per cent of them criminal) and entered judgement in 70 per cent of cases. Each court session was attended by between 300 and 1,000 members of the public. Aside from bringing the courts to the people, the magistrates spent time explaining the law and justice process to the general public. User surveys conducted afterwards found broad satisfaction with the process and surprise at seeing people deemed untouchable being held to account or even convicted by the court.

Source: UNODC Handbook on improving access to legal aid in Africa, pp. 64-65

See also chapter D, Access to legal assistance and legal aid, for a discussion of the considerable impact legal assistance can have on the use and duration of pre-trial detention.

## 5. Economic considerations

The excessive use of pre-trial detention can be very costly to the state. Direct costs include the operation of detention facilities, the upkeep of prisoners and the costs of investigation and the judicial process. Pursuing a criminal case against a pre-trial detainee usually costs the state more in comparison to defendants who are at liberty. Often pre-trial detainees have a higher number of hearings than defendants who are not detained, and the state must cover all costs associated with those hearings, including transportation and guards.<sup>240</sup> For example, the Open Society Institute (OSI) reports that a study in Ukraine found the total annual cost of pre-trial detention to the State to be US \$ 30 million.<sup>241</sup> This was 59 per cent of the total cost of pre-trial detention (including to the State, the detainees and their families), which was US \$ 51 million.<sup>242</sup> In Mexico the total annual cost of pre-trial detention to the State was estimated as US \$ 454 million, which was 58 per cent of the total cost.<sup>243</sup> In Argentina, the direct cost to the State of pre-trial detention was estimated to be US \$ 75 million, which was 68 per cent of the total cost of pre-trial detention.<sup>244</sup>

In the European Union the average cost in 2006 was 3,000 Euros to keep a person in pre-trial detention for one month.<sup>245</sup> With a pre-trial detention population of

<sup>240</sup>Socioeconomic Impact of Pretrial Detention, Open Society Justice Initiative, Open Society Foundations, UNDP, 2011, p. 35.

<sup>241</sup>Ibid. p. 35.

<sup>242</sup>Ibid. p. 35.

<sup>243</sup>Ibid. p. 36.

<sup>244</sup>Ibid. p. 36.

<sup>245</sup>Detained without trial: Fair Trials International's response to the European Commission's Green Paper on detention, Fair Trials International, October 2011, p. 6.

approximately 132,800 in 2011, the cost of pre-trial detention to the European Union Member States was almost 4.8 Billion Euros.<sup>246</sup>

Assessing the true costs of pre-trial detention—both direct and indirect—requires considering the full impact of excessive pre-trial detention not just on the detainees, but also on their families and communities, which can be immense. Many people, who are held in pre-trial detention, especially for long periods, will lose their jobs, which results in economic hardship for the families as well as loss of tax payments to the state. The health care implications and consequent costs of being held in pre-trial detention can be severe, as outlined in part I, chapter A, section 3.2. The potential criminalization of first time suspects, people charged with petty offences, or possibly innocent people, held with those charged with serious offences in pre-trial detention for long periods can contribute to future criminality and recidivism, especially when taken into account together with the loss of employment and the subsequent difficulties in finding jobs following release from pre-trial detention. These costs are difficult to calculate, but can be extensive.

The excessive use and costs of pre-trial detention can restrict a government's ability to invest in other spheres, such as education, health care and socioeconomic development, particularly in low-resource countries where state budgets are limited and usually inadequate to meet the basic needs of its citizens. This can impact on levels of criminality in general as discussed in part I, chapter B, section 2.

## KEY RECOMMENDATIONS

### *REDUCING THE USE OF PRE-TRIAL DETENTION*

#### *Reducing arbitrary arrests*

To legislators, policymakers and law enforcement officials

- To ensure that legislation on arrests complies with international standards and specifically prohibits arbitrary arrests.
- To put in place measures to ensure transparency and accountability, requiring law enforcement officials to keep a custody register of all suspects detained, including the time of arrest and reasons for arrest, among other details.
- To set strict custody time limits and put in place measures to ensure that those arrested and detained are brought before a judicial authority, without delay, in order for the judicial authority to decide the legality of detention and to release the person, when detention is not based on legal criteria.
- To provide training to law enforcement officials on relevant international standards and domestic legislation.
- To review criteria to evaluate the performance of law enforcement officials, ensuring that the number of arrests in themselves do not constitute a positive factor in the evaluation of their performance; and to repeal any arrest quotas established for specific offences.
- To set up an independent monitoring system to monitor whether and to what extent custody time limits are being complied with, to identify problems encountered and to make recommendations.

<sup>246</sup>Ibid., p. 7.

*Reducing Pre-trial Detention—Post-charge***To legislators, policymakers, prosecutors and the judiciary**

- To ensure that legislation and practice reflect the requirements of international standards relating to the use of pre-trial detention, restricting its use to narrowly prescribed circumstances.
- To remove the obligation for pre-trial detention for any offence and to prohibit the use of pre-trial detention for certain offences.
- To increase possibilities for bail and put in place measures to ensure that bail amounts are fair, taking into account the economic circumstances of defendants, and to introduce other alternatives to pre-trial detention, such as release on personal recognizance, supervision or certain restrictions.

*Diversion from the Criminal Justice System***To legislators and policymakers**

- To consider increasing the discretion the police and prosecutors enjoy; and ensuring their requisite training to divert suitable cases away from the criminal justice system, and to use their discretionary powers in a consistent and fair manner.

**To relevant ministries, police and prosecution services and agencies providing treatment and rehabilitation programmes**

- To provide guidance and information to police and prosecutors on programmes in the community to which offenders may be diverted; and to establish mechanisms of cooperation between the police and prosecutors and such services.

**REDUCING THE DURATION OF PRE-TRIAL DETENTION****To legislators, policymakers and the judiciary**

- To set statutory time limits on pre-trial detention.
- If not already established by law, detainees should have the right for their detention to be reviewed at regular intervals by an independent judicial authority, to determine whether their continued detention is necessary, and to be released if this is not the case.
- To put in place a system of judicial inspection to monitor the implementation of legislation relating to detention, including statutory time limits.
- To consider employing cost orders against courts in case of unjustified and frequent adjournments, and against lawyers who fail repeatedly to turn up at court hearings.
- To consider introducing mobile courts, where appropriate, to ensure that pre-trial prisoners are tried without undue delay.

## CHAPTER F. ALTERNATIVES TO IMPRISONMENT

When non-custodial measures and sanctions are used to replace imprisonment, they contribute directly to the reduction of the prison population. A further advantage of using alternatives to imprisonment is that they can help reduce reoffending, and thereby help reduce the prison population in the long term. Numerous studies have shown that reoffending rates are generally lower in the cases of those sentenced to non-custodial sanctions, in comparison to imprisonment.<sup>247</sup> Further, recidivism itself can lead to a much higher prospect of imprisonment for a second or third offence in some countries, resulting in a self-perpetuating cycle of imprisonment and release. Thus, when assessing the impact of alternatives on the reduction of the prison population, the comparative rates of recidivism among offenders who serve prison sentences and those who are subjected to community sanctions, as well as the impact of having been imprisoned on future sentencing, should also be taken into account, even if these factors are difficult to measure.

This chapter offers an overview of key issues, including the advantages and pitfalls of using alternatives, some examples of non-custodial sanctions and recommendations to ensure the implementation of alternatives to imprisonment. The examples of non-custodial sanctions have been selected on the basis of their relatively low cost, simplicity in implementation, at least some proven track record of reducing imprisonment, and their suitability for use in post-conflict environments. As such these are the alternatives included in the Model Criminal Code, developed by United States Institute of Peace (USIP) in cooperation with UNODC and others (see Bibliography). Diversion has been covered in the previous chapter. In this chapter, further reference to diversion is made in relation to special categories, in section 6.

For a more thorough study of the topic, please refer to the UNODC *Handbook on Basic Principles and Best Practices in implementing Alternatives to Imprisonment*<sup>248</sup> and the UNODC *Handbook on Restorative Justice Programmes*.<sup>249</sup>

### 1. Overview

The *United Nations Standard Minimum Rules for Non-custodial Measures (Tokyo Rules)* encourage the use of alternatives to detention and imprisonment, as a measure to reduce overcrowding and to meet more effectively the social reintegration needs of offenders in the community. They recommend the availability of a wide range of non-custodial sanctions in criminal legislation, suitable for different types of offences, and applicable to the individual circumstances of each offender.<sup>250</sup> The availability of a variety of non-custodial sanctions is obviously necessary as a first step towards increasing the use of alternatives to prison in practice.

<sup>247</sup>See, for example, Bondeson, U.V., “Global Trends in Corrections”, in *International Annals of Criminology*, Volume 36, 1998, pp. 91-116; Cid, J., “Is Imprisonment Criminogenic?: A comparative study of recidivism rates between prison and suspended prison sanctions”. (2009) *European Journal of Criminology*. 6(6):459-480; Lappi-Seppala, T., *Crime Prevention and Community Sanctions in Scandinavia* ([http://www.unafei.or.jp/english/pdf/RS\\_No74/No74\\_06VE\\_Seppala2.pdf](http://www.unafei.or.jp/english/pdf/RS_No74/No74_06VE_Seppala2.pdf)); The Matrix Knowledge Group, *The Economic Case for and against Prison*. (<http://www.matrixknowledge.co.uk/wp-content/uploads/economic-case-for-and-against-prison.pdf>); Cocker, S., 2006, *Using reconviction data to explore the effectiveness of community penalties in West Yorkshire*, Report no. 2005/6-5, National Probation Service, West Yorkshire; Bartels, L 2009, ‘The weight of the Sword of Damocles: a reconviction analysis of suspended sentences in Tasmania’, *Australian and New Zealand Journal of Criminology*, vol. 42, pp. 72-101.

<sup>248</sup>United Nations publication, Sales No. E.07.XI.2.

<sup>249</sup>United Nations publication, Sales No. E.06.V.15.

<sup>250</sup>Tokyo Rules, Rule 8.1

Non-custodial sanctions may include:

- *Fines*: The offender is ordered to pay a fine determined by the court.
- *Suspended sentences (with or without supervision)*:<sup>251</sup> A sentence given after the formal conviction of a crime that the convicted person is not required to serve. In criminal cases a trial judge has the ability to suspend the sentence of a convicted person after first pronouncing a penalty of a fine or imprisonment, or both.

There are two types of suspended sentences. A judge may unconditionally discharge the defendant of all obligations and restraints. An unconditionally suspended sentence ends the court system's involvement in the matter and the defendant has no penalty to pay. However, the defendant's criminal conviction will remain part of the public record. A judge may also issue a conditionally suspended sentence. This type of sentence withholds execution of the penalty as long as the defendant exhibits good behaviour. For example, someone convicted of shoplifting for the first time could receive a sentence imposed by the judge of thirty days incarceration—a penalty that could be suspended on the condition that the defendant does not commit further offences during the next year. Once the year passes without incident, the penalty is discharged. If, however, the defendant does commit another crime, the judge is entitled to revoke the suspension and enforce the serving of the thirty days prison sentence.

Whether a conditionally suspended sentence is considered equivalent or complementary to a probation order or is considered an entirely distinct legal action depends on the jurisdiction. Under a probation order, the convicted person is not incarcerated but is placed under the supervision of a probation officer for a specified length of time. A person who violates probation will likely have probation revoked and will have to serve the original sentence.

In some jurisdictions a postponement of sentencing is also considered to be a suspended sentence. A postponement of a criminal sentence means that the judge does not pronounce a penalty immediately after a conviction. Courts use postponement and conditionally suspended sentences to encourage convicted persons to stay out of trouble. In most cases, courts will impose these types of conditional sentences for less serious crimes and for persons who do not have a criminal record.

- *Deferred sentence*: A decision is taken not to pass sentence on condition that the offender undertakes some action, such as undergoing treatment for alcoholism, drug addiction or receiving psychological counsel. Depending on the result, the offender may not receive a formal sentence and then, depending on the jurisdiction, no permanent record of the crime will be made.
- *Removal of certain rights*: Restrictions are placed on certain rights, such as the right to take up certain types of employment, to occupy certain positions in government or to travel to certain places.

<sup>251</sup>The definition is that used by the Free Legal Dictionary. (<http://legal-dictionary.thefreedictionary.com/Suspended+Sentence>).

- *Limitation of freedom:* The offender is obliged live in a certain place (normally his/her place of residence) under the supervision of a specialized agency. The offender cannot change place of residence, work or education, without permission of the supervising body.
- *Community service:* The offender undertakes unpaid work for the benefit of society. Community service is performed in addition to the regular employment of the convicted person.
- *Correctional work:* This type of sentence is widely used in some Eastern European and Central Asian countries, whereby an offender continues regular employment but is ordered to pay a certain percentage of his/her salary to the state.
- *Electronic monitoring:* is sometimes referred to as an alternative, though strictly speaking, rather than being an alternative in itself, it is rather a new method of supervising or keeping track of those who have been released awaiting trial, or as a means of enforcing a range of sentences that are implemented in the community, as well as in cases of early release.

In some countries the experience of electronic monitoring has been positive and is seen as an effective way of keeping track of offenders in the community, thereby providing the confidence that judges require to apply non-custodial measures and sanctions. However, concerns have also been raised in relation to the use of electronic monitoring. These include the fact that the technology is expensive and therefore this method of supervision may not be suitable for many low-resource countries, where using human beings to supervise offenders may be much more cost effective. A further and more fundamental concern is that the use of electronic bracelets adds an additional layer of supervision and restriction on the offender, sometimes where not justified, thereby infringing excessively on the privacy and human dignity of the offender. Such considerations need to be carefully weighed before introducing the use of electronic monitoring, especially in low-resource countries.

### 1.1 Adherence to human rights principles

International standards prescribe the human rights framework in which non-custodial sanctions can be applied. An underlying principle with sanctions that oblige offenders to perform certain acts is that they require the consent of the offender.<sup>252</sup> In addition, as abuse of human rights can occur in the implementation of sanctions, such as community service, that require a person to perform certain acts under supervision, it is vital that offenders have recourse to a formal complaints system, clearly laid out in legislation.<sup>253</sup>

### 1.2 Alternatives can increase the volume of sanctions imposed

Experience in many countries has shown that alternatives to imprisonment do not necessarily reduce rates of imprisonment or overcrowding in prisons, but rather lead to the increase in the volume of sanctions handed down by the courts. They may even contribute to an increase in the prison population. For example, when offenders

<sup>252</sup>Tokyo Rules, 3.4

<sup>253</sup>Tokyo Rules, 3.6 and 3.7

sentenced to a community sanction breach the conditions of their sentence, they will end up in prison, sometimes for longer terms of imprisonment than they may have received had they been sentenced to imprisonment in the first place. Courts may also pass non-custodial sentences in minor cases, which may have been dismissed with a caution in the past, thereby directly expanding the volume of sanctions imposed. So, there is a need for great caution in targeting alternative sentences appropriately, while ensuring that the conditions attached are not unnecessarily cumbersome, to fulfil the aims of justice and to reduce the rate of imprisonment.

On the other hand, there is also evidence from a number of European jurisdictions, such as Scandinavian countries and Germany, that frequent use of fines rather than prison sentences has helped reduce imprisonment rates. The same is true for other alternatives such as conditional and suspended sentences and community service, as well as electronic monitoring (especially in Sweden).<sup>254</sup>

#### The reduction of the prison population with traditional alternatives in Finland

The Finnish experience proves that visible results can be achieved just by using traditional alternatives, such as fines and conditional sentences. As a consequence of the reform initiatives that started in this country in the 1960s, by the 1990s around two out of three prison sentences in Finland were imposed conditionally and fines accounted for more than 60 per cent of all penalties imposed by the courts. Community service was adopted on an experimental basis in 1992 and made permanent in 1995. The number of prison sentences fell from 11,538 in 1992 to 7,102 in 2007, together with the increase in the number of community service orders, from none in 1992 to 3,312 in 2007. In a short time community service came to replace 35 per cent of short prison sentences of a maximum of eight months.

*Source: Tapio Lappi-Seppala, Causes of Prison Overcrowding, Workshop on Strategies to Reduce Overcrowding in Correctional Facilities, Twelfth United Nations Congress on Crime Prevention and Criminal Justice (Salvador, Brazil, 12-19 April 2010).*

## 2. Targeting

In order for legislation to achieve a reduction in the rate of imprisonment, it needs to be correctly targeted.<sup>255</sup> Targeting refers to the careful selection of offenders eligible for non-custodial measures.

- First, an analysis needs to be carried out of those who are currently receiving short prison sentences, together with their offences.
- Based on that information, an assessment can be made as to the profile of the offenders, who could be eligible for alternatives.
- The type of offences and upper limit of prison sentences to which alternatives can be introduced must then be determined. If the upper limit is too high, it may lead to failure; if too low, it may have little impact on the prison population. These considerations will need to be balanced.

<sup>254</sup>Tapio Lappi-Seppala, Causes of Prison Overcrowding, Workshop on Strategies to Reduce Overcrowding in Correctional Facilities, Twelfth United Nations Congress on Crime Prevention and Criminal Justice (Salvador, Brazil, 12-19 April 2010).

<sup>255</sup>Stern, V., *Developing Alternatives to Prison in East and Central Europe and Central Asia, A Guidance Handbook*, International Centre for Prison Studies, King's College, University of London, May 2002, pp. 23-24.

- Other factors should also be taken into account: for example, repeat offenders are not typically suitable, as demonstrated by the experiences in some countries.

To reduce the risk of net-widening it is recommended that the court first decides a term of imprisonment for an offence which carries a prison sentence, following the usual criteria for sentencing, and then, in stage two, decides whether the length of sentence and other circumstances of the offence would justify the imprisonment to be replaced by an alternative. The Model Criminal Code proposes this procedure and sets the maximum term of imprisonment which may be replaced with an alternative, as three years. (See Box).

**Model Criminal Code, Article 54: Replacement of a Principal Penalty with an Alternative Penalty**

1. When the court pronounces a penalty of imprisonment not exceeding three years, either for a single offence or for multiple offences, prior to any deductions spent in detention under Article 51 (4), it may then replace this principal penalty of imprisonment with an alternative penalty.
2. In determining whether an alternative penalty is more appropriate than the principal penalty of imprisonment, the court must have regard to:
  - (a) The gravity of the criminal offence committed;
  - (b) The gravity of the consequences of the criminal offence;
  - (c) The degree of criminal responsibility of the convicted person;
  - (d) Any aggravating and mitigating factors set out in Article 51; and
  - (e) The character and personal circumstances of the convicted person.

**Commentary:**

“Paragraph 1: After the court has imposed a term of imprisonment upon a person, and that term for either a single offense or multiple-offenses is less than three years, the court moves to a new stage in the determination of the penalty: determination of the appropriateness of an alternatives penalty. If this step is considered appropriate, the court must choose which alternative penalty to impose....”

*See: United States Institute of Peace, eds. Vivienne O’Connor and Colette Rausch with Hans-Joerg Albrecht and Goran Klemencic, Model Codes for Post-Conflict Criminal Justice, Volume 1, Model Criminal Code, 2007, pp. 138-141.  
(<http://www.usip.org/model-codes-post-conflict-justice-/volume-1>)*

### 3. Measures to encourage courts to use alternatives

Courts may be encouraged to use alternatives to imprisonment instead of short prison sentences with sentencing guidelines that prescribe the use of non-custodial sanctions in certain cases and/or by requiring that judges explain the decision of the court to impose a prison sentence where an alternative is available in law. See example given later on in the box, with reference to Germany where the new Penal Code discouraged the imposition of sentences of less than six months and required courts to

provide specific reasons in writing for imposing short-term prison sentences. The courts also had to provide additional justification if they refrained from suspending a sentence of less than one year. This measure, together with others described in section 4, B, led to a significant reduction in the size of the prison population. A similar measure was adopted in Kazakhstan, following the examination of international practice within a comprehensive programme which aimed to reduce the size of the prison population in that country. See Box.

#### **Kazakhstan—judges required to explain the reasons for imposing prison sentences**

In October 2001 a decision was taken by the Criminal Collegium of the Supreme Court to introduce a mechanism obliging judges to explain in their court decisions the reasons for imposing a prison sentence, rather than an alternative, if the law provided for both options for the offence committed. This requirement had an important impact on the reduction of prison sentences in late 2001 and 2002.

The change led to a reduction of prison sentences from 51.3 per cent of all sentences in 2000 to 41.8 per cent in 2002.

*Source : Human Rights and Health in Prisons: a review of strategy and practice, Penal Reform International and The Royal Netherlands Tuberculosis Foundation, Atabay, T., Laticevschi, V., Vasil'eva, T., 2006, p. 72 ([www.penalreform.org/human-rights-and-health-in-prisons-a-review-of-strategy-and-practice.html](http://www.penalreform.org/human-rights-and-health-in-prisons-a-review-of-strategy-and-practice.html))*

## **4. Which alternatives?**

Today there exists a wide range of alternative sentences available in the legislation of many countries around the world. Some of them are quite complicated, may involve a combination of sanctions, and require a special service, such as a probation service, to supervise their implementation. While in principle they may be useful in assisting with the social reintegration of offenders in the community, many of them are rarely used because of the costs and organizational complications involved. Sometimes, the conditions are too onerous to fulfil, leading to frequent breaches and, as a consequence, imprisonment.

Traditional alternatives, such as fines and conditional and suspended sentences, may contribute to the reduction of the prison population without the need for a complicated and costly infrastructure, as required by some other more sophisticated or newer alternatives. These low-cost sanctions are available to most jurisdictions without any major investments. Community service orders are popular in many jurisdictions because of their symbolic aim of giving back something to the community that has been harmed by a criminal activity and because they are regarded more of a “punishment” than fines or suspended sentences. These are the alternatives which have been selected for overview below. The *Model Criminal Code for Post-Conflict Countries* (MCC) includes these alternatives as relatively suitable options in post-conflict countries.<sup>256</sup> The MCC also includes semi-liberty as an alternative penalty (Article 57), which has not been included here, due to its limited potential to reduce the prison population. This selection does not intend to discourage the use of other

<sup>256</sup>See Model Criminal Code, Articles 54 to 57, pp. 138-145.

constructive alternatives appropriate to the economic, social and political context of different jurisdictions.

## Fines

Fines are among the most effective alternatives in keeping many offenders out of prison.<sup>257</sup> Fines also appear relatively simple to use, but the imposition of fines and their implementation require some administrative support. Issues that need to be addressed are:

- The equitable calculation of fines, so that they do not disproportionately disadvantage the poor;
- Minimizing opportunities for corrupt practices by ensuring that the collection of fines is undertaken in line with legal procedures with transparent and efficient administrative structures;
- Setting rules in law and in guidelines to judges, obliging courts to consider fines as a first option, for certain crimes, with a fixed maximum length of prison sentences.

The introduction or reform of a fine system needs careful thought particularly, though not exclusively, in low-income countries, where detainees are most often poor and unable to pay fines. The imposition of a day-fine system, which takes into account the income of an offender may be effective in such circumstances. Certainly, where fines are provided for in the penal statutes as an alternative to prison, introducing a day-fine system may improve the credibility, fairness and effectiveness of this alternative.

### The Day-Fine System

According to the day-fine system, fines are calculated by multiplying two factors: one indicating the seriousness of the offence and the other indicating the offender's daily net income.

Thus, if a crime is valued at 30 "days", and each day valued at \$1 for a person with low-income and \$20 for a wealthier person, then the indigent offender would need to pay a fine of \$30, while the wealthier person would need to pay a fine of \$600.

The underlying principle is that the impact of the fine is the same on both the wealthier and the poorer person, which eliminates discrimination in sentencing.

*The Model Criminal Code commentary to Article 50, Determination of the Appropriateness of a Fine as a Principal Penalty*, acknowledges the superiority of the day-fine system in some respects, because it takes the individual earning capacity of the person into account. It concludes that the system is not appropriate for post-conflict countries, because of its complications, such as the difficulty in calculating the actual income of a person and the need for systems and structures that might not be available.

<sup>257</sup>UNODC, *Handbook of basic principles and promising practices on Alternative to Imprisonment*, Criminal Justice Handbook Series, 2007, p. 29

Therefore the MCC sets minimum and maximum levels of fine, with a proviso that the court must consider the convicted person's ability to pay the fine, as well as allowing the convicted person a reasonable period of time in which to pay the fine.<sup>258</sup>

### Suspended sentences

In general terms, the purpose of a suspended sentence is to give the perpetrator of an offence a strong warning with the potential of imprisonment at a future stage, by pronouncing a custodial sentence, without executing it. It aims to deter the offender from committing any further offences, while not subjecting him or her to the harmful impact of imprisonment. It is a simple and effective measure which is usually used against offenders who have committed non-violent and petty offences, first time offenders, in cases where mitigating circumstances apply and for special categories, such as juveniles and women with small children or pregnant women. The advantage of suspended sentences is that they do not require the input of significant additional human or financial resources for their application.

Suspended sentences come in different forms in different jurisdictions. In some, there may be no conditions attached to the suspension of the sentence, other than not to commit another crime in the period of suspension. In most jurisdictions the offender may need to fulfil certain conditions during the period of suspension, such as to undergo treatment for drug addiction or participate in another rehabilitation programme, such as psychosocial rehabilitation in the community or a restorative justice programme.

A number of studies have found that offenders who receive suspended sentences have lower rates of reoffending compared to some other non-custodial sanctions and to imprisonment.<sup>259</sup> However, there are also a number of concerns relating to the application of suspended sentences:

*Poor public image:* The public often regard suspended sentences as being a soft option and failing to punish the offender adequately for the crime committed.

*Net-widening:* Critics have also argued that the positive benefit suspended sentences may have on prison population may be outweighed by net-widening, which occurs when courts use a more severe sentencing option in lieu of otherwise appropriate more lenient alternatives.<sup>260</sup>

<sup>258</sup>See MCC, Article 50, paragraphs 3 and 4

<sup>259</sup>See, for example, Cocker, S., 2006, *Using reconviction data to explore the effectiveness of community penalties in West Yorkshire*, Report no. 2005/6-5, National Probation Service, West Yorkshire; Bartels, L 2009, 'The weight of the Sword of Damocles: a reconviction analysis of suspended sentences in Tasmania', *Australian and New Zealand Journal of Criminology*, vol. 42, pp. 72-101.; (<http://www.smh.com.au/national/better-results-with-suspended-sentences-20091111-ia07.html>).

<sup>260</sup>Rohan Lulham, Don Weatherburn and Lorana Bartels, The recidivism of offenders given suspended sentences: A Comparison with full-time imprisonment, Crime and Justice Bulletin, Number 136, September 2009, NSW Bureau of Crime Statistics and Research, p. 12. For example, in New South Wales (NSW), Australia, where the use of suspended sentences has increased considerably since their reintroduction in 2000, research found that most of the suspended sentences were passed instead of other alternatives, and in particular to replace community service orders and good behaviour bonds, rather than imprisonment, although a small reduction of sentences of imprisonment was also noted. This is highlighted as a matter of concern because the breach of a suspended sentence is more likely to result in a sentence of imprisonment than breach of a non-custodial order, such as a bond. The use of suspended sentences in cases where a non-custodial penalty might have been imposed, therefore, has the potential to increase rather than reduce the overall rate of imprisonment. (See Lia McInnis and Craig Jones, Trends in the use of Suspended Sentences in NSW, Issue paper. No. 47, May 2010, NSW Bureau of Crime Statistics and Research).

Others have defended the advantages of suspended sentences, because they keep offenders in the community, provide opportunities for rehabilitation and, if used properly, divert offenders from increasingly overcrowded prisons.<sup>261</sup>

In analysing as to whether the public does indeed oppose suspended sentences, some studies found that:

- The problem was not so much in the suspended sentence itself, but in the fact that the public was not sufficiently informed about the purpose and implications of suspended sentences;
- The majority of people are not against the use of suspended sentences in all cases, but only when they are used in the cases of violent and serious offences;<sup>262</sup>
- When conditions are attached to the suspension of a sentence, public support increases significantly (at least in Australia and Canada).<sup>263</sup>

The above considerations and research findings would appear to support the use of suspended sentences provided that:

- Their use is restricted to particular types of non-violent offences which would have received a short prison term, if a suspended sentence had not existed or to particular categories of offenders, such as offenders with mental illness, women with small children;
- The perpetrator of the offence is required to fulfil certain conditions during the operational period of the suspension, to address the root causes of the offence, where appropriate;
- The conditions attached to suspension are not so onerous to fulfil as to risk large numbers of offenders breaching the technical conditions of suspension and ending up in prison.<sup>264</sup>

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<sup>261</sup>Arie Freiberg, Victoria Moore, *Suspended Sentences And Public Confidence In the Justice System*, Presented at the Sentencing Conference (February 2008), National Judicial College of Australia/ANU College of Law. p. 16.

<sup>262</sup>*Ibid.* p. 13,14.

<sup>263</sup>*Ibid.* p. 13.

<sup>264</sup>In England and Wales research has found that courts are much more likely to attach two or more conditions to a suspended sentence than to a community order, contrary to Sentencing Guidelines Council advice that the requirements on a suspended sentence should be 'less onerous than those imposed as part of a community sentence'. Between April 2005 and July 2006, only 36 per cent of suspended sentence orders had a single requirement compared to 49 per cent of community orders. There are also said to be 'growing concerns about the numbers of people on Suspended Sentence Orders who are going to prison as a result of small technical breaches'. According to the Home Office, 800 people were imprisoned for breach between January and August 2006, compared to only 132 in the whole of 2005. (See Arie Freiberg, Victoria Moore, *Suspended Sentences And Public Confidence In the Justice System*, Presented at the Sentencing Conference (February 2008), National Judicial College of Australia/ANU College of Law, p. 13).

### **Germany—decriminalization and the expansion of the use of suspended sentences and fines to reduce the prison population**

In 1969, West Germany overhauled its Penal Code in order to reduce the use of custodial measures. To achieve this, the reform combined several measures. Firstly, prison sentences of less than one month were abolished and replaced with fines. Secondly, many petty offences were decriminalized and turned into administrative infractions punishable by fines only. These included many traffic offences, and public order offences. Thirdly, the new Penal Code strongly discouraged the imposition of sentences of less than six months, with a requirement for courts to provide specific reasons in writing for imposing short-term prison sentences. The courts had to provide additional justification if they refrained from suspending a sentence of less than one year. As a result, there was a massive reduction in sentences of imprisonment between 1968 and 1996 from 136,519 to 36,874. In 1996 prison sentences made up only 5 per cent of all court sentences, while 82 per cent of offenders received fines and the remaining 12 per cent suspended sentences. The imprisonment rate before the reforms in 1968 was 106.<sup>a</sup> This rate was reduced to 81 in 1995.

#### **Suspended sentences**

According to the Penal Code of Germany the court must suspend a prison sentence of up to one year whenever the offender can be expected to refrain from committing further criminal acts. The court is also authorized to suspend a sentence between one and two years if the court finds “special circumstances” in the offence or in the personality of the offender. What was originally understood as an exceptional act of clemency gradually became a routine disposition. Whereas only 878 sentences of 1-2 years were suspended in 1976, this figure increased to 10,735 in 1996, representing two out of three of prison sentences of 1-2 years. The expansion of suspended sentences had the effect of absorbing the increase in convictions for offences of medium seriousness without overburdening the prison system.

It is important to note that suspended sentences in Germany are accompanied by one or two conditions, which the offender is required to fulfil. These may be the payment of compensation to the victim or a charitable organization or to the state, reporting to the police, avoiding contact with certain persons or undergoing treatment or rehabilitation. If the offender commits a new offence or seriously violates the conditions of probation, the court can revoke suspension and the offender will then have to serve the original sentence of imprisonment.

Until at least 2008, fines continued to represent the most frequent sentence applied and the majority of prison sentences were suspended. In 2008 for example, imprisonment without suspension made up 6 per cent of all sentences passed and suspended prison sentences made up a further 13 per cent of all sentences. This meant that seven out of ten of all prison sentences were suspended. Fines made up 71 per cent of all sentences. Disciplinary measures and educational measures for young offenders made up 11 per cent of all sentences.<sup>b</sup>

*Source: The main source is Thomas Weigend, “Sentencing and Punishment in Germany” in *Sentencing and Sanctions in Western Countries*, edited by Michael Tonry and Richard Frase, New York, Oxford University Press, 2001, with additional information for recent statistics from the German Federal Statistics Office (see footnote b) and *World Prison Brief*, International Centre for Prison Studies, University of Essex <http://www.prisonstudies.org/info/worldbrief>*

<sup>a</sup>Thomas Weigend, “Sentencing and Punishment in Germany” in *Sentencing and Sanctions in Western Countries*, edited by Michael Tonry and Richard Frase, New York: Oxford University Press, 2001, p. 190.

<sup>b</sup>Federal Statistics Office of Germany. Website accessed on 15 July 2011. ([http://www.destatis.de/jetspeed/portal/cms/Sites/destatis/Internet/DE/Presse/pm/2009/10/PD09\\_\\_382\\_\\_243,templateId=renderPrint.phtml](http://www.destatis.de/jetspeed/portal/cms/Sites/destatis/Internet/DE/Presse/pm/2009/10/PD09__382__243,templateId=renderPrint.phtml)).

## Community service

A community service order requires an offender to do unpaid work for a specified number of hours or to perform a specific task. The work should provide a service to the community.<sup>265</sup> In addition to making a convicted person take responsibility for his or her actions, community service provides compensation to society for harm done. The effectiveness of community service as an alternative has been reported widely as has the satisfaction of local communities with this form of penalty for a convicted person.<sup>266</sup> The attraction of community service as an alternative to imprisonment is largely because offenders undertake some action as punishment for the offence committed, while also paying back the community which they have harmed. However community service is not a simple sanction to implement.

The following factors need to be taken into account when considering the introduction of community service programmes:

- Before imposing such an order, the court needs reliable information that work is available under appropriate supervision;
- Community service requires close supervision to verify that the offender does the work required and that he or she is not exploited in any way. In many jurisdictions, the probation services or officials performing an equivalent function bear primary responsibility for ensuring that these requirements are met;
- Effective cooperation mechanisms need to be established between courts, institutions that will provide work and the body responsible for supervision.

This system has obvious resource implications which should be considered prior to implementing legislation on community service measures. Adequate staff, premises and funding are necessary for the body responsible for supervising the community service programme.<sup>267</sup> This option may be appropriate for post-conflict environments but only when sufficient resources for supervision are available.

## 5. Post-sentencing dispositions

### 5.1 Developing or strengthening provisions for early release

An effective measure in the reduction of the prison population is various forms of early release which are available in the legislation of most countries. The *Tokyo Rules* encourage the use of early release schemes.<sup>268</sup> Post-sentencing dispositions listed under Rule 9.2 of the *Tokyo Rules* include parole and remission, which are the most commonly used forms of early release in jurisdictions worldwide, in addition to furlough and half-way houses, work and education release and pardons.

<sup>265</sup>UNODC *Handbook of basic principles and promising practices on Alternatives to Imprisonment*, pp. 35-37.

<sup>266</sup>MCC, Article 56: Community Service as an Alternative Penalty, Commentary, p. 143.

<sup>267</sup>MCC, Article 56: Community Service as an Alternative Penalty, Commentary, p. 144.

<sup>268</sup>Rule 9.1.

## DEFINITIONS

Parole or early conditional release means the early release of sentenced prisoners under individualized post-release conditions. It can be mandatory when it takes place automatically after a minimum period or a fixed proportion of the sentence has been served, or it can be discretionary when a decision has to be made whether to release a prisoner conditionally, after a certain period of the sentence has been served.<sup>a</sup> Conditional release or parole is always accompanied by a general condition that the prisoner should refrain from engaging in criminal activities. However, this is not always the only condition imposed. Other conditions may be imposed on the prisoner, to the extent that these are appropriate for his/her successful social reintegration.<sup>b</sup>

Remission of sentence is a form of unconditional release. Remission is usually awarded automatically after a fixed proportion of a sentence has been served, but it may also be a fixed period that is deducted from a sentence. Sometimes remission is made dependant on good behaviour in prison and can be limited or withdrawn if the prisoner does not behave appropriately or commits a disciplinary offence.<sup>c</sup>

Most systems have both remission and forms of early conditional release.

<sup>a</sup>There are many variations of early conditional release around the world. For example, there are three in the United Kingdom, nine in Australia, one each in New Zealand and Canada and at least 51 in the United States of America, as well as the separate systems for younger prisoners. (See Ellis, T., and Marshall, P., Does Parole Work? A Post-Release Comparison of Reconviction Rates for Paroled and Non-paroled Prisoners, The Australian And New Zealand Journal of Criminology, Volume 33, Number 3 2000 pp. 300-317, Endnote 1.

(<http://www.port.ac.uk/departments/academic/icjs/staff/documentation/filetodownload,73794,en.pdf>).

<sup>b</sup>UNODC, *Criminal Justice Assessment Toolkit*, Custodial and Non-custodial Measures, Social Reintegration Tool, p. 25.

<sup>c</sup>Ibid., p. 25.

Reoffending statistics from a number of countries demonstrate that reoffending on parole is low in comparison to reoffending following release. For example, in England and Wales around 67 per cent of offenders reoffend within two years. But only 6 per cent offend during the parole period which is typically around one year.<sup>269</sup> Comparisons of reoffending by those released on parole over a longer period of time including after the operational period of parole has come to an end, with those released from prison without parole, are scarce. However, one comprehensive United Kingdom-based study found that the actual reconviction rate of people released on parole, compared to the predicted reconviction rates within two years, was lower for all crimes and in particular for violent and sexual crimes.<sup>270</sup>

Detailed statistics from non-western and developing countries are not widely available. Limited information suggests that rates of reoffending among those who are released under various early release schemes are very low also in these countries.

<sup>269</sup>Christine Glenn, "Strategies to deal with Prison Overcrowding: The Role of Parole" (Workshop on Strategies to Reduce Overcrowding in Correctional Facilities, United Nations Crime Congress, Salvador, Brazil, 2010).

<sup>270</sup>Tom Ellis and Peter Marshall, Home Office Research, Development and Statistics Directorate, United Kingdom, "Does Parole Work? A Post-Release Comparison of Reconviction Rates for Paroled and Non-Paroled Prisoners", The Australian and New Zealand Journal of Criminology, volume 33 Number 3 2000 pp. 300-317, p. 306.

### Early conditional release in Kazakhstan

In Kazakhstan new legislation came into force in 2003, which increased the use of alternatives to imprisonment, reduced sentences for certain offences and relaxed the requirements for gaining the right to early conditional release, among other measures, which included a comprehensive public awareness campaign. A very significant reduction of the prison population was achieved as an outcome of these initiatives. The figure for prisoners released on parole more than doubled after the new law came into force. The general rate of recidivism (including all prisoners released) was decreased by 7.8 per cent between 2002 and 2003, despite the increase in those being released from prison.

*Source: Human Rights and Health in Prisons: a review of strategy and practice, Penal Reform International and The Royal Netherlands Tuberculosis Foundation, Atabay, T., Laticevschi, V., Vasil'eva, T., 2006, p. 71 (<http://www.penalreform.org/human-rights-and-health-in-prisons-a-review-of-strategy-and-practice.html>).*

### Early release in Uruguay

On 14 September 2005, the National Parliament adopted the law "Humanization and Modernization Law of the penitentiary system", which introduced a number of measures aiming to improve living conditions in prisons, including a one-off early release measure, as an emergency response to the acute overcrowding in prisons.

The one-time emergency right to early release was applied to carefully selected categories of sentenced prisoners or persons in preventive detention. Following release, they remained under the supervision of the Patronage of Incarcerated and Discharged Prisoners - an institution of the Ministry of Interior (in charge of the administration of the prison system in Uruguay) the objective of which is to supervise and support former prisoners in order to facilitate their social reintegration.

The Patronage divided its task into two stages:

Seven days prior to release, the prisoner was interviewed by a representative of Patronage and a civil servant was assigned to him/her until the remaining part of the sentence was completed. This interview and information gathered prior to release enabled the coordination of the support provided to the former prisoners with existing national social assistance plans, as well as obtaining an allocation in shelters, where necessary, to prevent homelessness.

During the second stage under the supervision of the Patronage, the challenges encountered by the released prisoners were examined in order to design a personalized plan to facilitate his/her resettlement. The distribution of an emergency basket of food, hygiene items and tickets for public transport were provided as a loan. In cases where the ex-prisoner needed employment, assistance was provided. If a person desired to receive training for a specific profession, the possibility to start with training courses was offered in cooperation with the Ministry of Labour. If the discharged person already had a profession but did not have the necessary tools to practice it, the institution provided them on condition that the former prisoner would repay the cost incurred with the product of his/her work.

Persons who did not fulfil the stipulated requirements (or committed a new crime) lost immediately the benefit granted by law and were returned to prison.

850 prisoners were released thanks to this law (approx. 10 per cent of the total prison population at that time) out of which 25 per cent had to return to jail, a proportion much lower than the ratio of national recidivism, which was around 60 per cent.

In order to fulfil the tasks of support and supervision, the Patronage has been strengthened with human and material resources.

The supportive role of Patronage and the positive results have demonstrated that when former prisoners receive adequate and coordinated support, they are more successful in starting afresh and the chance of their returning to prison is reduced considerably.

*Source: María Noel Rodríguez, ILANUD, Strategies and best practices to reduce overcrowding in penal institutions, Paper submitted to the Workshop on Strategies to Reduce Overcrowding in Correctional Facilities, Twelfth United Nations Congress on Crime Prevention and Criminal Justice (Salvador, Brazil, 12-19 April 2010).*

Care needs to be taken in applying the early release of large numbers of prisoners to relieve overcrowding at times of crises due to the risks of reoffending and the high cost this will entail in terms of reducing public support for such measures. As demonstrated in the case of Uruguay in the box, there needs to be a proper assessment of those who are to be released, as well as a sustained and coordinated support to former prisoners to achieve successful resettlement following release. In other countries, the release of large numbers of prisoners under exceptional early release laws has led to negative outcomes: the release of inappropriate prisoners, reoffending and poor public perceptions of the early release measure.

## 5.2 Taking decision to release

Early conditional release decisions are usually made by an independent or semi-independent authority, such as a judicial authority or a parole board. In order for confidence and trust in the justice system to be maintained, and to avoid any discrimination, it is important that such decisions are taken in a fair manner. The decision makers need adequate information about the prisoners eligible for early conditional release, including their behaviour in prison and further support needs in the community following release. It is important that this information is gathered with the assistance of assessment tools that can help reliably determine the risks posed by the prisoner and his or her needs. It is also important that the prisoner has an opportunity to participate in the decision making process. In some jurisdictions prisoners need to apply for early conditional release and if they are not aware of this right, they may fail to do so. Awareness-raising among prisoners about their rights to early conditional release is therefore essential in such jurisdictions. Access to legal assistance during imprisonment is important from this perspective, as mentioned in chapter D, section 3.

The authority that has the responsibility to take decisions should also have the right to review and modify conditions where necessary and an impartial procedure should be in place for judging alleged breaches of conditions of release.<sup>271</sup>

In addition, the prisoner should have an opportunity to appeal decisions by applying to higher authorities, such as specialist tribunals or the national court system.<sup>272</sup>

There are risks of abuse in the early conditional release system, especially in systems where corruption is a problem. It is important therefore that measures are put in place to ensure the accountability of decision makers.

<sup>271</sup>UNODC *Handbook of basic principles and promising practices on Alternatives to Imprisonment*, p. 55.

<sup>272</sup>Ibid. , p.55.

### 5.3 Support to offenders under early conditional release supervision

In order for early conditional release to achieve its aim of enabling the offender's gradual social reintegration following release, there need to be in place adequate social support networks and continuum of care in the community for any treatment received in prison, and for coordination between prison administrations and services in the community. The role and approach adopted by the body and its staff responsible for the supervision of offenders released on parole are extremely important in achieving a successful transition from prison to life outside. The most successful approach has been found to be that which responds to both the risks and the needs of the offenders and which aims to develop their strengths, as evidenced by the reduction in the rates of reoffending, as further discussed in section 5.4.

In most countries, especially in developing countries, the body responsible for such supervision has very limited staff, technical capabilities and resources and can thus only perform as the body to which the offender reports at periodic intervals. As such the impact on social reintegration is minimal and relies mainly on the special efforts and capabilities of the individuals involved.

In some countries of the Eastern Europe and Central Asia, initiatives are in place to transform the former "criminal executive inspections", which used to fulfil the function referred to above into western style "probation services", with an aim to providing support to offenders with their resettlement. The results are mixed. In the Russian Federation considerable success has been achieved due to the political will and investment in the system and the partnership with an international NGO (Penal Reform International) which has provided technical assistance and capacity building to help make the system work.

### 5.4 Revocation of early conditional release

The *Tokyo Rules* limit the use of imprisonment to the minimum necessary in the case of the breach of a non-custodial measure.<sup>273</sup> They encourage preference to be given to an alternative non-custodial measure in the case of a decision to modify or revoke a non-custodial measure and to impose a sentence of imprisonment only in the absence of another suitable alternative measure.<sup>274</sup> The modification or revocation of the non-custodial measure must be made by the competent authority and only after a careful examination of the facts by both the supervising officer and the offender.<sup>275</sup> The offender must have the right to appeal to a judicial or other competent independent authority.<sup>276</sup>

Despite these provisions, ex-offenders returning to prison due to breaches in complying with the conditions of conditional release rather than for committing a new offence, have contributed to the growth of the prison population very significantly in a number of jurisdictions, as mentioned earlier. In such countries, there is an urgent need to review all aspects of early conditional release systems, including the justification and appropriateness of the conditions placed on offenders on release and the quality of supervision and support provided.

<sup>273</sup> *Tokyo Rules*, Rule 14.3.

<sup>274</sup> *Tokyo Rules*, Rule 14.4.

<sup>275</sup> *Tokyo Rules*, Rule 14.2.

<sup>276</sup> *Tokyo Rules*, Rule 14.6.

A comparative study covering some states in the United States, Australia, Canada, England and Wales, Japan, New Zealand and Scotland<sup>277</sup> found that a number of key factors had contributed to the increasing rate of revocations, due to technical violations in a number of jurisdictions:

- The number of conditions attached to a conditional release that did not always constitute reasonable expectations.<sup>278</sup>
- A shift from “reintegration” to “law enforcement” (or “casework approach” to a “surveillance approach”) in parole supervision, which is often encouraged by a culture which emphasizes risk (rather than need) assessment and holds the supervisor accountable for offender recidivism while on conditional release, coupled with increasing caseloads which force supervisors to prioritize between their control and social reintegration functions, which most often leads to the selection of the easier and least risky option of “control”.<sup>279</sup>
- The introduction of new surveillance technology, which has increased the capacity of parole supervisors to detect parole violations, which, when coupled with the prevailing law enforcement approach, and current risk management philosophy, can lead to a significant increase in revocations.<sup>280</sup>
- The length of surveillance following release was also a factor. As the number of indeterminate sentences has been increasing in some jurisdictions, and as offenders who receive such sentences have a comparatively longer period of supervision following early release, the number of parole revocations of this group of offenders was also predicted to increase.<sup>281</sup>

The study also notes that there is no conclusive evidence demonstrating that non-compliance with technical conditions signals an offenders’ likelihood of further criminal behaviour, or that returning such offenders to prison actually prevents them from engaging in further criminal behaviour. The study also refers to other research which explained how the surveillance method had not been effective in reducing recidivism. In fact, a balanced supervisory approach—incorporating social worker and law enforcer functions—was proposed to be the most effective method of supervision.<sup>282</sup>

<sup>277</sup>Dandurand, Y., Christian J., Murdoch, D., Brown, R.E., Chin, V., The International Centre for Criminal Law Reform and Criminal Justice Policy, Conditional Release Violations, Suspensions and Revocations, A Comparative Analysis, November 2008.

<sup>278</sup>Ibid. p. 23.

<sup>279</sup>Ibid., p. 26.

<sup>280</sup>Ibid. p. 26.

<sup>281</sup>Ibid. p. 34.

<sup>282</sup>Ibid. p. 29.

### **Recommendations to reduce the number of people returning to prison due to technical violations of early release conditions**

Taking into account the conclusions and recommendations of available research, provisions of international standards and good practice examples, the following measures may be considered to reduce reoffending and breaches by offenders on early conditional release:

- The decision-making procedures and structures need to be reviewed to ensure that the body making decisions is independent, has access to adequate and reliable information on the offender, as well as effective need and risk assessment tools, in order to take fair, consistent and appropriate decisions, to minimize risks to the public and improve the resettlement prospects of the offender, by tailoring conditions to his/or her needs.
- Investment should be made in adequate levels of staffing and training for those who are responsible for supervising people on early conditional release. Training should aim to equip supervisors with a positive role, focusing on the successful social reintegration of their ex-offenders, rather than concentrating exclusively on law enforcement.
- Cooperation with social, health care, employment and housing agencies in the community should be actively encouraged and formalized with agreements. They should accept shared responsibility for the successful social reintegration of ex-offenders and be provided with adequate resources to fulfil this responsibility.
- Conditions of parole should not be too complicated or onerous to fulfil and should take into account the personal circumstances of the offender. For example, if the person lives in a rural area where he or she must travel long distances to be able to report to the nearest office responsible for parole supervisions, or if she is a mother and needs to arrange alternative care for her children, or a young offender who is required to attend school, arrangements need to take account of these circumstances.
- Conditions should also be reasonable and match the needs and risks posed by the offender (e.g. avoiding conditions such as routine drug or alcohol testing for those whose offences had no connection to drug or alcohol use).
- Imprisonment for parole breaches should be avoided as far as possible, allowing the competent authority to use discretion in responding appropriately, depending on the individual case. Guidelines may be developed to discourage the use of imprisonment, and propose a hierarchical structure of actions that may be taken, such as the review of the conditions, taking into account the reason for the breach, as well as other sanctions that may be applied, before resorting—as a last measure—to imprisonment.
- The participation of the offender in discussions to revoke early conditional release, the right to a fair hearing with legal representation, as well as to appeal against the decision to a higher authority must be guaranteed in law and practice.
- Better data collection and research into reoffending and technical violations of those released on parole, the decision-making process to release, the role of the supervising agency and good practices should be undertaken to develop policies and practices that are evidence-based and that lead to the reduction of recidivism.

## **6. Special categories**

As noted in chapter 1, there has been an increase in the proportion of certain groups of prisoners, including vulnerable groups, in prison systems worldwide. This chapter focuses, in particular, on alternative responses to drug-related offences, due to the impact of drug-related offending on the growth of the prison population worldwide. It also provides an overview of responses to offending by women and children and people with mental health care needs, due to their contribution to prison overcrowding and their particular vulnerability in overcrowded prison environments.

For more detailed guidance on these and other groups of prisoners, please refer to the *UNODC Handbook on Prisoners with Special Needs*; *UNODC Handbook for Prison Managers and Policymakers on Women and Imprisonment*; *UNODC/UNICEF Manual for the Measurement of Juvenile Justice Indicators and Criteria for the Design and Evaluation of Juvenile Justice Programmes*, among others listed in the bibliography.

Detailed recommendations in relation to appropriate criminal justice responses to those who commit drug-related offences, and especially those who themselves have substance dependencies, are provided in: *UNODC: From Coercion to Cohesion: Treating Drug Dependence Through Health Care, Not Punishment (2010)*; *UNODC Drug Dependence Treatment, Community Based Treatment (2008)*; *Drug Dependence Treatment, Interventions for Drug Users in Prison* and others listed in the bibliography.

### 6.1 Drug offenders

Alternatives to imprisonment for drug offences, where the offender is drug dependent, can be organized in various ways. One option is simple diversion at first contact with the criminal justice system. This would need legislative provision for diversion by the police, prosecution and courts, as well as the establishment of effective links between criminal justice institutions and health services in the community. There may also be a need for supervision of the person receiving treatment by a probation service, or other similar agency.

Another model increasingly offered in some countries is drug treatment under judicial supervision, which is well established in countries such as Australia, Canada, the United Kingdom and the United States, under the name of “drug courts” or “drug treatment courts”. Drug courts have also been introduced in other countries such as Belgium, Chile, Jamaica, Mexico and Suriname on a smaller scale.<sup>283</sup>

#### Drug treatment as an alternative to imprisonment

UNODC and WHO, in the Discussion Paper, *Principles of Drug Dependence Treatment*, emphasize and recommend the following.<sup>284</sup>

- In general, drug use should be seen as a health care condition and drug users should be treated in the health care system rather than in the criminal justice system where possible;
- Interventions for drug dependent people in the criminal justice system should address treatment as an alternative to incarceration, and also provide drug dependence treatment while in prison and after release. Effective coordination between the health/drug dependence treatment system and the criminal justice system is necessary to address the twin problems of drug use related crime and the treatment and care needs of drug dependent people;
- Research results indicate that drug dependence treatment is highly effective in reducing crime. Treatment and care as alternative to imprisonment or

<sup>283</sup> Caroline S. Cooper, Brent Franklin, Tiffany Mease, *Establishing Drug Treatment Courts: Strategies, Experiences and Preliminary Outcomes, Volume One: Overview and Survey Results*, April 2010.

<sup>284</sup> UNODC, WHO, *Principles of Drug Dependence Treatment, Discussion Paper*, March 2008. (<http://www.unodc.org/documents/drug-treatment/UNODC-WHO-Principles-of-Drug-Dependence-Treatment-March08.pdf>).

commenced in prison followed by support and social reintegration after release, decrease the risk of relapse in drug use, of HIV transmission and of re-incidence in crime, with significant benefits for individual health, as well as public security and social savings. Offering treatment as an alternative to incarceration is a highly cost-effective measure for society.

In order to implement such a strategy, there is need to ensure that:<sup>285</sup>

- The legal framework allows the full implementation of drug dependence treatment and care options for offenders, in particular treatment as an alternative to incarceration and psychosocial and pharmacological treatment in prisons;
- Mechanisms to guarantee coordination between the criminal justice system and drug dependence treatment system are in place and operational. Such mechanisms and collaborative work will promote the implementation and monitoring of diversion schemes as an alternative to incarceration.

Consideration should be given to ensuring that legislation offers the possibility of diverting those who have committed drug-related offences to a suitable treatment programme in order to effectively address the root cause of the offence committed and assist such persons with their rehabilitation, while avoiding the harmful impact of imprisonment. In order for this to happen in practice, there is a need for the police, prosecutors and courts to have adequate discretion and guidelines to exercise such discretion on a consistent basis, and effective systems of collaboration between the criminal justice system and health care providers in the community.

The key requirement in drug treatment is that it should be voluntary. The use of any long-term treatment for drug use disorders without the consent of the patient is in breach of international human rights agreements and ethical medical standards<sup>286</sup> In addition, evidence of the therapeutic effect of this approach is lacking, both compared to traditional imprisonment as well as to community-based voluntary drug treatment. It is expensive and benefits neither the individual nor the community.<sup>287</sup> It does not constitute an alternative to imprisonment because it is a form of incarceration. In some cases, the facilities become labour camps with unpaid, forced labour, humiliating and punitive treatment methods that constitute a form of extra-judicial punishment.<sup>288</sup>

Compulsory or involuntary treatment, without the consent of the patient should only be used in specific cases of severe acute disturbance that pose an immediate or imminent risk to the health of the patient or to the security of society. Short-term involuntary treatment for the protection of the vulnerable individual should be applied for the shortest periods of time necessary, as a last resort, and it should always be undertaken by multidisciplinary teams and supervised by transparent legal procedures and be rigorously evaluated.<sup>289</sup>

<sup>285</sup>Ibid.

<sup>286</sup>UNODC and WHO (2008) Principles of drug dependence treatment, Vienna, United Nations Office on Drugs and Crime.

<sup>287</sup>UNODC, From coercion to cohesion, p. 8.

<sup>288</sup>Ibid., p. 8.

<sup>289</sup>Ibid., p. 10.

## Drug courts

Drug courts provide an alternative to imprisonment that entails using the leverage of the criminal justice system and its potential sanctions to provide a judicially supervised programme of substance abuse treatment and other services. While the functions of drug courts vary in different jurisdictions, in general there are two main categories of drug courts:<sup>290</sup>

1. *Deferred prosecution programmes (pre-trial diversion method or “pre-plea”)*: people who enter a deferred prosecution programme are diverted into the drug court system before being convicted. They are not required to plead guilty and are only prosecuted if they fail to complete the programme.
2. *Post-adjudication programmes or post-sentencing method*: these require participants to plead guilty to the charges against them and have their sentences deferred or suspended while they are in the programme. The sentence will be waived or reduced and often the offence will be expunged from their record, if he or she completes the programme; the case will be returned to court and the person will face sentencing on their previously entered guilty plea if he or she fails to satisfy the programme requirements.

Drug courts draw not only upon the supervision services of the criminal justice system but also on public health, housing, vocational and other services provided by health care and social service agencies, as well as community organizations. While drug courts address the individual’s immediate offence, the longer term goals are to promote the individual’s recovery and reintegration into the community, thereby putting an end to the chronic recidivism that often characterizes the behaviour of drug dependent offenders.<sup>291</sup>

It is argued that the appeal of the drug court model lies in many factors, including<sup>292</sup>:

- More effective supervision of offenders in the community, compared to traditional probation supervision;
- Greater accountability for drug using individuals for complying with conditions of release and/or probation;
- Greater coordination and accountability of the justice system, public health and other community services provided, including reduced duplication of services and costs;
- More efficiency of the court system through removal of a class of cases that places significant resource demands for processing, both initially and with probation violations and new offences that otherwise would be expected to occur.

<sup>290</sup>Justice Policy Institute, *Addicted to Courts: How a Growing Dependence on Drug Courts Impacts People and Communities*, March 2011, p. 2.

<sup>291</sup>Caroline S. Cooper, Brent Franklin, Tiffany Mease, *Establishing Drug Treatment Courts: Strategies, Experiences and Preliminary Outcomes*, Volume One: Overview and Survey Results, April 2010, p. 7.

<sup>292</sup>*Ibid.* p. 7.

Though research on the impact of drug courts on recidivism rates is not extensive, some convincing indications of successful outcomes do exist. For example, a comprehensive study conducted in the United States reported that adult drug courts reduced recidivism rates by 8.7 per cent.<sup>293</sup> This compared to a reduction of 8.3 per cent with treatment in the community and of 6.4 per cent with treatment in prison.<sup>294</sup> Another comprehensive study conducted in the United States found that drug court participants were significantly less likely to re-offend, compared to the comparison group (40 versus 53 per cent).<sup>295</sup> The comparison group comprised participants of other programmes, aiming to address drug use and reoffending, including standard probation supervision with referral to treatment.<sup>296</sup> In the United States, drug court participants were also found to experience a lower rate of drug relapse, compared to the comparison group (56 versus 76 per cent) and were also less likely to report using serious drugs.<sup>297</sup>

In Rio de Janeiro, Brazil, scientific research results showed that the rate of recidivism among offenders who are not submitted to treatment was 80 per cent, whereas the proportion was only 12 per cent among those who received treatment via drug courts.<sup>298</sup> In Ireland, research based on two small random samples showed that there was a reduction in reoffending by 75 to 84 per cent during and after participation in a drug treatment court programme.<sup>299</sup> Most other programmes have anecdotally reported reduction in recidivism rates for drug treatment court participants, compared to offenders processed by traditional criminal justice procedures.<sup>300</sup>

See box for twelve principles that are deemed to be key to the success of drug court programmes.

#### UNODC's twelve principles for successful drug court programmes

The United Nations Office on Drugs and Crime set up an expert working group to assist in the establishment of drug courts. It identified twelve principles that ensure the success of drug court programmes:

1. Effective judicial leadership of the multidisciplinary drug court programme team.
2. Strong interdisciplinary collaboration of judge and team members while each also maintains his respective professional independence.
3. Good knowledge and understanding of addiction and recovery by members of the court team who are not health care professionals.

<sup>293</sup>Elizabeth K. Drake, Steve Aos and Marna G. Miller, Washington Institute for Public Safety, Evidence-Based Public Policy Options to Reduce Crime and Criminal Justice Costs: Implications in Washington State. (<http://www.wsipp.wa.gov/rptfiles/09-00-1201.pdf>).

<sup>294</sup>Ibid.

<sup>295</sup>The Multi-Site Adult Drug Court Evaluation: Executive Summary, The Urban Institute, Justice Policy Center, June 2011, p. 5.

<sup>296</sup>Ibid. p. 2.

<sup>297</sup>Ibid., p. 5.

<sup>298</sup>Caroline S. Cooper, Brent Franklin, Tiffany Mease, Establishing Drug Treatment Courts: Strategies, Experiences and Preliminary Outcomes, Volume One: Overview and Survey Results, April 2010, p. 107.

<sup>299</sup>Ibid., p. 108.

<sup>300</sup>Ibid., p. 107.

4. Operational manual to ensure consistency of approach and ongoing programme efficiency.
5. Clear eligibility criteria and objective eligibility screening of potential participant offenders.
6. Detailed assessment of each potential participant offender.
7. Fully informed and documented consent of each participant offender (after receiving legal advice) prior to programme participation.
8. Speedy referral of participating offenders to treatment and rehabilitation.
9. Swift, certain and consistent sanctions for programme non-compliance coupled with rewards for programme compliance.
10. Ongoing programme evaluation and willingness to tailor programme structure to meet identified shortcomings.
11. Sufficient, sustained and dedicated programme funding.
12. Changes in underlying substantive and procedural law if necessary or appropriate.

*Source: UNODC Handbook of basic principles and promising practices on Alternatives to Imprisonment, 2007, p. 65. United Nations publication, Sales No. E.07.XI.2.*

For further, detailed information and recommendations of the studies referred to above, as well as a study which provides a critical review of drug courts, see the bibliography.

## 6.2 Offenders with mental health care needs

As discussed in chapter B, section 9, in order to reduce the number of people with mental health care needs in prisons, comprehensive health care and criminal justice policies and measures need to be developed to address the root causes of the increasing use of prisons to accommodate people whose needs can be best addressed by treatment in the community.

A preference for non-custodial measures and sanctions, instead of imprisonment, in the case of offenders with mental health care needs, is an essential component of such strategies, which can have a significant impact on overcrowding levels in prisons, as well as the impact of overcrowding on this vulnerable group.

The following measures are suggested:

### Diversion

Where possible, individuals with mental disabilities should be diverted from the criminal justice system at the first point of contact with law enforcement officers and those with severe mental disabilities should never be held in prisons;<sup>301</sup>

Diversion should be possible throughout the criminal justice process—during prosecution, trial and on imprisonment. Courts should have access to information regarding mental health issues in general and the mental health care needs of the offenders in question, in particular, in order to take the appropriate decision at the earliest possible stage. Such information may be provided by

<sup>301</sup>SMR, Rule 82 (1); UNODC *Handbook on Prisoners with Special Needs*, 2009, p. 23.

mental health care professionals who may conduct assessments and screening of offenders with mental disabilities as early as possible during the criminal justice process. Diversion measures may necessitate the introduction of new legislation and procedures, as well as the training of law enforcement officials to recognize mental disabilities, in order to seek the assistance of mental health professionals at the first point of contact with the criminal justice system;

Diversionary measures could also be encouraged by providing judicial officers, as well as law enforcement officers, with training concerning the parameters of the mental disabilities they are likely to encounter in their criminal justice work and the sentencing and allied options that may be available to divert such offenders into the health system for treatment.

### Alternatives to imprisonment

Consideration should be given to introducing sentencing alternatives for offenders with mental disabilities, who have committed more serious offences. Such sentences should incorporate comprehensive medical care in a suitable facility and supervision. In general it is preferable for offenders who present a danger to the public to receive treatment in secure medical facilities, rather than in prison settings which will worsen their condition.

For guidance on the development of appropriate legislation, including the provision of alternative measures and sanctions in relation to offenders with mental disabilities, please refer to *World Health Organization Resource Book on Mental Health, Human Rights and Legislation, 2005*.<sup>302</sup>

### 6.3 Women

Women continue to constitute a very small proportion of the general prison population worldwide. However, not only are their numbers increasing in tandem with the rise in the overall prison population in many countries, but studies in some countries have shown that the number of female prisoners is increasing at a faster rate than that of male prisoners. Although rising, the overall number of women in prison is very small and as such not yet a significant factor in the overall growth of imprisonment rates. The reality for women prisoners in many countries, is that they experience severe overcrowding in the small number of women's prisons, due to the increasing number of women prisoners.<sup>303</sup> A large number of these women do not

<sup>302</sup>On non-custodial measures and sanctions, see pp. 75-80 of WHO Resource Book on Mental Health, Human Rights and Legislation (2005).

<sup>303</sup>For example, in California, United States, the State's two biggest female prisons are both in the town of Chowchillait where the Valley State Prison, designed to hold 2,024 people was housing 3,810 in 2011. Central California Women's Facility was holding 3,918, in a prison designed to hold 2,004. Cells originally built for four people were holding 10. The director of the women's campaign group Justice Now, commented "We've never, ever had the reports of violence among peers that we're seeing now...People are dirty, their cells are dirty, they're bleeding on themselves, they're emotional and in a state of despair. It's creating conditions inside a pressure cooker." (<http://www.independent.co.uk/news/world/politics/forced-and-beaten--life-for-women-in-jail-6278849.html?origin=internalSearch>); In Grand Valley Institution (GVI) in Kitchener, Ontario, Canada, the women's prison is so overcrowded that a number of prisoners have been forced to double bunk in units reserved for family visits, while prison officials have plans to convert the gymnasium into additional holding cells should the need arise. The units, designated for inmates to spend up to three days with a spouse or family members, are built to house only one offender and her loved ones. (<http://ca.news.yahoo.com/blogs/dailybrew/overcrowding-women-prison-causes-concern-143033229.html>); Overcrowding in Western Australia's main women's prison, Bandyup, which was meant to only hold 188 prisoners but reached 269 in August 2010 has put immense pressure on the number of beds available. While there was a massive investment in extra beds for male prisoners in Western Australia between 2008 and 2011, none of the beds were earmarked for

necessarily need to be in prison at all. Most are charged with minor and non-violent offences and do not pose a risk to the public. Many are imprisoned due to their poverty and inability to pay fines. A significant proportion is in need of treatment for mental disabilities or substance addiction, rather than isolation from society. Many are victims themselves but are imprisoned due to discriminatory legislation and practices. Community sanctions and measures would serve the social reintegration requirements of a vast majority of women offenders much more effectively than imprisonment.

Recognizing the changing profile of the prison population and the particularly harmful impact of imprisonment on women themselves, their families and communities, the *United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules)*<sup>304</sup> stipulate measures to be taken to prevent the imprisonment of women as far as possible, taking into account their typical backgrounds, the generally non-violent nature and circumstances of the offences they commit and their caring responsibilities.<sup>305</sup>

In line with the provisions of the *Bangkok Rules*, the following measures are recommended:

- Women offenders should not be separated from their families and communities without consideration being given to their backgrounds and family ties. Alternative ways of managing women who commit offences, such as diversionary measures and pre-trial and sentencing alternatives should be implemented wherever possible;<sup>306</sup>
- When sentencing women offenders, courts should have the power to consider mitigating factors such as lack of criminal history and relative non-severity and nature of the criminal conduct, in the light of women's caretaking responsibilities and typical backgrounds;<sup>307</sup>
- Appropriate guidelines may be developed for courts whereby they would only consider custodial sentences for pregnant women and women with dependent children when the offence was serious and violent, the woman represented a continuing danger, and after taking into account the best interests of their children;
- When certain categories of offences are committed by a pregnant woman or a mother with a small child, sentences may be deferred, for example, until

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women. The Inspector of Custodial Services said the accommodation situation deteriorated to the point mid-last year where 90 women were forced to sleep on mattresses on cold concrete floors. The majority of those affected, he said, were Aboriginal. "Together with the extreme cold and lack of ventilation, the overcrowding of cells created condensation to levels that constituted a risk to health," the Inspector said. (<http://news.smh.com.au/breaking-news-national/despair-palatable-at-womens-prison-report-20111007-1ldjl.html>); In the female ward of Sri Lanka's Welikada Prison, prisoners reported that about 150 women slept in a cell designed for 75 people. One prisoner described the female ward of the Welikada prison as "hell"—including maggots in the food, a complete absence of beds, mats or pillows and no fans, despite the 33 degrees Celsius heat. "There are 650 of us in the female ward though it was built for 150 people," she added, suggesting that, in the women's ward in particular, actual numbers outstrip the conservatively estimated occupancy rates of 200 per cent for the whole prison. (<http://english.aljazeera.net/indepth/features/2011/07/2011725142452794174.html>).

<sup>304</sup>General Assembly resolution 65/229 of 21 December 2010.

<sup>305</sup>Bangkok Rules, Rules 57 – 66.

<sup>306</sup>See Bangkok Rules, Rule 58.

<sup>307</sup>See Bangkok Rules, Rule 61.

the child reaches a certain age and reviewed at that time, based on pre-established criteria, which should provide eligibility for the cancellation of imprisonment or reduction to a non-custodial sanction under certain conditions;

- When prison is unavoidable, women offenders should be able to restore and maintain contact with their families through visits, correspondence and telephone. If the woman is a mother, the authorities must give consideration to the best interests of her children with respect to placement and programme decisions concerning the mother;
- Consideration should be given to investing in suitable alternatives for female offenders in order to combine the aforementioned measures with interventions to address the most common problems underlying offending behaviour in women, such as therapeutic courses and counselling for victims of domestic violence and sexual abuse, suitable treatment for those with mental disabilities and drug dependence, among others;<sup>308</sup>
- Authorities need to ensure that legislation and practice provide maximum possible protection for foreign women, such as victims of human trafficking and migrant domestic workers, from further victimization. Trafficked persons should not be prosecuted for trafficking-related offences, such as holding false passports or working without authorization. Given the victims' existing fears for their personal safety and of reprisals by the traffickers, the added fear of prosecution and punishment can only further prevent victims from seeking protection, assistance and justice.<sup>309</sup>

#### 6.4 *Children in conflict with the law*

Children are imprisoned too frequently and unnecessarily, as well as for longer periods than necessary, despite provisions in international law which provide that the detention and imprisonment of children may only be used as a measure of last resort and for the shortest possible period of time.<sup>310</sup> In 2000, it was estimated that more than one million children were held in prisons worldwide.<sup>311</sup> This number constitutes at least one tenth of the current total prison population. The impact needs to be assessed in conjunction with the cycle of crime and imprisonment to which a first time incarceration is likely to lead.

As has already been suggested in chapter 2, the first step that can be taken to reduce the imprisonment of children is to review the age of criminal responsibility and to raise it to 12 or higher, as recommended by the Committee on the Rights of the Child in its General Comment number 10.<sup>312</sup>

<sup>308</sup>See Bangkok Rules, Rule 60.

<sup>309</sup>See Bangkok Rules, Rule 66 and Toolkit to Combat Trafficking in Persons, Global Programme Against Trafficking in Human Beings, UNODC, 2006, p. 253.

<sup>310</sup>Convention on the Rights of the Child, Article 37 (b), Beijing Rules 13.1 and 19.1.

<sup>311</sup>Cappelaere G., Grandjean A., *Enfants privés de liberté: Droits et réalités*; Editions Jeunesse et Droit, Liège, Belgium. 2000.

<sup>312</sup>Committee on the Rights of the Child, General Comment No. 10, paragraph 32.

The need to prioritize the rehabilitation and reintegration of a juvenile convicted person is highlighted in a number of international standards.<sup>313</sup> This goal can be best achieved by taking into account the best interests of the children concerned on all occasions and avoiding their institutionalization to the maximum extent possible, as provided by Article 37 (b) of the Convention on the Rights of the Child (CRC) and the *Beijing Rules*, Rule 19.1.

The CRC (Article 40.3) requires states to promote measures for dealing with children alleged as, accused of, or recognized as having infringed the criminal law without resorting to judicial proceedings whenever appropriate and desirable.<sup>314</sup> The *Beijing Rules* also provide that those involved in dealing with children in conflict with the law should have as much discretion as possible in making decisions about how to deal with them.<sup>315</sup>

*Beijing Rules*, Rule 12 draws attention to the need for specialized training for all law enforcement officials who are involved in the administration of juvenile justice. As police are the first point of contact with the juvenile justice system, it is most important that they act in an informed and sensitive manner.<sup>316</sup> Rule 13 limits the use of pre-trial detention to the minimum and for the shortest period of time and puts forward constructive alternatives, including intensive care or placement with a family or in an educational setting or home.

*Beijing Rules* 14-17 provide detailed requirements in relation to the trials and sentencing of juvenile offenders, which include specific safeguards due to their age, including the requirement of social inquiry reports (social reports or pre-sentence reports) which are an indispensable aid in most legal proceedings involving juveniles. Courts should be informed of relevant facts about the juvenile, such as social and family background, school career, educational experiences, before deciding the appropriate response to the offence committed. Children should have access to child friendly legal aid services during the whole criminal justice process, as discussed in chapter D.

The *Beijing Rules* provide that imprisonment shall not be imposed unless the juvenile is convicted of a serious act involving violence against another person or of persistence in committing other serious offences and unless there is no other appropriate response.<sup>317</sup> A list of non-institutional dispositions suitable for juveniles is set out in Rule 18.1 of the *Beijing Rules*.

Based on these and other provisions in these standards and international good practice, the following are some of the measures that are recommended in dealing with children in conflict with the law:

<sup>313</sup>E.g. Article 40(1) of the *Convention on the Rights of the Child*. The *International Covenant on Civil and Political Rights* (Article 14(4)) also emphasizes the desirability of promoting the rehabilitation of juveniles in conflict with the law, as does the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the "Beijing Rules")*. The *African Charter on the Rights and Welfare of the Child* states that "the essential aim of treatment of every child during the trial and also if found guilty of infringing the penal law shall be his or her reformation, re-integration into his or her family and social rehabilitation." (Article 17 (3)).

<sup>314</sup>Along the same lines, the *Beijing Rules* provide specifically that consideration should be given, wherever appropriate, to dealing with juvenile offenders without resorting to a formal trial. The police and the prosecution or other agencies are directed to ensure that this occurs (Rules 11. and 12.2).

<sup>315</sup>*Beijing Rules*, Rule 6.1.

<sup>316</sup>*Beijing Rules*, Commentary to Rule 12.

<sup>317</sup>*Beijing Rules*, Rule 17.1 (c). See also the United Nations Standard Minimum Rules for the protection of Juveniles Deprived of Their Liberty, Rules 1 and 2.

- Dealing with the cases of children in conflict with the law should be the responsibility of a juvenile justice system, with separate, appropriately selected and trained police, prosecutors and judges. Criminal justice actors must act in the best interests of children at all times. If a separate system cannot be set up due to resource constraints, criminal justice actors who deal with the case of children should be appropriately trained and sensitized;
- Appropriate scope for discretion should be allowed at all stages of criminal proceedings and at the different levels of juvenile justice administration, to direct juveniles away from the criminal justice process. Criteria should be established in legislation that empower the police, prosecution or other agencies dealing with juvenile cases to dispose of such cases at their discretion, without having to resort to formal hearings. In order to facilitate the discretionary disposition on juvenile justice cases, efforts should be made to provide for community programmes, such as temporary supervision and guidance, restitution, and compensation of victims;<sup>318</sup>
- Efforts should be made to establish and apply programmes aimed at strengthening social assistance, which would allow for the diversion of children from the justice system and the application of non-custodial measures and sentences. To establish and apply such programmes, it is necessary to foster close cooperation between the child justice sectors, different services in charge of law enforcement and the social welfare and education sectors;<sup>319</sup>
- Consideration needs to be given to reviewing national legislation to comply with international standards in the area of juvenile justice, in particular ensuring that alternative mechanisms to formal legal proceedings and a variety of non-custodial measures and alternative sentences are available to competent authorities to minimize recourse to institutionalization;<sup>320</sup>
- Social inquiry reports need to be made available to the courts about the child before a sentence is passed. These may be prepared by social services or probation officers, or similar institutions.<sup>321</sup> Training needs to be provided to those who will be responsible for preparing such reports. Judges should also be trained/sensitized to take account of the recommendations of such reports;
- Authorities are encouraged to form links with civil society as far as possible in assisting with the social reintegration of children in conflict with the law.

## 7. Organization and infrastructure

Some of the main challenges encountered in trying to implement alternatives to imprisonment that require supervision, services and programmes to assist with the rehabilitation of the offender or workplaces in the case of community service, have been the lack of planning, the lack of effective coordination mechanisms with agencies and services in the community and lack of investment in the infrastructure required to implement and supervise the non-custodial measures.

<sup>318</sup>Beijing Rules, 6.1 and 11.2.

<sup>319</sup>Guideline 42 of the United Nations Guidelines for Action on Children in the Criminal Justice System (“Vienna Guidelines”).

<sup>320</sup>CRC, Article 40 (3) and Beijing Rules, 13.2.

<sup>321</sup>Beijing Rules, 16.1.

The implementation of all non-custodial measures and sanctions require some form of infrastructure—some much more than others. Fines require transparent mechanisms for their collection, community service orders and similar alternatives that put an obligation on the offender to undertake work, treatment, education or other activities require a body to coordinate, supervise and assist the offender. Such services may be provided by a specialist body, such as a probation service, but often the establishment of a separate structure will entail significant financial investment which is unlikely to be viable in many post-conflict or developing countries. Other models do exist, where community sentences may be managed by a social welfare agency, the courts, the Ministry of Labour or the prison administration itself and others.<sup>322</sup>

It is important that whatever structure is used, the decision should be based on a careful analysis of how alternatives can be best administered: the agency responsible should have the confidence of the courts as well as being close enough to the community to ensure its involvement.<sup>323</sup>

A problem with using existing structures may be that often the administration of alternatives will be added on to existing responsibilities, which they will continue to prioritize. Further, the staff of the agency may have no experience or training in what is required to both supervise and support their clients.

In order for any agency, whether a new body or an existing agency, to fulfill its responsibilities effectively there needs to be some investment in the administrative structures, in staffing and training. An understanding of the aim of alternatives needs to be developed, with a sense of purpose promoted by an active leadership.

It is also essential that systemized cooperation between all agencies responsible for delivering and supervising the sanctions is developed; and that cooperation with social and health services is established to provide the necessary care and support for offenders.<sup>324</sup> Clear rules and guidelines should be made available for all agencies involved.

See also *UNODC Handbook of Basic Principles and Promising Practices on Alternatives to Imprisonment*<sup>325</sup> for a discussion of infrastructure requirements for alternatives to pre-trial detention, sentencing alternatives and early conditional release.

## 8. Building a consensus to implement alternatives to prison

Experience in many countries has shown that alternative sentences are not used because there is not adequate understanding and commitment at the highest levels, including ministries, parliaments and executive bodies. In addition, the judiciary may lack confidence in their effective implementation or may be reluctant to apply them due to real or perceived public pressure. Therefore key requirements to ensure that alternatives are applied in practice are, firstly, to take measures to influence criminal

<sup>322</sup>Stern, V. *Alternatives to prison in developing countries*, International Centre for Prison Studies, 1999, p. 54.

<sup>323</sup>Stern, V. *ibid.*, pp. 54-55.

<sup>324</sup>The Tokyo Rules, Rule 22.1.

<sup>325</sup>See pp. 22-23, 39-41; 54-56.

justice policies by raising the awareness of politicians and decision makers. The essential step in this process is to define prison overcrowding on a political level as a problem that should and can be solved.<sup>326</sup>

Secondly there is a need to secure judges' confidence in alternatives to imprisonment. It is essential that the judiciary, as the body responsible for sentencing, is involved in the development of strategies and programmes that aim to reduce the use of imprisonment in favour of alternatives. They should receive additional training on alternatives to imprisonment, and their awareness about the use of alternatives worldwide and the potential benefits should be improved via, for example, participation in conferences and seminars.

Thirdly, experience shows that developing a regime of alternatives to imprisonment within a consultative process that includes all relevant government agencies, criminal justice institutions, and representatives of civil society generates commitment and support by all key actors and, consequently, sustainability.<sup>327</sup> Representatives of civil society, including victims' support organizations, should be involved in the consultative process, to increase public acceptance, understanding and involvement.

Fourthly, public awareness activities need to be carried out to harness public support. The public has an immense influence on the determination of criminal justice policies by politicians, as well as on sentencing tendencies of the courts. The public should be informed about the harmful consequences of imprisonment and the purpose and justification of alternative sentences. Much of people's and the politicians' response to crime and their reliance on punishments are explained by their belief that criminal sanctions are an effective way of dealing with many problems.<sup>328</sup> Learning about basic criminological facts from reliable sources, and not from the media, can help change their views.<sup>329</sup> To this end, accurate data should be widely available to the public and the media, so as to earn their understanding and cooperation.

Such measures need to be sustained over a long period, until the penal culture in a country has been changed sufficiently and the benefits of alternative responses to crime have been felt and understood, in order to reduce the risks of reverting to punitive criminal justice policies to which imprisonment is central.

## 9. Economic considerations

There are convincing economic arguments in favour of alternatives to imprisonment, though unfortunately, there has been insufficient research conducted on comparative costs in developing countries. In Zimbabwe, where a community service scheme was developed on this basis in the early 1990s, which has been replicated in a number of other African countries, the monthly cost of supervising an offender on community service was estimated to be about one third of that of keeping a person in prison.<sup>330</sup>

<sup>326</sup> Tapio Lappi-Seppala, *Enhancing the Community Alternatives – Getting the Measures Accepted and Implemented*, ([http://www.unafei.or.jp/english/pdf/RS\\_No61/No61\\_11VE\\_Seppala3.pdf](http://www.unafei.or.jp/english/pdf/RS_No61/No61_11VE_Seppala3.pdf)).

<sup>327</sup> *Ibid.*

<sup>328</sup> *Ibid.*

<sup>329</sup> *Ibid.*

<sup>330</sup> Stern, V., *Alternatives to prison in developing countries*, International Centre for Prison Studies, King's College London and Penal Reform International, London 1999, p. 42.

In western societies the supervision of offenders within a probation system is considerably less costly than the upkeep of a prisoner.<sup>331</sup>

A comprehensive study which meta-analysed various types of alternatives to imprisonment in Australia, Canada, Europe, New Zealand and the United States, implemented between 1996 and 2007, compared their success rates and costs to those of imprisonment and found that alternatives to imprisonment were less costly than prison sentences and produced better outcomes in terms of reducing rates of reoffending.<sup>332</sup> The study found that the interventions examined predicted that the cost savings per adult or juvenile offender receiving a community sanction rather than imprisonment ranged from £3,437 to £88,469 of savings to the taxpayer only and from £16,260 to £202,775 of savings to the taxpayer and the savings from fewer victim costs over the lifetime of an offender.<sup>333</sup>

Research in the United States indicates that drug courts are a more economic option than imprisonment. If drug courts are used as an alternative to imprisonment, savings can be considerable—the average annual costs of sending one person to prison are \$22,650, compared to an average of \$4,300 per person for a year of drug court.<sup>334</sup> And as noted earlier, drug courts can reduce recidivism rates by at least 8.7 per cent, compared to lower success rates achieved with prison-based drug treatment programmes, which means that the long-term cost savings are also higher.

Considering the convincing combination of cost savings and better success rates in enabling offenders' social reintegration, it would seem that the advantages of giving preference to non-custodial measures and sanctions is a much more effective criminal justice response to crime than imprisonment, in the vast majority of cases.

## KEY RECOMMENDATIONS

### To legislators and policymakers

- To ensure that legislation includes a wide range of non-custodial sanctions in criminal legislation, suitable for different types of offences and applicable to the individual circumstances of each offender.
- To develop policies and legislation that ensure that alternative sentences are appropriately targeted and that the conditions attached are not unnecessarily cumbersome or inappropriate, to ensure that the purpose of justice is met and that they lead to the reduction of the prison population.
- To take measures to encourage courts to use alternatives to imprisonment, in response to specific offences or instead of short prison sentences, taking into account also the vulnerabilities and circumstances of the offender.

<sup>331</sup>For example, the daily average cost per prisoner in Sweden in 2003 was EUR 200 (closed prison), compared to the cost of a probationer at EUR 17. In Finland the cost of a probationer in 2004 was EUR 2,800 per year, compared to the cost of a prisoner at EUR 44,600. In Estonia the cost of supervising each probationer is about ten times less than the cost of maintaining a prisoner and in Romania about eleven times less. (see Kalmthouht, A.M. Van, Netherlands, "Interventions under the Four Working Sessions", Paper presented at the Council of Europe/Ministry of Justice, Turkey Conference on Probation and Aftercare, 14-16 November 2005, Istanbul).

<sup>332</sup>The Matrix Knowledge Group, *The Economic Case for and against Prison*. (<http://www.matrixknowledge.co.uk/wp-content/uploads/economic-case-for-and-against-prison.pdf>)

<sup>333</sup>*Ibid.*, p. 14.

<sup>334</sup>Justice Policy Institute, *Addicted to Courts: How a Growing Dependence on Drug Courts Impacts People and Communities*, March 2011, p. 14.

### ***POST-SENTENCING DISPOSITIONS***

#### **To legislators and policymakers**

- To ensure that legislation provides for various forms of early release and to take measures to increase/improve the use of early release schemes.
- To review the decision-making procedures and structures to ensure that the body making decisions on release is independent, has at its disposal adequate and reliable information concerning the offenders and has effective need and risk assessment tools in order to make fair, consistent and appropriate decisions.

#### **To policymakers, including relevant ministries, probation services (or similar supervision services), agencies in the community and prison administrations**

- To put in place adequate social support networks and continuum of care in the community to follow-up on any treatment received in prison; and to ensure coordination between prison administrations and services in the community to assist with the social reintegration of prisoners following release.
- To review the conditions of parole to ensure that they are reasonable, not too complicated or onerous to fulfil and that they take into account the personal circumstances of the offender.

#### **To legislators and sentencing authorities**

- To avoid as far as possible imprisonment for parole breaches, allowing the competent authority to use discretion in responding appropriately depending on the individual case.

### ***DRUG OFFENCES***

#### **To legislators, policymakers, criminal justice actors and health care services in the community**

- To treat drug use as a health care condition and to treat drug users in the health care system rather than in the criminal justice system, where possible.
- To introduce interventions which address treatment as an alternative to imprisonment and to develop other constructive alternatives for minor drug offenders who are not drug dependent.
- To put in place effective coordination mechanisms between the health/drug dependence treatment system and the criminal justice system to ensure an effective referral mechanism in order to implement diversionary options. This could require enacting specific legislation.

(See also recommendations in chapter B)

### ***OFFENDERS WITH MENTAL HEALTH CARE NEEDS***

- Where possible, to divert individuals with mental disabilities from the criminal justice system at the first point of contact with law enforcement officers.
- To put in place policies and mechanisms and develop appropriate training for the police, prosecution and judiciary enabling diversion to be possible throughout the criminal justice process – during prosecution, trial and on imprisonment.
- To introduce sentencing alternatives for offenders with mental disabilities who have committed more serious offences.

(See also recommendations in chapter B)

**WOMEN****To legislators, policymakers, the prosecution service and the judiciary**

- To promote alternative ways of responding to women who commit offences, such as using diversionary measures and pre-trial and sentencing alternatives wherever possible.
- To give courts the power to consider mitigating factors such as lack of criminal history and relative non-severity and nature of the criminal conduct when sentencing women offenders, in the light of women's caretaking responsibilities and typical backgrounds.
- To invest in suitable alternatives for female offenders in order to combine the aforementioned measures with interventions to address the most common problems underlying criminal behaviour by women.
- To ensure that legislation and practice provides maximum possible protection for foreign women, such as victims of human trafficking and migrant domestic workers, from further victimization.

**CHILDREN IN CONFLICT WITH THE LAW****To legislators and policymakers**

- To avoid the imprisonment of children to the maximum possible extent.
- To ensure that legislation and criminal justice policies allow appropriate scope for discretion at all stages of criminal proceedings and at the different levels of juvenile justice administration to direct juveniles away from the criminal justice process.
- To develop appropriate services and community measures suitable for children in conflict with the law and to establish mechanisms of coordination between community services and criminal justice actors to ensure effective implementation of diversionary measures.
- To put in place legislation and mechanisms and provide the requisite funding and training to the relevant bodies for social inquiry reports to be made available to the courts about the child before a sentence is passed.

(See also recommendations in chapter B)

**ORGANIZATION AND INFRASTRUCTURE****To policymakers, including relevant ministries**

- To ensure that there is adequate investment in the administrative structures, staffing and training of the supervising body responsible for overseeing the implementation of non-custodial sanctions and measures.
- To put in place mechanisms which enable the systemized cooperation between all agencies responsible for delivering and supervising sanctions.

**BUILDING A CONSENSUS TO IMPLEMENT ALTERNATIVES TO PRISON****To legislators and policymakers**

- To secure judges' confidence in alternatives to imprisonment, involve the judiciary in the development of strategies and programmes that aim to reduce the use of imprisonment in favour of alternatives.
- To involve representatives of civil society in the consultative process to increase public acceptance, understanding and involvement.
- To put in place measures to inform the public about the harmful consequences of imprisonment and the purpose and justification of alternative sentences. To this end, to make widely available accurate data and to cooperate with the media.

## CHAPTER G. ASSISTING WITH SOCIAL REINTEGRATION AND REDUCING REOFFENDING

Today it is widely accepted that imprisonment itself does not have a reformative effect. On the contrary, imprisonment exacerbates the many challenges faced by people who have fallen into conflict with the law—such as poverty, lack of employment, weakened family and community support networks, mental health care needs, and substance dependencies, among many others. The high rates of reoffending in jurisdictions worldwide underline the need to focus on reducing the inflow into prisons rather than relying on “rehabilitating” offenders within the closed and harmful environment of prisons. Nevertheless, states and prison administrations entrusted with the supervision and care of prisoners have a duty to ensure that individuals who are isolated from society for whatever reason, are equipped, as far as possible, to lead crime-free lives upon release. The successful social reintegration of prisoners, and therefore the prevention of reoffending and return to prison, is an important factor that can contribute to the reduction of the prison population.

The social integration of prisoners and former prisoners refers to the process by which they rebuild their lives in a positive manner following release and the support given to them during this process, thereby reducing the likelihood that they will reoffend. A broad definition of the term encompasses the period starting from prosecution to release and post-release support. In this latter sense, social reintegration of offenders includes efforts undertaken following arrest to divert them from the criminal justice system to alternative measures, including a restorative justice process or suitable treatment. It includes imposing alternative sanctions instead of imprisonment, where appropriate, thereby facilitating the social reintegration of offenders within the community, rather than by subjecting them to the de-socializing and harmful effects of prison unnecessarily. Elements of this broader understanding have been addressed in different parts of this *Handbook*.

This chapter provides an overview of prison-based policies and initiatives that can promote the social reintegration of prisoners to build safer societies and reduce reoffending. Recognizing that overcrowding can severely obstruct the ability of prison administrations to provide a meaningful and positive regime for prisoners, which promotes their social reintegration, the chapter begins with an overview of measures that can be taken to reduce the harmful impact of overcrowding as a short-term strategy. This is followed by an overview of the key elements of prison management policies that can help with the rehabilitation of prisoners as a long-term strategy to reduce reoffending.

For a more in-depth study of the social reintegration of offenders and crime prevention measures to reduce recidivism, please refer to the *UNODC Introductory Handbook on the Prevention of Recidivism and the Social Reintegration of Offenders*.<sup>335</sup>

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<sup>335</sup>UNODC *Introductory Handbook on the Prevention of Recidivism and the Social Reintegration of Offenders*, New York, 2012.

## 1. Social reintegration in overcrowded prisons

### 1.1 Mitigating the harmful impact of overcrowding

The *SMR* prescribe the minimum conditions and services that must be made available to all prisoners, regardless of whether the prison system is under pressure from the excessive use of imprisonment. However, they do not provide guidance on how to mitigate the impact of overcrowding when it occurs. Prison overcrowding often poses immense challenges to the implementation of the principle of individualization of sentences. This principle, set out in the *SMR*, is at the heart of good prison management policies which promote social reintegration.

The Council of Europe has provided some guidance in its recommendation concerning prison overcrowding and prison population inflation where it recommends that, where overcrowding occurs, special emphasis should be placed on maintaining human dignity and that particular attention should be paid to the amount of space available to prisoners, to hygiene and sanitation, to the provision of sufficient and suitably prepared and presented food, to prisoners' health care and to the opportunity for outdoor exercise.<sup>336</sup> It has also emphasized that, in order to counteract some of the negative consequences of prison overcrowding, contacts with families should be facilitated to the extent possible and maximum use of support from the community should be made.<sup>337</sup>

ICRC recommends that in cases where the floor space per person in the prisoners' living quarters is very limited, prisoners must have access to the following to avoid a major health crisis:<sup>338</sup>

- Well-ventilated quarters;
- 10-15 litres of water each per day;
- Access at all times to drinking water stored in appropriate containers;
- A balanced diet comprising food which is adequate in terms of quality and quantity, and which is prepared in accordance with proper standards of hygiene;
- A sufficient number of toilets in working order;
- Access to exercise yards or any other place in the open air during the day;
- Access to medical care.

Taking these recommendations and international good prison management principles and experiences into account, some of the specific measures that may be taken to mitigate the harmful impact of prison overcrowding are suggested below.

#### Maintaining health and hygiene

- Water points and toilets may be increased to a number which ensures prisoner access and that water does not become a scarce and costly commodity because access to it is controlled by a few prisoners.

<sup>336</sup>Council of Europe, Committee of Ministers Recommendation No. R (99) 22 Concerning Prison Overcrowding and Prison Population Inflation, Paragraph 7.

<sup>337</sup>Ibid., paragraph 8

<sup>338</sup>ICRC, Water, Sanitation, Hygiene and Habitat in Prisons, p. 21

- Existing ventilation should be examined in order to ensure that it is not blocked or located where it can draw in poor quality air. Where the climate permits, consideration may be given to increasing ventilation and daylight by replacing solid cell and dormitory doors with barred doors. The choice of such doors should, however, take into account the prisoners' need for privacy in their daily lives. In very hot countries ventilation can be improved by electric ceiling fans. These do not cost much to install and use little electricity. When prisoners are kept in overheated rooms on a permanent basis, such fans are essential.<sup>339</sup>
- Cooking facilities and equipment, as well as the food distribution system, may be improved and expanded either centrally or at designated areas within the prison.
- Regular inspections of all parts of the prison(s) should be undertaken to ensure that basic standards of hygiene are maintained. Hygiene promotion should be included in prisoner orientation and education programmes.
- Groups of prisoners may be organized and provided with the means to take responsibility for keeping clean those parts of the prison to which prisoners have access. Prisoners must be appropriately remunerated for work undertaken.
- Taking into account the pressure that overcrowding generates on health services, cooperation with local health providers and NGO's may lead to an expansion of services related to health care.

#### Relieving pressure on space

- The time prisoners spend out of their cells should be increased. Ideally this would include the maximum possible time spent in the open air (also relevant to Maintaining health and hygiene).
- Consideration may be given to reclassifying under-utilized areas of the prison to maximize the use of existing prison space, to provide for more sleeping accommodation, while ensuring that the separation of prisoners complies with SMR. This latter is especially important in prisons where vulnerable groups are at risk of abuse. (Please see also chapter H, Managing prison capacity, section 3).
- Maximum possible use of early release programmes and home leave, as well as the transfer of eligible prisoners to lower security prisons, such as open prisons, may be considered in order to relieve pressure on space. When such measures are implemented, every effort needs to be made not to transfer prisoners further away from their homes, in order not to disrupt family links. (Please see also chapter H, Managing prison capacity, section 3).
- A privilege system may be introduced, whereby lower-risk prisoners could earn additional rights to home leave and work furloughs.

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<sup>339</sup>Ibid. p. 24

- Towards the end of their sentences, prisoners may be released to half-way houses, which could be managed by social services or NGOs. This would help release prison space as well as assist with the gradual preparation of prisoners for re-entry.
- A work release system may be established which provides for low-risk prisoners in the final 12 months of a lengthy sentence to attend a normal workplace and undertake a job while returning to the prison at the end of the working day.

#### Increasing family links

- Prison authorities should ensure that prisoners' contact with families is not restricted, but where possible increased all the more. In overcrowded prisons, family links are likely to be fundamental to maintaining the mental well-being of prisoners.
- As a general rule, and taking into account any security precautions that may need to be employed, families should not be prevented from providing food to prisoners, to enhance the diet which is likely to have been compromised due to overcrowding.

#### Increasing activities

- Idleness is often a main factor which harms mental well-being, leading to frustration and violence. It is therefore essential to create opportunities for prisoners to keep purposefully occupied by promoting occupations and productivity, such as library, work, sport events, peer education, maintenance work, etc. Providing labour outside of the prison may be a good way to ease the pressure inside during the day.
- Where possible activities may be introduced to generate income and produce food.
- The number of prisoners benefiting from work, education and vocational training programmes may be increased by using facilities on a rotation basis. Where the organization of work programmes proves to be challenging, education may be prioritized which is relatively easier to arrange in overcrowded conditions.<sup>340</sup>
- Measures may be taken to improve cooperation with community organizations and encourage their access to prison to undertake activities that aim to support prisoners and enhance their rehabilitation

#### *Improving prison management to reduce tension*

Overcrowding puts severe pressure on the proper management of prisons and on staff/prisoner relations. It is therefore important to take measures to reduce the tensions resulting from the consequences of overcrowding and prevent disturbances.

<sup>340</sup>As has been recommended by ILANUD (Carranza, E., Expert Group Meeting, Vienna, 14-15 November 2011).

As a first step the prison administration should inform the responsible ministry when prison capacity has been exceeded or, better, when it is expected to be exceeded, with a report on all the challenges confronted as a consequence.

Other specific measures that can be taken may include:

#### Maximizing the use of resources in order to ensure minimum essential services

- Systems and services should be regularly monitored to ensure they are being used to maximum capability. The breakdown of essential equipment needs to be anticipated and spare parts or replacements made available in advance.
- In crisis situations, prison authorities may identify and prioritize the essential facilities and services of the prison which most affect prisoners and on that basis decide which functions are essential for staff to undertake and discontinue non-essential functions to provide short-term relief.

#### Increasing the staff availability and training

- Where possible, efforts should be made to recruit additional staff. Reorganizing staff rosters may assist in better use of available staff.
- Training staff to recognize the warning signs, which show increased prisoner tension or anxiety, can prevent disturbances from occurring.

#### Enhancing communication

- In order to reduce tension and anger it is important to enhance communication channels with prisoners, to keep them informed of actions being initiated to resolve the most pressing problems and listening to prisoners' suggestions as to solutions to problems experienced regarding conditions and treatment. It is also good practice to communicate to prisoners about reductions or changes in the prison regime that are to take place before, rather than as they take place and to explain the reasons for those changes.
- Similarly, it is essential to encourage and support staff demonstrating that the management values them and appreciates the difficult circumstances in which they are working, in order to reduce levels of frustration and anger among prison personnel.
- Prison managers should keep in constant contact with headquarters in order to get their involvement and support and to ensure that the overcrowding problem is not forgotten.

#### Preventing corruption

- Due to the increased risk of corrupt practices at times of overcrowding, it is advisable to increase control over financial resources and to take measures to detect and prevent corruption.

### Addressing multiple issues related to overcrowding—the ICRC in Rwanda

The ICRC has been present in Rwanda since 1990 and has focused on visiting the tens of thousands of detainees held in central prisons after the 1994 genocide. Regular visits to temporary places of detention, including police stations and military facilities, were also carried out. The ICRC worked extensively to address the grave humanitarian issues caused by overcrowding through a variety of means. This included bilateral dialogues with authorities, supply of hygiene and food items in prisons, infrastructure and engineering projects and medical assistance.

The prison population of Rwanda peaked at around 130,000 in 1998. At the end of 2007, the prison population in Rwanda stabilized at around 60,000 as a result of both the completion of more than 1 million cases heard before 15,000 *gacaca* courts since July 2006; and the inclusion of a community service element in the sentencing of a large number of people who pleaded guilty.

Nonetheless, overcrowding remained a challenge faced by the authorities. Therefore, the ICRC worked alongside the authorities to bolster efforts to bring detention conditions in line with internationally recognized standards. In 2008, for example, the ICRC provided technical support, such as training and expert advice, to those responsible for prison administration, health, hygiene, nutrition and infrastructure. Emphasis was put on building the capacities of the national prison health and hygiene unit and the National Prison Service (NPS). In particular, the ICRC has advocated, and continues to advocate, for the formal establishment of the NPS through the centralization of local authorities' prison budgets and other responsibilities. The ICRC complemented this technical and structural input with substitution activities where needed, such as supplying hygiene materials to central prisons and undertaking construction projects in partnership with the Ministry of Internal Security to improve prison infrastructure.

In 2009, efforts to address the issue continued and the ICRC conducted briefings for 187 junior prison officers and 90 prison guards on ways to mitigate the consequences of overcrowding and improve detainee health and nutrition.

Separately and on the basis of a 50/50 cost-sharing agreement between the authorities and the ICRC, around 7,500 vulnerable detainees in three prisons in Rwanda had their dormitories rehabilitated and enlarged as part of efforts to address the consequences of overcrowding. Similar works were also ongoing for inmates in three other prisons. Hygiene conditions were improved for nearly 15,500 detainees after water supply systems were upgraded in six prisons, and some 12,400 living in three other prisons benefitted from kitchen repairs and new cooking materials.

Source: ICRC Annual Report 2010

## 2. Promoting social reintegration as a long-term strategy to reduce overcrowding

The success of efforts to assist prisoners with their social reintegration can reduce the return of former prisoners to prison once again, thereby reducing the size of the prison population in the long term. In order for sustainable results to be achieved, such efforts and investment need to be ongoing and be accompanied by other policies and measures to reduce imprisonment outlined in this *Handbook*, taking into account the specific needs and circumstances of the jurisdiction concerned.

Efforts to assist with prisoners' social reintegration should start on the first day of sentence and continue into the post-release period. A range of rules included in international instruments is based on this understanding. The *ICCPR* states that the essential principle of the treatment of prisoners shall be their reformation and social rehabilitation (Art 10, 3). The *SMR* make it very clear that the purpose and

justification of a sentence of imprisonment is ultimately to protect society against crime and that this end can only be achieved if the period of imprisonment is used to ensure, so far as possible, that upon returning to society the offender is not only willing but able to lead a law-abiding and self-supporting life.<sup>341</sup> The guiding principles are set down in the second part of the SMR and span the issues of security, classification, care and resettlement. The *Bangkok Rules* cover the special needs of women prisoners in further detail.

### 2.1 *A holistic prison management approach and policies*

As the SMR emphasize, assisting with the social reintegration of prisoners should be applied in a holistic manner, as an integral component of prison management approaches and practices. A management approach that has social reintegration as its central aim will encompass the creation of a safe and healthy prison environment, the positive engagement of staff with prisoners, the encouragement and promotion of contact with family, friends and the community. It will include assisting with the vocational, educational and personal development of prisoners, as well as addressing special needs with programmes covering a range of issues, such as substance dependence, mental health care needs, victimization, among others, which may have led to the offence committed. It will also ensure that opportunities are provided for prisoners' gradual re-entry into society, using various early release schemes, which have been discussed in the previous chapter, and cooperation and links established with community organizations and agencies to assist during the difficult period of transition from prison to liberty.

In order to achieve these objectives the following measures may be taken as a starting point:

- All prison management policies and practices may be reviewed and improved to ensure that prisoners are safe from harassment, abuse or violence and that they encourage a positive prison environment, with a balanced regime for all prisoners, taking into account the needs of special groups of prisoners.
- Cooperation with ministries and agencies responsible for education, vocational training, health care, social welfare and probation may be established or improved to ensure that joint responsibility is taken and joined-up strategies developed to ensure that those who fall into conflict with the law are given the support and assistance to help them rebuild their lives in a positive manner following release.
- The participation of civil society in supporting prisoners' rehabilitation may be encouraged and facilitated, during imprisonment and following release.

### 2.2 *Assessment and sentence planning*

A key component of a management approach that promotes the social reintegration of prisoners by meeting the needs of each individual prisoner is the assessment of the risks and needs of each prisoner, which should take place as early as possible following admission to prison. Such assessments aim to identify the risks each prisoner may present to him/herself and others and his/her rehabilitation needs, such as

<sup>341</sup>SMR, Rule 58

education, employment, treatment for substance dependence and psychosocial counselling for mental health care needs, among others.<sup>342</sup>

Gender-sensitive assessment tools should be developed to assess the needs of women prisoners, taking into account their backgrounds, including violence that they may have experienced, and caring responsibilities.<sup>343</sup>

Such assessments provide the basis for ensuring that prisoners are separated and allocated in a way that ensures safety, and that individual sentence plans are developed to assist prisoners with their rehabilitation. Such plans should be developed in consultation with the prisoner and, particularly towards the end of a detention period, in close cooperation with agencies responsible for post-release supervision.

Sentence plans should be reviewed at regular intervals and modified as necessary.

**Sentence plans should be used to provide a systematic approach to:**

- The initial allocation of the prisoner;
- Progressive movement through the prison system from more to less restrictive conditions, where applicable, with ideally, a final phase spent under open conditions, preferably in the community;
- Participation in work, education, training and other activities that provide for a purposeful use of time spent in prison and increase the chances of a successful resettlement after release;
- Interventions and participation in programmes designed to address risks and needs (e.g. psychosocial support, substance abuse, mental health care);
- Participation in recreation, sport and other activities to prevent or counteract the damaging effects of imprisonment;
- Support and supervision measures, where applicable, conducive to a crime-free life and adjustment in the community after release.

The success achieved in the Dominican Republic New Model Prison System, as described in the box, with the adoption of a holistic approach to rehabilitation and implementation of individualized sentence planning, despite the immense challenges confronted in this country, provides a good example of the effectiveness of the strategy.

### 2.3 Prisoner rehabilitation activities and programmes

The *SMR* Rule 66 underlines that the aim of imprisonment is to assist prisoners to live law-abiding and self-supporting lives after their release. It lists some of the measures that must be used in order to achieve this aim. Many other rules in the *SMR* provide further guidance on the details of education, work, maintaining family links and contact with the outside world, preparation for release and post-release support. Ensuring that prisoners have access to a range of rehabilitation programmes is not a privilege but a duty of states who are responsible for promoting prisoners' care and eventual return to society well equipped to live positive and responsible lives.

<sup>342</sup>*SMR*, Rule 67.

<sup>343</sup>See Bangkok Rules, Rule 41.

However, prisoner programmes or activities are in short supply in many prison systems, especially where there is overcrowding. Even where they are available, they are often found to have little impact. This may be due to a number of factors, including:

- They are not placed within a comprehensive overall rehabilitation framework and prison management policy, in parallel to measures which promote mental well-being and which help maintain links with the outside world, to reduce as far as possible the differences between life outside and in prison.
- They are often not based on an assessment and identification of individual needs or research that identifies the opportunities in the community to which the prisoner will be released—for example there may be no correlation between the training provided in prison and corresponding needs in the community, such as workplaces.
- The quality of training, education or counselling provided is usually much lower than that in the community, due to lack of resources and investment made in this neglected aspect of imprisonment and the lack of cooperation with public education, vocational training and health care services/ministries.
- They reach only a small proportion of prisoners and often only those who are sentenced, so that pre-trial prisoners, who form the majority of the prison population in many countries, may remain idle and without support for months and years.

Success can be achieved when measures are taken to avoid the potential shortcomings referred to above. Adequate investment in individualizing sentences and in providing appropriate, constructive activities for prisoners need to form the basis of developing effective prison regimes that foster social reintegration and such programmes should be regarded as only one component of a rehabilitative prison management policy that starts with the admission of a prisoner and continues into the post-release stage and encompasses all aspects of prison management.

More specifically, and based on available research, four issues are of key importance to the successful resettlement of prisoners following release: (a) family support; (b) employment; (c) education; and (d) housing.

#### **Dominican Republic—New Model Prison System and social reintegration**

The New Model Prison System in the Dominican Republic has adopted a management approach which focuses especially on the social reintegration of prisoners. The success achieved is apparent in the rates of recidivism which have been reduced to 2.7 per cent, which compares to around 50 per cent in the United Kingdom, for example, and similar high rates in other Western countries, and to rates of 26 to 55 per cent in some countries in the Eastern Caribbean. This achievement is an outcome of a comprehensive approach to the issue of social reintegration, which includes the way in which prisons are managed, the training received by staff, their relationship with prisoners, facilities provided which are conducive to mental well-being, the importance accorded to family visits, including conjugal visits, as well as prison management aspects that are directly related to assisting prisoners to live crime-free lives following release.

A key element of assisting with the social reintegration of prisoners in the Dominican Republic is the individual assessments of each prisoner and the progressive prison regime, applied to all prisoners. The progressive sentence management system is made up of three stages:

- Observation: 10-30 days. During this period a multidisciplinary team assesses the needs of the prisoner and make up individual protocols relating to health, family situation, education and psychological needs. All these individual protocols are combined to make one protocol and an individual programme is determined.
- Treatment phase: This phase starts from the day after observation and continues until release and it constitutes the implementation of the plan.
- Proof (checking) period: Each prisoner is given increasingly more responsibilities as they approach their release date to prepare them for re-entry and deinstitutionalize them. During this time the prison administration may grant prisoners “home leave” under supervision.

There are plans to add a fourth period—post-prison—during which time there would be a need to support prisoners and to see if the prison rehabilitation programme had been effective in helping them live responsible lives, away from crime, after release.

Each prisoner has to follow an individualized programme as determined by the assessment on admission. The Treatment Committee, composed of the Director of the prison (referred to as Correction and Rehabilitation Centres (CCRs)), the doctor, psychologist, social worker, legal specialist, educator and sub-director for security, meets on a regular basis to discuss progress and review plans.

Prison activities and education are a high priority in all CCRs and education is obligatory for all prisoners. In particular, the system aims to reach zero illiteracy—which it has achieved—and provides a literacy and full basic education programme for prisoners. Education is provided by the Ministry of Education and follows the national curriculum. Educated prisoners are employed as facilitators to support education activities. UNODC was informed in 2010 that in the previous five years no prisoner taking exams in the national system had failed, in comparison to the 48 per cent failure rate in the country as a whole. Prisoners are engaged in activities throughout the day. Each prison has the same routine, which begins at 7.00 and ends at 22.00.

In addition to education, other activities provided include theatre, dance, singing, painting, a range of language classes and vocational training classes, such as carpentry, sewing and mechanics. Animal and vegetable farming is undertaken to provide food for the prison and for sale to generate income. Prisoners engaged in productive activities are paid for their labour and a small part of their earnings goes towards continuing prison reform initiatives.

The Social Assistance Department ensures links between prisoners and their families. They can also undertake mediation with families. The Legal Assistance Department has the responsibility to check the legality of detention and can also apply to the Attorney General’s Office for lawyers, where needed.

*Source: UNODC, The Prison System and Alternatives to Imprisonment in Selected Countries of the Organization of Eastern Caribbean States, Barbados and the Dominican Republic, November 2010 (unpublished)*

Assistance to prisoners during their imprisonment to maintain family links, to help them improve their education, equip them with marketable skills that can help them gain employment on release, and making arrangements to help them find housing and employment following release are basic ways in which prison administrations can contribute to the reintegration of prisoners very significantly.

## Family links

In order to facilitate ongoing contact between family and prisoners, it is important that prisoners are placed close to their homes, as recommended by international standards.<sup>344</sup> Placement close to the usual place of the prisoner's residence is important in all cases, but particularly in the case of women prisoners, who feel the impact of separation from their children, families and their communities with particular severity.

In the case of foreign prisoners, the implication is that they should be able, if possible and if they so wish, to serve the sentence in their home country.<sup>345</sup> See *UNODC Handbook for Prisoners with Special Needs*, chapter 4 and the *UNODC Handbook on the International Transfer of Sentenced Persons*,<sup>346</sup> for a more detailed discussion of this topic.

The rules governing visits and the availability of sufficient facilities for visits are of great importance to help maintain family links. While closed or non-contact visits may need to be used in the case of a small number of prisoners, identified according to their individual assessment, as a general rule facilities should provide for contact (open) visits. It is good practice to also provide for long-term visits (e.g. up to 3 days or more), which are permitted in some countries. In other systems conjugal visits are allowed, which are also important to maintain close links between spouses and partners and should be encouraged.

Other means of maintaining links with families are telephones and letters. When prisoners are allocated to prisons far from their homes, these are of particular importance. According to good prison practice there should be no restrictions on letters and telephone communication with families in the case of most prisoners. Only in cases where the prisoner has been assessed to be a high security risk, there may be a need to censor correspondence and have a list of approved correspondents.<sup>347</sup>

In the case of pre-trial prisoners, communication and visits may be subject to restrictions and monitoring necessary for the requirements of continuing criminal investigations, but such restrictions, ordered by a judicial authority, should nevertheless allow an acceptable minimum level of contact.

### **The ICRC supports and facilitates restoration of family links in detention**

Restoring family links between prisoners and their relatives is an activity regularly carried out by the ICRC in places of detention through a wide range of activities.

The ICRC may encourage authorities to establish or extend family links services and if needed, the ICRC may be engaged in supporting the authority's efforts, for example helping the authorities to organize and keep registers of all prisoners including contact information for direct family members.

<sup>344</sup>Body of Principles, Principle 21; and the Bangkok Rules, Rule 4.

<sup>345</sup>See Model Agreement on the Transfer of Foreign Prisoners, adopted by the Seventh United Nations Crime Congress, 1985.

<sup>346</sup>UNODC *Handbook on the International Transfer of Sentenced Persons*, New York, 2012.

<sup>347</sup>Coyle, A., *A Human Rights Approach to Prison Management*, p. 100.

Alternatively, the ICRC may provide the service directly or help to improve the internal organization within a prison. For instance, it is regular practice for the ICRC to facilitate written correspondence between family members and prisoners through Red Cross Messages for the purpose of restoring as well maintaining family links. The ICRC has also facilitated telephone calls and video teleconferences for prisoners in many contexts in which it works.

Among other services that can be offered, the ICRC may, whenever needed, support authorities with the organization of family visits and transport for family members. This is an activity that has a beneficial impact on the psychological well-being of the prisoners and their relatives and may also contribute to reducing tensions in the place of detention, including where overcrowding is an aggravating factor.

ICRC family visit programmes have been conducted in a various contexts including Afghanistan, Iraq, Georgia, Israel and the State of Palestine.

*Source: ICRC, Geneva*

### **A study in the United States found that family visits reduce the likelihood of prisoners committing crimes after release**

A recent study in the United States has found that just a single visit from a family member or a friend can make a big difference in whether or not a prisoner ends up back behind bars after their release. The study, by researchers with the Minnesota Department of Corrections, determined that prisoners who received at least one personal visit at any time during their imprisonment were 13 per cent less likely to commit another felony and 25 per cent less likely to end up back in prison on a technical parole violation. Data showed that the more visits prisoners received, the lower their chance of reoffending after release.

The study tracked 16,000 prisoners over nearly five years, making it the largest such study of its kind.

*Source: [http://www.huffingtonpost.com/2011/12/07/prison-visits-inmates\\_n\\_1135288.html](http://www.huffingtonpost.com/2011/12/07/prison-visits-inmates_n_1135288.html).*

## Work and vocational training

There are many initiatives that prison administrations can take to improve the employment prospects of prisoners on release. The starting point is to ensure that prisoners have access to professional skills training programmes and workshops in prisons, which correspond to market needs and, as far as possible, to the wishes of the prisoners themselves. Such initiatives are all the more productive if links are established with job providers outside, who might provide training and eventually job placements for prisoners.

Vocational training and access to meaningful work in prisons have proven to reduce rates of reoffending. For example, according to a comprehensive study which meta-analysed the findings of 545 comparison group evaluations in t of adult and juvenile crime prevention programmes in custodial and non-custodial settings, vocational training could reduce recidivism rates by 9.8 per cent, while prison work by 6.4 per cent.<sup>348</sup> Another study found that vocational training could lead to a 15 per cent reduction in reoffending.<sup>349</sup>

<sup>348</sup>Drake, E. K., Aos, S. and Miller, M. G., Evidence-Based Public Policy Options to Reduce Crime and Criminal Justice Costs: Implications in Washington State Washington Institute for Public Policy, Table 1.

<sup>349</sup>Matrix Knowledge Group, The Economic Case for and Against Prison (2007).

In many countries prison administrations face challenges to find suitable work for prisoners, especially in overcrowded circumstances. Prison administrations can utilize creative ways to improve the employment prospects of prisoners, for example, by cooperating with NGOs and facilitating peer training/education by skilled prisoners. Much more can be achieved however, if the provision of skills training and work opportunities for prisoners and former prisoners forms part of a strategy involving other departments of governments, including at higher levels.

Any work undertaken by prisoners must be subject to the same laws as applicable in the community, i.e. the work must be carried out in a safe manner, prisoners must be trained for such work and appropriately remunerated. This issue is addressed in guidance published in 2012 by the ICRC *Water, Sanitation, Hygiene and Habitat: Supplementary Guidance*, 2012.

In the wake of a natural disaster, where supervisory staff are available and when otherwise appropriate, prisoners may participate in projects to rebuild destroyed communities. Such projects should always have the agreement of key community leaders.

#### **Prison workers to supply law enforcement units under new legislation in Hungary**

New legislation requires Hungary's law enforcement agencies to order all their supplies – from food to office furniture—from businesses operating in prisons.

Under a government decree effective from July 2011 and a following ministerial decree, State-owned prison companies must be sole suppliers to all the administrative units belonging to the Interior Ministry, including police and law enforcement agencies. Under a value cap of 8 million forints (EUR 29,500), no other bids will be considered and, even above this limit, prison companies have significant advantage over private firms. For example, a police officer's new uniform will be tailored by prison workers and prison food should come exclusively from the large prison farm operating in Palhalma, central Hungary. The companies currently employ about 3,000 prisoners.

*Source: <http://www.politics.hu/20110831/prison-workers-to-supply-law-enforcement-units-under-new-legislation/>*

#### **Assisting with the employment of former prisoners in Uruguay**

In Uruguay, a law entitled "Humanization and Modernization of the Penitentiary System" includes a measure through which it is mandatory that in contracts for public works and services, companies have to hire former prisoners who are registered with the Patronage of Incarcerated and Discharged Prisoners. These workers must make up a minimum of 5 per cent of the personnel concerned.

*Source: UNODC Regional Office for Central America and the Caribbean in Panama (ROPAN)*

## **Education**

Education is essential to develop prisoners' self-confidence, awareness and employability and has been proven to be one of the most important aspects of offender rehabilitation. For example, the same study referred to above found that high school graduation on its own (as a crime prevention measure) could reduce recidivism rates by 21 per cent, while providing general education in prison could reduce recidivism

rates by 8.3 per cent.<sup>350</sup> Another study, which meta-analysed the outcomes of prison based programmes in Australia, Canada, Europe, New Zealand and the United States, found that education could lead to a 15 per cent reduction in reoffending.<sup>351</sup> Other studies have also found that education programmes can reduce recidivism levels significantly.<sup>352</sup>

Education is essential in the case of those who are illiterate, as well as for young persons, who are faced with a break in their usual schooling with imprisonment.<sup>353</sup> In all cases, efforts should be made to provide education on the basis of the national curriculum and official recognition of the training in order not to discriminate against the prisoners' right to the same level of education provided to others and not to disadvantage them when/if they continue their education following release.<sup>354</sup>

Prisoners may be encouraged in various ways to participate in education programmes, as the example in Brazil referred to in the box shows. However, it is important that education is made accessible in all prisons, in order not to disadvantage those who are placed in prisons without any education programmes that meet their needs.

#### **Brazil cuts prison time for studies**

According to a law published in June 2011 in the official gazette in Brazil prisoners will get one day off their sentences for every 12 hours spent in the classroom. The law benefits convicted prisoners taking elementary school to college level courses, as well as those taking professional trade and requalification courses.

Brazil's prisons have allowed classes for years, taught by teachers from the public school system or hired by each state's prison system.

A Justice Ministry spokesperson said that the law applied to all inmates regardless of the crime they have committed. The law also cuts prison sentences by one day for every three that prisoners work behind bars or in work-release programmes.

Source: <http://latino.foxnews.com/latino/lifestyle/2011/07/01/brazil-cuts-prison-time-for-studies/>

#### **Special programmes**

Other targeted programmes that may be offered include those that address the root causes, as well as consequences, of certain types of crime. These may include substance dependence treatment as a priority, taking into account the very large number of prisoners who have drug or alcohol dependencies, including specialized treatment programmes designed for women substance abusers,<sup>355</sup> awareness-raising on risks

<sup>350</sup>Drake, E. K., Aos, S. and Miller, M. G., Evidence-Based Public Policy Options to Reduce Crime and Criminal Justice Costs: Implications in Washington State Washington Institute for Public Policy, Table 1

<sup>351</sup>Matrix Knowledge Group, The Economic Case for and Against Prison (2007)

<sup>352</sup>Research Brief, Occasional Paper Series - No. 2 - September 1997, Open Society Institute, Criminal Justice Initiative, Education as Crime Prevention, Providing education to prisoners. ([http://www.prisonpolicy.org/scans/research\\_brief\\_\\_2.pdf](http://www.prisonpolicy.org/scans/research_brief__2.pdf)).

<sup>353</sup>See SMR, Rule 77.

<sup>354</sup>SMR, Rule 77 (2).

<sup>355</sup>Bangkok Rules, Rule 15.

associated with drug use, including awareness-raising on the treatment, prevention and care of HIV/AIDS and other blood borne and sexually transmitted infections; psychosocial counselling for those with mental health care needs among others, depending on individual needs. Evidence-based drug dependence treatment programmes have proven to be particularly effective in reducing rates of recidivism.<sup>356</sup>

In the case of women prisoners, the *Bangkok Rules* provide that pregnant women, nursing mothers and women with children in prison should have access to appropriate programmes. They also require special efforts to be made to provide appropriate services for women prisoners who have psychosocial support needs, especially those who have been subjected to physical, mental or sexual abuse.<sup>357</sup>

### 3. Post-release support and the role of the community

#### 3.1 Preparing prisoners for release

Post-release support to former prisoners is key to ensuring successful reintegration in the community. The *SMR* underline the need to ensure that prisoners are given aftercare in a coordinated manner by governmental or private agencies in order to reduce prejudice against them and assist with their social rehabilitation.<sup>358</sup> They require approved representatives of such services and agencies to have all necessary access to the prisoners and to be consulted on the future of prisoners from the beginning of their sentence. They also encourage the coordination of the activities of such agencies as far as possible in order to secure the best use of their efforts.<sup>359</sup> The following are some key measures that may be taken:

- When the date of release is known or can be presumed, sentence planning should focus more on identifying the risks and needs that are likely to present themselves in the immediate post-release period and making plans to deal with them;
- In post-conflict situations this should include as much as possible broader considerations such as unresolved ethnic or political tensions, reconciliation processes at community level, risk of interaction with victims or victims committees and the existence or need for mechanisms to address those issues; Prison administrations and relevant agencies and organizations in the community (e.g. probation services, where they exist, as well as NGOs, social welfare, health services, housing and employment agencies) need to work together to provide the practical, social, psychological, health care and other support requirements of prisoners after release to help them rebuild their lives in a positive manner. Such support may include assistance with finding housing, employment, arranging for the continuation of any substance dependence treatment programme started in prison and with family links, among others.

<sup>356</sup>Matrix Knowledge Group, *The Economic Case for and Against Prison* (2007); Drake, E. K., Aos, S. and Miller, M. G., *Evidence-Based Public Policy Options to Reduce Crime and Criminal Justice Costs: Implications in Washington State* Washington Institute for Public Policy, Table 1.

<sup>357</sup>*Bangkok Rules*, Rule 42, paras. 3 and 4.

<sup>358</sup>*SMR*, Rule 64.

<sup>359</sup>*SMR*, Rule 81.

- Ideally this collaborative approach should be formalized within a national strategy, with adequate budget allocated to the agencies involved to enable them to undertake their tasks effectively;
- Consideration may be given to developing guidelines for the staff of such agencies and information provided to prison staff about services available in the community, with contact details, and steps that must be taken to refer former prisoners to appropriate support mechanisms;
- The specific needs of women and children need to be taken into account during their preparation for release and following release. Relevant rules are included in the *Bangkok Rules*;<sup>360</sup>
- The specific circumstances of the communities of origin of prisoners due for release need to be accounted for during preparation for release.

### 3.2. *Preparing the community and harnessing its contribution to rehabilitation*

Even the best rehabilitation regime during imprisonment may be significantly undermined if former prisoners find themselves rejected when they are released into the larger community. The attitude of the community, their acceptance and support to former prisoners, play an important role in reducing the risk of former prisoners' return to crime.

States aiming to reduce reoffending among former prisoners are encouraged to make a concerted effort to prepare the community to receive former prisoners. The task needs political support, multi-agency collaboration and the active engagement of civil society. The example of the Singapore Prison Service initiatives described in the box provides a successful model that can be of guidance.

#### **Engaging the community to support prisoners and ex-prisoners in Singapore**

In recent years Singapore's prison population has declined significantly in contrast to the general worldwide trend from 18,000 in 2002<sup>a</sup> to 11,919 in 2010<sup>b</sup>. The imprisonment rate currently stands at 250 in comparison to 392 in 2004.<sup>c</sup> Although this is still a very high rate of imprisonment, the reduction during the last seven years is remarkable. It is believed that a major contribution to this success was provided by a new strategy adopted to reduce the rate of reoffending, which decreased from 44.4 per cent for the 1998 release cohort to 27.3 per cent for the 2008 release cohort.<sup>d</sup> The recidivism rates for offenders who had been placed on the Community Based Programmes to serve the last portion of their sentence was even lower at 12.9 per cent.<sup>e</sup>

The key characteristic of the Rehabilitation Framework, first developed in 2000 by the Singapore Prison Service, is the partnerships and collaborative relationships formed across different government institutions, as well as the community based organizations and the media to form public opinion.

<sup>360</sup>See Rules 45 – 47.

The Yellow Ribbon Project, led by the Singapore Prison Service, aimed to raise the awareness of the public and promote a more accepting society willing to accept former prisoners in a positive spirit. In 2008, the Yellow Ribbon Project distributed more than 340,000 yellow ribbon packs island wide, signed up 133 new employers willing to hire ex-offenders and collaborated with 45 community partners in organizing various Yellow Ribbon activities, including a mass community walk, in which 10,000 people took part, followed by a carnival at Changi Prison.

The month of September was designated as the “Yellow Ribbon Month” and every September, the Prison Service organizes numerous community activities, including concerts, walks and runs, art exhibitions and other public outreach events to raise awareness. The Singapore Prison Service also works with the media to raise awareness on the issue of ex-offenders.

The Fund, set up to support community-initiated programmes which help ex-offenders and their families, is reported to have raised more than \$5 million.

The Singapore Prison Service reports that at end 2008, some 1,700 volunteers, almost as many as regular prison staff, were coming into prisons and detention centres voluntarily to provide training and counselling for prisoners. Almost 2,000 Singaporean employers were registered in the Singapore Prison Service’s job bank, ready to offer employment to prisoners and former prisoners.

A wide-ranging survey conducted by the Singapore Prison Service in 2006 to gauge public perception of their community engagement initiatives found that more than 80 per cent of the Singaporean public indicated awareness of the Yellow Ribbon objectives and about 70 per cent expressed willingness to accept ex-offenders either as friends or colleagues. These findings were replicated in later surveys ran in 2007 and 2008.

*Sources: The information provided is based on a paper by Soh Wei Wah, Discussing early release programs in Singapore, presented at the Workshop on Strategies to Reduce Overcrowding in Correctional Facilities, United Nations Crime Congress, Salvador, Brazil, 2010; Peter Joo Hee Ng, Offender Rehabilitation, Community Engagement and Preventing Reoffending in Singapore, Resource Material Series No. 80 UNAFEI, Fuchu, Tokyo, Japan March 2010 and statistics from the Singapore Prison Service website. [www.prisons.gov.sg](http://www.prisons.gov.sg).*

<sup>a</sup>Peter Hoo Jing Ng, Offender Rehabilitation, Community Engagement and Preventing Reoffending in Singapore, Resource Material Series No. 80 UNAFEI, Fuchu, Tokyo, Japan March 2010, p. 26.

<sup>b</sup>[http://www.prisons.gov.sg/content/dam/sps/publication\\_latest/Press per cent20Release per cent20- per cent20Prisons per cent20Statistics per cent2025 per cent20Jan2011.pdf](http://www.prisons.gov.sg/content/dam/sps/publication_latest/Press%20Release%20Prisons%20Statistics%20Jan2011.pdf)

<sup>c</sup>World Prison Brief, International Centre for Prison Studies, based on a prison population figure of 16,835, which is a lower figure than that in 2002, when the imprisonment rate would also have been higher. ([http://www.prisonstudies.org/info/worldbrief/wpb\\_country.php?country=110](http://www.prisonstudies.org/info/worldbrief/wpb_country.php?country=110)).

<sup>d</sup>Figures from the Singapore Prison Service website as accessed on 11 July 2011. The figures are based on recidivism rates during a two year period following release. ([http://www.prisons.gov.sg/content/dam/sps/publication\\_latest/Press per cent20Release per cent20 per cent20Prisons per cent202010 per cent20Statistics per cent2025 per cent20Jan2011.pdf](http://www.prisons.gov.sg/content/dam/sps/publication_latest/Press%20Release%20Prisons%20Statistics%20Jan2011.pdf)).

<sup>e</sup>This is the latest figure available. (Soh Wei Wah, Discussing early release programs in Singapore, paper submitted to Workshop on Strategies to Reduce Overcrowding in Correctional Facilities, United Nations Congress on Crime Prevention and Criminal Justice, Salvador, Brazil, 2010). As the author of the paper notes: “caution needs to be exercised in the interpretation of such statistics. Similar to efforts elsewhere which seek to compare and evaluate the effectiveness of prisons-based programmes, the above comparison suffers from a lack of control group and self selection bias. Generally, inmates who are selected for such programmes are better behaved in prison, display more positive attitude, and have fewer criminal antecedents. Hence, the observation should not be interpreted as a scientific validation”.

#### 4. Economic considerations

The provision of education, work, vocational training and targeted rehabilitation programmes for prisoners is not a privilege to be earned but a duty of the state to be provided to all prisoners under its care and supervision. All such programmes are best developed within the framework of the relevant ministry programmes for the

general public and provided for by the budgetary allocations of each ministry. While cost savings can be made by forming partnerships with NGOs, and such collaboration should be encouraged, it should be understood that the primary responsibility for the social reintegration of prisoners lies with the state.

Obviously the cost of the vast array of programmes designed to reduce reoffending vary immensely depending on the type of programme, the country where it is implemented and many other factors. A comprehensive study on the effectiveness of programmes designed to reduce recidivism, which systematically reviewed over 400 research studies conducted in Canada and the United States, for example, found that a programme that achieves even relatively small reductions in crime can be cost-beneficial.<sup>361</sup> Another study found that investing more in constructive activities and rehabilitation programmes for prisoners delivers increased savings in the long run. According to this research, due to the associated reductions in reoffending rates, prisons which include educational and vocational programmes save society £67,000 for each prisoner, whilst prison with drug treatment saves £116,000.<sup>362</sup> Other research has shown that education programmes have proven to be very effective in reducing reoffending, while enabling substantial cost savings.<sup>363</sup>

## KEY RECOMMENDATIONS

### SOCIAL REINTEGRATION IN OVERCROWDED PRISONS

#### MITIGATING THE HARMFUL IMPACT OF IMPRISONMENT

To prison authorities

##### *Maintaining health and hygiene*

- Water points and toilets may be increased to facilitate access; ventilation systems should be checked and improved.
- Cooking facilities and equipment, as well as the food distribution system, may be improved and increased.
- Regular inspections of all parts of the prison(s) should be undertaken to ensure that basic standards of hygiene are maintained.
- Cooperation with local health providers and NGO's may be increased in the provision of health care.

##### *Relieving pressure on space*

- The amount of time prisoners spend out of their cells may be increased, with maximum possible time spent in the open air.
- Consideration may be given to reclassifying under-utilized areas of the prison to make sure that prison space is being used as creatively as possible to allow for more sleeping accommodation.

<sup>361</sup>The Comparative Costs and Benefits of Programs to Reduce Crime, Version 4.0, Steve Aos, Polly Phipps, Robert Barnoski, Roxanne Lieb, Washington State Institute for Public Policy, May 2001, p. 6.

<sup>362</sup>The Matrix Knowledge Group, The Economic Case for and against Prison. (<http://www.matrixknowledge.co.uk/wp-content/uploads/economic-case-for-and-against-prison.pdf>).

<sup>363</sup>See, for example, Research Brief, Occasional Paper Series - No. 2 - September 1997, Open Society Institute, Criminal Justice Initiative, Education as Crime Prevention, Providing education to prisoners. ([http://www.prisonpolicy.org/scans/research\\_brief\\_2.pdf](http://www.prisonpolicy.org/scans/research_brief_2.pdf)).

- Maximum possible use of early release programmes and home leave, as well as the transfer of eligible prisoners to lower security prisons, such as open prisons, may be considered, to relieve pressure on space.
- Towards the end of their sentences prisoners may be released to half-way houses, which could be managed by social services or NGOs. This would help release space as well as assist with the gradual preparation of prisoners for re-entry.

#### *Increasing family links*

- Prison authorities should ensure that prisoners' contact with families is not restricted but where possible increased. As a general rule, and taking into account any hygiene and security precautions that may be necessary, families should not be prevented from providing complementary food to prisoners, to enhance the diet which is likely to have been compromised due to overcrowding.

#### *Increasing activities*

- The number of prisoners benefiting from work, education and vocational training programmes may be increased by using facilities on a rotation basis.
- Where possible activities may be introduced to generate income and produce food.
- Providing remunerated labour outside of the prison may be a good way to ease the pressure inside during the day.

#### *Maximizing the use of resources in order to ensure minimum essential services*

- Systems and services should be regularly monitored to ensure they are being used to maximum capability.
- Essential equipment needs to be properly maintained with spare and replacement parts on hand in anticipation of equipment failure.
- In crisis situations and for a limited time, prison authorities may identify and prioritize the essential facilities and services of the prison and on that basis decide which functions are essential for staff to undertake and discontinue non-essential functions; Measures may be taken to improve cooperation with community organizations and encourage their access to prisons to undertake activities that aim to support prisoners and enhance their rehabilitation.

#### *Increasing the staff availability and training*

- Where possible, efforts should be made to recruit additional staff. Reorganising staff rosters may assist in better use of available staff.
- Training staff to recognize the warning signs, which show increased prisoner tension or anxiety, can prevent disturbances from occurring.

#### *Enhancing communication*

- In order to reduce tension and anger it is important to enhance communication channels with prisoners, to keep them informed of actions being initiated to resolve the most pressing problems and listening to prisoners' suggestions as to solutions to problems experienced regarding conditions and treatment.
- Similarly, it is essential to encourage and support staff, demonstrating that the management values them and appreciates the difficult circumstances in which they are working, in order to reduce levels of frustration and anger among prison personnel.
- Prison managers should keep in constant contact with headquarters in order to get their involvement and support and to ensure that the overcrowding problem is being addressed.

*Preventing corruption*

- Due to the increased risk of corrupt practices at times of overcrowding, it is advisable to increase control over financial resources and to take measures to detect and prevent corruption.

**PROMOTING SOCIAL REINTEGRATION AS A LONG TERM STRATEGY TO REDUCE OVERCROWDING***DEVELOPING A HOLISTIC PRISON MANAGEMENT APPROACH***To policymakers and prison authorities**

- To review and improve all prison management policies and practices to ensure that prisoners are safe from abuse or violence and that they encourage a positive prison environment with a balanced regime for all prisoners, taking into account the needs of special groups.
- To put in place policies and mechanisms for cooperation with ministries and agencies responsible for education, vocational training, employment, health care, social welfare and probation to ensure that joint responsibility is taken and joined-up strategies developed to ensure that prisoners are given the support and assistance to help them rebuild their lives following release.
- To encourage the participation of civil society in supporting prisoners' rehabilitation.

*ASSESSMENT AND SENTENCE PLANNING***To prison authorities**

- To ensure that the assessment of the risks and needs of each prisoner is undertaken as early as possible following sentencing and admission to enable the development of appropriate sentence plans, with a progression of sentence towards lower security levels.

*FAMILY LINKS***To prison authorities**

- To make efforts to place all prisoners close to their homes in order to facilitate ongoing contact between families and prisoners. In the case of women prisoners, to regard this as a priority.
- Ensure that prison policies and facilities allow for family visits to take place frequently and that contact (open) visits are used as a general rule, with exceptions based on individual risk assessments.
- As a general rule, not to place restrictions and censorship on letters and telephone communication, apart from individual high risk cases.
- Ensure priority is given to maintaining (and re-establishing) family contacts, and where necessary to seek partnerships with social welfare departments, NGOs and international organizations.

*WORK AND VOCATIONAL TRAINING***To prison authorities and ministries of labour (or similar body)**

- To ensure that prisoners have access to professional skills training programmes and workshops in prisons, which correspond to market needs and, as far as possible, to the wishes of the prisoners themselves.

- To work together to include prisoners' skills training and employment in a national strategy and programme.
- To develop partnerships with outside services and NGOs to improve vocational training provided to prisoners, while enabling them to establish links with organizations that can assist them on release.

### ***EDUCATION***

#### **To prison authorities and ministries of education**

- To provide education for all prisoners, but prioritizing especially those who are illiterate and young persons.
- To ensure that education is provided on the basis of the national curriculum and that it leads to a nationally valid qualification.
- To develop joint agency cooperation and strategies to include the education of prisoners in plans and budgetary allocations at the national level, as well as to cooperate with education services in the community and NGOs.

### ***SPECIAL PROGRAMMES***

#### **To prison authorities**

- Make available other targeted programmes to prisoners to address the root causes of their behaviour, depending on individual needs, including the gender specific needs of women prisoners.

### ***POST-RELEASE SUPPORT AND THE ROLE OF THE COMMUNITY***

#### **To prison authorities, probation services and relevant services and bodies in the community**

- To ensure that the preparation for release of prisoners focuses on identifying the risks and needs that are likely to present themselves in the immediate post-release period and make plans to deal with them.
- To work together to provide the practical, social, psychological, health care and other support requirements of former prisoners to help them rebuild their lives.

#### **To policymakers and relevant ministries and organizations of civil society**

- Consider formalizing this collaborative approach within a national strategy, with adequate budget allocated to the agencies involved to enable them to undertake their tasks effectively.
- To make a concerted effort to prepare the community to receive former prisoners with a range of public awareness-raising activities.

## CHAPTER H. MANAGING PRISON CAPACITY

Prison capacity refers to the number of prisoners able to be accommodated in a given place of detention based on the standard set out in national legislation, regulations or other guidance document. Part I, chapter A discusses this issue more fully including recommended specifications in this regard.

Today it is widely accepted that increasing prison capacity does not, on its own, constitute a sustainable strategy to combat prison overcrowding. As has been emphasized by many commentators, “where there are prisons they will be filled” and in the long term a constant expansion of the prison estate may even lead to an increase in imprisonment rates. Of particular concern should be the growing evidence that the short-term relief from overcrowding offered by new construction may in fact delay discussion of the causes of overcrowding. Authorities are advised to give consideration to other strategies outlined throughout this *Handbook*, taking into account the specific circumstances and challenges faced by the country concerned, before an expansion of the prison estate is contemplated. Where prison expansion is proposed and accepted in the short term, consideration of its place in longer-term policy and planning should continue, and a full range of options considered.

At the same time, it must be recognized that the minimum standards which require that prisoners are held in conditions that comply with human dignity, should be reflected in the design and management approach of any new prisons or parts of prisons. Of particular importance are those standards concerning health, nutrition and access to water. In addition, a system to ensure accountability of the prison management for maintaining specified standards is necessary. The accountability system should also enable determination of when refurbishment is needed, when water, sanitation, health care and other services need to be upgraded and when additional space and services need to be provided. It is considered good practice for such scrutiny to be a regular activity, as part of an overall strategic planning process to assist with effective and sustainable policy development.

In post-conflict countries, where the prison system and prison infrastructure are likely to have been destroyed, there may be a pressure to construct new prisons to ensure that those who are imprisoned are held in accommodation that meets the requirements of international standards. In the absence of prisons that meet such requirements and without the establishment of a professional prison service, prisoners may be subjected to unacceptable conditions and abuse, be held in unofficial and/or private detention, under the control of military or other bodies. However, prison building even in circumstances of such acute need should be undertaken with great care, as part of a comprehensive package that covers the rehabilitation and reform of the whole criminal justice system.

In all cases it is essential that a proper assessment and planning process takes place before any building is started to ensure that valuable resources are not wasted in the long run, by building prisons that are not suitable in a particular environment or culture or which do not reflect the core values and management principles by which the prison system is to operate.

This chapter provides a brief outline of key considerations, including factors to take into account to assess the need for prison refurbishment or construction. It also

provides an overview of measures that can be taken to increase prison capacity by improving the management of prison space. These same issues are also addressed in the ICRC publication *Water, Sanitation, Health and Habitat in Prisons 'Supplementary Guidance'*, 2012, which provides practical operational guidance for those involved in advising and implementing the overall issue of creating capacity. It is also the repeated observation of the ICRC, over many years, that hard to manage facilities are often the outcome of planning flaws. Notably, insufficiently comprehensive planning processes, which omit steps in the process and do not involve the necessary range of expertise make it all but impossible to construct a facility which complies with international standards and meets the needs of prisoners and staff.

### 1. Assessment and planning

The way a prison system develops is influenced by criminal justice policies, which, in turn, are influenced by the politics, culture and values that are dominant in the society in which the system is located, as preceding chapters have aimed to emphasize. Thus, all key decisions about the management and reform of a prison system, including those that relate to updating or expanding the prison estate, should be made within the context of the wider framework. In order to make this possible, there needs to be a broad and dynamic planning process, which can underpin accurate decision-making and review and modify decisions on a regular basis. This is referred to as strategic planning.

The starting point of such a planning process, if not already done, should be determining the core values of the entire criminal justice system within which prisons are placed and the goals of that system. Such core values and goals should be guided by international and regional standards and norms. As such, they will include the goal of using prisons sparingly, as recommended by such standards, as well as ensuring that prisoners are accommodated in conditions where their human dignity is respected and social reintegration promoted. Decisions to refurbish or build new prisons should comply with these core values.

It is essential that the planning process always starts with an initial assessment of existing facilities and capabilities. Such an assessment should look not only at the prison system, but also at the system of non-custodial sanctions and measures in order to develop an overall understanding of the sanctions system. This will make it possible for decision makers to make better connections between the two systems, both at the planning and implementation phase, from the legislative and regulatory framework to introducing and upgrading services. Making the links will help prescribe the correct response that will lead to long-term changes. For example, a prison assessment on its own may identify that there are many prisoners with drug dependence in prison but that services and treatment programmes are lacking. In the absence of a wider assessment, the response may focus exclusively on improving services and treatment programmes in prisons. However if the assessment includes the types of offences these prisoners have committed, the legal framework and sentencing policies in the particular jurisdiction, including in relation to drug offences, and the availability of drug treatment services in the community, the response may be a decision to amend the legal framework and sentencing policies to allow for the diversion of people with drug dependencies who have committed minor offences to community services and to improve services in the community for drug treatment. If this is achieved, then there will be a smaller number of people in prison with a need for

drug dependence treatment and authorities will not need to plan for a massive expansion of prison based services and programmes. In other words, a broad scale assessment covering the whole sanctions system can influence policy. In this way prison management policy development will not only be reactive, but also proactive.

Similarly, when planning for the maintenance, updating and expansion of the prison estate is put within this broader context, the relationship between overcrowding and prison management practices will also become more apparent. Within such a broader perspective, a response to overcrowding may be to increase the use of early release schemes and transfers to lower security prisons rather than building new capacity, if the assessment has also identified that such opportunities are not being utilized. (See chapter G, section 1.1)

### *1.1 Forecasting growth in prisoner and offender numbers*

One of the key elements of an assessment and planning process is the identification of past and expected future trends that will impact on the number of prisoners in custodial facilities and offenders undergoing community sanctions.

- The most reliable methodology to determine the expected growth in prisoner and offender numbers is to first look at past growth trends and extrapolate those into the future.
- It is then necessary to determine the impact of changes to policies and legislation, as well as political realities in a country or region and adjust the future trend calculations accordingly.

This should allow for a three to five year planning horizon which will enable prison administrators to decide whether new capacity is required, plan for short to medium-term expansion of prison capacity through various methods of initially utilizing existing facilities and if required, developing options for future expansions or the construction of new prisons. As new prisons usually take at least three years to design and build and should last for decades, it has been recommended that a national or state plan should look as far ahead as is feasible. Many governments have found that a 10-year period is manageable for projecting needs and for having enough time to “stretch out” the substantial funding required to construct what could be several new facilities.<sup>364</sup>

In conflict situations, long-term planning is rarely if ever possible or appropriate. In crisis situations, particularly where sudden changes occur e.g. mass arrests and detention or natural disasters, contingency plans should be implemented. These often temporary situations should not be the basis of long-term planning since the congestion is often relieved very quickly by executive decisions to release the majority of those detained in such circumstances.

<sup>364</sup>See Goble, R.T., The International Scientific and Professional Advisory Council of the United Nations Crime Prevention and Criminal Justice Program and the International Corrections and Prisons Association, Correctional Facilities Needs Assessment and Master Planning, Planning Manual, the International Scientific and Professional Advisory Council of the United Nations Crime Prevention and Criminal Justice Programme and the International Corrections and Prisons Association, prepared by Robert T. Goble, June 2004, p. 6.

Forecasting should be regularly updated using the same methodology, as this provides administrators and financial supporters with the ability to plan ahead and to make informed decisions regarding adjustments to the criminal justice system policies, including the identification of alternative strategies and prison capacity.<sup>365</sup>

### *1.2 Other components of a comprehensive assessment*

In order for strategic decisions to enable effective planning for short, medium and long-term plans to reduce overcrowding, it is good practice for the assessment to also include:

- Legislative framework applicable to pretrial detention and penal sanctions, as well as sentencing trends and the use of pre-trial detention in practice;
- Profile of offenders, including offences committed, sentences received, their rehabilitation and treatment needs, gender and age profiles;
- An assessment of all the institutions in the prison system to determine the capacity, actual population, conditions, shortcomings and potentials in each individual prison;
- An assessment of the organization, infrastructure and implementation of the system of non-custodial measures and sanctions;
- Costs of imprisonment in different institutions, various community sanctions and measures, estimated costs of refurbishing prisons that need updating, estimated costs of building new prisons and maintaining them, including the costs of services and programmes that need to be provided.

## **2. Deciding strategy**

The next step for decision makers would be to decide strategic responses to the data presented. In all cases a process of consultation is highly desirable to ensure that the strategy decided is in line with the reality and resources available in the short, medium and long term and that it is accepted by all actors involved.

Such consultation would involve key criminal justice institutions and actors, representatives from ministries responsible for providing services such as health care, education, vocational training, employment, service providers in the community, health-care professionals, psychologists, social workers, prison security experts and representatives from civil society. Budget and finance ministries should also be involved. The extent to which reliance is to be placed on the use of prisons versus the use of community-based supervision and sanctions should be discussed and agreed during this consultative process. The process will determine the approach and direction of the plan; its balance between deprivation of liberty and community supervision; and its support of the criminal justice system's "core values and goals" determined at the beginning of the process. Having actual costs and cost estimates available to decision makers will be of immense value for strategic decisions to be based on resource realities. It could also provide an additional impetus for giving preference to non-custodial measures, taking into account their lower cost.

<sup>365</sup>See *ibid.*, pp. 11-13 for a detailed discussion of forecasting and what methods may be used.

In deciding whether to build new prisons, add to or refurbish existing ones or not to build, the following issues should be considered:

- If the prison occupancy rate is high, the proportion of pre-trial prisoners is large and/or the growth and expected growth of the prison population is significant (e.g. higher than the demographic growth of the general population), expanding prison capacity may be necessary, as one element of a strategy to reduce prison overcrowding.
- In such cases, and based on the outcomes of the initial assessment, consideration should first be given to developing policies and strategies to reduce the existing prisoner population, some of which have been suggested in this *Handbook*.
- Where overcrowding has reached a critical level (sometimes considered to be equal to 120 per cent)<sup>366</sup> and needs to be reduced urgently to avoid a major crisis, the construction of new prisons will not be effective in meeting immediate needs, bearing in mind that building a new facility will take around three years. Other options, such as amnesties, early release schemes and redistribution of prisoners within the prison system will need to be considered, instead or as well as an expansion of prison capacity.
- *Expanding space in existing facilities:* Where a strategic decision to expand the prison capacity has been taken, a key consideration in the planning is to determine if it is more feasible to add to existing prisons or build new prisons. The planned size of any expanded prison capacity may influence this decision as will assessment of whether the existing facilities can be well maintained in the future and have sufficient useful life remaining for its purpose. A limited expansion may be best realized by making better use of existing prison space by improving prison capacity management as outlined in chapter G and in the following section 3 and/or by introducing minor architectural modifications to existing prisons.
- *Constructing new prisons:* If the existing prison facilities (all or some) are in a poor state, not providing accommodation that complies with international standards, and if such conditions are made worse by overcrowding levels, obviously consideration needs to be given to updating and expanding the facilities. Such consideration may have to include constructing new facilities and closing existing ones that cannot provide adequate facilities due to location, design features, lack of sufficient sources of water and electricity etc.
- There may also be a need to construct new prisons if the existing geographical distribution of prisons does not ensure that prisoners are held close to their homes, as far as possible, or if it leads to overcrowding in some facilities, with a redistribution of prisoners among different facilities not being a good option (e.g. as it might mean that they would then be located further away from their homes, that pre-trial detainees would not be close enough to courts).

<sup>366</sup>A definition used by the European Committee on Crime Problems (CDPC) (see Carranza, Crime, Criminal Justice and Prison in Latin America, op. cit., p. 59).

- In post-conflict countries an entire prison system, with a number of prisons of different security levels, may need to be constructed/re-constructed to ensure that prisoners are accommodated in acceptable conditions.
- *Cost:* Generally prison infrastructure is expensive and it is imperative that careful consideration is given to the cost of construction, including the on-going costs to maintain and operate facilities. It is important to develop a cost analysis over the expected life of the extended or new prison(s). This will allow funding bodies or governments to gain an in-depth understanding of various cost components, cost drivers and ongoing requirements.
- While economic imperatives require costs to be minimized, a decision to increase prison infrastructure must be accompanied by provision of adequate funding to ensure effective implementation of policy and good design principles, including those which relate to the creation of prisons that provide acceptable conditions of imprisonment and promote mental well-being and effective social reintegration.

### 3. Maximizing the use of existing prison capacity

#### 3.1 Maximizing capacity in the prison system

In many prison systems, overcrowding is experienced in a few prisons located in urban centres, in pre-trial detention facilities or high security prisons, whereas low-security prisons, open and semi-open prisons may be underutilized. High security prisons are expensive to maintain and operate. In many countries prisoners who are housed in such facilities will have been allocated there on the basis of the crime they have committed rather than on the basis of a proper assessment of their security risk.

Thus, if overcrowding is experienced in some prisons, but not in others, the following measures may be considered:

- Based on their risk assessments, selected prisoners may be transferred to lower security levels, to relieve overcrowding experienced in higher security levels, while also providing better conditions for the social reintegration of prisoners.
- In this context, more use can be made of open and semi-open prisons, where prisoners can have closer links with the community and where opportunities for their employment can be enhanced with placements in jobs outside prisons.
- In taking the above suggested steps it is important not to move prisoners further away from their homes, which would restrict family visits, and not to move pre-trial detainees further away from courts responsible for their cases.

#### 3.2 Maximizing capacity within individual prisons

Prison authorities may also take a number of measures to relieve overcrowding within their prisons, where all other measures, such as transfers to other prisons, maximizing the use of early release schemes and prison leave (see chapter G, section 1.1) have been exhausted.

- All buildings capable of housing prisoners may be examined and brought to a state of repair sufficient for habitation. Experience shows that with the simplest of modifications unused space or space used for other purposes can be brought into use as living accommodation. In doing so, there should be a thorough consideration of the advantages and disadvantages of reassigning existing premises. For example, converting workshops into dormitories will increase capacity at the expense of reducing opportunities for activities. Where premises are converted into living accommodation, this should be done in compliance with rules relating to hygiene, security, ventilation, lighting and access to sanitary facilities.
- Prisoners may be distributed more rationally within the prison. For example, low risk prisoners may be accommodated in less secure areas, prisoners who are permitted to spend the longest periods out of cells may be accommodated in the most crowded sections of the prison, as a short-term measure, while other measures are taken to reduce such overcrowding.

The arrangements for storing personal belongings may be improved and bunk beds can be introduced to increase space available in cells and dormitories. Where bunk beds are introduced care should be taken that all prisoners have access to adequate ventilation and the overall space available in the cell remains within recommended specifications. See *International Committee of the Red Cross (ICRC), 'Water, Sanitation, Hygiene and Habitat in Prisons' Supplementary Guidance' 2012*, chapter 3.

#### 4. Development of a master plan

If a decision is taken to construct new prisons, any proposed expansion programme should be consistent with the provisions of an overall master plan for the prison system, where it exists, which provides an overall guide for direction, policy, building strategy, location guidelines and budget targets to assist with the subsequent architectural design, refurbishment and construction of each facility, depending on the outcome of the assessments and strategic decisions.<sup>367</sup> Where such a plan does not exist, good practice would encourage the development of such a plan which would then be used to inform specific proposals for expansion of capacity.<sup>368</sup>

The development of a master plan includes the following steps:<sup>369</sup>

- Determining the core values upon which the prison department bases its decisions about the system's management and development.
- Determining goals for the prison system and each prison.
- Conducting needs assessment(s) to determine the capacity and capability of existing institutions and analysing prison population and trends (see section 1).
- Making a plan of the entire sanctions system (prisons and non-custodial sanctions) to ensure its structure provides a variety of prison functions and capacities, as well as placement options for the implementation of non-custodial sanctions, catering for different groups or classifications of prisoners.

<sup>367</sup> Correctional Facilities Needs Assessment and Master Planning, p. 18.

<sup>368</sup> ICRC, Practical Guidance, op.cit., p. 74.

<sup>369</sup> Ibid. pp. 74-75.

The initial master planning process will depend on a range of factors including the number of prisons in the system as well as the knowledge of key personnel involved in the planning process. The master plan should be updated each year.

## 5. Management strategy for the prison system

Where the prison system is being re-established or substantially updated, there is a need for the development of a comprehensive strategy to guide the change process.

The management strategy for the prison system should be developed by a multidisciplinary team and should cover:<sup>370</sup>

- The purpose of the prison system and the underlying philosophy.
- The services and facilities to be provided in each prison and the functional relationships between these.
- The key operational policies including the regime and hours of operation, the supervisory approach and security.
- The number and type of prisoners.
- The proposed range of programmes and activities.
- The services and facilities within each accommodation block and cell.
- The total size of the prison(s) within the external perimeter, the dimensions of the accommodation dormitories, rooms and cells.
- The project budget and design constructions schedule.
- The management structure, staff organization structure and staff numbers (custodial, administration, programmes, industries, health, maintenance etc).

The importance of describing the operation of the prison system is to ensure that the design supports the operation, rather than design leading to modifications in the operation, therefore undermining the reflection of core values and achievement of goals.<sup>371</sup>

## 6. Key planning principles

According to international standards and good prison management practices, key principles that need to be considered during the planning process include the following.

### 6.1 *Least restrictive environment*

The master plan should provide for a prison system with a variety of prison functions and capacities which cater for different groups or classifications of prisoners, based on the principle of accommodating prisoners in the least restrictive environment, guided by their individual assessment and classification. This principle implies that most prisoners can be held in medium to low security levels and a significant number

<sup>370</sup>As per ICRC, Practical Guidance, op. cit., p. 75.

<sup>371</sup>ICRC, Practical Guidance, op. cit., p. 75.

may be held in semi-open and open prisons. Such prisons are often under-utilized, not necessarily because of objective risk factors, and an increase in their usage should be among options considered. (See also chapter G, section 1.1 and section 3.1 above.)

A proper risk assessment of prisoners, undertaken on the basis of reliable assessment criteria and tools, can enable prison administrations to identify prisoners whose accommodation in high security facilities are truly justified. They usually make up a very small proportion of the total prison population.

The implementation of this principle will ensure that funds are saved, due to the lower costs involved in the building, maintenance and operation of low-security prisons.

## 6.2 Location

It is considered good practice for prisons to be sited within reasonable proximity to and have close connections with the community with which the prisoners have their closest ties. This allows the ongoing facilitation of contact between prisoners, their families and their communities which is an important requirement for effective rehabilitation. Prisons should also be close to an adequate water supply and electricity grid. They should be located near to an urban centre which can provide a suitable pool of services from state institutions and civil society, including health care, education and vocational training for prisoners, as well as schools for staff families.

A prison intended for pre-trial prisoners should be located close to courts where the cases of the majority of prisoners will be heard.

Remote locations which may offer less expensive initial land costs, may prove to be less economical in the longer term, due to the higher cost of transporting goods and services, the possible need to subsidize the cost of staff accommodation or provide incentives for staff to live in more remote areas, the difficulties encountered in accessing services (education, health, medical, emergency) needed in prisons and the costs involved in attracting specialist staff to remote locations.<sup>372</sup> Additionally, staff who relocate to remote areas often experience high stress levels and absenteeism, especially when they are separated from their families.

## 6.3 Size

The *SMR* provide that: “[i]t is desirable that the number of prisoners in closed institutions should not be so large that the individualization of treatment is hindered. In some countries it is considered that the population of such institutions should not exceed five hundred. In open institutions the population should be as small as possible.”<sup>373</sup> and “[o]n the other hand, it is undesirable to maintain prisons which are so small that proper facilities cannot be provided.”<sup>374</sup>

While short-term financial considerations have led many jurisdictions to opt for increasingly larger prisons in order to save on the cost of infrastructure and services, long-term planning which takes account of the overall goal of the criminal justice

<sup>372</sup>Ibid. p. 78.

<sup>373</sup>SMR, Rule 63 (3).

<sup>374</sup>SMR, Rule 63 (4).

system, should favour smaller prisons. It is generally accepted that smaller prisons are more suitable to promote mental well-being and social reintegration.<sup>375</sup> Commentators have suggested maximum prisoner numbers between 100 and 600. Above this size it is claimed that regimentation and excessive concentration on routine will be inevitable, anonymity fostered and the prison environment will tend towards extensive institutionalization, rejection and oppressive security.<sup>376</sup> Research suggests that smaller prisons are more suitable for the implementation of constructive prison management principles, provide an environment in which the social reintegration needs of prisoners can be more effectively met and a positive relationship between prisoners and staff can be fostered, which is an essential element of dynamic security.

Although difficult to measure in the long run, smaller prisons that promote social reintegration or at least reduce the damage done by prisons, are likely to save funds by contributing to successful resettlement and therefore reducing reoffending.

#### 6.4 Community sanctions system

The master plan should also include provisions for the community sanctions system, including treatment services and programmes to be provided for the number of people who are expected to receive non-custodial sanctions, as per the strategic decisions taken at the outset and the projections for type of offences that are expected to be committed. Including both the custodial and non-custodial options in one master plan will show how an improved system can provide a comprehensive hierarchy of placement options, from the least restrictive to the highest level and can better inform overall criminal justice policy development.

For detailed guidance on prison architecture, general design principles, water supply, sanitation, hygiene facilities, prison maintenance and planning for prison construction or rehabilitation, see “*Water, Sanitation, Hygiene and Habitat in Prisons, Supplementary Guidance*” 2012.

### KEY RECOMMENDATIONS

#### ASSESSMENT

To policymakers and criminal justice actors, including prison administrations

- To undertake an assessment of the relevant criminal justice policies and developments in the country, to inform decision makers on whether prison expansion is needed and, if so, the type and capacity required. To ensure that the assessment covers not only the prison system but also the system of non-custodial sanctions and measures, and that it is a regular activity.
- As a part of a forecasting process, to identify past and expected future trends that will impact on the number of prisoners in the criminal justice system; and to include an analysis of the profile of offenders, to forecast the potential use of non-custodial sanctions and rehabilitation needs of offenders and prisoners.

<sup>375</sup> See, for example, Fairweather, L., “Psychological effects of the prison environment”, in Fairweather, L. and McConville S (eds), *Prison Architecture, Policy, Design and Experience*, 2003, p. 37.

<sup>376</sup> Ibid. p. 37 (In the United Kingdom, Lord Justice Woolf proposed a maximum of 400, while the official guidance document, the *Prison Design Briefing System*, suggests 600. In Australia, a capacity of 500 is considered as maximum).

**DECIDING STRATEGY****To policymakers, prison administration, other criminal justice actors and relevant services and groups in the community**

- To ensure that a process of extensive consultation is undertaken to ensure that the strategy decided reflects the realities of the specific context, including resources available and that it is accepted by all actors involved. The extent to which reliance is placed on the use of prisons versus the use of community-based supervision and sanctions should be discussed and agreed during this consultative process.
- To consider the implementation of longer-term criminal justice strategies, outlined in this *Handbook*, prior to considering an increase in prison capacity to relieve overcrowding, taking into account that building new prisons does not alone constitute a sustainable solution to prison overcrowding.
- Where prison expansion is proposed and accepted in the short term, to continue to give consideration to longer-term policy and planning strategies and to consider a full range of criminal justice policy and practice options to achieve more sustainable outcomes.
- To ensure that a decision to increase prison infrastructure is accompanied by provision of adequate funding to ensure effective implementation of policy and good design principles, including those which relate to the creation of prisons that provide acceptable conditions, promote mental well-being and effective social reintegration.

**MAXIMIZING THE USE OF EXISTING PRISON CAPACITY****To prison authorities*****Maximizing capacity in the prison system***

- Selected prisoners may be transferred to lower security levels, to relieve overcrowding experienced in higher security levels.
- In this context, more use can be made of open and semi-open prisons.

***Maximizing capacity within individual prisons***

- All buildings capable of housing prisoners may be examined and brought to a state of repair sufficient for habitation.
- Prisoners may be distributed more rationally within the prison.
- The arrangements for storing personal belongings may be improved and bunk beds can be introduced to increase space available in cells and dormitories while still respecting the recommended specifications for multiple occupancy cells.

**PLANNING FOR PRISON EXPANSION**

- To start the planning process by determining the core values of the criminal justice system within which prisons are placed and the goals of that system, with guidance from international standards and norms; identifying and determining the future role of the expanded capacity in the overall prison system and the particular functions of each prison.
- To consider preparing a master plan which provides an overall guide for direction, policy, building strategy, location guidelines and budget targets to assist with the subsequent architectural design, refurbishment and construction of each facility, including services and facilities needed to provide for the implementation of non-custodial sanctions and measures.

*KEY PLANNING ELEMENTS*

- To base prison expansion or renovation plans on the principle of accommodating prisoners in the least restrictive environment, based on individual risk assessments. As such consider the expansion of the use of open and semi-open establishments.
- To ensure that prisons are sited in reasonable proximity to the community to which the prisoners have the closest ties and to an adequate water and electricity supply, medical and other services.
- To give preference to smaller prisons, which have proved to be more suitable to enable better management, promote social reintegration and the mental well-being of both prisoners and staff.

## CHAPTER I. ACTION PLAN TO REDUCE PRISON OVERCROWDING

This chapter brings together the key recommendations made in this *Handbook* to assist authorities to develop short, medium and long-term strategies to reduce prison overcrowding in their jurisdictions. Reference is made to the relevant chapters, where more detailed guidance is offered.

### 1. Assessment

As a starting point, the development of strategies and policies in each country will need to be based on the circumstances in that country and the specific challenges faced and therefore should start with a thorough assessment of the situation. Such an assessment may cover a review of criminal legislation, the operation of the criminal justice system and challenges faced, the use of pre-trial detention, the implementation of legislation in practice, sentencing policies and trends, implementation of non-custodial measures and sanctions, overcrowding levels in prisons, profiles of prisoners, trends in imprisonment rates, services offered in the community for non-custodial measures and sanctions, cooperation between services in the community and criminal justice authorities, access to legal aid, among others, discussed in this *Handbook*.

Such an assessment is essential in particular for the development of medium and long-term strategies to ensure their effectiveness and sustainability. Assessments should be repeated at periodic intervals to review progress and revise policies and plans.

### 2. Short-term strategies

#### 2.1 Releasing prisoners

In countries where overcrowding levels are very high, immediate measures may be considered to address prison management challenges to avoid a health crisis and to ensure that prisoners are held in conditions which do not infringe upon their human dignity.

Such short-term measures to be considered may include:

- *Amnesties*: Amnesties may be implemented, taking into account the recommended safeguards covered in part II, chapter B, section 11.
- *Compassionate release and other special release mechanisms*: Compassionate release and other national release mechanisms may be used/increased and the procedures for applying for such release may be reviewed and simplified, where necessary. See part II, chapter B section 10.
- *Reviewing the legality of detention*: A monitoring system may be established, for example by inspecting judges, to undertake a review of the legal status of prisoners, with a view to releasing those who can be released on bail, those who have overstayed statutory time limits of pre-trial detention, those who have completed their sentences but have not been released and those who

are eligible for non-custodial sanctions instead of imprisonment. (See part II, chapter C, section 5 and chapter E, section 4).

*Key Actors: Legislators, policymakers, prison authorities and judicial authorities.*

## 2.2 Mitigating the impact of prison overcrowding

The following measures to mitigate the impact of prison overcrowding and relieve pressure on space in prisons may be taken:

### Maximizing capacity in the prison system

- Selected prisoners may be transferred to lower security levels, to relieve overcrowding experienced in higher security levels.
- Maximum possible use of early release programmes and home leave may be considered.

### Maximizing capacity within individual prisons

- All buildings capable of housing prisoners may be examined and brought to a state of repair sufficient for habitation ensuring that such action doesn't compromise minimum standards for visits, access to health services or other essential services.
- Prisoners may be distributed more rationally within the prison.
- The arrangements for storing personal belongings may be improved and bunk beds may be introduced to increase space available in cells and dormitories.

### Protecting prisoners' physical and mental health

- The time prisoners spend out of their cells may be increased, with maximum possible time spent in the open air.
- Water points may be increased to facilitate access, ventilation systems may be improved, cooking facilities and equipment, as well as the food distribution system may be reviewed and improved, where possible, and cooperation with local health providers and NGO's may be increased in the provision of health care.
- Prisoners' contact with families may be increased, where possible, to protect their mental well-being. As a general rule, and taking into account any security precautions that may need to be employed, prison authorities are encouraged not to prevent families from providing food to prisoners to enhance the diet which is likely to have been compromised due to overcrowding.
- Activities may be introduced to generate income and produce food.
- The number of prisoners benefiting from work, education and vocational training programmes may be increased by using facilities on a rotation basis.
- Providing labour outside of the prison may be a good way to ease the pressure inside during the day.

### Maximizing the use of resources in order to ensure minimum essential services

- To compensate for any staff shortages, prison authorities may identify and prioritize the essential facilities and services of the prison that affect prisoners most and on that basis decide which functions are essential for staff to undertake and discontinue non-essential functions on a temporary basis.
- Systems and services should be regularly monitored to ensure they are being used to maximum capability.
- Measures may be taken to improve cooperation with community organizations and encourage their access to prisons to undertake activities that aim to support prisoners and enhance their rehabilitation.

### Increasing the staff availability and training

- Reorganizing staff rosters may assist in better use of available staff.
- Training staff to recognize the warning signs, which show increased prisoner tension or anxiety, may be considered, in order to prevent disturbances.

### Enhancing communication

- In order to reduce tension and anger it is important to enhance communication channels with prisoners and keep them informed of actions being initiated to resolve the most pressing problems.
- Similarly, it is essential to encourage and support staff, demonstrating that the management values them and appreciates the difficult circumstances in which they are working.

### Preventing corruption

- Due to the increased risk of corrupt practices at times of overcrowding, it is advisable to increase control over financial resources and to take measures to detect and prevent corruption. (See part II, chapter G, section 1)

*Key Actors: Prison authorities*

## 3. Short to medium-term strategies

### 3.1 Improving cooperation mechanisms between criminal justice agencies

- Mechanisms of cooperation between criminal justice agencies may be established or strengthened to address the causes for the delays in the criminal justice process, so that case backlogs can be approached in a systematic manner and pressure on prisons relieved by joint action. (See part II, chapter C, section 2)

*Key Actors: Policymakers and criminal justice institutions*

### 3.2 *Simplifying and Speeding up the Criminal Justice Process*

- A thorough review of the operation of the criminal justice process, including court administration procedures, may be undertaken, to identify how they may be simplified, with consideration being given to reforming procedural law and reducing any bureaucratic practices that lead to excessive delays. (See part II, chapter C, section 3).

*Key Actors: Policymakers, legislators and criminal justice institutions*

### 3.3 *Improving access to legal aid*

- Consideration may be given to strengthening cooperation with non-state legal aid service providers by adopting a comprehensive approach, for example by encouraging the establishment of centres to provide legal aid services that are staffed by lawyers and paralegals, and by entering into agreements with law societies and bar associations, university law clinics, and non-governmental and other organizations to provide legal aid services. (See part II, chapter D).

*Key Actors: Policymakers, criminal justice institutions, legal aid providers*

### 3.4 *Taking measures to reduce the duration of pre-trial detention*

- Measures to be taken may include setting statutory time limits on pre-trial detention, putting in place a system of judicial inspection to monitor the implementation of legislation relating to detention, including statutory time limits, and introducing mobile courts, where appropriate, to ensure that pre-trial prisoners are tried without undue delay. (See part II, chapter E, section 4).

*Key Actors: Policymakers, legislators, judicial authorities and prison authorities*

### 3.5 *Taking prison capacity into account in the enforcement of pre-trial detention and imprisonment*

- Consideration may be given to prohibiting, in law and practice, the imprisonment of people in prisons where internationally and nationally acceptable standards for their accommodation and care cannot be provided due to overcrowding. (See part II, chapter B, section 7).

*Key Actors: Legislators, policymakers and courts*

### 3.6 *Increasing prison capacity*

- Depending on the outcomes of the initial assessment and consultations with key stakeholders, there may be a need to consider increasing prison capacity as a short to medium-term measure, while other strategies to reduce imprisonment are developed and implemented.
- Unless there is a clear need for the expansion of prison capacity, taking into considerations outlined in part II, chapter H, sections 1 and 2, measures that focus on developing appropriate criminal justice responses may suffice.

- If a decision to increase prison capacity is taken, the next consideration would be to assess whether increasing capacity in existing prisons, by minor architectural interventions, or the construction of new prisons is necessary. (See chapter H, for further guidance).

*Key Actors: Policymakers, criminal justice institutions, agencies/ministries providing services in prisons, prison authorities*

## 4. Medium to long-term strategies

### 4.1 Establishing a sustainable and effective legal aid mechanism

- Funding for legal aid mechanisms may be increased and consideration may be given to setting up a legal aid authority and further diversifying legal aid provision. (See part II, chapter D).

*Key Actors: Legislators, policymakers, criminal justice officials and legal aid providers*

### 4.2 Reducing use of pre-trial detention

- Legislative and practical measures may be taken to reduce arbitrary arrests, increasing possibilities to divert suitable cases from the criminal justice system, prohibiting the use of pre-trial detention in some cases and removing any obligation for pre-trial detention in the case of others, and by increasing possibilities for alternatives other than monetary bail. (See part II, chapter E, sections 1 and 2)

*Key Actors: Legislators, policymakers, law enforcement and criminal justice officials*

### 4.3 Introducing and improving the use of alternatives to imprisonment

- Legislation may be reviewed to ensure that it includes a wide range of non-custodial sanctions, suitable for different types of offences, and applicable to individual circumstances. (See chapter F).
- Policies and legislation may be reviewed and revised to ensure that non-custodial sentences are appropriately targeted and that the conditions attached are not unnecessarily cumbersome or inappropriate, to ensure that the purpose of justice is met and that they lead to the reduction of the prison population. (See chapter F).
- Measures may be introduced to encourage courts to use non-custodial sentences in response to specific offences or instead of short prison sentences, taking into account the vulnerabilities, needs and circumstances of the offenders. (See chapter F).
- The system of early conditional release may be reviewed and improved, with the introduction of a better decision-making process, investment in staffing and training of those responsible for the supervision of offenders on early

conditional release, a review and modification of conditions attached to release, the reduction of imprisonment as a response to breaches of conditions, among others, set out in chapter F, section 5.4.

- The situation of offenders with drug dependencies and offenders with mental health care needs may be given special attention, and alternatives to imprisonment with appropriate and voluntary treatment options in the community may be introduced or improved. (See chapter B, sections 8 and 9; chapter F, section 6).

*Key Actors: Policymakers, criminal justice authorities and relevant national research institutions*

#### 4.4 Improving transparency and accountability

- Internal prison inspections may be used as an opportunity to assess levels of overcrowding in the prison system and individual prisons, as well as the possible causes of such overcrowding, and taking appropriate measures to resolve the problems faced. (See part II, chapter C, section 5).
- The transparency of prison may be improved by cooperating with international, regional and national bodies responsible for monitoring prisons and efforts may be intensified to combat corruption in the criminal justice system. (See part II, chapter C, section 5).

*Key Actors: Legislators, policymakers and sentencing authorities*

- In order to improve the implementation of alternatives to prison, adequate investment in the administrative structures, staffing and training of the supervising body responsible for overseeing the implementation of non-custodial sanctions and measures and services in the community, such as mental health care, drug treatment and other health care service, as well as opportunities for education and vocational training, will need to be made.
- Mechanisms for cooperation between all agencies responsible for delivering and supervising the sanctions will need to be established. (See chapter F)

*Key Actors: Policymakers, criminal justice institutions, agencies providing health care, drug treatment and other services in the community*

## 5. Long-term strategies

### 5.1 Review and revision of legislative framework

- A review and revision of criminal justice legislation may be undertaken which may include decriminalization of certain offences, the increase in the age of criminal responsibility and the development of a juvenile justice system aiming to reduce the institutionalization of children, a reduction of sentence lengths, a review and restriction of the number of offences carrying life sentences,

repeal of mandatory minimum sentencing laws in whole or in part, developing non-custodial sentences and other diversion schemes, allowing more discretion for judges reviewing drug control policies and modifying them with a view to reducing the imprisonment of minor offenders, among others. (See part II, chapter B).

*Key Actors: Legislators and policymakers*

## 5.2 Improving the Efficiency of the Criminal Justice System

- Measures may be taken to improve the efficiency of the criminal justice system, by building the capacity of criminal justice actors, reviewing and revising recruitment procedures and practices and criteria to evaluate performance and by allocating adequate funding for the administration of criminal justice. (See part II, chapter C, section 1).

*Key Actors: Legislators and policymakers*

## 5.3 Research and data management for evidence based strategies and policies

- Measures can be taken to ensure that the criminal justice system produces relevant data on an ongoing basis to inform policy development, including with the establishment and improvement of prisoner data management systems.
- Measures can be taken to generate similar data in other relevant spheres of government responsibility, such as social welfare, education and health care policies, so that comprehensive and holistic policies may be developed to reduce factors that can contribute to social exclusion and criminal behaviour, in order to reduce imprisonment in the long term.

(See part II, chapter A, sections 1 and 3).

*Key Actors: Policymakers, criminal justice institutions, national research agencies*

## 5.4 Harnessing public support for reforms

- Data generated to develop strategies and policies may also be used to raise the awareness of politicians and the public and to begin a public debate on the use of imprisonment, the cost and impact of imprisonment on individuals, families, communities, on how best to achieve a balance between custodial and non-custodial measures, and the role of the community in the implementation of strategies to reduce overcrowding in prisons.
- Measures to raise public awareness may also include establishing mechanisms for cooperating with the media.

(See part II, chapter A, sections 3 and 4).

*Key Actors: Policymakers and criminal justice institutions*

## TERMINOLOGY

*Accused:* A person who has been charged or who is alleged to have committed an offence.

*Acquittal:* Discharge of defendant following a verdict of not guilty.

*Adjudication:* The legal process of resolving a dispute. The formal giving or pronouncing of a judgment or decree in a court proceeding; also the judgment or decision given.

*Arrest:* A seizure or forcible restraint; an exercise of the power to deprive a person of his or her liberty; the taking or keeping of a person in custody by legal authority, especially, in response to a criminal charge.

*Bail:* A legal mechanism used so that a person accused of a crime can be released from detention prior to the conclusion of their case if certain conditions are met. These conditions are designed to ensure that the accused returns to court for trial. They usually involve placing an amount of money as security with the court, which can be forfeited to the state should the accused fail to return to court at the appointed time and place.

*Charge:* A formal accusation against a person.

*Conviction:* The outcome of a criminal prosecution which concludes in a judgment that the defendant is guilty of the crime charged.

*Crime prevention:* A range of approaches which prevent (or reduce) crime. They may include social development, community integration, urban renewal and working with specific people who are identified as vulnerable to crime, or likely to commit offences, including offenders and former offenders.

*Criminal justice system:* The practices and institutions of governments directed at upholding public safety, enforcing laws and administering justice.

*Decriminalization:* The removal of a conduct or activity from the sphere of criminal law; Decriminalization may include either the imposition of sanctions of a different kind (administrative) or the abolition of all sanctions. Other (non-criminal) laws may then regulate the conduct or activity that has been decriminalized.

*Defendant:* Person standing trial or appearing for sentence.

*Depenalization:* A relaxation of the penal sanction exacted by law for a specific offence or offences.

*Judicial authority:* A court, a judge or a public prosecutor.

*Imprisonment:* In this *Handbook* the term “imprisonment” has been used to refer to deprivation of liberty in all places of detention, including in pre-trial detention facilities and prisons. Often the term is used to refer to deprivation of liberty following a sentence has been past, in prison.

*Imprisonment rate:* The number of prisoners per 100,000 of the general population.

*Mitigation:* To make less rigorous or penal.

*Life sentence:*

The following are the three main types of life sentences:

- ‘Life’ or long-term sentence for a determinate number of years, after which the prisoner is released with no further restriction.
- ‘Life’ sentence for a minimum number of years, after which, at a certain defined point, the prisoner may be considered for release.
- Imprisonment until (natural) death, with no possibility of release (LWOP), and/or with a possibility (theoretical or realizable) of a pardon.

*Long-term sentence:* While there is no international definition of a long-term sentence, according to the Council of Europe the threshold of a long-term sentence is five years or more.

*Mandatory minimum sentence:* Mandatory minimum sentence refers to the fixed sentence that a judge is obliged to deliver to an individual convicted of a crime, notwithstanding the culpability and other mitigating factors involved in the crime.

*Occupancy rate (also known as population density):* Determined by calculating the ratio of the number of prisoners present on a given day to the number of places specified by the official capacity.

*Offender:* Someone who has been convicted of an offence.

*Official capacity or design capacity of a prison:* The total number of prisoners a prison can accommodate while respecting minimum requirements, specified beforehand, in terms of floor space per prisoner or group of prisoners including the accommodation space. The official capacity is generally determined at the time the prison is constructed.

*Operational capacity:* The total number of persons who can be safely and humanely accommodated in a prison at any time. This figure may alter over time as changes are made to the prison and as resources fluctuate.

*Paralegal:* A person who provides legal aid to people ranging from providing information about the law and court procedures to providing advice and assistance with legal problems. Paralegals will have received some training on law but not to the level of a qualified lawyer.

*Pre-trial detainee or detainee:* An accused person, deprived of his or her liberty, who has not yet received a final judgment (a conviction or an acquittal) by a court, with regard to the alleged offence committed.

*Pre-trial detention:* In this *Handbook* the term is used to refer to the period during which a person is deprived of liberty prior to adjudication, including detention by the police, through to the conclusion of the criminal trial, including appeal. Often the term is used to refer to the period after the order of detention by a judicial authority, excluding the initial period of custody by the police or other law enforcement institutions.

*Prison:* The term “prison” has been used to refer to all authorized places of detention within a criminal justice system, holding all prisoners, including those who are held during the investigation of a crime, while awaiting trial, after conviction and before and after sentencing. The term does not cover detention centres holding people detained due to their irregular immigration status.

*Prison density:* See Occupancy rate.

*Prisoner:* The term “prisoner” has been used to describe all those who are held in places of detention, including adults and juveniles, during the investigation of a crime, while awaiting trial, after conviction and before and after sentencing. (In other publications the term is also used to refer exclusively with respect to persons who have been convicted of an offence and sentenced to a prison term).

*Prosecution:* The institution or conduct of criminal proceedings against a person.

*Rehabilitation:* A broad concept whereby the underlying factors that lead to criminal behaviour in the first place are addressed and the likelihood of reoffending reduced; often used interchangeably with reintegration or treatment.

*Re-entry:* Process by which a prisoner is prepared to reintegrate into society when he or she has served a prison sentence.

*Reoffend:* When an offender commits a new crime after being convicted of a previous offence.

*Revocation:* An action taken by a competent body such as the court, public prosecutor, prison authority or parole agency in response to a violation or violations of the conditions attached to a non-custodial measure. This may involve a new offence or a violation of other technical conditions.

*Sanction:* Punishment for a criminal offence.

*Social reintegration:* The social reintegration of prisoners and former prisoners refers to the process by which they rebuild their lives in a positive manner following release

and the support given to them during this process, thereby reducing the likelihood that they will reoffend.

*Status penalties:* deny the offender specified rights in the community. Such a penalty might, for example, prevent someone convicted of fraud from holding a position of trust as a lawyer or director of a company. It might prevent a doctor convicted of medical malpractice from continuing to practice medicine.

## Non-custodial measures and sanctions

*Absolute discharge:* An absolute discharge is a legal term for a judicial action that nullifies the underlying basis of the case in criminal and certain types of civil actions. The actual definition of this type of discharge differs by jurisdiction. In criminal cases in many jurisdictions an absolute discharge is a dismissal of the case that is granted by a judge to an innocent defendant who has already been found guilty. The effect of the discharge is to throw out the criminal conviction as if it had never happened. The defendant's criminal record is wiped clean and it is as if he or she was never indicted for the offence. Certain jurisdictions define an absolute discharge in criminal cases differently. In the U.K., for instance, a defendant who is guilty can also be granted an absolute discharge by the court. The U.K. allows the court to find that a person may be guilty of an offence but that it is not in the public interest for the person to be punished for his actions. In this case the offender's discharge may appear on his or her criminal record.<sup>377</sup>

*Caution:* Warning given following admission of guilt as an alternative to prosecution. Cautions may either be simple or conditional. A 'simple caution' is used to deal quickly and simply with those who commit less serious offences and it is not a criminal conviction, but it will usually be recorded on the police database. With 'conditional cautions', the person must comply with certain conditions to receive the caution and to avoid prosecution for the offence committed. Just like a simple caution it is not a conviction.

*Community service order:* A sentence served in the community during which offenders undertake unpaid work which is of benefit to the community, under supervision.

*Compensation:* A sanction or measure that involves requiring an offender to compensate the victim.

*Conditional discharge:* The discharge of an offender without sentence on condition that he/she does not reoffend within a specified period of time. If an offence is committed in that time then the offender may also be sentenced for the offence for which the conditional discharge was given.

*Discharge:* The offender is found guilty of the offence and the conviction appears on his or her criminal record, but either no further action is taken at all (absolute discharge), or no further action is taken as long as the offender does not offend again within a certain period of time (conditional discharge).

<sup>377</sup><http://www.wisegeek.com/what-is-an-absolute-discharge.htm>

*Diversion:* An administrative procedure allowing certain offenders to bypass the formal criminal justice system in order to avoid further prosecution and conviction by participating in, for example, mediation processes or treatment programmes, or by compensating the victim.

*Deferred sentence:* A decision is taken not to pass sentence on condition that the offender undertakes some action, such as undergoing treatment for alcoholism, drug addiction or receiving psychological counselling. Depending on the result, the offender may not receive a formal sentence, and then, depending on the jurisdiction, no permanent record of the crime will be made.

*Electronic monitoring:* a method of supervising or keeping track of those who have been released awaiting trial, or as a means of enforcing a range of sentences that are implemented in the community, as well as in cases of early release. The accused or the offender wears an electronic tag or bracelet on the ankle or wrist which notifies monitoring services if the person is absent during the curfew hours.

*Fine:* A sentence of the court which involves the offender paying money to the court as punishment for their offence.

*Half-way house:* A living space, normally run by the probation or prison service, designed to bridge the gap between life in prison and life in society.

*Mediation:* A way of resolving conflicts or differences of interests between the offender and the victim. This service may be provided by probation services or civil society or victim support organizations.

*Non-custodial measures:* Requirements imposed on a defendant in order to avoid pre-trial detention. They may include: undertakings to appear before the court as and when required; not to interfere with witnesses; periodic reporting to police or other authorities; submitting to electronic monitoring and/ or curfews or surrender of passports.

*Non-custodial sanctions:* Sentences of the court which deal with the offender in the community rather than in prison. These involve some restriction of liberty through the imposition of conditions and obligations such as attendance at counselling programmes or drug treatment and testing.

*Parole or early conditional release:* means the early release of sentenced prisoners under individualized post-release conditions. It can be mandatory when it takes place automatically after a minimum period or a fixed proportion of the sentence has been served, or it can be discretionary when a decision has to be made whether to release a prisoner conditionally after a certain period of the sentence has been served. Conditional release or parole is always accompanied by a general condition that the prisoner should refrain from engaging in criminal activities. However, this is not always the only condition imposed. Other conditions may be imposed on the prisoner, to the extent that these are appropriate for his/her successful social reintegration.

*Remission:* Remission of sentence is a form of unconditional release. Remission is usually awarded automatically after a fixed proportion of a sentence has been served, but it may also be a fixed period that is deducted from a sentence. Sometimes

remission is made dependant on good behaviour in prison and can be limited or withdrawn if the prisoner does not behave appropriately or commits a disciplinary offence.

*Restorative justice:* Processes that give victims the chance to tell offenders the impact of their crime, to get answers to their questions and to receive an apology, and give offenders the opportunity to understand the impact of their actions and to do something to repair the harm. Restorative justice may take place as an alternative to prosecution for less serious crimes, when an offender has pleaded guilty in court but before sentence, after sentence, in prison or in the community.

*Suspended sentence:* Where a sentence of imprisonment is pronounced but its implementation is suspended for a period on a condition or conditions set by the court. There are two types of suspended sentences. A judge may unconditionally discharge the defendant of all obligations and restraints. An unconditionally suspended sentence ends the court system's involvement in the matter and the defendant has no penalty to pay. However, the defendant's criminal conviction will remain part of the public record. A judge may also issue a conditionally suspended sentence. This type of sentence withholds execution of the penalty as long as the defendant exhibits good behaviour. For example, if a person was convicted of shoplifting for the first time, the judge could impose thirty days of incarceration as a penalty and then suspend the imprisonment on the condition that the defendant not commit any offences during the next year. Once the year passes without incident, the penalty is discharged. If, however, the defendant does commit another crime, the judge is entitled to revoke the suspension and have the defendant serve the thirty days in jail.

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- UNODC *Handbook for Prison Managers and Policymakers on Women and Imprisonment*, New York, 2008. (<http://www.unodc.org/documents/justice-and-prison-reform/women-and-imprisonment.pdf>).

- UNODC *Handbook on the International Transfer of Sentenced Persons*, New York, 2012.  
([http://www.unodc.org/documents/justice-and-prison-reform/11-88322\\_ebook.pdf](http://www.unodc.org/documents/justice-and-prison-reform/11-88322_ebook.pdf)).
- UNODC publications on justice for children can be accessed at:  
(<http://www.unodc.org/unodc/en/justice-and-prison-reform/tools.html?ref=menuaside>).

### Early conditional release/parole

- Burke, P., Tonry, M., *Successful Transition and Reentry for Safer Communities, A Call to Action for Parole*, 2006.
- Dandurand, Y., Christian J., Murdoch, D., Brown, R.E., Chin, V., *The International Centre for Criminal Law Reform and Criminal Justice Policy, Conditional Release Violations, Suspensions and Revocations, A Comparative Analysis*, November 2008.
- Ellis T. and Marshall P., Home Office Research, Development and Statistics Directorate, United Kingdom, “Does Parole Work? A Post-Release Comparison of Reconviction Rates for Paroled and Non-Paroled Prisoners”, *The Australian and New Zealand Journal of Criminology*, volume 33 Number 3, pp. 300-317, 2000.

### Social reintegration/recidivism

- Maruna, S., and Immarigeon, R., *After Crime and Punishment, Pathways to offender reintegration*, 2004.
- Rios, N. and Greene, J., *Reducing Recidivism: A Review of Effective State Initiatives*, Justice Strategies, A Project of the Tides Center, April 2009.
- UNODC *Introductory Handbook on the Prevention of Recidivism and the Social Reintegration of Offenders*, 2012.

### Prison construction and infrastructure

- Fairweather, L. and McConville, S., *Prison Architecture, Policy, Design and Experience*, 2003.
- Goble, R.T., *Correctional Facilities Needs Assessment and Master Planning, Planning Manual*, The International Scientific and Professional Advisory Council of the United Nations Crime Prevention and Criminal Justice Programme and the International Corrections and Prisons Association, June 2004.
- *Water, Sanitation, Hygiene and Habitat in Prisons*, ICRC, 2005.
- *Practical Guidance, A Companion to “Water, Sanitation, Hygiene and Habitat in Prisons”*, 2012.

## USEFUL WEBSITES

- United Nations Office on Drugs and Crime – [www.unodc.org](http://www.unodc.org)
- UNODC, Criminal Justice Reform, Tools and publications: [www.unodc.org/unodc/en/justice-and-prison-reform/tools.html?ref=menuse](http://www.unodc.org/unodc/en/justice-and-prison-reform/tools.html?ref=menuse)
- United Nations Latin American Institute for the Prevention of Crime and the Treatment of Offenders – [www.ilanud.or.cr](http://www.ilanud.or.cr)
- United Nations African Institute for the Prevention of Crime and the Treatment of Offenders – [www.unafri.or.ug](http://www.unafri.or.ug)
- United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders – [www.unafei.or.jp/english/](http://www.unafei.or.jp/english/)
- United Nations Children’s Fund – [www.unicef.org](http://www.unicef.org)
- International Committee of the Red Cross – [www.icrc.org](http://www.icrc.org)
- Council of Europe – [www.coe.int](http://www.coe.int)
- International Centre for Criminal Law Reform and Criminal Justice Policy – [www.icclr.law.ubc.ca](http://www.icclr.law.ubc.ca)
- International Centre for Prison Studies – [www.kcl.ac.uk](http://www.kcl.ac.uk) (Coyle, A., A Human Rights Approach to Prison Management, 2009; Guidance Notes on prison reform issues, including on prison overcrowding, pre-trial detention and alternatives to imprisonment).
- ICPS, World Prison Brief (World prison populations, imprisonment rates). (<http://www.prisonstudies.org/info/worldbrief/>).
- Penal Reform International ([www.penalreform.org](http://www.penalreform.org)).
- Urban Institute, Justice Policy Center ([www.urban.org](http://www.urban.org)).
- The Vera Institute of Justice (<http://www.vera.org/>).
- Open Society Institute, Justice Initiative ([www.soros.org/initiatives/justice/focus](http://www.soros.org/initiatives/justice/focus)).
- Open Society Institute Justice Initiative, Pretrial Justice, (<http://www.soros.org/initiatives/justice/focus/pretrial-justice>) (Pre-trial detention)





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