

Report of the Workshop

**STRATEGIES AND BEST PRACTICES AGAINST
OVERCROWDING
IN CORRECTIONAL FACILITIES**

Twelfth United Nations Congress on Crime Prevention and Criminal Justice
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United Nations Asia and Far East Institute
for the Prevention of Crime and the Treatment of Offenders
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PREFACE

Overcrowding in correctional facilities is one of the gravest problems occurring in many parts of the world, and affects both developed and developing countries. On the basis of this recognition, the Workshop on “Strategies and Best Practices against Overcrowding in Correctional Facilities” was convened on 16 April 2010, Salvador, Brazil, within the framework of the Twelfth United Nations Congress on Crime Prevention and Criminal Justice (Congress).

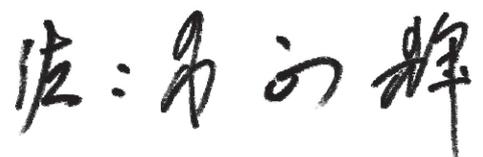
The United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders (UNAFEI), established in 1962 by agreement between the United Nations and the Government of Japan, located in Tokyo, which has the longest history of all the institutes comprising the United Nations Crime Prevention and Criminal Justice Programme Network, was responsible for the administration of this Workshop as an official component of the Congress, and played an active role in its organization and preparation.

The Workshop aimed to describe the nature and extent of prison overcrowding, to analyse the reasons for it and to propose what can be done to relieve it. Many countries have adopted measures to address the multiple problems created by overcrowding in correctional facilities and to mitigate the effects of overcrowding. The Workshop, consisting of four Presentations and three Panel discussions, offered an opportunity for government representatives, experts and practitioners to exchange information on strategies and best practices for reducing overcrowding in correctional facilities, and it ended by addressing how to build political, judicial and public support for reducing overcrowding and limiting the use of imprisonment.

The present publication is a compilation of the summary of all the presentations and discussions of the Workshop, and all the reference papers made available to the Workshop. It is our great pleasure to publish this comprehensive report of the Workshop to further disseminate its outcomes for countries afflicted with prison overcrowding.

I would like to express my sincere appreciation to all the moderators, presenters and panellists of the Workshop, 16 prominent experts from all over the world who are active in various international fora, without whose strenuous contribution the Workshop would not have been such an outstanding success. Furthermore, I owe my gratitude to the International Centre for Criminal Law Reform and Criminal Justice Policy for its co-operation in organizing the Workshop, and to all the individuals whose unselfish efforts behind the scenes contributed significantly to the realization of both the Workshop and this publication.

Finally, I am convinced that this publication is essential reading material for all those who are interested in prison overcrowding, including criminal justice practitioners, policy makers, and academics. I am also confident that it will serve as a valuable reference source for international, as well as local, training activities.



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Director, UNAFEI

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INTRODUCTION

Background paper on the Workshop on Strategies and Best Practices
against Overcrowding in Correctional Facilities

Workshop Programme on Strategies and Best Practices
against Overcrowding in Correctional Facilities

Background paper on the Workshop on Strategies and Best Practices against Overcrowding in Correctional Facilities (A/CONF. 213/16)

Summary

The reduction of prison overcrowding, although complex, should be a high priority. This paper reviews factors contributing to that problem, such as criminal justice policies that give excessive weight to punishment or may not have been adequately assessed for impact; lack of alternatives to imprisonment and of sentencing policies and guidelines encouraging the use of non-custodial measures; inefficiency and delays within the justice process; challenges faced by the poor and vulnerable in accessing justice; lack of social reintegration programmes and postrelease support to prisoners; and insufficient prison infrastructure and capacity.

I. Introduction

1. The rapid growth of the prison population constitutes one of the most challenging problems faced by criminal justice systems worldwide. According to the International Centre for Prison Studies, more than 9.8 million people, including sentenced prisoners and pretrial detainees, are held in penal institutions throughout the world.¹ The World Prison Brief² prepared by the Centre, indicates that the prison population has risen in 71 per cent of the countries surveyed (in 64 per cent of countries in Africa, 83 per cent in the Americas, 76 per cent in Asia, 68 per cent in Europe and 60 per cent in Oceania). Prison population rates, measured as the number of prisoners per 100,000 of the general population, vary considerably among different regions of the world, within regions and among prison facilities within countries.

2. According to the World Prison Brief, 114 of the 191 countries for which data had been collected had a rate of prison occupancy above 100 per cent (indicating overcrowding). Of those, 16 countries had rates of prison overcrowding³ above 200 per cent, while 25 countries reported rates of between 150 and 200 per cent. According to Penal Reform International, the size of prison populations in Europe on average exceeds official capacity by 30 per cent, while the average prison occupancy rate in the United States of America is 107 per cent. In Bangladesh, the prison population stands at 288 per cent of official capacity, the highest rate in South Asia. Kenya has the highest rate of prison overcrowding in the world, with prison occupancy at 337 per cent of capacity.

3. Participants at the Tenth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Vienna in 2000, and the Eleventh United Nations Congress on Crime Prevention and Criminal Justice, held in Bangkok in 2005, recognized the importance of containing the growth and overcrowding of prison populations by promoting safe and effective alternatives to incarceration and developing restorative justice policies.

4. Participants at the four regional preparatory meetings for the Twelfth United Nations Congress on Crime Prevention and Criminal Justice⁴ recognized that occupancy of prison facilities was exceeding capacity and that overcrowding was an acute and widespread problem worldwide and recommended that the Workshop on Strategies and Best Practices against Overcrowding in Correctional Facilities

1 Roy Walmsley, "World prison population list", 8th ed. (London, King's College, International Centre for Prison Studies, December 2008). Available from www.kcl.ac.uk/depsta/law/research/icps/downloads/wpp1-8th_41.pdf.

2 Available from www.kcl.ac.uk/depsta/law/research/icps/worldbrief/ (last accessed on 8 February 2010).

3 The term "prison overcrowding" generally refers to situations in which the rate of prison occupancy is above 100 per cent of prison capacity. However, the way in which prison capacity is measured varies from country to country, depending on the space allocated for each prisoner in accordance with national legislation and administrative rules. Comparisons of overcrowding levels can therefore be misleading. The impact of overcrowding depends not only on the amount of space allocated to each prisoner, but also on the amount of time each prisoner can spend engaged in activities outside his or her cell. The scope of the present paper does not extend to measures that can be taken within prisons to mitigate the effects of overcrowding.

4 Reports of the Latin American, Western Asian, Asian and Pacific and African regional preparatory meetings for the Twelfth Congress (A/CONF.213/RPM.1/1, A/CONF.213/RPM.2/1, A/CONF.213/RPM.3/1 and A/CONF.213/RPM.4/1, respectively).

pay particular attention to the development of comprehensive, coordinated, multisectoral and sustained strategies and policies involving all stakeholders in the criminal justice system.

5. For over 50 years, the United Nations has developed standards and norms to encourage the development of criminal justice systems that meet basic human rights standards. Prison overcrowding may hinder compliance with such standards, with a resulting negative impact on prisoners, their families, prison systems and the community as a whole. In addition, failure to respect the right to a fair trial may contribute to an increase in the number of pretrial detainees and convicted persons and thus in the size of the prison population.

6. The earliest of the United Nations standards and norms, the Standard Minimum Rules for the Treatment of Prisoners⁵ contains provisions relating to the rights of prisoners and minimum requirements regarding conditions of detention, which may be compromised by overcrowding in prison facilities. The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (General Assembly resolution 43/173, annex) and the Basic Principles for the Treatment of Prisoners (Assembly resolution 45/111, annex) expand on those standards. Other United Nations instruments highlight the importance of non-custodial measures and of the use of imprisonment and pretrial detention as last-resort options that could assist in reducing the numbers of persons sent to prison (United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules) (Assembly resolution 45/110, annex)). The United Nations instruments that specifically address unnecessary or unnecessarily prolonged pretrial detention, which often contributes to prison overcrowding, include the Universal Declaration of Human Rights (Assembly resolution 217 A (III)) and the International Covenant on Civil and Political Rights (Assembly resolution 2200 A (XXI), annex). Instruments such as the basic principles on the use of restorative justice programmes in criminal matters (Economic and Social Council resolution 2002/12, annex) encourage the use of restorative justice, which facilitates the use of alternatives to pretrial detention (pretrial diversion) and imprisonment. The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) (Assembly resolution 40/33, annex) and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (Assembly resolution 45/113, annex) provide exclusively for children and juveniles in conflict with the law and set out guidelines for the administration of juvenile justice and for institutions in which juveniles are confined.

7. Regional instruments also highlight the serious problems posed by prison overcrowding, including its potential to undermine the rights of prisoners, and provide for effective alternatives to imprisonment in policy and practice as a viable long-term solution to prison overcrowding (the Kampala Declaration on Prison Conditions in Africa (Council resolution 1997/36, annex); the Kadoma Declaration on Community Service (Council resolution 1998/23, annex I) and related recommendations on prison overcrowding; the Arusha Declaration on Good Prison Practice (Council resolution 1999/27, annex); and the Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System) in Africa.

8. Overcrowded prison conditions violate prisoners' basic rights, undermine the safety of prison staff and that of the general public and weaken the ability of the prison system to meet prisoners' basic healthcare, food and accommodation needs and to provide rehabilitation programmes, education, training and recreational activities. Overcrowding hinders the ability of prison authorities to manage prisons effectively, address prisoners' social reintegration needs and ensure that their treatment meets the requirements set out in United Nations standards and norms, and may create an unsafe working environment for prison staff. It may also preclude an accurate census and effective classification of prisoners. Prisoners who do not have access to treatment programmes are more likely to reoffend following their release. The cost to society of failure of prisoners to reintegrate into the community is significant, both financially and in terms of public safety.

5 *Human Rights: A Compilation of International Instruments*, Volume I (First Part): *Universal Instruments* (United Nations publication, Sales No. E.02.XIV.4 (Vol. I, Part 1)), sect. J, No. 34.

9. Many countries have adopted measures to address the multiple problems created by overcrowding in correctional facilities⁶ and to mitigate the effects of overcrowding. The Workshop offers an opportunity for government representatives, experts and practitioners to exchange information on strategies and best practices for reducing overcrowding in correctional facilities. Specifically, the Workshop provides a forum for:

(a) The consideration of strategies to improve the fairness and efficiency of the criminal justice process;

(b) The review of good practices and strategies in improving access to justice for the poor and vulnerable;

(c) The review of good practices with respect to decriminalization, pretrial diversion, restorative justice at all stages of proceedings and alternatives to imprisonment, and assessment of the impact of such practices on prison overcrowding;

(d) The consideration of possible strategies for expanding the use of early release measures;

(e) The identification of effective programmes for the prevention of recidivism as a means of reducing prison overcrowding.

II. Factors contributing to prison overcrowding

10. The reasons for the growth of prison populations worldwide are numerous and vary from region to region and from country to country. A range of social and economic factors and policies, the existence or lack of social support networks and health-care services in the community, crime prevention measures, the development of the criminal justice system, societal perceptions of crime and the role of imprisonment in countering crime all have an impact on the size of those populations. Other factors, such as excessive use of imprisonment, corruption, harsh social policies and growing income inequality can also have a considerable impact on the size of prison populations. In most countries, these factors have a cumulative effect. A multidisciplinary and comprehensive strategy is therefore needed in order to address them effectively.

11. For the purposes of the present paper, the key causes of overcrowding may be summarized as follows: (a) the inefficiency of the criminal justice process; (b) punitive criminal justice policies and the overuse of detention and imprisonment, particularly at the pretrial stage; (c) inadequate legislative provision for non-custodial measures and sanctions and lack of clear sentencing policies and guidelines encouraging the application of such measures and sanctions; (d) challenges faced by large sectors of society, especially the poor and vulnerable, in accessing justice; (e) inefficient measures to prevent recidivism; (f) lack or underuse of release programmes; and (g) inadequacy or lack of prison facilities and resources.

A. Inefficiency of the criminal justice process

12. Prison overcrowding is often the result of problems and inefficiencies in the criminal justice system including ineffective or delayed investigation, the limited use of pretrial release provisions, inefficient case management practices, limited resources within the prosecution service and the judiciary and the lack of provision for or limited use of summary proceedings.⁷ These problems contribute to case backlogs in courts, unacceptably long delays in completing investigations and committing cases to trial, multiple and often unnecessary court adjournments and excessive delays in trial proceedings and case dispositions, all of which have been identified as factors contributing to lengthy pretrial

6 In the present paper the term “correctional facilities” is used to include all prisons and pretrial detention facilities, although the latter do not have a correctional function.

7 For the purposes of the present paper the term “summary proceedings” refers to simplified procedures which accelerate the trial process with the objective of ensuring greater efficiency in the criminal justice system and minimizing costs. Generally, summary proceedings are used in the lower courts, usually for lesser criminal offences, and constitute fast-track proceedings whereby certain formal procedures are dispensed with or streamlined. In Canada, for example, the amendment of relevant national legislation has involved the “hybridization” of offences under the Criminal Code that had previously been strictly indictable. Such hybridization allows prosecutors to choose summary proceedings in appropriate cases, thus avoiding the more complicated

detention periods.⁸ There are instances in which the period of pretrial detention exceeds the length of the sentence likely to be imposed. In many jurisdictions, pretrial detainees account for a significant proportion of the prison population.⁹

13. Lack of cooperation among criminal justice agencies such as the police, prosecutors and courts, compounded in some cases by poor information exchange, is also a key concern. One of the underlying causes of such challenges is the lack of accurate and up-to-date information on individuals held in penal establishments.

Without accurate records, prison authorities have insufficient information concerning the identities of prisoners and are unable to track the case files of those prisoners. In the case of pretrial detainees, the lack of accurate records, including records of the dates of court hearings, can lead to considerable delays. The presence of a complete, accurate and accessible prisoner file system is a prerequisite for effective policymaking and prison management.

B. Punitive criminal justice policies and the overuse of detention and imprisonment

14. Punitive criminal justice policies have had an impact on the growth of the prison population and prison overcrowding in many countries. Research in some countries indicates that the increase in the size of prison populations is attributable to causes often unrelated to crime rates.¹⁰ In many cases the increase in the use of imprisonment appears to be a consequence of punitive penal policies that may be ad hoc and driven by short-term political exigencies. Courts in many countries are more likely now than a decade ago to sentence offenders to imprisonment and impose longer sentences.¹¹ In some countries, the increased use of life sentences with or without parole for a wider range of crimes is a growing trend. In many countries, non-violent offenders who have committed minor crimes are imprisoned rather than dealt with at the first stage of the criminal justice process by way of a caution, fine, suspended sentence or restorative justice measure.

15. Certain criminal justice policies have been identified as major factors contributing to increases in prison populations and to prison overcrowding, including extension of the range of offences to which the penalty of imprisonment applies and the introduction of longer terms of imprisonment for certain offences.¹² Policies that require convicted offenders to serve more time in prison, such as the shift from indeterminate to determinate sentencing, the increase in the number of mandatory minimum sentences¹³ and the elimination of the practice of awarding good time to prisoners, can contribute to overcrowding. Community pressure also plays a contributory role; within communities concerned with safety and security, there may be de facto support for legislation and policies that contribute to prison overcrowding, including the extensive use of pretrial detention. The pressure that citizens exert on Governments, often through the media, to penalize offenders is one of the reasons why prisons remain

procedures for indictable offences (such as a preliminary hearing (committal hearing) or trial before judge and jury). Hybridization offers a way to simplify and accelerate the trial process in cases relating to lesser offences and warrant summary proceedings. For a review of a number of reforms implemented in inquisitorial criminal justice systems with the aim of accelerating criminal proceedings, inter alia, by reducing the formality of criminal trials and streamlining the investigatory process, see Albin Eser, "The acceleration of criminal proceedings and the rights of the accused: comparative observations as to the reform of criminal procedure in Europe", *Maastricht Journal of European and Comparative Law*, vol. 3, No.4 (1996).

8 Human Rights Watch, *"The Perverse Side of Things": Torture, Inadequate Detention Conditions, and Excessive Use of Force by Guinean Security Forces* (New York, 2006), available from www.hrw.org/reports/2006/guinea0806/.

9 United States Department of State, Country reports on human rights practices: Senegal (2007), available from www.state.gov/g/drl/rls/hrrpt/2007/100501.htm.

10 "Over-use of imprisonment: causes, consequences and responses", *Penal Reform International Newsletter*, vol. 55, July 2006, p. 5.

11 Ibid.

12 David Beck-Brown, "The high cost of prison overcrowding", *San Diego Union-Tribune*, 27 April 2006 (available from www.davidbeck-brown.com/literaryarts_cost_of_prison_overcrowding.shtml); see also Patrick Kinkade, Matthew Leone and Scott Semond, "The consequences of jail crowding", *Crime and Delinquency*, vol. 41, No. 1 (1995), pp. 150-161.

13 Julia Sloth-Nielsen and Louise Ehlers, "Assessing the impact: mandatory and minimum sentences in South Africa", *SA Crime Quarterly*, vol. 14, December 2005, pp. 15-22.

the primary instruments of punishment.¹⁴ Community pressure may also make parole boards reluctant to grant offenders early release or may hinder the establishment of programmes and services to assist offenders in successfully reintegrating into the community.

16. Policies relating to criminal procedures during the investigation and trial process and provision for bail or pretrial release can have a significant impact on prison populations. The lack of legislation or failure to enforce existing legislation relating to the criteria for placing persons in pretrial detention can limit access to bail and other pretrial release options. Remand prisoners may be imprisoned for lengthy periods as a result of policies and practices that cause unnecessary delays and inefficiency in the justice process. In some jurisdictions, suspects are expected to be brought before the court within a specific period. However, there may be no limit as to the number of times the police may obtain an extension on that period while completing investigations. As a result, persons may be detained for lengthy periods without charge.

C. Inadequate provision for non-custodial measures and sanctions

17. In many countries, national legislation provides only for limited alternatives to imprisonment; where such alternatives exist, courts are often reluctant to use them, generally preferring imprisonment. Limited use of non-custodial measures may be part of a criminal justice policy that is punitive as a whole, or could be related to failure to reform legislation owing to lack of resources, lack of training for judges and the absence of clear sentencing guidelines encouraging the use of non-custodial measures.

18. Sentencing policies that encourage the use of community-based programmes but do not establish any obligation to develop and sustain such programmes are ineffectual and do nothing to alleviate prison overcrowding. Where such alternatives to imprisonment exist, sufficient resources are necessary to support non-custodial measures and to supervise offenders in the community.

D. Issues concerning access to justice

19. The absence of a proper and effective legal representation system can contribute to the size of prison populations. Accused persons without representation may face a higher risk of being detained until the date of the hearing or trial or until being incarcerated upon conviction, even in cases involving minor offences. Lack of representation is also one of the causes of delays in the criminal justice process. The number of legal counsels or paralegals available to represent or assist accused persons at police stations, in court or in prison may be low, particularly in remote areas. In many jurisdictions, poor and vulnerable persons have inadequate access to legal assistance that could help them to remain in the community until the hearing or trial date or to appeal for an alternative to imprisonment upon conviction.

E. Inefficient measures to prevent recidivism

20. Absent, limited or ineffective rehabilitation measures for offenders, both in the community and in prison, can have an impact on recidivism rates. The lack of reintegration programmes within correctional facilities can impede the successful reintegration of offenders into the community, thus increasing the likelihood of recidivism, which may in turn have a significant impact on prison populations. In some jurisdictions, the fastest growing segment of the prison population comprises offenders who have violated the terms of their parole or probation.¹⁵ However, consideration should also be given to the possibility that conditions attached to probation or parole may be too strict and therefore difficult for offenders to comply with, and that in some jurisdictions, the only option available to the authorities in the event of a breach of those conditions is to order that the offender return to prison, in some cases to serve the remainder of his or her sentence, however minor those breaches

14 Jeremy Sarkin, ed., *Human Rights in African Prisons*, Ohio University Research in International Studies, Africa Series (Athens, Ohio, Ohio University Press, 2008), p. 2.

15 Yvon Dandurand and others. *Conditional Release Violations, Suspensions and Revocations: A Comparative Analysis* (Vancouver, International Centre for Criminal Law Reform and Criminal Justice Policy, November 2008), p. 3. Available from [www.icclr.law.ubc.ca/files/books/Conditional Release Violations Final_English.pdf](http://www.icclr.law.ubc.ca/files/books/Conditional%20Release%20Violations%20Final_English.pdf).

may be (such as breach of curfew).

F. Lack or underuse of release programmes

21. In many jurisdictions, there is little provision for early release from prison, and where such provision exists, that mechanism is often underused due to resource limitations and other factors. Ineffective or inefficient parole systems or rigid parole rules that limit the number of cases in which parole is granted contribute to large prison populations. The number of parole suspensions and revocations depends not only on the behaviour of offenders but also on the manner in which they are supervised in the community and the legislative framework within which that supervision is carried out.

G. Inadequate prison infrastructure and capacity

22. In many countries, prison facilities are in need of replacement or renovation. They do not adequately accommodate existing prison populations or increases in the number of prisoners. In many post-conflict and transitional societies, the prison system has been destroyed or severely damaged. Lack of investment in prison construction and renovation and delays in building new facilities contribute to prison overcrowding and aggravate its effects. Prison construction, where undertaken, must be part of a comprehensive strategic plan to address overcrowding in prisons, inter alia, through measures to decrease the number of persons incarcerated.

H. Other factors

23. Some regions have experienced a rapid increase in the size of their prison populations as a result of a rise in crime rates that has a positive correlation with inequality, inadequate responses to poverty and social marginalization.¹⁶ In many countries, the problem of prison overcrowding is exacerbated by the fact that illegal migrants are often detained before being repatriated (even if, as in many cases they have been living illegally in the country for a long time). In others, prisons have become the only facilities available for persons with mental health problems.

III. Strategies to reduce prison overcrowding

24. Strategies developed to reduce prison overcrowding will vary according to the specific needs of individual jurisdictions. Best practices call for concerted and comprehensive efforts on the part of the entire criminal justice system, involving the cooperation and coordination of all criminal justice stakeholders. States should analyse their national criminal justice systems in the context of their historical, legal, economic and cultural background. Specific strategies are: (a) to ensure a system-wide, integrated and sustained approach to the criminal justice process and related programmes; (b) to improve the efficiency of the criminal justice process; (c) to ensure comprehensive sentencing policies; (d) to increase the use of alternatives to detention and imprisonment, on the basis of the principle of imprisonment as a last resort and the principle of proportionality; (e) to strengthen access to justice and public defence mechanisms; (f) to develop or strengthen, as appropriate, provisions for early release; (g) to strengthen measures to prevent recidivism, such as rehabilitation and reintegration programmes; (h) to increase prison capacity if absolutely necessary; and (i) to conduct research and development activities relating to information systems for the justice and corrections sectors. Strategies to reduce overcrowding should be gender-sensitive and should respond effectively to the needs of vulnerable groups.

25. The United Nations Office on Drugs and Crime (UNODC) has developed a number of tools and handbooks that can serve Member States as practical guides in developing strategies, such as the Criminal Justice Assessment Toolkit on custodial and non-custodial measures. It has also designed specific tools to assist in the development of strategies to reduce overcrowding among female prisoners

16 See Pablo Fajnzylber, Daniel Lederman and Norma Loayza, "Inequality and violent crime", *Journal of Law and Economics*, vol. 45, No. 1 (April 2002); see also Elias Carranza and others, *Carcel y Justicia Penal en America Latina y el Caribe: Como Implementer el Modelo de Derechos y Obligaciones de las Naciones Unidas* (Mexico City, Siglo XXI, 2009).

and vulnerable groups in prisons, such as the *Handbook for Prison Managers and Policymakers on Women and Imprisonment*¹⁷ and the *Handbook on Prisoners with Special Needs*.¹⁸ Furthermore, the Commission on Crime Prevention and Criminal Justice, in its resolution 18/1, requested the Executive Director of UNODC to convene an open-ended intergovernmental expert group meeting to develop, consistent with the Standard Minimum Rules for the Treatment of Prisoners and the United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules), supplementary rules specific to the treatment of women in detention and in custodial and non-custodial settings. The meeting, which was held in Bangkok from 23 to 26 November 2009, endorsed a series of supplementary rules providing, inter alia, for greater use of alternatives to prison in the case of certain categories of female offenders. The draft rules will be before the Congress (A/CONF.213/17) for appropriate consideration and action.

A. Comprehensive criminal justice policies and programmes

26. Successful strategies to reduce prison overcrowding are based on an integrated and sustained approach to enhancing the criminal justice process and are strengthened by in-depth understanding of the nature of the crime problem, the effective functioning of the criminal justice system and general strategies for crime prevention. Comprehensive policies may include both crime prevention measures and strategies that limit the reach of the criminal justice system, such as the use of decriminalization or pretrial diversion, thus reducing the number of persons convicted and imprisoned. Informal and restorative justice mechanisms have the potential to reduce court costs and case processing times and to provide communitybased forums for the resolution of cases. Policies should also discourage the use of criminal justice systems to deal with social issues such as mental health problems.

27. Strategies should cover the three stages of the criminal justice process: pretrial, trial and conviction. Measures to decrease the use and duration of pretrial detention include legislative and policy frameworks ensuring that police and pretrial detention are used only when absolutely necessary; encouragement of the use of pretrial release options; the requirement that pretrial detention be decided by a competent authority and for a determinate period of time; and the requirement that trials be held within a reasonable period of time beyond which detention is not permitted. Strategies such as plea bargaining or mechanisms for entering early guilty pleas or for fast-track case management can encourage the early disposition of cases. Governments could consider creating small claims courts or courts to hear cases involving minor offences. A number of jurisdictions have developed specialized courts designed to address the specific needs of certain groups of offenders and to provide an alternative to the use of imprisonment. Offenders who are mentally ill or dependent on drugs are often caught in an inescapable cycle of incarceration and release. Strategies that have used the authority of the court to compel therapeutic intervention (such as drug treatment courts and courts that try cases relating to violence in the family) have proved successful in this area.¹⁹

B. Improving the efficiency of the criminal justice process

28. One of the key challenges that must be addressed by strategies to reduce the prison population is inefficiencies in the criminal justice process that have a direct impact on the size of the prison population. Practices that contribute to prison overcrowding by creating backlogs of court cases and increasing the number of pretrial detainees could be identified through a system-wide review.

29. Strategies must also seek to reduce the time between commencement of proceedings and their conclusion with a final judgement; impose time limits (e.g. under statutory or constitutional law) for the conclusion of investigations and trials; review rules of procedure and court rules; improve joint investigations by and communication between the police and prosecution services; improve court administration, including automation, scheduling, case-tracking and casemonitoring schemes; enhance case management; and streamline pretrial processes such as disclosure, admissions and

17 United Nations publication, Sales No. E.08.IV.4.

18 United Nations publication, Sales No. E.09.IV.4.

19 John Weekes and others, "Drug treatment courts", *FAQs*, Canadian Centre on Substance Abuse (Ottawa, March 2007). Available from www.ccsa.ca.

case conferences. Strategies that might be explored include the creation of new courts, particularly in rural areas; the allocation of resources to increase the capacity of the criminal justice system; the introduction of summary proceedings;²⁰ the creation of opportunities for offenders to enter early guilty pleas; greater legal representation for offenders; more efficient case management; improved scheduling and notification processes; and strengthening of the role of paralegal professionals in facilitating the processing of cases.

30. Initiatives to improve the efficiency of the criminal justice process require a concerted effort on the part of the entire criminal justice system, which may require training for police, prosecutors, judges, staff of correctional facilities, communitybased non-governmental organizations and other agencies and organizations. The Chain Linked Initiative, which is being implemented in a number of African States, involves cooperation between courts, prosecutors, prisons, social services, local community leaders and non-governmental organizations. Participants in the initiative hold regular meetings, conduct joint prison visits and have developed and distributed agreed performance standards, which have been successful in expediting the processing of cases and the release of detainees found to have been imprisoned unlawfully.²¹ Regional and national conferences involving all justice stakeholders serve as useful forums for the examination of ways to improve the administration of justice and for the development of interagency cooperation. For example, UNODC, the International Centre for Criminal Law Reform and Criminal Justice Policy and the United Nations Mission in the Sudan (UNMIS) are jointly supporting the capacity-building and reform efforts of the Southern Sudan prison service. While those activities are focused on supporting the prison service, they also include the strengthening of cooperation among relevant stakeholders in the justice system in identifying key issues and drawing up strategies for developing alternatives to imprisonment.

31. Justice systems should be supported by good information management systems providing up-to-date and easily accessible information on cases, accused persons and convicted offenders. The *Handbook on Prisoner File Management*,²² published by UNODC, highlights the importance of maintaining accurate prisoner files as a means of ensuring compliance with international treaties and standards. Effective caseload management can help to expedite the hearings of pretrial detainees, facilitate the identification of convicted persons eligible for early release and ensure that adequate supervision and services are provided to persons released. Participants in the four regional preparatory meetings for the Twelfth Congress considered the special challenges posed by the fact that, in recent years, foreign nationals have tended to account for a large proportion of the prison population in many countries. Some of the practices suggested as a means of alleviating this problem include split sentences, programmes for the exchange of foreign prisoners and regional schemes for the transfer of such prisoners.²³ The transfer of foreign prisoners to their countries of origin should be conducted in accordance with international standards and, to the extent possible, in line with the Model Agreement on the Transfer of Foreign Prisoners.²⁴

C. Comprehensive sentencing policies

32. Comprehensive sentencing policies, based on enabling legislation can provide guidance to courts and encourage the use of alternatives to imprisonment. The cost to society of imprisonment in relation to the costs of other options should be taken into account when designing sentencing policies. Legislation and policies based on the principle of imprisonment as a last resort and the principle of proportionality can limit the overuse of imprisonment and contribute to a reduction in the size of prison

20 See footnote 7 above.

21 Personal Reform International, "*Index of Good Practices in Reducing Pre-Trial Detention*", version 7, October 2005. Available from www.penalreform.org.

22 United Nations publication, Sales No. E.08.IV.3.

23 The requirement that prisoners must consent to the transfer ensures that transfers are not used as a method of expelling prisoners or as a means of disguised extradition (A/CONF.121/10, para. 14).

24 *Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26 August-6 September 1985: report prepared by the Secretariat* (United Nations publication, Sales No. E.86.IV.1), chap. I, sect. D.1, annex I.

populations. Policies might include the provision of non-binding guidance to the courts on judicial discretion, the establishment of fixed upper limits and flexible lower limits for penalties or the adoption of legally binding sentencing guidelines that establish priorities with regard to the use of imprisonment and require courts to determine penalties in accordance with the limits of available prison capacity.

33. Such policies can help to minimize the use of mandatory sentences so that mitigating factors can be given greater consideration at the time of sentencing. The incarceration of offenders who do not pose a substantial threat to society, in conditions that undermine their human rights and endanger their mental and physical health and overall well-being, is not conducive to successful rehabilitation or reintegration. Sentencing policies should set out clear provisions relating to the social rehabilitation of offenders. Some countries have introduced sentencing processes that provide for the introduction of pre-sentence reports, which allow judges to consider a variety of options. Various restorative justice approaches can also be designed to provide for non-custodial alternatives. Sentencing policies should also address the impact of recidivism on prison populations.

D. Increasing the use of alternatives to detention and imprisonment

34. Relevant international instruments recommend that criminal legislation provide for a wide range of non-custodial sanctions applicable to different types of offence and to the individual circumstances of the offender (e.g. rule 8.1 of the Tokyo Rules). The availability of a range of alternatives to imprisonment is clearly necessary as a first step towards increasing the use of non-custodial sanctions in practice. In the UNODC *Handbook of Basic Principles and Promising Practices on Alternatives to Imprisonment*,²⁵ the basic principles central to understanding alternatives to imprisonment at every stage of the criminal justice process are introduced and promising practices implemented throughout the world are described (see boxes 1 and 2).

Box 1

Good practices in India and South Africa

A pilot bail information scheme designed to reduce the use of detention in South Africa for persons unable to pay bail has reduced the number of persons in pretrial detention and improved the functioning of the courts in several pilot locations. The general view among those involved in the scheme is that it has produced positive outcomes.^a

In India, a pilot project to implement a prison visitors' programme and a rights monitoring campaign designed to discourage the use of detention and to expedite trials, has reduced the number of persons detained while awaiting trial.^b

a Louise Ehlers, "Frustrated potential: the short and long term impact of pretrial services in South Africa", in *Justice Initiatives: Pretrial Detention* (New York, Open Society Justice Initiative, 2008), pp. 121-140.

b R. K. Saxena, "Catalyst for change: the effect of prison visits on pretrial detention in India", *Justice Initiatives: Pretrial Detention* (New York, Open Society Justice Initiative, 2008), pp. 57-69.

35. Alternatives to imprisonment that might be considered when reviewing sentencing legislation and policies include suspended sentences, probation, community service, fines, compensation, conditional sentences, home detention with or without electronic monitoring, verbal sanctions and restriction of certain rights. In some jurisdictions, probation is a widely used alternative to imprisonment. The popularity of probation is due in large measure to its versatility. The duration and conditions of probation can be tailored to the offender's needs and circumstances and, similarly, the level of supervision can be adapted to the danger posed by the offender. Probation officers may, in addition to providing supervision, help persons under community supervision gain access to treatment programmes, such as programmes on violence prevention and substance abuse management and programmes targeting sex offenders through a cognitive skills approach. In many European jurisdictions and in North America, the expansion of electronic surveillance programmes, including

25 United Nations publication, Sales No. E.07.XI.2.

electronic monitoring and “tagging”, has increased the number of offenders who can be supervised in the community. Probation services have also been expanded to include specialized units providing community-based supervision for higher-risk offenders, including sex offenders.²⁶

Box 2

Good practice in Kyrgyzstan: criminal justice reform in 2007

On 25 June 2007, Kyrgyzstan adopted a number of amendments to its Criminal Code, Code of Criminal Procedure, Penal Enforcement Code and to seven other laws. The changes introduced new alternatives to imprisonment, expanded the use of existing alternatives and reduced the length of sentences applicable to certain offences. The right to decide to arrest a person was transferred from the prosecutor to the courts. As a direct result of those changes, the prison population of Kyrgyzstan decreased dramatically from 15,249 in July 2006 to 9,797 in July 2009. That decrease was attributable largely to the reduction of prison sentences and the easing of conditions for early conditional release.

36. However, in low-income countries where alternatives such as probation and electronic surveillance programmes would entail an unmanageable financial burden, simpler alternatives, such as suspended sentences, home detention, compensation and fines (calculated on an equitable basis) may be preferred options. Unpaid work (community service) is also a possible alternative to short prison sentences. Many jurisdictions provide for a range of penalties applicable in cases in which enforcement of a sentence has failed, and explicitly provide for imprisonment only as a last resort. UNODC is working in Afghanistan to increase the use of alternatives to imprisonment by encouraging the use of those alternatives which are already provided for under relevant legislation but which are not being used. The initiative is based on a comprehensive needs assessment outlined in *Afghanistan: Implementing Alternatives to Imprisonment, in Line with International Standards and National Legislation*, published by UNODC in 2008. As part of that process, UNODC has led the review of the Code of Criminal Procedure of Afghanistan and has also recommended that national legislation provide for a greater number of alternatives to pretrial detention.

37. Capacity-building and awareness-raising are needed in order to increase the use of alternative measures by police, prosecution services and the judiciary. However, one of the key concerns regarding the development of alternatives to imprisonment is that a greater number of persons will require supervision by the justice system.

38. The availability of adequate resources to implement non-custodial measures is essential to any strategy to reduce overcrowding in correctional facilities. Civil society, including non-governmental organizations, can play a pivotal role in the use of community-based alternatives to imprisonment. One of the key challenges is to devise strategies to engage the community, sustain community involvement and promote public acceptance of schemes that allow offenders to remain in the community. Involvement of the community in schemes to reduce prison overcrowding through alternatives to imprisonment is not only cost-effective but also serves to strengthen reform efforts. Activities to raise public awareness of the effectiveness of community sentences can increase public acceptance of such alternatives. The design of alternative measures for specific groups of offenders, such as pregnant women, mothers of young children, elderly persons and prisoners with disabilities, should also be considered.

E. Strengthening access to justice and access to public defence mechanisms

39. Good defence lawyers, an effective public defence system, access to legal representation and information on available legal aid significantly improve the administration of justice and may reduce the number of persons in prison. Legal counsel or paralegals²⁷ can help to ensure that cases are heard within the legally mandated time frame or, failing that, that the accused person is released; in addition,

26 Curt T. Griffiths, *Canadian Corrections*, 3rd ed. (Toronto, Nelson Education, 2010).

they can counsel prisoners on the benefits of pleading guilty early and provide them with accurate and up-to-date information. They play an important role in reducing prisoner anxiety and stress by increasing the legal literacy of prisoners and detainees. The provision of free legal aid can help to ensure that all individuals have access to legal advice. A further strategy to ensure that prisoners in situations of overcrowding have access to justice is to strengthen access to civil law procedures, class actions or compensation schemes.

F. Developing or strengthening provisions for early release

40. Early release mechanisms can reduce prison overcrowding and facilitate social rehabilitation and reintegration. The Tokyo Rules encourage the use of postsentencing alternatives in order to avoid institutionalization and to assist offenders in their early reintegration into society including, furlough and halfway houses, work or education release, various forms of parole, remission and pardon. Open prisons should also be considered. Parole or conditional release provides the State with the possibility of imposing conditions specifically tailored to the needs of the individual offender and to assist the offender in the transition from imprisonment to a law-abiding life in the community. Amnesties, pardons and prerogatives of mercy have also been used to reduce prison populations, particularly in cases in which persons convicted of a petty offence have been imprisoned or remanded for long periods or the offender is chronically or terminally ill.

41. Legislation and policies should provide clearly for the possibilities of parole and early release and the conditions for such release. The scope of early release programmes could be extended in such a way as to make early release part of the normal process of sentence enforcement. It is also necessary to ensure adequate supervisory resources, programmes and facilities within the community and to develop and adopt appropriate risk assessment instruments, which can be of use in identifying offenders who may be eligible for early release. In jurisdictions where prisoners must apply for parole in order to be considered for such release, they should be encouraged to do so. Such procedures may allay public concerns about community safety and provide a mechanism whereby offenders are informed at an early stage as to what they must do to qualify for early release and how they must behave in order not to forfeit their eligibility. Criteria used as the basis for early release decisions, such as good behaviour in prison, should be clear and fair. Parole revocation procedures might define specific criteria for revocation, such as the commission by the offender of a new or repeat offence while on parole, and could grant the appropriate authorities discretion to decide on partial revocation.

42. Administrative infrastructure is likely to be required in order to facilitate and monitor compliance with conditions for early release. Those conditions might include the payment of compensation or reparation to victims; treatment for drug or alcohol problems that played a part in the commission of the offence; participation in work, education or vocational training; participation in personal development programmes; or compliance with an order to refrain from contact with a certain person or to stay away from a certain place. The use of early release programmes and services to provide support to those released can facilitate successful reintegration into the community and help to reduce recidivism.

G. Effective measures to prevent recidivism

43. Comprehensive measures to prevent recidivism are important in reducing the number of persons in prison. Offenders may face social, financial and personal challenges, such as mental illness or substance abuse or addiction, that make it difficult for them to avoid returning to criminal activity. Essential features of a broader crime prevention effort include providing skills training, education, treatment programmes and psychological support for offenders in the community and for prisoners, and establishing programmes to assist offenders released from prison in becoming law-abiding citizens. Research shows that rehabilitation programmes yield better results when implemented in community settings. Strategies should include increasing the effectiveness of education, vocational training, social reintegration assistance and rehabilitation programmes offered to prisoners and of community

27 See footnote 7 above.

reintegration and supervised release programmes. Vocational training, education and rehabilitation programmes comprise a key component of the majority of the prison reform programmes implemented by UNODC in developing and post-conflict countries and areas such as Afghanistan, the occupied Palestinian territories and Southern Sudan.

44. Reintegration programmes emphasizing the importance of preparing prisoners for release and of the continuity of treatment interventions before and after release have been introduced in a number of jurisdictions.²⁸ The aims of such programmes are to integrate the various elements of the criminal justice response, develop partnerships with communities and integrate institutional and community-based interventions to form an unbroken continuum. Case management plays a key role in individualizing treatment in prison and facilitating social reintegration.

45. Rehabilitation and reintegration programmes may involve the participation of justice personnel, social workers, educators, non-governmental organizations and community volunteers. Such programmes must prepare not only the prisoners themselves but also their families and the wider community for their return to the community. Public education is a key component of any strategy designed to increase community involvement in community-based programmes for offenders and ex-offenders. The Tokyo Rules encourage the organization of conferences, seminars, symposiums and other activities and the utilization of the mass media to stimulate awareness of the need for public participation.

H. Increasing prison capacity

46. While it is sometimes necessary to increase prison capacity, experience has shown that the construction of new prisons alone is unlikely to provide a sustainable solution to prison overcrowding. In addition, the construction and maintenance of new prisons is expensive and therefore places a strain on possibly limited resources.

47. Where new prisons are essential, their construction should be accompanied by a comprehensive strategy to reduce the number of persons sent to prison in order to achieve a sustainable solution to the continuing growth of the prison population. The creation or strengthening of essential prison infrastructure can provide an opportunity to improve prison conditions, prison security and observance of the human rights of prisoners. However, it also requires expansion of the capacity of the prison service. Prison services should be available in remote areas so as to ease high congestion in prisons in urban centres, make prisoner transfers more secure and less costly and reduce delays in the justice process. Prisons should ideally be built in the vicinity of police buildings and courts so as to mitigate the challenge of transferring prisoners between police custody, the courts and prisons.

48. The mobilization of resources for construction and renovation programmes can be challenging for Member States. There is a need to strengthen cooperation between the prison service and those stakeholders who are able to advocate for support and bring more visibility to the challenges facing the prison system. Prison services should consider partnerships with other government agencies, such as ministries of health or education. The establishment or support for the commercialization of prison industries are possible ways of generating funds for the prison service and supporting rehabilitation efforts through skills training, and they might be promoted through private investment, cooperation with the private sector or the adoption of government policies that support such industries (e.g. in the area of procurement). Institutions that monitor detention conditions, safeguard prisoners' rights and prevent exploitation of prison labour could also play a role in mobilizing resources for prisons.

I. Conducting research and developing information systems

49. Successful initiatives tend to be those founded on empirical understanding validated by key

28 Curt T. Griffiths, Yvon Dandurand and Danielle Murdoch, *The Social Reintegration of Offenders and Crime Prevention*, Canada, Public Safety Canada, Research Report No. 2007-2 (Ottawa, National Crime Prevention Centre, 2007). Available from www.publicsafety.gc.ca/res/cp/res/_fl/soc-reint-eng.pdf.

stakeholders. It is therefore important to set up mechanisms for collecting information on how the correctional system operates and how resources are used. Jurisdictions should develop information systems to document caseload and procedures for gathering information on persons held in prisons. That information can serve as the basis for evaluating the effectiveness of initiatives designed to reduce prison overcrowding; such evaluations in turn can be used in the development and application of relevant best practices. All available information should be readily comprehensible to all major stakeholders. In addition, networks to facilitate the sharing of information among jurisdictions should be developed in order to enhance reform initiatives. Governments should provide the necessary knowledge basis for criminal policy planning and legislation by ensuring that proper research infrastructure and resources are in place. Additional efforts are needed to raise public awareness of the way in which the criminal justice system functions and the various crime prevention strategies available. The introduction of a system for the management of prisoner data is one of the components of a number of UNODC prison reform projects in developing countries.

J. Comprehensive social policies

50. Crime is a social problem to which criminal justice systems can provide only a partial response. Strategies to ensure fair social justice and social equality, reduce income inequality and prevent social marginalization are needed in order to achieve a long-term and sustainable solution to prison overcrowding. Policies and actions relating to crime and criminal justice must be comprehensive, encompassing education, health, housing, employment and measures to combat violence.

IV. Conclusion

51. Overcrowding in prisons is a serious impediment to safe prison management, effective rehabilitation of offenders and compliance with United Nations instruments and standards relating to the human rights of prisoners. Overcrowding in correctional facilities may lead to multiple human rights violations, such as limitation of access to health care, nutrition and sanitation.

52. While the effectiveness of measures to counter overcrowding in correctional facilities varies depending on the specific situation and criminal justice system of each State, such measures should in all cases be part of a comprehensive crime prevention and criminal justice strategy.

53. Pursuant to the relevant United Nations standards and norms, the Workshop may wish to consider the following:

(a) Member States should recognize prison overcrowding as an unacceptable violation of human rights that requires a firm response. Each Member State should determine the upper limit of its prison capacity. Decisions to increase the number of prison places as a means of reducing overcrowding should not be taken without consideration of ways to reduce demand for prison places, thus avoiding an overall increase in the number of persons in prison;

(b) Member States should consider reviewing, evaluating and updating their policies, laws and practices in order to ensure their comprehensiveness and effectiveness in addressing prison overcrowding;

(c) The implementation by Member States of reforms and strategies to reduce overcrowding should be gender-sensitive and should respond effectively to the needs of vulnerable groups;

(d) Member States are urged to conduct a system-wide review to identify inefficiencies in the criminal justice process that contribute to detainees' being held for long periods during the pretrial and trial processes; to develop strategies to improve the efficiency of the criminal justice process through, inter alia, measures to reduce case backlogs; and to strengthen access to justice and access to public defence mechanisms;

(e) Member States should regard pretrial detention as a last resort. Accordingly, they should consider introducing time limits for detention, a mechanism for reviewing decisions to detain suspects, restorative justice, mediation programmes and electronic monitoring in order to reduce the number of persons held in pretrial detention and the duration of such detention;

(f) Member States are urged to ensure that courts are provided with principled guidance on sentencing, without infringing on their independence and discretionary freedom. Legislative or

policy guidance should be given in a form that reflects the principle of proportionality in such a way as to protect against unfounded severity and ensure the effective implementation of alternatives to imprisonment;

(g) Member States are strongly encouraged to review the adequacy of legal aid and other measures with a view to strengthening access to justice and public defence mechanisms, particularly for the poor and the most vulnerable;

(h) Member States should encourage the participation of all relevant stakeholders in the development and implementation of national strategies and action plans against overcrowding;

(i) Member States are urged to promote the participation of civil society organizations and local communities in implementing alternatives to imprisonment;

(j) Member States are encouraged to introduce measures that facilitate early release from correctional facilities, such as referral to halfway houses, electronic monitoring and good time;

(k) Member States should develop and strengthen research and data collection mechanisms in order to evaluate the effectiveness of reforms and strategies and to communicate that information to the public.

Workshop Programme on Strategies and Best Practices against Overcrowding in Correctional Facilities

Chairperson: **Dr. Sitona Abdella Osman** (Alternate Representative, Sudan)
Vice-Chairperson: **Mr. Adam Sadiq** (Ambassador, Embassy of the Democratic Socialist Republic of Sri Lanka in Brazil)
Rapporteur: **Mrs. Maggie Jackson** (Attorney-General's Department, Australia)
General Moderator: **Professor Dr. Dr. h. c. Hans-Jörg Albrecht** (Managing Director of the Max-Planck-Institute for Foreign and International Criminal Law, Germany)
Drafter: **Dr. Tapio Lappi-Seppälä** (Director of National Research Institute of Legal Policy, Finland)

Friday, 16 April: Morning Session

10:00-10:10

Opening **Chairperson**
Introduction **Ms. Claudia Baroni** (Representative of the Secretariat)
Remarks **Mr. Masaki Sasaki** (Director, UNAFED)

Presentations

10:10-10:30 (i) "Current Situation of Prison Overcrowding"
Mr. Rob Allen (Director of the International Centre for Prison Studies, King's College London)

10:30-10:50 (ii) "Causes of Prison Overcrowding"
Dr. Tapio Lappi-Seppälä (Director of National Research Institute of Legal Policy, Finland)

10:50-11:10 (iii) "Countermeasures against Prison Overcrowding"
Professor Dr. Dr. h. c. Hans-Jörg Albrecht (Managing Director of the Max-Planck-Institute for Foreign and International Criminal Law, Germany)

11:10-11:40 (iv) "Specific Situations in Middle and Low Income Countries"
Mr. Elias Carranza (Director of the United Nations Latin American Institute for the Prevention of Crime and the Treatment of Offenders (ILANUD))
Dr. Nsimba Masamba Sita (Director of the United Nations African Institute for the Prevention of Crime and the Treatment of Offenders (UNAFRI))

11:40-12:30

Panel discussion I: "Strategies for Reduction of Prison Populations through Diversion, Informal and Restorative Justice and Alternatives to Pre-trial Detention"

Moderator: **Mr. Rob Allen** (Director of the International Centre for Prison Studies, King's College London)

Panellists: **Dr. Kittipong Kittayarak** (Permanent Secretary for Justice, Ministry of Justice, Thailand)
Ms. Elinor Wanyama Chemonges (National Coordinator of the Paralegal Advisory Services, Foundation for Human Rights Initiative, Uganda)
Mr. Clifford Wayamuka Msiska (National Director of the Paralegal Advisory Service Institute, Malawi)
Mr. Toshihiro Kawaide (Professor, Graduate Schools of Law and Politics, the University of Tokyo, Japan)
Professor Dr. Dr. h. c. Hans-Jörg Albrecht (Managing Director of the Max-Planck-Institute for Foreign and International Criminal Law, Germany)
Sir Judge David J. Carruthers (Chairman of the New Zealand Parole Board)

12:30-13:00

Discussion

Friday, 16 April: Afternoon Session

15:00-16:10

Panel discussion II: “Strategies for Reduction of Prison Populations at the Sentencing and Post-Sentencing Stages”

Moderator: **Professor Yvon Dandurand** (Senior Associate, International Centre for Criminal Law Reform and Criminal Justice Policy)

Panellists: **Dr. Ela Wiecko Volkmer de Castilho** (Member of the Federal Public Prosecution Service and National Council on Criminal and Penitentiary Policy, Brazil)

Ms. Maria Noel Rodriguez (Director of the Programme on Woman and Jail, United Nations Latin American Institute for the Prevention of Crime and the Treatment of Offenders (ILANUD))

Mr. Soh Wai Wah (Director of the Singapore Prison Service)

Ms. Christine Glenn (Parole Commissioner of Northern Ireland and Immigration Judge)

16:10-17:00

Panel discussion III: “Strategies for Securing Support for Reduction of Prison Populations”

Moderator: **Dr. Tapio Lappi-Seppälä** (Director of National Research Institute of Legal Policy, Finland)

Panellists: **Dr. Kittipong Kittayarak** (Permanent Secretary for Justice, Ministry of Justice, Thailand)

Mr. Soh Wai Wah (Director of the Singapore Prison Service)

Dr. Nsimba Masamba Sita (Director of the United Nations African Institute for the Prevention of Crime and the Treatment of Offenders (UNAFRI))

Ms. Christine Glenn (Parole Commissioner of Northern Ireland and Immigration Judge)

Dr. Mario Luis Coriolano (Vice President of the Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT))

17:00-17:50

Discussion

17:50-18:00

Remarks

Mr. Masaki Sasaki (Director, UNAFEI)

Professor Dr. Dr. h. c. Hans-Jörg Albrecht (Managing Director of the Max-Planck-Institute for Foreign and International Criminal Law, Germany)

Closing

Chairperson

EXECUTIVE SUMMARY OF THE WORKSHOP

Executive Summary of the Workshop on “Strategies and Best Practices against Overcrowding in Correctional Facilities”

I. Introduction

Workshop 5 of the Twelfth United Nations Congress on Crime Prevention and Criminal Justice was held in Salvador, Brazil, on 16 April 2010. The Workshop focused on the topic of “Strategies and Best Practices against Overcrowding in Correctional Facilities”, as mandated by the General Assembly resolution 63/193 of February 2009.

The Workshop was organized by the United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders (UNAFEI). In order to make organizational and substantive preparations for the workshop, the organizer hosted three preparatory meetings in January 2009 (Tokyo), September 2009 (Tokyo), and April 2010 (Salvador), just prior to the Workshop.

The Workshop, held within the framework of Committee I of the Congress, was chaired by **Dr. Sitona Abdella Osman**, Alternate Representative, Sudan, and assisted by a Moderator, **Professor Dr. Dr. h. c. Hans-Jörg Albrecht**, Managing Director of the Max-Planck-Institute for Foreign and International Criminal Law, Germany, who facilitated the discussion throughout the Workshop. In addition to the Rapporteur of Committee I, **Mrs. Maggie Jackson**, Attorney-General's Department, Australia, the Workshop had as its Drafter **Dr. Tapio Lappi-Seppälä**, Director of the National Research Institute of Legal Policy, Finland.

The work of the Workshop consisted of four presentations and three panels: Strategies for Reduction of Prison Populations through Diversion, Informal and Restorative Justice and Alternatives to Pre-trial Detention; Strategies for Reduction of Prison Populations at the Sentencing and Post-sentencing Stages; and Strategies for Securing Support for Reduction of Prison Population, followed by interaction with the floor. The selection of the topics of the presentations and the panels, contained in document A/CONF.213/16, was made in accordance with the issues and elements contained in the Discussion Guide of the Congress (A/CONF.213/PM.1) and the reports of the regional preparatory meetings for the Twelfth Congress (A/CONF.213/RPM.1/1, A/CONF.213/RPM.2/1, A/CONF.213/RPM.3/1, and A/CONF.213/RPM.4/1).

II. Proceedings of the Workshop

A. Opening

The Workshop was opened by the Chairperson on the morning of 16 April 2010. This was followed by an introductory statement by **Ms. Claudia Baroni**, a representative of the Secretariat, who referred to the negative impact of overcrowding in correctional facilities and stressed the importance of addressing prison overcrowding in a comprehensive and multisectoral manner. After her statement, there was welcoming statement from **Mr. Masaki Sasaki**, Director of UNAFEI, who emphasized that the workshop will pursue the subject matter through a practice-oriented, comprehensive and integrated approach, addressing possible efforts at the legislative level and all stages of the criminal justice process, including the rehabilitation of offenders, instead of simply focusing on the causes and countermeasures within the prison settings.

B. Presentations

The first presentation was intended to show the audience the current situation of overcrowding in correctional facilities and its impact on human rights and the administration of criminal justice. The second presentation analysed the causes of the overcrowding. The third presentation was intended to facilitate the audience's understanding of the overview of the measures to prevent overcrowding and alleviate its impact, which were elaborated in the three panels following the presentations. At the end of the presentation session, a joint presentation took place to present the specific situations in middle and low income countries.

1. Presentation on “Current Situation of Prison Overcrowding”

In his speech, **Mr. Rob Allen**, the Director of the International Centre for Prison Studies, King's College London, presented the current situation of prison overcrowding around the world. At the beginning of his presentation, he introduced, with several stunning pictures, the devastating consequences of overcrowding in correctional facilities e.g. death caused by insufficient air, the spread of tuberculosis, and rioting. He pointed out the difficulty in measuring overcrowding because there was no universal agreement on how much space should be allocated for each inmate. Using the database of the International Centre for Prison Studies on occupancy level, the best available proxy measure of overcrowding, he showed the occupancy rate of countries all over the world, some of which exceeded 300 percent, although he pointed out that prison capacity may be designated in an arbitrary manner. He argued that while high rates of over-occupation were not necessarily linked with high rates of imprisonment, they were related to high proportions of pre-trial detainees in prison populations.

2. Presentation on “Causes of Prison Overcrowding”

The second presenter, **Dr. Tapio Lappi-Seppälä**, explored the causes of prison overcrowding and listed the following factors: excessive use of pre-trial detention; punitive “tough on crime” policies; lack of alternatives to imprisonment; rigid sentencing systems; restrictive and rigid early release practices and rigid revocation procedures; high reoffending rates, resulting from missing or inadequate in-prison and community rehabilitation programmes; and criminal justice systems adopting tasks that could be better managed by social, health and other services. He also pointed out that more general structural and cultural factors such as public fears and concerns over safety and security, public pressures, media impact, socio-economic equality and security, and political culture also affect prison overcrowding. At the end of his presentation, he introduced a promising Finnish example of prison population reduction as a result of political will, without any notable effects on national crime rates.

3. Presentation on “Countermeasures against Prison Overcrowding”

The third presenter, **Professor Dr. Dr. h. c. Hans-Jörg Albrecht**, argued that overcrowding problems were associated with problems of governance, a weak economy and factors inherent to the criminal justice system. He emphasized that projection of the prison population was important and information systems were essential for that purpose. Although it was obvious that reduction of admission to prison and in the length of the stay was effective in reducing prison populations, the constituency for prisons was narrow, specialized and not influential, and implementation of those measures was difficult. He discussed the following measures for preventing overcrowding: prison construction and amnesty are effective in the short term, but avoid dealing with the causes of overcrowding; impact assessment when introducing new sentencing legislation is an essential element in good governance; prison litigation could become a means to and a part of prison reform; community sanction and parole were successful in reducing prison populations, but revoking them might increase such populations. Finally, he called for well-designed and longitudinal research to identify the reasons for success and failure of these measures and to propose measures policy makers should take.

4. Joint Presentation on “Specific Situations in Middle and Low Income Countries”

The fourth presenter, **Mr. Elias Carranza**, Director of the United Nations Latin American Institute for the Prevention of Crime and the Treatment of Offenders (ILANUD), explained the current situation in the Latin American and Caribbean countries, in some of which the incarceration rate had doubled

or tripled since the 1980s and 1990s. He emphasized that inequality of income distribution had great impact on crime and on prison overcrowding. He stressed that crime prevention and criminal justice policies should be accompanied by policies to reduce this inequality. He introduced constructive cases in Costa Rica and the Dominican Republic, which took a holistic approach to addressing overcrowding, including training of prison personnel and improving prison conditions.

The fifth presenter, **Dr. Nsimba Masamba Sita**, Director of the United Nations African Institute for the Prevention of Crime and the Treatment of Offenders (UNAFRI), explored the relationship between Human Development and overcrowding in correctional institutions in African countries. He pointed out that there was a negative correlation between them, with a few exceptions, and argued that overcrowding in low Human Development Index countries is mainly the result of prolonged pre-trial detention caused by inefficient criminal justice procedure.

C. Panels

1. Panel I on “Strategies for Reduction of Prison Populations through Diversion, Informal and Restorative Justice and Alternatives to Pre-trial Detention”

This panel was intended to explore effective and efficient measures to reduce overcrowding in correctional facilities at the pre-adjudication stage. As previous presenters mentioned, large numbers of inmates under pre-trial detention is one of the dominant contributors to overcrowding, especially for developing countries. Possible measures to reduce pre-trial detention are to reduce admission to detention facilities and length of detention through diversion, informal and restorative justice, alternatives to pre-trial detention and speedy trial. **Mr. Rob Allen** moderated this panel and six panellists made presentations.

The first panellist, **Dr. Kittipong Kittayarak**, Permanent Secretary for Justice, Ministry of Justice, Thailand, introduced offender treatment reform in Thailand. From 1996 to 2000, there was a sharp increase in prisoner numbers, the largest proportion of whom were drug-related offenders. As a reform initiative in response to overcrowding, the Thai government introduced the following measures: a drug diversion scheme accompanied by compulsory treatment programmes; restorative justice interventions for juvenile offenders; and enhancing the scope of probation work. Several lessons were drawn from the implementation of these measures. First, to convince the public and policy makers, political dialogue, such as campaigning, is important. Second, co-ordinated management of the dual track diversion scheme, voluntary and compulsory treatment programmes, is needed. Third, community participation is essential to support the programme as well as to persuade drug addicts to undergo the programme. Fourth, a foundation including a legal framework, capacity building and budget allocation is important to make these reform efforts a sustained enterprise. In conclusion, he emphasized that, being sustainable, these measures should be effective in preventing recidivism and promoting re-education and social protection; reducing overcrowding is not the primary purpose.

The second panellist, **Ms. Elinor Wanyama Chemonges**, National Coordinator of the Paralegal Advisory Services, Foundation for Human Rights Initiative, Uganda, presented strategies used in Uganda to reduce the prison population. Specific intervention included: the use of alternative dispute resolution, such as traditional justice mechanisms, Local Council Courts, and dispute resolution by family and religious leaders; weeding out cases in which there is no possibility to proceed; institutionalization of pro bono services to encourage faster case disposal; dispute resolution within the formal justice system before commencement of formal trial; legislation in supporting use of incarceration as a last resort; and legislative and policy amendments allowing lower courts to handle cases, which quickens case disposal. She argued that the Paralegal Advisory Services programme which addressed overcrowding in police cells and prisons, as well as delays in the criminal justice system, had been successful.

The third panellist, **Mr. Clifford Wayamuka Msiska**, National Director of the Paralegal Advisory Service Institute, Malawi, made a presentation on the success of paralegal services in reducing the numbers of pre-trial detainees in Malawi. He argued that a practical, affordable and effective legal aid

delivery scheme should be established, especially for the poor, who need not only legal representation, but also advice on bail or appeal, and support for mediation. Because the government cannot provide legal representation in every case, prisoners should be empowered to represent themselves and paralegals can assist them in applying the criminal law and procedures appropriately in their own cases and getting out of prison as soon as possible. Paralegals also facilitated screening the remand caseload, which contributed to the reduction of overcrowding. He stated that paralegal advisory services succeeded in reducing the prison population by over 5,000 and diverted over 80 percent of juveniles out of the criminal justice system.

The fourth panellist, **Mr. Toshihiro Kawaide**, Professor, Graduate Schools of Law and Politics, the University of Tokyo, described countermeasures against prison overcrowding at the pre-trial stage in Japan. He listed the following factors that eased overcrowding at the pre-trial stage: restriction of the use of pre-trial detention, including limitation of the period of detention before prosecution; speedy trial procedure for minor offences, where, with the defendant and defence counsel's consent, trial is simplified and sentence is restricted to imprisonment with suspension of execution or fine; moderate use of pre-trial detention; diversion in the phase of prosecution under the discretionary power of prosecutors; and *de facto* restorative justice practice, where prosecution is suspended as a result of compensation by the suspect.

The fifth panellist, **Professor Dr. Dr. h. c. Hans-Jörg Albrecht**, discussed three types of approaches to reduce pre-trial detention, and its length; criminal procedure reform such as restriction of conditions of pre-trial detention; introduction of alternatives to pre-trial detention such as electronic monitoring; and improvement of case management to reduce case-backlogs and mandatory assignment of defence counsellors. He pointed out that these measures could be effective, but long-term effect should be evaluated to detect whether there were causal relationships.

The final panellist of Panel I, **Sir David J. Carruthers**, Chairman of the New Zealand Parole Board, described the restorative justice process. He stated that there were many different types of restorative justice processes. In New Zealand, a restorative justice process for juveniles was introduced in 1989, and the number of custodial institutions for juveniles had dropped from 18 to four. Recently, restorative practice was increasingly used not only in the criminal justice system but also in the education system, and in workplace disputes and other types of community disputes. He argued that overwhelming research showed that restorative justice significantly contributed to the reduction in the use of imprisonment. Several research studies pointed out that restorative justice had the effect of reducing reoffending and also increasing victim satisfaction. Restorative justice methods introduced in school had succeeded in reducing expulsion and exclusion from school by 30 percent and eventually contributed to preventing crimes.

2. Panel II on “Strategies for Reduction of Prison Populations at the Sentencing and Post-Sentencing Stages”

In this panel, measures to alleviate overcrowding in correctional facilities at the sentencing and post-sentencing stage were discussed. The possible measures are: appropriate sentencing such as those based on sentencing guidelines and pre-sentencing reports, which can reduce the number of admissions to prisons; early release through parole and other measures, which can reduce the length of imprisonment; and institutional and community rehabilitation programmes, which can reduce reoffending of released prisoners. **Professor Yvon Dandurand**, Senior Associate, International Centre for Criminal Law Reform and Criminal Justice Policy, moderated this panel and four panellists made presentations.

The first panellist, **Dr. Ela Wiecko Volkmer de Castilho**, Member of the Federal Public Prosecution Service and National Council on Criminal and Penitentiary Policy, Brazil, presented the Brazilian experience in introducing alternatives to imprisonment. Although the use of alternatives to imprisonment had been increasing steadily since 1987, it did not reduce the Brazilian prison population. She argued that the major contributors to this situation were: punitive culture; a common sense

understanding that imprisonment was the only effective response to certain crimes; and Brazilian law, which prescribed imprisonment for about 1,600 offences and restricted the possibility of replacement by alternative penalties. She underlined that to make alternative measures successful in reducing incarceration, the following actions were necessary: to reduce the punitive paradigm through global and coherent effort; to limit the number of prisoners detained in prisons; to apply the restorative paradigm not only to minor offences but also other type of offences; to amend laws to enlarge the possibility of application of alternative measures; and to implement the rights of equality and non-discrimination in Brazilian society.

The second panellist, **Ms. Maria Noel Rodriguez**, Director of the Programme on Woman and Jail, United Nations Latin American Institute for the Prevention of Crime and the Treatment of Offenders (ILANUD), introduced two strategies discussed at the Latin American and Caribbean Regional Preparatory Meeting for this Congress, in which ILANUD actively participated. The first strategy was to determine the maximum capacity of correctional facilities. There were three initiatives related to this: Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, approved by the Inter-American Commission on Human Rights, which established minimum standards for accommodation and stated that occupation over the maximum capacity should be prohibited by law; the standard proposed by the Latin American Standing Committee of the International Penal and Penitentiary Foundation, which recommended that an impartial body should determine the maximum capacity of each prison; and the project of Buenos Aires, Argentina, where an inter-ministerial body determines the maximum capacity of each institution. The second strategy was increased use of alternative measures to imprisonment. She described the practices in Uruguay, where 10 percent of the prison population was released in 2005 because of serious overcrowding. The early release was followed by individualized after-care such as provision of food coupons, transportation tickets and job training. Of the released inmates, 25 percent were returned to prison; this percentage is much lower than the average after usual release. At the same time, the use of house arrest was widened for pregnant women, handicapped people and elderly people and a sentence redemption system through work and study was established.

The third panellist, **Mr. Soh Wai Wah**, Director of the Singapore Prison Service, described a holistic rehabilitative approach adopted by Singapore prisons to rehabilitate offenders and to reduce prison population through prevention of recidivism. Since 2000, Singapore has experienced a sharp improvement in recidivism and prison population. He argued that this could partly be attributed to its holistic approach to rehabilitation. In this approach, every prison officer took on the role of a personal supervisor to the group of inmates in the cells under his or her charge and ensured that they attended suitable rehabilitation programmes. There was a systematic in-care programme where prisoners went through four phases - Admission, Deterrence, Treatment and Pre-release. Recognizing that aftercare for ex-offenders was critical for successful reintegration, the Singapore Prison Service formed an alliance with several other government and non-government agencies to help rehabilitate ex-prisoners. This alliance was called the CARE Network and comprised social welfare agencies, including the ministry responsible for welfare, the association for ex-prisoners, and a body for narcotics prevention volunteers.

The fourth panellist, **Ms. Christine Glenn**, Parole Commissioner of Northern Ireland and Immigration Judge, emphasized that parole and the managed early conditional release of a prisoner was one strategy to tackle prison overcrowding and also contributed to rehabilitation of offenders. She underlined that parole was for public protection at its heart and also a part of human rights engagement. Parole could be effective at tackling prison overcrowding and improving behaviour in prison, although it was not a reward for that. She stressed that parole was not a soft option even though it could be seen as one by public, media and victims. She listed the key factors of risk assessment and the main indicators of risk: past behaviour and convictions; motivation for and attitude towards offending; access and proximity to victims; preparedness to use weapons; disinhibitors such as alcohol and drugs; and situational triggers. Then, she described risk management strategies, which consisted of external and internal strategies. The external strategies were to reduce triggers and

opportunities of offending through restrictive conditions such as curfew, electronic tagging, prohibition of access to particular places and people; and to be delivered through external limits and controls such as mandatory drug testing and attendance of a sex offender programme. The internal strategies were to be delivered through rehabilitation programmes such as victim awareness and anger management, and restorative justice. In making risk assessment, protective factors should be considered, which includes factors derived from offenders themselves, their family and their community. In conclusion, she stressed that although there were no “no risk” decisions, with robust information and supervision, parole was an effective tool in managing overcrowding and in contributing to rehabilitation.

3. Panel III on “Strategies for Securing Support for Reduction of Prison Populations”

Panel III was aimed at discussing the strategies to secure the understanding and support of the public and other stakeholders for the measures discussed in Panel I and II. Every detained offender returns to society sooner or later by bail, probation, parole, expiration of sentence, etc. If society is not ready to accept offenders, it will become an impediment to his or her reintegration and will increase the possibility of his or her reoffending. In addition, rehabilitation programmes and other interventions for offenders that the government, especially those of developing countries, can offer are limited because of the lack of financial and human resources. NGOs, individual experts and communities can provide these resources and sometimes have better expertise in the specific fields than the government. Lastly, as discussed in the presentations, public fear of crime and punitive “tough on crime” policies are one of the factors that cause overcrowding. To implement alternative measures to detention and imprisonment, the understanding of the public and policy-makers is essential. **Dr. Tapio Lappi-Seppälä** moderated this panel and five panellists made presentations.

The first panellist, **Dr. Kittipong Kittayarak**, introduced the Thai experience in running alternative programmes. First, he mentioned the initiative aimed at introducing alternative measures against drunk driving through a nationwide comprehensive campaign. Probation was the least known agency, he argued, and convincing policy-makers to advocate probation and allocate financial resources was key to the success of probation. The “Drink-Don't Drive” Campaign was implemented to make probation work more visible to the public. The campaign included community services by drunk drivers, which were specifically tailored to sensitize them to reform their behaviour and to satisfy the public view that the treatment of these offenders should not be too lenient. Celebrities from popular TV shows have been involved in the campaign. Second, he emphasized the essential role of community participation. In Thailand, Volunteer Probation Officers provided linkage between probation officers and community members. Another measure to facilitate community participation was the Community Justice Network, which was piloted in 2003 and is based on Thai tradition. It established partnership between state and community and was responsible for community justice issues such as crime prevention, alternative dispute resolution, aftercare and reintegration. Third, he underlined the importance of the legislative framework in making the reform initiative sustainable and the sharing of the research outcome with the public.

The second panellist, **Mr. Soh Wai Wah**, presented Singapore's collaboration with the community to reduce recidivism through the Yellow Ribbon Project (YRP), which was a nation-wide initiative with the aim of creating awareness in the public of the message of “unlocking the second prison”, to make the public conscious of its role in the rehabilitation of ex-prisoners. Several activities were organized to champion the YRP in Singapore, such as the annual 'Wear-A-Yellow-Ribbon' activity; the YRP Run; and the Yellow Ribbon Art Exhibition. He emphasized that the real ambassadors of the YRP were the ex-prisoners themselves because involvement of ex-prisoners gave a human face to the perception of ex-prisoners. After six years of championing the YRP, on average, about 38 percent of the population had worn a yellow ribbon on their shirt for a day. About six percent of the population had participated in a Yellow Ribbon event, on average. There had been an increase by 13 times in the number of volunteers involved in rehabilitation activities.

The third panellist, **Dr. Nsimba Masamba Sita**, explored the reasons for the success and failure of implementation of alternatives to imprisonment in Africa. First, the outcome depended on the

effective involvement of the local community at the pre-trial and post-trial stages. This facilitated effective social rehabilitation and reintegration of inmates. Relatives, friends, neighbours and local authorities should be involved in this process to reach a restorative outcome. The second aspect was a shift from punitive and retributive logic to compensatory, conciliatory and therapeutic logic. Restorative justice had already been used in practice, but needed to be better documented and folded into the mainstream criminal justice system.

The fourth panellist, **Ms. Christine Glenn**, showed a video from the Parole Board for England and Wales used to promote its activities. She told of her experience at a victim's conference where a victim said to her that parole was “black arts” because the victim had no idea how parole decisions are made and who makes them. She emphasized the importance of educating the public and key stakeholders, such as victims and judges, and explaining to them Parole Board activity so that the use of parole can be facilitated. For that purpose, the Parole Board employed various programmes such as inviting judges, ministers and other influential people to observe hearings for parole decisions and developed a website. The video, which was shown at the Workshop, was made to show what the Parole Board does.

The fifth panellist, **Dr. Mario Luis Coriolano**, Vice President of the Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT), focused on responsibility and accountability in respect to prison overcrowding. He argued that inhumane situations in prisons were caused by those at different levels of decision-making, such as those involved in public policy, organizing institutions and sentencing. He underscored that the important thing was how to limit the rate of imprisonment and who is to initiate the reduction of the prison population and ensure the sustaining of such initiatives. He noted that some policies promoted by politicians resulted in increasing prison populations because they did not replace imprisonment with alternative measures but added to the number of imprisoned persons. He also stressed the importance of independent bodies to monitor prisons and independent defence counsels in improving the human rights of detained people. He argued that the capacity of each institution should be defined by law or superior regulations. He emphasized that it is important to detect who is responsible for accounting how many people should be kept in a prison. With respect to the activity of SPT, he stated that co-ordination with other stakeholders is important and all relevant bodies should be on the same track.

D. Interaction with the Floor

After Panel I and Panel III, the chairperson invited the floor to make comments and ask questions. After Panel I, Interventions were made by the representatives of **Italy, Morocco, the Russian Federation, Azerbaijan, Brazil and the Dominican Republic**, and the observers for the **Friend World Committee for Consultation and Penal Reform International**. After Panel III, interventions were made by the representatives of **Canada, Brazil and Algeria**, the observers for the **International Commission of Catholic Prison Pastoral Care**, and an individual expert. They presented their respective national strategies to reduce overcrowding, such as increased access to justice, correctional programmes, increase of prison capacity and legislative reform; referred to the benefit of increasing the use of alternatives to detention and imprisonment; and emphasized the importance of focusing on access to justice and restorative justice.

E. Closing

At the end of the workshop, **Mr. Masaki Sasaki** made closing remarks, where he indicated that UNAFEI planed to further disseminate the outcomes of this workshop. This was followed by remarks by **Professor Dr. Dr. h. c. Hans-Jörg Albrecht**, who identified the following as conclusions emanating from the discussion.

- Overcrowding in correctional facilities is: a serious obstacle to implementing standards and instruments related to human rights; a serious risk to delivering services, inter alia rehabilitative services; and a violation of human rights.
- Crime is a social problem and can not be solved by criminal law alone. Good policy is social

policy.

- Imprisonment should be a last resort.
- The most effective countermeasures against overcrowding vary depending on the current situation and criminal justice system of each State.
- Measures against overcrowding should be comprehensive. There is no one single bullet that can solve the problem.
- All alternative measures should be carefully designed and evaluated.
- It should be defined how many people can be detained without violating human rights.
- In the case of pre-trial detention, provision of legal aid, including paralegal services, is effective. It requires spending, but various research studies demonstrate that provision of legal aid is less expensive than detaining a person in prison.
- Measures against overcrowding cannot succeed without raising awareness among the public.
- Although there are many blueprints, models and ideas about how to tackle and prevent overcrowding and implement policies, overcrowding has remained a serious problem for decades. However, practices presented in this Workshop can be implemented and succeed in solving this problem.

After these remarks, the Workshop was closed by the Chairperson on the afternoon of 16 April 2010.

OPENING REMARKS

*Opening Remarks by Mr. Masaki Sasaki
Director, UNAFEI*

Thank you Ms. Chairperson. Good morning distinguished delegates, and ladies and gentlemen.

As the director of UNAFEI, the United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders, it is my great honour and privilege to be here as a co-ordinator of the workshop on Strategies and Best Practices against Overcrowding in Correctional Facilities.

Overcrowding in correctional facilities is one of the most serious and most pressing issues faced in many parts of the world. It leads to deterioration in the living conditions of inmates and infringes upon their rights, which are set out in various international instruments. It undermines the overall effectiveness and efficiency of the criminal justice system by, inter alia, hampering the provision of appropriate correctional treatments aimed at the rehabilitation and social reintegration of offenders, as well as reducing recidivism.

In this workshop, UNAFEI would like to pursue the subject matter through a practice-oriented, comprehensive and integrated approach, addressing possible efforts at the legislative level and all stages of the criminal justice process, including the rehabilitation of offenders, instead of simply focusing on the causes and countermeasures within the prison settings.

I am hopeful that this workshop will present effective strategies to reduce overcrowding in correctional facilities which, in turn, will enhance the prevention of crime. I would like to take this opportunity to express my sincere gratitude and appreciation for the participation of the eminent moderators, presenters and panellists of the workshop and for the co-operation of the International Centre for Criminal Law Reform and Criminal Justice Policy in organizing this workshop.

Thank you very much.

PAPERS AND CONTRIBUTIONS

Presentations

“Current Situation of Prison Overcrowding”
“Causes of Prison Overcrowding”
“Countermeasures against Prison Overcrowding”
“Specific Situations in Middle and Low Income Countries”

Panel I

“Strategies for Reduction of Prison Populations through Diversion, Informal and Restorative Justice and Alternatives to Pre-trial Detention”

Panel II

“Strategies for Reduction of Prison Populations at the Sentencing and Post-Sentencing Stages”

Panel III

“Strategies for Securing Support for Reduction of Prison Populations”

Please note that the following papers have not been edited for publication. The opinion expressed therein are those of the authors, and do not necessarily reflect the opinion of the organizations they represent.

PRESENTATIONS

Mr. Rob Allen

Director, the International Centre for Prison Studies, King's College London

Dr. Tapio Lappi-Seppälä

Director, National Research Institute of Legal Policy, Finland

Professor Dr. Dr. h. c. Hans-Jörg Albrecht

Managing Director, the Max-Planck-Institute
for Foreign and International Criminal Law, Germany

Mr. Elias Carranza

Director, the United Nations Latin American Institute
for the Prevention of Crime and the Treatment of Offenders (ILANUD)

Dr. Nsimba Masamba Sita

Director, the United Nations African Institute
for the Prevention of Crime and the Treatment of Offenders (UNAFRI)

CURRENT SITUATION OF PRISON OVERCROWDING

Rob Allen

Director, International Centre for Prison Studies, London, UK

1. It is estimated that there are more than 10 million prisoners in the world and that each year perhaps 30 million people enter prison establishments. Despite a number of international treaties and instruments which should protect the rights of prisoners, such rights are routinely violated. The UN Special Rapporteur on Torture told the General Assembly last year that “in many countries of the world, places of detention are constantly overcrowded, filthy and lack the minimum facilities necessary to allow for a dignified existence. Moreover, tuberculosis and other highly contagious diseases are rife. Inter-prisoner hierarchies and violence are common features of many places of detention, and the guards often delegate their authority and responsibility to protect detainees against discrimination, exploitation and violence to privileged detainees who, in turn, use this power to their own benefit.”
2. Overcrowding is the most important reason for the failure of states to meet minimum standards of decency and humanity. The aim of this paper is to describe briefly what we know about the state of overcrowding around the world, before my colleagues go on to discuss causes and counter measures.
3. It is important to try to agree what we mean by overcrowding. It is relatively easy to recognise it when we see it - situations where there is not enough room for prisoners to sleep; not the facilities to provide sufficient food, health care or any form of constructive activities; insufficient staff to ensure that prisoners are safe; the lack of accommodation to hold separately types of prisoners who should be kept apart - women from men, juveniles from adults; untried from convicted; or lack of capacity to receive any more numbers so that emergency measures have to be taken - in the form of amnesties, emergency accommodation or the holding of prisoners in police stations.
4. If we think about these dimensions we realise that the problem of overcrowding exists in all sorts of prison systems in rich and poor countries, common and civil law jurisdictions, and different types of polity. In the UK emergency measures were introduced in 2007 and are still in place to release prisoners 18 days early in order to free up space; in France last year violent protests erupted when guards started industrial action against overcrowding. In California federal judges have ruled that overcrowding is the chief impediment to adequate healthcare and ordered a cap on the number of prisoners at two thirds of the existing level. In South America the Inter American Court has issued mandates relating to overcrowding and the associated life threatening problems here in Brazil (Urso Branco) and in Argentina (Mendoza). In some of the poorest countries, particularly in Africa, congestion can lead to suffocation and death. Examples abound of overcrowding leading to riots and mutinies, violence and corruption, damage to physical and mental health not just of prisoners but of staff as well. Overcrowding is not limited to adult prisoners. The Special Rapporteur found that far too many of the children whom he met on his visits “are held in severely overcrowded cells, under deplorable sanitary and hygienic conditions.”
5. It is possible to illustrate the current situation of overcrowding with reference to disturbing descriptions of human misery from every continent. But it is important to go beyond specific examples to build an accurate picture of the extent and nature of the problem globally.
6. There is not however a straightforward way of measuring overcrowding because there is no universal agreement about how much space prisoners should have or the facilities to which they should have access. International standards state that each prisoner must have enough space, although definitions of adequacy vary from country to country and depend among other factors on

how much time prisoners spend in their cells. The UN Standard Minimum Rules do say that all cells and dormitories must have adequate heating, lighting and ventilation and that every detainee or prisoner should have his own bed or mattress with clean bedding. But in the absence of a binding convention on prisoners' rights, we are short of comprehensive baseline information.

7. The International Committee of the Red Cross (ICRC) has recommended minimum standards in respect of these dimensions e.g. minimum space per prisoner of no less than 3.4 sq m¹ and area within the security perimeter of 20-30sq m per person. Minimum rates of air renewal and intensity of light have also been specified.² But there is no systematic data available to assess whether these objective standards are being met or to enable comparisons to be made. There is even less data about how prisoners perceive overcrowding. As the UN Rapporteur has said "If cells are severely overcrowded, not much privacy is left for individual detainees within the cells." But we know little about how prisoners experience overcrowding.
8. The ICPS World Prison Brief includes details of the *occupancy* levels in the prison systems of 191 countries. It does this by showing the official (uncrowded) capacity of the prison system and presenting the prison population total as a percentage of the capacity figure. This percentage is the occupancy rate and it demonstrates whether a prison system holds more prisoners than it is intended to hold and, if so, by how much.
9. The occupancy level is *not* the same thing as the level of overcrowding. But, it is perhaps the best proxy measure of overcrowding that is available in the absence of detailed information about the amount of space that each prisoner has in their living accommodation.
10. There are some important caveats about this measure. First a system as a whole may have fewer prisoners than it is intended to hold but individual prisons or parts of prisons may be overcrowded - sometimes severely so. For example Argentina and Russia report less than 100% occupancy but it is well known that there is gross overcrowding in some penal institutions in those countries. In a recent case at the European Court of Human Rights detention in a Russian remand centre provided from 0.5 to 0.6 square metres of floor space per person. (Andreyevskiy v. Russia 2009). In a similar vein, while Cameroon's total occupancy level may be 138 %, New Bell Prison in Douala had four times the number of prisoners it was designed for when ICPS visited in 2008.
11. A total occupancy level in a large country may serve to mask sizeable variations between regions or types of institution. The overall US occupancy level of 110% comprises 95% in local jails, 116% in state prisons and 162% in federal prisons. There is likely to be considerable variation too within each category of prison - California's prison population is about double capacity.
12. In most systems there tends to be more overcrowding among pre trial prisoners than among sentenced prisoners. Indeed the requirement to keep pre trial detainees apart from sentenced prisoners can lead to gross discrepancies in living space within one institution.
13. The second caveat is that countries can decide and sometimes change the designated capacity of a prison. By moving a bunk bed into a cell the capacity doubles and 100% overcrowding disappears! So it is possible for each prison in a prison system to hold fewer prisoners than its official capacity, and for the prison system's overall occupancy rate thus to be below 100%, but nonetheless for the prison system to be overcrowded. This occurs when the official capacity of the system is set at a level that allows so little space per prisoner in the living accommodation that the prisons are overcrowded despite the fact that they hold no more prisoners than the official capacity. Since the official capacity of each prison system is set according to criteria decided by the country

1 Standards are higher in Europe

2 Nembrini, G. P. (2005) *Water, Sanitation, Hygiene and Habitat in Prisons*. Geneva: International Committee of the Red Cross

concerned, it follows that those international comparisons of occupancy levels are far from precise.

14. Despite these warnings, prison systems that have occupancy rates exceeding 100% will (almost certainly) have overcrowding in the system and the higher the rate the more likely that the overcrowding is of a serious nature. What does our data show?
15. First that in 60% of countries (114 out of 191) the prison system holds more prisoners than it is intended to hold. The official capacity is exceeded in 72% (28/39) of African countries on which information is available, 70% (32/46) of countries in the Americas, 56% (9/16) of countries in Oceania, 68% (17/25) of Asian countries and 44% (25/57) of countries in Europe.
16. Second in 41 countries (21%) the occupancy rate exceeds 150%, meaning that the prison system is more than 50% overcrowded. The extent of overcrowding is greatest in African prison systems. The occupancy rate is over 150% in 41% (16/39). A similar level of severe overcrowding is present in 19% (3/16) of the countries in Oceania on which information is available, in 28% (7/25) of Asian countries, in 28% (13/46) of countries in the Americas and 2% (1/57) of European countries.
17. Third, in 16 of the 191 countries (8%) the occupancy rate exceeds 200%, meaning that there are at least two prisoners accommodated in the space intended for one. Nine of these countries are in Africa (Benin, Burundi, Côte d'Ivoire, Kenya, Mali, Rwanda, Sudan, Uganda and Zambia), two in Asia (Bangladesh and Pakistan), four in the Americas (Ecuador, El Salvador, Haiti and St Vincent and the Grenadines) and one in Oceania (French Polynesia).
18. The table below summarises prison occupancy rates by continent.

	Under 100%	100% but under 120%	120% but under 150%	150% but under 200%	200% and over	Total
Africa	11	4	8	7	9	39
Americas	14	8	11	9	4	46
Asia	8	4	6	5	2	25
Europe	32	16	8	1	0	57
Oceania	7	4	2	2	1	16
Total	72 (39%)	36 (20%)	35 (19%)	24 (13%)	16 (9%)	183 (100%)

19. As a way of leading to further considerations of causes and countermeasures, I would conclude by pointing out that our data suggests two important elements of the problem. First the countries that have the highest rates of over-occupancy do not tend to have particularly high rates of imprisonment per head of population. Of the 14 most overcrowded countries where detailed comparison is possible, it is only El Salvador whose prison population rate exceeds 150 per 100,000. By contrast several have relatively low rates of imprisonment.
20. This might suggest that the way to address the problem is to build more prison capacity. But the other interesting finding is that the most overcrowded countries generally have high rates of pre trial detention. Of the 16 most overcrowded systems, 7 have prison populations of which more than half are waiting for trial and it is more than 35% in a further four.
21. The table below shows the prison population rate and percentage of pre-trial detainees in the 16 countries with the highest occupancy rates³

3 These statistics were taken from World Prison Brief *Online* at 11 February 2010. Statistics are not necessarily from the same year but represent the most recent figures available.

Country	Occupancy rate (%)	Prison population rate (per 100,000 of the national population)	Pre-trial detainees (% of prison population)
Haiti	335.1	83	78.0
Benin	307.1	66	79.6
Bangladesh	302.4	51	69.0
Burundi	264.2	129	68.0
Sudan	255.3	45	c.10
Pakistan	249.5	55	66.1
El Salvador	240.8	273	35.9
Kenya	223.3	117	43.3
Mali	223.3	52	88.7
Uganda	223.0	91	56.0
Cote D'Ivoire	218.0	56	28.5
French Polynesia (France)	215.9	153	N/A
Zambia	207.3	120	35.3
St Vincent and the Grenadines	205.0	346	21.8
Ecuador	202.7	126	44.4
Rwanda	202.4	593	26.9

22. Looked at the other way round, of the 20 countries with the highest rate of pre trial detention 14 have high rates of occupancy - over 120% . What this suggests is that the route to addressing overcrowding is to improve the functioning of the criminal justice process.
23. The table below shows the occupancy rate in the 20 countries with the highest percentage of pre-trial detainees⁴

Country	Pre-trial detainees (% of prison population)	Occupancy rate(%)
Liberia	97.3	136.3
Mali	88.7	223.3
Benin	79.6	307.1
Haiti	78.0	335.1
Niger	c.76	64.6
Bolivia	78.4	165.5
Congo (Brazzaville)	c.70	N/A
Paraguay	69.5	116.3
Nigeria	69.3	84.1
Bangladesh	69.0	302.4
Burundi	68.0	264.2
India	66.6	135.7
Pakistan	66.1	249.5
Cameroon	65.6	137.4
Monaco	64.0	44.4
Honduras	63.5	140.0
Philippines	63.3	156.4
Uruguay	63.1	133.6
Seychelles	63.0	76.3
Lebanon	62.5	120.9

24. This is particularly true in respect of countries emerging from conflict. Until the disaster, Haiti had the highest level of over-occupation and while data is difficult to obtain, overcrowding situations in Liberia, Rwanda and DR Congo can amount to humanitarian emergencies. Like all such emergencies, the response must include short term relief and the development of longer term sustainable solutions.

⁴ These statistics were taken from World Prison Brief *Online* at 11 February 2010. Statistics are not necessarily from the same year but represent the most recent figures available.

CAUSES OF PRISON OVERCROWDING

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I. INTRODUCTION

Imprisonment rates

An unprecedented expansion of penal control has occurred in recent decades in different parts of the world. Since the mid 1970s imprisonment rates in North America have increased nearly fivefold. A similar increase occurred in many other countries during the 1980s and 1990s, in Africa, Asia, Europe and Oceania. During the last 15 years (1992-2008), in two out of three (63 %) countries, imprisonment rates increased by at least 10 %. The steepest increases exceed 200 %. Changes in prisoner rates by country from 1992-2008 are shown in figure I.1 (measured as percentages).

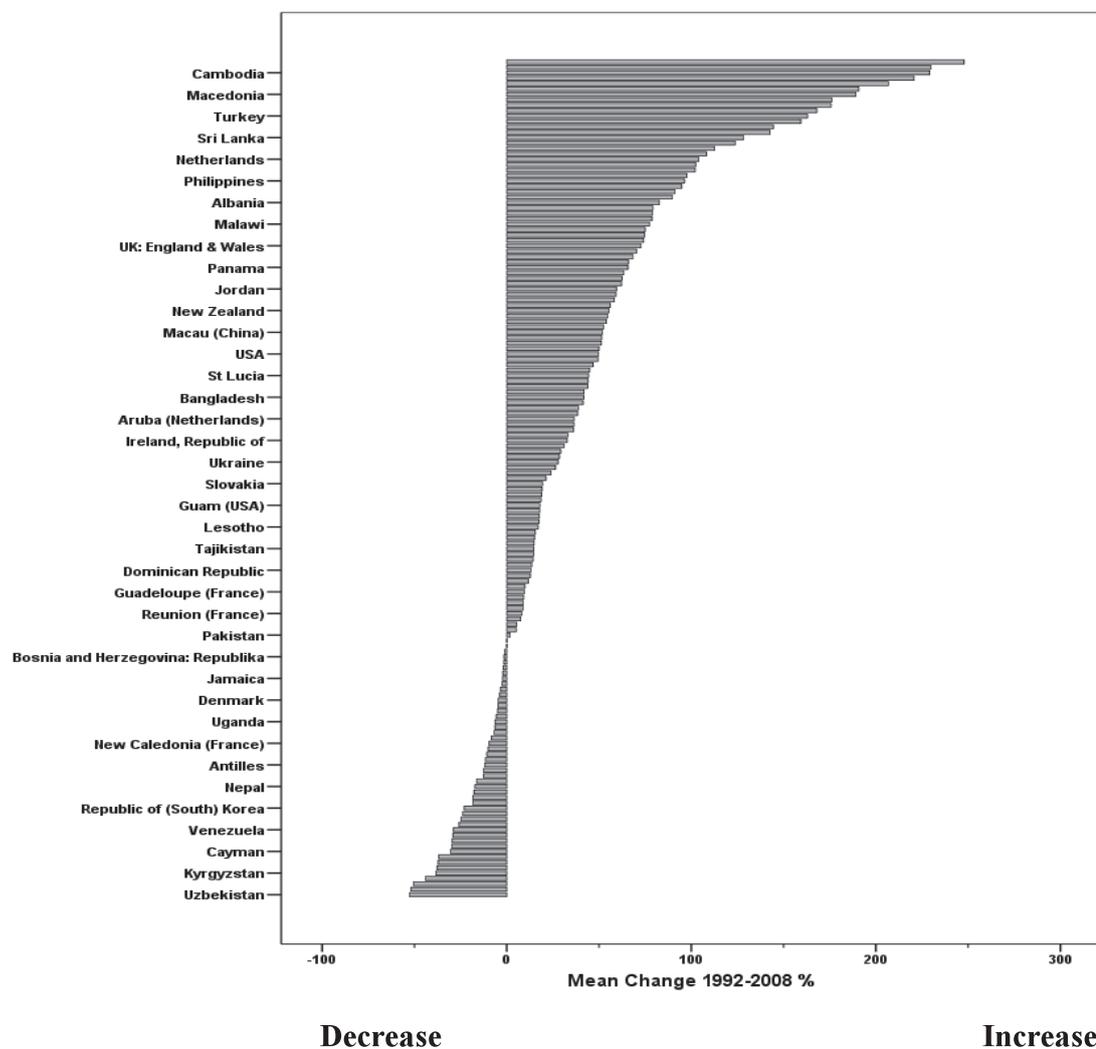


Figure I.1. Changes in national imprisonment rates per 100 000 population in 1992-2008 by country (ICPS)

Another distinct feature is a huge variation in the size of the prison population in different countries (counted per 100 000 population.). Imprisonment rates by country are presented in figure I.2 below.

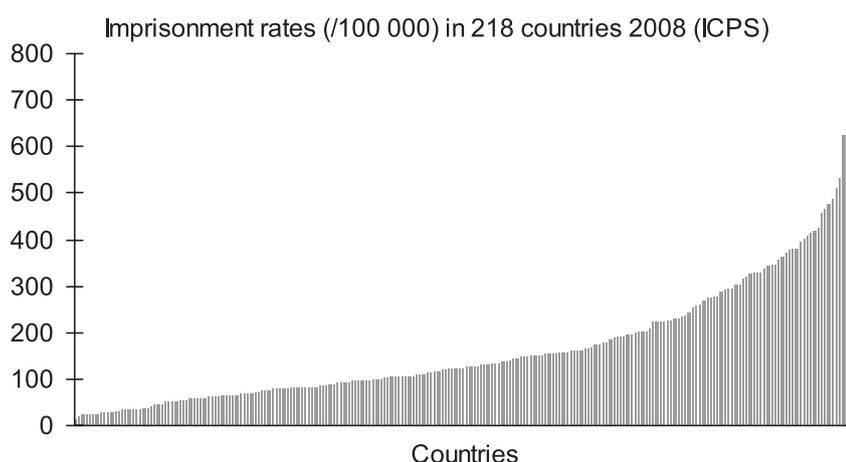


Figure I.2. Imprisonment rates per 100 000 population in 218 countries 2007/8 (ICPS)

At the top of the scale remains the US with 760 prisoners/100 000 pop. The lowest figures, around 10-20, can be found in the smaller (mostly Western) African countries, as well as in some micro-states (Liechtenstein, San Marino, Faeroe Islands, Tuvalu, Nauru, Timor Leste). The overall mean lies around 165 prisoners / 100 000.¹

Regional analyses within continents show the lowest overall rates in Europe (mean 144) with the figures ranging regionally from 56 in Scandinavia to over 300 (Russia and the former Soviet Union region). In Africa (mean 111) the figures range from 50 in Western Africa to 250 in Southern Africa, in Asia (mean 158) between 110 (South-Central Asia) and a little below 200 (Central-Asia) . The Highest overall figures are found in the Americas (mean 282) ranging between 200 (South America) and 750 (USA, and 350 Canada included).

Occupancy and overcrowding

The increase in the use of imprisonment has resulted in severe overcrowding. In this paper, overcrowding is given a technical definition with the help of the statistical occupancy rate. Overcrowding means simply that the number of prisoners exceeds the official prison capacity (over 100 % occupancy rate). For the moment, this is the only available measure for wider comparisons between countries. The main problem with this measure is that the extent of overcrowding in this sense depends heavily on national/local standards. County which allow four prisoners in one cell may report “free space” if some cells are occupied by only three prisoners, while countries with single-cell accommodation as a norm may report overcrowding with much less “objective” overcrowding. Neither does this measure take into account differences in space, or in other prison conditions.

This means that the following figures of overcrowding are in most cases the absolute minimum figures. Using more substantial criteria - for example those imposed by the CPT - ratings for prison overcrowding would most probably look much worse.

More substantial criteria would refer for example to spatial density (sq meters /person), social density (number of persons in one space), and privacy (the time individuals can spend on their own). Subjective criteria of overcrowding would also include feelings of helplessness and stress, etc.

¹ Data is obtained from the ICPS (International School of Prison Studies, King’s College, London) website. At the moment there is information from 218 countries. See <http://www.kcl.ac.uk/schools/law/research/icps>. These figures contain “raw” imprisonment rates on a specific day (not as annual averages). They do not take into account the differences whether figures in individual countries include juveniles detained in juvenile institutions, persons in drug treatment or mental health facilities, immigrants and foreigners detained on the basis of immigration laws. These adjustments are possible only for a limited number of countries (see Lappi-Seppälä 2008 and SPACE I 2009).

However, for the moment there is no data of these measures for comparative purposes. Neither is there agreement on international standards of what constitutes prison overcrowding. The Council of Europe Prison Rules has no provisions for the minimum space in the EPR (as there is the risk that the minimum will become a norm, see Zyl Smit & Snacken 2008 p.131 ff). The CPT has emphasized that the acceptable minimum space depends also on the quality of the space and the time to be spent in the cells. Nevertheless, according to the CPT, the absolute minimum would be 4 sq meters in shared accommodation and 6 sq meters in single cells, which is more than can be found in several countries across the world.

Figure I.3. shows the distribution of countries according to the level of occupancy rate. Rate 100 % means that all prison places are in use. Rates exceeding 100 % demonstrate that prisoners have been inhabited more densely than the official enforcement policy would indicate.

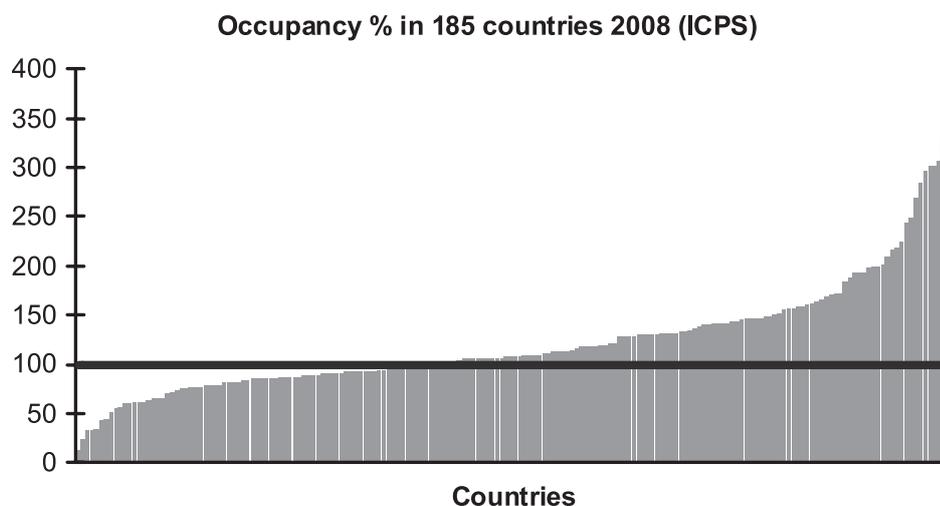


Figure I.3. Occupation rates (% of total prison capacity) in 185 countries 2007/8 (ICPS)

The data from ICPS indicates that more than two out of three countries have an occupancy rate of over 100 %. The average global occupancy rate is 122 %, exceeding the overall capacity by more than one fifth. In the worst cases the number of prisoners exceeds the number of prison places by three to one. Figure I.4. displays occupancy rates by region.

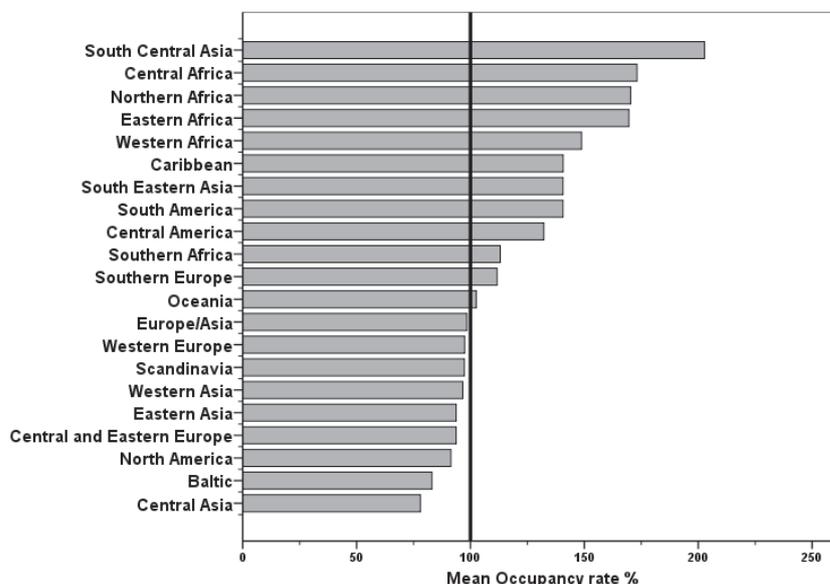


Figure I.4. Occupancy rates (% of total prison capacity) by regions 2007/8 (ICPS)

Occupancy levels differ systematically. All European regions are below 100 %, while all African regions are above 100 %, and most of them over 150 %.

Factors contributing to overcrowding and overuse of imprisonment

Technically, overcrowding results from the fact that the justice system is sending more people to prison, and for longer periods, than the prison capacity allows. The immediate cause of overcrowding is either overuse of imprisonment or insufficient prison capacity.² Also the remedy is simple: send fewer offenders to prison and/or for shorter periods, or build more prisons. But which would be the most preferable way to proceed?

Prison construction hardly provides a sustainable solution to the overcrowding problem. Prisons usually tend to get filled once they have been built. Also the CPT has concluded that the expansion of prison capacity to tackle prison overcrowding has not been successful (see Zyl Smit & Snacken 2008 p.89 and 132).

The search for remedies needs to draw attention also to those factors that contribute *to the general use of imprisonment*. There are also substantial reasons to be worried, not only about overcrowding but also of overuse. The consensus represented in the UN standards and norms urge member states to use prison as a last resort (see the UN Handbook on alternatives to imprisonment). Also, the social costs of extensive use of imprisonment are well documented in research literature (Garland 2001).

The following examines in more detail the reasons behind both overcrowding and overuse of imprisonment with the help of comparative statistics from the ICPS and two other data bases.³ Since causal explanations are highly problematic in explaining the functioning of complex social institutions, such as criminal punishment, the following discusses instead direct causes of “factors contributing to overcrowding and overuse of imprisonment” .

II. OVERCROWDING AND THE ROLE OF PRE-TRIAL DETENTION

The overall share of pre-trial prisoners of all prisoners is 32 %. However, this share varies between different regions from 15 to 55 %, and among single countries from 0 to close to 100 %. Figure II.1. displays these differences by regions.

2 Which of these alternatives is stressed, depends, of course, of each and everyone's own point of view. There is, perhaps, even less agreement on what constitutes “overuse” than “overcrowding” (see above). It is fundamentally a value judgment. However, this judgment can be given reasons related to the social and economic costs involved in the use of imprisonment, as well as its relative cost-effectiveness, as compared to other available crime prevention strategies.

3 Three samples are employed. The first contains all 218 countries in the ICPS database. The second covers top 100 countries ranked according to the UN human development index. Third sample includes 25 industrialized countries with more detailed information on possible background variables. The sample includes 16 in Western Europe, three in Eastern Europe (Czech Republic, Hungary, and Poland), two Baltic countries (Estonia, Lithuania), and four Anglo-Saxon countries (United States, Canada, New Zealand, and Australia). Samples and sources are described in more detail in Lappi-Seppälä 2008.

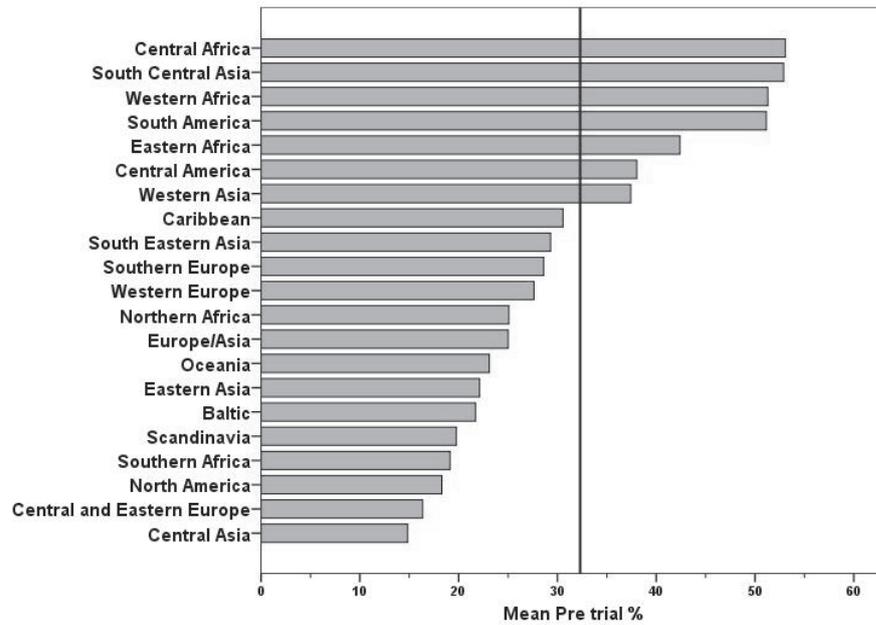


Figure II.1. Pre-trial rates (% of all prisoners) by regions 2007/8 (ICPS)

These differences are reflected also in differences in occupancy rates. We may confirm this by comparing the share of pre-trial detainees occupancy rates.

Table II.1. Pre-trial rates and occupancy rates by selected regions

HIGH PRE TRIAL REGIONS			LOW PRE-TRIAL REGIONS		
	Occupancy rate %	Pre trial %		Occupancy rate %	Pre trial %
Central Africa	173	53	Scandinavia	94	19
South-Central Asia	203	53	North America	91	18
Western Africa	149	51	Central-Eastern Europe	94	16
South America	141	51	Oceania	99	16
Eastern Africa	170	42	Central Asia	78	15

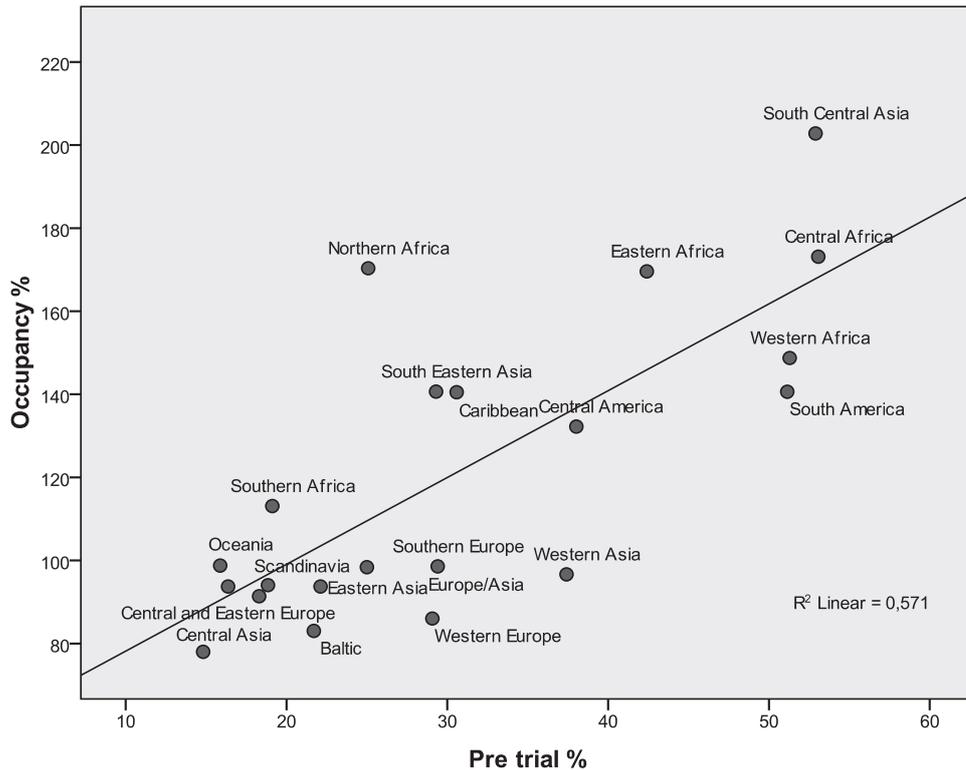


Figure II.2. Pre trial rates and occupancy rates by regions 2007/8 (ICPS)

The overuse of pre-trial detention is one major factor contributing to prison overcrowding. This applies to most countries in all African regions. The situation is exceptionally bad also in South Central Asia and in parts of South America. The scatter plots below illustrate the association between the share of pre-trial detainees and occupancy rates by individual countries.

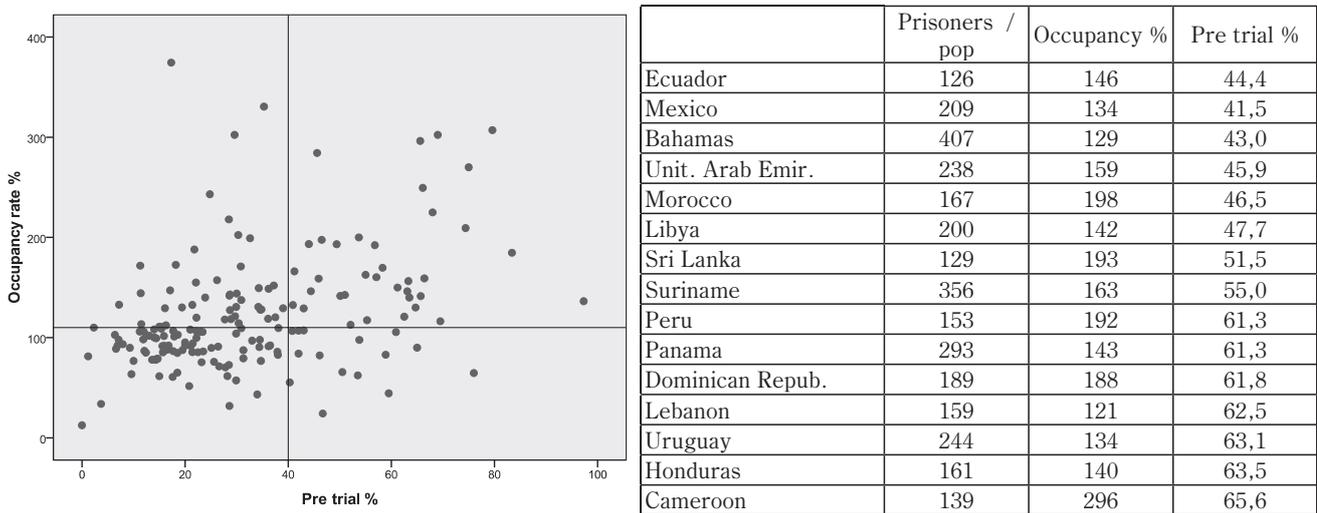


Figure II.3. Pre-trial rates and occupancy rates by countries 2007/8 (ICPS)

The higher the share of pre-trial detainees in prisons, the higher the occupancy levels. The upper right corner in the first plot displays countries with over 110 % occupancy rates and more than a 40 % share of pre-trial prisoners. In these countries especially, the reducing of the use and length of pre-trial detention would work effectively against overcrowding. The separate table on the right lists countries with a pre-trial rate exceeding 40 %, occupancy rate exceeding 120 % and imprisonment rate exceeding 120 prisoners / 100 000.

The use of pre-trial imprisonment is not the only factor behind high occupancy rates. The upper left corner in figure III.3. holds countries with high occupancy rates, but low pre-trial rates. Thus, quite often overcrowding is just a result of the overuse of imprisonment, or a result of insufficient prison capacity (depending on one's point of view on this issue). If high occupancy rates coincide with high overall prisoner rates, one might be inclined to support more the former than the latter interpretation. The table in the appendix divides countries according to the overall levels of incarceration and occupancy rates (see appendix).

III. THE RELEVANCE OF CRIME

What is the impact of the level of crime and criminality on overcrowding and the general use of imprisonment? In advance one could imagine several mechanisms: prisons are used as a consequence of crime, and it would be only natural that the number of sentenced offences would reflect also the overall use of imprisonment (overcrowding). Imprisonment is also used *as a means to reduce crime*. Therefore the views of policymakers on trends of crime (and the effectiveness of imprisonment), may well have an effect on policy decisions.

The following correlation table III.1. takes a brief look at the statistical associations between imprisonment rates and crime rates. Crime is measured using several indicators: The UN survey data for total recorded crime in 44 countries (row 1), health statistics data (mainly WHO) data for completed homicide in 192 countries (row 2), data from victimization studies in assault worldwide (68 countries, row 3) and for 10 crimes in the EU (29 countries, row 4). In addition, the impact of crime on imprisonment is examined using conviction statistics both from the UN surveys and the European Sourcebook (Space I, rows 5-6).

Table III.1. Bivariate correlations between crime and imprisonment rates

	PRISONERS / 100 000 (2007/8, ICPS)	COUNTRIES N
1. Total reported crime /100 000 (2004, UN)	-0,36*	44
2. Homicide /100 000 (completed, WHO, UN)	,031	192
3. Victimization % assault % (ICVS, van Dijk 2009)	0,06	68
4. Victimization % (EU ICS, prevalence 2005, 10 crimes)	0,14	29
5. Convictions 2004 / 100 000 (total, UN)	-0,08	34
6. Convictions 2003 (traffic excluding, Space I)	-0,21	20

*. Correlation is significant at the 0.05 level (2-tailed).

**. Correlation is significant at the 0.01 level (2-tailed).

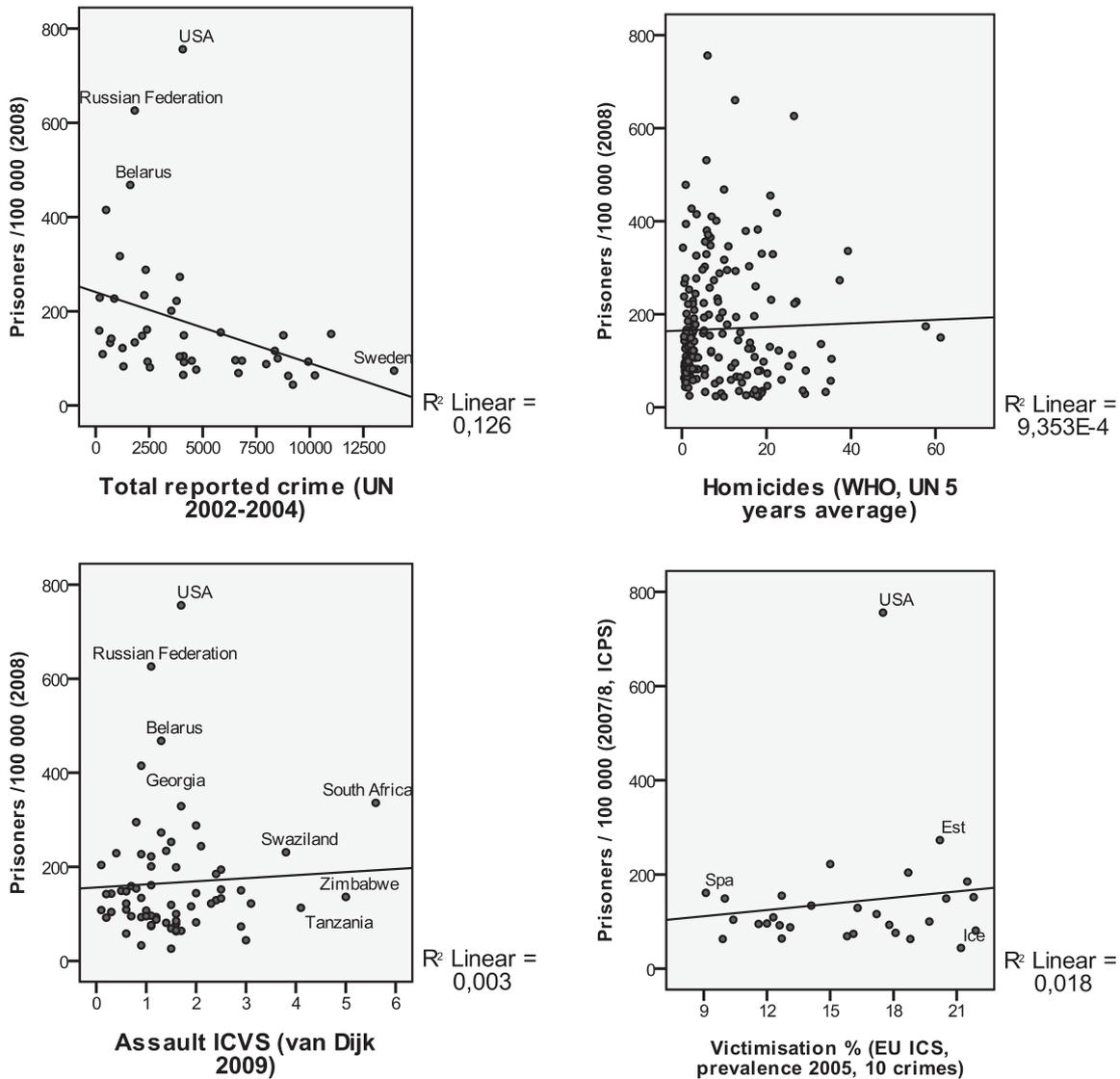


Figure III.1 Reported crime, victimization and imprisonment rates

The only statistically significant correlation is a negative one. Total reported crime is inversely associated with the number of prisoners (more crime, less prisoners). This may well be partly a result of differences in reporting practices (developed Western countries report more crimes). Health statistics on lethal violence are usually deemed to be the most reliable sources for comparisons. They cover also the largest number of countries. However, the correlation is close to zero. Victimization studies give a more reliable picture of the true level of crime less serious forms of crime. However, neither the worldwide victimization figure for assault, nor the European victimization figures for 10 offences correlate with prisoner rates. The same applies to conviction data. The number of convictions and prisoner rates are at best negatively correlated, if at all (see rows 5-6 in the table).

A tentative conclusion is that neither reported crime nor victimization is systematically reflected in the levels of incarceration. Also, trends in the use of imprisonment and trends in crime may differ without a seemingly constant pattern, as is indicated in following comparisons.

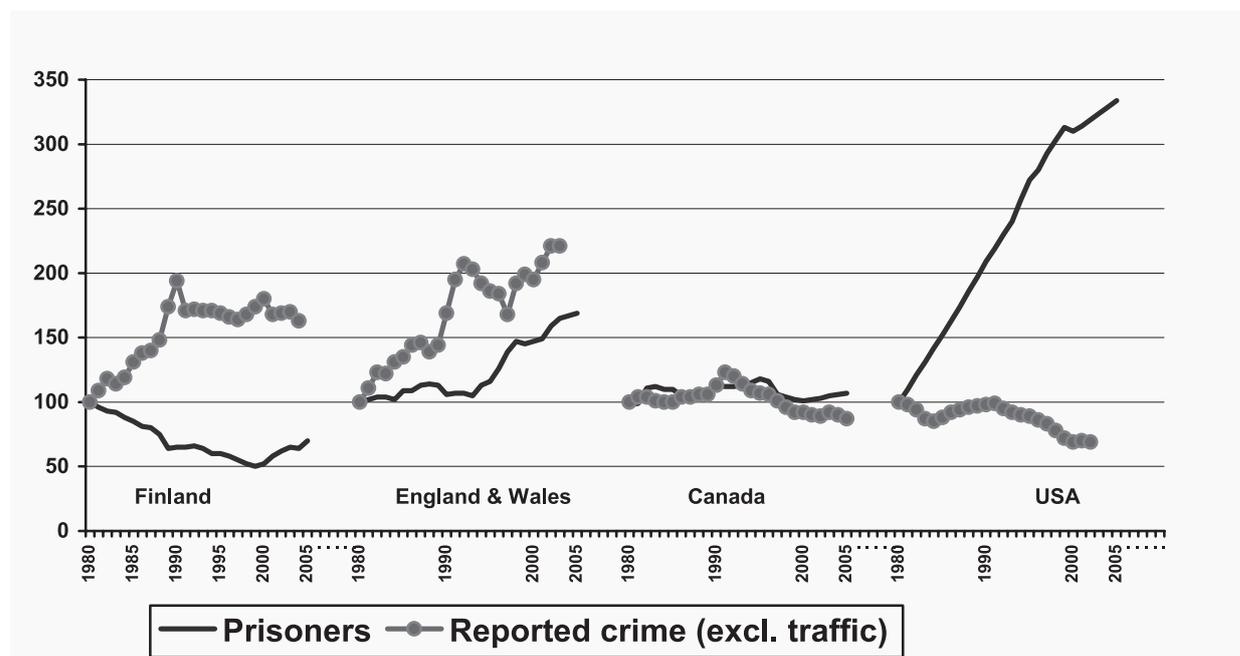


Figure III.3 Prisoners and Reported Crime in Finland, Canada and the United States 1980-2005 per 100,000 population (1980=100). Source: National Statistics

In Finland, total reported crime went up when prison trends were declining. In England & Wales both crime trends and prison rates were going up (but not simultaneously). In the US, crime trends remained first stable and then declined, as the prison figures were rising. The Canadian crime trend looks much like the one from the US, but the imprisonment curve is totally different.

These and other similar comparisons indicate that general crime trends do not explain the overall use of imprisonment. This does not preclude the possibility that in some countries drugs and drug-related criminality may give a specific profile for those countries' prison problems. Neither does this preclude the possibility that in some countries concerns of serious and visible forms of crime have a substantial impact also on prison policies.

IV. BEHIND PRISON OVERCROWDING I - MACRO LEVEL FACTORS

High prison rates and overcrowding are not “automatic” results of a high level of crime or increasing crime trends. We may find high-crime countries with high imprisonment rates, but also high-crime countries with low imprisonment rates and no overcrowding. And we may find low-crime countries with high imprisonment rates, but also low crime countries with low imprisonment rates.

One explanation for these differences is that different systems react differently to trends in crime. Some systems may be more prone to respond to changing crime trends by altering their prison policies, other systems may be less sensitive to changes in crime and try to respond by alternative means.

Another closely related explanation is that the level of imprisonment is *affected by other factors*, and not by crime (or by public impressions of crime). These other factors may relate to macro level structural factors, such as social, economic and political structures. But they may also relate to the individual countries' specific histories and local circumstances.

This section takes a look at the first group of factors. The next one gives some examples of country-specific micro level factors.

Criminological research provides a variety of theories offering explanations for differences in penal

severity and the use of imprisonment. Most of the in depth studies are confined to a small selection of (usually Western) countries. Comparisons covering a larger numbers of countries, on the other hand, are often impaired by the availability of data.

None of the analyses so far have been able to produce a simple explanation for global penal differences, and one may doubt whether they ever will. However, it has been possible to detect factors which seem to explain a large proportion of the differences in the use of imprisonment in many developed industrialized democracies. Still, it remains open to what extent these explanations apply to developing countries. One may need to pay attention to different things in explaining penal policies in Northern Europe, in Latin America, or in Africa. Being aware of these risks, the following gives some examples of interesting associations between imprisonment and selected social, political and economic factors.

Economic wealth

Building prisons is expensive, so it is natural to assume that an increase in economic resources will at some point contribute to the increased use of imprisonment. But, one may also assume that after reaching a certain level of economic wealth, also other measures and strategies become available, should politicians wish to use them.

These assumptions have also some empirical support. The direction of the correlation seems to be dependent on the general level of economic prosperity.

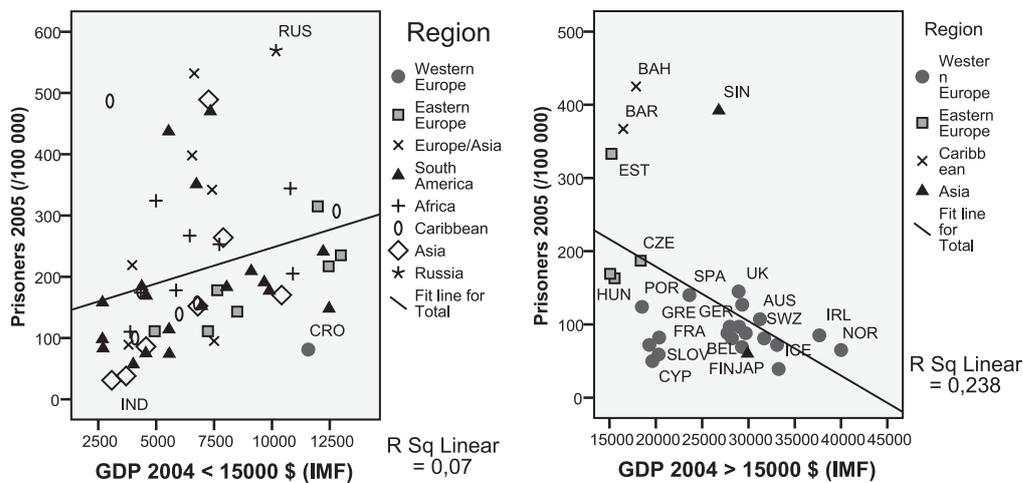


Figure IV.1 Prisoner Rates and GDP. GDP under and over 15,000 \$.
 Sample 100. Outliers US and Luxemburg removed.
 Source: Sourcebook 2006 complemented, IMF

In poorer countries with GDP below \$15,000 the association is positive (more money means more prisoners), whereas in rich democracies the correlation changes direction (more money, fewer prisoners - except in the US). Building prisons is expensive, and having a positive correlation makes sense from this point of view.⁴ At some point, however, the accumulation of economic wealth becomes negatively associated with penal severity. In general, wealthy nations seem to be less punitive, with one obvious outlier - the United States.

This does not apply to overcrowding (occupancy levels). Here the general rule is that increased

4 This fact is reflected also in recent trends in the use of imprisonment among developing countries. Johnson (2008, p.51) observes how developing countries in the Asian region are now constructing the required infrastructure for routine based use of imprisonment, resulting in a rapid increase in the use of imprisonment in those regions.

wealth is weakly associated with less overcrowding both in poorer and richer countries.

Social indicators and general well-being

Along with economic wealth the use of imprisonment is affected by a number of social factors. Indicators that measure the general well-being seem to be closely connected also with the quality and severity of criminal justice. These factors include economic and social equality and the extent of social protection provided by the state.

One measure of social equality is income distribution. There is a clear positive correlation between income inequality⁵ and prisoner rates among the EU-member states. The correlation is somewhat weaker but still significant among OECD countries, but much weaker and non-significant among countries outside the EU and/or OECD.

Correlations between Imprisonment rates 2008/7 and income inequality (Gini-index mid 2000s)	Corr. (Pearson's)	Countries N
EU Member state	0,60**	24
OECD member	0,37*	29
Not EU member	0,13	64
Not OECD member	0,11	69
Total	0,27*	88

*. Correlation is significant at the 0.05 level (2-tailed).

**. Correlation is significant at the 0.01 level (2-tailed).

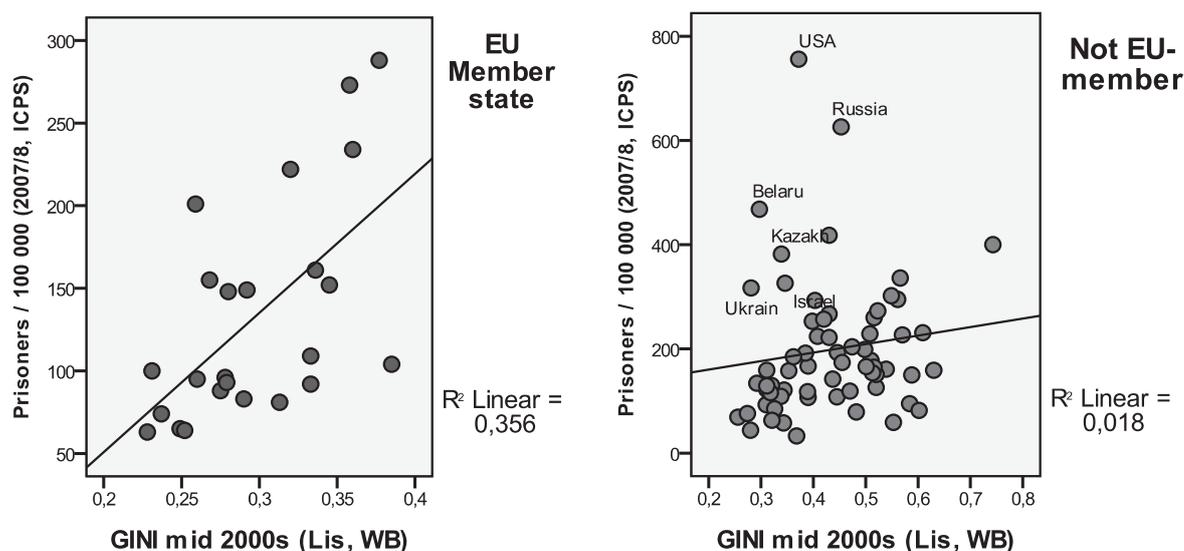


Figure IV.2 Gini-Index and Imprisonment Rates 2000. EU-countries and Non-EU -countries
Source: Sourcebook 2006 complemented, ICPS, LIS, WB

The scatter diagram shows that the weaker correlation between income equality and prisoner rates outside the EU is mainly explainable by six outliers, five from the former Soviet Union countries and by the US.

Other indicators measuring social security and social justice seem to cohere with less use of imprisonment. Comparative data is unfortunately available only mainly from the OECD countries. That evidence indicates clearly that increased investments in welfare (either in absolute terms or as percentages of the GDP) associate with lower imprisonment rates.

5 The “fairness” of income distribution is measured by the Gini-index. The index expresses to what extent the real income distribution differs from the “ideal” and fair distribution (0=total fairness, 1=total unfairness). On the associations between income inequality and imprisonment, see also Killias 1986 and Tham 2005.

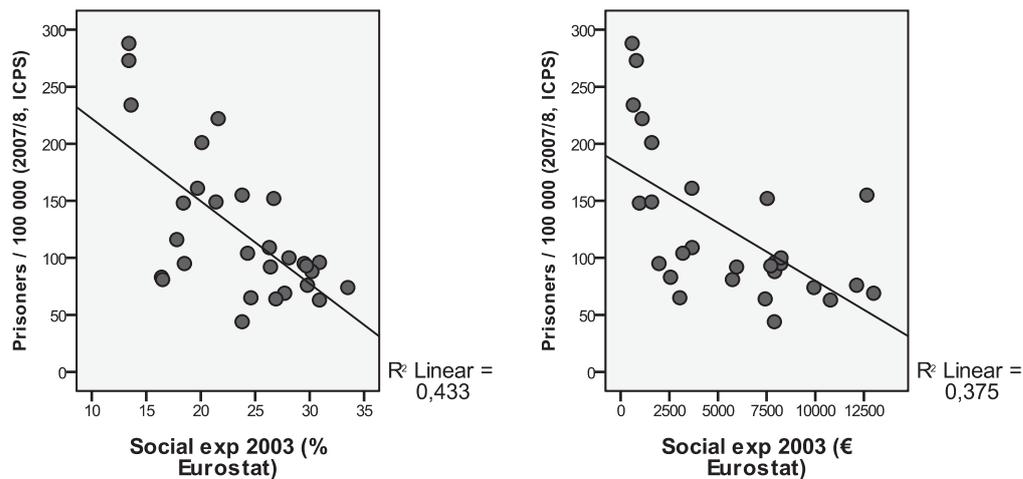


Figure IV.3 Social expenditure and Imprisonment Rates: OECD countries.
Source: Sourcebook 2006 complemented, Eurostat

In the right lower corner are the countries with strong investments in welfare and low imprisonment/occupancy rates. On the upper left corner we find mostly Eastern countries.

Trust and legitimacy

It is also assumable that the legitimacy of the political system and confidence in the legal system and the severity of criminal justice may be intercorrelated. A legitimate system 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. The norms of criminal law are followed out of legitimacy, and not out of fear. And in such a system the legislator may well be able to use more moderate sanctions.

Both assumptions get support among the developed countries, but less so among developing countries.

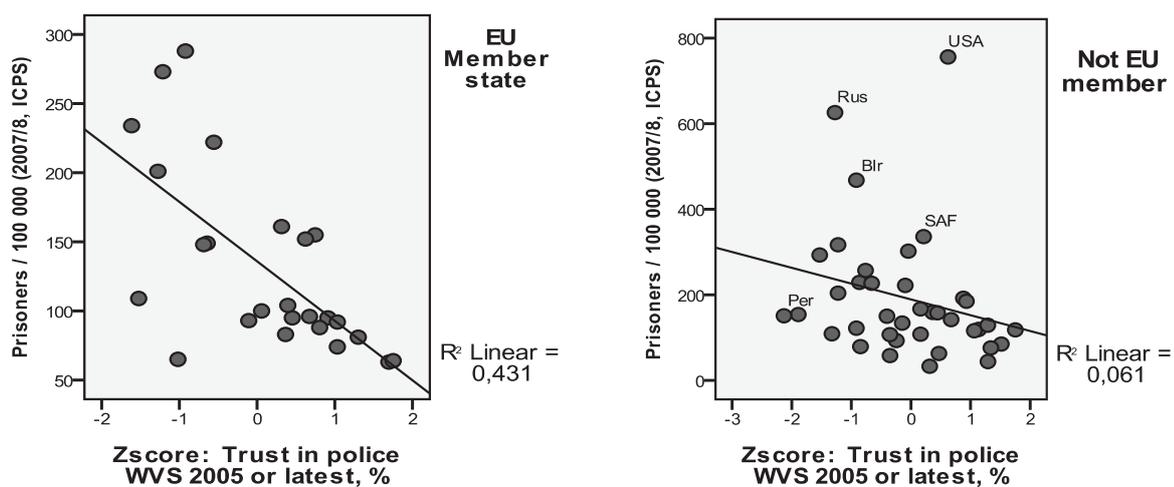


Figure IV.4 Trust in Police and Imprisonment Rates. Sample 100, EU-countries and Non-EU -countries.
Source: Sourcebook 2006 complemented, WVS

The strongest association between social trust (trust in people) and institutional trust (trust in police and the legal system) and the use of imprisonment can be detected among European countries

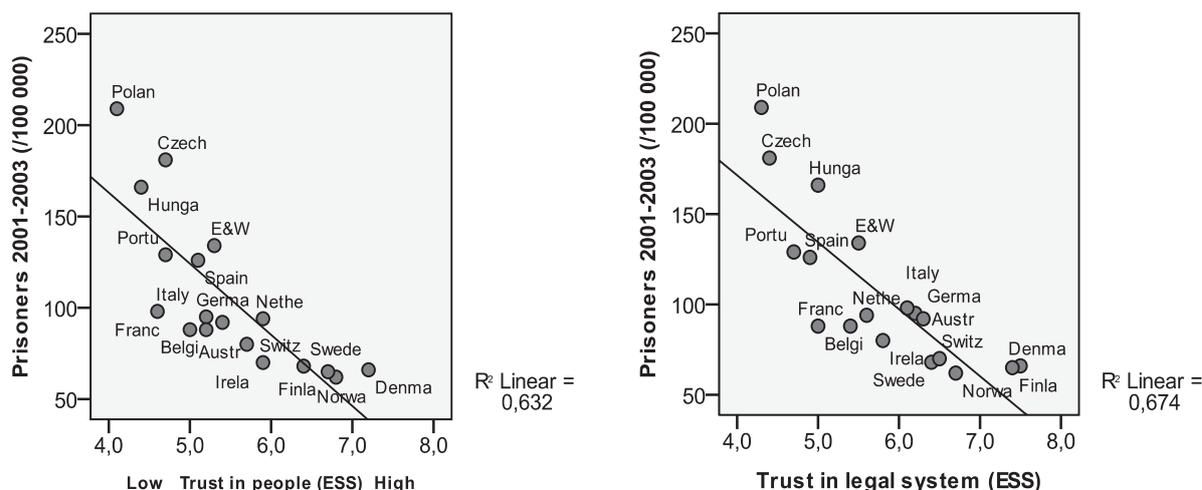


Figure IV.4 Social trust and trust in legal system and Imprisonment Rates. Basic sample.
Source: Sourcebook 2006 complemented, ESS

Discussion

These tentative findings need several qualifications. Firstly, there are other factors which should also have been included; among others, the political culture and differences in democratic structures. A closer analyses would indicate that “consensual democracies”, as opposed to “conflictual” majoritarian democracies associate with more moderate penalty levels and lower imprisonment rates (Lijphart 1999, Lappi-Seppälä 2008, Green 2008). Such democracies are also characterized by better political and economic equality, stronger welfare and lesser fears.

In fact, most of the key factors studied above are interrelated. Economic wealth, social security, low fears, income equality and the quality of democracy seem all to sustain each other, and at the same time promote moderation in penal policies. It is hard to say which of these comes first, or which is more fundamental. In any case, that would be a task of another study. But for the purpose of the discussions in the workshop it may be enough to conclude that the building of a democratic state under the rule of law, and promoting social equality, is also building a legitimate system of criminal justice. And this system manages to fulfil its tasks with less use of imprisonment.

Or put the other way around: a high imprisonment rate is not a sign of a well functioning democracy and trusted legal system, rather the opposite. At least the efforts to uphold confidence in the justice system by severe sanctions do not seem to carry very far. After all, the countries with high trust tend to have low imprisonment rates, but countries with high imprisonment rates tend to have low trust.

V. BEHIND OVERCROWDING II: MICRO LEVEL CASE STUDY OF FINLAND

But if the use of imprisonment is determined by structural factors, where does it leave human action? This question is based on misunderstanding. Macro level structural factors do not determine the outcome, they merely increase the probability of some type of policies (and they may make other policies less probable). Still, they never dictate the end result. Structure is not determination (Lacey 2008 p. 205), and there always remains room for choice. That can be seen just by looking at the countries (above and below the regression lines) which have not followed the general patterns.

Studying these “deviant countries” may also give information of these specific local conditions that have influenced the policy choices. A single country case-study from Finland may also illustrate how it has been possible to swim against the tide, at times when other countries were moving in the opposite direction. These experiences give also concrete examples of the causes of overcrowding, as well as of proper countermeasures.

Social and economic background

A small country from northern Europe with only a little over 5 million inhabitants may seem too remote a point for meaningful comparison. However, the nature of the problems is surprisingly similar, once we look back at history. Today Finland is a prosperous and safe Nordic welfare state. However, this was not always the case. During the last century Finland experienced a brutal civil war, the harshness of the Second World War, heavy war compensations, severe social crises, and deep recessions.

These social and political crises were reflected in the Finnish criminal justice system. At the beginning of the 1950s, the prisoner rate in Finland was four times higher than in the other Nordic countries. Our prisoner rates were on the same level as several countries in Northern and Southern Africa and South America, including Brazil. Finland had almost 200 prisoners per 100,000 inhabitants, while the figures in Sweden, Denmark and Norway were around 50. Even during the 1970s, Finland's prisoner rate continued to be among the highest in Western Europe.

The first hand explanation for this relates to structural factors discussed above. Burdened with political and economic crisis Finland had been unable to invest in criminal justice reform in a similar manner to its neighbours. Consequently, the legislation became to lag far behind general societal development. This discrepancy became more and more evident once Finland was joining the Nordic welfare family in the course of the 1960s and 70s

Ideological and legislative background

Reasons behind overcrowding were partly ideological, as well. In the 1950s and early 1960s the criminal justice system and imprisonment were seen as the key answer to the crime problem. The strong reliance on the effectiveness of imprisonment started to weaken during the 1960s. We began to realize the limitations of the prison system, first just by comparing our prisoner rates and crime rates with the other Nordic countries (see for example Christie 1968). The nature of the crime problem in the Nordic countries was more or less the same, but there were huge differences in the numbers of incarcerated people. This was deemed to be both irrational and inhuman.

Also, criminological research findings pointed at the same direction. Reoffending rates were documented to be generally higher after imprisonment, compared to other sanctions. In Finland, as well as in other Nordic countries, the conclusion was a general distrust of the overall effectiveness of criminal sanctions, when compared to other means of crime prevention. As a consequence, attention was directed to social and situational crime prevention strategies.

These findings may have relevance for today's discussions as well. Popular overreliance on the preventive effects of imprisonment (whether rehabilitation or deterrence) may still be one of the major background factors behind high incarceration rates and high levels of overcrowding. Public policies would benefit from a lot of the systematic use of research evidence on relative cost-effectiveness of prison policies, as compared to social and situational crime strategies.

The simple technical explanation for the unduly high prisoner rates in Finland was, however, our outdated and overly severe criminal law. Political consensus was reached that the penal code should be reformed and our prisoner rates should also be reduced to be closer to our Nordic neighbours'. This, in turn, was motivated by the intensified Nordic cooperation in penal matters. This reform work started in the mid 1960s and continued till the mid 1990s. This long-term programme can also be read as a part of a series of actions targeted against the major legislative causes of prison overcrowding.

Unnecessary criminalization and overuse of default imprisonment for unpaid fines

The first target was the overuse of default imprisonment for unpaid fines, as well as the misuse of the criminal law as a means of social control. Criminal law should be used as a last resort, and not extend itself to areas that can better be dealt with by means of social and health policy. This advice was not appreciated in Finland in the 1950s and 1960s when public drunkenness was still punishable by

finers. And as these people were often unable to pay their fines, fines were converted to imprisonment. This practice was both irrational and unjust. 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.

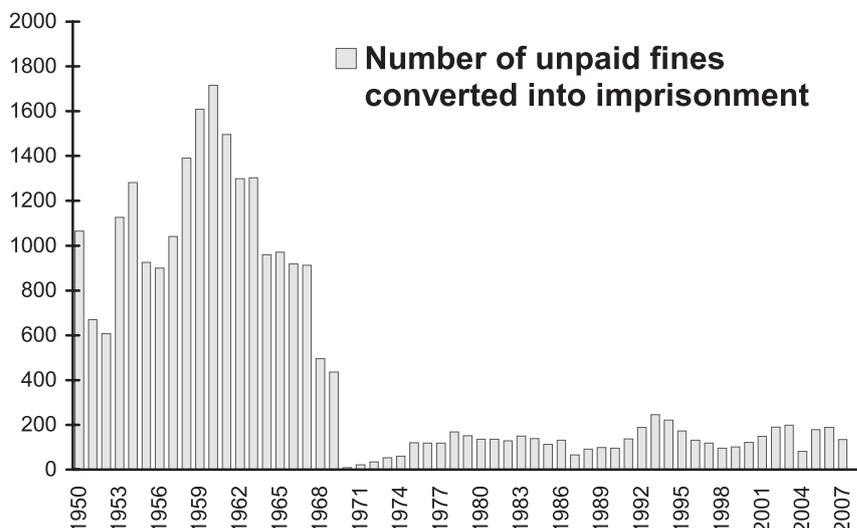


Figure IV.3 The number of fine defaulters in Finland 1950 2007 (absolute figures)
Source: Criminal Justice Agency.

Criminal justice systems may become seriously overburdened if they adopt tasks that suit better the social and health services. Prohibition serves as a historical example. Drugs and drug-related offences constitute a similar problem today. In many parts of the world drug-related offenders constitute a large proportion of the prison population. Any efforts to remove drug users outside the realm of criminal justice, or at least outside the prison system, may have a substantial effect on overcrowding. This can take place in the form of drug-courts or specific treatment contracts.

Severe sanctions for minor property offences

Punishments should be proportionate to the seriousness of the offence. This fundamental principle is the backbone of any criminal justice system appreciating the principle of Rule of Law. Still, it is not always followed. Valuations of the seriousness of offences change over time, but the legislature does not always follow these changes.

This is what happened with theft offences in Finland. Theft was once a serious offence. It threatened the social security of an individual in the 18th century, when personal possessions were the foundation of a person's economy. This was no longer the case in the late 20th century, when losses were covered by insurances, and the relative value of stolen goods was reduced as a result of the surplus of consumer items.

But the theft law hadn't followed this development, and theft offences were punished disproportionately severely. In the early 1970s and 1990s theft offences were devaluated, penal latitudes were reduced and crime definitions were made more flexible. And this brought also a change in our prison populations. Another offence with similar changes (but for different reasons) was drunk-driving.

Mechanical recidivism rules

Reoffending rules have a significant impact on courts sentencing practices. Up till the mid 1970s Finland had mechanical recidivism rules which led to 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.

Today mechanical reconviction rules are still one key factor behind overly long prison terms in

several parts of the world. Sometimes rigid definitions for organized crime have the same impact (for example stipulating that any offence committed together by several persons is to be treated as a form of organized crime). As a result, a substantial part of prisoners may be serving unduly long sentences for fairly trivial property offences. This is much due to the fact that in this offence type reoffending is generally common and rigid recidivism sentencing provisions lead easily to unduly harsh penalties.

Rigid early release practices

Early release and parole procedures are another key factor affecting the extent of the use of imprisonment. In the 1950s, and even into the 1960s, Finland had quite rigid early release provisions, which granted the possibility for parole only after six months of a prison term had passed. This minimum time was gradually reduced to 14 days, and early release was made a semi-automatic practice now reaching 99 % of all prisoners. Also, the rules of parole revocation were made more flexible. All these reforms had an immediate impact on the Finnish incarceration rates.

Today the pivotal role of parole and early release is demonstrated by those countries with increasing prisoner rates as a result of the adoption of a determinate sentencing system. This effect is escalated if prior sentencing practice remains the same, but prisoners are denied parole.

Juveniles in prison

Sending young offenders to prison is unwise policy. Research tells us that re-offending rates are generally very high. Placing juveniles in prison creates thus a substantial risk for a prolonged prison-career.

This was one of the obvious drawbacks of the Finnish prison policy in the 1960s. Finland had several times more juveniles in prison than its neighbours. The detrimental effects of prison for juveniles became widely acknowledged during the 1970s. This also led to a strong reduction in custodial sanctions for children under 18, both in law and in court practice.

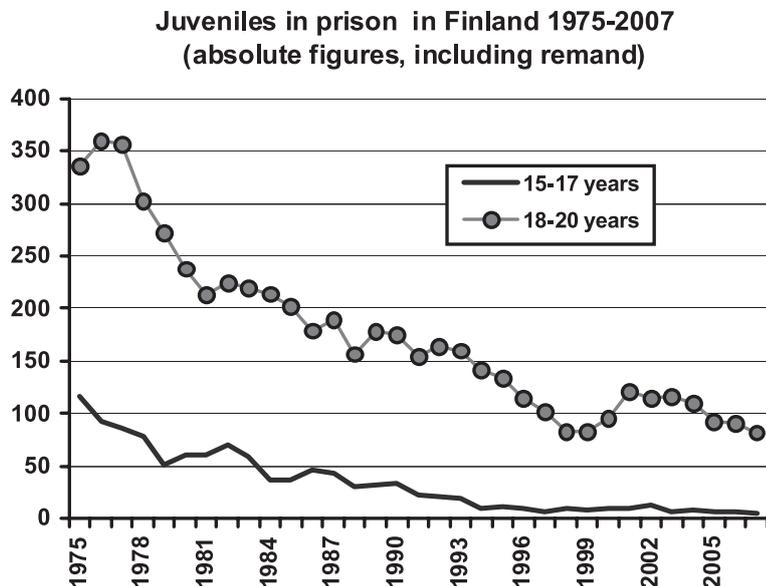


Figure IV.5 The number of juvenile prisoners 1975-2007 (annual averages, absolute figures, remand included). Source: Criminal Sanctions Agency

The large number of children in custody is a specific problem for a substantial number of high-imprisonment countries. The share of juveniles under 18 of all prisoners may, in some cases, near one tenth of the overall imprisonment rate, while in most low-imprisonment countries this share ranges between 1 to 2 %. Today several low-imprisonment countries prefer other than criminal justice solutions in dealing with young offenders. According to the general Nordic youth justice model all children under 15 and many of those aged 15-17 are dealt with using social welfare and child protection measures, instead of the criminal law.

More alternatives to imprisonment

The international movements of the 1970s towards alternatives to imprisonment began to have legislative consequences first during the 1980s, and more widely in the 1990s. The Finnish experiences, on the other hand, prove that visible results can be achieved just by using traditional alternatives, such as fines and conditional sentences.

By the 1990s around two out of three prison sentences in Finland were imposed conditionally and fines accounted for more than 60 % of all penalties imposed by the courts. It was unlikely that these alternatives could be extended beyond that point. New alternatives were needed, and community service served that purpose. Community service was adopted on an experimental basis in 1992 and made permanent in 1995. As the statistics below show, the number of prison sentences fell, together with the increase in the number of community service orders, between 1992-1997. In a short time community service came to replace 35 % of short prison sentences of a maximum of eight months.

Imprisonment and community service in the Finnish court practice 1992-2005

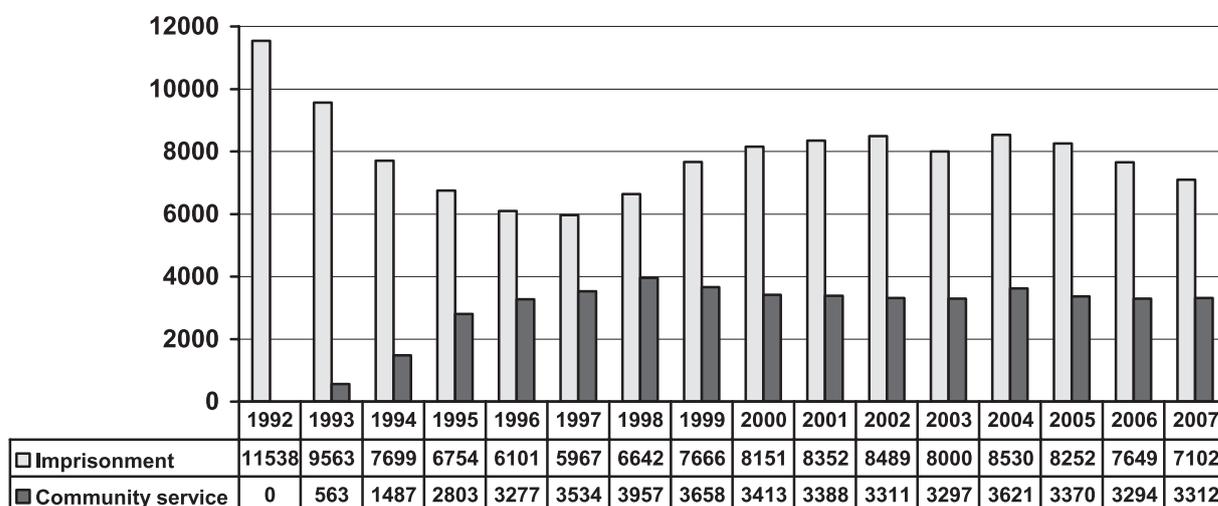


Figure IV.6 Imprisonment and community service in Finland 1992-2007 (court statistics).

Source: Statistics Finland

All in all, there is evidence from low imprisonment countries, such as Scandinavia and Germany that frequent use of fines goes together with lower imprisonment rates. The same holds true for traditional alternatives such as the conditional and suspended sentence, as well as more recent innovations such as community service and electronic monitoring (especially in Sweden). Overall, a substantial part of the low imprisonment level in Scandinavia, Germany and Switzerland may be attributed to the effective implementation of non-custodial alternatives.

The lack of alternatives may obviously explain the overuse of imprisonment in countries whose sanctions system operates mainly through imprisonment. Often this may also be a question of material resources. New alternatives, such as community service and electronic monitoring, require a proper infrastructure. But in such cases, it might be good to remember that there are also traditional alternatives, such as fines and conditional and suspended sentences, which may contribute to the system with a much lighter infrastructure. These low-cost sanctions are available to most jurisdictions without any major investments. And using shorter sentences does not require any infrastructure at all.

Prison rates and crime rates

These were by far not the only reforms that were carried out in order to bring down the Finnish prisoner rates. Other important changes were made in provisions concerning pre-trial, preventive detention, day-fine rules, conditional imprisonment, drunken driving, non-prosecution, etc. Also, prison laws were reformed and new enforcement practices were adopted in order to ease the overcrowding problem (open prisons and prison furloughs).

The overall result of these reforms was a substantial reduction in the prison population from the exceptionally high level of 150 (p/pop) in the beginning of the 1960s, to the common Nordic level of around 60 in the early 1990s. This raises also the question of what were the crime preventive effects of this steep decrease in the use of imprisonment. To evaluate this, we need to include the other Nordic countries in the comparisons.

These countries have strong social and structural similarities. But they have different penal history on one point: in the exceptional fall of the imprisonment rate that took place in Finland from the 1950s. This provides an unusual opportunity to assess how drastic changes in penal practices in one country have been reflected in the crime rates compared to countries (with similar social and cultural conditions) which have kept their penal systems more or less stable. Figure VI.2 shows incarceration and reported crime rates in Finland, Sweden, Denmark and Norway from 1950 to 2005.

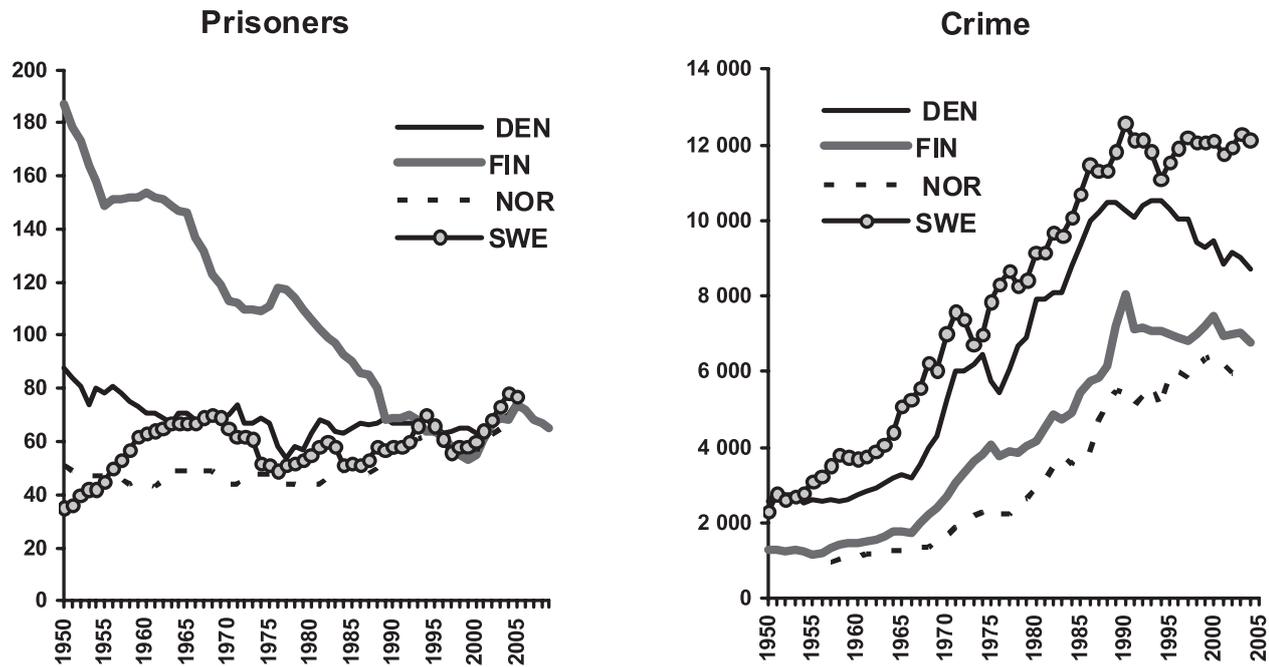


Figure IV.7 Prison rates and crime rates in four Nordic countries 1950-2005. Compiled from: Falck et al 2003 and national Statistics

There is a striking difference in the use of imprisonment, and a striking similarity in the trends in recorded criminality. That Finland has substantially reduced its incarceration rate has not disturbed the symmetry of the Nordic crime rates. These figures, once again, support the general criminological conclusion that crime and incarceration rates are fairly independent of one another; each rises and falls according to its own laws and dynamics.

V. CONCLUSIONS

The title promised an answer to the question of “causes of prison overcrowding”. Unfortunately, no simple answers are available.

In several countries, overcrowding results simply from the overuse of pre-trial detention. This applies especially to the African regions. In many of the African prisons suffering from severe overcrowding, more than half of the prisoners are on pre-trial detention.

But besides the use of pre-trial detention one should look also for other reasons behind overcrowding.

Against what one could assume, trends in crime seem to have less impact on the overall use of

imprisonment. There is no general association between total reported crime and victimization. Nor do the overall trends of reported crime associate systematically with changes in incarceration. The search for the reasons for overcrowding and differences in the use of imprisonment must proceed beyond the analyses of crime trends. This does not mean that crime is irrelevant, but the relevance of crime may differ, depending on other social and political factors.

The search for these background causes may take different routes. We may examine individual countries and their histories. Or we may compare a larger number of countries in order to figure out what factors are common in high imprisonment countries, and what unites low imprisonment countries. Both methods increase our understanding of the dynamics of penal change.

In a wider historical and comparative perspective, the general practice of punishment seems to be conditioned by macro level factors, including economic and social structures, political culture, and also public sentiments and political legitimacy. This may appear disappointing for anyone wishing to initiate a penal change. However, there is always room for political choice, even in this “structurally given” environment. It is, still, in the hands of local governments and politicians to decide, what to do and how to conduct domestic penal policy. In the end, it is up to political will.

This conclusion is highlighted by the case study from Finland. High incarceration was defined at the political level as a problem. The Finnish politicians also understood and accepted that the use of imprisonment could be reduced without serious repercussions on the level of criminality, and they acted accordingly.

One central element behind the success was a broad based approach to the problem. The reform programme was grounded in research-based theoretical notions on the functions of the criminal justice system. Legislative actions were carried out on all fronts and of all levels of the criminal justice system: in criminal process, sanctions systems, specific offences, sentencing principles, enforcement and prison law, and juvenile justice. This was achieved with the close cooperation of all the key groups in the criminal justice system.

Appendix. Countries by prisoner rates and occupancy levels (ICPS)

Prisoners /100 000 (2008)	Occupancy rate %						Total
	<75 %	75-100 %	101-110 %	111-150 %	151-200 %	Over 200 %	
-50	Andorra Liechtenstein Solomon Islands Niger Gambia	Faeroe Islands (Denmark) Nigeria Iceland	Mauritania Republic of Guinea	Liberia India Nepal	Burkina Faso	Sierra Leone	8 %
51-100	Sao Tome e Principe Iraq Vanuatu Syria	Angola Austria Bahrain Bosnia and Herzegovina: Federatio Denmark Finland Germany Ireland, Republic of Kosovo/Kos Malta Netherlands Norway Papua New Guinea Switzerland Tonga Northern Ireland	Japan Sweden Guatemala Samoa Cyprus Kiribati	Italy Paraguay Venezuela France Belgium Slovenia Marshall Islands Mayotte (France) Madagascar Bosnia and Herzegovina: Republika Croatia Mozambique Cambodia	Senegal Indonesia Ghana Malawi Haiti Uganda	Bolivia Cote D'Ivoire Pakistan Congo (Dem Repub of) Bangladesh Benin	28 %

101-150	Cook Islands (NZL) Monaco Kyrgyzstan Guernsey (United Kingdom) Tajikistan Isle of Man (United Kingdom)	Slovakia Romania Jordan Armenia Portugal Fiji Bulgaria Canada Lesotho Hong Kong (China)	UK: Scotland Macedonia Kuwait Turkey Zimbabwe Australia Montenegro	Uzbekistan Serbia Hungary Colombia Nicaragua Brunei Darussalam Greece Myanmar Ecuador	Philipp. New Caledon. Sri Lanka Tanzania	Burundi Kenya Cameroon Zambia	22 %
151-250	Northern Mariana Islands (USA) Gibraltar (United Kingdom) Jersey (United Kingdom)	Macau (China) Moldova Azerbaijan Dominican Republic Turkmenistan New Zealand Lithuania Swaziland Namibia Argentina Czech Republic Costa Rica	Greenland (Denmark) Mauritius Reunion (France) Poland Luxembourg	Jamaica England & Wales Guadeloupe Lebanon Malaysia Albania Martinique (Mexico Honduras Spain Libya Uruguay Brazil	United Arab Emirates Peru Algeria Morocco	Rwanda French Polynesia Iran	22 %
251-400	Seychelles Bermuda (UK) Latvia	Kazakhstan Antilles Puerto Rico (USA) Trinidad and Tobago Aruba (Netherlands) Estonia Singapore Israel Ukraine St Vincent and the Grenadines	Guyana	Cayman Guam (USA) St Lucia Antigua and Barbuda French Guiana/Guyane South Africa Botswana Maldives Dominica	Chile Thailand Panama Suriname El Salvador	Barbados	16 %
Over 400		Belize Russian Federation Virgin Islands (UK)	Belarus USA	Bahamas Georgia Anguila	St. Kitts and Nevis	Grenada	5 %
Total	11 %	30 %	12 %	27 %	11 %	9 %	100 %

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PRISON OVERCROWDING

- Finding Effective Solutions. Strategies and Best Practices Against Overcrowding in Correctional Facilities -

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1. Introduction: General remarks

Prison overcrowding is a serious problem indeed; moreover it is an elusive phenomenon although national and international actors have dealt with it for decades¹. Overcrowding seems even to represent a characteristic troubling the modern prison since its invention in the 19th century². The ongoing debates in California on how to resolve prison overcrowding demonstrate the problems prison systems face when prisons are seriously overcrowded and the problems politicians face when looking for a rapid way out of prison overcrowding³ under the double pressure of court orders and a severe fiscal crisis. And it is certainly also fair to say that it is in general much easier to produce overcrowded prisons than developing and implementing effective ways to reduce prison populations. The debates demonstrate, however, also, that the problem of prison overcrowding is located at an intersection where several important policy and crime research related topics converge. These topics concern criminal sentencing, the role of prison sentences and imprisonment in the system of criminal sanctions, the standards adopted when it comes to accommodating prisoners and providing adequate health care and rehabilitative services, the development of crime, in particular crime which attracts prison sentences, the budget provided for prisons and prison construction as well as economic restraints and finally general criminal policy determining the course of criminal law and punishment in a society. Overcrowding somehow is associated with all of these issues, although it is not clear how these issues interact and under what conditions they become effective in turning the course of the growth or decline in prison populations. The cross-sectional nature of prison overcrowding is challenging because of the complexity coming with it⁴.

On the one hand overcrowding sometimes seems to emerge as a problem which remained hidden for long time until it all of sudden puts policy makers under pressure, be it as a consequence of activities

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- 1 See for example United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules) A/RES/45/110, 14 December 1990; Prison Overcrowding Project: Etiology of Prison Populations - Implications for Prison Population Projection Methodology. National Institute of Corrections, United States 1984; National Institute of Corrections: Our Crowded Prisons. The Annals of the American Academy of Political and Social Science. Vol. 478, Beverly Hills 1985; United Nations Economic and Social Council: International cooperation aimed at the reduction of prison overcrowding and the promotion of alternative sentencing. Resolution 1998/23, 44th plenary meeting, 28 July 1998.
 - 2 Mullen, J.: Prison Crowding and the Evolution of Public Policy. National Institute of Corrections: Our Crowded Prisons. The Annals of the American Academy of Political and Social Science. Vol. 478, Beverly Hills 1985, pp. 31-46, p. 31.
 - 3 Governor of the State of California: Prison Overcrowding State of Emergency Proclamation. Office of the Governor, 10/04/2006.
 - 4 See United Nations Economic and Social Council: Reform of the Criminal Justice System: Achieving Effectiveness and Equality. Use and Application of United Nations Standards and Norms, Especially Concerning Juvenile Justice and Penal Reform. Report of the Secretary-General, 2002.
 - 5 See for example Amnesty International: Amnesty International's Concerns in Serbia, including Kosovo: January-June 2009. www.amnesty.org/en/library/asset/EUR70/016/2009/en/f2e02aae-bf9a-4989-9d3d-3545d077e604/eur700162009en.pdf, p. 4; CPT: Report to the Government of the United Kingdom on the visit to the United Kingdom carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 18 November to 1 December 2008. Strasbourg 2009, pp. 20-21; European Court of Human Rights, Judgment as of 22 October 2009 in the cases *Orchowski v. Poland* (application

of human rights watchdogs or court decisions which find serious violations of constitutional rights⁵. On the other hand, rapid declines of the prison population seem to come often also as a surprise for criminal justice administrators. The patterns of turning points in the course of prison populations reflect to a certain extent the degree of stability of criminal justice policies and criminal sentencing and the extent of their insulation from outside pressures.

Policies aimed at reducing prison overcrowding are faced with problems of how to introduce and to explain changes in sentencing practices or parole decision-making to a public which demands increasingly for more security and often equates security with long prison sentences, incapacitation and restrictive parole⁶. Many countries are exposed to economic and financial hardships which bring with it conflict-laden choices on where to direct scarce resources. Furthermore, policy makers have to respect separation of power principles and thus are subject to normative constraints which contribute to problems of effective planning, close coordination and rapid adjustments of the use of prison sentences and the flow of prisoners⁷. The subsystems of criminal justice are independent from each other, the operations of subsystems like criminal courts in terms of sentencing decisions do not consider the possible impact such decisions will have on the prison system⁸. Despite such problems overcrowded prisons have stimulated attempts to develop instruments which provide projections or forecasts of the course prison populations will take in order to be able to make sound decisions on whether to provide for more prison capacity or to close prisons⁹. But, projections of prison populations are faced with well known problems of predicting the future, point to uncertainty and ultimately also to self-fulfilling prophecies. Prison projections have been developed as a basis for policy making in particular in the United Kingdom¹⁰, in the United States¹¹, Canada¹², Australia¹³ and New Zealand¹⁴. Prison projection methodology, however, has not received much attention in other parts of the world.

Prison overcrowding can come as the result of a slow, steady and long term increase in the number of prisoners, developing into a culture of "chronic overcrowding"¹⁵; it can come also in a rapid move upwards for example in the wake of collective violence and as a consequence of detaining scores of

no. 17885/04) and Norbert Sikorski v. Poland (no. 17599/05) holding that the conditions under which the applicants are detained establish a breach of Art. 3 of the ECHR and that where prison overcrowding reached a certain level, the lack of space in a prison could constitute the central factor to be taken into consideration under Article 3; see also the judgment as of 26 May 2008 of the Polish Constitutional Court: the serious and chronic nature of prison overcrowding in Poland can in itself be qualified as inhuman and degrading treatment; Article 248 of the Polish Code of Execution of Criminal Sentences (which allows for departing from the minimum space of 3 m² per prisoner) was incompatible with Article 40 (prohibiting inhuman and degrading treatment) of the Constitution.

- 6 See for example CAT: Summary record of the 622nd meeting: Argentina. 22/11/2004. CAT/C/SR. 622, No. 22.
- 7 Kaufman, G.: The National Prison Overcrowding Project: Policy Analysis and Politics, a New Approach The ANNALS of the American Academy of Political and Social Science 1985; 478, pp. 161-172.
- 8 Albrecht, H.-J.: Particular Difficulties in Enforcing the Law arising out of basic Conflicts Between the Different Agencies Regarding the Best Suited Reactions upon Highly Sensitive Kinds of Crime. In: Council of Europe (Ed.): Interactions within the Criminal Justice System. Strasbourg 1988, pp. 41-82.
- 9 Miller, D.: Prison population projections. A review of methods used by state correctional agencies. Illinois Dept. of Corrections, Bureau of Policy Development 1981; Blumstein, A.: Research on sentencing. National Research Council, Washington 1983, pp. 239.
- 10 Ministry of Justice: Prison Population Projections 2009-2015, England and Wales. London, Ministry of Justice Statistics Bulletin, 28 August 2009.
- 11 See for example Minnesota Department of Corrections: Minnesota Prison Population Projections. Fiscal Year 2008 Report. St. Paul 2008; according to PEW: Public Safety, Public Spending. Forecasting America's Prison Population 2007-2011. Washington 2007, V, 42 states and the Federal prison administration have adopted prison projections as instruments to instruct policy makers.
- 12 Boe, R.: A Medium-Term Federal Offender Population Forecast: 2001 to 2004. Correctional Service of Canada, February 2001.
- 13 Fisher, G.: Victoria's Prison Population: 2001 to 2006. Sentencing Advisory Council, Melbourne 2007.
- 14 www.justice.govt.nz/publications/global-publications/c/2009-2017-criminal-justice-forecast-report
- 15 Report to the Government of the United Kingdom on the visit to the United Kingdom carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 18 November to 1 December 2008. Strasbourg, 8 December 2009, pp. 20, 22, 68.
- 16 Amnesty International: Rwanda. The enduring legacy of the genocide and war. London 2004, pp. 3-4.

perpetrators for serious crimes as it was (and evidently still is) the case in Rwanda¹⁶. In the wake of the Rwandan genocide 1994, approximately 120.000 persons suspected being involved in mass murder have been detained in a prison system designed only for a small fraction of this number and in face of a criminal justice system capable to deal with only a few thousand cases per year¹⁷. Systems may be affected by prison overcrowding for short periods of time and manage to deal with it quickly; in some countries overcrowding appears as an ebb and flow phenomenon¹⁸ others suffer from overcrowding for extended periods of time and do not seem to find effective, sustainable solutions.

Strategies against overcrowding must be subject to thorough evaluation. It has been noted that the “acid test” of strategies against overcrowding is not what can be temporally or locally achieved but what can be sustained¹⁹. The question of evaluation poses a myriad of (old) problems which are visible in cost-benefit research addressing sentencing options, prison and treatment regimes or studies on net widening. Moreover, the quest for sustained effects points to longitudinal studies and the availability of reliable data on various aspects of criminal justice and corrections, therefore also to significant commitments on the side of reform and research communities.

2. How is Overcrowding Explained?

2.1 Introduction: Overcrowding Defined

The search for effective solutions to overcrowding has to be preceded by the search for causes of overcrowding and is dependent therefore on a definition of overcrowding. While at its essence, the size of a prison system is a function of how many people are admitted to prison and how long they remain there²⁰, the definition of overcrowding and the determination of a situation of overcrowding depends on a mix of normative and factual elements. Normative links to the definition of overcrowding are provided by international and regional human rights instruments which prohibit cruel, inhuman and degrading treatment and punishment and guarantee human dignity. Besides the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), the International Covenant on Civil and Political Rights contains provisions that prohibit cruel, inhuman or degrading treatment and punishment (Art. 7) and provides for a mechanism of monitoring prison conditions for example through visits and reports of a Special Rapporteur. Regional human rights treaties reiterate international prohibitions of cruel, inhuman and degrading punishment as do national constitutions. Sometimes national constitutions explicitly mention a prisoners right to “adequate accommodation” (for example the South African Constitution Art. 35, 2e which places “adequate accommodation” in the context of “conditions of detention that are consistent with human dignity”). In exceptional cases national prison law defines the minimum square meters per prisoner (see for example Article 110 of the Polish Code of Execution of Criminal Sentences). Moreover, a number of UN and regional soft law instruments outline minimum standards as regards prison conditions (and prison accommodation) and serve as guidelines in judging infringements on the prohibition of cruel, inhuman or degrading punishment, among them the “Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment” or the European Prison Rules²¹.

The problem of defining overcrowding is due to the lack of an internationally consented set of

17 PRI Rwanda: The contribution of the Gacaca jurisdictions to resolving cases arising from the genocide. Contributions, limitations and expectations of the post-Gacaca phase. London 2010, p. 11.

18 Human Rights Watch: Prison Conditions in Indonesia. An Asia Watch Report. New York 1990, pp. 12-13.

19 Varenik, R.O.: Mixing Politics, Data, and Detention: Reflections on Reform Efforts. In: Open Society Institute (ed.): Justice Initiatives. Pretrial Detention. New York 2008, pp. 172-183, p. 174.

20 Mauer, M.: The Hidden Problem of Time Served in Prison. Social research 74(2007), pp. 701-706.

21 Council of Europe: European Prison Rules. Strasbourg 2006, p. 47; see in particular rule 18.4: National law shall provide mechanisms for ensuring that these minimum requirements are not breached by the overcrowding of prisons; see also Recommendation No. R (99) 22 of the Committee of Ministers to Member States Concerning Prison Overcrowding and Prison Population Inflation, and UN Standard Minimum Rules for the Treatment of Prisoners Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977, rules on accommodation.

criteria which could be used to construct an instrument that can be applied uniformly in measuring overcrowding. In the evaluation of prisons with regard to overcrowding courts have adopted a case by case approach which does not rely on a single indicator (like for example square meters available for an individual prisoner), but consider a wide range of aspects in a process which after all weighs interests of the prison administration, security, economics and individual rights of the prisoner. Overcrowding, of course, then refers to a multi-dimensional assessment as the core of the overcrowding problem is located in the judgment whether proper prison regimes, related programs of rehabilitation, health care, safety of prison inmates as well as staff and public security, kitchen and sanitary facilities, as well as visiting programs and facilities for work and education and outdoor exercise may be operated and delivered according to established standards under certain conditions of occupancy. Decisions of the European Court of Human Rights on the space which should be available refer to guidelines set by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment²². The CPT has stressed that a standard of 3 m² per prisoner does not offer a satisfactory amount of living space and has recommended to adopt a standard of at least 4 m² per prisoner. It advised also that cells with less than 6 m² should be taken out of service as prisoner accommodation²³. The Special Rapporteur has underlined that four square meters are in particularly not acceptable if (remand) prisoners are confined for most of the time within the cell and remain in remand prisons for extended periods of time²⁴. 7 m² per prisoner might serve as an approximate and desirable guideline for a detention cell, but establishing overcrowding from the perspective of an infringement of Art. 3 of the European Convention on Human Rights will be dependent on more than just an observation of less than 7 square meters being available for one prisoner. Length of time spent in an overcrowded prison facility, possibilities to spend time outside the cell, participation at furlough programs, the delivery of rehabilitative services and medical treatment as well as security issues will be taken into account, too. Insofar, overcrowding will also be dependent on the normative and cultural framework within which overcrowding (in terms of infringements on basic rights) is assessed. The European Court of Human Rights, however, has made clear that falling under a certain amount of space will always raise an issue under the prohibition of torture and inhumane and degrading treatment or punishment. The finding that a prisoner was placed in a cell which left 0,9-1,9 m² of space per inmate evidently results in inhumane conditions of confinement. In the judgment reference was made to aggravating circumstances coming with overcrowding, in particular the necessity to sleep in turns, disturbance through general commotions and noise from a large number of inmates as well as the lack of "real privacy" and risks of catching diseases as well as the length of confinement under overcrowded conditions, while it was noted that a lack of intent to put prisoners into such conditions would not exclude a finding of violation of the prohibition of inhumane and degrading treatment or punishment (Art. 3 ECHR)²⁵. The European Court on Human Rights in recent cases in fact has stressed that space itself could represent the central factor indicating an overcrowded situation which establishes an infringement on the prohibition of inhuman treatment/punishment²⁶. It does not come as a surprise

22 CPT: Report to the Government of Bosnia and Herzegovina on the visit to Bosnia and Herzegovina carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 11 to 15 May 2009. CPT/Inf (2010) 11, Strasbourg, 31 March 2010, No. 24, 4 square meters per prisoner in a multi-occupancy cell; see also CPT Reports on the visit to Poland carried out by CPT from 30 June to 12 July 1996, on the visit to Albania carried out by the CPT from 9 to 19 December 1997", on the visit to Slovakia by the CPT from 9-18 October 2000.

23 CPT: Report to the Polish Government on the visit to Poland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 30 June to 12 July 1996. Strasbourg, 24 September 1998, No. 70.

24 Commission on Human Rights: Report of the Special Rapporteur, Manfred Nowak. Addendum. Follow-up to the recommendations made by the Special Rapporteur. visits to Azerbaijan, Brazil, Cameroon, Chile, Mexico, Romania, the Russian Federation, Spain, Turkey, Uzbekistan and Venezuela. E/CN.4/2006/6/Add.2, 21 March 2006, p. 57.

25 ECHR *Kalashnikov v. Russia*, Application No. 47095/99, Judgment, Strasbourg, 15 07 2002.

26 ECHR: *Orchowski v. Poland*, Application no. 17885/04), Judgment, Strasbourg, 22 October 2009; *Sikorski v. Poland*, Application No. 17599/05, Judgment, Strasbourg, 22 October 2009.

27 Court references 2B1367 and 2B1368/09 in the Sheriff Court of Lothian and Borders at Edinburgh under the Extradition Act 2003, *Poland v. Adam Kropiwnicki*, Prisoner in HM Prison Saughton, Edinburgh 16th December 2009.

then that concerns for systemic overcrowding and the risk of a violation of Art. 3 ECHR have been raised in European Arrest Warrant proceedings²⁷.

Approaches to the assessment of overcrowding under international and national laws and standards amount roughly to a “totality-of conditions” test²⁸ which essentially provides for a multi-dimensional scale. This scale includes “core conditions” of adequate circumstances of detention/imprisonment²⁹, including the space available for a prisoner (and it embraces also a “prison space per se” test). The smaller the space available, however, the more important becomes space in itself. The ruling of the Polish Constitutional Court³⁰ holding that an emergency provision in the prison law which allows suspension of the statutorily determined minimum space of 3 square meters is unconstitutional, underlines that a minimum amount of space determines a baseline of overcrowding. In most countries in Western Europe, where the tradition has been that each prisoner should be kept in a single cell, overcrowding generally means having two or three prisoners living in a cell that was originally constructed to hold one person. However, single cell accommodation is not the rule in other regions. In some countries in Eastern Europe throughout the 1990s overcrowding meant three prisoners having to share one bed, sleeping in turns. The size of living accommodation is, of course, only one element to be taken into account when considering whether a prison is overcrowded. The Anti-Torture Committee of the Council of Europe has moreover stated that even with an occupancy level of 95% of the total design capacity of a prison estate, it becomes difficult or even impossible to deliver those services which are required to ensure respect for inmates' human dignity³¹. Insofar, the definition of overcrowding and its relevance for cruel, inhuman, degrading treatment/punishment as well as human dignity is subject to an ongoing discourse which reflects various concerns and interests.

Apart from courts and human rights monitors, prison administrations have adopted procedures and standards which result in measures of prison capacity and with that also measures of overcrowding. Such definitions refer basically to a number of prisoners actually imprisoned exceeding the number of prison cells/beds which has been set as the maximum to be held in a prison. With a “designated capacity” the number of prisoners is established through administrative decisions for whom the prison can provide adequately for medical care, rehabilitative programs, education, personal safety of prisoners and staff³². Besides designated capacity, design, rated and operational capacity concepts can be found. Design capacity refers to the number of inmates which in the planning process was intended, operational capacity evidently means the number of prisoners which can be accommodated without putting at risk basic objectives such as health, safety and security while rated capacity relies on assessments by designated officials in a jurisdiction³³.

Definitions of overcrowding thus require first of all the establishment of a maximum number of prisoners which can be accommodated in a prison facility. The maximum number must be established on the basis of criteria consistent with human rights and minimum standards issued by the United Nations or regional bodies. Definitions of overcrowding, however, will differ among world regions and will be dependent partially on whether single cell accommodation is adopted as a rule³⁴ or communal

28 Chung, S.Y.: Prison Overcrowding: Standards in Determining Eight Amendment Violations. *Fordham Law Review* 68(2000), pp. 2351-2400.

29 Steinberg, J.: Prison Overcrowding and the Constitutional Right to Adequate Accommodation in South Africa. Paper commissioned by the Centre for the Study of Violence and Reconciliation, Capetown, January 2005.

30 Polish Constitutional Court, decision as of 26 May 2008.

31 CPT: Report to the Government of the United Kingdom on the visit to the United Kingdom carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 18 November to 1 December 2008. Strasbourg 2009, p. 20.

32 Griffiths, C.T., Murdoch, D.J.: Strategies and Best Practices against Overcrowding in Correctional Institutions. International Centre for Criminal Law Reform and Criminal Justice Policy: Vancouver 2009, p. 1.

33 Baker, J. et al.: A Solution to Prison Overcrowding and Recidivism: Global Positioning System Location of Parolees and Probationers. - Innovative Tracking Systems. University of Maryland, 2002, pp. 31-32.

34 Coyle, A.: Managing prison overcrowding: A European perspective. Rencontre Européenne des Directeurs d'Administration Pénitentiaire Ministère de Justice. Place Vendôme, Paris, 11 July 2008. International Centre for Prison Studies, London 2008.

cells and on the general prison designs and culture³⁵, on the economic resources available and the degree of elasticity which is demanded from prison administration by politicians, law makers and the judiciary. However, imprisonment (and prisons) refers to criminal punishment which is the least elastic when contrasting it with probation, day fines or other community sanctions. The question of how much “double bunking” (or triple bunking) can be tolerated and for which time demonstrates the apparent need for elasticity and the corresponding need to monitor tightly its use in order to avoid that short term relief strategies turn into long term overcrowding. Prison capacity therefore has been assumed to be a “slippery concept” which expresses the need for elasticity and can be used to make overcrowding more or less apparent³⁶.

Problems of assessing occupancy rates from the perspective of overcrowding in many countries are due to the lack of robust data on the number of prisoners detained and available (or designed) and adequate prison space. Reports on the basis of prison visits carried out by General Rapporteurs or commissions provide for additional, but selective information, they may not compensate fully a general deficit in valid and reliable (in particular longitudinal) data on prison systems.

2.2 Causes of Overcrowding

2.2.1 Where and When Does Overcrowding Occur?

Explanations of overcrowding have been preoccupied with the excessive use of prison sentences and the overall growth of prison populations³⁷. Insofar research has dealt rather with explaining prison growth than finding answers to the question of how overcrowding may be explained. Evidently, it is assumed widely that overcrowding is strongly correlated with a heavy use of imprisonment³⁸. The most prominent example these days certainly concerns California exhibiting even by US standards an extremely high rate of imprisonment and at the same time extreme overcrowding which has resulted in a court decision obliging the state of California to reduce its prison population by some 55.000 prisoners within three years in order to re-establish prison conditions not infringing on constitutional rights of prison inmates (8th Amendment)³⁹. In Europe, England/Wales may serve as an example for a prison system which on the one hand is characterized by a strong increase in the number of prisoners and top-ranked in Western Europe as regards the prisoner rate, and, on the other hand experiences during the last years overcrowding in many prisons⁴⁰.

However, a closer look at prison systems reveals that the correlation between the rate of imprisonment and overcrowding is rather weak. Data from the Council of Europe Penal Statistics 2006 can be used for an analysis of prison occupancy rates of 42 European countries which are members of the Council of Europe⁴¹. Data for 2006 allow for a basic description of occupancy rates and the under- or over capacity operation of correctional systems. The data show that 17 correctional systems in 2006 had occupation rates which are less than 95% of the actual capacity (Latvia, Monaco, Northern Ireland, Turkey, Switzerland, Armenia, Azerbaijan, Republic Srpska, Iceland, Lithuania, Liechtenstein, Luxemburg, Malta, Moldova, Russian Federation, San Marino, Slovakia). 14 countries

35 Giffard, C., Muntingh, L.: The Effect of Sentencing on the Size of the South African Prison Population. Newlands 2006, p. 9.

36 Cox, G.H., Rhodes, S.L.: Managing Overcrowding: Corrections Administrators And The Prison Crisis. Criminal Justice Policy Review 4(1990), pp. 115-143, p. 120.

37 Blumstein, A., Piquero, A.R.: Restore Rationality to Sentencing Policy. Criminology & Public Policy 6(2007), pp. 679-688.

38 Hartney, C.: US Rates of Incarceration: A Global Perspective. Research from the National Council on Crime and Delinquency, November 2006, p. 1.

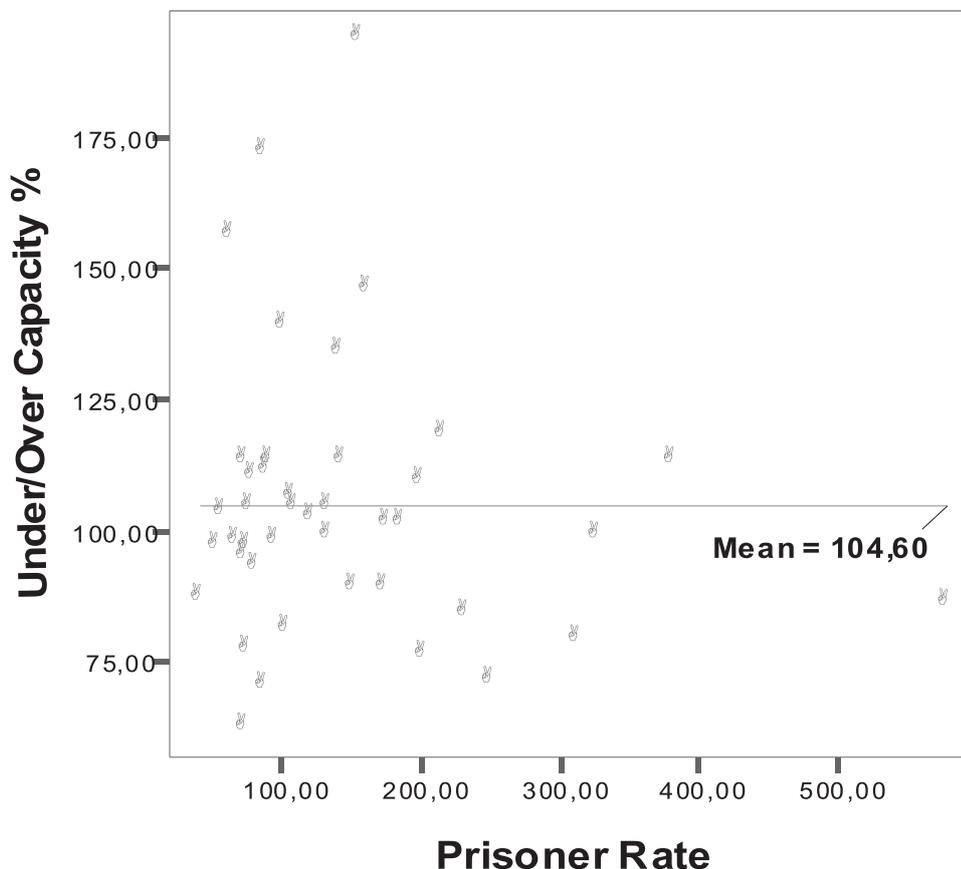
39 In the United States District Courts For the Eastern District of California and the Northern District of California United States District Court, Ralph Coleman et al.(Plaintiffs) v. Arnold Schwarzenegger et al (Defendants); Marciano Plata et al. (Plaintiffs) v. Arnold Schwarzenegger et al. (Defendants), No. CIV S-90-0520 LKK JFM P; No. C01-1351 TEH, August 4, 2009.

40 Gray, C., Elkins, M.: Projections of Long Term Trends in the Prison Population to 2008 8/01. England and Wales. London 2001.

41 Aebi, M.F.: Council of Europe’s Annual Penal Statistics. SPACE I. Strasbourg 2007, p. 18.

report occupation rates which fall in between 95% and 105% of the official prison capacity (Albania, Bosnia, Czech Republic, Denmark, Estonia, Germany, Netherlands, Norway, Portugal, Romania, Slovenia, Sweden, Macedonia, Scotland). Minor overcrowding (of less than 10%) is noted for two countries (Austria, Georgia), while seven countries had a number of prisoners which exceeded prison capacity by 10 to 30% (Ukraine, Poland, Belgium, Croatia, Finland, France, England/Wales). Three countries are affected by occupation rates ranging between 30-50% over the capacity (Spain, Italy, Hungary) and the rates of another three (Greece, Cyprus, Bulgaria) were 50% above the number of prisoners which officially can be accommodated in available prison cells.

Graph 1: Prisoner Rates (100.000) and Overcrowding in Europe



Source: Aebi, M.F.: Council of Europe’s Annual Penal Statistics. SPACE I. Strasbourg 2007, p. 18 the figures provided in SPACE I for England/Wales are evidently wrong and have been replaced by the figures provided by NOMS: Population in Custody. Monthly Tables, October 2006, England and Wales. London 2006, table 4.

The correlation between prison occupancy rates and prisoner rates calculated for all countries covered by the Council of Europe prison statistics amounts to -0.153 (Pearson’s R) indicating a negative correlation (which means that with an increasing prisoner rate occupancy rates are decreasing). However, this is due to many of the Eastern European countries still providing for significant official prison capacity despite significant decreases in the number of offenders actually sent to prison⁴². This results in many of the Eastern European countries experiencing a rather low average utilization of prison capacity. When taking Eastern European countries out of the calculation then, the correlation coefficient turns into the positive direction (0.204). But, the coefficient is not significant and should be

42 See for example CPT: Report to the Latvian Government on the visit to Latvia carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 27 November to 7 December 2007. Strasbourg 2009, pp. 21-22, noting a significant reduction of the number of prisoners since the last visit of the CPT to Latvia (from 8231 in to 6530 in 2007) and a number of prisoners well below the maximum capacity of Latvian prisons.

interpreted as demonstrating that overcrowding can come with both, low and high levels of prisoner rates.

2.2.2 Occupancy Rates and Their Correlates

In order to look for broader patterns of possible correlates of overcrowding occupancy and prisoner rates (as on display in the most recent World Prison Survey⁴³) have been analyzed with introducing various indices related to the economy, human development, social equality, state fragility, violence and corruption. The analysis results in the correlation matrix on display below. The degree of inequality is represented by the Gini index which measures (economic) inequality on the basis of the distribution of family income in a country. The corruption related data were taken from the most recent Corruption Perception Index published by Transparency International. Violence data stem from statistics compiled by UNODC on the basis of criminal justice and health data. The Human Development Index considers besides the Gross National Product life expectancy, the rate of literacy as well as other economic and education related indicators. Finally, effectiveness and legitimacy indices refer to security, economic, political and social dimensions which add up to the (total of) state fragility index⁴⁴.

Table 1: Correlates of Prison Occupancy Rates

Variable	Total	Europe	Africa	South America	Asia
Prisoner Rate (100.000) R *	-.083	-.222	.098	.097	-.274
Sig	.341	.147	.627	.703	.175
Pretrial Detention % R	.451	-.014	.210	-.019	.723
Sig	.000	.929	.294	.030	.000
Foreigners % R	-.140	.085	-.299	-.148	-.032
Sig	.131	.583	.214	.558	.887
GDP Capita US\$ R	-.313	-.093	-.263	-.436	-.141
Sig	.000	.596	.186	.070	.501
Gini Index R	.226	.236	-.531	.362	.048
Sig	.010	.123	.005	.154	.816
Democracy Index R	-.162	-.251	.212	-.306	.146
Sig	.063	.100	.288	.216	.478
Violent Death / 100.000 R	.355	.411	.058	.512	.163
Sig	.000	.006	.772	.030	.436
Corruption Index R	-.318	-.207	-.158	-.068	-.168
Sig	.000	.176	.431	.788	.412
Human Development Index R	-.450	-.350	-.122	-.233	-.473
Sig	.000	.020	.587	.352	.017
State Fragility R	.378	.440	.188	.338	.207
Sig	.000	.004	.558	.185	.321
Effectiveness R	.390	.395	.140	.384	.266
Sig	.000	.010	.488	.128	.199
Legitimacy R	.318	.452	.061	.243	.082
Sig	.000	.003	.764	.347	.697

Sources: Gini Index: www.cia.gov/library/publications/the-world-factbook/fields/2172.html. GDP: www.infoplease.com/world/statistics/economic-statistics-by-country.html. Violence: UNODC, Homicide Statistics, Criminal Justice Sources - Latest available year (2003-2008); Homicide Statistics, Public Health Sources - Latest available year (2003-2008). Democracy Index: The Economist Intelligence Unit's Index of Democracy 2008. Prison figures: www.kcl.ac.uk/depsta/law/research/icps/worldbrief/. State Fragility, Effectiveness, Legitimacy: Marshall, M.G., Cole, B.R.: Global Report 2009. Conflict, Governance, and State Fragility. Center for Systemic Peace, Center for Global Policy 2010. Human Development Index: hdr.undp.org/en/ Human Development Reports. Corruption Index: Transparency International: Corruption Perception Index 2009. www.transparency.de

* R = Pearsons Correlation Coefficient

The correlations on display in table 1 reveal nothing unexpected for the data at large. Overcrowding

43 www.kcl.ac.uk/depsta/law/research/icps/worldbrief/

44 Marshall, M.G., Cole, B.R.: Global Report 2009. Conflict, Governance, and State Fragility. Center for Systemic Peace, Center for Global Policy 2010, p. 31.

is correlated with the rate of pretrial detainees, the size of the GDP per capita, the degree of inequality as measured by the Gini index, democracy, the extent of perceived corruption, state fragility and its sub components as well as violence. Overcrowding is neither significantly correlated with the prisoner rate at large nor with the share of foreign prison inmates. On the basis of this pattern of correlations it can be concluded that overcrowding problems essentially are associated with problems of governance, a weak economy and obvious problems in the criminal justice systems (expressed in the share of pretrial detainees). When it comes to the regions it is also to be expected that due to small numbers correlation coefficients only rarely get significant. Most of the correlations which are found for world regions follow expectations. A significant correlation between pretrial detention and occupancy rates is not found for South America. This means that there is not much variation in the share of pretrial detainees in South American countries; all prison systems are affected to more or less the same extent.

2.2.3 Overcrowding in World Regions

2.2.3.1 Clusters of Overcrowding

A cluster analysis confirms the pattern of correlates presented in table 1. Three distinct clusters emerge, representing low (cluster 1), medium (cluster 2) and high (cluster 3) over capacity operation of correctional systems and displaying differences in economic, social, governance and criminal justice related dimensions. Cluster 1 points to a high GDP per capita, a low violence rate, low state fragility, high achievements in human development and democracy and a low extent of perceived corruption. Most of the countries falling into cluster 1 belong to Europe, North America and Oceania. Cluster 2 exhibits in comparison with cluster 1 a slightly higher rate of overcrowding, a comparable rate of pretrial detainees and a significantly higher rate of imprisonment. Differences in comparison with cluster 1 are particularly marked in the GDP variable, in violent death rates and in the corruption index. Cluster 3 embraces countries with high occupancy rates. While the prisoner rate in this cluster is low compared with the other clusters, it is distinguished from the other clusters clearly through a high rate of violent death, low per capita GDP, democracy and human development values as well as manifest signs of weak governmental structures. An elevated rate of pretrial detainees in cluster 3 points then to deficits in case processing and procedural capacity.

Table 2: Clusters of Overcrowding

	Final Cluster Centers		
	1	2	3
Occupancy Rate %	105,14	110,83	144,68
Pretrial Detainees %	26,73	24,74	40,01
GDP Capita US\$	32331,82	15604,35	3894,94
Violent Death/100.000	1,41	8,34	15,13
State Fragility Index 2008	1,05	2,17	11,37
Prisoner Rate / 100000	156,32	197,22	140,80
Human Development Index	954,09	867,57	656,78
Democracy Index	8,36	7,03	5,08
Corruption Index 2009	7,90	4,88	2,90
Share of Regions at Clusters	23% (100)Northern Europe	9% (25) Southern Africa	8% (75) Southern Africa
() % of countries from a region falling in clusters 1 - 3	36% (90) Western Europe	4% (10) South East Asia	9% (100) East Africa
	5% (10) Southern Europe	39% (53) Eastern Europe	14% (100) West Africa
	5% (33) Far East	13% (40) Southern Europe	5% (100) North Africa
	5% (10) South East Asia	4% (10) Western Europe	8% (100) Central Asia
	5% (20) Near East	4% (33) Far East	11% (80) South East Asia
	5%(20) Middle East	9% (40) Middle East	4% (100) Caribbean
	8% (100) North America	18% (25) South America	11% (47) Eastern Europe
	8% (100) Oceania		5% (50) Southern Europe
			1% (33) Far East
			3% (40) Middle East
			5% (80) Near East
			16% (75) South America

2.2.3.2 Overcrowding in Europe

When looking at prison occupancy rates as they unfolded after the last account in the Council of Europe Prison Statistics 2006, it can be observed that in many cases of overcrowding on display in the data from 2006 there were no improvements made. For Greece, the CPT noted at the occasion of a visit in 2007 that despite plans to implement a prison construction program and a criminal policy which should encourage alternatives to imprisonment and early release/parole, prison overcrowding had not lost its momentum⁴⁵. The problem of overcrowding persists also in Bulgaria⁴⁶ although Bulgaria has experienced a significant reduction in the prison population over the last years⁴⁷. Albania made progress in reducing overcrowding problems, though over capacity operation of facilities for remand and sentenced prisoners still is observed⁴⁸. Other European countries have evidently slipped deeper into overcrowding problems (Belgium⁴⁹, France⁵⁰, Italy⁵¹). Since mid 2008, overcrowding affects Irish prisons. In face of a “design capacity” of 2.969 places counted in July 2008 3.589 prisoners had to be accommodated and the Irish prison population reached almost 4.000 at the end of May 2009⁵². In England/Wales approximately a quarter of prisoners since the beginning of the new millennium is detained under conditions of overcrowding⁵³. On the other side, some countries have managed to reduce prison populations significantly (Portugal, Romania, The Netherlands, Germany)⁵⁴.

The situation in Central/Eastern Europe and Russia looks rather mixed. For Georgia, serious problems of overcrowding are reported, evidently as a consequence of a rapid increase in the number of prisoners between 2004 and 2008. The number of prisoners tripled in this period from some 6.500 to almost 20.000⁵⁵. Overcrowding as a problem has been raised for Poland and Hungary⁵⁶ (which is also visible in the number of cases pending before the European Court on Human Rights). The most dramatic reduction in prison numbers in any member state of the Council of Europe over the last decade occurred in Russia, where the prison population stood at over one million in 1998 and

45 CPT: Report to the Government of Greece on the visit to Greece carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 20 to 27 February 2007. Strasbourg 2008, p. 25; see also van Kalmthout, A.M. Knapen M.M., Morgenstern, C.: Pre-trial Detention in the European Union. An Analysis of Minimum Standards in Pre-trial Detention and the Grounds for Regular Review in the Member States of the EU. Nijmegen 2009, pp. 437-464.

46 United States Department of State, 2009 Country Reports on Human Rights Practices - Bulgaria, 11 March 2010, available at: <http://www.unhcr.org/refworld/docid/4b9e530d2.html> [accessed 28 March 2010]

47 Round Table on detention conditions, Prison population in the European Union Brussels 8 December 2009, <http://www.kcl.ac.uk/depsta/law/research/icps/worldbrief/?search=europe&x=Europe>, the number of prisoners in Bulgaria stands at approximately 9400 in 2009, a significant decrease from some 11500 in 1998.

48 Amnesty International: Amnesty International's Concerns in Albania: January-June 2009. London 2009, p. 3.

49 Committee against Torture: Committee Against Torture Begins Review of Report of Belgium. Geneva, 12 November 2008.

50 Report By Mr. Alvaro Gil-Robles, Commissioner For Human Rights on the Effective Respect For Human Rights in France Following his Visit From 5 to 21 September 2005, CommDH(2006)2, Strasbourg, 15 February 2006, p. 21.

51 Human Rights Council: Report of the Working Group on Arbitrary Detention. Addendum: Mission to Italy. A/HRC/10/21/Add.5, 26 January 2009, No. 24-27.

52 ICCPR Follow-Up Submission on Ireland, subsequent to rule 71, paragraph 5 of the UN Human Rights Committee's rules of procedure, August 2009, p. 4.

53 See www.publications.parliament.uk/pa/cm/cmhansrd.htm

54 15th Conference of Directors of Prison Administration: “Overcrowded Prisons: Looking for Solutions”. Conclusions by the General Rapporteur Edinburgh 9-11 September 2009, CDAP(2009)04; see also Round Table on detention conditions, Prison population in the European Union Brussels 8 December 2009, www.kcl.ac.uk/depsta/law/research/icps/worldbrief/?search=europe&x=Europe.

55 Penal Reform International: Assessment of Penal Legislation in Georgia. Tiflis 2009, p. 19; Human Rights Council: Tenth session. Agenda item 3. Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak. Addendum Follow-Up to the Recommendations Made by the Special Rapporteur. Visits to China, Georgia, Jordan, Nepal, Nigeria and Togo, A/HRC/10/44/Add.5, 17 February 2009, p. 98-100; Human Rights Watch: World Report. New York 2010, p. 416.

56 European Roma Rights Centre: Written Comments of the European Roma Rights Centre, Chance for Children Foundation and the Hungarian Helsinki Committee: Concerning Hungary. For Consideration by the United Nations Committee at its 98th Session, p. 12.

had fallen to 763,000 by the beginning of 2005⁵⁷. While the reduction has been explained by a mix of grounds, among them political will, legislative changes, the systematic involvement of key players of the criminal justice process, especially judges and prosecutors, re-assurance of the public and the media that the changes in the prison system will not threaten public safety, in recent years the prison population has increased again and stands in 2008 at approximately 900,000 prisoners (however still well below prisoner rates in the 1990s)⁵⁸. In other Central and Eastern European countries overcrowding has been linked to remand prisons and the vast use of pretrial detention. In Moldova efforts to reduce prison overcrowding have been launched through implementing alternatives to imprisonment, but overcrowding persists in remand prisons⁵⁹. Also, in the Ukraine problems of overcrowding are felt especially in pretrial detention centers⁶⁰.

2.2.3.3 North America

Prison growth has been particularly marked in the United States where a policy of mass incarceration⁶¹ has resulted in imprisonment and prisoner rates that go far beyond what is observed in other countries⁶². With 1 among 100 adults in prison at any given day costs for incarceration are placing increasing pressure on public budgets and experiences of imprisonment are far more prevalent among Hispanic and Afro-American men (with one in nine black men aged 20 - 34 years behind bars)⁶³. However, prison rates, prison growth and prison crowding vary widely in the United States⁶⁴. While rates of imprisonment continued to grow for almost four decades between 1973 and 2008, the pace of growth slowed down during the last years and 2009 saw the first time a decline - though small and amounting to - 0,4% for the United States at large⁶⁵. The overall decline did not reduce the divide between states with decreasing numbers of prisoners on the one hand and states with an expanding system of imprisonment. Rather, this divide is deepening, showing for example states with extreme drops in the number of prisoners and states with evenly extreme increases. Overcrowding in the American prison system can be studied on the basis of official accounts and statistics which provide for an accurate picture of occupancy of most prison systems in the United States⁶⁶. Canada, in contrast to the United States, has a far lower prisoner rate and less capacity problems despite a development of crime rates that corresponds to that in the United States.

2.2.3.4 Latin America

Latin America displays a mixed picture as regards the size and growth of prison population⁶⁷ but virtually all countries in this region have been plagued by prison overcrowding for decades. Recent reports of the Inter-American Commission on Human Rights have revealed overcrowding problems in the Chilean prison system⁶⁸. In Mexico overcrowded prisons have been linked to prison riots and

57 Russian Research Center for Human Rights: Russian Federation. NGO Report on the implementation of the ICCPR (prior to the adoption of the List of issues). Moscow, December 2008 p. 3.

58 Coyle, A.: Managing prison overcrowding: A European perspective. Rencontre Européenne des Directeurs d'Administration Pénitentiaire Ministère de Justice. Place Vendôme, Paris, 11 July 2008. International Centre for Prison Studies, London 2008, p. 8; Russian Research Center for Human Rights: opus cited, 2008, p. 3.

59 Human Rights Council: Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, Mission to the Republic of Moldova. A/HRC/10/44/Add.3, 12 February 2009, No. 30-48.

60 Amnesty International: Briefing for the Committee against Torture on Ukraine Index: EUR 50/001/2007 Geneva April 2007.

61 The PEW Center on the States: One in 100: Behind Bars in America 2008. Washington 2008.

62 Tonry, M.: Looking Back to See the Future of Punishment in America. social research 74(2007), pp. 353-378.

63 The PEW Center on the States: opus cited, 2008, p. 6.

64 The PEW Center on the States: opus cited, 2008, p. 7.

65 The PEW Center on the States: Prison Count 2010. State Population Declines for the First Time in 38 Years. Washington 2010, p. 1.

66 See for example Quarterly Report on the Status of Prison Overcrowding, Fourth Quarter 2009 Massachusetts Department of Correction Submitted in Compliance with Chapter 799 Section 21 of the Acts of 1985; Commission on Prison and Jail Overcrowding: Report to the Governor and the Legislature, State of Connecticut, 2006.

67 Walmsley, R.: World Prison Population List (eighth edition). Kings College, London 2009, p. 3.

severe impediments to successful re-entry programs⁶⁹. Argentina reports critical prison conditions in particular from the province of Buenos Aires. In 2009, the overpopulation in provincial prisons worsened with 77% of detainees placed in pretrial detention⁷⁰ and despite a landmark ruling of the Argentine Supreme Court from May 2005 which declared that all prisons in the country must abide by the United Nations Standard Minimum Rules for the Treatment of Prisoners there are no signs of significant changes. Brazil's prisons are plagued by severe overcrowding, too. Delays within the justice system contribute to overcrowding; some 45% of all inmates in Brazil are pretrial detainees. The Brazilian National Justice Council reported in 2009 that approximately 60,000 inmates were being held arbitrarily⁷¹. For Uruguay plans to address overcrowding have been developed in a response to a mission of the Special Rapporteur⁷². Paraguay, in spite of a rather low prisoner rate, displays heavy overcrowding in the prison system⁷³.

2.2.3.5 Overcrowding in Africa

Africa seems to be particularly exposed to overcrowding⁷⁴. The most recent figures show for all African countries (below the Sahara) for which information is available elevated rates of overcrowding⁷⁵. Overcrowding and related precarious conditions of prisons had been made a central point in the Kampala Declaration 1996 which draws on experiences from the 1970s and 1980s⁷⁶. In addition to chronic overcrowding problems, several African countries have experienced substantial growth of prison populations in recent years as well as deterioration of capacity problems coming with that. Uganda reports for October 2009 approximately 31.000 prisoners (up from around 20.000 in 2007). More than 50% of these are remand prisoners⁷⁷. As the prison capacity was established at around 10.000 beds in 2007, capacity problems evidently have significantly worsened. The optimistic assessment in the 2007 Uganda census report which assumed a further decline in the prison population growth, was certainly unfounded⁷⁸. The Tanzanian Prison Service is responsible for the custody and care of more than 45.000 inmates while its official accommodation capacity is 22.669. This implies that the prison facilities are overcrowded by more than 100%⁷⁹. Overcrowding then is reported from the Democratic Republic of Congo⁸⁰ as well as from countries of Southern Africa. For South Africa a prison population of 40% over the official capacity was noted for 2009. Among prisoners figured some 16,000

68 Inter-American Commission on Human Rights: Rapporteurship on the Rights of Persons Deprived of Liberty. N° 39/08.

69 Comunicación Social GDF, Boletín 1498 del Domingo, 06 de septiembre de 2009.

70 Human Rights Watch: World Report. New York 2010, p. 194.

71 Human Rights Watch: World Report. New York 2010, p. 203.

72 Office of the United Nations High Commissioner for Human Rights: United Nations Special Procedures. Facts and Figures 2009. New York 2009, p. 10.

73 Human Rights Council: Seventh session Item 3 of the agenda Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development. Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, Addendum Mission to Paraguay A/HRC/7/3/Add. 3.1 October 2007 p. 17.

74 Dankwa, V.: Overcrowding in African Prisons. In: Sarkin, J. (ed.): Human Rights in African Prisons. Capetown 2008, pp. 83-92, p. 88; see also the Report of the Mission of the Special Rapporteur on Prisons and Conditions of Detention in Africa to the Federal Democratic Republic of Ethiopia 15 - 29 March, 2004, p. 24; Report of the Special Rapporteur on Prisons and Conditions of Detention in Africa, The African Commission on Human and People's Rights: Report to the Government of the Republic of Cameroon on the visit of the Special Rapporteur on Prisons and Conditions of Detention in Africa From 2 to 15 September 2002, p. 10; p. 126 (Guinea), p. 137 (Liberia), p. 154 (Sierra Leone).

75 Muntingh, L.: Alternative Sentencing in Africa. In: Sarkin, J. (ed.): Human Rights in African Prisons. Capetown 2008, pp. 178-203, p. 184.

76 Kampala Declaration on Prison Conditions in Africa, available at www.penalreform.org/english/pana_declarationkampala.htm.

77 Uganda Prison Service: Summary of UPS Prisoners. Statistical Returns October 2009. Kampala 2009.

78 Uganda Prison Service: Census of Prisoners in 48 Central Government Prisons, 30th September 2007. Kampala 2007, p. 3.

79 www.moha.go.tz/index.php?option=com_content&view=article&id=20&Itemid=11.

80 2009 Country Reports on Human Rights Practices - Republic of the Congo Bureau of Democracy, Human Rights, and Labor, March 11, 2010.

who were detained because they could not afford bail or paying a fine of 1,000 Rand (102€) or less⁸¹. Namibia is affected by prison capacity problems since independence at the beginning of the 1990s⁸². Overcrowding has been reported from the central prison in Windhoek⁸³ as well as from police detention facilities⁸⁴.

In Africa, overcrowding problems are evidently independent from the prisoner rate. Overcrowding problems are noted for West and Central African countries (with imprisonment rates well below those found in Europe or North America) as overcrowding is observed in countries with high prisoner rates such as South Africa, Botswana or Namibia⁸⁵. Sudan`s prisons show signs of overcrowding⁸⁶ as do most of the countries of Northern Africa, for which information is available. Moreover, in many African countries, prison facilities were built during colonial rule and have received little attention after independence⁸⁷.

2.2.3.6 Overcrowding in Asia

Prison growth and prison overcrowding are reported from virtually all South-East Asian countries. There were approximately 90.000 prisoners in Indonesia in 2006; three years later more than 140,000 inmates have been counted in face of an official prison capacity of 80,000⁸⁸. The Special Rapporteur has noted that a large share of the Indonesian prison population concerns drug offenders and that pretrial detainees are outnumbering sentenced prisoners⁸⁹. Overcrowding has a negative impact on efforts to control tuberculosis and other transmittable diseases (in particular HIV) in Indonesian prisons⁹⁰. For Jakarta prisons it was stated that in face of a official capacity of 5000 inmates these prisons housed in 2009 nearly 12,000 detainees, among them some 6.900 who were detained for drug related crime⁹¹. Sri Lankan prisons hold some 28.000 prisoners although the official capacity was established with 8.200 prison beds⁹². Overcrowded prisons have been reported from the Philippines⁹³, from Vietnam⁹⁴, Thailand (200.000 prisoners in prisons and detention facilities designed to hold 100.000)⁹⁵ and Pakistan (95.000 prisoners are detained in 72 prisons originally built to hold 36.000 persons)⁹⁶. Most of Central

81 [www.pfi.org/Home/Centre for Justice and Reconciliation/News/Partnership for Addressing Prison Overcrowding in South Africa](http://www.pfi.org/Home/Centre%20for%20Justice%20and%20Reconciliation/News/Partnership%20for%20Addressing%20Prison%20Overcrowding%20in%20South%20Africa).

82 Oxche, T.-R.: Post-independence prison reform in Namibia - some observations. CSPRI Newsletter No. 17, 2006.

83 *The Namibian*, April 18, 2008.

84 Ruppel, O.C., Groenewaldt, A.L.: *Conditions of Police Cells in Namibia*. University of Namibia, Human Rights and Documentation Centre 2009.

85 See Muntingh, L.: opus cited, 2008, pp. 184-185.

86 2009 Country Reports on Human Rights Practices - Sudan. Bureau of Democracy, Human Rights, and Labor, March 11, 2010.

87 Tapscott, C.: Challenges to good prison governance in Africa. In: Sarkin, J. (ed.): *Human Rights in African Prisons*. Capetown 2008, pp. 67-82, p. 73.

88 www.ssig.kpkk.gov.my/ssig/news/fullnews.php?news_id=89191&news_cat=

89 Human Rights Council: Seventh session. Agenda item 3. Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak. Addendum, Mission to Indonesia. A/HRC/7/3/Add.7 10 March 2008, p. 30; drug offences and drug offenders represent significant shares of prison populatrions in many South-Asian countries, see for example Thailand where in 2008 the share of drug offenders at the prison population at large amounted to one third (Department of Corrections, Ministry of Justice Thailand, Bangkok, 1 April 2008).

90 IRIN: Indonesia: Overcrowding fuels TB in prisons. Friday 02 April 2010.

91 Intellasia: Indonesia's drug fight pushes prison Aids explosion. 5 Aug, 2009.

92 Human Rights Council: Seventh session. Agenda item 3. Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak. Mission to Sri Lanka. A/HRC/7/3/Add.6, 26 February 2008, pp. 2, 22.

93 ICRC: Philippines: protecting life and dignity in places of detention. ICRC Bulletin No. 01 / 2010, 3 February 2010.

94 2009 Country Reports on Human Rights Practices - Vietnam. Bureau of Democracy, Human Rights, and Labor, March 11, 2010.

95 2009 Country Reports on Human Rights Practices - Thailand. Bureau of Democracy, Human Rights, and Labor, March 11, 2010.

96 2009 Country Reports on Human Rights Practices - Pakistan. Bureau of Democracy, Human Rights, and Labor, March 11, 2010.

Asian countries as well as countries of the Far East (for example Japan) are less affected by prison overcrowding.

2.2.3.7 Post-Conflict and Conflict-Affected Countries

Particular problems of overcrowding are observed in countries which undergo rapid social change and significant transitions or find themselves in a post-conflict situation and in a difficult process of state building. Here, prisons and prison conditions should become an integral part of the general reform of the security sectors and general security policies⁹⁷. However, prisons until now did not receive much attention in countries with fragile and weak state structures, although a properly operating prison system could contribute to building up trust in the state and provide for security. Particular problems of weak states are experienced in Afghanistan and Haiti. Of course, more countries are affected by the problem of having to cope with ongoing violence and the task of re-establishing state structures and functioning criminal justice systems. Table 1 accounts for the extent of state fragility and shows that state fragility is correlated with conditions unfavorable to an effective handling of prison problems.

In Afghanistan a rapidly increasing prison population is assumed to be the result of serious shortcomings in the criminal justice system which faces a heavy increase in cases coming to courts (also as a consequence of new criminal laws, in particular criminal drug law)⁹⁸. The prison population is predicted to reach 110.000 in 2010 (up from 9.600 in 2007⁹⁹).

The Haitian prison system suffers from significant problems¹⁰⁰. The prison system is overburdened, understaffed and severely overcrowded. As of December 2008, Haiti's 8,204 prisoners were held in facilities with a capacity of 2.448¹⁰¹. The number of prisoners has skyrocketed from some 2.500 in 2005 to more than 6.000 in 2007. The physical infrastructure of criminal corrections has been partially destroyed in violent conflicts. The National Penitentiary, in April 2007, housed more than 2.500 prisoners although it was built to accommodate 800 detainees. Approximately four fifths of the prisoners are not sentenced but pretrial detainees¹⁰². The rate of pretrial detainees is particularly high among young prisoners¹⁰³. Prison conditions certainly are not in line with the United Nations Minimum Standards as basic needs of prisoners such as access to potable water, health services, food etc. allegedly are not catered to in an adequate way. Security problems in the prison are responded to by reducing the number of prison visits and keeping prisoners locked up in their cells¹⁰⁴.

2.2.3.8 Prison Overcrowding: A Mixed Picture

Data on prison capacity and overcrowding reveal also that overcrowding may affect a country's prisons selectively with some prisons showing over capacity occupancy while others operate below the level of accommodation capacity¹⁰⁵. A prison system at large may not exhibit a situation of overcrowding, but nonetheless overcrowding restricted to certain regions or individual prison facilities may occur¹⁰⁶. As prison systems are structured on the basis of general normative principles such as separation of juveniles from adults and women from men, high risk offenders from low risk

97 OECD: The OECD DAC Handbook on Security System Reform (SSR). Supporting Security and Justice. Paris 2007, pp. 199.

98 International Centre For Prison Studies: Alternatives to Imprisonment in Afghanistan. A Report by the International Centre for Prison Studies. London 2009, p. 4.

99 Walmsley, R.: World Prison Population List (eighth edition). Kings College, London 2009, p. 4.

100 Security Sector Reform Monitor: Haiti. The Centre for International Governance Innovation. Waterloo, May 2009, pp. 6-7.

101 Human Rights Watch: World Report. New York 2010, p. 229.

102 IACHR Press Release No. 32/07 "Rapporteur on the Rights of Persons deprived of Liberty Concludes Visit to the Republic of Haiti", <http://www.cidh.oas.org/Comunicados/English/2007/32.07eng.htm>;

103 Fuller Anne et al.: Prolonged pretrial detention in Haiti. Vera Institute of Justice, July 2002.

104 Observations of the Inter-American Commission on Human Rights Upon Conclusion of Its April 2007 Visit to Haiti. General Secretariat Organization of American States, Washington 2008, p. 8.

105 See for example Uganda Prison Service: Summary of UPS Prisoners. Statistical Returns October 2009. Kampala 2009, pp. 2-3, where for the South-West of Uganda it is reported that prisons hold more than the threefold of what prisons are designed to accommodate, while in the East of Uganda the over capacity rate lies at 15%.

prisoners or by placing prisoners close to the communities they come from, it is evident that the flow of prisoners may affect some prison facilities while others remain unaffected. In particular in countries with a federal political system which leaves responsibility for the operation of criminal justice to states or other political entities, overcrowding may be felt only in some political entities. Reports of the General Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment provide for examples of the uneven distribution of prisoners across a prison system and point to particular problems of prisons serving large cities where various social problems converge and fuel prison overcrowding¹⁰⁷. Sometimes, deterioration of overcrowding comes with particular crack downs in specific locations and related to special crime problems¹⁰⁸.

Although, there are but few longitudinal studies on prison overcrowding, it can be assumed on the basis of research and reports that distinct patterns of careers in overcrowding exist which can be modeled along various economic, cultural and political conditions¹⁰⁹. Turning points in the course prison populations take reflect the impact of amnesties, changes in sentencing policies, in sensitivity towards certain types of crime etc.¹¹⁰

Besides prisons, detention centers holding illegal immigrants or psychiatric hospitals accommodating and treating insane/mentally ill offenders can be affected by overcrowding, too¹¹¹.

Prison populations are growing in some parts of the world. However, in some regions/countries marked decreases in prison populations have been observed in the last decade. There is evidently no uniform trend. Even within (Federal) states prisoner rates take completely different courses.

Finland may serve then as (a rather unique) example for a long term trend of falling numbers of

106 See for example the case of Portugal in Human Rights Council: Universal Periodic Review. Report of the Working Group on the Universal Periodic Review. Portugal. A/HRC/13/10, 4 January 2010, No. 15; for Switzerland, Committee against Torture, Forty-second session, 26 April-14 May 2010: List of issues to be addressed during the consideration of the sixth periodic report of Switzerland (CAT/C/CHE/6)* 18 January 2010, No. 21; Guyana, Committee Against Torture: Thirty-seventh session 6-24 November 2006, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention. Conclusion and recommendations of the Committee against Torture (Extracts for follow-up), Guyana.

107 Human Rights Council: Seventh session. Agenda item 3. Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak. Addendum, Mission to Indonesia. A/HRC/7/3/Add.7 10 March 2008, p. 13; Commission on Human Rights: Sixty-second session Item 11 (a) of the provisional agenda. Report of the Special Rapporteur, Manfred Nowak. Addendum. Follow-up to the recommendations made by the Special Rapporteur. Visits to Azerbaijan, Brazil, Cameroon, Chile, Mexico, Romania, the Russian Federation, Spain, Turkey, Uzbekistan and Venezuela. E/CN.4/2006/6/Add. 2, 21 March 2006, p. 29.

108 CBC News: Prison overcrowding worse after Hells Angels roundup. Last Updated: Monday, April 20, 2009.

109 See for example Steinberg, J.: Prison Overcrowding and the Constitutional Right to Adequate Accommodation in South Africa. Paper commissioned by the Centre for the Study of Violence and Reconciliation, January 2005 describing such fluctuations for South Africa as do Dissel, A., Ellis, S.: Reform and Stasis: Transformation in South African Prisons. Center for the Study of Violence and Reconciliation, Capetown 2002 or Spelman, W.: Crime, cash, and limited options: Explaining the prison boom. *Criminology & Public Policy* 8(2009), pp. 29-77 for the United States; Ministry of Justice: Story of the prison population 1995 - 2009 England and Wales. Ministry of Justice Statistics bulletin. London 2009, for England/Wales.

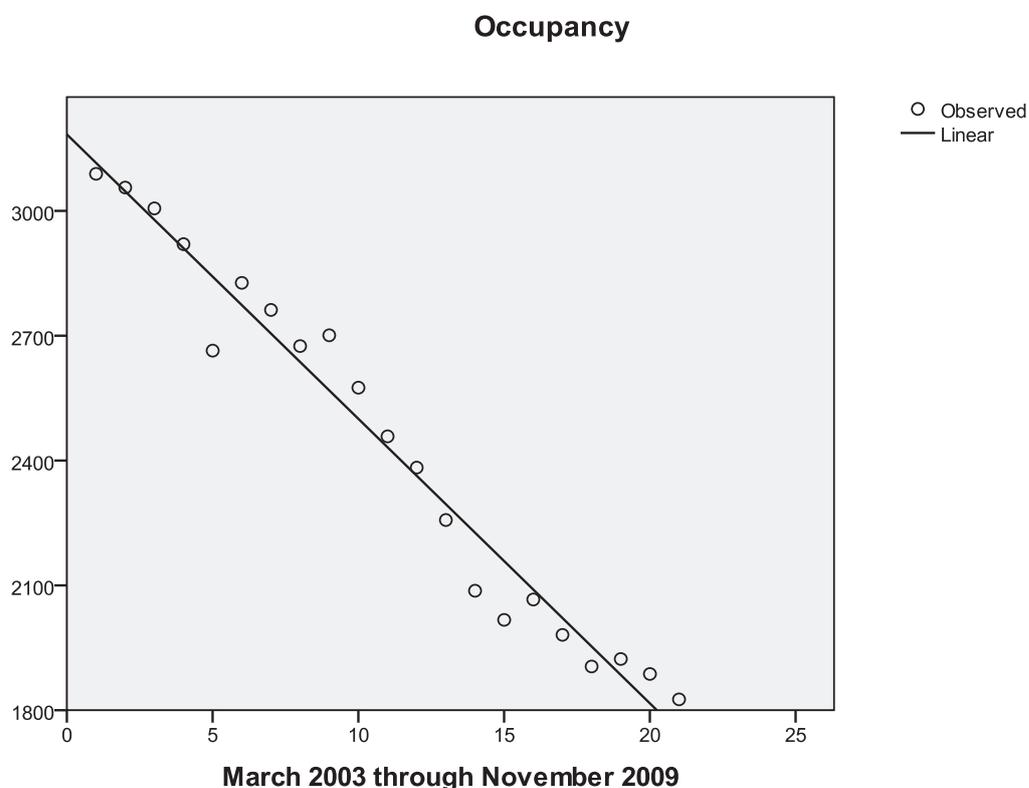
110 Giffard, C., Muntingh, L.: The Effect of Sentencing on the Size of the South African Prison Population. *Newlands* 2006, V.

111 See Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families: Consideration of Reports Submitted by States Parties Under Article 9 of the Convention. Concluding Observations of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families. Mexico. Fifth session, Geneva, 30 October-3 November 2006, No. 27; CPT/Inf (2010); Response of the Government of Austria to the Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to Austria from 15 to 25 February 2009, CPT/Inf (2010) 5, Strasbourg, 11 March 2010, p. 36; Human Rights Watch: World Report. New York 2010, pp. 316, 350.

prisoners¹¹² as are examples Germany, Portugal and The Netherlands for a more recent short term but significant decline of the prison population and questions linked to significant vacancy in prison facilities.

In Germany a steady decline brought down the prison population from 81.176 (March 31 2003) to 73.592 in 2009 (March 31), a drop of almost 10%. The General Accounting Office of the State of Hamburg recently has advised the state government to respond to the dramatic decline in the Hamburg prison population (2003: N=3.120; 2008: 2.030) through adjusting the prison budget and reducing the prison capacity accordingly¹¹³. The decline in the Hamburg prison population is due to reductions in both, the number of pretrial detainees and sentenced prisoners. In the case of sentenced prisoners, the reduction, which is particularly marked for prison sentences above one year, was rather due to a drop in prison admissions and not to release on parole (which has rather decreased between 2003 and 2008). The sharp decrease in prison admissions has more than neutralized an increase in the use of indeterminate (incapacitating) measures of security and more restrictive parole decisions.

Graph 2: Prisoner Rates in the State of Hamburg 2003 - 2009



112 Lappi-Seppala, T.: Reducing the prison population: long-term experiences from Finland. In: Council of Europe (ed.): Crime Policy in Europe. Strasbourg 2006, pp. 139-155; von Hofer, H.: Nordic Criminal Statistics 1950-1995. Stockholm 1997.

113 Rechnungshof der Freien und Hansestadt Hamburg: Jahresbericht 2009 über die Prüfung der Haushalts- und Wirtschaftsführung der Freien und Hansestadt Hamburg mit Bemerkungen zur Haushaltsrechnung 2007. Hamburg, January 8, 2009, pp. 156.

Model Summary and Parameter Estimates

Dependent Variable:Occupancy

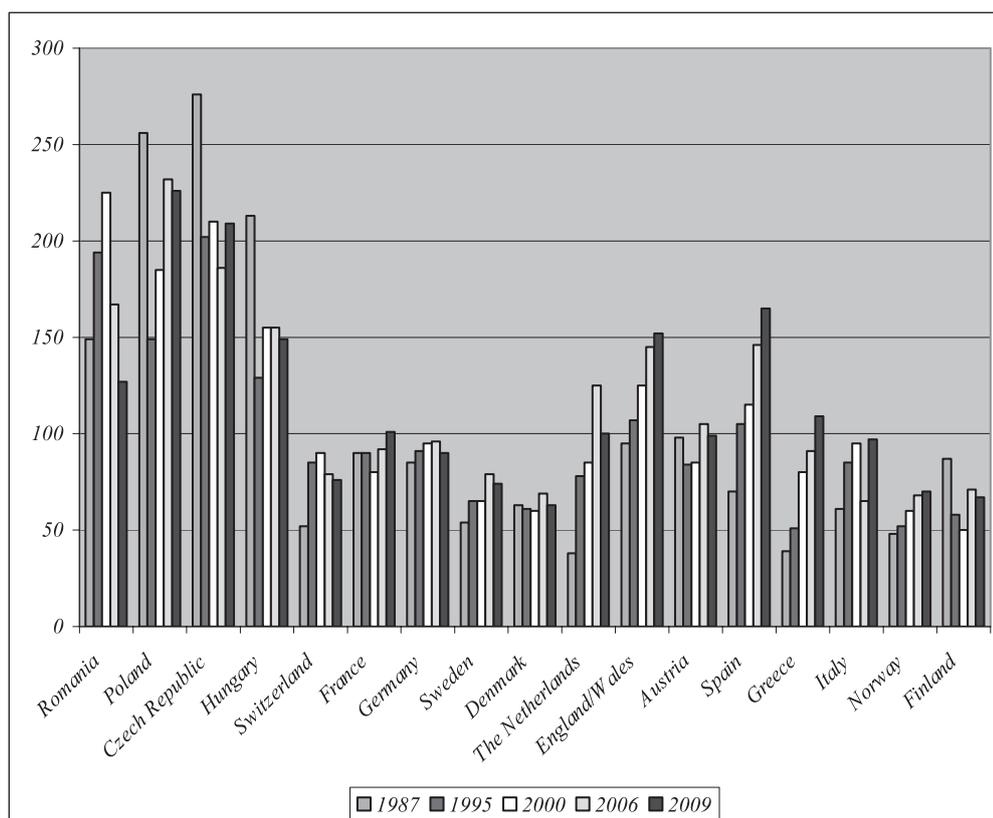
Equation	Model Summary					Parameter Estimates	
	R Square	F	df1	df2	Sig.	Constant	b1
Linear	,967	555,986	1	19	,000	3183,767	-68,373

Source: Statistisches Bundesamt: Rechtspflege Bestand der Gefangenen und Verwahrten in den deutschen Justizvollzugsanstalten nach ihrer Unterbringung auf Haftplätzen des geschlossenen und offenen Vollzugs jeweils zu den Stichtagen 31. März, 31. August und 30. November eines Jahres. Wiesbaden 2010.

The debates ensuing at the occasion of the Hamburg General Accounting Office report demonstrate that the prison population drop was neither planned nor was it expected. It was and still is rather the (unintended) consequence of a decline in crime (in particular robbery, rape and aggravated forms of property crime), furthermore a result of a long term decrease in the number of asylum seekers who were exposed particularly to the risk of being detained prior to trial¹¹⁴.

The Dutch ministry of justice in May 2009 announced the closing down of 8 prisons and the loss of some 1200 prison related jobs due to a rapid decline in the number of prisoners which is assumed to be the result of declining crime rates¹¹⁵. Other European countries experienced also decreases in prison populations as can be seen in graph 3, while some display a certain degree of stability in prison admissions and prisoner rates.

Graph 3: Prisoner Rates In Europe 1987 - 2009



Sources: Walmsley, R.: World Prison Population List (eighth edition). Kings College, London 2009 as well as updated prison data from national correctional services.

114 Albrecht, H.-J.: Criminalization and Victimization of Immigrants in Germany. In: Palidda, S. (ed): Criminalisation and Victimization of Migrants in Europe. Agenzia X, Milano 2009, pp. 118-138.

115 www.nrc.nl/international/article2246821.ece/Netherlands_to_close_prisons_for_lack_of_criminals; the ministry announced as well that The Netherlands will sell prison capacity (500 beds) to Belgium which is suffering from overcrowding.

2.3 Criminalization, Crime Rates, Growth of Prison Populations and Overcrowding

A consensus seems to exist that changes in crime rates do not contribute significantly to prison growth and overcrowding¹¹⁶. However, the assumption that crime rates are not correlated with prison growth (and overcrowding associated with that) deserves greater scrutiny. Most of the studies assuming a non-correlation stem from North America where in fact in face of decreasing crime rates overcrowding problems in some jurisdictions have worsened. While this assumption may hold true for changes in crime rates in general, increases in (sensitive) crime categories which attract prison sentences, in particular long prison sentences, during the last decades have been identified as drivers of overcrowding in prisons as has the reliance on criminal law for example in the field of public order policies.

Drug offences are a prominent example for penal policies which in many countries have significantly contributed to prison inflation. Growing public concern for marijuana, heroin and then cocaine and crack (sometimes analyzed from the viewpoint of "moral panics"¹¹⁷ and resulting in the declaration of wars against drugs¹¹⁸) internationally went hand in hand with enhanced prison sentences for all forms of drug offences (including sometimes addicted drug users¹¹⁹). Changes in the structure of prison populations which started to take effect in the 1980s point to the overreliance on imprisonment as a response to developing and expanding drug markets. Germany, for example has experienced overcrowding problems in the 1980s as a consequence of sentence enhancements in drug laws and a corresponding wave of long prison sentences. Also for Sweden and Denmark sentencing of drug offenders is cited as a driver of admissions to prisons and as a cause of capacity problems in the last decades¹²⁰. Increasing violence associated with drug markets in the new millennium in many Latin American countries has generated secondary crime waves which are felt in already strained correctional systems¹²¹. Evidence from the United States shows also a strong link between drug policies, drug arrests and increases in prison populations¹²².

Large scale violence erupting suddenly in the form of genocide, as was the case in Rwanda, or as a consequence of socially and politically motivated violent unrest as was the case in Haiti during the last years may result in a surge of the number of pretrial detainees in criminal justice systems which are not geared towards efficient handling and processing of such large numbers. But, the data on prison overcrowding analyzed above demonstrate also that a lasting high level of general violence experienced in a country is positively correlated with the extent of overcrowding. While such a correlation does not say something about a causal relationship, it seems nevertheless plausible to assume that sustained high levels of violence represent a proxy for weak state structures and with that a system of criminal

116 Hartney, C.: US Rates of Incarceration: A Global Perspective. Research from the National Council on Crime and Delinquency. Washington, November 2006; Coyle, A.: Managing prison overcrowding: A European perspective. Rencontre Européenne des Directeurs d'Administration Pénitentiaire Ministère de Justice. Place Vendôme, Paris, 11 July 2008. International Centre for Prison Studies, London 2008, p. 7; Cox, G.H., Rhodes, S.L.: opus cited 1990, p. 135 presenting data from a survey of correctional administrators which show that overcrowding is explained by administrators rather by stricter sentencing codes and more punitive public opinion than by increases in crime or the inability to build new prison space.

117 Cohen, S.: Folk Devils and Moral Panics. 1972; Goode, E., Ben-Yehuda, N.: Moral panics: the social construction of deviance. Cambridge 1994.

118 Gerber, J., Jensen, E.L.: Drug War American Style - The Internationalization of Failed Policy and Its Alternatives. New York/NY, London 2001; Caulkins, J.-P., Reuter, P., Iguchi, M.Y., Chiesa, J.: How Goes the "War on Drugs"? An Assessment of U.S. Drug Problems and Policy. RAND, Santa Monica 2005.

119 Intellasia: Indonesia's drug fight pushes prison Aids explosion. 5 Aug, 2009.

120 Träskman, P.O.: Drug Control and Drug Offences in the Nordic Countries: A Criminal Political Failure too often Interpreted as a Success. Journal of Scandinavian Studies in Criminology and Crime Prevention 5(2004), pp 236-256, pp. 250.

121 Ousey, G.C., Lee, M.R.: Homicide Trends and Illicit Drug Markets: Exploring Differences Across Time. Justice Quarterly 24(2007), pp. 48-79; Reuter, P.: Systemic violence in drug markets. Crime, Law & Social Change 52(2009), pp. 275-284.

122 Gottschalk, M.: Money and mass incarceration: The bad, the mad, and penal reform. Criminology & Public Policy 8(2009), pp. 97-109, p. 99.

justice which lacks the means to deal effectively with large numbers of serious crime.

While the emergence of new social problems, the eruption of large scale violence or systemic violence may influence the course prison populations take, a third example for crime impacting on prisons and causing prison inflation refers to general public order offences. Reports from various world regions have raised questions as regards the role “old” criminal law plays for prison congestion. “Anachronistic colonial law” has been cited as a cause of prison overcrowding in some African countries. Criminal law which sends scores of people to detention facilities for vagrancy, prostitution, loitering or failing to pay debts may indeed have an inflationary impact on the prison population. Under conditions of economic problems and large scale poverty there will be no shortage of a constant supply of detainees if such laws are strictly enforced¹²³.

2.4 A Growing Demand for Punishment and Reliance on Imprisonment: Punitivity, Imprisonment and Overcrowding

Increases in prison entries as well as increases in sentence length (and increases in the subsequent length of stay in the prison system) have been specified as major contributors to the inflation of prison population and overcrowding¹²⁴. However, it has been argued on the basis of cross-national research also that sentence length is not necessarily correlated strongly with prison inflation and that diversity prevails which makes it difficult to generalize “longer prison sentences - more overcrowding” assumptions¹²⁵.

Reports from many country underline then that over the last decades the public became more punitive, less supportive of rehabilitation and demands for tougher responses to crime¹²⁶. Demand for punishment becomes visible in the increase in long term prison sentences¹²⁷. In fact, in many criminal justice systems minimum and maximum penalties have been raised and minimum sentences have been introduced in particular for violent and sexual criminal offences during the last decade¹²⁸. Extended minimum sentences will have lagged effects on prison populations; their impact will be felt long after their introduction¹²⁹.

Life imprisonment in some countries has been introduced to respond to a broad range of offences going far beyond its conventional use for first degree murder¹³⁰ and expanding the group of prisoners serving life sentences sometimes extremely¹³¹. The introduction of “Truth in Sentencing” policies,

123 Sekhonyane, M.: Prison reform in Africa: recent trends. CSPRI Newsletter, No. 10 April 2005.

124 Kuhn, A.: What can we do about prison overcrowding? *European Journal on Criminal Policy and Research* 2-4(1994), pp. 101-106, p. 104; Tournier, P.V.: *The Prisons of Europe. Prison Population, Inflation and Prison Overcrowding*. Penal Issues 2000, pp. 6-9; see also Carter, P.: *Lord Carter’s Review of Prisons. Securing the future*. Ministry of Justice, London 2007 noting that in England/Wales approximately 70% of the increase in demand for prison places between 1995 and 2005 resulted from changes in custody rate and sentence length.

125 Aebi, M.F., Aubusson de Cavarlay, B., Stadnic, N.: *Entrées en Prison et Durées de Détention. La Diversité pénitentiaire en Europe*. Questions Pénales, Bulletin d’Information, 2007 - XX.2.

126 Miyazawa, S.: The politics of increasing punitiveness and the rising populism in Japanese criminal justice policy. *Punishment & Society* 10(2008), pp. 47-77; Giffard, C., Muntingh, L.: *The Effect of Sentencing on the Size of the South African Prison Population*. Newlands 2006, p. 16.

127 See for example Lambropoulou, E.: *Crime, Criminal Justice and Criminology in Greece*. *European Journal of Criminology* 2(2005), pp. 211-247, p. 223.

128 Miyazawa, S.: opus cited, 2008, pp. 59 for Japan; Terblanche, S., Mackenzie, G.: *Mandatory Sentences in South Africa: Lessons for Australia?* *The Australian and New Zealand Journal of Criminology* 41(2008), pp. 402-420.

129 Terblanche, S., Mackenzie, G.: *Mandatory Sentences in South Africa: Lessons for Australia?* *The Australian and New Zealand Journal of Criminology* 41(2008), pp. 402-420, p. 410.

130 van Zyl Smit, D.: *Taking Life Imprisonment Seriously*. The Hague 2002; Steinberg, J.: *Prison Overcrowding and the Constitutional Right to Adequate Accommodation in South Africa*. Paper commissioned by the Centre for the Study of Violence and Reconciliation, January 2005.

131 See Nellis, A., King, R.S.: *No Exit. The Expanding Use of Life Sentences in America*. Washington 2009, where it is reported that in the United States 140.610 prisoners are serving life sentences, out of which 41,095 do not have the possibility of parole, the highest proportion of life sentences relative is reported from California, where 20% of the prison population is serving a life sentence.

determinate sentencing, mandatory minimum penalties, three and two strikes laws and ultimately the move towards a new architecture of security which assigns security a prominent role within the goals of criminal law and criminal punishment have been interpreted as indicating a paradigm shift¹³². Attention shifted away from the offender and individualization of punishment to seriousness of crime and deterrent punishment (or had never changed from being directed at punishment¹³³). The new concern for the victim and protection of potential victims certainly is a visible expression of such changes. These changes have been interpreted also as indicating a “pervasive penal populism” on the side of politicians pushing for harsher penalties especially for recidivists¹³⁴ and as a gap between criminal justice practitioners and researchers interested in evaluating the substance of criminal justice policies on the one hand and politicians interested in sending out messages to the public on the other hand¹³⁵. But, it is rather a fragmentation of theory and politics of criminal punishment once uniformly organized around prevention through rehabilitating and re-integrating criminal offenders which characterizes today systems of criminal justice. While security orientation and punitive responses in fact prevail with respect to offender groups deemed dangerous and a threat to public security (such as sexual and violent offenders), alternatives to imprisonment, community sanctions, intermediate penalties, mediation and restorative justice approaches, most recently a new interest in designing effective re-entry programs for ex-convicts still figure prominently on crime policy agendas¹³⁶.

Statutory frameworks of sentencing which allow for grossly inflated periods of imprisonment¹³⁷ and the imposition of consecutively running prison sentences for multiple crimes add to the rise of long prison sentences¹³⁸. Particular attention should be devoted to life prison sentences and here to life without parole¹³⁹.

Placing emphasis on long prison terms and life prison sentences should not prevent to consider the impact of short term imprisonment on capacity problems, too. Short prison sentences point toward a particular group of offenders, persistent or chronic offenders, who pose special problems and result in a heavy burden for correctional systems. The frequency of re-offending and reconvictions causes considerable costs and over the long run puts pressure on prison capacity¹⁴⁰; moreover, persistent offenders demonstrate limits of prison based rehabilitation.

2.5 Failed Alternatives to Imprisonment and Recalls for Parole Violations

Alternatives to imprisonment such as fines, day fines, community service, electronically monitored house arrest and probation/suspended sentences have been incorporated into systems of criminal sanctions successfully during the last decades. Despite its abolition in some countries, early release on parole remains an important instrument in most correctional systems. Alternatives to imprisonment and parole, however, carry a risk of imprisonment in case of failure to pay a fine, violations of conditions coming with alternatives or re-offending. Fines are particularly prone to be converted into substitute imprisonment under conditions of poor economic circumstances and large scale poverty. Reports from countries where extreme poverty prevails demonstrate that significant

132 Tonry, M.: opus cited 2007, pp. 353-354.

133 Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, Mission to the Republic of Moldova. A/HRC/10/44/Add.3, 12 February 2009, No. 57.

134 Daems, T.: Engaging with penal populism. The case of France. *Punishment & Society* 9(2007), pp. 319-324.

135 Tonry, M.: *Criminology, Mandatory Minimums, and Public Policy*. *Criminology & Public Policy* 5(2006), pp. 45-56, pp. 51.

136 Lynch, J.P.: *Prisoner Reentry: Beyond Program Evaluation*. *Criminology & Public Policy* 5(2006), pp. 401-412.

137 Mauer, M.: *The Hidden Problem of Time Served in Prison*. *social research* 74(2007), pp. 701-706; blogs.findlaw.com/blotter/2009/06/100-year-sentence-for-teen-sex-offender-with-47-iq-concurrent-sentences-fair.html;

Terreblanche, S.: *Sentencing: Changes and effect since 1994*. www.csvr.org.za/wits/confpaps/terreblanche.htm.

138 Ashworth, A.: *Sentencing and Criminal Justice*. 4th ed. Cambridge 2005, pp. 248.

139 For a review of positions of the South African and Namibian Supreme Courts on life without parole see Terreblanche, S.: *Sentencing: Changes and effect since 1994*. www.csvr.org.za/wits/confpaps/terreblanche.htm.

140 Report by the Comptroller and Auditor General: *Managing offenders on short custodial sentences HC 431 Session 2009-2010*. London, 10 March 2010, p. 4.

numbers of offenders are imprisoned because they could not pay even small fines¹⁴¹. Recalls to prison of parolees have contributed in some countries to the increase of prison populations. For England/Wales it has been observed that a growing number of prisoners are in prison because parole has been revoked. Parole violators make up for almost 40% of prison admissions in California¹⁴². The majority of revocations takes place after technical violations, few are the result of further offending¹⁴³. Research shows also that changes in revocation patterns are rather explained by changes in the sensitivity towards parole violations than to changes in the actual behavior of parolees¹⁴⁴. In face of clear evidence that returning parolees to prison for technical violations of parole (which essentially will be the consequence of the intensity of supervision) will not lead to a decrease in recidivism¹⁴⁵, particular attention should be given to the statutory framework of revocation of suspended sentences and parole.

Poor and unsettled offenders turn out to fuel prison inflation in different contexts. In developing countries poverty is at the core of the problem of failure due to persons not being able to pay even small amounts of fines or bail. Sanction systems which do not provide for alternatives to alternatives to custody are doomed to fail in the attempt to overcrowding relief. In the European context unsettled offenders are equated with immigrants, in particular illegal immigrants. This group of unsettled offenders is often assessed to be not suited for alternative or community penalties as (illegal) immigrants do not exhibit strong bonds to the community and therefore are perceived as particular risks in decisions on pretrial detention and in decisions on alternatives to imprisonment.

2.6 Pretrial Detention

Root causes of overcrowding then have been identified in statutory frameworks and practices of pretrial detention. Significant proportions of unsentenced detainees at the prison population at large are observed in some regions¹⁴⁶. The information on display in table 1 above certainly demonstrates that there is a strong and significant correlation between pretrial detention and the extent of overcrowding. However, the strength of the correlation varies along countries (and regions). The correlation between pretrial correlation and overcrowding may be explained by different factors.

First, it may be a delay in processing cases through the system which keeps pretrial detainees behind bars for lengthy periods of times¹⁴⁷. Such delays may be the consequence of legal and procedural problems, but also a result of practices which do not consider adequately needs to define priorities in clearing backlogs of cases.

Second, a high share of pretrial detainees may be caused by criminal courts making excessive use of pretrial detention. This again may be a result of a statutory framework which does not provide for viable alternatives to pretrial detention or a result of practices which despite available alternatives do not make adequate use of such instruments¹⁴⁸.

141 www.pfi.org/Home/Centre for Justice and Reconciliation/News/Partnership for Addressing Prison Overcrowding in South Africa.

142 Legislative Analysts` s Office: Prison Overcrowding - An Overview On Construction and Rehabilitation. Senate Public Safety Committee February 19, 2008 p. 5.

143 Padfield, N., Maruna, S.: The revolving door at the prison gate: Exploring the dramatic increase in recalls to prison. *Criminology and Criminal Justice* 6(2006), pp. 329-352, pp. 330-332.

144 Reitz, K.: Questioning the Conventional Wisdom of Parole Release Authority. In: Tonry, M. (ed.): *The Future of Imprisonment in the 21st Century*. New York 2004, pp. 199-235; Padfield, N., Maruna, S.: opus cited, 2006, pp. 337.

145 Petersilia, J., Turner, S.: *Intensive Probation and Parole*. In: Tonry, M. (ed.): *Crime and Justice. An Annual Review of Research*, Vol. 19, Chicago 1993, pp. 281-335.

146 Zepeda Lecuona, G.: *Myths of Pretrial Detention in Mexico*. Monterrey 2005, p. 7; Schönteich, M.: *The Scale and Consequences of Pretrial Detention around the World*. In: Open Society Institute (ed.): *Justice Initiatives. Pretrial Detention*. New York 2008, pp. 11-43.

147 ICRC: Philippines: protecting life and dignity in places of detention. ICRC Bulletin No. 01/2010, 3 February 2010.

2.7 Summary: The Need for Country Specific Research

Research has dealt with various approaches to explain increases (to a lesser extent decreases) in prison populations. Increases in prisoner rates are commonly linked to a growth in the demand for punishment. Public opinion has been seen to be crucial in understanding the increase in prison populations in some countries¹⁴⁹. However, it is evident that the course of imprisonment and the trends in the size of prison populations do not follow a common set of variables or conditions. Developments in prison populations and overcrowding are diverse and reflect - as Tonry/Farrington recently have pointed out - idiosyncracies which necessitate careful analysis of individual national systems of criminal justice¹⁵⁰. Research on prison overcrowding (specifically: on the increase and decrease in the size of prison populations) has demonstrated that those conditions affecting the size of the prison population are manifold and differ from system to system. Such conditions vary along historical, legal, economic and cultural particulars. They are dependent on past experiences and specific political structures. In a recent analysis of US prison data covering the period 1977 to 2005 Spelman concluded that the best predictors of the size of prison populations are crime, sentencing policy, prison overcrowding and state spending (on prisons)¹⁵¹. Prison overcrowding thus may be part of the onset of a political process where due to a lack of imagination of other options than building new prisons spending on prisons results in a dynamic which reiterates political decisions and at the same time boosts the potential for overcrowding. The conclusion that the massive prison built up in the United States was not inevitable (and with that the overcrowding problems coming with it) is underlined by the successful reduction of the institutional population of the mentally ill in the 1970s and 1980s (through providing federal financial incentives for deinstitutionalization policies) and points to the crucial role of decisions made in the political system¹⁵².

Policy recommendations addressing measures against prison overcrowding therefore should be based on careful analysis of individual systems and cover the pretrial phase, in particular pretrial detention, sentencing (and factors influencing sentence length), post adjudication and post release decision making (including also pardon and amnesty practices). Substantive knowledge on how offenders are processed, information on sentencing and on post adjudication processes as well as correctional decision-making is needed in order to tailor policies to the specific configurations found in a specific country. Cross-cultural research on crime, punishment and corrections, however, indicates that national data sources exhibit "fundamental problems and inadequacies"¹⁵³, which make it difficult (if not impossible) to draw and to generalize conclusions.

What remains also unaccounted for concerns the questions why prison populations remain stable or decrease and why criminal justice systems evidently do not learn from past experiences. Prison overcrowding refers to an old policy and research issue. As early as in the 1970s (when in particular new criminal offence statutes and long prison sentences imposed for drug offences resulted in a wave of admissions to prison facilities) research has focused on the problem of overcrowding and how to respond to overcrowding. There is a wealth of research reports and policy proposals, all of which basically suggest the same remedies (against prison overcrowding as well as against prison inflation)¹⁵⁴.

148 See for example Commission on Human Rights: Report of the Special Rapporteur, Manfred Nowak. Addendum. Follow-up to the recommendations made by the Special Rapporteur. visits to Azerbaijan, Brazil, Cameroon, Chile, Mexico, Romania, the Russian Federation, Spain, Turkey, Uzbekistan and Venezuela. E/CN.4/2006/6/Add.2, 21 March 2006, pp. 53-54, where it is stated that despite the possibility to release suspects on bail and public approval of such measures, release on bail is very rarely used in practice.

149 Freiberg, A., Gelb, K.: Penal populism, sentencing councils and sentencing policy. In: Freiberg, A., Gelb, K. (eds.): *Penal Populism, Sentencing Councils and Sentencing Policy*. Cullompton 2008, pp. 1-14, p. 3.

150 Tonry, M., Farrington, D.P.: Punishment and Crime across Space and Time. In: Tonry, M., Farrington, D.P. (eds.): *Crime and Punishment in Western Countries, 1980 - 1999*. Crime and Justice. A Review of Research. Vol. 33, Chicago, London 2005, pp. 1-39.

151 Spelman, W.: Crime, cash, and limited options: Explaining the prison boom. *Criminology & Public Policy* 8(2009), pp. 29-77.

152 Spelman, W.: opus cited, 2009, p. 73.

153 Tonry, M., Farrington, D.P: opus cited, 2005, p. 11.

However, despite the calls for alternatives to imprisonment, better rehabilitation programs, alternative measures for drug addicts and the mentally ill, less reliance on imprisonment and the recognition of the last resort principles, policy makers sometimes adopt instruments which propel criminal justice systems deeper into capacity problems. So, for example in the 1990s, the impact of three strike laws and harsher sentencing in general on the Californian criminal justice system was correctly predicted¹⁵⁵. Research predicted huge costs and few returns in the form of more security¹⁵⁶. In general, it is well established through research that prison does not pay off in terms of less recidivism or more deterrence compared with alternatives to imprisonment¹⁵⁷. However, it was only after the financial burden became too heavy and courts started to demand for immediate and effective reductions of the prison population that politicians initiated significant changes. In fact, there do not seem to exist many “windows of opportunity” for passing knowledge from research to the political system¹⁵⁸ in order to develop “evidence based” correctional policies.

3. Effects of Overcrowded Prisons

Overcrowded prisons have a negative impact on all conditions of imprisonment and intended consequences of imprisonment¹⁵⁹. Several effects of overcrowding may be distinguished. Overcrowding results first of all in a restricted living space and associated losses of privacy and human dignity (which will in turn affect trust and confidence of prisoners in the legitimacy of prison regimes). Then, overcrowding may result in a reduction of general services to be provided in a prison facility in order to comply with standards set for access to medical treatment, sanitary equipment and educational, training or rehabilitative programs¹⁶⁰. Rehabilitative needs may be affected also through assigning low risk prisoners to maximum security units because other prison space is not available¹⁶¹. In particular sub-standard medical treatment and an environment prone to the spread of infectious diseases have been noted in this context¹⁶². As prison populations exhibit higher rates of certain infectious diseases, in some world regions these include besides HIV and hepatitis (b, c) in particular tuberculosis, programs to deliver effective treatment are impeded as are policies to prevent the transmission of diseases within the prison itself¹⁶³; after release from prison of course, the threat of further transmission extends to the general public¹⁶⁴.

154 Petersilia, J.: Influencing public policy: an embedded criminologist reflects on California prison reform. *Journal of Experimental Criminology* 4(2008), pp. 335-356.

155 Parent, D., Dunworth, T., McDonald, D., Rhodes, W.: Key Legislative Issues in Criminal Justice: Mandatory Sentencing. National Institute of Justice, Washington, January 1997, p. 4.

156 Stolzenberg, L., D'Alessio, S.J.: “Three Strikes and You’re Out”: The Impact of California’s New Mandatory Sentencing Law on Serious Crime Rates. *Crime Delinquency* 43(1997), pp. 457-469.

157 von Hirsch, A., Bottoms, A., Burney, E., Wikstroem, P.-O.: Criminal Deterrence and Sentence Severity: an analysis of recent research. Oxford 1999; Shepherd, J.: The Imprisonment Puzzle: Understanding How Prison Growth Affects Crime. *Criminology & Public Policy* 5(2006), pp. 285-298, p. 285; Aos, S., Miller, M., Drake, E.: Evidence-Based Public Policy. Options to Reduce Future Prison Construction, Criminal Justice Costs, and Crime Rates. State Institute for Public Policy, Washington 2006; Marsh, K., Fox, C., Hedderman, C.: Do You Get What You Pay for? Assessing the Use of Prison from an Economic Perspective. *The Howard Journal for Penal Reform* 48(2009), pp. 144-158.

158 Tonry, M.: opus cited, 2006, p. 54.

159 Fry, L.J.: Continuities in the determination of prison overcrowding effects. *Journal of Criminal Justice* 16(1988), pp. 231-242.

160 Walmsley, R.: Prison health care and the extent of prison overcrowding. *International Journal of Prisoner Health* 1(2005), pp. 9 - 12.

161 Petersilia, J.: Understanding California Corrections: Summary. UC Irving Center for Evidence Based Corrections 2006, p. 2.

162 Sarkin, J.: An overview of human rights in prisons worldwide. In: Sarkin, J. (ed.): *Human Rights in African Prisons*. Capetown 2008, pp. pp. 1-39, p. 19; Human Rights Council: Seventh session. Agenda item 3. Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak. Addendum, Mission to Indonesia. A/HRC/7/3/Add.7 10 March 2008, p. 13.

163 Winarso, I., et al.: Indonesian National Strategy for HIV/AIDS control in prisons: A public health approach for prisoners. *International Journal of Prisoner Health* 2(2006), pp. 243 - 249

164 Declaration on Principles of Cooperation Between Prison Health and Public Health Services and Development of a Safer Society. Adopted during the 6th Partnership Annual Conference on 25 November 2009, Oslo, Norway, p. 3.

Small prison health budgets, a high share of prisoners with infectious diseases (especially drug offenders) and overcrowding reinforce each other¹⁶⁵. Higher rates of suicide have been assumed to follow conditions of overcrowding¹⁶⁶. The fall of staff/inmate ratios may have adverse consequences for personal security, the implementation of prison visits and the admission to prison leave programs. A negative impact on family visits and an infringement on the right to family life (see for example Art. 8 ECHR) may come as a side effect of overcrowding relief policies which result in the transfer from overcrowded facilities to less crowded but far away prisons¹⁶⁷. Higher levels of prison violence indeed have been reported from many countries¹⁶⁸. The General Rapporteur in a report on the prison situation in Paraguay has hinted to a prison where 3,000 detainees are guarded by 40 guards per shift and has pointed to severe safety problems coming through inter-prisoner violence, but also through uncontrolled drug trafficking within prison walls¹⁶⁹.

Overcrowding in some instances is associated with the overuse of prison sentences and thus associated with imprisoning a larger share of - normally - young men from minority groups and disadvantaged neighborhoods¹⁷⁰. In particular, mass imprisonment is considered to impact heavily on the uneducated and poor groups in a society and its major effect has been perceived to be the reinforcement of social inequality¹⁷¹. Overuse of imprisonment results in re-entry problems and communities burdened with a high rate of ex-convicts¹⁷² and exposed to erosion of the capacity of informal control¹⁷³. It has been assumed also that serving a prison sentence under conditions of overcrowding may increase the risk of re-offending upon release¹⁷⁴.

Overcrowding then affects prison staff with working conditions that create stress and situations of non-compliance of international and national standards of accommodating prisoners¹⁷⁵. Overcrowding is linked to violations of normative standards and statutory law. Separation principles, in particular separation of sentenced and remand prisoners, juvenile detainees and adult prisoners, are sometimes at risk of being not complied with.

165 The PEW Center on States: opus cited, 2008, p. 12.

166 The Howard League for Penal Reform: Briefing paper on prison overcrowding and suicide. October 2005; Leese M, Thomas S., Snow L.: An ecological study of factors associated with rates of self-inflicted death in prisons in England and Wales. *International Journal of Law and Psychiatry* 29(2006), pp. 355-360; however, see also Fazel, S., Grann, M., Kling, B., Hawton, K.: Prison suicide in 12 countries: an ecological study of 861 suicides during 2003-2007. *Social Psychiatry and Psychiatric Epidemiology* 45(2010), published online) who do not find a correlation between overcrowding and suicide rates.

167 Memorandum from The Prison Reform Trust. www.parliament.uk.

168 Baker, J. et al.: opus cited, 2002, pp. 33-34.

169 Human Rights Council: Seventh session. Item 3 of the agenda. Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak. Addendum. Mission to Paraguay. A/HRC/7/3/Add.3, 1 October 2007, p. 18.

170 Petersilia, J.: *When Prisoners Return to the Community: Political, Economic, and Social Consequences*. Sentencing & Corrections. Issues for the 21st Century. National Institute of Justice, Washington 2000.

171 Western, B.: *Mass Imprisonment and Economic Inequality*. *social research* 74(2007), pp. 509-532, p. 530.

172 Mukamal, D.A.: *Introduction: Consequences of a Carceral State*. *social research* 74(2007), pp. 569-573.

173 Clear, T.R., Rose, D.R.: *When Neighbors Go to Jail: Impact on Attitudes About Formal and Informal Social Control*. National Institute of Justice, Washington 1999.

174 Steinberg, J.: *Prison overcrowding and the constitutional right to adequate accommodation in South Africa*. Centre for the Study of Violence and Reconciliation, Capetown 2005, p. 7.

175 International Centre for Criminal Law reform and Criminal Justice Policy: *International Prison Policy Development Instrument*. Vancouver 2001; Baker, J. et al.: opus cited, 2002, pp. 36; *The Correctional Investigator Canada: Annual Report of the Office of the Correctional Investigator 2008-2009*. Ottawa 2009, p. 31.

4. Addressing Prison Overcrowding Effectively

4.1 Overcrowding and Remedies Against Overcrowding: Well Known Agendas

Overcrowding has been on international and national policy agenda since decades. Insofar, it does not come as a surprise that strategies to reduce overcrowding have been extensively discussed and widely disseminated¹⁷⁶. In general, approaches to deal with prison overcrowding refer to reduction of admissions to prison and detention and reduction in the length of the stay¹⁷⁷.

Strategies to achieve the goals of reductions in admissions and length of stay include the use of alternatives to penal prosecution (diversion), the recognition of restorative justice approaches, the use of traditional justice, decriminalization, reducing the numbers of unsentenced prisoners through effective co-operation between the police, the prison services and the courts to ensure speedy trials and effective case management, recognition of the last resort principle, better access to defense councils and greater use of paralegals in the criminal process, setting targets for reducing the prison population, increased use of proven effective alternatives, imposition of sentences of imprisonment only for the most serious offences and as a last resort and for the shortest time possible, consideration of prison capacity when determining decisions to imprison and the length and terms of imprisonment, implementation of early and conditional release schemes, promotion of promising models for replication, promotion of regional and international Charters on Prisoners' Rights, pushing the political will to change and reform¹⁷⁸. Operation of prison systems within the limits of officially established prison capacity usually is also explained by complying with and implementing the above mentioned strategies and guidelines¹⁷⁹.

Full consent then seems to exist on a two pronged approach of implementation which on the one hand identifies the measures with which to reduce/combat etc. prison overcrowding and on the other hand “gets the measures accepted”. Of course, strategies have to be implemented and the “key players” must understand, “must be convinced”, must be helped to understand (the cost of prisons)¹⁸⁰, however, the course prison overcrowding takes during the last decades and in particular in recent years underline that criminal justice and prison policy is dependent on political will and social and economic conditions which evidently provide for differential structures of opportunities. Overcrowding evidently is recognized and understood to represent a grave problem; however, policy options which inflate prison populations are obviously more attractive. Overcrowded prisons and prison reform are not dealt with as priority issues in political systems¹⁸¹. Moreover, cultural contexts have to be considered when developing policies to deal with overcrowded prisons. Solutions to overcrowding have to deal with the complexity of the decision making processes which have generated overcrowding¹⁸². Such complexities are certainly due to the elaborate normative structure which determines limits of powers of individual state actors and fragmentizes criminal justice. Insofar, proposals to address prison

176 See for example Report on the Conference to Develop Strategies to Combat Overcrowded Prisons. Held at Pretoria/Tshwane from 14 to 16 September 2005; European Federation of Public Service Unions, Trade Unions and Prison Services in Europe: Seminar on 19 May 2005, Luxembourg Discussion Document. Brussels 2005; Dankwa, V.: Overcrowding in African Prisons. In: Sarkin, J. (ed.): Human Rights in African Prisons. Capetown 2008, pp. 83-92, p. 89.

177 The PEW Center on States: One in 100: Behind Bars in America 2008. Washington 2008, p. 20.

178 Ouagadougou Declaration and Plan of Action on Accelerating Prison and Penal Reforms in Africa, Wed, 25 Feb 2004; Taylor Griffiths, C., Murdoch, D.J.: Strategies and Best Practices against Overcrowding in Correctional Institutions. The International Centre for Criminal Law Reform and Criminal Justice Policy, Vancouver 2009.

179 Kitada, M.: Prison Population in Asian Countries: Facts, Trends and Solutions. United Nations Programme Network Institutes Technical Assistance Workshop.: World Prison Population: Facts, Trends and Solutions. Vienna, May 10, 2001, pointing to strict observation of law and speedy processing of cases, restricted use of pretrial detention, effective use of alternatives to imprisonment and parole as an explanation of the lack of overcrowding in the Japanese prison system.

180 See for example Walmsley, R.: opus cited 2003, p. 75.

181 Sekhonyane, M.: Prison reform in Africa: recent trends. CSPRI Newsletter No 10 April 2005.

182 Kaufman, G.: The National Prison Overcrowding Project: Policy Analysis and Politics, a New Approach. The ANNALS of the American Academy of Political and Social Science 1985; 478; pp. 161 - 172, p. 162.

overcrowding on the basis of a system-wide approach¹⁸³, rather than one centered only on the prison system alone, are limited. Comprehensive approaches, furthermore, generate and boost the very complexity they are intended to deal with.

4.2 Normative Guidelines

Prisons and other places of deprivation of liberty fall under a normative framework of national and international law on the basis of which overcrowding and its implications for prisoner human rights situations are evaluated. International human rights instruments such as the International Covenant on Political and Civil Rights and the UN Convention Against Torture contain prohibitions of inhuman and degrading punishment and treatment as do regional human rights instruments like the European Convention on Human Rights (Art. 3), the European Convention Against Torture, the American Convention on Human Rights (Art. 5) or the African Charter on Human and People's Rights (Art. 5). Hard international law is supplemented by soft law which comes in the form of Minimum Standards, recommendations, moreover the United Nations have published Best Practice Handbooks which shall provide for guidance in developing and implementing prison reform and alternatives to imprisonment. Apart from norms which give human dignity and the prohibition of cruel, inhuman and degrading punishment a central place in the operation of prisons and prison reform, international instruments contain other rules which are of relevance for developing responses to overcrowding. Among such rules the "last resort" principle when it comes to imprisonment certainly plays a significant role as it expresses (for example in the Child Convention or in the UN Standard Minimum Rules for Non-Custodial Measures) a clear message that deprivation of liberty must be specifically justified and should not be used as routine punishment. Furthermore, the United Nations Conventions, Standards and Guidelines give clear priority to the goal of rehabilitation; they embrace a set of procedural principles which adopt relevance in the context of overcrowding (pretrial detention as a last resort, presumption of innocence, speedy trial rules etc.).

Implementation of international law is monitored by human rights bodies and Special Rapporteurs on the basis of regular state reports, country visits and individual complaints. National prison law contains in various forms mechanisms which shall allow for transparency and independent supervision of prison conditions. It is certainly not surprising that overcrowding plays a prominent role on the agenda of international and national actors in the fields of human rights, crime and security policy and prison reform.

There is no shortage of proposals as to which remedies are available to reduce prison overcrowding. The Council of Europe has issued a fully elaborated set of recommendations with respect to responses to prison overcrowding as early as 1999¹⁸⁴. Recommendations as regards prison overcrowding are part of the Kampala Declaration and various other documents. These recommendations reiterate many principles which have been outlined in United Nation Conventions, Standards and Rules. A common perspective concerns that prison overcrowding and prison population growth represent a major challenge to prison administrations and the criminal justice system (in terms of human rights and of the efficient management of penal institutions). Reference is made then to factors driving prison growth such as the crime situation in general, system of criminal sanctions and sentencing practices favoring imprisonment, community sanctions, pretrial detention practices, effectiveness of criminal justice and public attitudes. The need for embedding measures aimed at combating prison overcrowding in a

183 See for example Penal Reform in Africa: Index on good practices in reducing pre-trial detention. PRI 2005, stressing the need for participation of all agencies in the criminal justice system.

184 Recommendation No. R (99) 22 of the Committee of Ministers to Member States Concerning Prison Overcrowding and Prison Population Inflation; these recommendations are part of a series of recommendations geared towards regulation of alternatives to imprisonment and acceptable conditions of detention: Recommendation Rec(2000)22 on improving the implementation of the European rules on community sanctions and measures, Recommendation Rec(2003)22 on conditional release (parole), Recommendation Rec(2003)23 on the management by prison administrations of life sentence and other long-term prisoners, Recommendation Rec(2006)2 on the European Prison Rules, Recommendation Rec(2006)8 on assistance to crime victims and Recommendation Rec(2006)13 on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse.

coherent and rational crime policy is stressed. Particular attention is paid to the basic principles of rule of law and democracy while underlining also the need for support by criminal justice practitioners and the public and finally also the need for balanced information on the effectiveness of criminal punishment and the reality of prisons. When it comes to concrete recommendations, a standard principle concerns classification of prison sentences as a last resort restricted to crimes of a degree of seriousness which “would make any other sanction clearly inadequate”. Prison construction programs as a response to overcrowding are considered exceptional measures which do not offer a lasting solution to a situation of overcrowding. Indeed, experiences made in the US and in England/Wales underline the salience of this recommendation¹⁸⁵. Recommendations then concern the provision for a range of community sanctions (or alternatives of imprisonment such as probation, suspended prison sentences with conditions attached, electronically monitored house arrest (intensive probation), victim-offender-reconciliation and community service) as well as decriminalization or downgrading certain types of offences so that they do not attract prison sentences. Lengthy prison sentences should be reduced as far as possible while short term imprisonment should be replaced by community sanctions. It is recommended also to consider treatment obligations in appropriate cases. From a practical perspective it is evident that a maximum capacity should be defined for every penal institution. Coping with prison overcrowding should be guided first of all by a clear consideration of human rights and minimum standards as regards accommodation of prisoners. Enforcement of prison sentences allow for the use of modalities such as open prison regimes, prison leave, electronically monitored house arrest and may be used also to compensate for hardships coming with prison overcrowding (contacts with the outside world). Particular emphasis is laid on alternatives for pretrial detention; diversion and out-of court settlement of cases are mentioned. It is then interesting to note that prosecutors and judges are encouraged to “bear in mind” prison capacity when applying and deciding on the criminal sentence. But of course, individual sentencing decisions cannot be made dependent on the availability of prison space. The legislators are then encouraged to set sentencing rationales which are suited to enhance the use of community sanctions instead of prison sentences and to consider carefully the role of mitigating and aggravating factors, in particular the role of previous convictions in the decision on criminal punishment. The role of community sanctions and measures is highlighted and attention is drawn to making such sanctions credible alternatives to short terms of imprisonment. Credibility is seen also as being dependent on their effective implementation, in particular through the provision of the infrastructure for the execution and monitoring of such community sanctions, not least in order to give judges and prosecutors confidence in their effectiveness; confidence then refers to the development and use of reliable risk-prediction and risk-assessment techniques as well as supervision strategies, with a view to identifying the offender's risk to relapse and to ensuring public protection and safety. Individualized measures, such as early conditional release (parole) are assessed to be superior over collective measures for the management of prison overcrowding (amnesties, collective pardons). In particular, parole is regarded as one of the most effective measures in attempts to reduce the length of imprisonment and smooth return of the offender to the community. Effects are also expected from effective programs for treatment during detention and for supervision and treatment after release which should contribute to facilitating rehabilitation of offenders and reducing recidivism.

In fact, revolving door problems and high rates of recidivism after imprisonment still pose many problems which are not solved¹⁸⁶. In particular the question under what conditions prison regimes may reduce the risk of re-offending (and subsequent prison sentences) needs to be answered¹⁸⁷.

4.3 The Public, Imprisonment and Prison Overcrowding

Research rarely addresses public attitudes towards prison overcrowding and acceptable instruments to resolve such problems. In general, it was found that the public is not interested in prison policy¹⁸⁸.

185 See in particular Spelman, W.: opus cited, 2009.

186 O'Donnell, I., Baumer, E.P., Hughes, N.: Recidivism in the Republic of Ireland. *Criminology and Criminal Justice* 8(2008), pp. 123-146.

187 Gottfredson, D.M.: *Effects of Judges Sentencing Decisions on Criminal Careers*. Washington, National Institute of Justice 1999.

188 Conrad, J.: Corrections and Its Constituencies. *Prison Journal* 64(1984), pp. 47-55.

The constituency for prisons is evidently narrow, specialized and not influential. A study from the 1980s revealed for the United States that substantive support was voiced for community sanctions and good time policies in prisons. The public rather disapproved prison construction programs as well as more discretionary power for parole boards and rejects reduction in sentence length¹⁸⁹. The International crime survey provides for comparative attitudes on sentencing. The data for 2005 show that there is a divide with some regions favoring community service over imprisonment¹⁹⁰ while other show significant support for imprisonment¹⁹¹. On the other hand public opinion in Europe certainly does not adopt the view that more imprisonment will reduce crime¹⁹².

4.4 Responding to Prison Overcrowding: What Works and What is Promising?

4.4.1 Recommendations and General Restraints

There are certainly no states of denial on the side of states and criminal justice officials when it comes to recognizing overcrowding problems. State parties to human rights instruments usually acknowledge the facts and problems found by Rapporteurs and Commissions, although sometimes debates arise on the issue of how overcrowding should be defined. Clues for understanding the response of states to overcrowded prisons possibly can be found in the process of monitoring and the reactions to findings and decisions of Human Rights Courts, Commissions and Rapporteurs. The European Court on Human Rights when dealing with situations of overcrowding first recognized the structural problems which are evidently behind sustained and long term overcrowding which are neither denied nor intended by the state party. The European Court encouraged the development of an efficient system of complaints to the Prison Service and the authorities supervising detention facilities, which were best placed to take appropriate measures speedily¹⁹³. It is therefore rather the responses to problems which are consented which are interesting and which possibly can provide for clues as to why overcrowding persists and available strategies of problem solving are not implemented.

When looking at recommendations of the Special Rapporteur provided in situations of serious prison overcrowding we find the advise to design and implement comprehensive structural reforms of the prison system, aimed at reducing the number of detainees, increasing prison capacities and modernizing prison facilities, to remove non-violent offenders from pretrial detention facilities and to increase the use of non-custodial measures¹⁹⁴. Proposals stress particularly an adequate statutory framework which helps avoiding unnecessary detention prior to trial through providing for alternatives to detention in the form of bail and other measures and the encouragement of judicial practices which prevent non-violent and less serious or petty offences from being eligible for pretrial detention¹⁹⁵. Plans to build additional prisons find support¹⁹⁶ as find support collective pardons or amnesties (focused on

189 Skovron, S.E., Scott, J.E., Cullen, F.T.: Prison Crowding: Public Attitudes Toward Strategies of Population control. *Journal of Research in Crime and Delinquency* 25(1988), pp. 150-169.

190 See also Proos, I., Pettai, I.: Attitudes of Georgia's population towards crime and penal policy. Institute of Social Studies and Analysis, Georgia 2009.

191 Dijk, J., van Kesteren, J., Smit, P.: Criminal Victimization in International Perspective. Key findings from the 2004-2005 ICVS and EU ICS. The Hague 2007, p. 147.

192 See Irish Penal Reform Trust: Public Attitudes To Prison February 2007. TNS mrbi/155055/Irish Penal Reform Trust - Public Attitudes to Prison/February 2007; McAuley, M., Macdonald, K.I.: Russia and Youth Crime. A Comparative Study of Attitudes and their Implications. *British Journal of Criminology* 47(2007), pp. 2-22, p. 2; Proos, I., Pettai, I.: Attitudes of Georgia's population towards crime and penal policy. Institute of Social Studies and Analysis, Georgia 2009.

193 European Court of Human Rights, Judgment as of 22 October 2009 in the cases *Orchowski v. Poland* (application no. 17885/04) and *Norbert Sikorski v. Poland* (no. 17599/05)

194 Human Rights Council: Seventh session. Agenda item 3. Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak. Mission to Sri Lanka. A/HRC/7/3/Add.6, 26 February 2008, pp. 25-26; Human Rights Council: Tenth session. Agenda item 3. Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak. Addendum Follow-Up to the Recommendations Made by the Special Rapporteur. Visits to China, Georgia, Jordan, Nepal, Nigeria and Togo, A/HRC/10/44/Add.5, 17 February 2009, p. 32.

195 Human Rights Council: Tenth session. Agenda item 3. Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak. Addendum Follow-Up to the

non-violent offenders and suspects of petty crimes) which are assessed to respond to the most pressing problems of overcrowding¹⁹⁷. Apparently, non-violent first time offenders are perceived to represent candidates for non-custodial measures¹⁹⁸. However, there is also evidence that petty offences in some countries contribute to the burden of prison systems¹⁹⁹. With respect to drunk or disorderly conduct, prostitution and the like, downgrading to administrative offences, which do not carry prison sentences, seems a rational solution.

Within the European context of overcrowded prisons the CPT has voiced concern for both, the extensive use of long term imprisonment and short prison sentences. Concern for short term imprisonment is based on perceptions of adverse effects of short periods of detention in prison and advantages of community sanctions²⁰⁰. It is then in particular those prison conditions which are deemed to provide for opportunities of adequate rehabilitation that attract attention from the viewpoint of human rights²⁰¹.

Many countries find themselves today in an economic and financial situation which does not allow the allocation of substantial resources for prison construction programs. Faced with the question where to invest seriously limited resources, prisons have the lowest priority. It has been argued that it is practically impossible to receive loans for prison construction from international financial institutions²⁰² which reduces options available for the most debt and poverty plagued countries severely. According to debt relief programming of the International Monetary Fund among the 42 “Heavily Indebted Countries” 32 are African²⁰³. However, most of the recommendations found in documents of the General Rapporteur and other actors do not require particular funding. Revision of sentencing statutes, early release and parole procedures, alternatives to pretrial detention and imprisonment etc are rather dependent on political will.

4.4.2 Organization, Intelligence and Financial Incentives

Recommendations Made by the Special Rapporteur. Visits to China, Georgia, Jordan, Nepal, Nigeria and Togo, A/HRC/10/44/Add.5, 17 February 2009, p. 83-84; Human Rights Council: Seventh session. Item 3 of the agenda. Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak. Addendum. Mission to Paraguay, A/HRC/7/3/Add.3, 1 October 2007, p. 17, referring to a case a detainee who had spent one and a half years in pretrial detention on suspicion of having stolen a bicycle; see also Michigan Task Force on Jail and Prison Overcrowding Task Force on Jail and Prison Overcrowding Presents Report. April 22, 2005.

196 Committee against Torture: Consideration of reports submitted by States parties under article 19 of the Convention. Second periodic report of States parties due in 1997; the present report is submitted in response to the list of issues (CAT/C/KHM/Q/2) transmitted to the State party pursuant to the optional reporting procedure (A/62/44, paras. 23 and 24), Cambodia. CAT/C/KHM/2, 2 February 2010, pp. 7-8.

197 Committee Against Torture: Conclusions and recommendations of the Committee against Torture (Concluding Observations/Comments 10-21 November 2003) Cameroon. CAT/C/CR/31/6, 05/02/2004.

198 Commission on Human Rights: Sixty-second session. Item 11 (a) of the provisional agenda. Report of the Special Rapporteur, Manfred Nowak. Addendum. Follow-up to the recommendations made by the Special Rapporteur. Visits to Azerbaijan, Brazil, Cameroon, Chile, Mexico, Romania, the Russian Federation, Spain, Turkey, Uzbekistan and Venezuela, E/CN.4/2006/6/Add.2 21 March 2006, p. 10, pp.44-45.

199 Dankwa, V.: opus cited, 2009, p. 85.

200 Report to the Government of the United Kingdom on the visit to the United Kingdom carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 18 November to 1 December 2008. Strasbourg, 8 December 2009, pp. 20-22; see also the response of the United Kingdom.

201 Report by Mr Alvaro Gilo-Robles, Commissioner for Human Rights, on the Effective Respect for Human Rights in France Following his Visit from 5 to 21 September 2005 for the attention of the Committee of Ministers and the Parliamentary Assembly. CommDH(2006)2, Strasbourg, 15 February, 2006 p. 22.

202 Committee Against Torture: Thirty-seventh session 6-24 November 2006 Consideration of Reports Submitted by States Parties Under Article 19 of the Convention. Conclusion and recommendations of the Committee against Torture (Extracts for follow-up) Guyana (State Party’s Response).

203 International Monetary Fund: Factsheet. Debt Relief Under the Heavily Indebted Poor Countries (HIPC) Initiative. February 18, 2010.

Responding to overcrowded prisons will be dependent on a range of issues related to organization, knowledge and information as well fiscal infrastructures and budgeting.

Allocation of political responsibility for prisons to the Ministry of Justice instead of the Ministry of the Interior has been highlighted as an important element in promoting reform of pretrial detention and the development and increased use of alternatives to imprisonment²⁰⁴. The responsibility of ministries of justice for prison reform expresses the commitment to bring in line prison administration with international norms and standards. In Russia, the significant fall in the prison population in the new millennium has been traced to the reform of the criminal procedure code which provided for judicial control over investigations and prosecutions. A most significant decision was evidently move the power to place suspects in pretrial detention away from the prosecutor and to the courts²⁰⁵.

The question has been raised then whether the fiscal infrastructure may be used to cut imprisonment and to change crime policies away from imprisonment through providing less of financial incentives to resort to imprisonment (or more financial incentives to resort to non-custodial measures). Evidence from some countries underlines the salience of a fiscal approach as administrative bodies will make their decisions not least dependent on costs coming with certain measures and who will have to bear them. The structure of the financing of prisons and alternatives of imprisonment may result in discouraging the provision and use of community based alternatives which have to be funded by local entities while prison and imprisonment are financed through state budgets. This will increase of course the total costs and should lead to a careful review of the impact respective fiscal structures may have on the overall use of imprisonment²⁰⁶.

Analysis of overcrowding, identification of conditions under which overcrowding emerges as well as evaluation of approaches to contain or reduce overcrowding are in need of reliable and valid data on police recorded crime, sentencing, the prison population and the flow of cases. Demands for good data and proper evaluation research are not new²⁰⁷. However, most of the penitentiary systems do not provide for meaningful data; moreover research on prison and imprisonment is limited, in particular as regards research comparing various sentencing options (including imprisonment). This has been stressed recently in a meta-analysis of empirical research comparing recidivism after custodial and community sanctions²⁰⁸. It is particularly those sentencing options which are deemed to carry a high potential in replacing imprisonment and responding effectively to overcrowding (suspended prison sentences, probation and parole) which are seriously under-researched²⁰⁹.

Research is not evenly distributed but demonstrates concentration on a few countries. This coincides largely with countries where prison projections have been part of an intelligence producing process in the correctional system. Prison projections are perceived to represent an instrument which in principle can advise and guide policy. Prison projection methodology, however, is developed and implemented in particular in countries where overcrowding affects the prison system. But, as prison

204 International Centre For Prison Studies: International Experience in Reform of Penal Management Systems. A Report by the International Centre for Prison Studies. London 2008, No. 78.

205 International Centre for Prison Studies: opus cited 2008, No. 39.

206 Solomon, E. Allen, R.: Out of Trouble. Reducing child imprisonment in England and Wales - lessons from abroad. Prison Reform Trust, London 2009, p. 48.

207 See Griffiths, C.: Implementing International Standards in Corrections: Challenges, Strategies and Outcomes. The United Nations Office on Drugs and Crime (ODC) Expert Group Meeting on the Application of United Nations Standards and Norms in Crime Prevention and Criminal Justice, 10 -12 February 2003, Burgenland, Austria.

208 See Villettaz, P., Killias, M., Zoder, I.: The effects of custodial vs. non-custodial sentences on re-offending. A systematic review of the state of knowledge. Campbell Collaboration Crime and Justice Group, Lausanne 2006, p. 41; see also Gendreau, P., Goggin, C., Cullen, F.T.: The effects of prison sentences on recidivism. Ottawa, ON: Correctional Service of Canada, Solicitor General Canada 1999; Smith, P., Goggin, C., Gendreau, P.: The Effects of Prison Sentences and Intermediate Sanctions on Recidivism: General Effects and Individual Differences. www.sgc.gc.ca (2002).

209 Davis, R., Rubin, J., Rabinovich, L., Kilmer, B., Heaton, P.: A synthesis of literature on the effectiveness of community orders. RAND, Santa Monica 2008, pp. 21-22.

projections and prediction methodology are in need of complete and valid data on offenders as they pass through the criminal justice system and corrections, they provide rich information on various subpopulations within the prison system which can be used to study causes and consequences of overcrowding.

Prison projections essentially are based on past developments in the criminal justice and prison system, but any projection will depend on future developments in crime policies, sentencing and administrative practices. This means that any prison population forecast will project to a certain extent past trends which means that projections become less accurate the further out the prediction horizon and the more instable developments in crime policies. Insofar, it does not come unexpected that all official prison projections accessible (in England/Wales, Scotland and in the United States) predicted during the last decade further increases in the size of the prison populations²¹⁰. An analysis of prison projections for the United States at large shows the prediction of a far faster growth of the prison population, forecasting 2006 that the prison population will jump by 104.000 by 2009. But, the actual increase was 40.000 less than predicted²¹¹. For California, prison projections predicted for 2010 a prison population of some 183.000²¹². However, the actual prison population 2010 in California stood at 169.000²¹³. The problem, of course, concerns unpredictable changes which affect sentencing and parole decisions²¹⁴. The difficulty for projections of the prison population is that trends observed over a number of years can not be assumed to continue. In England it was found that no projection made between 1990 and 1994 predicted the rapid rise in the prison population emerging since 1994²¹⁵.

In spite of the limitations of prison projections, implementation of this approach will result in information systems which can inform research, the public and politicians and thus improve the basis for impact assessments and political discourses around sentencing and other crime related policies²¹⁶.

4.4.3 Prison Construction Programs

Prison overcrowding of course reflects a situation where additional prison space evidently can serve as a measure to ensure compliance with basic standards of accommodation. Prison construction programs or the acquisition of additional space through privatization can provide certainly relief in case of overcrowding. However, prison construction programs are placed under restrictions as first of all sufficient funding is required (which - as was outlined earlier - will be faced with enormous problems in many heavily indebted countries and will be virtually impossible for some). Second, additional prison capacity may in fact worsen the problem of overcrowding in the long run²¹⁷ and furthermore reinforce a policy of reliance on imprisonment and the deprivation of liberty which does not comply with the principle of last resort and proportionality as well as basic procedural standards, in particular presumption of innocence and the right to a speedy trial. An advise to invest in prison construction therefore is dependent on weighing various interests and values. Prison construction programs will be reasonable in cases where prisons facilities are in need of complete or partial overhaul and where concerns of spiraling into overuse of imprisonment can be ruled out²¹⁸. The recent announcement of a huge prison construction program in Italy responds also to need to modernize prison facilities most of them built in the 19th century and is part of a comprehensive concept which includes also the

210 See for Scotland The Scottish Government: Statistics Publication Notice. Crime and Justice Series. Scottish Prison Population Projections: 2008-2009 to 2017-2018. November 2008; The Scottish Government: Statistics Publication Notice. Crime and Justice Series. Scottish Prison Population Projections: 2009-2010 to 2018-2019. January 2010;

211 Pew Center on the States: Public Safety, Public Spending: Forecasting America's Prison Population, 2007-2011, Public Safety Performance Project 2007.

212 California Department of Corrections: Adult Population Projections 2008 - 2013. Fall 2007, p. 6.

213 The PEW Center on the States: opus cited 2010, p. 7.

214 California Department of Corrections: opus cited, 2007.

215 White, P., Cullen, C.: Projections of Long Term Trends in the Prison Population to 2007, Issue 2/00, 10 February 2000.

216 See for example the request for a robust and integrated information system in Uganda Prison Service: Census of Prisoners in 48 Central Government Prisons, 30th September 2007. Kampala 2007, p. 6.

217 See Spelman, W.: opus cited, 2009.

implementation of alternatives to imprisonment²¹⁹. In other cases, announcements of prison building programs have resulted in criticism because of alternative measures not exhausted and new prison designs too much focused on providing additional space and less guided by delivering adequate rehabilitative services²²⁰.

4.4.4 Prison Litigation

As overcrowding may infringe on the basic right of human dignity as well as privacy (or the prohibition of cruel and unusual punishment) which are protected also within the prison environment and, in the case of human dignity, may not be restricted (or suspended)²²¹ litigation over prison conditions, although limited in some systems²²², has become an issue of concern. Overcrowding litigation according for example to supreme court rulings in Germany may result in compensation of prisoners for pain and suffering²²³. Research has dealt with the question which effects successful overcrowding litigation might have²²⁴. Prison litigation, according to an American study leads to higher per inmate incarceration costs, lower inmate mortality rates, and a reduction in prisoners per capita²²⁵. In this study it was also found that those court interventions, which are associated with higher expenditures for prisons, result in lower spending on social welfare. This suggests that the burden of increased spending for prisons as a result of prison litigation is borne by the poor²²⁶. However, this finding expresses essentially that states have to make choices when budgets are prepared. Prison litigation has resulted in California being pressured into changing prison politics. In June 2007 the Delhi High Court ordered for example the Tihar authorities to release 600 prisoners charged with disturbing public peace, considered a relatively minor offence, to reduce overcrowding in the prison²²⁷.

Prison litigation can become a means to and a part of prison reform²²⁸. As prisons and prisoner do not have a strong constituency, strengthening inmates rights in litigation cases could be a effective tool in de-crowding prisons through the empowerment of inmates and NGOs²²⁹.

4.4.5 Decriminalization, Depenalization and Diversion

The findings on causes of overcrowding point to the relevance of developing and implementing decriminalization and depenalization policies. In particular public order offences, but also drug offences related to drug use - where they are in force and applied -, could be candidates for either complete decriminalization or for transformation into administrative offences which do not carry prison

218 See for example the case of Cambodia in Committee against Torture Consideration of reports submitted by States parties under article 19 of the Convention Second periodic report of States parties due in 1997; the present report is submitted in response to the list of issues (CAT/C/KHM/Q/2) transmitted to the State party pursuant to the optional reporting procedure (A/62/44, paras. 23 and 24), Cambodia, 29 October 2009, No. 42.

219 www.correctionsreporter.com/2010/01/15/italy-prison-overcrowding-emergency/

220 See for example CPT: Report to the Government of the United Kingdom on the visit to the United Kingdom carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 18 November to 1 December 2008. Strasbourg 2009, p. 21 with a critical discussion of the so called 'Titan' prisons.

221 Constitutional Court Berlin (VerfGH 184/07) - Decision as of 3. November 2009 (KG/LG Berlin), HRRS. Online Zeitschrift für Höchstrichterliche Rechtsprechung zum Strafrecht <http://www.hrr-strafrecht.de> 10(2009), p. 472.

222 US Supreme Court in *Wilson v. Seiter*, 501 US 294 (1991), requiring prove of deliberate indifference on the part of prison officials in face of overcrowded conditions.

223 (German) Supreme Court (Bundesgerichtshof), Decision as of 4. 11. 2004, III ZR 361/03.

224 Angelos, C., Jacobs, J.B.: *Prison Overcrowding and the Law*. The Annals of the American Academy of Political and Social Science. Vol. 478, Beverly Hills 1985, pp. 100-112; Levitt, S. D.: *The Effect of Prison Population Size on Crime Rates: Evidence from Prison Overcrowding Litigation*. The Quarterly Journal of Economics 111(1996), pp. 319-351.

225 Levitt, S. D.: *The Effect of Prison Population Size on Crime Rates: Evidence from Prison Overcrowding Litigation*. The Quarterly Journal of Economics 111(1996), pp. 319-351.

226 Boylan, R.T., Mocan, N.H.: *Intended and Unintended Consequences of Prison Reform*. National Bureau of Economic Research, Working Paper 15535, November 2009 (www.nber.org/papers/w15535).

227 The Telegraph, Calcutta, India, Tuesday, June 19, 2007.

228 Welsh, W.N.: *Counties in Court. Jail Overcrowding and Court-Ordered Reform*. Philadelphia 1995, pp. 10-18.

229 Steinberg, J.: opus cited, 2005.

sentences.

Furthermore, reports indicate that drug addicted prisoners and the mentally ill represent in some correctional systems significant groups which not only contribute to overcrowding but also to additional problems as regards the risk of transmitting infectious diseases. Here, diversion to treatment seems a viable option.

A promising example has been reported from Thailand where between 1993 and 2002 the number of prisoners had tripled causing severe overcrowding problems. A solution was found in a law reform which changed the perspective on drug addicts who are now held to be persons in need of medical treatment and are therefore diverted to treatment in the community or in treatment centers²³⁰. While this approach did not completely resolve prison crowding problems, it was certainly an important step to contain the number of prisoners on a lower level²³¹. Addicted and mentally ill offenders convicted for non-violent offences are a common and promising target for diversion policies²³².

Then, restorative justice and mediation programs may be useful to reduce the length of prison sentences. Serious efforts for reconciliation between offender and victim are in some systems considered as mitigating factors. Such efforts should take place before (or during the trial). But, it is difficult to assess the potential of restorative justice, mediation and restitution due to the absence of evaluation research which addresses the impact of restitution, restorative justice or victim-offender-reconciliation programs on sentencing and the prison population²³³.

Traditional or customary approaches to deal with crime certainly have a potential as an alternative to formal criminal proceedings. Gacaca trials in Rwanda and the wide use of (informal) reconciliation procedures in African and Asian countries demonstrate effectiveness but also risks related to equal treatment and fairness²³⁴.

4.4.6 Dealing with Pretrial Detention

The Standard Minimum Rules for Non-Custodial Measures spell out that detention pending trial shall be used only as a last resort and for the shortest possible period of time. The rules call also for the use of alternative measures. For children standards are even stricter than for adults²³⁵. Plenty of evidence supports the view that overcrowding in many criminal justice systems is linked to an excessive use of pretrial detention²³⁶. The European Anti-Torture Commission has on many occasions and for many European countries advised that it is in particular pretrial detainees who suffer from overcrowding and related conditions of confinement²³⁷. Research shows also that there is significant regional variation as to the share of pretrial detainees at all prisoners²³⁸.

A significant share of pretrial detainees at the prison population at large points to several issues which can be made points of departure for approaches to reduce the number of suspects who are placed in pretrial detention, and second, the length of time suspects spend in pretrial facilities²³⁹. Inflation of

230 Kittayarak, K.: Diversion Programs for Drug Addicts, Restorative Justice and New Community-based Treatment Measures in Thailand, a paper submitted to the nineteenth International Conference of the International Society for the Reform of Criminal Law held at Edinburgh, Scotland, 26-30 June 2005, www.isrcl.org/Papers/2005/kittayarak.pdf.

231 Department of Corrections, Ministry of Justice Thailand, Bangkok, 1 April 2008.

232 The PEW Center on States: opus cited, 2008, p. 18; Smith-Heisters, S.: The Nonviolent Offender Rehabilitation Act: Prison Overcrowding, Parole and Sentencing Reform (Proposition 5). Reason Foundation, Los Angeles 2008.

233 For a summary see Albrecht, H.-J.: Forschungen zur Implementation und Evaluation jugendstrafrechtlicher Sanktionen. *Zeitschrift für Jugendkriminalrecht und Jugendhilfe* 3(2003), pp. 224-232.

234 Albrecht, H.-J.: Conflict Perspectives: Dealing with Wrongs in the Middle East. In: Albrecht, H.-J. et al (eds): *Conflicts and Conflict Resolution in Middle Eastern Societies - Between Tradition and Modernity*. Berlin 2006, pp. 1-12.

235 Kiessl, H.: *Die Regelwerke der Vereinten Nationen zum Jugendstrafrecht in Theorie und Praxis*. Freiburg 2001.

236 Open Society Institute (ed.): *Justice Initiatives. Pretrial Detention*. New York 2008.

the pretrial detainee population may be caused by a normative framework which does not provide for adequate consideration of standards set for pretrial detention or does not include those alternatives to pretrial detention which may reduce the risk of absconding or obstruction of justice, that is bail, seizure of passport or other identity papers, notification requirements as regards traveling, changes of residence etc., obligations to report at certain times to the office of the judge, the prosecuting authority or police, restrictions on free movement (backed up by electronic monitoring). The use of pretrial detention may be boosted by lengthy and ineffective criminal proceedings which may be due to shortcomings in procedural law or practices related to processing cases²⁴⁰.

It seems to be promising to place the emphasis first on the normative framework of pretrial detention and alternatives to pretrial detention²⁴¹. Of utmost importance for a normative framework geared towards minimizing pretrial detention is the principle of proportionality and the way proportionality is translated into the conditions set for pretrial detention. Placing a strict statutory cap on the length of pretrial detention certainly plays a decisive role in limiting pretrial detention as does a general clause which prevents that petty offences (which will most probably result in non-custodial sentences) will lead to detention prior to trial.

The use of pretrial detention has been tackled in Latin America systematically by introducing penal procedure reforms aimed at reducing pretrial detention on a broad scale. While legislative reforms have in general been successful in terms of introducing new procedural provisions on pretrial detention, the impact on pretrial detention practices has been mixed. However, on the basis of various indicators of pretrial detention it has been concluded that reforms have been in general successful in curbing the number of those detained prior to trial²⁴² (although a rigid empirical test of the reduction hypothesis could not be carried out because of a lack of data). Absence of data has been cited as a ground for the failure of pretrial detention reforms in Chile. The consequences of reform had been disputed, however, the absence of data abetted a counter reform which took place before the reform was fully implemented did not allow to communicate reform effects to the public, justice practitioners and politicians²⁴³.

237 See for example the CPT country reports for Bulgaria Report to the Bulgarian Government on the visit to Bulgaria carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 17 to 26 April 2002. Strasbourg 2004, No. 49; for Estonia Report to the Estonian Government on the visit to Estonia carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 23 to 30 September 2003. Strasbourg 2005, No. 52; for France Rapport au Gouvernement de la République française relatif à la visite effectuée en France par le Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT) du 27 septembre au 9 octobre 2006, Strasbourg 2007, No. 145; for Italy Rapport au Gouvernement de l'Italie relatif à la visite effectuée en Italie par le Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT) du 21 novembre au 3 décembre 2004, Strasbourg 2006, No. 71; for Poland Report to the Polish Government on the visit to Poland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 4 to 15 October 2004. Strasbourg 2006, No. 80; for England/Wales Report to the Government of the United Kingdom on the visit to the United Kingdom and the Isle of Man carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 12 to 23 May 2003. Strasbourg 2005, No. 16.

238 Schönteich, M.: The Scale and Consequences of Pretrial Detention around the World. In: Open Society Institute (ed.): Justice Initiatives. Pretrial Detention. New York 2008, pp. 11-43.

239 Deltenre, S., Maes, E.: Pre-trial Detention and the Overcrowding of Prisons in Belgium. Results from a Simulation Study into the Possible Effects of Limiting the Length of Pre-trial Detention. *European Journal of Crime, Criminal Law and Criminal Justice* 12(2004), S. 348-370.

240 Human Rights Council: Tenth session. Agenda item 3. Report of the Working Group on Arbitrary Detention. Addendum. Mission to Italy. A/HRC/10/21/Add.5, 26 January 2009, p. 10.

241 van Kalmthout, A.M. Knapen M.M., Morgenstern, C.: Pre-trial Detention in the European Union. An Analysis of Minimum Standards in Pre-trial Detention and the Grounds for Regular Review in the Member States of the EU. Nijmegen 2009; Nwapa, A.: Building and Sustaining Change: Pretrial Detention Reform in Nigeria. Open Society Institute (ed.): Justice Initiatives. Pretrial Detention. New York 2008, pp. 86-102.

242 Duce, M., Fuentes, C., Riego, C.: La Reforma Procesal Penal En América Latina Y Su Impacto En El Uso De La Prisión Preventiva. In: Riego, C., Duce, M. (eds.): Prisión Preventiva y Reforma Procesal Penal en América Latina. Evaluación y Perspectivas. CEJA-JSCA 2009, pp. 13-73.

Pretrial detention - though only justifiable by the goal to secure regular criminal proceedings and trials and if it can be expected that the defendant will abscond, tamper with evidence or relapse into serious crime - is assumed to be used in some countries for other, extra-legal purposes. In China, for example, it is contended that pretrial detention serves the purpose of punishment and the wide use of pretrial detention (which amounts to placing virtually all criminal suspects in secure custody) is explained by the adoption of strict crime control policies²⁴⁴. But, extra-legal factors have been identified as drivers of pretrial detention in other countries, too²⁴⁵.

Research in India has underlined that pretrial detention is ordered in significant numbers of petty crime cases and that costs could be considerably decreased if petty offenders were kept out of pretrial detention²⁴⁶. In systems which place the emphasis on bail pretrial detention is sometimes not a function of the risk of absconding or obstruction of justice but rather a result of the economic weakness which prevents that suspects can pay even small amounts of bail.

Studies demonstrate then that the risk of escape is often misjudged and as a consequence many false positives are held in pretrial detention. In the 1990ies a study was carried out in Germany the results of which demonstrate the potential for reducing pretrial detention without affecting rule of law and criminal proceedings. The study analyzed all decisions made in the Hamburg High Court in cases of extended pretrial detention (beyond 6 months). German criminal procedural law prescribes that pretrial detention may not extend over a period of 6 months if there are no compelling grounds for not carrying through a criminal trial before expiration of the 6 months period. The Hamburg High Court found in 23 cases no compelling grounds which would have justified pretrial detention of more than 6 months. So, 27 suspects had to be set free for whom the risk of absconding had been established by lower courts. However, 17 of these suspects voluntarily showed up for the criminal trial which took place some time after their release. Only six suspects actually absconded and did not comply when summoned by the trial court. Almost all of these were suspected of drug trafficking (and were foreign nationals)²⁴⁷. From the viewpoint of accuracy of prediction these results say simply that for any one suspect rightly predicted to represent an escape risk four others are falsely predicted to abscond. This amounts to a rate of false positives of some 80%, a rate which sounds plausible when taking into account the poor performance in criminal justice predictions at large.

The results of the study reported above demonstrate first of all the need for sound information when deciding on pretrial detention. Here, the installation and proper functioning of pretrial social services providing courts with information on community ties and other relevant issues will be one crucial element in avoiding that low risk suspects are detained²⁴⁸.

Assigning a defense council very early in criminal proceedings seems to be correlated with shorter periods of pretrial detention²⁴⁹. An experiment carried out in German court districts could demonstrate

243 Venegas, V., Vial, L.: Boomerang: Seeking to Reform Pretrial Detention Practices in Chile In: Open Society Institute (ed.): Justice Initiatives. Pretrial Detention. New York 2008, pp. 44-56, p. 49.

244 Yanyou, Yi: Arrest as Punishment. The abuse of arrest in the People's Republic of China. Punishment & Society 10(2008), pp. 9-24.

245 Dünkel, F.: Praxis der Untersuchungshaft in den 90er Jahren - Instrumentalisierung strafprozessualer Zwangsmittel für kriminal- und ausländerpolitische Zwecke? Strafverteidiger 1994, pp. 610-621; Jehle, J.-M.: Entwicklung der Untersuchungshaft bei Jugendlichen und Heranwachsenden vor und nach der Wiedervereinigung. Bonn 1995; Parliamentary Assembly, Committee on Legal Affairs and Human Rights: Situation of European prisons and pre-trial detention centres. Report. Doc. 10097, 19 February 2004.

246 Saxena, R.K.: Catalyst for Change: The Effect of Prison Visits on Pretrial Detention in India. In: Open Society Institute (ed.): Justice Initiatives. Pretrial Detention. New York 2008, pp. 57-69, p. 60.

247 Petersen, E.: Haftprüfungspraxis nach § § 121, 122 StPO des Hanseatischen OLG Hamburg. Erfahrungen in den Jahren 1990-1996. In: Jehle, J.-M., Hoch, P. (Eds.): Oberlandesgerichtliche Kontrolle langer Untersuchungshaft. Wiesbaden: Eigenverlag Kriminologische Zentralstelle e.V. 1998, pp. 71-78.

248 Ehlers, L.: Frustrated Potential: The Short and Long Term Impact of Pretrial Services in South Africa. In: Open Society Institute (ed.): Justice Initiatives. Pretrial Detention. New York 2008, pp.121-140.

that early assignment of a defence council through the court results in detention periods two months shorter on the average than those experienced by pretrial detainees who did not have a lawyer²⁵⁰. Systematic assignment of lawyers, it was concluded could reduce time spent in pretrial detention by 16%²⁵¹. Effective, early defense projects have been implemented in the Ukraine which proved successful²⁵².

In the same line of practices fall approaches which, also for budgetary reasons, install assistance through paralegals²⁵³. The Malawi based Paralegal Advisory Service supports pretrial detainees in particular in practical matters concerning release from detention (filling out bail applications, finding relatives who can serve as sureties, channeling relevant information to police and prosecutors)²⁵⁴. On the basis of pretrial detention figures the service is assessed to be successful in diverting suspects from pretrial detention. The remand population has been stabilized in Malawi after implementation of the paralegal advisory scheme at some 22% (down from 50% before the scheme)²⁵⁵.

Experiences with electronic monitoring have not yet been evaluated systematically in the context of replacing pretrial detention²⁵⁶; however, reports from Portugal describe electronic monitoring as an important element in a package designed to bring down the prison population and to reduce overcrowding²⁵⁷.

The European Supervision Order (Framework Decision 2009/829/JI as of 23 October 2009) seeks to compensate a particular risk of foreign nationals to be placed in pretrial detention²⁵⁸ and at the same time to strengthen the principle of presumption of innocence. Through mutual recognition of pretrial (non-custodial) supervision orders it is sought in the European Union context to create an additional option in the strategy to reduce pretrial populations²⁵⁹.

Case backlog reduction programs may serve to raise awareness for giving priority to cases where pretrial detention was ordered and reduce the time suspects spend in pretrial detention²⁶⁰. The basis of backlog reduction programs is the implementation of case file management which ensures from the moment of arrest that a case file moves expeditiously from one agency to another²⁶¹.

249 Human Rights Watch: *The Quality of Justice. Failings of Iraq's Central Criminal Court*. New York 2008, p. 1.

250 Schöch, H.: *Der Einfluß der Strafverteidigung auf den Verlauf der Untersuchungshaft. Erfahrungsbericht über ein Projekt der Hessischen Landesregierung zur "Entschädigung von Anwälten für die Rechtsberatung von Untersuchungsgefangenen"*. Baden-Baden 1997.

251 Schöch, H.: opus cited 1997, p. 73.

252 Naimark-Rowse, B., Schönteich, M., Sorochinsky, M., Tomasini-Joshi, D.: *Studies in Reform: Pretrial Detention Investments in Mexico, Ukraine, and Latvia*. Open Society Institute (ed.): Justice Initiatives. Pretrial Detention. New York 2008, pp. 152-171.

253 Uganda Human Rights Commission: opus cited 2009.

254 Open Society Institute: *Between Law and Society. Paralegals and the Provision of Primary Justice Services in Sierra Leone* New York, 2006, p. 4; Msiska, C.: *On the Front Lines: Insights from Malawi's Paralegal Advisory Service*. Open Society Institute (ed.): Justice Initiatives. Pretrial Detention. New York 2008, pp. 70-85.

255 Msiska, C.: opus cited, 2008, p. 78.

256 Albrecht, H.-J.: *Electronic Monitoring in Europe. A Summary and Assessment of Recent Developments in the Legal Framework and Implementation of Electronic Monitoring*. Konferenz- und Arbeitspapiere aus dem Max-Planck-Institut für ausländisches und internationales Strafrecht. Freiburg 2005.

257 15th Conference of Directors of Prison Administration: "Overcrowded Prisons: Looking for Solutions", (9-11 September 2009, Edinburgh). Conclusions by the General Rapporteur, 11 September 2009, CDAP(2009)04, p. 3.

258 Tonry, M. (ed.): *Ethnicity, Crime, and Immigration. Comparative and Cross-National Perspectives*. Chicago, London 1997.

259 See also Council of Europe Committee of Ministers: Recommendation No. R (80) 11 of the Committee of Ministers to Member States Concerning Custody Pending Trial; Kühne, H.-H., Esser, R.: *Die Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte (EGMR) zur Untersuchungshaft*. *Strafverteidiger* 22(2002), pp. 383-393, p. 385.

260 Uganda Human Rights Commission: *11th Annual Report of the Uganda Human Rights Commission*. Kampala 2009; see also a promising example of backlog reduction projects in Manila presented in ICRC: *Philippines: protecting life and dignity in places of detention*. ICRC Bulletin No. 01/2010, 3 February 2010.

4.4.7 Systems of Sanction: Alternatives to Imprisonment

The principle of reserving prison for serious crime and understanding imprisonment as a last resort can be taken from the Standard Minimum Rules for Non-Custodial

Measures which list furthermore a range of alternatives (or community sanctions).

Proposals as to effectively address overcrowding emphasize alternatives to imprisonment as an instrument to curb admissions to prison facilities²⁶². Remarkable success stories can be reported from creating and successfully implementing alternatives to imprisonment in Europe. There is eg. clear evidence that day fines succeeded in Austria, Germany and some Scandinavian countries as well as in Switzerland, partially also in France and Spain in replacing to a quite considerable though differing extent in particular short-term imprisonment in the 1960s and 1970s²⁶³. Day fines have certainly considerable advantages as regards their potential to be adjusted at the same time to the seriousness of the offence and to the income of the offender and thus implement the principle of equal treatment. That has been recognized also by INACIPE when proposing introduction of a day fine system in Mexico²⁶⁴. The apparent problem of fine default²⁶⁵ has been addressed by various means, in particular through offering the possibility to work off a fine through community service.

Suspended prison sentences and probation turned out to be quite successful as alternatives to immediate imprisonment. The particular relevance of suspended prison sentences and probation is endorsed in the European Probation Rules 2010 where their important role in containing prison population is explicitly recognized²⁶⁶. In general, community based criminal sanctions and the development of punishment philosophies trying to integrate punishment, non-custodial, community sanctions as well as the crime victim had received wide support in the 1980s and were based upon the perception that still too many offenders were sent to prison although not presenting risks to the community²⁶⁷. Actually, intermediate sanctions and diversion work in many countries and for a wide range of offender groups. A lot of these success stories are documented in several volumes on sentencing and sentencing systems published in the 1990s and providing compelling evidence for the success of alternatives to imprisonment²⁶⁸.

Yet, although alternatives to imprisonment have been introduced since the 1960s/1970s in many regions and in spite of their apparent success alternatives have not or could not be implemented in a way which had prevented further prison growth and overcrowding²⁶⁹. The UNODC Handbook of basic principles and promising practices on Alternatives to Imprisonment outlines various alternatives and elaborates the conditions under which alternatives may effectively replace prison sentences²⁷⁰. It

261 Nwapa, A.: Building and Sustaining Change: Pretrial Detention Reform in Nigeria. Open Society Institute (ed.): Justice Initiatives. Pretrial Detention. New York 2008, pp. 86-102.

262 Economic and Social Council: Resolution 1998/231998/23 - International cooperation aimed at the reduction of prison overcrowding and the promotion of alternative sentencing 44th plenary meeting 28 July 1998; Penal Reform International: Alternatives to imprisonment in the Republic of Kazakhstan. Resolution and Recommendations. International Conference, Almaty, 27-30 October 1999. London 1999.

263 See the comprehensive historical analysis in Jescheck, H.-H., Grebing, G. (Eds.): Die Geldstrafe im deutschen und ausländischen Recht. Nomos, Baden-Baden 1978.

264 INACIPE: 10 razones para reformar el sistema de justicia penal en Mexico. INACIPE, Mexico 2004, p. 26.

265 See for example The Irish Times: Number of people jailed for not paying fines set to double Monday, November 9, 2009.

266 Recommendation CM/Rec(2010)1 of the Committee of Ministers to member states on the Council of Europe Probation Rules. Adopted by the Committee of Ministers on 20 January 2010 at the 1075th meeting of the Ministers' Deputies; see also United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules).

267 See eg. Home Office: Punishment, Custody and The Community. London 1988, p. 2.

268 Tonry, M., Hatlestad, K. (Eds.): Sentencing Reform in Overcrowded Times. A Comparative Perspective. New York, Oxford 1997; see also van Kalmthout, A., Tak, P.: Sanctions-Systems in the Member States of the Council of Europe. Part I and II, Deventer, Arnhem 1988, 1992.

269 Weissman, M.: Aspiring to the Impracticable: Alternatives to Incarceration in the Era of Mass Incarceration. NYU Review of Law & Social Change 33(2009), pp. 235-269.

270 UNODC: Handbook of basic principles and promising practices on Alternatives to Imprisonment. United Nations, New York 2007.

mentions good practice examples and provides information on a legislative project in Kazakhstan which is assessed to have had a significant impact on the prison population though the increased use of non-custodial sentences²⁷¹. However, the rates of imprisonment remain extremely high in Kazakhstan²⁷².

For African countries it has been argued that it is rather the high share of unsentenced prisoners and the problem of lengthy investigations and trials and not the lack of alternatives to imprisonment which drives capacity problems²⁷³. However, community service has been introduced in a couple of African countries which seem to have worked quite well (although evaluation research as to whether they had an impact on reducing prison growth or overcrowding has not been carried out)²⁷⁴. Community service evidently can be implemented also in face of strained budgets. It was pointed out that community service fits much better into African traditions of responding to deviance and crime than do prison and imprisonment which are part of the colonial legacy. Recent experiments with community service (partially related to Gacaca trials and perpetrators of genocidal acts) in Rwanda demonstrate a significant potential and exhibit interesting and innovative features. The community service program is integrated with professional training and with the idea of restitution and paying back to the immediate community ("neighborhood community service" ²⁷⁵. Large scale community service programs recently have been initiated also in Kenya where they are an essential element in plans to decongest Kenyan prisons²⁷⁶. Mexico is planning for the introduction of community service, too²⁷⁷. Here, community service shall be offered as an alternative for first time and small scale property offenders.

However, it has been pointed out also that community service is perceived as being a much more lenient sentence compared with imprisonment and that more efforts are needed to raise public awareness as regards the benefits of community service²⁷⁸.

Electronic monitoring has found its place in modern systems of sanctions²⁷⁹. Electronic monitoring at the beginning was restricted to the adult system of criminal justice. Electronic monitoring now is extended to the juvenile justice systems. Active tracking systems are increasingly put on trial, following a trend to introduce tracking devices for sexual offenders after release from prison. Particular benefits of active tracking systems are expected for pre-trial supervision of offenders as well as for implementing exclusion orders in domestic violence cases. Costs coming with electronic monitoring are in general lower than those linked to imprisonment²⁸⁰. As regards cost comparisons with other community sanctions, evidence is less conclusive. Costs, however, are largely dependent on the type of (rehabilitative) programmes that are implemented together with electronic monitoring. In general, completion rates are high and failure rates are low. This reflects careful selection of offenders. A consensus exists that electronic monitoring replaces to a certain extent imprisonment (and influences - though on a small scale - the number of offenders sent to prison). Research on recidivism has come up with mixed results as does research on absconding while on pre-trial electronic monitoring²⁸¹.

271 UNODC: opus cited, 2007, p. 26.

272 www.state.gov/g/drl/rls/hrrpt/2009/sca/136088.htm (2009 Human Rights Report: Kazakhstan).

273 Muntingh, L.: opus cited, 2008, p. 186.

274 Stern, V.: opus cited, 1999, pp. 233, 238; UNODC: opus cited, 2007, p. 37.

275 Penal Reform International: Monitoring and Research Report on the Gacaca Community Service (TIG). Areas of reflection. Gacaca Report, Kigali, March 2007 p. 1.

276 Daily Nation: 50.000 to be released in prison decongestion plan. March 16 2010.

277 CDHDF: Presentan CDHDF Y ALDF Iniciativas de reforma al Sistema Penitenciario. June 9 2009.

278 Birung, C.: Community Service in Uganda as an Alternative to Imprisonment. A Case Study of Masaka and Mukono Districts. Capetown 2005, pp. 69-70.

279 Nellis, M.: Surveillance, Rehabilitation and Electronic Monitoring: Getting the Issues Clear. Criminology & Public Policy 5(2006), pp. 103-108.

280 See for example Fenech G.: Le placement sous surveillance électronique. Rapport de la mission confiée par Premier Ministre à Monsieur Georges Fenech, député du Rhône. Paris, Ministère de la Justice 2005.

4.4.8 Sentencing Policies

Sentencing policy and the statutory framework of sentencing refer to a crucial factor in determining the size of a prison population and the extent of overcrowding. In this respect sentencing guidelines and sentencing commissions which set priorities for prison eligible offences and take into account available prison capacity had been assumed to represent effective controls of prison growth²⁸². However, the experiences made during the last decades demonstrate that it is rather the substance of sentencing guidelines and not the method which will impact on the use of prison sentences. overcrowding. Of particular relevance seems the response to recidivists in sentencing law and practice. The emergence of “three and two strikes laws” and truth in sentencing policies, general approaches to enhancing penalties in case of recidivism and minimum penalty legislation have been discussed as major drivers of long prison sentences and as an area where reforms should be focused on implementing the principle of proportionality. The finding presented earlier that the wide and indiscriminate use of enhanced prison sentences does not improve public safety but rather contributes to the deterioration of crime and crime control problems should result in considering strictly the internationally endorsed principles of proportionality and imprisonment as a last resort in sentencing legislation. Sentencing legislation should leave enough room for judges to adjust the penalty to individual characteristics of offence and offender²⁸³. This would mean to re-consider mandatory minimum sentencing laws, truth in sentencing policies and in particular “three strikes and you’re out” policies²⁸⁴ and to provide for a system of sentencing which is better insulated from penal populism. From a normative perspective and legal doctrine the problem extends then to the question of what may fall under the verdict of disproportionate or grossly disproportional punishment²⁸⁵.

The perspective of parliaments when reforming sentencing laws has to pay attention to the question whether a specific sentencing policy can be sustained. While it is sometimes thought that prosecution services and the judiciary should also consider which impact certain sentencing decisions have on the prison system, from a viewpoint of separation of powers it is primarily the task of the legislator to take into consideration possible and probable consequences (and side effects) of legislation and to base legislation on thorough impact assessments. Impact assessments have found a wide field of application, for example in policies for the protection of the environment²⁸⁶ and are today an essential element in good governance²⁸⁷. Impact assessments may provide for rough estimates on the effects to be expected

281 Renzema, M., Mayo-Wilson, E.: Can electronic monitoring reduce crime for moderate to high-risk offenders? *Journal of Experimental Criminology* 1(2005), pp. 215-237; Swedish National Council on Crime Prevention: *Electronic Tagging in Sweden. Report 2005*; Dodgson, K., Goodwin, P., Howard, P., Llewellyn-Thomas, S., Mortimer, E., Russell, N., Weiner, M.: *Electronic monitoring of released prisoners: an evaluation of the Home Detention Curfew scheme. Home Office Research Study 222, Home Office Research, Development and Statistics Directorate, March 2001*; Padget, K.G., Bales, W.D., Blomberg, T.G.: *Under Surveillance: An Empirical Test of Effectiveness and Consequences of Electronic Monitoring. Criminology & Public Policy* 5(2006), pp. 61-92.

282 Kennedy, E.M.: *Prison Overcrowding: The Law's Dilemma. The Annals of the American Academy of Political and Social Science. Vol. 478, Beverly Hills 1985*, pp. 113-122; Frase, R.S.: *The Minnesota Sentencing Guidelines. In: Freiberg, A., Gelb, K. (eds.): Penal Populism, Sentencing Councils and Sentencing Policy. Cullompton 2008*, pp. 83-102, p. 99.

283 Tonry, M.: *Mandatory penalties. In: Tonry, M. (ed.): Crime and justice: A review of research, Vol. 16. Chicago 1992*, pp. 243-273.

284 Zimring, F.E.: *Protect Individual Punishment Decisions From Mandatory Penalties. Criminology & Public Policy* 6(2007), pp. 881-886.

285 Van Zyl Smit, D., Ashworth, A.: *Disproportionate Sentences as Human Rights Violations. The Modern Law Review* 67(2004), pp. 541-560.

286 For an overview see Albrecht, H.-J.; Kilchling, M., Braun, E.: *Criminal Preventive Risk Assessment in the Law-Making Procedure. Freiburg 2002*.

287 See Terblanche, S., Mackenzie, G.: *Mandatory Sentences in South Africa: Lessons for Australia? The Australian and New Zealand Journal of Criminology* 41(2008), pp. 402-420, describing the process of making sunshine legislation on minimum sentences of South Africa 1998 permanent legislation without considering the impact these minimum sentences would have a decade later.

from penal legislation for law enforcement, courts and the correctional system. With that a sound basis will be established which will help to answer the question whether changes in sentencing laws may be sustained without causing unacceptable problems in the correctional system.

Particular concern then should be given to special groups of offenders, among them children, women and foreign nationals which may be affected through sentencing in different ways.

Sentencing laws and sentencing practices have to respect the Child Convention which demands for custody to be used as a last resort and requires effective and specific implementation of this principle²⁸⁸. Furthermore, Article 37(a) provides for a standard of neither applying capital punishment nor life imprisonment without the possibility of release. However, current practices demonstrate that children sometimes are exposed to a high risk of imprisonment. Debates in England/Wales on children in custody for example point to a strong increase in the number of children sent to custodial facilities despite findings that such custodial sentences are neither in the interest of lowering rates of re-offending nor in the interest of public protection²⁸⁹. The vast majority of children/juveniles placed in custody have not been convicted for violent crime²⁹⁰. Furthermore, concerns have been raised with respect to the age of criminal responsibility as well as the age from which on children may be sentenced to imprisonment²⁹¹. The Standard Minimum Rules for the Administration of Juvenile Justice advise not to fix the age of criminal responsibility too low and if resorting to custodial sentences to impose only the minimum necessary period (which allows for education and reform of juvenile offenders). While the wide and sometimes indiscriminate use of life imprisonment has been discussed above, special attention should be paid to life imprisonment for the juvenile offender²⁹². According to recent statistics from North America there are 6.807 juveniles serving life sentences; 1.755 of whom are serving sentences of life without parole²⁹³.

Women, representing a minority among prisoners at large everywhere are at risk of being neglected when it comes to prison reform. The challenges posed by this largely vulnerable group²⁹⁴ have been summarized recently in a report submitted to the English government²⁹⁵. The report advises the government to radically change correctional policies for women offenders with non-custodial sentences for non-violent women being the rule and replacing women`s prisons by dispersed, small and multifunctional facilities. Such a strategy is considered to provide partial solution to persistent overcrowding problems.

Foreign nationals run particular risk of receiving prison sentences or being detained prior to trial²⁹⁶. Research from Europe has stressed that in many countries alternatives to imprisonment or pretrial detention do not work properly for foreign offenders (or illegal immigrants) due to a strong bias in community sanctions and alternatives to remand prison towards settled offenders with bonds to the community²⁹⁷. The European Union has responded to this problem with initiating Framework Decisions

288 Joint Committee on Human Rights (January 2008) Legislative Scrutiny: Criminal Justice and Immigration Bill Fifth Report of Session 2007-08.

289 Standing Committee for Youth Justice: Criminal Justice and Immigration Bill. House of Lords - Committee Stage. Children`s custody threshold. February 2008, p. 4.

290 Ministry of Justice: Statistical bulletin. Offender management caseload statistics 2006. London 2007.

291 Human Rights Council: Seventh session. Agenda item 3. Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak. Addendum, Mission to Indonesia. A/HRC/7/3/Add.7 10 March 2008, p. 16.

292 Nellis, A., King, R.S.: No Exit. The Expanding Use of Life Sentences in America. Washington 2009.

293 Nellis, A., King, R.S.: opus cited, 2009, p. 3.

294 CPT: Report to the Government of the United Kingdom on the visit to the United Kingdom carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 18 November to 1 December 2008. Strasbourg 2009, p. 21.

295 A report by Baroness Jean Corston of a review of women with particular vulnerabilities in the criminal justice system, Home Office, London 2007.

296 Human Rights Council: Tenth session. Agenda item 3. Report of the Working Group on Arbitrary Detention. Addendum Mission to Italy. A/HRC/10/21/Add.5, 26 January 2009, p. 2.

on the mutual recognition of pretrial supervision orders (Framework Decision 2009/829/JI as of 23 October 2009) and the Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions. The framework decisions establishing mutual recognition of alternatives to pretrial detention and imprisonment have been introduced in order to compensate for the increased risk of not being eligible for non-custodial measures due to a lack of bonds in the territory where proceedings are held and sanctions are executed. While this policy has emerged under the particular conditions of the European Union, the general approach of transferring enforcement and supervision of non-custodial measures to the home country of an offender provides for a reasonable option for the particularly vulnerable group of foreign offenders and hence an additional option in the control of overcrowding.

4.4.9 Post Adjudication Measures Against Overcrowding

Standard Minimum Rules for Non-Custodial Measures²⁹⁸ assign the post adjudication stage an important function in the process of implementing rehabilitation and to assist offenders in the process of re-integration. Parole is the core of a set of measures which ranges from reductions in the original prison sentence, early release under supervision to various forms of prison regimes (open prison, work furloughs, home detention etc.). Parole and good time approaches are among the conventional instruments to reduce the time which has to be spent actually in prison. Parole and organization of parole are furthermore important as recidivism research shows that of those who recidivate (and are re-imprisoned a majority does so within the first year after release²⁹⁹). Parole therefore serves as a bridge between incarceration and return to the community and represents the most important instrument in tackling the problem of “revolving doors”. It is based on the consideration that a gradual and supervised release provides a more effective way of protecting the public than a sudden release at sentence expiry. Parole over the last decades has partially lost ground, though, in countries where parole was abolished good time credits serve as an alternative which results in reductions of the original prison sentence.

Parole comes in different forms. While some systems have adopted automatic parole after statutorily fixed periods of imprisonment, most criminal codes still provide for a decision which is based on an assessment of risk and which can result in early release after a certain part of the prison sentence has been served³⁰⁰. Parole decisions normally point to three elements: a statutorily fixed part of the prison sentence has to be served (special rules usually apply to prisoners serving life sentences or being subject to measures of security), a parole commission or a judge assesses the risk of relapse into crime and specifies conditions the parolee has to comply with and which will be monitored by parole/probation officers. The parole commission/judge then will fix a period of time of parole supervision. While these elements explain why parole is an elastic instrument which lends itself to respond to prison overcrowding³⁰¹, they refer also to an explanation why changes in parole decision making may lead to prison growth and overcrowding. In fact, during the last decades prison growth has been explained also by more restrictive, caused by concerns for public security, paralleled by a trend of parole supervision away from a social service orientation to a surveillance oriented instrument of public protection³⁰². The latter has been made responsible for a tightening of conditions and orders coming with early release from prison. Stricter surveillance of conditions of parole has in

297 Tonry, M.: A Comparative Perspective on Minority Groups, Crime, and Criminal Justice. *European Journal of Crime, Criminal Law and Criminal Justice* 6(1998), pp. 60-73.

298 Council of Europe: Recommendation Rec (2003) 22 of the Committee of Ministers to member states on conditional release (parole).

299 Nadesu, A.: *Reconviction Patterns of Released Prisoners: A 36-months Follow-up Analysis*. Department of Corrections, Auckland, March 2007, p. 4.

300 *Les Documents de Travail du Sénat: La Libération Conditionnelle. Série Législation Comparée, n° LC 152*, Paris, Novembre 2005 ; Padfield, N. et al. (eds.): *Release From Prison. European Policy and Practice*. Cullompton 2010.

301 Snacken, S., et al.: Belgium. In: Padfield, N. et al. (eds.): *Release From Prison. European Policy and Practice*. Cullompton 2010, pp. 70-103, p. 88.

302 Padfield, N., Maruna, S.: The revolving door at the prison gate: Exploring the dramatic increase in recalls to prison. *Criminology and Criminal Justice* 6(2006), pp. 329-352, p. 338.

some systems led to a sharp increase in the return of parolees because of technical violations of parole, surpassing prison sentences as a driver of prison growth³⁰³ and resulted in additional strain placed on overcrowded prisons³⁰⁴. Intensive supervision, originally designed to reduce the risk of relapse into crime and to expand the use of early release, thus can turn into a mechanism which adds to the problem of overcrowding. Research on electronically monitored house arrest corroborates this view³⁰⁵.

Parole has come under particular scrutiny and pressure - as have suspended prison sentences - due to security concerns caused by spectacular crimes committed by parolees or persons who had been placed under probation after suspension of a prison sentence³⁰⁶. With increasing concerns for public security risk assessment and the development and application of elaborated risk assessment instruments have become more important.

There is not much known about best practices as regards revocation of parole and recalls to prison³⁰⁷. As a minimum recalls to prison should be based on the principle of consistency and they should reflect recognition of the basic standards applied to the use of imprisonment in general. This means also that recalls should be used as a last resort and in a proportional manner and after tightening and adjustment of conditions have failed. In general, revocation for technical violations of parole should be restricted to repeated and substantial violations and violations which indicate a danger to the public.

4.4.10 Amnesties and Collective Pardons

When addressing prison overcrowding sometimes amnesties and collective pardon are applied which are deemed to be problematic from the viewpoint of recommendations as well as the perspectives of principles of sustainability, rule of law and separation of powers. Amnesties usually have rather short-lived effects on prison populations. They do not affect root causes of growth and result in short term improvements which fade away shortly after implementation if nothing else changes. Large scale amnesties reportedly have been used in Zimbabwe several times during the 1980s and 1990s to bring down the size of the prison population, however, despite significant short term decreases in the population, empty prison cells have been filled³⁰⁸ Italy saw a major amnesty in 2006 as a response to prison capacity problems which in fact emptied the prisons, but resulted also in mistrust and insecurity in the public. A policy of granting amnesty had been implemented in South Africa. Here, too, the impact was short-lived³⁰⁹.

Amnesties certainly have their role to play as an instrument to settle large scale conflicts and to pacify a country where a significant potential of conflict escalation looms. In the wake of major political transitions amnesties may be a tool supporting reconciliation (as it was the case at some occasions in the new democracies in Central and Eastern Europe)³¹⁰. However, the regular use of amnesties as a

303 Travis, J., Petersilia, J.: Reentry Reconsidered: A New Look at an Old Question. *Crime & Delinquency* 47(2001), pp. 291-313; Petersilia, J.: *When Prisoners Come Home: Parole and Prisoner Reentry*. Oxford 2003; Weiman, D.R.: Barriers to Prisoners' Reentry into the Labor Market and the Social Costs of Recidivism. *social research* 74(2007), pp. 575-611, p. 599; The PEW Center on States: opus cited, 2008, p. 18.

304 Auerhahn, K.: Conceptual and Methodological Issues in the Prediction of Dangerous Behaviour. *Criminology & Public Policy* 5(2006), pp. 771-778, p. 774.

305 Dodgson, K., Goodwin, P., Howard, P., Llewellyn-Thomas, S., Mortimer, E., Russell, N., Weiner, M.: Electronic monitoring of released prisoners: an evaluation of the Home Detention Curfew scheme. Home Office Research Study 222, Home Office Research, Development and Statistics Directorate, March 2001.

306 Albrecht, H.-J.: Security Gaps: Responding to Dangerous Sex Offenders in the Federal Republic of Germany. *Federal Sentencing Reporter* 16(2004), pp. 200-207.

307 Padfield, N., Maruna, S.: opus cited 2006, p. 347.

308 Stern, V.: Alternatives to Prison in Developing Countries: Some Lessons from Africa. *Punishment & Society* 1(1999), pp. 231-241, p. 236; see also Dankwa, V.: Overcrowding in African Prisons. In: Sarkin, J. (ed.): *Human Rights in African Prisons*. Capetown 2008, pp. 83-92, p. 84.

309 Dissel, A., Ellis, S.: *Reform and Stasis: Transformation in South African Prisons*. Center for the Study of Violence and Reconciliation, Capetown 2002.

310 Albrecht, H.-J.: Braucht die Politik die Amnestie? Anmerkungen zum Problem der Amnestie aus der Perspektive der Rechtsentwicklung im Ausland. In: Greve, W. (ed.): *Amnestie, Gnade, Politik*. Loccum Protokolle. Loccum 1990, pp. 67-95.

response to prison overcrowding seems to undermine confidence in the criminal justice system. The issue of a possibly negative impact on confidence is also raised by the Human Rights Council when faced with large scale amnesties³¹¹. Despite such concerns, it has been argued that amnesties may play a useful role in controlling overcrowding if other measures are not available at all³¹². Although, such a situation is in principle imaginable (for example in the case of a sudden, unexpected and drastic increase in the number of prisoners), the routine practice of amnesties and collective pardons until now is observed in countries with long histories of overcrowding. As a rule, amnesties and collective pardons are only legitimate under the goal of achieving reconciliation in a society affected by severe conflicts.

5. Summary and Conclusions

5.1 Findings

1. Prison overcrowding is a serious problem and an elusive phenomenon. Overcrowding seems to represent a characteristic troubling the modern prison since its invention in the 19th century.
2. Overcrowding sometimes emerges as a problem which remained hidden for a long time; rapid declines of the prison population seem to come often also as a surprise for criminal justice administrators.
3. The patterns of turning points in the course of prison populations reflect to a certain extent the degree of stability of criminal justice policies and criminal sentencing and the extent of their insulation from outside pressures.
4. The problem of prison overcrowding is located at an intersection where several important policy and crime research related topics converge. These topics concern criminal sentencing, the role of prison sentences and imprisonment in the system of criminal sanctions, prison standards, the course of crime, prison budgets, economic restraints and general criminal policy determining the course of criminal law and punishment in a society.
5. Prison overcrowding can come as the result of a slow, steady and long term increase in the number of prisoners, developing into a culture of “chronic overcrowding” ; it can come also in a rapid move upwards for example in the wake of collective violence Correctional systems may be affected by prison overcrowding for short periods of time; in others overcrowding appears as an ebb and flow phenomenon.
6. Approaches to the assessment of overcrowding under international and national laws and standards amount roughly to a “totality-of conditions” test. The smaller the space available, however, the more important becomes space in itself.
7. Prison capacity is a “slippery concept” which expresses the need for elasticity and can be used to make overcrowding more or less apparent.
8. A closer look at prison systems reveals that the correlation between the rate of imprisonment and overcrowding is rather weak
9. Overcrowding is correlated with the rate of pretrial detainees, the size of the GDP per capita, the degree of inequality, democracy, the extent of perceived corruption, state fragility as well as violence. Overcrowding is not significantly correlated with the prisoner rate at large. On the basis of the pattern of correlations found it can be concluded that overcrowding problems essentially are associated with problems of governance, a weak economy and obvious problems in the criminal justice systems.

311 Human Rights Council: Tenth session. Agenda item 3. Report of the Working Group on Arbitrary Detention. Addendum. Mission to Italy. A/HRC/10/21/Add.5, 26 January 2009, p. 9.

312 Walmsley, R.: Global Incarceration and Prison Trends. Forum on Crime and Society 3(2003), pp. 65-78, p. 74.

10. Three distinct clusters of overcrowding can be distinguished, displaying differences in economic, social, governance and criminal justice related dimensions. Low overcrowding is correlated with a high GDP per capita, a low violence rate, low state fragility, high achievements in human development and democracy and a low extent of perceived corruption. A slightly higher rate of overcrowding comes with a low rate of pretrial detainees and a high rate of imprisonment. High overcrowding is correlated with a rather low prisoner rate, a high rate of violence, low per capita GDP, democracy and human development values as well as manifest signs of weak governmental structures.

11. Particular problems of overcrowding are observed in countries which undergo rapid social change and significant transitions or find themselves in a post-conflict situation and in a difficult process of state building. Here, prisons and prison conditions should become an integral part of the general reform of the security sectors and general security policies.

12. Data on prison capacity and overcrowding reveal also that overcrowding may affect a country's prisons selectively with some prisons showing over capacity occupancy while others operate below the level of accommodation capacity.

13. Particular problems of overcrowding are observed for prisons serving large cities where various social problems converge.

14. Although, there are but few longitudinal studies on prison overcrowding, it can be assumed on the basis of research and reports that distinct patterns of careers in overcrowding exist which can be modeled along various economic, cultural and political conditions. Turning points in the course prison populations take reflect the impact of amnesties, changes in sentencing policies or in the sensitivity towards certain types of crime.

15. Prison populations are growing in some parts of the world. However, in some regions/countries marked decreases in prison populations have been observed in the last decade. There is evidently no uniform trend. Even within (Federal) states prisoner rates take completely different courses.

16. Prison population drops come sometimes unexpected. Recent prison population drops in Germany and in The Netherlands are explained by a decline in crime. Others (Portugal) are a consequence of deliberate planning.

5.2 Explanations

1. According to many voices changes in crime rates do not contribute significantly to prison growth and overcrowding. While this assumption may hold true for changes in crime rates in general, increases in (sensitive) crime categories which attract prison sentences, in particular long prison sentences, during the last decades have been identified as drivers of overcrowding in prisons.

2. New social problems (drugs), the eruption of large scale violence or systemic violence may influence the course prison populations take. Another potential for crime impacting on prisons is in some countries found in general public order offences.

3. In many criminal justice systems minimum and maximum penalties have been raised and minimum sentences have been introduced. Extended minimum sentences will have lagged effects on prison populations.

4. Statutory frameworks of sentencing which allow for grossly inflated periods of imprisonment and the imposition of consecutively running prison sentences for multiple crimes add to the rise of long prison sentences. Particular attention should be devoted to life prison sentences and here to life without parole

5. While security orientation and punitive responses in fact prevail with respect to offender groups

deemed dangerous, alternatives to imprisonment, community sanctions, intermediate penalties, mediation and restorative justice approaches, most recently a new interest in designing effective re-entry programs for ex-convicts still figure prominently on crime policy agendas.

6. Alternatives to imprisonment and parole, however, carry a risk of imprisonment in case of failure to pay a fine, violations of conditions coming with alternatives or re-offending. Fines are particularly prone to be converted into substitute imprisonment under conditions of poor economic circumstances and large scale poverty.

7. During the last decades prison growth has been explained also by more restrictive, caused by concerns for public security, paralleled by a trend of parole supervision away from a social service orientation to a surveillance oriented instrument of public protection. The latter has been made responsible for a tightening of conditions and orders coming with early release from prison. Stricter surveillance of conditions of parole has in some systems led to a sharp increase in the return of parolees because of technical violations of parole, surpassing prison sentences as a driver of prison growth

8. Poor and unsettled offenders turn out to fuel prison inflation in different contexts. In developing countries poverty is at the core of the problem of failure due to persons not being able to pay even small amounts of fines or bail.

9. Root causes of overcrowding have been identified in statutory frameworks and practices of pretrial detention.

10. Developments in prison populations and overcrowding are diverse and reflect idiosyncracies which necessitate careful analysis of individual national systems of criminal justice.

11. In a recent comprehensive analysis of US prison data covering the period 1977 to 2005 it was concluded that the best predictors of the size of prison populations are crime, sentencing policy, prison overcrowding and state spending (on prisons). Prison overcrowding thus may be part of the onset of a political process where due to a lack of imagination of other options than building new prisons spending on prisons results in a dynamic which reiterates political decisions and at the same time boosts the potential for overcrowding.

12. There do not seem to exist many “windows of opportunity” for passing knowledge from research to the political system in order to develop “evidence based” correctional policies.

5.3 Conclusions

1. Overcrowding has been on international and national policy agenda since decades. Insofar, it does not come as a surprise that strategies to reduce overcrowding have been extensively discussed and widely disseminated.

2. In general, approaches to deal with prison overcrowding refer to reduction of admissions to prison and detention and reduction in the length of the stay.

3. Full consent exists on a two pronged approach of implementation which on the one hand identifies the measures with which to reduce/combat etc. prison overcrowding and on the other hand “gets the measures accepted” .

4. Research rarely addresses public attitudes towards prison overcrowding and acceptable instruments to resolve such problems. In general, it was found that the public is not interested in prison policy. The constituency for prisons is evidently narrow, specialized and not influential.

5. There are certainly no states of denial on the side of states and criminal justice officials when it

comes to recognizing overcrowding problems.

6. Analysis of overcrowding, identification of conditions under which overcrowding emerges as well as evaluation of approaches to contain or reduce overcrowding are in need of reliable and valid data on police recorded crime, sentencing, the prison population and the flow of cases.

7. Most of the penitentiary systems do not provide for sufficient data; moreover research on prison and imprisonment is limited, in particular as regards research comparing various sentencing options (including imprisonment)

8. Prison projections represent an instrument which in principle can advise and guide policy.

9. In spite of limitations of prison projections, implementation of this approach will result in information systems which can inform research, the public and politicians and thus improve the basis for impact assessments and political discourses around sentencing and other crime related policies.

10. Prison construction programs or the acquisition of additional space through privatization can provide relief in case of overcrowding. However, prison construction programs must be placed under financial restrictions. Second, additional prison capacity may in fact worsen the problem of overcrowding in the long run and furthermore reinforce a policy of reliance on imprisonment and the deprivation of liberty.

11. Prison litigation can become a means to and a part of prison reform. As prisons and prisoner do not have a strong constituency, strengthening inmates rights in litigation cases could be a effective tool in de-crowding prisons through the empowerment of inmates and NGOs.

12. Public order offences, small drug offences and criminal offences committed by addicted offenders are candidates for either complete decriminalization or for transformation into administrative offences which do not carry prison sentences.

13. Drug addicted prisoners and the mentally ill represent in some correctional systems significant groups which not only contribute to overcrowding but also to additional problems as regards the risk of transmitting infectious diseases.

14. Restorative justice and mediation programs may be useful to reduce the length of prison sentences. Serious efforts for reconciliation between offender and victim are in some systems considered as mitigating factors. But, it is difficult to assess the potential of restorative justice, mediation and restitution due to the absence of evaluation research which addresses the impact of restitution, restorative justice or victim-offender-reconciliation programs on sentencing and the prison population.

15. Traditional or customary approaches to deal with crime certainly have a potential as an alternative to formal criminal proceedings. The wide use of (informal) reconciliation procedures in African and Asian countries demonstrate effectiveness but also risks related to equal treatment and fairness.

16. With respect to pretrial detention it seems to be promising to place the emphasis first on the normative framework of pretrial detention and alternatives to pretrial detention. Of utmost importance for a normative framework geared towards minimizing pretrial detention is the principle of proportionality and the way proportionality is translated into the conditions set for pretrial detention. Placing a strict statutory cap on the length of pretrial detention certainly plays a decisive role in limiting pretrial detention as does a general clause which prevents that petty offences (which will most probably result in non-custodial sentences) will lead to detention prior to trial

17. Studies demonstrate then that the risk of absconding is often misjudged in decisions on pretrial

detention and as a consequence many false positives are held in remand prisons.

18. Assigning a defense council very early in criminal proceedings seems to be correlated with shorter periods of pretrial detention. In the same line of practices fall approaches which, also for budgetary reasons, install assistance through paralegals.

19. Experiences with electronic monitoring have not yet been evaluated systematically in the context of replacing pretrial detention; however, reports describe electronic monitoring as an important element in packages designed to bring down the prison population.

20. The European Supervision Order seeks to compensate a particular risk of foreign nationals to be placed in pretrial detention and at the same time to strengthen the principle of presumption of innocence. Through mutual recognition of pretrial (non-custodial) supervision orders it is sought in the European Union context to create an additional option in the strategy to reduce pretrial populations.

21. Case backlog reduction programs may serve to raise awareness for giving priority to cases where pretrial detention was ordered and reduce the time suspects spend in pretrial detention.

22. Remarkable success stories can be reported from creating and successfully implementing alternatives to imprisonment. There is clear evidence that day fines succeeded in the past to replace to a quite considerable though differing extent in particular short-term imprisonment.

23. Suspended prison sentences and probation turned out to be quite successful as alternatives to immediate imprisonment.

24. Although, alternatives to imprisonment have been introduced since the 1960s/1970s in many regions and in spite of their apparent success alternatives have not or could not be implemented in a way which has prevented further prison growth and overcrowding.

25. Community service programs have been introduced in many countries which seem to work quite well. Community service evidently can be implemented also in face of strained budgets. Some of the new community service programs demonstrate a significant potential and exhibit interesting and innovative features. These community service programs are integrated with professional training and with the idea of restitution and paying back to the immediate community ("neighborhood community service").

26. The emergence of "three and two strikes laws" and truth in sentencing policies, general approaches to enhancing penalties in case of recidivism and minimum penalty legislation have been discussed as major drivers of long prison sentences and as an area where reforms should be focused on implementing the principle of proportionality.

27. The wide and indiscriminate use of enhanced prison sentences does not improve public safety but rather contributes to the deterioration of crime and crime control problems. This should result in considering strictly the internationally endorsed principles of proportionality and imprisonment as a last resort in sentencing legislation.

28. Sentencing legislation should leave enough room for judges to adjust the penalty to individual characteristics of offence and offender. This would mean to re-consider mandatory minimum sentencing laws, truth in sentencing policies and in particular "three strikes and you're out" policies. Sentencing should be better insulated from penal populism.

29. Parliaments when reforming sentencing laws have to pay attention to the question whether a specific sentencing policy can be sustained. It is primarily the task of the legislator to take into consideration possible consequences (and side effects) of legislation and to base legislation on thorough

impact assessments. Impact assessments have found a wide field of application and are today an essential element in good governance.

30. Parole is the core of a set of measures which ranges from reductions in the original prison sentence, early release under supervision to various forms of prison regimes (open prison, work furloughs, home detention etc.). Parole and good time approaches are among the conventional instruments to reduce the time which has to be spent actually in prison.

31. Parole therefore serves as a bridge between incarceration and return to the community and represents the most important instrument in tackling the problem of “revolving doors.”

32. There is not much known about best practices as regards revocation of parole and recalls to prison. As a minimum recalls to prison should be based on the principle of consistency and they should reflect recognition of the basic standards applied to the use of imprisonment in general. This means also that recalls should be used as a last resort and in a proportional manner and after tightening and adjustment of conditions have failed. In general, revocation for technical violations of parole should be restricted to repeated and substantial violations and violations which indicate a danger to the public

33. Amnesties usually have rather short-lived effects on prison populations. They do not affect root causes of growth and result in short term improvements which fade away shortly after implementation if nothing else changes. Amnesties certainly play a legitimate role as an instrument to settle large scale conflicts and to pacify a country where a significant potential of conflict escalation looms, not in responses to

5.4 Open Questions

Crucial and still open questions concern the explanation of success and the explanation of failure of measures to control overcrowding. If the acid test of reform should be rather what can be sustained than what can be attained³¹³, then, well designed longitudinal research is needed. For most of the projects and approaches described in this report such research is not available. The assessment of success and failure is based on a mix of limited data, selective and systematic observation, narratives and assessments based on practical experiences. But, beyond that theoretical underpinning is required which structures the complexity which comes with the onset and disappearance of prison overcrowding, reconciles normative and empirical approaches and ultimately provides guidance for political decisions.

When looking at explanations of success a diverse picture can be drawn which essentially fits the assumption of rather unique configurations which in the context of a countries history explain why certain approaches work (and others not). Successful reforms and changes in pretrial detention practices in the Ukraine for example are explained by placing pretrial detention reform into a larger policy of moving away from a repressive Soviet style system and to become an accepted member of the Council of Europe³¹⁴. Specific incentives insofar have been perceived to exist and have been linked to prison conditions. Successful reduction of remand and sentenced prison population in Portugal over the last years is linked to a comprehensive reform of substantive and procedural criminal law; behind that stood evidently the political will to contain prison growth and to improve prison conditions. Political will as to what place prison sentences should play in a system of criminal sanctions and how prison sentences should be enforced certainly have a central place in explanations. A major impact on the size of prison populations can be expected from deliberate political decisions to cut down the use of imprisonment. Examples can be drawn from decisions made by Austrian and German parliaments to reduce the use of short term prison sentences (up to six months) in the 1960s. Finland opted also for a major change in the use of prison sentences when making a decision to adjust to practices implemented in other Scandinavian countries. Both examples, the German/Austrian as well as the

313 Varenik, R.O.: *Mixing Politics, Data, and Detention: Reflections on Reform Efforts*. In: Open Society Institute (ed.): *Justice Initiatives. Pretrial Detention*. New York 2008, pp. 172-183, p. 174.

314 Naimark-Rowse, B., Schönteich, M., Sorochinsky, M., Tomasini-Joshi, D.: *opus cited*, 2008.

Finnish, demonstrate also what is needed to initiate political discourses and ultimately political changes which reduce the prison population effectively: a justificatory system or a narrative which is politically acceptable and which endorses decarceration policies or alternatives to imprisonment³¹⁵. In Germany/Austria the narrative drawn from the program of Franz v. Liszt was very successful when implementing in the 1960ies a policy which gave priority to fines and cut back drastically short prison sentences. In Finland it was evidently the wish to fall in line with the rest of the Scandinavian countries which resulted in adopting a decarceration policy which decreased the prison population significantly. However, it is not clear how such justifications are made to work and why under certain conditions they seem to be successful and under other conditions they are not.

The Finnish case shows that discourses on the role of prison sentences and the size of the prison population may be also initiated by placing prison figures into a comparative perspective. In the 1990s in Australia the question was raised why New South Wales would experience a much higher prisoner rate than the demographically similar state of Victoria³¹⁶. Research came up with a mix of grounds. In New South Wales more imprisonment for fine default, longer prison sentences, and in particular a higher rate of custodial sentences can be observed, while Victoria disposes of an additional alternative, periodic detention. Such comparisons seem to become effective within clusters of countries (or political entities) which are due to various reasons close to each other. However, comparisons may also result in discourses headed towards increasing the size of the prison population. The Chairman of a Northern Irish political party in 2005 and at the occasion of the publication of English prison figures expressed surprise when noticing that Northern Ireland had prison population figures half of those in England/Wales³¹⁷. Referring to violence and security it was then stated that the public would not understand that Northern Ireland resorts that rarely to imprisonment.

Financial crises and budgetary problems are sometimes cited as causing political change and encouraging decisions to revisit sentencing policies and early release procedures. A direct causal relationship, however, is contended. Case studies from the United States are interpreted as showing that states began to re-evaluate security policies and recognized that prison populations can be reduced without a negative impact on public security³¹⁸.

Answers to the question how to explain why reforms fail in producing sustained and durable changes in prisons are diverse, too. Often, it is assumed that failure of new options in reducing prison overcrowding is the consequence of deep rooted attitudes and beliefs of criminal justice officials who continue to rely on deprivation of liberty, even if plausible alternatives are available³¹⁹. In Chile, the absence of data showing an impact of the reform of rules and practices of pretrial detention have been noted as an explanation why a counter reform succeeded after a public debate on whether security had been compromised by strengthening proportionality in decisions on pretrial detention.

Financial problems certainly play a crucial role in achieving sustainability. Projects are sometimes based on resources which are available for a limited period of time. Failure of finding permanent funding may explain why quite some projects discontinue or cannot be expanded.

Prisons then are regarded to be low priority issues in all political systems and that there is little awareness of prison conditions among the public³²⁰. Moreover, criminal justice and correctional systems may be more or less exposed to partisan politics dependent on the political system and the extent of insulation of the judiciary from political pressure. It can be assumed that partisan politics bring more instability in the course practices of sentencing, early release, amnesties, prison

315 Jacobs, J.B.: Finding Alternatives to the Carceral State. *social research* 74(2007), pp. 695-699.

316 Gallagher, P.: Why does NSW have a higher imprisonment rate than Victoria? NSW Bureau of Crime Statistics and Research, *Crime and Justice Bulletin*, May 1995.

317 www.allianceparty.org/news/001618/surprise_at_prison_population_figures.html (10th Sep 2005).

318 The PEW Center on the States: opus cited, 2010, p. 2.

319 Schwartz, O.: Ebb Tide: The Russian Reforms of 2001 and Their Reversal. In: Open Society Institute (ed.): *Justice Initiatives. Pretrial Detention*. New York 2008, pp. 103-119, p. 317.

construction and prison regimes take. The question then arises how political will and political practices can be initiated³²¹ which are in line with international standards and the body of principles which, in theory, provide for blueprints, models and all instruments needed to contain prison populations. A similar question may be raised with respect to how the community and social elites can be made interested in prison reform. There are interesting cases which describe that interest can be raised³²² and in fact placing the focus on practices instead of norms (which are a field for legal specialists) could provide more opportunities and perhaps more incentives for participation at justice and prison reform³²³.

If political will is in fact decisive for success or failure of prison reform, then general theoretical approaches to the explanation why state actors comply with rules and standards should be pursued³²⁴.

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320 Dankwa, V.: opus cited, 2009, p. 87.

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323 Foglesong, T.: Grand Ambitions, Modest Scale. In: Open Society Institute (ed.): Justice Initiatives. Pretrial Detention. New York 2008, pp. 4-10, p. 7.

324 See Hathaway, O.A.: Do Human Rights Treaties Make a Difference? The Yale Law Journal 111(2002), pp. 1935-2042; Cole, W.M.: Sovereignty Relinquished? Explaining Commitment to the International Human Rights Conventions, 1966 - 1999. American Sociological Review 70(2005), pp. 472-495.

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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 Republic¹ -

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Status of prison overcrowding in Latin America and the Caribbean. Importance of identifying the origin of overcrowding in order to be able to reduce it effectively. Effects of income distribution inequality on crime and on prison overcrowding. Truly comprehensive policies and actions are required. What to do specifically in penitentiary systems. What not to do. Inconvenience of private prisons in middle and low income countries. The good examples of Costa Rica and the Dominican Republic. The need to persist and become renovated.

Status of prison overcrowding in Latin America and the Caribbean

This presentation is one result among others of the ILANUD/RWI Penitentiary Systems and Human Rights Programme that ILANUD has been implementing over almost four years with the generous co-operation of the Raoul Wallenberg Institute of Human Rights and Humanitarian Law, RWI, and the Swedish International Development Agency, SIDA, 2006-2009, with participation of the nineteen countries of Latin America.

Since the creation of ILANUD in 1975 the issue of prisons has constituted one of its permanent programmes. In this area special attention has been paid to prison overcrowding, the most serious problem that the countries of Latin America and the Caribbean have been facing for the past two decades, which we measure on the basis of density for every one hundred places.

The two tables below show the current density in the region's penitentiary systems. As can be observed, the prisons in 25 out of the 29 countries in both tables were overcrowded², and in most cases exceeding the critical overcrowding parameter of 120% or over, established by the European Committee for Crime Problems (Comit? Europeen 1999 : 43) which we also utilize to assess the situation in the Latin American region.

It is necessary to make clear that due to the following and other reasons the overcrowding situation is actually more serious than these tables show:

- a) the figures in the tables are averages of the total figures for all prisons in the penitentiary system of each country. In reality it occurs that there is little or no overcrowding in some facilities while very high densities even of several hundreds and in inhuman conditions are found in some cases;
- b) in an attempt to alleviate the serious situation, penitentiary officials do whatever they can within their narrow range of possibilities, making changes with the furniture and the facilities. They provide bunk beds, frequently of several tiers of berths (in one case we counted as many as eight berths per bunk bed); they also convert areas that were devoted to other uses before (for instance,

1 A previous version of this document was delivered in the workshop on Penal Reform and Prison Overcrowding held at the 18th Session of the United Nations Commission on Crime Prevention and Criminal Justice, Vienna International Centre, April 15th 2009. The translation from the Spanish original was made by Orlando García Valverde.

2 The exceptions are Costa Rica, among the countries of the Latin American group, and Belize, Dominica and Trinidad and Tobago in the Caribbean group. The table shows Argentina also without overcrowding, but the figure corresponds only to the Federal Penitentiary Service. In some of the provinces the situation is the same as at the regional level.

hallways, recreation rooms, etc.) into sleeping quarters, and build bedrooms in areas that were formerly open yards or soccer fields. The result of such transformations is an increase in sleeping quarter capacity but at the expense of the quality of life in prisons which becomes worse. Prison unit capacity becomes thus redefined: for instance, a prison with an original capacity for 500 individuals will now be described as having a capacity for 1,000. This makes it very difficult to measure the actual capacity of the systems, and it may be asserted that the figures in these tables are optimistic. In reality densities are higher and frequently very much higher.

It is obvious, we might add, that in addition to being a cruel, inhuman and degrading treatment, as expressed by the Inter-American Court of Human Rights, critical overcrowding damages all essential functions of penitentiary systems: health, nourishment, rest, visitation, work, education, security of both inmates and personnel, etc.

PRISON OVERCROWDING IN COUNTRIES OF LATIN AMERICA

COUNTRY	1999-2002		2005-2006	
	POPULATION	DENSITY X 100 PLACES	POPULATION	DENSITY X 100 PLACES
Argentina (02-05)*	52,914	118		99
Bolivia (99-06)	8,315	162	7,721	207
Brazil (02-06)	239,345	132	401,236	173
Colombia (01-06)	71,837	136	81,367	117
Costa Rica (02-05)	7,626	110	8,407	99
Chile (01)	33,620	141	42,532	
Dominican Republic (99-05)*	14,188	256	13,887	138
Ecuador (01-05)	7,859	115	14,331	161
El Salvador (02-05)	11,506	167	12,853	162
Guatemala (99-09)	8,169	113	10,962	128
Honduras (99-06)	10,869	209	11,178	141
Mexico (00-05)	151,662	126	210,140	128
Nicaragua (02-05)	6,885	104	6,103	104
Panama (02-05)	10,423	137	11,688	161
Paraguay (99-05)	4,088	151	6,290	128
Peru (02-05)	27,417	138	37,445	154
Uruguay (01-06)	4,903	151	6,584	145
Venezuela* (00-06)	20,659	113	26,047	115

E. Carranza, ILANUD

*Argentina: The 2005 figure is only for the Federal Penitentiary Service. There was overcrowding in provincial penitentiary services.

*Dominican Republic: The 2002 figures are from the Commission for the Definition, Implementation and Supervision of the Nation's Penitentiary Policy and the calculation was made taking into account only 21 prisons, 12 having been excluded, since according to the Commission «all prisons have collective cells and due to numerous remodeling and expansion works it is impossible to determine exactly the capacity of the 32 facilities there are in the country.»

PRISON OVERCROWDING IN THE CARIBBEAN 2008		
	PRISONERS	DENSITY PER 100 PLACES
Antigua & Barbuda	208	131
Bahamas	1,084	129
Belize	1,334	86
Dominica	254	85
Grenada	367	374
Jamaica	4709	111
St .Kitts & Nevis	232	155
Saint Lucia	503	101
St. Vincent & Grenadines	376	188

Suriname	1,600	135
Trinidad & Tobago	3,510	88
Source: International Centre for Prison Studies, King's College, London.		

It is important to identify the origin of overcrowding in order to be able to reduce it effectively.

Prison overcrowding in Latin America and the Caribbean cannot be solved simply by making changes inside prisons. Prison systems are the last link of «an inmate production chain» which generally starts with the police, continues at the prosecutorial agency and moves on to the courts before arriving at the penitentiary system which receives and lodges the inmates with a very little chance or with no chance at all to turn them back or to exert an influence towards correcting and reducing such «production chain.» Although a good professional performance on the part of penitentiary officials is very important to attain acceptable standards of dignity and respect for the basic rights of those in prison, the prison staff by themselves have very limited possibilities to reduce overcrowding, it being indispensable for the prosecutorial agency and the judges to apply preventive imprisonment and prison sentences more prudently.

Nor can overcrowding be solved simply by building more prisons, although in some cases it is necessary to build facilities. The countries of the region have a high vegetative population growth rate and some also in terms of immigration. This means that, even if it were possible to maintain confinement rates stable, prison populations will always show a certain growth that will generally require additional space.

But it occurs that in addition to the vegetative growth of the countries, populations confinement rates have also been growing at an accelerated pace with very few exceptions since the end of the eighties and the beginning of the nineties, whereby the absolute figures concerning individuals in prison have grown impressively having multiplied themselves by 2 and 3 between 1992 and 2008, and no country has the economic capacity to solve the problem solely by building new facilities (see tables for rates at the end of the document). The origin of such growth of prison rates lies in the operation of the entire chain of criminal justice system links and in the need to tackle crime and other social conflicts not only through prison sentences, but also with non penal responses and with penal responses other than imprisonment, and this also has to do with crime increases, the consequent alarm on the part of the population, and with structural reasons resulting from the manner in which income distribution has been managed within globalization³. Very rigorous research has been conducted with respect to the latter, which proves that income distribution inequality measured by the Gini coefficient has a significant and strong effect which results in an increase in the rates of crimes committed against both individuals and property. This has been measured for the crimes of homicide and robbery and burglary in 39 UN member countries, the co-relation having been verified within the countries and particularly among countries (Carranza, E., 2007, 2006; Fajnzilver P. et al., 2002; Bourgignon F., 2001). It couldn't be by chance that both, crime, and prison populations would grow at such an accelerated pace and simultaneously throughout the entire region.

Truly comprehensive policies and actions are required

We may conclude from the preceding that public policy concerning crime and criminal justice must be truly comprehensive, not merely of a criminal nature, and that it must be accompanied by policies that will reduce inequality in income distribution. This has been said for years in numerous criminal policy documents of United Nations where it is explained that crime is a social phenomenon and that in order to keep crime levels low and to benefit from a good criminal justice it is indispensable to attain good levels of equality in the exchange and distribution of income and development within the countries and among countries. It is indispensable to insist on this. Otherwise we shall become stuck on the search for «good technocratic practices» rather than satisfying the basic needs of prisons and

3 On globalization and how it has been managed see Joseph Stiglitz 2002.

criminal justice systems. It is the same case as with the basic needs of our societies in terms of health, food, water, education, housing, labour, etc. It has been proven that countries that meet such basic needs with justice and equality have good ratings in other areas such as culture, art, and sciences, as well as low levels of social violence and crime.

What to do specifically in penitentiary systems. What not to do. The good examples of Costa Rica and the Dominican Republic

Once the need for comprehensiveness in policies and actions has been established we must then ask ourselves what to do specifically in penitentiary systems to reduce overcrowding and related problems.

In many countries of Latin America and the Caribbean we find examples of good penitentiary staff members who perform their jobs admirably with great dedication although in very difficult conditions. We observed this again while we were implementing the ILANUD/RWI Programme. However, these experiences are generally focused on a province, a prison, or a wing of a prison, and are frequently individual efforts that normally are not afforded the necessary support or continuity and that become ultimately interrupted.

Not to preclude other examples that would also deserve to be brought to public attention, we shall refer to two notable cases characterised by the fact that they constitute country-wide national and comprehensive reforms where a model has been coherently under development for thirty years in one case and for five in the other. In other words we shall not be referring to two «proposals», or to two cases of «good practices» but to two specific realities that have been and are being shaped comprehensively in the penitentiary systems of two countries, and which have also been accompanied by considerable coherence and comprehensiveness in terms of actions in their criminal justice systems and also, to a certain extent, in terms of State policies in other social and economic areas. These are the cases of Costa Rica and the Dominican Republic. The current model of Costa Rica has been under development, with small variations, for 30 years. That of the Dominican Republic is younger but will soon enter into its sixth year of coherent development after three consecutive administrations.

Without ignoring the important differences in terms of history, culture, language, per capita income, etc., that separate these two countries from the Northern European countries and Canada, and focusing our appreciation exclusively on penitentiary systems, we feel that both, Costa Rica, and the Dominican Republic are developing a State penitentiary system that is very similar to that of cited countries in the areas indicated, although with a necessary adjustment to their situation and reality of middle income countries trying to solve not only the specific overcrowding problem, but that of the comprehensiveness of their penitentiary systems as well, as the only way to attain success in the pursuit of better dignity and basic rights standards for both the inmates and the staff, and also as the only way to do so at a reasonable cost (since prison, by its very nature, is very expensive and requires a considerable investment).

The model or strategy implemented by both countries has the following characteristics:

a) It was introduced thanks to a political decision from the highest level of government: the presidency of the republic and the respective ministry. This was an essential requirement in both countries to install the prison reform;

b) Key staff members were very carefully selected on the basis of their vocation, educational background, knowledge of the subject matter and full-time dedication to the job (head of the penitentiary system, of the staff training school or institute, and of each prison), as were other officials in related areas, such as the head of crime policy.

The prevailing situation in Latin America in general, with exceptions, is that the heads of the main prisons do not arrive at such positions with a background in penitentiary studies or experience in the field or both. Many of them who belong to the army or the police are appointed temporarily

in the penitentiary system; others are normally civilians who are appointed in such capacity by the government in power but also without a background in penitentiary studies or experience in the field or both. ILANUD has verified cases of great functional instability, with a rotation of directors general every six months on average.

In Costa Rica the directors general of the Social Adaptation Department are always staff members selected from among those already in the penitentiary career; so are the heads of prisons and of the Penitentiary Training School. The case of the Dominican Republic is very interesting: two parallel systems function in the country: the «new» one with eleven prisons already and growing with the opening of new or remodelled facilities exclusively under new «PST» officials (VTP⁴) who enter into the system after eight months of training at the Penitentiary Training School; and the «old» one which still has 24 prisons and which gradually disappears in the course of consolidation of the new system. All officials with the leadership of such change have maintained their stability since the beginning of the process.

c) Continuity has been uninterrupted in the reform programme. It is indispensable for the penitentiary reform to outlast the different administrations and for it to last from eight to ten years in order to become consolidated. In Costa Rica the process started in 1975 and it has been able to survive for eight administrations. In the Dominican Republic it started in July 2003 and it is into the third administration.⁵

d) The penitentiary career was created in both countries.

In most countries of the region there is no penitentiary professional career and penitentiary officials are not benefited by stability in their positions. Both, Costa Rica, and the Dominican Republic created professional penitentiary careers with the guarantee of stability on the job and social security and retirement benefits.⁶

e) In both countries a training school or institute that selects and trains necessarily all personnel that enters into the system and that provides continuously in-service training was created. All penitentiary personnel must be adequately trained and know the institution for which it works as well as develop an interest in it.

f) In both countries a considerable initial investment was made. The governmental decision to establish the new system must be accompanied by the necessary resources. Both, Costa Rica, and the Dominican Republic devoted considerable initial resources to the project.

It is indispensable to invest on: i) well remunerated personnel and an adequate inmate:staff ratio; ii) facilities; no overcrowded prison can function adequately, just as no hospital, school or any other institution in overcrowding conditions could; iii) an annual budget that would make it possible to make the necessary expenditures for the system to function adequately, including food, health, education, etc., as well as the monthly salary of the staff.

g) Both countries continued to make regular annual investments. Periodic investment is necessary to maintain the level and advancement of the system. If the system is neglected the cost to recover it is very high, but the most serious consequence is the loss of trust on the part of the staff and the inmates, who shall interpret that this was one more promise by the politicians in vogue and that placing your life at stake by opposing very powerful and violent interests that would be

4 Abbreviation for Penitentiary Surveillance and Treatment in Spanish.

5 The process started in July 2003; a new administration took over in August 2004 and it was re-elected for the 2008-2012 period.

6 In Costa Rica technical and professional personnel are protected by the Civil Service administration, and penitentiary police are protected under the General Police Law and the General Penitentiary Police Regulations.

affected by the reform was not worth the risk. Constant investments must be made on: i) personnel, providing in-service training periodically to all operators to maintain and raise their professional level (in the Dominican Republic all prison staff without exception benefits at least once a year from a week of training); ii) recruiting new personnel to maintain the adequate inmate:staff ratio; and iii) infrastructure, adjusting periodically the system's infrastructure capacity. Both, Costa Rica and the Dominican Republic have been complying with this requirement.

h) The penitentiary reform did not focus on the overcrowding problem in any of these countries; nor did it limit itself to the construction of one or several high security, high cost megaprisons. The purpose of the reform in both countries was to attain comprehensiveness of the penitentiary system through the adoption of dignity and quality standards for all inmates in all prisons, and through observance of the principle of equal justice for all. Both, Costa Rica and the Dominican Republic established State penitentiary systems to such effect using public resources rather prudently and intelligently.

Offers were made to both countries for construction of private prisons which would lodge only a small fraction of all inmates and at a very high cost. Initially Costa Rica signed a pre-contract for construction of a private prison with a capacity for 1,200 inmates for 73 million dollars. Later the government realised its error and did not proceed with the pre-contract; instead it built facilities at its own expense for 2,600 inmates, more than double the number of inmates, for only 10 million dollars. The government realised that if it built that prison whose management and maintenance would be undertaken by private enterprise for twenty years at a daily per capita cost of US\$37 per inmate while the cost within the State system was US\$11, the cost of operation of that prison alone would keep it from being able to make other improvements in the rest of the system which was responsible for 80% of the inmates. The government decided to improve the situation of all individuals under confinement raising the daily per capita amount for all the population to US\$16.

An offer was made also to the Dominican Republic for the building of a similar prison for 1,200 inmates, for 53 million dollars. The government, which had already built and refurbished nine prisons that were operating with good quality standards for slightly more than 10 million dollars did not accept the offer either, and continued with its State comprehensive penitentiary programme which is generating very good results.

The ILANUD/RWI Penitentiary Programme found several similar cases in other countries of the region.

The following table explains why, in addition to the inconvenience of their high costs, private prisons cannot solve the overcrowding problem in middle and low income countries⁷ while instead they worsen the situation notably throughout the system.

The introduction of a private prison into a penitentiary system with a minimum budget, several or many overcrowded prisons, and a shortage of materials and personnel, such as is the case in general of the penitentiary systems of the Latin American countries since the eighties, creates a situation of privilege for a small group, in addition to the fact that it further deteriorates the rest of the system. We explain this by means of a typical example:

Three years ago countries X and Y built their last prison. Country X built a State prison; country Y built a private prison. Both countries have 10 prisons with a total capacity for 10,000 inmates, but both have 15,000 inmates, which is to say that both work at 150% of their capacity. Country X has 10 State prisons; country Y has 9 State prisons and 1 private prison. Let us see its situation in the following tables:

7 We use the World Bank country classification. In its classification all Latin American countries, with the exception of Haiti and Nicaragua, are middle income countries. Haiti and Nicaragua are low income countries (World Bank 2005:289, 2000:335).

COUNTRY "X" WITH A CAPACITY FOR 10,000, BUT WITH 15,000 INMATES

10 PRISONS WITH A CAPACITY OF 1,000 EACH	DISTRIBUTION OF INMATES PER PRISON
0 private prisons	0
10 public prisons	1,500

COUNTRY "Y" WITH A CAPACITY FOR 10,000, BUT WITH 15,000 INMATES

10 PRISONS WITH A CAPACITY OF 1,000 EACH	DISTRIBUTION OF INMATES PER PRISON
1 private prison	1 000
9 public prisons	1 550

In country X the limited penitentiary resources can be distributed equitably with better results. However, in country Y overcrowding increases progressively in State prisons while an unfair distinction of doubtful constitutionality is established between those who are serving time in State prisons and the few who are serving time in the private prison in a situation of privilege.

And in countries where the prison population is characterised by a high growth rate, such as in those of Latin America, overcrowding becomes worse as time goes by; it accumulates inequitably suffocating those in State prisons, in contrast with the privilege of a few who remain, at a very high cost, in the private prison.

The need to persist and become renovated

We have highlighted the general features of two successful reforms in the region although each item would deserve a more extensive review. Such a review can be found in the book *"Crime, Criminal Justice and Prison in Latin America and the Caribbean: How to Implement the United Nations Rights and Obligations Model"* (Elías Carranza et alii, ILANUD/SIGLO XXI, México 2009).

The consolidation in Costa Rica of its new penitentiary system not only solved the endemic overcrowding problem but it also established a system that is recognised internationally for its lower level of violence⁸ and respect for the basic rights of both inmates and staff members. This is the same case of the new penitentiary system in the Dominican Republic. ILANUD has been able to verify it in both countries by means of successive visits; it cooperates with both countries in this and other criminal justice matters, and feels that these are two penitentiary systems that deserve a careful look on the part of third countries since with the necessary adjustments they may serve as very valuable orientation in the horizontal processes of the transfer of knowledge.

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8 Prisons, such as close systems in general, are characterised throughout the world by the generation of higher levels of violence than those that characterise life outside. It is necessary, then, to encourage the greatest transparency possible in them in order to reduce violence and to reduce the use of prison to the minimum indispensable level.

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PENITENTIARY RATES IN COUNTRIES OF LATIN AMERICA 1992-2008 IT INCLUDES FEDERAL AND PROVINCIAL/STATE PENITENTIARY SYSTEMS, AND IN SOME CASES INDIVIDUALS HELD IN POLICE PRECINCTS.																	
	92	93	94	95	96	97	98	99	00	01	02	03	04	05	06	07	08
<i>Argentina</i>	63	64	68	74	97	96	99	106	118	126	141	157	163	164	152		
<i>Bolivia</i>						79	85	101	109	96					80	86	85
<i>Brasil</i>	74	80	81	107		119		131	133	132	133	169	182	193	211	219	226
<i>Colombia</i>	92	96	97	98	120	129	128	139	157	170	157	178	199	207	179	174	188
<i>Costa Rica</i>	104	105	109	121	133	160	162	169	168	183	187	190	196	196	191	186	189
<i>Chile</i>	154	153	148	153	161	170	179	203	215	216	221	228	226	228	259	290	318
<i>R. Dominicana</i>	145	135	151	161	129	140	165	168				189	150	143	148	164	166
<i>Ecuador</i>	74	81	81	85	95	81	79	70	65	63	69	77	87	91	107	128	118
<i>El Salvador</i>	101	103	109	124	138	157	136	112	130	158	177	180	188	186	184	226	258
<i>Guatemala</i>					62			75			101	101	96	87	84	83	88
<i>Honduras</i>	110	113	139	160	166	153	160	178			183			170	159	148	148
<i>México</i>	101	104	97	101	108	116	127	142	152	163	170	177	185	196	200	200	202
<i>Nicaragua</i>	78	78	91	98	111	106	132	143	128	124	131	112	116	117	111	121	120
<i>Panamá</i>	176	215	221	229	269	282	292	294	293	320	341	361	360	359	356	342	275
<i>Paraguay</i>					70	75	74	78	67	74	85	92	107	109	105	99	100
<i>Perú</i>	77	80	83	88	96	100	105	108	108	104	104	108	116	123	136	149	153
<i>Uruguay</i>	96	99	100	99	101	106	120	122	129	148	170	203	215	213	198	212	231
<i>Venezuela</i>					101	112	106	97	85	104	104	103	98	76	96		

E.Carranza, ILANUD. Prepared with penitentiary data provided by the governments of each country and population data from the Latin American and Caribbean Demographic Centre, CELADE.

PRISON RATES IN THE CARIBBEAN	
Antigua & Barbuda	1995 (341) 1998 (278) 2005 (269)
Bahamas	1998 (478) 2002 (410)
Barbados	1993 (238) 1998 (291) 2002 (317) 2005 (367)
Belize	1992 (310) 1995 (293) 1998 (448) 2001 (384) 2003 (420) 2006 (516)
Dominica	1992 (387) 1995 (392) 1998 (421) 2004 (418)
Grenada	1998 (352) 2002 (333) 2005 (265)
Jamaica	1992 (178) 1995 (171) 1998 (162) 2003 (176)
St .Kitts & Nevis	1995 (295) 1998 (288) 2001 (441) 2004 (559)
Saint Lucia	1992 (210) 1995 (263) 1998 (216) 2001 (296) 2004 (294)
St. Vincent & Grenadines	1992 (294) 1995 (323) 1998 (390) 2001 (270) 2005 (338)
Suriname	1992 (308) 1995 (302) 1998 (382)
Trinidad & Tobago	1992 (269) 1995 (299) 1998 (353) 2001 (370) 2004 (302)

Source: International Centre for Prison Studies; King's College, London.

HUMAN DEVELOPMENT AND OVERCROWDING IN PRISONS

*N. Masamba Sita¹ and
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INTRODUCTION

The relationship between “Crime” and “Development” is no longer questionable (See inter alia, N. Masamba Sita, 2004, and UNODC, 2005). It is a double edged inverse relationship: “Crime” leading to “Underdevelopment” and “Development” in some circumstances leading to Crime. Using tables to describe the African situation, the presentation will be examining (1) the Human Development Index (HDI), an indicator that classifies countries in: developed, developing and under-developed countries (Section 1); (2) the overcrowding in the selected African countries (Section 2); and (3) discusses the relationship between the countries’ Human Development indices and overcrowding in prisons (Section 3).

The working hypothesis is that there is a negative correlation between the Human Development index (HDI) and Overcrowding in respective countries. It is supposed that in countries with a “Very high or high Human Development, there is “No overcrowding”, while those with a “Low Human Development index”, face “Overcrowding”.

The concern of this workshop is overcrowding in prisons, a situation that undermines concerted efforts for human development in the African region. One of the objectives of the workshop is to look at strategies, policies and means at our disposal to effectively combat the phenomenon. The hypothesis the presentation intends to address is: very high or high Human Development in African countries has a positive impact on Overcrowding in Prisons. This helps to better understand the varied aspects of development issues the development actors should take into consideration.

The paper substantiates, from some statistics at our disposal, the relationship between Human Development Indices (HDI) of countries and overcrowding in their prisons. In order to understand whether there is association between the two variables, we shall use the Pearson’s coefficient of correlation, where applicable and other non parametric test as the Spearman’s rho.

SECTION 1: THE HUMAN DEVELOPMENT INDEX (HDI)

The Human Development Index is a comparative measure of life expectancy, literacy, education and standards of living for countries worldwide (UNDP, Human Development Report, 2009). It helps at the household level to measure the quality of life of populations and their accessibility to public services provided by the government. Our hypothesis is that life expectancy, literacy, education and standards of living for populations depends on the category: very high, high, medium and low their countries belong to. It is to be noted that the majority of the African countries listed as “Poorest Countries” are countries with low Human Development (least developed countries) and some of them are now in “Medium Human Development category (developing countries).

The United Nations Development Program’s Human Development Report lists countries in four categories, according to their Human Development Index (HDI). The four (4) categories are the following:

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1. Very high human development (developed countries)
2. High human development (developing countries)
3. Medium human development (developing countries)
4. Low human development (least developed countries)

In each of the above categories, we focus on African countries. According to the list, there is no African country with very high human development. We consider that countries with low income are mainly those under the fourth category, i.e. countries with low human development index. Therefore, the presentation examines only the high, medium and low human development indices.

1.1 AFRICAN COUNTRIES WITH HIGH HDI

Only the following three (3) African countries figure in this category: Libya, Seychelles and Mauritius. Their rank, human development index and changes realized are indicated on table 1 below.

Table 1: African Countries with High Human Development Index

N°	RANK	COUNTRY	HUMAN DEVELOPMENT INDEX (HDI)	
			2007 DATA	CHANGE COMPARED TO 2006 DATA
1	55	LIBYA	0.847	0.005
2	57	SAYCHELLES	0.845	0.004
3	81	MAURITIUS	0.804	0.003

1.2 AFRICAN COUNTRIES WITH MEDIUM HDI

The indices of the 26 African countries listed under this category vary from 0.511 to 0.769.

Table 2: African Countries with Medium Human Development Index

N°	RANK	COUNTRY	HUMAN DEVELOPMENT INDEX(HDI)	
			2007 DATA	CHANGE COMPARED TO2006 DATA
1	98	TUNISIA	0.769	0.006
2	103	GABON	0.755	0.005
3	104	ALGERIA	0.754	0.005
4	118	EQUATORIA GUINEA	0.719	0.007
5	121	CAPE VERDE	0.708	0.004
6	123	EGYPT	0.703	0.003
7	125	BOTSWANA	0.694	0.011
8	128	NAMIBIA	0.686	0.008
9	129	SOUTH AFRICA	0.683	0.003
10	130	MOROCCO	0.654	0.006
11	131	SAO TOME AND PRINCIPE	0.651	0.006
12	136	REPUBLIQUE OF CONGO	0.601	0.002
13	139	COMOROS	0.576	0.003
14	142	SWAZILAND	0.572	0.003
15	143	ANGOLA	0.564	0.012
16	145	MADAGASCAR	0.543	0.006
17	147	KENYA	0.541	0.006
18	150	SUDAN	0.531	0.005
19	151	TANZANIA	0.530	0.011
20	152	GHANA	0.526	0.008
21	153	CAMEROON	0.523	0.004
22	154	MAURITANIA	0.520	0.001

23	155	DJIBOUTI	0.520	0.003
24	156	LESOTHO	0.514	0.003
25	157	UGANDA	0.514	0.009
26	158	NIGERIA	0.511	0.005

1.3 AFRICAN COUNTRIES WITH LOW HDI

In this category, the indices of 22 countries vary from 0.340 to 0.499.

Table 3: African Countries with Low Human Development Index

N ^o	RANK	COUNTRY	HUMAN DEVELOPMENT INDEX (HDI)	
			2007 DATA	CHANGE COMPARED TO 2006 DATA
1	159	TOGO	0.499	0.001
2	160	MALAWI	0.493	0.009
3	161	BENIN	0.492	0.005
4	163	COTE D'IVOIRE	0.484	0.002
5	164	ZAMBIA	0.481	0.008
6	165	ERITREA	0.472	0.005
7	166	SENEGAL	0.464	0.002
8	167	RWANDA	0.460	0.005
9	168	GAMBIA	0.456	0.003
10	169	LIBERIA	0.442	0.008
11	170	GUINEA	0.435	0.002
12	171	ETHIOPIA	0.414	0.012
13	172	MOZAMBIQUE	0.402	0.005
14	173	GUINEA-BISSAU	0.396	0.005
15	174	BURUNDI	0.394	0.007
16	175	CHAD	0.392	0.001
17	176	DEMOCRATIQUE REPUBLIC OF THE CONGO	0.389	0.018
18	177	BURKINA FASO	0.389	0.005
19	178	MALI	0.371	0.005
20	179	CENTRAL AFRICAN REPUBLIC	0.369	0.002
21	180	SIERRA LEONE	0.365	0.008
22	182	NIGER	0.340	0.005

SECTION 2: OVERCROWDING

Under this section we look at overcrowding of prisons in the countries above. It is worth noting that overcrowding in Africa, according to the available statistics (See ICPS Report 2007; see also PRI, 2005), is a consequence of long illegal detentions (long periods awaiting results of appeal, of trial, non implementation of related legal provisions, undue delay in commencement of trial). Hereafter are some statistics provided by International Centre for Prison Studies (ICPS) on:

- (1) Prison Population total (including pre-trial detainees / remand prisoners);
- (2) Prison Population Rate (per 100,000 of national population);
- (3) Pre-trial / Remand Prisoners (percentage of prison population);
- (4) Female Prisoners (percentage of prison population);
- (5) Foreign Prisoners (percentage of prison population);
- (6) Official Capacity of Prison System;

- (7) Occupancy level (based on official capacity); and
 (8) Recent Prison Population trend (year, prison population total, prison population rate).

2.1 OVERCROWDING IN COUNTRIES WITH HIGH HUMAN DEVELOPMENT INDEX:

Only three African countries figure in this category: Libya, Seychelles and Mauritius. Their profile in terms of overcrowding is as follows:

Table 4: Overcrowding in Countries with high HDI

N ^o	COUNTRY	PRISON POPULATION TOTAL (PPT)	PRISON POPULATION RATE PER 100,000 (PPR) 3	PRE-TRIAL DETAINEES/ REMAND % (PD/R)	FOREIGN PRISONERS (FP)	OFFICIAL CAPACITY (OC)	OCCUPANCY LEVEL (OL)	TRENDS 2004 2007, TOTAL POPULATION AND RATES PER 100,000	OVERCROWDING
1	LIBYA	12,905	200	47,7%	29,1%	9,000	141,6%	2004 9,763 (173) 2007 13,217 (217)	3,905 (30.3%)
2	SEYCHELLES	305	371	63.0%	4.1%	400	76.3%	2003 149 (186) 2007 221 (270)	
3	MAURITIUS	2,163	166	29.9%	4.6%	2,058	104.0%	2001 1,985 (165) 2005 2,464 (205)	105 (4.9%)

Overcrowding in prisons is measured by:

- (1) The difference between the Prison Population Total (PPT) and the Official Capacity (OC) of the prison system; and
- (2) The occupancy level (OL).

Table 4 reveals that there is no overcrowding in Seychelles, very low rate in Mauritius and low in Libya, percentages that seem to represent foreign prisoners.

2.2 OVERCROWDING IN COUNTRIES WITH MEDIUM HUMAN DEVELOPMENT INDEX

Table 5 indicates variations among the 16 affected countries. The overcrowding ranges from 7.0% to 60.8%. Countries without figures under the overcrowding column are countries without overcrowding according to the available statistics.

Table 5: Overcrowding in Countries with Medium HDI

N ^o	COUNTRY	PRISON POPULATION TOTAL (PPT)	PRE-TRIAL DETAINEES/ REMANDS % (PD/R)	FOREIGN PRISONERS (FP)	OFFICIAL CAPACITY (OC)	OCCUPANCY LEVEL (OL)	TRENDS 2004 2007, TOTAL POPULATION AND RATES PER 100,000	OVERCROWDING
1	ALGERIA	54,000	11.3	1.0%	31,500	171.8%	2003 38,868 (121) 2005 43,797 (132)	22,500 (41.7%)
2	BOTSWANA	5,216	17.0	22.6%	3,967	131.5%	2004 6,105 (339)	1,249 (23.9%)

							2006 5,969 (332)	
3	NAMIBIA	4,064	7.9	5.5%	4,347	93.5%	1997 4,071 (250) 2000 (4,779 (273))	
4	SOUTH AFRICA	161,320	31.2	5.1%	115,297	139.9%	2005 156,175 (333) 2008 163,719 (343)	46,023 (28.5%)
5	MOROCCO	53,580	46.5	2.2%	27,113	197.6%	2002 54,288 (191) 2003 54,542 (177)	26,467 (49.4%)
6	SAO TOME AND PRINCIPE	160	c.34.0	0.8%	300	43.3%	2002 130 (79) 2005 155 (82)	
7	SWAZILAND	2,628	27.5	6.0%	2,838	92.6%	2003 3,169 (288) 2006 2,734 (249)	
8	ANGOLA	C.8,300	58.9	.	6,000	82.9%	1999 4,884 (39) 2002 4,975 (37)	2,300 (27.7%)
9	MADAGASCAR	17,703	47.9	0.1%	10,199	173.6%	2004 19,971 (112) 2006 17,495 (90)	7,504 (42.4%)
10	KENYA	46,662	43.3	0.7%	20,892	223.3%	2001 35,340 (117) 2005 50,000 (144)	25,770 (55.2%)
11	SUDAN	19,144	10.0	c.1%	7,500	.	1997 12,933 2002 12,809	11,644 (60.8%)
12	TANZANIA	40,111	48.5	3.7%	27,653	145.1%	2006 43,911 (113) 2008 41,613 (97)	12,458 (31.1%)
13	GHANA	13,377	28.6	4.5%	7,875	169.9%	2004 11,581 (54) 2007 13,336 (58)	5,502 (41.1%)
14	LESOTHO	2,701	16.8	1.0%	2,936	92.0%	2001 2,699 (145) 2004 3,173 (170)	
15	UGANDA	29,826	56.0	0.8%	13,373	223.0%	2005 26,126 (95) 2008 25,464 (80)	16,453 (55.2%)
16	NIGERIA	41,405	69.3	.	47,815	84.1%	2005 40,444 (30) 2008 40,240 (27)	

2.3 OVERCROWDING IN COUNTRIES WITH LOW HUMAN DEVELOPMENT INDEX

Table 6: Prison Overcrowding in African Countries with Low HDI

N°	COUNTRY	PRISON POPULATION TOTAL (PPT)	PRISON POPULATION RATE PER 100,000 (PPR) 3	PRE-TRIAL DETAINEES/ REMAND % (PD/R)	FOREIGN PRISONERS (FP)	OFFICIAL CAPACITY (OC)	OCCUPANCY LEVEL (OL)	TRENDS 2004 2007, TOTAL POPULATION AND RATES PER 100,000	OVERCROWDING
1	MALAWI	11,996	78	18.5%	1.0%	6,070	197.6%	2005 9,656 (74) 2007 10,830 (78)	5,926.0 (49.4%)
2	BENIN	6,083	66	79.6%		1,900	307.1%	2000 4,961 (81) 2006 5,834 (75)	4,183.0 (68.8%)
3	COTE D'IVOIRE	11,143	56	28,5%	c.30%	4,871	218.0%	1998 13,670 (95) 2002 10,356 (62)	6,272.0 (56.3%)
4	ZAMBIA	15,544	120	35.3%	2.1%	7,500	207.3%	2003 13,200 (122) 2005 14,347 (122)	8,404 (54.1%)
5	SENEGAL	6,425	53	37.2%	7.5%	2,972	152.0%	2000 4,990 (52) 2002 5,360 (54)	3,453 (53.7%)
6	RWANDA	59,311	593	26.9%	0.3%	46,700	202.4%	2004 87,000 (129) 2006 82,000 (172)	12,611 (21.3%)
7	GAMBIA	450	32	18.5%	66.7%	780	65.0%	1999 478 (38)	
8	LIBERIA	1,600	40	97.3%	2.0%	750	136.3%		850 (53.1%)
9	BURUNDI	10,700	129	68.0%	.	4,050	264.2%	2005 7,969 (106) 2008 9,114 (104)	6,650 (62.1%)
10	BURKINA FASO	4,207	27	58.3%	.	2660	158.2%	2002 2,800 (23)	1,547 (36.8%)
11	MALI	6,700	52	88.7%	.	3,000	223.3%	2002 4,040 (34) 2004 4,407 (33)	3,700 (55.2%)
12	SIERRA LEONE	2,328	41	49.2%	1.7%	1,975	108.1%	2004 c.1,400 (c.27) 2007 1,899 (33)	353 (15.3%)
13	NIGER	5,709	46	c.76%	.	8,840	64.6%	1998 5,263 (52) 2002 c.6000 (c.52)	

Compared to other countries under this category, Rwanda seems to have a very high Prison Population Total (PPT): 53,311, a high Prison Population Rate (593) and Official Capacity (OC): 46,700.

SECTION 3: HUMAN DEVELOPMENT INDEX AND OVERCROWDING

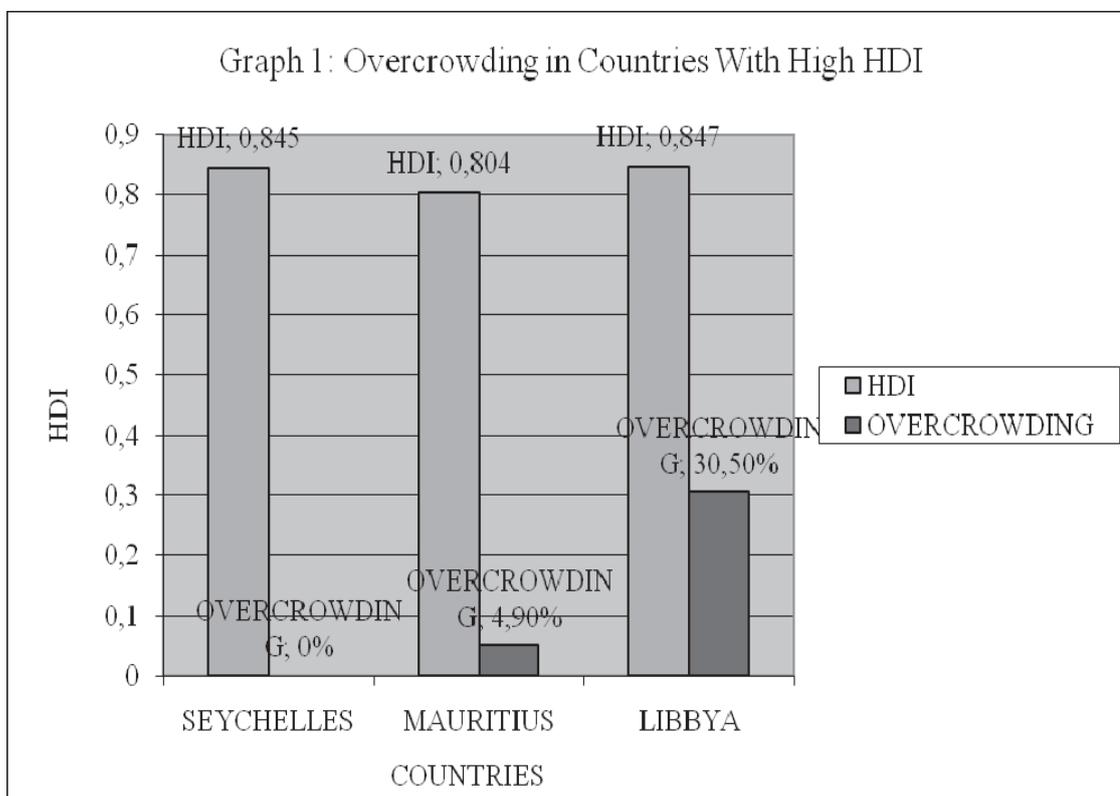
The analysis of data led us to consider “human development” as an Independent variable and “Overcrowding” the dependent variable. In other words Low Human Development appears to be a suitable explanation of “Overcrowding in prisons” in Africa. A concept such as poverty helps to understand how populations’ Low Income affects the quality of their lives. This results in “Overcrowding” in prisons.

3.1 High HDI and Overcrowding:

Table 7: African Countries with High HDI and Overcrowding

N ^o	COUNTRY	HDI	LEVEL OF OVERCROWDING (LO)	
			PRISON POPULATION TOTAL (PPT) MINUS OFFICIAL CAPACITY (OC)	OCCUPANCE LEVEL (OL)
1	LIBYA	0.847	3,905 (30.5% of total prison population)	141.6%
2	SEYCHELLES	0.845	- 95	76.3%
3	MAURITIUS	0.804	105 (4.9%)	104%

The Levels of Overcrowding (LO) that is calculated from the PPT minus OC and translated into percentage for Libya and Mauritius reveals almost an equivalent percentage of their respective foreign Prisoners (FP): 29.1% (30.5%) and 4.6% (4.9). Seychelles escapes from the observed trend: 4.1% (See above Table 4). Even the level of occupancy would have been much lower without foreign prisoners; hence, confirming no overcrowding in Seychelles. Graph 1 hereafter still supports our hypothesis.



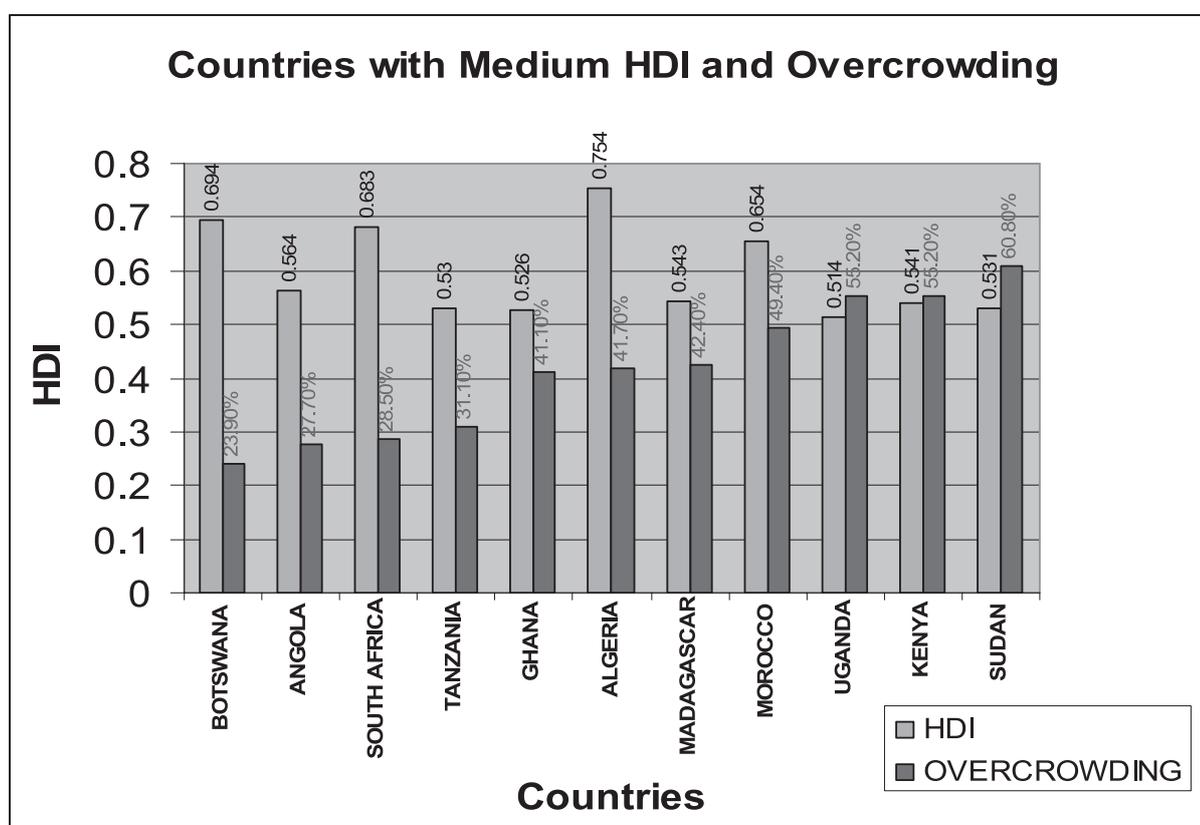
3.2 Medium HDI and Overcrowding:

Countries without overcrowding (Lesotho, Nigeria, Sao Tome and Principe, Swaziland), or with very low rate (Namibia) do not appear in Table 8, because this affects the calculation of the correlation between HDI and Overcrowding.

Table 8: Countries with Medium HDI and Overcrowding

N ^o	COUNTRY	HDI	LEVEL OF OVERCROWDING	
			PRISON POPULATION TOTAL (PPT) MINUS OFFICIAL CAPACITY (OC)	OCCUPANCE LEVEL (OL)
1	ALGERIA	0.754	22,500 (41.7%)	171.8%
2	BOTSWANA	0.694	1,249 (23.9%)	131.5%
3	SOUTH AFRICA	0.683	46,023 (28.5%)	139.9%
4	MOROCCO	0.654	26,467 (49.4%)	197.6%
5	ANGOLA	0.564	2,300 (27.7%)	82.9%
6	MADAGASCAR	0.543	7,504 (42.4%)	173.6%
7	KENYA	0.541	25,770 (55.2%)	223.3%
8	SUDAN	0.531	11644 (60.8%)	.
9	TANZANIA	0.530	12,458 (31.1%)	145.1%
10	GHANA	0.526	5502 (41.1%)	169.9%
11	UGANDA	0.514	16,453 (55.2%)	223.0%

Graph 2 hereafter also visualizes the a tendency for the high values of the HDI to be paired with smaller values of Overcrowding, and vice versa



3.3 Low HDI and Overcrowding:

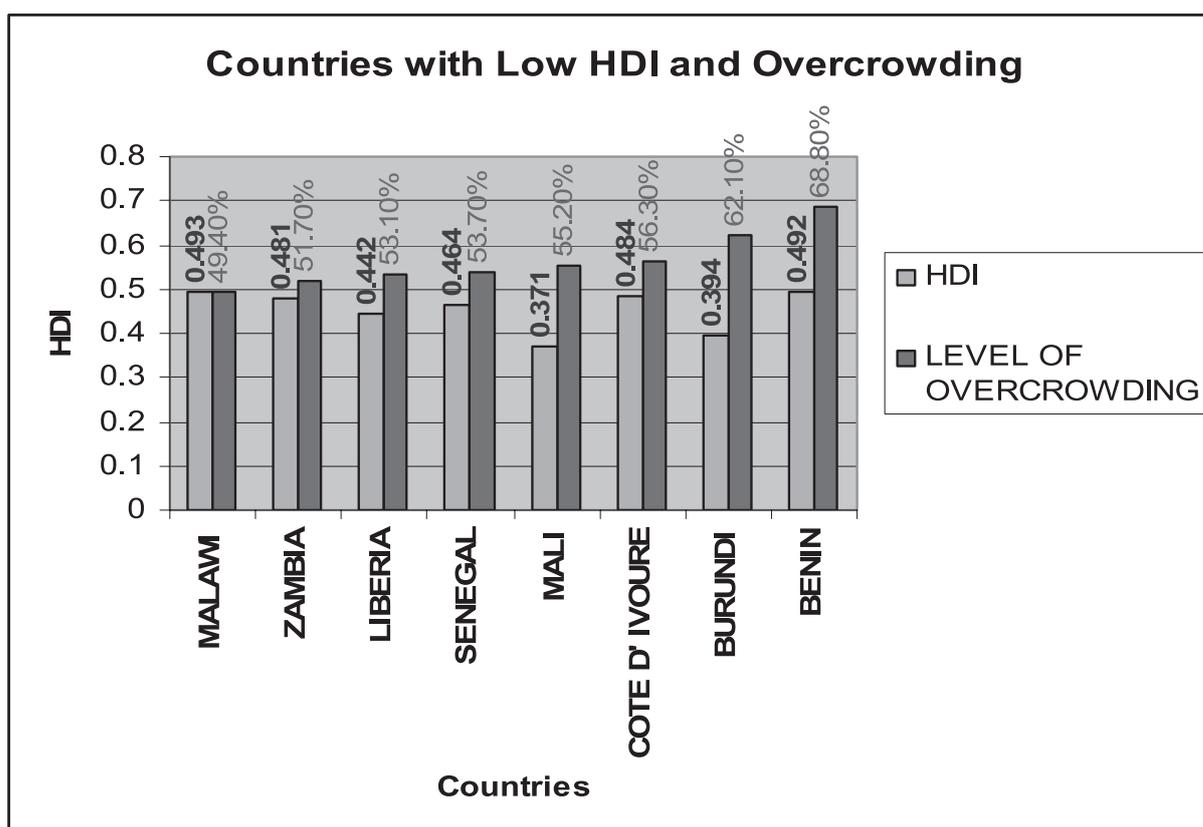
Table 9 is part of table 6 which has 13 countries. We have selected only 8 countries having the needed statistics. Table 9 does not include countries with very low overcrowding (Burkina Faso, Rwanda and Sierra Leone), as they affect our inquiry into the relationship between HDI

and Overcrowding. It is interesting to note that countries with low HDI are also exhibiting a low overcrowding. Cases in point are: Sierra Leone with a HDI of 0.365 with an overcrowding of 15.2% and Burkina Faso with a HDI of 0.389 and Overcrowding of 36.8%, and Rwanda with a HDI 0.460 and an Overcrowding of 21.3%.

Table 9: Countries with Low HDI and Overcrowding

No	COUNTRY	HDI	LEVEL OF OVERCROWDING	
			PRISON POPULATION TOTAL (PPT) MINUS OFFICIAL CAPACITY (OC)	OCCUPANCE LEVEL (OL)
1	MALAWI	0.493	5,926 (49.4%)	197.6%
2	BENIN	0.492	4,183 (68.8%)	307.1%
3	COTE D'IVOIRE	0.484	6,272 (56.3%)	218.0%
4	ZAMBIA	0.481	8,044 (51.7%)	207.3%
5	SENEGAL	0.464	3,453 (53.7%)	152.0%
6	LIBERIA	0.442	850 (53.1%)	136.3%
7	BURUNDI	0.394	6,650 (62.1%)	264.2%
8	MALI	0.371	3,700 (55.2%)	223.3%

Graph 3 hereafter visualizes the trend. A calculated rho of - 0.19 led us to conclude that there is a relationship between Human Development Indices and Overcrowding in correctional institutions, as visualized hereafter in Graph 3.



CONCLUSION

The main working hypothesis was that where there is very high or high Human Development, there is no or very low Overcrowding. In the case of Libya and Mauritius, their respective observed overcrowding of 30.3% and 4.9% (See Table 4) seems to be induced by the presence of foreign nationals. Concerning Seychelles in the same table, data seems to confirm the hypothesis. What they have in common is: absence of or very low overcrowding (Seychelles and Mauritius (4.9%)). We encountered discrepancies in the case of Libya that we are not able to explain (Table 4).

In case of countries that fall under Medium Human Development index (See Tables 7), Pearson's Product Moment Correlation Coefficient reveals a high degree of association between the Human Development Indices and Overcrowding. The correlation coefficient was found to be negative $r = -0.75$. This also means that 56.0% of variations in overcrowding are explained by variations in the Human Development Indices. This confirms that there is a strong relationship between the HDI and Overcrowding. In this case, there is a tendency for the high values of the HDI to be paired with smaller values of Overcrowding, and vice versa. We will only say that 72.7% of these countries have a high overcrowding (only 3 countries have a rate of overcrowding below 50%).

As for the Low Human Development Index countries, we consider that our hypothesis stands. We used a non parametric test: Spearman's rho to establish whether there is a correlation between low HDI and Overcrowding. A calculated rho of -0.19 led us to conclude that there is a relationship. This conclusion was drawn from one tailed test for negative correlation where the null Hypothesis (H_0): the HDI and Overcrowding are not correlated, against an alternative hypothesis: there is a tendency for the large values of HDI to be paired with small values of Overcrowding and vice versa. Null hypothesis was rejected as the calculated rho of -0.19 was too small. We observe that 87.5% of these countries have an overcrowding rate beyond 50%, which we consider as a very high rate.

The analysis of the data at our disposal has substantiated the association between Human Development and Overcrowding. However, we did observe that there were countries (Burkina Faso, Rwanda and Sierra Leone), which were exceptional to our confirmed hypothesis: "very high or high HDI being paired with low Overcrowding". Although the three countries had low HDI, they also had low Overcrowding.

This is significant to us as this variation may help to identify and understand the factors (good practices) if any, that have led to the observed variation in the above countries. A negative relationship has been observed in the three categories: 1) countries with High Human Development Index; 2) countries with medium Human Development Index; and 3) countries with low Human Development Index, meaning that in countries with high Human Development Index (HDI), there is no or very low rate of overcrowding and vice versa. The exceptional countries, deviating from the hypothesis, suggest a need to look at good practices in countries, which may explain the observed situation: low rate of overcrowding in countries with low Human Development Indices; and others practices leading to the situation of (low) overcrowding in countries with high or medium Human Development Indices.

PANEL I

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RESPONDING TO PRISON OVERCROWDING: ANOTHER ATTEMPT FROM THAILAND

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I. INTRODUCTION

Criminal justice systems around the world have been coping with increasingly difficult challenges amid rapid changes in varying political and socio-economic systems. Imbalanced development has weakened our social mechanisms, rendering us less effective in coping with economic hardships, which can contribute to the increased number of crimes. Rising crime rates result in greater numbers of offenders entering the criminal justice system and increased incarceration. Because many prison facilities are not equipped to handle the increased volume of inmates, prison overcrowding has become problematic. Failure to cope with these new challenges could bring serious consequence as the functioning of the criminal justice system, and the assertion of individual human rights of prisoners, are at stake. In order to avoid the serious issues of case backlog and overcrowding of the correctional facilities, it is imperative that the offender treatment systems are continuously improved and further developed.

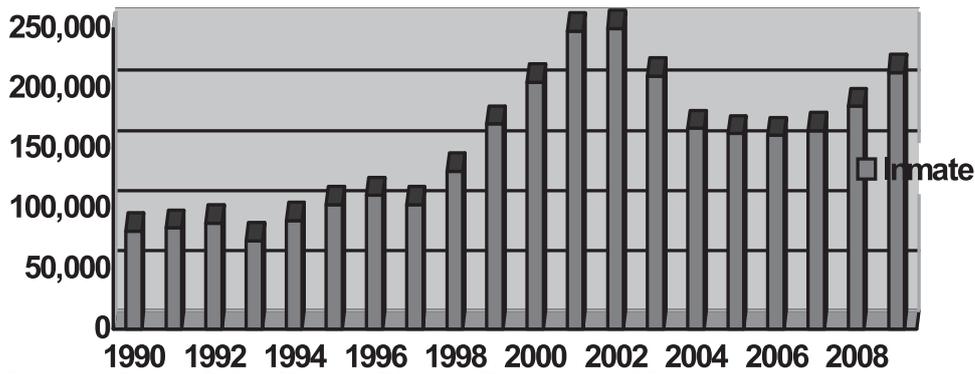
This paper will begin with the assessment of current trends and reasons on the incidence of prison overcrowding in Thailand. The discussion will then focus on non-custodial measures that Thailand has used to reduce overcrowding in inmate facilities, including alternatives to imprisonment, diversionary methods, restorative justice, and community-based treatment initiatives. Finally, I will share my views on the key challenges involved in reducing prison overcrowding, and make recommendations for how the Thai criminal justice system can continue its work in finding effective alternative methods to incarceration.

II. PRISON OVERCROWDING IN THAILAND: CURRENT TREND AND SITUATIONS

Among the issues related to treatment of prisoners in Thailand, prison overcrowding is one of most problematic. During the years 1996-2002, correctional facilities in Thailand had to deal with unprecedentedly large number of inmates. Thai prisons housed 103,202 inmates in 1996, with that number increasing to 250,000 by the end of 2002. The current prison capacity, however, provides for approximately 110,000 spaces. This clearly indicates a prison overcrowding situation. The trend of increasing inmates shown by the below Figures is ominous because there is little relief on the capacity issue; prisoners increase, but the space to house them remains the same.

In Figure 1 the prison population for the period of nineteen years is shown. At present, the number of inmates in Thailand remains high - 253 inmates per 100,000 - compared to other countries in Asia and Pacific region, as shown in Table 1.

Figure 1. Prison Population in Thailand from 1990 to 2008



Source: Inmate Statistics Center, Policy Planning Division, Department of Corrections.

This rate of increase was quite unusual and cannot be accounted for under normal functioning conditions of the criminal justice system. The disproportionate increase of inmate population since 1998 could be attributed to Thailand’s penal policy, which severely criminalized offenses related to drug use, especially the substance amphetamine, to achieve deterrence effect among drug-related offenders.

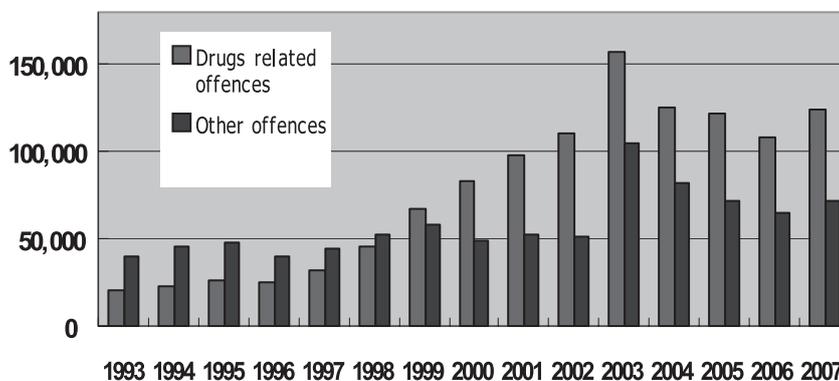
Table 1. Prison Population across Seven Countries in Asia and Pacific in 2007

Country	Total number	Total number (per 100,000 people)	Portion of Female Inmates(percent)	Portion of Child Inmates(percent)
Indonesia	128,876	56	4.7	0.4
Macao	797	174	22.1	6.1
Malaysia	50,305	192	28.7	2.2
Myanmar	65,063	126	15.0	1.6
Sri Lanka	25,537	121	1.4	0.04
Singapore	11,768	267	10.0	4.7
Thailand	165,316	253	15.1	3.9

Source: International Centre for Prison Studies, 2008

Figure 2 shows that the number of inmate convicted of drug-related offenses has almost doubled in 15 years, while the statistics for the other offenders remain mostly unchanged. This leads to a conclusion that the large number of drug-related offenders is the result of severe measures, while the contribution from the increase in the criminal activities themselves might be only secondary.

Figure 2. Number of inmates convicted of drug offense vs other offenses from 1993- 2007



Source: Inmate Statistics Center, Policy Planning Division, Department of Corrections.

III. POSSIBLE EXPLANATIONS FOR PRISON OVERCROWDING

There are numerous factors that have contributed to the overcrowding of prisons in Thailand. These include the increase of drug offenders entering the system as a result of the Royal Thai Government's shift to a more prioritized crackdown on narcotics in the late 1990's; the large percentage of incarcerated inmates who are awaiting investigation or trial; and a historical reliance on imprisonment for even low-level offenders.

With respect to the increase in drug offenders in the system, there are two possible explanations. First, the rise could signify the enhanced effectiveness of the criminal justice system in bringing those who commit the crime to justice; the implication being that the drug problem in Thailand has been properly taken care of since 1997. A second explanation is that by over-criminalizing the possession or consumption of amphetamines, the demand for the now highly-punishable drug is even higher than before, leading to a rise in cost and therefore profit, thereby increasing the incentive for people to risk trading them. This graver theory signifies that severe punishment as deterrence measure has been far from achieving its policy objectives. The question then becomes, how does a criminal justice system deal with drug offenders in a way that does not exacerbate the prison overcrowding problem?

With regards to the high percentages of inmates on remand, it is clear from statistics that this group constitutes many of the total incarcerated individuals. Tables 2, 3 and 4 illustrate the inmate population profile according to their categories, types of offences and terms of imprisonment. The largest portion of Thailand's correctional resources is being used to provide custodial treatment for the convicted offenders, while the suspects awaiting trial or final judgment constitute the second largest group of the population. This results in a current rate of imprisonment prior to conviction at nearly 30%, which implies that the criminal process has not yet been able to provide a timely response to those awaiting trials and who must be assumed to be innocent. Table 5 provides regional comparative data on this category of inmates, portraying that Thailand is among the top on the list of countries having a large percentage of inmates on-remand. When viewed by types of offences, inmates who have been convicted of offences related to drug use constitute the largest group or almost 60%. It should also be noted that about half of the total population in prisons are currently those serving relatively short terms - less than 5 years.

Table 2. Overall population of the Thai prison system according to major categories
(As of 1 September 2008)

Categories	Male	Female	Total	Percentage
1. Convicted	112,464	18,594	131,058	70.825
2. On-remand	44,744	7,538	52,282	28.25
2.1 pending appeals	22,354	3,541	25,895	13.99
2.2 awaiting trial	9,576	1,495	11,071	5.98
2.3 awaiting investigation	12,814	2,502	15,316	8.28
3. Child and youth under detention	401	3	404	0.22
4. Relegated persons	11	1	12	0.01
5. Detainee	1,128	185	1,313	0.71
Total	158,748	26,321	185,069	100

Source: Inmate Statistics Center, Policy Planning Division, Department of Corrections

Table 3. Prisoners Statistics by Type of Offences

Type of Offences	Male	Female	Total	Percentage
1. Offence against property	25,911	1,647	27,558	22.25
2. Offence against narcotics law	56,689	15,349	72,038	58.16
3. Offence against life	8,798	277	9,075	7.83
4. Bodily harm	3,552	83	3,635	2.93
5. Offence against social security	216	11	227	0.22
6. Others	5,031	496	5,527	4.46

Source: Corrections in Thailand 2008- an annual report published by the Department of Corrections, Thailand.

Table 4. Prisoners Statistics by Sentence Terms

Sentence Term	Male	Female	Total	Percentage
Less than 3 months	899	96	955	0.77
3- 6 months	2,889	382	3,271	2.53
6 months - 1 year	7,930	1,263	9,193	7.12
1 - 2 years	16,164	3,173	19,337	14.97
2 - 5 years	32,700	4,274	36,974	28.63
5 - 20 years	38,018	6,836	44,854	36.22
20 - 50 years	10,149	2,142	12,291	7.83
Life imprisonment	1,653	218	1,871	1.51
Death penalty	113	7	120	0.09

Source: Corrections in Thailand 2008- an annual report published by the Department of Corrections, Thailand.

Table 5. Numbers of offenders awaiting trial in several countries in Asia in 2007.

Country	Total Number of Inmates	Total Number of Inmates On-Remand	Percentage of Inmates on-remand
Indonesia	128,876	387	0.3
Iran	158,351	39,271	24.8
Macao	797	176	22.1
Malaysia	50,305	14,438	28.7
Myanmar	65,063	7,417	11.4
Mongolia	6,593	1,305	19.8
Hong Kong	10,440	1,409	13.5
Japan	81,255	9,751	12.0
Taiwan	60,346	7,181	11.9
Brunei	486	35	7.2
Laos	4,020	40	1.0
Singapore	11,768	812	6.9
Thailand	165,316	43,313	26.2

Source: International Centre for Prison Studies, 2008

Lack of coherent and effective penal policies has also been a key factor, hindering any systematic attempt to implement alternative approaches for parties of conflicting interests, and provide them access to justice. Social norms - as can be seen from the negative public attitude toward offenders, along with the strong inclination among Thais to rely on formal criminal process or legal action as means to solve their problems - also play significant roles in shaping the current situation of the Thai correctional system. Further at the root of the problem, the symptoms of which can be seen from the severe drug problems and high rate of crime, is the inability of the society to cope with the negative impact of globalization. Various societal institutions such as family, community, educational system and spiritual faith have been faced with new type of challenges and threats.

The entire criminal justice system has been placed under considerable pressure as a result of the lack of a coordinated effort to systematically deal with these challenges. The burden caused by the anomalously sharp rise in inmate number has been enormous, resulting in worsening living conditions for prisoners. Regardless of the peak increases in Thai inmate numbers from 1997-2006, the number of correctional staff remained nearly the same, making the current ratio of the corrections officers to inmates at 1:32. This is well-above the international standard of a 1:5 ratio. The current high ratio has led to a heavy workload for the staffs, affecting both their job morale and quality of work necessary to meet the treatment needs of inmates.

Issues such as limitations in space, unsafe hygienic conditions, and the overall deterioration of the prison environment for both inmates and staff, have arisen out of prison overcrowding. The United Nations Standard Minimum Rules for the Treatment of Prisoners (SMR, 1955) set expected norms for the treatment of prisoners with respect these issues, and prisons overcrowding directly threatens these minimum standards.

In order to respond to the serious issue of overcrowding, there has been a dual-approach by Thailand. Budgets have been increased and allocated to expand and/or build new prisons to help ease the overcrowding of existing ones. However, as these new facilities will soon be full, more alternative approaches which start early in the pre-prosecutorial stage and therefore prevent more offenders from entering the correctional system, have been introduced and proven to be successful. In the next section some of these key measures will be highlighted to illustrate Thailand's attempt to reduce the problems caused by prison overcrowding.

IV. SELECTED NON-CUSTODIAL METHODS FOR REDUCING PRISON OVERCROWDING IN THAILAND

The overhaul of the Thai criminal justice system which began in 1996, culminated in 2002 when the Ministry of Justice was reorganized and repositioned as the focal point for justice administration. This reorganization directly impacted the situation of overcrowded prison facilities by paving the way for the application of alternatives to inmate incarceration, including diversion, restorative justice, and community-based treatment. The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules, 1985), the United Nations Standard Minimum Rules for Non-Custodial Measures (the Tokyo Rules, 1990), and the Bangkok Declaration (2005) all helped to inform Thailand's approach to dealing with prison overcrowding.

One of key milestones in the development of incarceration alternatives was the cabinet resolution on July 10, 2001, which specified clear guidelines on how to reduce case backlog and overcrowding. The so-called 'July 10 Resolution' recommended several non-custodial and community-based treatment as desirable approaches, and thus served as a road map for tackling prison overcrowding in Thailand. Some of the key initiatives included the expansion of the scope of probation to include juvenile offenders as new target group, the initiation of drug diversion programs, the setting up of community mediation centers to settle certain kind of dispute within the communities, and the encouragement for the use of prosecutorial discretion not to prosecute subject to certain kind of conditions. This new policy has proved effective not only by introducing new approaches for diversion of cases from the formal criminal justice process, but also by providing alternatives to imprisonment that are more efficient at reintegrating the offenders successfully back into the society. As a result, the number of prisoners decreased from 250,000 in 2001 to 210,000 in 2003, which demonstrates approximately a 16 % reduction in the inmate population in two years.

A. Alternatives to imprisonment: the Role of Probation

Probation is a significant non-custodial measure to insure that prison remains a last resort of the system. In Thailand, probation measures for adult offenders were provided for by the Penal Code of 1956, but had not been actively implemented due to the lack of a specialized agency or probation officers to carry out the court order. In 1979 a law on probation was proposed and a specialized agency

was created, with probation officers appointed to carry out the court orders imposing the conditions for the supervision and rehabilitation of the offenders under suspended or deferred sentences. This law marked the beginning of the community-based treatment of offenders in Thailand, under the responsibility of the probation officers, volunteer probation officers, and the civil organizations based in the community. In 1992, the Department of Probation was established to handle all adult probations all over the country.

During its first two decades of operation, the Department of Probation focused its work on providing probation programs for offenders whose imprisonment terms were suspended. The programs mainly consisted of the supervision of the offenders, combined with other types of support such as education, counseling, rehabilitation, community services, and other social welfare. The overall objective of these activities was to assist the offenders in their effort to rehabilitate and successfully reintegrate into society, and to become productive members of society without relapsing into re-offending.

Prior to the launch of 'July 10 Resolution', although the Department of Probation did excellent work providing successful adult probation programs, it was unable to expand its scope of work to cover new, community-based alternative to incarceration. Lack of necessary legislation and overall criminal justice policy planning, lack of interagency cooperation and coordination among key actors, and inadequate funding were among the major reasons hampering the successful introduction of community-based treatment as alternative to the long-held practices based mostly on retributive, custodial measures.

Under the aforementioned 'July 10 Resolution', however, the Department of Probation, under the Ministry of Justice, became the key organization in the implementation of the new policy. The Department's scope of work expanded to include probation programs for all types of offenders, namely juvenile and adults. Additionally, its programs now cover all stages of the criminal process, including the pre-trial, trial, and post-conviction stages. With a specialized agency in charge of all the probationary involvement for suspects and offenders at all stages of the criminal process, the probation system in Thailand, while larger, is now more focused than in the past, enabling the Department to come up with innovative ideas to carry on its new assignments. The challenge, of course, is to do so while maintaining the quality of its traditional functions at the same time. The successes of the programs run by the Department of Probation - the probation of adults, youth, and parolees, as well as the community-based treatment - are vital in reducing the numbers of incarcerated inmates, and therefore the problem of prison overcrowding.

Figures 3 and 4 indicate the clear trend of explosive growth in responsibility by the probation officers in recent years, as seen from the change in total number of cases handled by probation officers during the past 30 years, and the number of offenders who entered the probation system in comparison with those put under the custody in prisons for the same period.

Figure 3. Number of cases handled by the Department of Probation in past 30 years. The number represents that coming from all types of work except that of the community justice.

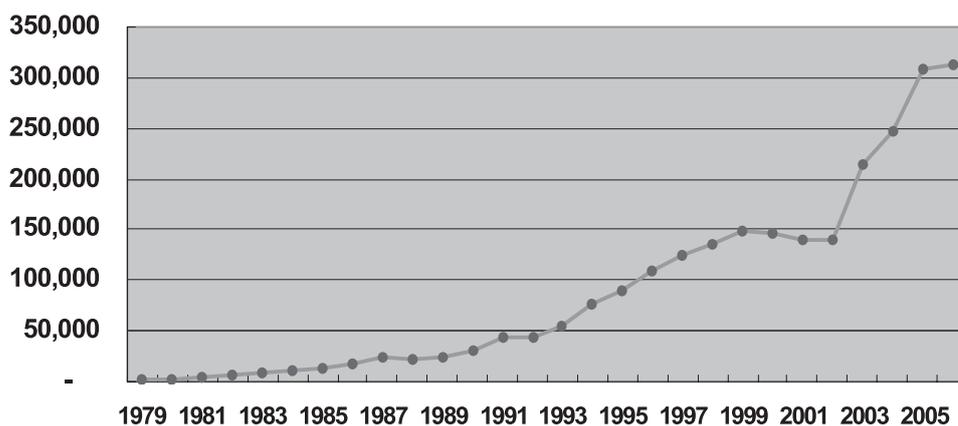
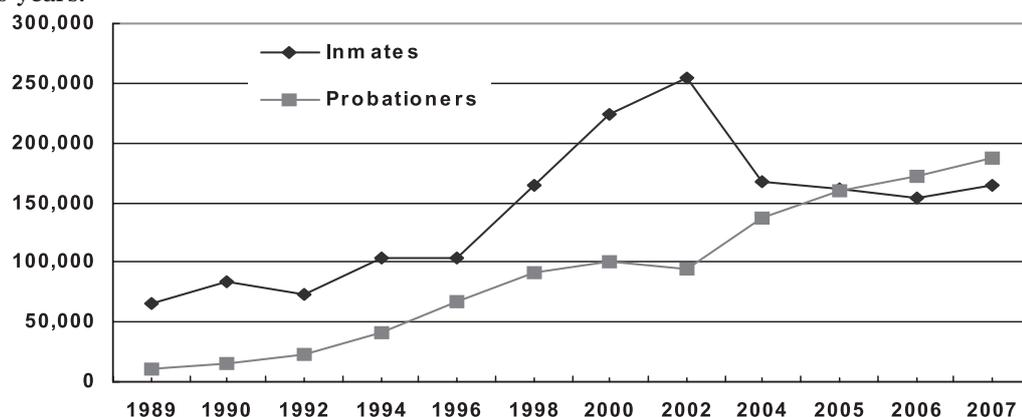


Figure 4. Number of offenders entering into the probation system vs. that placed under custody for the period of 30 years.



From its moderate inception in 1979, the probation system has now overseen more than 1.5 million offenders, with less than 20% recidivism after probation, indicating that most of the offenders who have been through treatment programs can successfully reintegrate into the society (see Table 6 for more detailed statistics).

Table 6. Numbers of offenders who re-offend under probation programs during 2004-2007.

Year	Total number of offenders under probation	Number of re-offenders under probation	Percentage of re-offenders under probation
2004	176,799	23,867	13.50
2005	126,974	10,590	8.34
2006	128,954	16,622	12.89
2007	137,178	20,988	15.30

Source: Annual Reports of the Department of Probation for the period of 2004-2007.

Here are some of the alternatives to incarceration measures that have been implemented by the Department of Probation.

1. Probation of Adult Offenders

The current adult probation system in Thailand consists of:

(a) Social Investigation

The social investigation in Thailand, in accordance with the Penal Code 1979 (B.E. 2522) Section 56, is conducted by probation officers in a pre-trial phase. Probation officers then have to prepare a pre-sentence report required by court before a sentence is imposed. The overall aim of social investigation is to gather facts related to the offender and offence, and to make recommendations for courts on appropriate sentences.

A report contains the offender's social background, circumstances of the offence, the risk the offender is likely to pose to the public and advice on suitable probation measures for individual offenders. The likelihood of individual reform is also taken into account. Another essential part of the social investigation is the Risk/Need Assessment to be included in the pre-sentence report.

During the social investigation, as a result of a needs assessment, probation officers may address the offender's needs and provide assistance where appropriate, such as helping them with bail matters, meal allowance, transportation assistance, etc. More importantly, at this stage probation officers may also work with victims of crime to give them voices, and provide them with support based firmly on restorative justice principles.

(b) Supervision

The supervision of adult offenders is an offender rehabilitation process, in which probation officers apply many different techniques, including:

- i. The supervision of adult probationers with the use of counseling techniques as a rehabilitative tool;
- ii. The use of community-based rehabilitation programs that are appropriate to individual offenders; and
- iii. The provision of assistance.

Supervision is a procedure to oversee, treat, support, and give counseling to probationers within the community. Probationers will be given a helping hand to amend their habits, to reintegrate into the community as a law-abiding citizen, and to discourage them from re-offending or continuing their criminal lifestyle.

When courts impose a suspended sentence or a suspension of sentence with probation conditions, probation officers will make an arrangement with the offender to fulfill the court order. The arrangement is based largely on the outcome of risk and needs assessment of each offender. The conditions could be modified or reduced or the probation may be terminated early before the specified date. Probation officers will comment on this when reporting the progress of probation outcomes. Additionally, the probation and supervision plan will be reassessed every 3-6 months. The supervision also gives offenders the chance to compensate for the harm done by the crime they commit, and to be encouraged to stop re-offending.

(c) Specific Rehabilitation Programs

Concerning treatment programs, the Department of Probation has initiated a wide range of rehabilitative interventions and activities. The strength of our rehabilitation is the way in which probation rehabilitative practices are integrated with local resources and boundlessly work in partnership with other government and non-government agencies. Various constructive programs have been implemented. Explicit examples include 'Buddhist Ordination', 'Dharma activities' (religious training), 'Ethical Camps', 'Anti Drink-Driving Campaign', etc.

In attempting to create innovative rehabilitation programs, the department encourage probation officers to work jointly with multi-agencies, volunteer probation officers (VPO), psychologists, social workers, social welfare officers, religious organizations (Buddhism, Islam, Church), etc. Moreover, the department also works closely with the 'Victims of Drunk Driving' Club whose members are seriously-injured or handicapped victims from drunk-drivers.

(d) Basic Assistance

Probation officers are mandated to provide basic assistance for all offenders- the offender under social investigation, adult probationers, juvenile delinquents, parolees, ex-probationers, and ex-prisoners. Basic assistance will be provided in accordance with the result of needs assessment and generally includes vocational training, helping with higher education, job searches, job applications, and other assistance beneficial for rehabilitation. The objective, again, is for the offenders to be able to support themselves and successfully integrate back into the society.

2. Probation of Youth Offenders

The responsibility of the probation of juvenile delinquents in Thailand lies with two agencies: the Department of Juvenile Observation and Protection and the Department of Probation. The Department of Juvenile Observation and Protection deals with the social investigation of young offenders and oversees those in the delinquent detention centers. The Department of Probation

supervises young offenders imposed probation orders by the court and those juveniles released from detention centers nationwide for a specific period of time. Since 2004, the Department of Probation has begun the Juvenile Rehabilitation Program which incorporated a number of related projects aimed at strengthening the cooperation with the community networks and the networks of civil society organizations, empowering the family and the community, and capacity building for the probation officers in their works for the children. In order to provide a venue for counseling and for creative activities by the youth within the community, a number of community centers for juveniles have been established to serve as a forum for coordinating assistance and support, as well as for the introduction of useful youth programs and activities in the community.

3. Probation of Parolees

After serving at least one of three of their sentence or at least ten years for life prisoners, most prisoners are eligible for parole. Before a decision is made, probation officers will propose a post-sentence investigation report to the Parole Board. A report consists of relevant information about the inmate and his/her behavior during the imprisonment, as well as details of supporters. Probation officers may also include in the report the views of the victim, the offender's neighbor, and the community leaders.

The purpose and practice of the supervision of parolees is similar to that of the supervision of adult probationers. Their differences lie, however, in the ways in which they are approached and their program requirements. This is due partly to the fact that the offenders have been in custodial institutes for some time, and adapting into the community and even their own family can be more challenging.

4. Aftercare Services

Another specialized category of services is available for ex-probationers who have completed the probation term within one year. These offenders are considered the socially disadvantaged who have lost their potential to abide the rule of law. Aftercare services aim to improve reformative potential and self-sustainability.

For aftercare services, the Department of Probation has applied the use of the 'halfway house' to help offenders in need of accommodation. Halfway houses are there to help them adjust and prepare to reintegrate into their family and community. As temporary accommodation, there are a variety of routine activities and programs in the halfway houses for residents to take advantage of, including occupational training, spiritual counseling, and various skill development programs. In running the temporary residences, the Department of Probation attempts to integrate various sciences, local and traditional know-how's, cultures, and religions to frame their programs. Thus the halfway house can be considered a joint venture among the probation departments, religious institutes, and the community at large.

At present, there are several halfway houses operated by the Department which are located in provinces such as Nakhon Sawan, Amnat Charoen, Maha Sarakham, Kamphaeng Phet, and Phatthalung. These provide services for not only the offenders under the probation order, but also the drug addicts under the diversion initiative. Therefore, other than the aforementioned programs, additional activities include drug rehabilitation programs and supervised community service.

While new initiatives are considerably more diverse and target group-specific populations, implementing such treatment programs effectively at large scale require enormous resources far beyond the normal capacity of any government agency. Therefore, recruitment of volunteers and active participation by the community itself are of great importance as they provide sustainable resource for implementing the community-based correctional programs. It is also important to empower each community to develop its own mechanism of crime prevention by means of knowledge sharing. Some of the ongoing initiatives aimed at community empowerment in Thailand include a program that utilizes volunteer probation officers, a community justice network aimed to strengthen public participation in the criminal justice system, and the media-guided campaign against drunk

driving.

B. Diversion

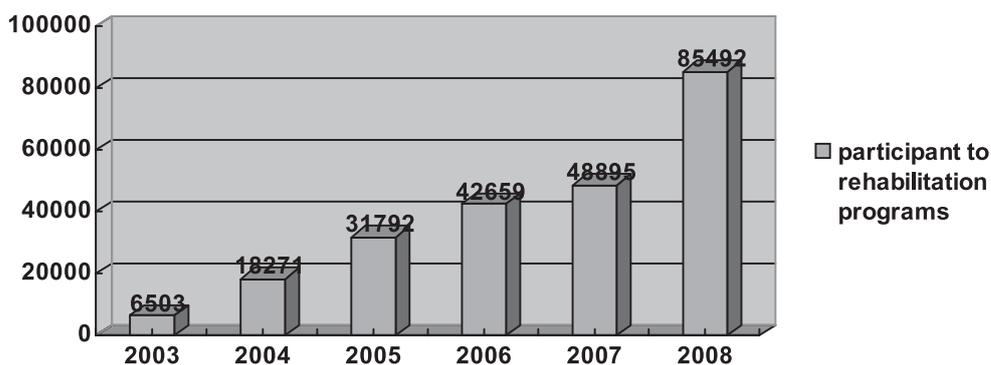
Diversion is both a natural process that takes place within the criminal justice system through the filtering of offences and offenders, and a deliberate method to process offenders in alternative ways. The practice of diversion begins with the police and prosecutors, often at their discretion, and therefore the practice must have rules and standards that both offer protection for the accused, the victim, and society, and provide for the most appropriate method of justice. Two well-utilized methods of diversion in Thailand include drug treatment for drug offenders and restorative justice interventions for offenders and victims.

1. The Compulsory Rehabilitation of Drug Addicts: A major scheme to reduce overcrowding in Thailand

In 2002, the Thai government adopted a new policy to tackle the narcotic drug problem which emphasized the enhancement of the preventive measures. Under the policy, the Drug Rehabilitation Act of 2002, small drug pushers and drug addicts who would have been previously prosecuted as criminal offenders were now to be regarded as patients who need rehabilitation treatment. This law was meant to provide a new legal framework for the integrated treatment of drug related offenders in Thailand. Under the revised scheme, all related government agencies have to work closely together to provide integrated responses to the treatment of drug offenders. These agencies include the Office of the Narcotic Control Board, the Royal Thai Police, the Department of Corrections, the Department of Juvenile Observation and Protection, the Court of Justice, the Royal Thai Army, the Royal Thai Navy, the Royal Thai Air Force, the Ministry of Public Health, the Ministry of Interior, the Bangkok Metropolitan Administration, and the Department of Probation serving as the focal point.

The Drug Rehabilitation Act of 2002 can be regarded as a revolutionary piece of Thai legislation. The 2002 Act makes clear that drug addicts are not ‘criminals’, but ‘patients’ who are in need of effective treatment, thus contributing to thousands of drug cases being diverted from courts, and shifting public view on drug dependents in Thailand. After taking-up the responsibility, Department of Probation did not hesitate to take a more holistic approach by introducing various drug rehabilitation programs to assist drug addicts rebuild a new life. The number of drug addicts who had been treated under the scheme from 2003 to present is shown in Figure 5.

Figure 5. Number of participants to compulsory rehabilitation programs from 2003- 2008



The 2002 Drug Rehabilitation Act stipulates that the person charged with “drug addiction”, “drug addiction and possession”, “drug addiction and possession for disposal”, or “drug addiction and disposal,” - if the amount of possession is less than the limitation of the law - is to be transferred to the court within 48 hours, and in the case of young persons, 24 hours. The court then will begin to divert the case from the traditional criminal justice system to designated facilities for drug assessment. The evaluation will be conducted by the regional Sub-committee of Narcotic Addict Rehabilitation, chaired by Chief Provincial Public Prosecutors, who will make a decision whether the person is a drug addict. Apart from this, the committee is given statutory power to supervise drug abusers/addicts during the

assessment and rehabilitation, refer the person to drug rehabilitation centers, consider the extension or reduction of rehabilitation period, and grant temporary release during detention. If the evaluation result shows that the person is a drug abuser/addict, s/he will be required to attend treatment programs for a specific period of time.

If s/he is assessed as being addicted, the prosecutor will suspend the prosecution and the person will be mandated to undergo one of the two compulsory systems: the “custodial” or “non-custodial” rehabilitation program.

a. Custodial Rehabilitation

For custodial rehabilitation participants, there are two types of arrangements: intensive and non-intensive treatment. *Intensive Custodial Rehabilitation Program* comprises three stages; rehabilitation process, re-entry process, and follow-up process. The Lat Lum Kaeo Community Treatment Center and the Royal Air Force are responsible for rehabilitation process through the Therapeutic Community (TC) and the Jirasa Program. After 4 months, participants then move on to re-entry process. Activities in this stage include community service, vocational training, and screening for drug abuse in urine sample arranged by Department of probation. This stage lasts for two months. Then, participants move on to follow-up process. Follow up process is under responsible of Ministry of Public Health, community representatives, and volunteer probation officers. This process lasts for 1 year. Participants who are deemed successful are then exempt from the criminal prosecution.

Non-intensive Custodial Rehabilitation Program differs from the intensive programme in terms of responsible agencies. Rehabilitation process of non-intensive program is operated by the Royal Thai Army, The Royal Thai Navy and the Department of Medical Services. This stage lasts for 4 months. The re-entry process and follow-up process is as same as those imposed for Intensive Program.

b. Non-Custodial Rehabilitation

In cases where no custody is required during the period of intensive treatment, participants who are diagnosed as addicts may be admitted as patients to hospitals or other rehabilitation centers for four to six months, where they can receive the appropriate treatment. In cases where participants are deemed not to addicts, but merely drug users, they will receive a treatment provided by the Department of Probation for six months. The remaining two-month probation period and the one-year monitoring period, are implemented in the same way as the rehabilitation under the custody scheme.

In addition to the implementation of the rehabilitation scheme, the Department of Probation has also come up with a number of initiatives to assist drug-related offenders in their effort to achieve successful reintegration. These include the following:

- **Basic Educational Support:** Drug addicts who undergo the rehabilitation program are also given the opportunity to receive basic education. The program, run by the Department of Probation in collaboration with the Ministry of Education, offers a special curricula equivalent to that of the regular elementary or primary schools to each participant depending on his/her need. It is hoped that by fulfilling the educational gap for these drug related offenders, they will be more prepared for future employment or motivated to pursue higher education of their choice upon the completion of the program.
- **Enhancement of Family Support:** This initiative involves educating family members of the drug addicts on how to support the rehabilitation effort and provides counseling service for family members as well as the participants to the rehabilitation program. The rationale for this initiative is that rehabilitation will have a greater chance of success if it involves all stakeholders, since the family members of each drug addict can play significant roles in their recovery. In order to ensure the smooth and happy reintegration of the offenders back into the

society, the support and understanding on the part of his or her family is deemed indispensable. It has been found the participants whose family members also took part in the initiative of rehabilitation had a higher rate of success.

- **Buddhist Teaching for Drug Addicts:** With the aim of applying relevant Buddhist principle and guidelines to help the drug addict in developing their mental strength to carry out the rehabilitation, this initiative has gained support from three Buddhist temples willing to provide a pilot program under the initiative.

While drug treatment programs for drug offenders attempt to divert individuals away from incarceration by taking into consideration their crime in the context of addiction, another form of diversion - restorative justice - aims to divert individuals away from incarceration by taking into consideration the context of justice for the victim.

2. Restorative Justice Interventions

As a more specific form of diversion, restorative justice recognizes the role of victims and community in the process of justice, and has a definite place in modern criminal justice systems. Restorative justice emphasizes informal methods of dealing with crime, and often works hand-in-hand with the community-based treatment options.

In Thailand, there are several criminal justice agencies implementing restorative justice interventions. To begin with, the Department of Juvenile Observation and Protection has been implementing restorative justice conferences since 2003. It is implemented under the guise of 'Family and Community Group Conference' (FCGC), and conducted in the pre-trial stage as a channel of diversions. From the beginning of the program in June 2003 until February 2008, there have been 21,490 cases where FCGC was conducted, of which 18,128 cases were approved for non-prosecution by public prosecutors. Similarly, the Department of Probation has initiated a program on restorative justice known as 'Restore-Relationship Conferencing', which is conducted at the pre-sentence/social investigation stage. Due partly to the legislative limitation, the initiative does not place an emphasis on diversion. Rather, the outcome of restorative justice conferences proves beneficial for judges in giving appropriate sentences. This is particularly true when judges examine the extent to which offenders feel guilty about their crime and if any reparation can be made.

Restorative justice has begun to gain wider acceptance in Thailand. Recently, the Criminal Court has initiated a pilot project on criminal mediation based on restorative justice principles. Draft legislations on diversions of small criminal cases during the police and prosecutors stages have also been proposed for consideration of the parliament.

a. Restorative Justice in Response to Domestic Violence

In recent years, domestic violence (DV) has been recognized as another serious issue that threatens the stability of the family in Thai society. Traditional views tend to regard violence in the home as a private matter, in which it is inappropriate for outsiders to interfere. The result is a problematic dynamic where victims - who are female in the majority of the cases - are reluctant to report the violence to authorities, and the incidences are repeated again and again in the home.

The Department of Probation in cooperation with the Royal Thai Police, the Rama Hospital, the Bangkok Metropolitan Administration, the Women Empowerment Association (an NGO which provides emergency shelters for female victims of violence) and the Friends of Women Foundation, has designed an integrated DV response system where the concept of restorative justice is used in conjunction with the law enforcement and rehabilitation programs, organized by the interdisciplinary professional organizations, to provide assistance to the victims of the violence and offenders in an effort to change their behaviors and end the cycle of violence.

The restorative justice concepts have proved effective in providing a suitable ground for resolving dispute within the family in a way that tries to maintain the relationships among the family members, if desired. In bringing the conflicted parties to engage in dialogue towards a mutual agreement, emphasis is made on responding to the needs of the victims as well as holding offenders accountable. By taking into account the needs and desires of victims, as well as the complexity of domestic violence, restorative justice techniques have provided a more effective alternative to the formal criminal justice process in response to DV.

When the violence occurs between married couples, regardless of their legal status, the partner who has been inflicted with the violence can exercise his or her right to bring a criminal case against the offender by first reporting it to the police. Under the restorative justice initiative, he or she can request that a mediation dialogue with the partner be arranged by the probation officer, the psychologist, or the social welfare worker. If the two sides can reach an agreement, the charge against the offender will be suspended on the condition that he or she participates in a rehabilitation program under the supervision of the probation officer for an agreed period. During that period, the participants will be able to receive various kinds of assistance from the Department of Probation, including legal aid counseling, occupational training, and accommodation support. If the participant has not repeated any incidences of violence, the charge will be completely dropped. Within the prescription period of the offense, if the attempt at rehabilitation proves unsuccessful, the victim can at any time request that the prosecution reinstate the charges against her partner.

IV. KEY CHALLENGES AND RECOMMENDATIONS FOR REDUCING PRISON OVERCROWDING IN THAILAND

In order to tackle the problem of prison overcrowding, it is important that well-focused criminal justice policies regarding alternatives to incarceration, non-custodial treatment, diversion, and successful reintegration of offenders are in place throughout the criminal justice process. It can be said that these alternative methods and community-based approaches have begun to take root in the Thai criminal justice system and greater society. Yet, for these alternative approaches to survive and attain maturity, a number of key challenges will have to be adequately dealt with. Here are some of the challenges that, in my opinion, could adversely affect the continuing effort to tackle the issue of prison overcrowding in Thailand.

A. Key Challenges

1. Explosive growth in scope of work

The increase is not only in the quantity of work, but also the variety of missions. New laws that have been in force in recent years have paved the way for the expanded scope of probation work from the traditional intensive probation based on investigation and supervision of the offenders, to the new frontier where probation work becomes an essential instrument for the diversion and crime prevention. An introduction of innovative techniques such as the electronic monitoring for treatment of offenders in the community, has also led to significant increase of work load for the probation officers. While vital in the fight to control the growth of incarcerated offenders, the expanded scope of work has considerable impact on the probation staff, many of whom are already under stress from being employed in a constantly under-staffed work environment. Figure 4 shows the number of cases that fall under the responsibility of the probation officers, while Figure 5 traces the number of probationers entering the system during the past 30 years. Here the explosive growth in responsibility of the probation staffs in recent years is clearly visible.

For prison officers, in normal circumstances, prison works has already been difficult especially in terms of security control and rehabilitation operations. Moreover, prison staff in Thailand normally have to perform double roles: as professional staff and also as guards. When the number of prison population rapidly increases coupled with expanded demands from the public, policy makers and new legislations, prison works are now even harder while the number of prison staff remains relatively unchanged. Upper policy-level constraints make it difficult for the public agency to employ additional

staff to tackle the additional missions. In order to effectively address the overwhelming problem of workload increase and its impact on the morale of staff, the government must take this issue seriously and devise a systematic way to provide support and funding to ensure that the quality of the probation program will not suffer.

2. Need for enhanced visibility

Probation work - as the approach where most of the activities take place within the community at the microscopic level - tends to be less visible in the eyes of the general public as compared to institutional custody treatment. One serious implication for this relatively low visibility is the difficulty in trying to convince decision-makers who might find it difficult to see the tangible results of probation work, that their policy advocacy and funding support are vital. While the overcrowding of prisons is effectively shown with increasing figures of inmates, the linkage between decreasing the incarcerated population and strengthening the programs of probation is a more difficult relationship to portray.

The Department of Probation will therefore have to put forth a more strategic effort to make the outcome of the probation programs as clear and concrete as possible in order to gain understanding and appreciation from the policy-makers and general public. One successful example of raised visibility is the campaign regarding drunk driving. Through the use of the media, the campaign was successful in sending out clear messages to the public that the imposition of community services, such as working in hospital or providing care for victims of drunk-driving accidents, is more effective enforcement of the law, as it forced the offenders to face the impact of their actions and refrain from repeating them. The Court was also convinced to increase its use of community service orders as punishment, as opposed to fines alone. The success of this program should encourage similar tactics to increase visibility with respect to more types of offences.

3. Need for effective treatment programs

With the ever-increasing complexity of issues related to crimes involving addiction, domestic violence, and other societal and familial problems, there is a constant need for law enforcement, probation staff, and court officials to acquire new knowledge and skills to enable them to understand and cope better with conducting supervision and providing assistance to such offenders. By effectively addressing such problems at a fundamental, rather than superficial, level, there can be a true impact on recidivism rates and therefore numbers of offenders in the system and overall inmate population.

In earlier days, when the Department of Probation was under direct control of the judiciary, the main responsibility of probation officers was to prepare the so-called social inquiry and offender supervision reports with more emphasis on the prevalent forms of punishment - imprisonment and fines - and less emphasis on turning the probation programs into effective alternatives. Now, the probation programs need to be able to fulfill more policy requirements while providing no less effective options for the treatment of offenders than the custodial approaches. The general public must be informed and convinced that the programs can deliver desirable results - the reform of the offenders' attitude and behaviors - when these programs are implemented in local communities. In order to achieve that, the programs need to be more responsive to as many types of target groups as possible, especially with respects to their types of offences. More cooperation and partnership with healthcare providers and social welfare agencies must be sought after in designing such programs.

4. Integration of enforcement agencies on treatment of offenders

The reorganization of the Ministry of Justice in 2002 successfully brought all related government agencies charged with the treatment of offenders under one umbrella. Yet there is still an urgent need for the integration of these agencies to cascade down to real practice and work procedures within each agency and across the related agencies. The development of an integrated system of offender treatments is crucial to achieving more efficiency and reducing the duplication of work.

Every agencies in the criminal justice system will have to work closely with one another encies in order to develop a suitable framework for such integration, with well-defined scope of responsibility

and accountability. A unified strategic plan will be necessary for the smooth delivery of each key process along the value chain of the overall offender treatment process, including the pre-release preparation and after-release support. Additionally, the Department of Probation will need to continue its effort in promoting participation and partnership with other non-public sectors.

5. Maintaining the quality of public participation in probation work

Success by the Department of Probation in promoting public participation in the criminal justice process of Thailand has inspired decision-makers at the top policy levels to apply this model of volunteering and community networking to other key criminal justice issues. A good example of this is the development of the community-based system of responses focusing on the alternative dispute resolution and access to legal assistance. So far, the volunteer probation officers initiative as well as the prototyped networking initiatives by the Department of Probation have led to great success in mobilizing public support for and understanding of the work on offender treatment. This ultimately results in a more effective implementation of treatment programs and after-release assistance programs within the community. Still, for the public participation and partnership models developed in such manner to be effectively applied to address other criminal justice issues, substantial funding and support will be necessary. Otherwise, it might lead to the undesirable consequence where the current efforts in the community-based treatment of offenders will be diluted as a result of insufficient resources.

6. Political challenges and consistency of penal policy

New initiatives and treatment programs related to offenders take time to be accepted as worthwhile not only for the policy-makers and the general public, but for employees within the criminal justice system itself. Practitioners such as prison officers, law enforcement employees, probation officers, and court members must have a certain level of belief and buy-in for the programs to be implemented successfully. Programs such as diversion, restorative justice, and community treatment must first be shown to be effective in their objectives (of reducing incarceration rates, recidivism, etc.) before buy-in can be achieved. Having time for the process to play out is difficult when there is a lack of consistency regarding penal policy in the country. Because many of these initiatives are relatively new to criminal justice in Thailand, there has not yet been a consistent approach to reducing prison overcrowding through such initiatives. Changing agendas of political leaders, as well as changing of the leaders themselves, has contributed to this problem. A consistent and committed approach by the policy-makers would allow the programs to reach their full potential, thus providing tangible statistics to allow for evidence-based decisions regarding penal policy.

7. Judiciary's involvement in promoting community corrections sentence

In many cases, despite all the work being done at the pre-prosecutorial stage by the Ministry of Justice, sentences ultimately lie in the hands of the judiciary. This can be a challenge not only because of the necessary buy-in discussed in the previous section, but because historically the judiciary tends to utilize the traditional methods of fines and imprisonment rather than the more alternative methods. As the 'sentencers' of the offenders, the judiciary play a vital role in the promotion and utilization of the alternative methods, and are a key group involved in tackling the rate of incarceration. By accepting and mandating various methods of diversion, treatment, mediation, etc. while remaining independent, the judiciary can go a long way towards promoting community corrections sentences.

B. Recommendations

Based on a recognition that prison overcrowding is not merely as a result of increased crime, but as a result of the criminal justice policies made to deal with criminals, the solution then becomes about effective treatment that is not merely about keeping offenders under control through incarceration, but about providing them with the necessities and treatment for a successful reintegration into a crime-free life in society. Here are a few of my thoughts on how to enhance alternative to incarceration measures to better cope with the challenges mentioned above, and positively impact the problem of prison overcrowding in Thailand.

1. Earlier application of alternative measures

Prison overcrowding is by and large the result of a breakdown of the system of applying alternative measures to appropriate offences and offenders from the stage of initial arrest through to the sentencing stage. Non-custodial measures must be more vigorously applied in the pre-prosecutorial stage of the criminal justice system for the system to work, and for prison to be the last resort. The mindset of prison as a last resort must be present in all sectors of the system from the beginning, so that the offender will be channeled as early and as appropriately as possible into alternative measures of community corrections.

2. More variety for non-custodial treatment

While imprisonment may be justified for certain types of offenders under certain circumstances, it is not justified for all. In order for the system to better serve and respond specifically to the needs of the offenders, more options for the community-based and alternative treatment measures is highly desirable. Introduction of such measures at the pre-trial stage and during the period of suspended sentence, as well as in-house arrest could provide more variety for the non-custodial treatment in the community. Specific treatments that match the needs of certain group of offenders are also desirable. In addition to the offenders or suspects awaiting trials, as well as drug abusers, prisoners with short terms of imprisonment (i.e. those who have committed compoundable offences of less than two- years term) might well be a good candidate for such measures. Furthermore, the entire criminal punishment system needs to be reformed in order to allow for the introduction and implementation of the non-custodial measures in greater variety. The legal framework needs to be revised to allow for more alternatives to imprisonment in order to reduce the number of inmates incarcerated for the short-term.

3. Multilevel conditions

At present, the conditions set forth for the offenders to observe during probation tend to be quite rigid and inflexible, rendering them less responsive to the different needs and circumstances of each offender. For instance, in case of offenders who have re-offended, the conditions may well be appropriately intensive, with a combination of limiting freedom of movement, restriction on access to any particular areas, compulsory rehabilitation, or even the increase of the probation period. On the other hand, for offenders of petty crimes, normal conditions might not necessary. One approach to allow for such multi-level conditions is to empower the probation officers to use their discretion in order to reach an agreement with each offender in a tailor-made fashion.

4. Need for ‘national penal policy’ and modernized legislations

Reiterating the challenge of consistent policies, there is a demonstrated need for a ‘national penal policy’ which promotes community corrections and reserves prison spaces for only hardcore criminals. This will take the modernization and innovation of legislation, using best practices and evidence-based knowledge from around the globe, and applying it in a manner that is suitable to Thai law, customs, culture, and society. Currently, Thailand is exploring a number of innovative policies regarding intermediate sanctions, including intensive probation, home detention, weekend detention, periodic detention, and electronic monitoring for the community-based treatment of the offenders. Additional innovative approaches might include pre-sentencing probation, assistance program for victims of crimes, as well as the implement of restorative justice measures.

5. Improvement of transition operation and aftercare services

Prison should not be a revolving door for inmates; the issue of overcrowding can not be addressed without looking at keeping offenders from re-offending after they leave prisons or other correctional programs. Community-based corrections and treatment programs are only as good as their re-offending rates, so it is crucial that transition operations for inmates and aftercare services for ex-probationers are improved to prevent recidivism.

In response to the need to systematically embrace more innovative approaches, some might look for the establishment of new agency to be responsible for the new demand. Still, in my opinion, it

might be more productive to consider assigning such new missions to the Department of Probation, considering that its staffs have had considerable real work experience and are equipped with the necessary fundamental knowledge and skills. Each probation officer, provided that they are properly trained, will have at least three significant qualifications, namely: 1) being knowledgeable with respect to laws and criminal justice system, 2) having good background knowledge on psychology and social welfare, and 3) having intensive working experience with all key stakeholders in the criminal justice process- whether they are the police, the public prosecutors, the offenders, the victims of crimes, or the members of local community. Therefore, we only need to build up more on the well-laid foundation which will be more cost effective and feasible.

At the heart of any quality treatment lies the ultimate goal of reintegration of the offenders into the society. Measures must be tested and monitored for their effectiveness in terms of providing assistance to the offenders so they can attain such goal. This involves taking into account the societal and familial dynamics surrounding the crime, and applying the support needed to reintegrate the offender back into the community. As the society becomes more and more complex with more compounded impact of the weakened social institutions, so are the nature and circumstances surrounding the offenders and their offences. The probation officers will require constant training and re-training to bring their knowledge and skills in keeping up with the latest development of the serious issues of the days. They are required to do more than just supervising the offenders according to the conditions set forth by the court orders. They must be able to work closely and productively with the offenders, the victims of crimes, and the local communities. Their role will not be limited to merely 'rules keepers' but extend to encompass that of the 'local community resources managers' in order to truly return the offenders back into the society.

6. Increased partnership

My experience in working to promote public participation in the treatment of offenders has confirmed the fundamental belief that direct engagement of the community members, either through the form of volunteers or networking, is indispensable for the effective implementation of the alternative treatments for imprisonment. It is the most efficient way to make use of the resources within the local community as well as other forms of social capital to support the probation work and decrease in the rate of incarceration. In the context of Thailand's political system, direct participation from the local community also contributes to the on-going efforts with respect to decentralization of administration power from the central government, as mandated by the Constitution. As present, there are over 6,700 Tambon Administration Organizations - the smallest units of local governments - throughout Thailand with more independence in terms of policy planning and budget management. The success in promoting community involvement in the treatment of offenders should be expanded to include the form of partnership agreements with these local administrations, which will provide a more sustainable solution to the chronic problems of budget constraints and lack of support for the assistance program for the reintegration of the offenders into the society.

V. CONCLUSION

Prisoners' rights are human rights, and as stipulated in the SMR (United Nations, 1955), prisoners have the right to adequate facilities. The problem of overcrowded prisons is one that many countries, including Thailand, are currently dealing with. One approach utilized has been capacity-based - solving the situation by building more prisons. The Ministry of Justice in Thailand recognizing that the issue of prison overcrowding is not just a symptom of increased crime, but of penal policies as well, has used a three-prong approach: prevent newcomers from entering prisons; reduce the current prison population by using early release (parole) measures for prisoners who are near the end of their sentence and have earned parole through good behavior; and reduce the recidivism rate. Initiatives created to underline these three strategies include alternatives to incarceration, such as enhanced probationary measures that include community treatment, diversion, and restorative justice.

Alternatives to incarceration programs have come a long way in Thailand since they were first introduced thirty years ago. They currently operate as well-accepted options for the diversion of

criminal cases from the historical method of fines and imprisonment. Additionally, there have been a number of new measures for specific group of offenders to better serve their needs, along with the needs of the victims and society at large. Public participation and community engagement have become the integral part of system where rehabilitation and reintegration are the ultimate goals. Some innovative measures such as restorative justice with emphasis and role for the victim have been sought after more and more. Finally, the working style where community networking and partnership are the absolute ingredients has become the norm. All these are the good signs for not only the sustainable development of the community corrections approach, but for the situation of prison overcrowding as well. The more offenders who are diverted to other forms of rehabilitation, the more the prisons remain last resorts for only the most dangerous criminals.

There is room for improvement, however, as many challenges remain with respect to the implementation of community corrections and alternative measures. Since the time of the inception, the present time is perhaps the most crucial for making real headway in Thailand's response to prison overcrowding. It is important that all concerned parties who shoulder the responsibilities of implementing alternative measures put great effort into initiating, implementing, monitoring and evaluating the outcome of such programs, while maintaining the quality of work despite the rising demands. Through a decade of hard work, pioneers involved in the process of reform, including the Department of Probation, have been successful at - among other things - establishing the system of probation for adult offenders as well as juvenile offenders in Thailand. There are more than 100,000 persons under supervision annually, and the success rate has been satisfactory. Offenders who are under the supervision of parole are not, by definition, adding to the prison population, and therefore this is a crucial piece in the work of decreasing the incarceration rate.

In the case of penal policy, there can be no shortcut to success. While the utilization of non-custodial measures to combat prison overcrowding can be viewed as a cheaper alternative to building more facilities, such measures in Thailand, similar to many countries, are facing a chronic lack of funding and inadequate allocation of personnel. Although initiatives such as diversion and restorative justice may in fact be a cheaper alternative, this does not mean that they can survive without adequate funding and support. To ensure that Thailand maintains a prison population that is consistent with the capacity of its facilities, it is necessary that non-custodial measures of treatment and rehabilitation continue to be given their due consideration and support, to enable them to succeed during this important period for continuing growth and maturity.

STRATEGIES AND BEST PRACTICES AGAINST OVERCROWDING IN CORRECTIONAL FACILITIES

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I. Introduction

1. Strategies for the reduction of prison populations spans a range of efforts from stemming the flow of cases into the justice system; efforts towards improving the efficiency and effectiveness of the justice system for purposes of reducing delays and bottlenecks at the stages from arrest and pre-trial detention; through to trial, sentencing, appellate proceedings and innovations of reducing the physical stay of prisoners on custodial sentences in detention facilities. This paper however focuses on strategies and good practices at the stages of stemming the flow of cases into the justice system and the pre-trial stage.

2. Prison overcrowding results from high prisons admissions and few releases/discharges coupled with delays in the trial processes in the formal justice system and the award of long prison sentences with limited use of parole. It could also be a result of limited use of alternatives to custodial sentences such as fines, community service orders, confiscation orders and suspended sentences.

II. Strategies and best practices against overcrowding - the case of Uganda

3. Interventions to reduce overcrowding in prisons have included both government and civil society as complementary duty bearers as well as building of strategic partnerships of between government and civil society organizations. Furthermore, the use of multidisciplinary teams in the provision of legal aid services has proved vital in offering comprehensive and effective services. Specific strategies and practices that have contributed to the reduction of prison overcrowding include;

- a. Prevention of cases getting into the formal justice system through use of alternative dispute resolution including traditional justice mechanisms - these are restorative in nature and promote reconciliation and settlement of disputes outside the formal justice processes; Local Council Courts - Community based semi- formal institutions to handle disputes without arrest and detention powers; family members including clan leaders and religious leaders also resolve disputes for purposes of stemming the flow of cases into the formal justice system. It should however be noted that these are relevant for minor and often domestic related cases that are not capital offences.
- b. Weeding out non-founded cases from the formal justice system such as formal withdrawal of cases through the Directorate of Public Prosecutions, mediation and reconciliation. Paralegals working in the criminal justice institutions identify and document deserving cases or those that are erroneously forgotten in the system and bring them to the attention of judicial officers. In cases where complainants report to have lost interest in pursuing the matter through court or where they are not willing to testify in court to help court complete the trial process, Paralegals arrange for both parties together with police to write additional statements in liaison with the Prosecution department to formally withdraw the case hence securing releases from prison.
- c. Legislative and policy amendments such as lowering the jurisdiction of cases from High Court to lower courts such as the Chief Magistrates' courts. High court sessions handle criminal matters at an average rate of twice a year in a magisterial area. High Court was previously

responsible for trial of all defilement cases. This created a huge backlog of cases due to the limited number of High Court Judges and resource constraints. The legislation on defilement was revised to separate simple defilement - involving a minor victims fourteen years and above to be tried at the Chief Magistrates' Court while aggravated defilement - involving a minor victims below the age of fourteen was left in the jurisdiction of High Court. This led to a reduction in prison populations because Chief Magistrates' courts are in session through out the year. The campaign against death penalty has also yielded results including the review of inmates on death sentences which has led to overturning some death sentences and consequent releases.

- d. Institutionalization of pro bono services to encourage faster case disposal through representation in court especially for the indigent. The initiative relates to advocates in private practice and non governmental organizations as well as services of Paralegals. Pro bono services supplement government efforts in provision of legal aid through advocates to represent prisoners. The initiative also improves legal awareness of prisoners to enable them become active participants through effective demand for justice.
- e. Within the legal and policy framework, there are provisions in the formal justice system that encourage out of court settlement of disputes at various stages. Examples include;
 - The Family and Child Protection Unit at Police which handles domestic disputes aiming at prevention of petty/minor cases from progression into the formal justice system. This reduces the possibility of ending up in incarceration.
 - Magistrates Court Act Cap 16 Section 160 provides that in criminal cases, a Magistrate's Court may promote reconciliation, and encourage and facilitate the settlement in an amicable way, of proceedings for assault or for any other offence of a personal or private nature, not amounting to felony and not aggravating degree, in terms of payment of compensation or other terms as approved by the court.
 - In civil cases a magistrates court shall not deprive any person of the benefit of any civil customary law which may be applicable that is not repugnant to justice, equity or good conscience or incompatible with any other law - Section10 Magistrate Courts Act Cap16
 - Most legislation promotes the principle of using incarceration as a last resort in pretrial. Examples include, provisions minimizing detention of juveniles and reduction of statutory remand periods 60 days for non Capital offenders and 180 days for capital offenders. These were revised from 180 days and 360 days for petty and capital cases respectively.
 - Willingness to try out and adopt new innovations to address overcrowding in places of detention such as the Paralegal Advisory Services programme.

III. Paralegal Advisory Services Programme

4. The Paralegal Advisory Services Programme provides basic legal aid services aimed at improving access to justice for poor persons caught up in the criminal justice system. It addresses the problems of overcrowding in police cells and prisons as well as delays in the criminal justice system.

5. The programme promotes the interventions of Social Workers and Paralegals working in all the criminal justice institutions on a daily basis as a link on behalf of the suspects and prisoners. They provide first legal aid through general advice and education to persons in conflict with the law and their relatives in consultation with the officials of the criminal justice institutions i.e. Police, Prosecution department, Courts, Prisons and Remand Homes. Although the Paralegals' and Social Workers' interventions target suspects and prisoners, they also assist the victims as well as improve communication and coordination among the justice institutions.

6. Objectives of the Paralegal Advisory Programme relating to the reduction of congestion in prisons include the following;

- a. To contribute to the process of physical and case file decongestion in the Criminal Justice system through;
 - Stemming the flow of non founded cases into the criminal justice system - at police and courts as well as following up and identifying cases in prison.
 - Reducing the proportion of petty offenders on remand
 - Diverting the petty cases from the criminal justice system to Alternative Dispute Resolution and traditional systems
- b. To link the demand and supply sides of the Criminal Justice System through;
 - Training suspects and prisoners in self representation to allow for reduction of wastage of court time
 - Facilitation of quality sureties to help suspects and prisoners on pre-trial access police bond and court bail respectively
 - Linking suspects to communities to allow for settlement of disputes out of the formal justice system as well as standing as sureties to access police bond and court bail
- c. To change practices within the Criminal Justice chain through advocacy and civic engagement

Congestion in prisons also results from loop holes in legislation and practices or non adherence to standard procedures and guidelines. The PAS programme engages in;

- Practice Advocacy to ensure that there is issuance of practice directions to reduce bottlenecks in the administration of justice
- Modification of practices where necessary through civic engagement with the stakeholders in the administration of justice. This is achieved through identifying and proposing alternative practices to fill practice gaps
- Encouraging enforcement of enabling legislation and practice standards.

IV. Challenges of Reducing Prison Populations

7. Challenges of reducing prison populations relate to poor enforcement of standards, inherent challenges in the strategies and practices as well as the limited use of modern technology for improving access to justice.

- a. Failure to enforce enabling legislation and programmes such as the pro bono services and low adherence to standard guidelines. This stems from resource constraints including; human, infrastructural, and financial constraints.
- b. Challenges of sustainability of innovations such as the Paralegal Advisory Services. Most innovations are initiated and managed by civil society organizations which depend on funds from international development partners.
- c. Chronic delays in the administration of justice. These stem from systemic and technical inconsistencies.
- d. Limited acceptance of non- lawyers in the administration of justice. The concept of using multidisciplinary teams in the access to justice arena is still relatively new on the African continent. Interventions to improve access to justice have largely been relegated to the law profession.

- e. Absence of a national legal aid policy to allow for equitable access to justice especially for the indigent. This in most cases leads to the limited commitment of government as the major duty bearer of legal aid service provision.
- f. Lack of sufficient preparation of the communities to receive persons out of prisons on pretrial and lack of public acceptance for suspects and prisoners on pretrial such as those on police bond, court bail, and parole. The suspects and prisoners are harassed, alienated and stigmatized. This in most cases leads to re-offending manifesting as recidivism and at worst it has resulted into mob justice.
- g. Most discussions and decisions do not reach the lower levels of staff in the justice systems that have direct interaction with the prisoners. Whereas initiatives such as the Chain Linked Initiatives, stakeholder conferences improve coordination and cooperation in the justice system, the participants are often at management levels and information does not adequately trickle down to the officers who would implement decisions.
- h. Incomplete support systems for the integration of prisoners into communities. There are instances when prisoners are released but due to lack of transport to their home areas, they are left stranded in the localities where they were incarcerated so they end up re-offending in the process of trying to fend for themselves or finding transport to take the back home.
- i. Whereas Community service has proved to be an effective alternative to custodial sentences, the challenge of follow up to ensure compliance has been a major set back. This is in part due to the lack of tracking changes in addresses especially in urban slum areas of Africa where many offenders reside.

V. Conclusion

8. There is recognition that even when there is enabling legislation, adherence to minimum standards, effective and functional justice system, there could be some practices especially relating to following due processes that are counter productive and could be contributing to delays in the administration of justice leading to prison overcrowding.

9. In recognition of the challenges for Africa in the use of technology such as surveillance and electronic tagging devices, diversionary measures such as house arrest, suspended sentences and curfews are difficult to use hence the need to develop tailor- made community strategies based on the traditional justice mechanisms to follow up prisoners on early release from prison.

10. Most of Africa's prison management are grappling with the basic challenges related to overcrowding such as feeding, sanitation, security of prisoners that they do not have adequate financial and human resources to address specific needs of prisoners such as the mentally challenged, drug-related or terminally ill and elderly prisoners.

11. Recidivism remains a major contributor to prison overcrowding. In most of the African countries with no national identification systems in place coupled with inaccessibility and use of modern technology and tracking mechanisms, the rates of recidivism could be much higher than recorded because prisoners change identities which are not detected hence passing as first time entrants into prisons.

12. Whereas caution should be exercised in building of more prisons as a strategy for reducing prison overcrowding, consideration of the growing national populations and the escalation of crime coupled with depreciation of physical infrastructures should not be disregarded.

THE PARALEGAL ADVISORY SERVICE & ACCESS TO JUSTICE IN MALAWI

Clifford Msiska

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INCEPTION OF PARALEGAL ADVISORY SERVICE

- The 1996 Pan-African Seminar on Prison Conditions in Africa noted that under-trial prisoners constituted up to 80% of the total prison population in some countries in Africa due to lack of legal aid services
- Review of juvenile cases in 3 prisons in Malawi (1999) revealed 179 in Zomba prison illegally held
- Regional Seminar on Juvenile Justice recommends launching of Paralegal Advisory Service in prisons to monitor remand cases

ISSUES IN LEGAL AID SERVICE PROVISION

- Practical, affordable and effective legal aid service delivery scheme
- No one country has got it right-judicare has collapsed in many countries, pro bono schemes have hidden costs and many problems
- In Europe, legal aid costs have risen and governments are looking for radical alternatives

WHAT DO POOR PEOPLE NEED BEFORE LEGAL REPRESENTATION

- Advice: bail, appeal
- Assistance: trace sureties, parents/guardians
- Mediation: civil cases and petty criminal cases
- Referral services which are affordable and free

Prison

- Paralegals conduct Daily Paralegal Aid Clinics in prisons: empowering prisoners to apply the criminal law and procedures in their own case (arrest to appeal)
- Paralegals facilitate Camp Courts-screening sessions- held in prisons: magistrate screens the remand caseload:bail,discharge, set dates for hearing

Police

- Trace parents/guardians of juveniles
- Screen juvenile offenders with a view to diversion (24/7)
- Attend at police interview with juvenile
- Attend at police interview with adult accused

Court

- Attend outside court to assist:
 - Witnesses (role and orientation)
 - Accused persons not in custody (not represented by a lawyer)
 - Follow up individual cases from prison and police

Targeted interventions (1) Homicide backlog

- PAS involved in tackling homicide backlog through the Homicide Taskforce. The approach has been to try and address the backlog before trial stage-many homicide cases prove either ineffective or collapse when they finally come for trial at huge expense
- Following referral to DPP and LAD in 2003, 29 out of 33 homicide remandees enter pleas and are sentenced; 2 are not produced at court, 2 enter NG pleas: savings to judiciary \$33,000
- Census of homicide cases indicates 50% will plead to the right charge-manslaughter. Potential savings of >\$400,000 by the Judiciary
- This approach results in a three-fold benefit in terms of: 1) improved case management; 2) reduction of the backlog and breaking down the remainder into manageable numbers; and 3) substantial savings to the judiciary in terms of Judge days spent trying the matters and in terms of costs.
- This has been further carried on with the assistance of the Bluhm Legal Clinic of Northwestern University in Chicago in March 2007, 2008 and 2009

Targeted interventions (2): Juveniles at police

- Steps:
 - Parents/guardians traced
 - Liaise with Victim Support Unit for victim offender mediation
 - Recommendations to prosecuting authorities:
 - Bail
 - Diversion (formal caution + new link with Diversion Programme)
 - Sent to approved school
 - Remainder remanded to prison (majority charged with serious offences or jointly charged with adult accused)
 - ➔ with PAS follow up in prison and refer to Camp Court or secure early appearance in court

EVALUATION OF PARALEGAL ADVISORY SERVICE

- Energising the criminal justice system'
 - PLCs impact: >250,000 prisoners more 'sophisticated' in their understanding of the criminal law and procedure
- Criminal Justice Agencies talking to one another more (CUCs)
- Case flow improving
- Almost >5,000 prisoners released
- Remand population stabilized between 17.5% and 23%
- >80% Juveniles diverted at the police station out of the criminal justice system
- PAS replicated in Benin(2002), Kenya (2004), Uganda (2005), Niger (2006), Bangladesh (2008), Sierra Leone (2009).
- Invitations to start in Liberia, Lesotho, Zambia, Zimbabwe, Botswana, Rwanda and Tanzania.

END OF PRESENTATION

GOOD LUCK!!!!

SYSTEM AND PRACTICE TO CONTROL AND REDUCE PRISON POPULATION IN JAPAN

Toshihiro Kawaide

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Prison overcrowding in Japan

	average daily number of inmates in penal institutions		rate of imprisonment of penal institutions	
	Sentenced inmates	Untried inmates	Sentenced inmates	Untried inmates
1993	45057	7664	78	52
1998	51986	9060	89	58
2003	59062	12052	115	70
2008	69020	8336	98	47

Pre-trial Detention : System

- Limitation of detention period before indictment
 - 23 days for an offence (maximum)
- Bail after indictment
 - Mandatory and discretionary bail
- Speedy trial procedure for not serious offence

Speedy trial procedure

<Conditions>

- consent of the defendant with defense counsel

<Effect>

- trial within 14 days after indictment and judgment on that day
- simplification of examination of evidence
- limitation of sentencing:
 - imprisonment with a stay of execution or fine

Pre-trial Detention : Practice

Moderate use of pre-trial detention

↑

Arrest rate:

about 30 % of all suspects

Diversion : System

- Principle of discretionary prosecution

(Code of Criminal Procedure)

Article 248:

Where prosecution is deemed unnecessary owing to the character, age, environment, gravity of the offense, circumstances or situation after the offense, prosecution need not be instituted.

Diversion :Practice

- Active use of discretion by the prosecutor
 - The prosecutions of about 40 % of all suspects for non-traffic penal code offenses are suspended, although there is enough evidence to prosecute.
 - The prosecution of serious offences can be suspended.
- Compensation to the victim as one factor in deciding the suspension of prosecution

Suspended prosecution rate, by type of offense in 2008

Total	60.2
Penal code offenses	80.6
Non-traffic penal code offenses	42.1
Homicide	4.2
Robbery	4.0
Injury	39.7
Theft	42.6
Causing Death or Injury through Negligence in driving a vehicle	90.0
Special act offenses	31.3
excluding violations of road traffic related acts	39.8
Immigration Control Act	56.5
violations of road traffic related acts	29.6

PRISON OVERCROWDING

- Finding Effective Solutions. Strategies and Best Practices Against Overcrowding
in Correctional Facilities -

Hans-Jörg Albrecht

*Managing Director, the Max-Planck-Institute
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See p. 65 to 130

RESTORATIVE JUSTICE

David J. Carruthers
Chairman, the New Zealand Parole Board

1. GENERAL

Restorative justice in the criminal justice system is a way of responding to offending and the effects of crime that makes the people affected by the crime the focus of the process. Restorative justice seeks to repair harm caused by the offending, to appropriate responsibility for repairing the harm and to involve those who have been affected by the harm, including the community, in the resolution.

The many different types of restorative justice processes simply reflect national and cultural differences. Restorative justice is constantly changing to meet new circumstances.

International research shows that restorative justice significantly reduces imprisonment, reconviction and reoffending. Importantly, it provides significantly greater victim satisfaction. This paper in support of the workshop at the United Nations Congress on Crime Prevention in Brazil will in particular, focus on the research evidence which shows that use of restorative justice reduces the use of imprisonment and has other beneficial results. Restorative justice is significant in any discussion of prison overcrowding.

2. DEFINITION

Definitions can be problematic but broadly speaking restorative justice refers to: “*a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future*”.¹ The aims of restorative justice “*are to repair the damage created by criminal offending and restore the balance of relationships within society*.”² Restorative justice practices involve the devolution of some decision making power from the State to the community. It helps those caught up in criminal offending feel that their respective voices are heard and respected - something which victims of crime increasingly feel the traditional criminal justice system does not adequately allow.

Professor John Braithwaite, an eminent Australian criminologist, has said that restorative justice: “*has been the dominant model of criminal justice throughout most of human history for all the world’s people*”.

Certainly this is true of restorative justice in New Zealand. Consedine notes³ that prior to European contact, the indigenous Maori population had a well-developed system of custom and practice that ensured the stability of their societies, one which had much in common with the philosophy of restorative justice:

“Essentially the system was akin to what is now referred to as restorative justice. There were a number of important elements to this. When there was a breach, community process enabled a consideration of the interests of the whanaungatanga (social group) and ensured the integrity of the social fabric. Through whanau (family) or hapu (wider family) meetings, and on occasional iwi (tribal) meetings, the voices of all parties could be heard and decisions arrived at by consensus (kotahitanga). The aim was to restore the mana (prestige/authority) of the victim, the victim’s family and the family of the offender, and to ensure measures were taken to restore the future

1 Marshall T (1996) Restorative Justice: An Overview. London Home Office, Page 5.

2 Maxwell G (2007) “The Defining Feature of a Restorative Justice approach to Conflict,” Institute of Policy Studies Page 6.

3 Consedine, J. (1999) Restorative Justice: Healing the effects of crime, Ploughshares, Chapter 6. See also *Restorative Justice: A Māori Perspective* by the NZ Māori Council in *Restorative Justice: Contemporary Themes and Practice*, Bowen and Consedine (eds) 1999 Ploughshares.

social order of the wider community. Because these concepts were given meaning in the context of the wider group, retribution against an individual offender was not seen as the primary mechanism for achieving justice. Rather, the group was accountable for the actions of the individual (manaakitanga) and that exacted compensation on behalf of the aggrieved”.⁴

A traditional form of what we know as “reparation” (utu - balancing the scale) was muru. This involved the offending party and their kinsmen acting as a raiding party and plundering the offender and their kin of food or other resources (the scope and extent of the raid having been previously agreed upon).⁵

It is certain that to a degree these restorative roots in Maori culture influenced and expedited the adoption of restorative justice processes in contemporary youth justice and the movement towards the use of restorative justice in adult criminal justice settings in New Zealand.

3. RESTORATIVE JUSTICE IN THE YOUTH COURT

The enactment of the Children, Young Persons and Their Families Act 1989 in New Zealand introduced a philosophical sea change in the youth justice system. Prior to this legislation many youth offenders were sent to institutions or to detention centres or borstal, places where they would further develop their bad-boy/bad-girl image and learn new anti-social and criminal tricks.⁶

The existing system was seen to have failed to prevent reoffending and also failed in the manner in which it encouraged dependency on the welfare of the State. Further factors which influence calls for change were summarised by Maxwell⁷:

“Concern for children’s rights: a new approach to effective family therapy: research demonstrating the negative impact of institutionalism on children, inadequacies in the approach taken in the 1974 legislation for young offenders: the failure of the criminal justice system to take account of issues for victims: experimentation with new models of service provision and approaches to youth offending in the courts: and concerns raised by Maori about the injustices that had been involved in the removal of children from their families.”

All of these concerns led to the Children, Young Person and Their Families Act 1989 a radical piece of legislation incorporating restorative justice techniques. This pioneering legislation has been the subject of scrutiny by many other nations and adopted in whole or in part in youth justice systems around the world.

4. THE KEY PROVISIONS SUMMARISED

The procedure now followed in New Zealand for youth offenders is explained by His Honour Judge F W McElrea.⁸

“A typical restorative justice conference involves the prior admission of responsibility by the offender, the voluntary attendance of all participants, the assistance of a neutral person as facilitator, the opportunity for explanations to be given, questions answered, and apologies given, the drawing up of a plan to address the wrong done, and an agreement as to how that plan will be implemented and monitored. The court is usually but not necessarily involved.

In the youth justice sphere, about one-third of conferences are not directed by the court but are

4 Ibid at 86

5 Ibid at 87

6 Ibid at 102 - 103

7 Maxwell, G. (2007), *The Youth Justice System in New Zealand: Restorative Justice Delivered Through the Family Group Conference in Restorative Justice and Practices in New Zealand* (Institute of Policy Studies, VUW) at 46

8 Judge FWM McElrea, “*Customary values, restorative justice and the role of prosecutors: a New Zealand Perspective*” presented to the *Restorative Justice and Community Prosecution Conference, Cape Town, South Africa, 23 February 2007.*

diversionary conferences, initiated - and attended - by the police. (However, New Zealand does not subscribe to the practice in some parts of Australia, Canada and the United Kingdom of having the police run the conferences. There is always an independent facilitator in charge.) If agreement can be reached as to an outcome that does not involve the laying of charges, then no charges are laid - so long as the outcome is implemented.

The youth court nearly always accepts such plans, recognising that the scheme of the Act places the primary power of disposition with the FGC. However, in serious cases, the court can use a wide range of court-imposed sanctions, the most severe being three months residence in a social welfare institution, followed by six months supervision; or the court may convict and refer the young person to the district court for sentence under the criminal justice act 1985 (s 283(o)), which can include imprisonment for up to five years.

As with other diversion schemes, if the plan is carried out as agreed, the proceedings are usually withdrawn; if the plan breaks down, the court can impose its own sanctions. Thus the court acts as both a back stop (where FGC plans break down) and a filter (for patently unsatisfactory recommendations)."

5. RESTORATIVE JUSTICE IN THE ADULT COURT

The experiments with restorative justice for young people inevitably flowed into restorative processes being used in the adult setting.

In New Zealand, adult courts began to accept restorative justice conference recommendations. These conferences were run by community groups with support from local judiciary. A common theme in the successful adoption of restorative justice processes in New Zealand and elsewhere has been the involvement of the local community and the utilisation of groups already in existence and working to deal with problems in local communities. For the most part the necessary infrastructure existed. It simply needed to be supported by the State through the provision of necessary training and/or funding.

In New Zealand some appellate decisions affirmed the right of New Zealand courts to take into account restorative justice processes in adult criminal matters but in 2002 there was legislative recognition of restorative justice in the adult criminal system.

6. LEGISLATIVE PROVISIONS SUPPORTING RESTORATIVE JUSTICE PROCESSES

In New Zealand, a number of legislative reforms were passed into law in 2002 which supported and recognised restorative practices. In summary, the Sentencing Act 2002 requires that when sentencing an offender, the court "must take into account any outcomes of restorative justice processes" and included provisions facilitating restorative justice conferences as part of the sentencing process; the Victim Rights Act 2002, which also supported such conferences or meetings as a victim's right; the Parole Act 2002, which required a Parole Board to "give due weight" to any restorative justice outcomes when considering the release of prisoners on parole; and, later, the Corrections Act 2004, which required the prison system to provide prisoners "with access to any process designed to promote restorative justice between offenders and victims" where appropriate. These legislative provisions can be accessed at WWW.LEGISLATION.GOV.NZ.

7. RESTORATIVE JUSTICE PRACTICES IN ADULT COURT

In adult criminal justice systems, restorative justice can occur:

- (a) as part of police adult diversion process;
- (b) pre-sentence (after a guilty plea but before sentencing); and
- (c) post-sentence (in the parole of offenders and as part of re-integration back into the community).

(a) POLICE DIVERSION

For many years, the police in New Zealand have utilised a “diversion” scheme whereby an adult offender who accepts responsibility for offending, is not prosecuted through the court but makes amends for the wrong by performing some kind of community work, paying reparation where appropriate and apologising to the victim. This saves considerable judicial time and the offender avoids the consequences of a conviction.⁹

The police have recently started considering referrals to a restorative justice process for certain offenders who receive diversion. In such cases, the agreed means of making amends, will in large part, stem from the restorative justice meeting, rather than simply being directed by the diversion officer. Restorative justice used in this way, provides a more meaningful intervention for an offender with better prospects for rehabilitation.

(b) RESTORATIVE JUSTICE CONFERENCING IN THE ADULT COURT

Once charges have been laid in court, there are some restorative justice processes which run alongside the court process. The Sentencing Act supports restorative justice and allows the engagement in a restorative justice process to occur prior to sentencing so that the outcome of that can then be taken into account by the sentencing judge. There is no definition of restorative justice in the Act, so a variety of restorative justice processes can be used, but the most common process is the restorative justice conference, which is akin to the FGC in the youth court.

The general process for restorative justice conferencing in New Zealand is outlined below:¹⁰

(b)(i) BEFORE A CONFERENCE

Restorative justice facilitators meet separately with the offender, the victim and their support people, to assess whether a restorative justice conference would be helpful.

If the offender does not take responsibility, is aggressive, or cannot participate fully because of ill health or a disability the process will not proceed.

If the victim and offender agree to meet and there is likely to be a positive outcome, the facilitators arrange a conference.

Sometimes the conference will involve members of a community panel as well as, or instead of, a direct victim.

(b)(ii) AT A CONFERENCE

A restorative justice conference is a relatively informal meeting between the offender and the people affected. They are there to talk honestly about what happened, what harm has been caused, and to work out ways forward. Conferences are private meetings. However, a report is prepared for the court. How participants agree to move forward is for them to decide. Some conferences result in an agreement on a plan of action that the offender will do to put things right, but this is not the outcome at every conference.

The facilitators make sure that everyone is safe and supported, and that all participants have their say without interruption.

9 More info on the adult scheme is available at <http://www.police.govt.nz/service/diversion/policy.html>

10 <http://www.justice.govt.nz/publications/global-publications/r/restorative-justice-english-courts-118/publication#20>

Most conferences will agree on things the offender can do to begin to put right the harm caused by the offence.

A report of the meeting and any agreements will go to the judge if the meeting happens before sentencing.

(b)(iii) AFTER A CONFERENCE

The facilitators write a report about what happened at the conference and any agreements reached. Copies are given to the victim, offender, and any others involved in the case, such as the police prosecutors, victim advisers, probation officers and lawyers.

The purpose of the restorative justice report is to clearly set out agreements, as information for a judge. They are not used to make sentencing recommendations to the court.

If the offender is still waiting to be sentenced the restorative justice report is given to the sentencing judge.

The sentencing act 2002 requires the outcome of restorative justice processes to be taken into account by judges when sentencing. The judge also considers any other reports such as a pre-sentence report about the offender written by the probation service or a victim impact statement.

The judge chooses whether or not to make all, or some, of any restorative justice agreement part of the sentence.

The judge must, by law, consider what victims think, but also has to think about other information and laws when deciding on the sentence.

Conferencing has been piloted in four district courts in New Zealand as a court referred restorative justice project since 2001.¹¹ An evaluation of the pilot¹² found that there were high levels of satisfaction amongst participating victims and offenders. The evaluation also showed a reduction in the re-conviction rate of offenders, fewer and/or shorter sentences of imprisonment imposed on participating offenders and more use made of home detention.

(c) MATARIKI COURT

Judges continue to support and adopt new initiatives for adults which draw on the philosophy underlying restorative justice. A good example is a special court being set up in the northern most region of New Zealand to deal with the sentencing of indigenous Maori people. It is essentially a restorative justice conference which incorporates Maori tikanga (custom), but takes place in a special court room with a judge as facilitator.

The process, though different from conventional sentencing hearings, will not be alien because of its connection with modern concepts of restorative justice, therapeutic justice, and sentence monitoring. The process is similar to that used in the Koori Court of Victoria,¹³ Australia, the Murri Court of Queensland,¹⁴ the Sentencing Circles of New South Wales,¹⁵ and the Gladue Court of Toronto,¹⁶ Canada, but will be a distinctly New Zealand model.

The Matariki Court will sit in a standard courtroom around an elliptical table. A judge (expected

11 <http://www.justice.govt.nz/publications/global-publications/i/information-about-the-court-referred-restorative-justice-pilot/publication>

12 <http://www.justice.govt.nz/publications/global-publications/n/new-zealand-court-referred-restorative-justice-pilot-evaluation-may-2005/publication>

to be a Maori judge in the pilot) will preside. At the hearing, the prosecutor will outline the offence, defence counsel will make a submission, a probation officer will speak and the views of whanau (family) and other representatives will be sought. Two kaumatua (elders) of the defendant's iwi will then participate in a judge-led discussion which may include interaction with the defendant, to arrive at a suitable sentence.

This special court sitting draws on other recently adopted initiatives in the youth court, which involves a youth court judge sitting at the local marae (meeting house) to monitor the compliance of Maori youth offenders with the outcomes of their FGC.

(d) RESTORATIVE JUSTICE POST SENTENCING

A more recent development in the general field of restorative justice has been its use post-sentence as part of the parole system for prisoners.

It is important first to give those initiatives some context.

The primary purpose of parole is to manage the safe release of prisoners from prison back into the community. The international research shows that sensible parole decisions based on the best research, can be three to four times more successful in preventing re-offending than automatic release at the end of a fixed sentence. The Canadians claim six or seven times more success, but their extraordinary use of halfway houses is part of the explanation for this. In New Zealand, the statistics are elusive as it is hard to get a control group! It is thought that parole in New Zealand achieves similar results to those revealed by the international research.

This makes sense because one would expect that those who are helped to get work, to have an income, to have a good place to live, and to have pro-social people surrounding them, are going to do better than people who are simply released from prison without any support.

There are other beneficial purposes of a good parole system. Very briefly, they are to encourage good conduct in prison and to provide an incentive to undertake tough rehabilitative programmes, which have been shown to be effective in reducing re-offending, and to save public money (it now costs approximately NZ\$95,000 a year to keep a prisoner in prison in New Zealand).

Finally, in New Zealand at least, managed parole which realises the benefits referred to above, can have positive impacts on the disgraceful statistics which show that 51% of the adult male prison population are Maori when only 15% of the entire New Zealand population identify as Maori. Worse still, the prognosis for children of prisoners is well known; the research shows that they are nearly seven times more likely to become prisoners themselves. If something can be done about ameliorating that problem, then it is another significant step towards a peaceful and crime free society.

13 Koori Courts were created in order to allow participation of the Aboriginal community and culture in the legal system, in an attempt to bridge the cultural differences between Indigenous Australians and the imposed colonial law.

14 The Murri Court sentences Aboriginal and Torres Strait Islander offenders who plead guilty to an offence which falls within the jurisdiction of the Magistrates Court. Murri Court provides a forum where Elders, Respected Persons, Community Justice Groups and the offender's family can be involved in the sentencing process. Murri Court proceedings are less formal than those in conventional Magistrates or Children's Courts. The Magistrate, Elders and other participants may sit at a table close to the defendant, rather than on a raised bench.

15 See Criminal Procedure Amendment (Circle Sentencing Program) Regulation 2005. It directly involves local Aboriginal people in the process of sentencing offenders, with the key aims of making it a meaningful experience for the offender and improving the Aboriginal community's confidence in the criminal justice system.

16 The Toronto Gladue (Aboriginal Persons) Court is a specialist court of the Ontario Court of Justice, the criminal jurisdiction of which is remarkably similar to that of the New Zealand District Court. For more detail see http://www.aboriginallegal.ca/docs/apc_factsheet.htm

New Zealand has had its own successes with restorative justice post sentencing. There is a vigorous restorative justice programme being run in parts of the country by the Prison Fellowship, although it is not yet systemic. There are many good examples of such interventions.

A young woman who, as a child, had watched her mother being murdered by her then partner, sought a restorative justice conference with the murderer who was still in prison. It was a tough conference because she was a very staunch and courageous woman and had lots of questions which the court process had left unresolved. She got the answers she needed. The victim says she is not now concerned about the prospect of the offender being released. It is not always about forgiveness, which sometimes happens. It is about meeting victim's needs.

These things do not happen unless there is genuineness and honesty. Everyone in this meeting was alert to that. The result is that the tragedy will remain a tragedy and the loss will remain a loss. But it means that fear of reprisals is put to one side and if these people ever meet again in a small country like New Zealand, they will meet without embarrassment and with dignity. Family and friends and others who might otherwise live in fear, can also be freed to get on with their lives. These opportunities, are being missed because restorative justice is not yet systematically available.

There are other opportunities arising from general restorative practices post sentence. The faith-based communities in Canada developed the concept of "circles of support" for indefinitely detained prisoners; - often child sex offenders who are notoriously difficult to support back into the community. This way of working - constructing artificial support where no natural support now exists - is well known in "therapeutic communities" and it is to be found now widely in the United Kingdom and elsewhere. New Zealand is just starting to develop its own version of circles of support within its own cultural context.

Under the Parole Act, the Parole Board is obliged to "give due weight to" the outcome of any restorative justice conference or process. The outcome is not definitive, nor should it ever be. What this way of working does achieve, however, are better outcomes for victims. All the international research supports that. The present court system leaves many of the questions a victim wants to ask outstanding and leaves many issues unresolved.

Under the restorative justice model the focus is on the harm caused by the offences - harm to victims, communities and offenders. The aim of the process is to repair that harm. To facilitate the same, the focus shifts away from the state and the courts towards the victims, the offender and their families and communities. A healing process is sought for both victims and offenders.

There is now an agreement with the Department of Corrections, which manages prisons in New Zealand, to fund any restorative justice conference which the Parole Board recommends. A process is being developed to ensure that opportunities are not missed because it is easy for these conferences to be undermined by those who have no concept of how it might work and who have no confidence in its efficacy.

Referrals come from the Parole Board but they can also be instigated by victims, offenders, case officers, probation officers, social workers, prison chaplains, prison fellowship and other organisations and people. It is not uncommon for prisoners to express their remorse and sorrow and ask if they could meet with the victims' families in a conference. It is not uncommon for victims to seek the same.

This is highly professional work and no place for well meaning but untrained enthusiasts. The role of the trained professionals to whom these matters are referred is first to meet with the prisoner to determine suitability and agreement to attend such a conference. If the prisoner is thought to be sensible then contact is made with the victim to determine whether they are suitable and will agree to attend a conference? If they are, then the arrangements move onto contact with support persons,

preparing everyone for the conference, arranging a date and eventually running the conference. A report is then prepared on the agreed outcomes. It is a professional process requiring considerable skills.¹⁷

It must be acknowledged that not all cases will be suitable for a post-sentence conference. If an offender continues to deny involvement or blame others, a conference is not appropriate. It will not be helpful if offenders have untreated mental health problems which prevent them taking part in any rational discussion. It will not be appropriate or helpful if victims are so angry, bitter and intransigent that they are not able to take part in any exchange. They have to be ready to participate. It may take time but often people come to a point where they wish to get other answers about something which remains a tragedy and continues to blight their lives.

The New Zealand experience is that, when successful, a restorative justice conference has produced, if not forgiveness, an understanding and ability for both victim and offender to move on and allow others to do the same. When this happens, it is truly impressive and often very humbling. It makes the board's decision making much easier although that is of course a secondary function.

8. SUMMARY

The differences between youth justice and adult justice in delivery of restorative justice processes present two potential models for reform. But perhaps the most substantial difference is that the FGC is mandatory in New Zealand for virtually all youth offenders, while uptake in the adult setting is much more sporadic, depending as it does on the agreement of all involved for it to occur. It may be that in the future, restorative justice conferences should become mandatory for adult offenders unless there are strong and good grounds not to do so.

In New Zealand most restorative justice has taken the form of family group conferences for young persons and community panels for police diversion. In other countries circle of sentence, which originated in Canada, has been the primary restorative justice process but restorative justice has also taken other forms. Those forms include offender-victim mediation¹⁸ and restorative reintegration techniques such as the circles of support and similar reintegration initiatives involving the community, victims, and concerned others.

9. RESTORATIVE JUSTICE IN EDUCATION

There are clear similarities between the ways society has historically sought to regulate behaviour in the wider community and in the school community. For many years, school disciplinary procedures were similar to the procedure traditionally followed by courts, both in the way responsibility was established and in the way consequences were visited upon those found guilty.

Perhaps the most fundamental similarity has been the belief that a tariff based deterrent sentence has been thought necessary to deter future offending by the culprit and others in the respective communities. Meting out negative consequences following undesirable conduct has been the primary approach - as a way to deter future similar conduct.

The focus in both arenas has therefore traditionally been on finding a suitable punishment for the offender. Little focus has been given to the cause of the offending. Neither the procedures in the wider community nor school communities are particularly suitable for identifying and addressing the causes. Little if any focus has been on teaching new positive behaviours.

If success is measured as preventing further offending by the present offender and others in society, both systems have traditionally been found lacking. It must be recognised that after the punishment

17 For a clear statement of the principles to be considered see: United Nations (1999) Declaration of Basic Principles on the use of the Restorative Justice Programmes in Criminal Matters: General Assembly Vienna : United Nations

18 See e.g. Umbreit, "Victim meets Offender" the impact of restorative justice and mediation. "Willowtree Press Inc. New York 1994

has been exacted, the offender will almost always return to life in their respective community. In what condition do we want that person to return? In the school setting, the final consequences (suspensions and exclusions) prevent the offender receiving one of the most fundamental tools for building their future, an education. Involvement in education is crime prevention at its best.

Finally, both systems have tended to neglect the victims of the offending in addressing the harm caused to them and giving them a voice in determining the way in which the wrong committed against them can be righted.

The perceived shortcomings outlined above have all influenced the adoption of restorative justice practices in New Zealand's criminal court systems. Since the same shortcomings can be identified in the education setting, and since both are in the business of what Margaret Thorsborne and David Vinegrad call "behaviour management",¹⁹ it was inevitable that restorative justice practices be extended into the school setting.

10. THE NEW ZEALAND EXPERIENCE OF RESTORATIVE JUSTICE IN SCHOOLS

Restorative justice conferencing was formally introduced into schools in New Zealand in the late 1990's as part of a Ministry of Education initiative called the suspension reduction initiative. (There had been many such private initiatives). A group from Waikato University was contracted to provide restorative justice conferencing into five schools initially; with 24 schools subsequently sending their staff for training. The group drew on the FGC concept. Suspension in those schools went down.²⁰

In 2005 Sean Buckley and Dr Gabrielle Maxwell conducted an examination of the experiences of 15 schools in New Zealand who were utilising restorative practices.²¹ they reported that there were five common restorative practice methods being employed:

"the restorative chat is a one on one private conversation between staff and student where an issue is discussed using a series of questions based on a restorative approach that aims to explore the events, their consequences and how any harm can be repaired (that is, 'what happened?', 'what were you thinking at the time?', 'who do you think has been affected?', 'how could you have acted differently?' and 'what do you need to make things right?')

The restorative classroom is an open dialogue held within the classroom to discuss specific conflicts as they arise and how members of the class should approach potential conflict situations before they happen. Often, a class will write down its agreed set of guiding principles and display these within the classroom. At any stage, the class can revisit these principles and make changes.

The restorative thinking room is a room specifically set aside for students who have become involved in a conflict situation and who may need time away from peers to regain their composure. Time is spent in the restorative thinking room working through several restorative questions with a staff member and discussing the conflict and how to repair any harm caused.

A restorative mini conference is held for more serious conflict situations. It includes the victim, the offender, a staff member and perhaps one other individual. The number of those in attendance is limited in order to make it easier for the conference to be quickly arranged and held.

The full restorative conference is loosely based on the youth justice family group conference. It

19 *Restorative Justice Practices in Schools: Rethinking Behaviour Management*, Margaret Thorsborne and David Vinegrad, 2002, at 7

20 Wendy Drewery, *Restorative Practices in Schools: Far-Reaching Implications*, Chapter 10 in *Restorative Justice and Practices in New Zealand* (Institute of Policy Studies, VUW)

21 *Respectful Schools: Restorative Practices in Education. A Summary Report*. Wellington: Office of the Children's Commissioner and The Institute of Policy Studies, School of Government, Victoria University.

may take several days or weeks to organise, because participants are likely to include, though are not limited to, victims, offenders, staff, family/whanau, officials, and other support personnel. Conferences are used for the most serious of conflict issues and can take several hours”.²²

Buckley notes that much like the adult criminal justice system, some of the schools have been unable to secure the funding required to move to a fully restorative practice, so “*have been forced to operate between management paradigms, either reverting to one based on exclusionary processes or mixing this with a restorative process when only limited support exists for restorative options*” .

That has also been the experience in the adult court system, and it should not be seen as a disadvantage. A brief outline of how restorative justice is used in the New Zealand court system illustrates the different ways restorative justice can and is being used in the school setting while co-existing with the existing exclusionary processes:

“As a diversionary procedure a restorative justice conference is convened in suitable cases prior and as an alternative to a formal disciplinary investigation being launched. In the criminal system police are utilising restorative justice conferences to develop a plan for ‘righting the wrong’ as part of their adult diversion schemes. In the education setting a restorative justice conference is convened to develop a similar plan, the successful completion of which would mean that disciplinary procedures need not be invoked.

*As a procedure to be used to determine a suitable sentence/punishment/plan (or to present such exclusion). In the youth court there is a separation to be found between (a) adjudication upon liability, i.e. Deciding whether a disputed charge is proved, and (b) the disposition of admitted or proved offences. The adversary system is retained for the former, while a FGC, a key restorative practice, is utilised for the latter. Something similar is already used in schools. The school could, if it wishes, conduct its usual investigations in order to be satisfied that the conduct occurred. The next step, (as in the youth court) would be to have a restorative justice conference to which decision making power in respect of disposition can be devolved. The school board could meet periodically to supervise compliance with the plan developed at the conference, as the youth court does.”*²³

The vision for restorative justice in schools envisages a fully restorative approach (whole of culture) to the way the school orders itself in all its relationships and every aspect of its functioning; a fully restorative therapeutic learning community.

Already some schools around the world have achieved this final form. For others it will be a step too far and smaller steps need to be taken before pursuing wholesale change.

One thing is certain. The experience of the criminal justice system in New Zealand has given birth to a new approach to the management of relationship problems in many New Zealand schools. Other countries have had similar successful experiences. Both justice and education have, in this area, much to learn from each other about a process which will always be dynamic and challenging.

11. CONSEQUENCES OF RESTORATIVE JUSTICE - REDUCTION IN USE OF PRISON AND REOFFENDING

There have now been a number of studies looking at the effects of restorative justice in its very many guises on reoffending and re-imprisonment.

22 Taken from Restorative Practices in Education: The Experiences of a Group of New Zealand Schools by Sean Buckley, chapter 11 in *Restorative Justice and Practices in New Zealand* (Institute of Policy Studies, VUW)

23 *Restorative Justice Practices in Schools: Rethinking Behaviour Management*, Margaret Thorsborne and David Vinegrad, 2002, at 7

The New Zealand court referred restorative justice pilot was evaluated in terms of reoffending over a two-year follow up period. The report can be found at <http://www.justice.govt.nz/publications/global-publications/e/evaluation-of-the-court-referred-restorative-justice-pilot-case-studies/publication>. It showed a reduction in re-imprisonment rates, a reduction in reconviction rates and significant benefits to victims.

A review of restorative justice conferencing on reoffending by Dr Heather Strang and Professor Lawrence Sherman conducted under the auspices of the Jerry Lee Centre of Criminology in Pennsylvania but concentrating on the United Kingdom position, showed a significant reduction in reoffending. A summary of the findings of that research project showed a 27% reduction in crime.

Interestingly enough, that research also showed that restorative justice conferencing worked best for the most frequent offender, worked best for violent offences rather than property offences, was more effective for serious offending and was wasted on minor offences.

Yet another important finding from that research was the beneficial effect on victims which showed a dramatic decrease in post-traumatic stress symptoms and consequently a significant effect on the health budget - an aspect of restorative justice which has hitherto been neglected.

These research evaluations have been replicated in the Australia Rise Evaluation, a long-term project conducted in Canberra, Australia,²⁴ in the Indianapolis Juvenile Property/Violence Study in the United States and in the studies in Northumbria, London and the Thames Valley in the United Kingdom.

Additional support, if it is needed, can be obtained from a 2008 study conducted by the Sheffield University - Centre for Criminological Research. Their website is <http://www.shef.ac.uk/law/research/ccr/>.

12. CONCLUSION

Victims of crime and offenders are disenchanted with the criminal justice system. Last year the Chief Justice of New Zealand delivered a speech which received widespread coverage in the media. In it, she suggested that the traditional criminal court process should not overly accommodate victims, focusing instead on the dispassionate and fair delivery of justice.

Against this view, Professor Howard Zehr²⁵ has recently advocated restorative justice processes as providing a mechanism through which victims rights may receive greater recognition. Incorporating restorative justice as a mandatory practice at all court events would also go some way to lowering our imprisonment rate and reducing re-conviction rates. It clearly has positive effects for victims, helping them understand the offending and to move on with their lives.

Restorative justice conferences can also be a better place than courtrooms for identifying and addressing the underlying causes of crime. Restorative justice conferences can bring an offender into contact with the necessary state agency into to provide the services an offender needs if they are to turn away from crime and/or drug dependency.

This is not to say that there should be no punishment for criminal offending. The worst and most dangerous offenders are likely to require incarceration in some form. However, there is support in New Zealand to tilt further still in favour of a restorative approach to criminal justice in the adult courts.

24 See [http:// www.aic.gov.au/rjustice/rise/](http://www.aic.gov.au/rjustice/rise/)

25 Author of the seminal book on restorative justice (1990) *Change Lenses: A new Focus for Crime and Justice* : Herald Press.

The advantages of restorative justice processes are first and foremost in bringing home to the offender the consequences of his wrongdoing and making him accountable. They also meet the needs of victims so that they are victims no longer. They also have to do with preventing reprisals and revenge.

Restorative Justice can restore some peace to communities after terrible things have happened. It can also have other consequences in the reduction of imprisonment, preventing re-offending and better outcomes for victims.

PANEL II

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STRATEGIES TO REDUCE THE PRISON POPULATION IN THE EARLY STAGES OF “POSTSENTENCING AND SENTENCING”

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Introduction

The paper discusses, with a focus on the Brazilian experience, if the alternative to prison constitute a successful strategy to reduce prison overcrowding. Initially it will be briefly explained the difference between alternative penalties and alternative measures provided in the Brazilian law and the hypotheses of their application. Afterwards there will be presented some data about prison population, deficit of places and the increasing application of alternative penalties and measures. It will be also presented the type of crime and the profile of prisoners as well as of abiding alternatives, according to the data collected by the Ministry of Justice and by the United Nations Latin American Institute for the Prevention of Crime and the Treatment of Offenders (ILANUD). The data indicate that the alternative penalties and measures not only did not reduce the prison population, but increased the punitive control. Therefore, there will be an approach about the challenges and potentialities for the alternatives to prison policy in order to reach their aim In this perspective. It will be highlighted as previous conditions not only the reduction of the demand for criminalization but also the breach of common sense about the effectiveness of the prison as the unique tool to ensure public safety. At the end, it will be pointed at the characteristics of the Brazilian experience on the application of alternatives to prison as punishment which can serve as a reference to other countries.

1 Alternatives to imprisonment in Brazil

Following international guidelines, in particular the United Nations Standard Minimum Rules for Non-Custodial Measures (Tokyo Rules, General Assembly Resolution 45/110 of 14/12/90), Brazil carried out legislative and administrative provisions necessary to reduce the use of prison as penalty. They started timidly with the Penal Code reform in 1984, took shape with the Law 9099 of 1995, which created the Special Criminal Courts, and with the Law 9.714 of 1998. Finally they were strengthened with the creation in 2000 of the National Center for Support and Monitoring for Alternative Penalties and Measures (Cenapa), under the Ministry of Justice. According to law, alternative penalties are the criminal sanctions other than imprisonment. Among them, the restricting of certain rights, which replace the deprivation of liberty. But there is more and more alternatives that are not substitutive. In turn, alternative measures consist in a large number of legal instruments which avoid sentencing and the application of a penalty, or, postsentencing, the imprisonment.

Brazilian law provides more than ten species of non-custodial penalties, defined in the Penal Code or in special laws, almost exclusively as substitute penalties. It means that, the judge must impose a custodial sanction first in order to replace it by an alternative sanction. Prevails in practice, firstly, the provision of community or public service, and, secondly, the pecuniary instalment. In general, it is the so called “basic baskets”, which consist on delivering food or other necessities to charities.

The application of alternative penalties is limited to crimes whose sentencing do not surpass four years imprisonment and that have not been committed with violence or serious threat to the person, or whatever the sentence, if the crime is nonintentional. It requires as objective condition that the defendant is not a recidivist in intentional crimes, as well as an analysis of the reasons, the circumstances of the crime and subjective elements, such as culpability, previous records, social behavior and personality.

Alternative measures are in a minority. Include civil composition, criminal transaction, suspended process, sursis, conditional release, judicial and legal pardon. The most usual alternative measures are

criminal transaction and suspended process, in crimes for which the maximum penalty, in abstract, not exceed two years in prison. The way they are fulfilled often get mixed up with the pecuniary instalment and the community or public services.

According to research by Machado (2008), in Brazil 1320 types of crimes admit the application of alternative penalties and measures. However, this legal provision do not produce impact in reducing the rate of incarceration, as it will be discussed below.

It should be noticed that the Law 9714, which amended the Criminal Code, to extend from one year to four years imprisonment penalties, in order to admit their replacement by restriction of rights, answered at the time to the unsustainable prison overcrowding and to tens of thousands of not fulfilled arrest warrants.

Nevertheless, Azevedo (1999, p. 55) criticizes the Law 9714, because the alternative penalties, particularly the restricting rights, kept from being a reaction to the imprisonment of short term, to apply generally to sentencing up to four years, which constitute the majority of imprisonment sanctions, except for the crimes committed with violence or serious threat to a person.

Toledo (1999, p. 139) also criticizes the law, not by the expansion but by the distortion that engenders. For example, perpetrators of crimes against public administration very difficultly will be compelled to carry a custodial sanction, even in the case of serious misconduct.

In spite of critics, it should be enhanced that in 2008, the number of people who comply with alternative penalties and measures exceeded the number of convicted to custodial sentences.

The Table below shows the number of people who comply with alternatives to imprisonment and of the institutions involved.

Table 1 : Historical evolution of Alternative Penalties and Measures (PMA) in Brazil

Year	Law	Time of fulfillment of PMA	Public equipment of monitoring PMA	Number of Abiding-restricting rights penalties		Number of PMA	Number of prisoners
				Alternative measures	Alternative penalties		
1987	7210	0 - 1	01 Núcleo no RS	Sem informação	197	Sem informação	Sem informação
1995	7.210/84 9.099/95	0 - 1	04 Núcleos	78.672	1.692	80.364	148.760
2002	7.210/84, 9.099/95 9.714/98, 10.259/01	0 - 4	04 Varas Especializadas 26 Centrais/ Núcleos	80.843	21.560	102.403	248.685
2006	7.210/84, 9.099/95 9.714/98, 10.259/01 10.671/03, 10.826/03 11.340/06, 11.343/06	0 - 4	10 Varas Especializadas 213 Centrais/ Núcleos	237.945	63.457	301.402	401.236
2007	7.210/84, 9.099/95 9.714/98, 10.259/01 10.671/03, 10.826/03 11.340/06, 11.343/06	0 - 4	18 Varas Especializadas 249 Centrais/ Núcleos	333.685	88.837	422.522	423.373

2008	7.210/84, 9.099/95 9.714/98, 10.259/01 10.671/03, 10.826/03 11.340/06, 11.343/06	0 - 4	19* Varas Especializadas 306 Centrais/ Núcleos	457.811	101.019	558.380	446.764
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Remarks:

Number of Counties in Brazil: 2510 (source: UNDP / MJ, 2006)

Number of Counties with Public Service PMA in Brazil: 325 (13%) (source: CGPMA / DPP / DEPEN)

% Of Recidivism of ex-abiding of sentences of imprisonment (prisoners): 70 to 85%

% Of Recidivism of ex-abiding PMA: 2 to 12% (Source: ILANUD) (Source: Nunes, Adeildo, 1996)

Social Network Monitoring = 13000 registered partner organizations

The National Penitentiary Fund (FUNPEN) of the National Penitentiary Department (DEPEN) of the Ministry of Justice was created by Complementary Law 79, of 1994.

* In July 2009, was created the Court of PMA Macapá - AP.

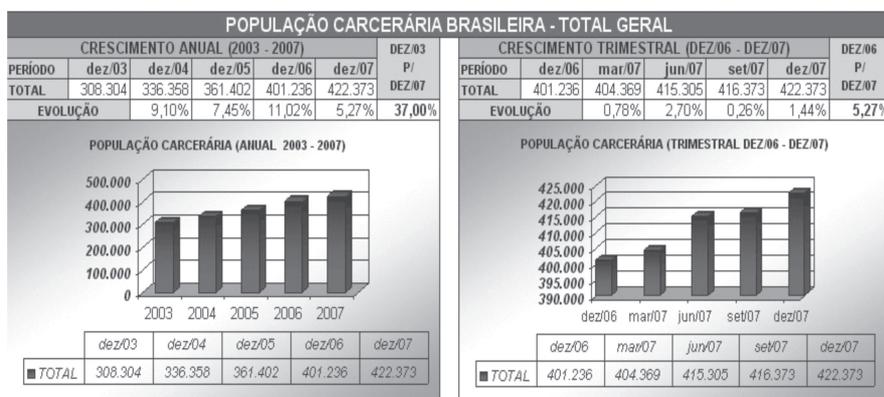
The ILANUD / Brazil carried, between December 2004 and January 2006, a National Survey on the Enforcement of the Alternatives Penalties, in nine Brazilian cities (Belém, Belo Horizonte, Fortaleza, Campo Grande, Curitiba, Porto Alegre, Recife, Salvador, Sao Paulo) besides the Federal District. It assessed the effect of the policy deployed nationwide by CENAPA. Further, we review some of its conclusions.

2 The numbers of incarceration in Brazil

According to the estimate of the Geography and Statistics Brazilian Institute (IBGE), in 2009 the Brazilian population reached 191.5 million people. But the annual average rate of growth is decreasing. From 1.6% in the period 1990-2000 , reduced to 1.2% in 2000-2010 in 2010. The prospective for 2020 is 1% (CARVALHO, 2004). At the same time the projection indicates the increase in the group of elders and women.

Regarding the prison population, the incarceration rate almost doubled from 1995 to 2003. The First National Prison Census was conducted in 1975 when were counted 148,760 inmates. The latest consolidated data of the Penitentiary Department (DEPEN) in 2007 in Table 1 show a continued growth in the period of 2003-2007. In December 2003 there were a total of 308,304 prisoners in the country. That same month in 2007, there were 422,373 inmates, which means an increase of 37% of the prison population¹. Therefore, the incarceration rate in Brazil is much higher than the rate of population growth.

Table 2²

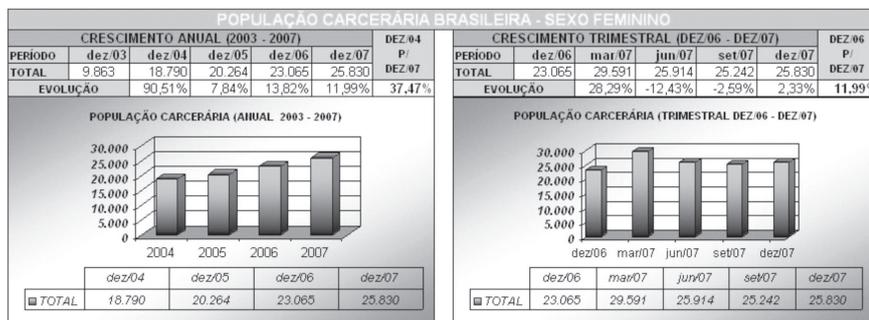


1 This number includes men and women abiding prison in closed, semi-closed and open regimes ou security measures (in case of mental illness), at establishments under penitentiary administration or policial of the states. It should be add 217 inmates at federal penitentiaries.

2 The total do not include 217 inmates at federal penitentiaries. Source: DEPEN/MJ

The Table 3 shows the evolution of the female prison population, whose rate of increase has been greater than that of the male prison population, thus raising problems and new demands. From December 2006 to December 2007, meanwhile the growth rate of the male population was of 5,2%, the women's growth rate reached 11,99%

Table 3



Source: DEPEN/MJ

The last published data points the total of 451,429 prisoners in December 2008, and for December 2009 the total of 473,626, of which 442,225 are men and 331,401 women. At these numbers, Brazil has a proportion of about 300 prisoners per 100 thousand habitants.

The Table 4 shows the number of penitentiary establishments, from 2005 to 2009. In June 2009 were computed 1771 establishments, almost all under administration of the states.

Table 4



Source: DEPEN/MJ

Differently from the tables related to the growth of the male and female prison population, in this table the columns remain stable, revealing the deficit of places, specially for women.

There is constant deficit which results in prison overcrowding in a large number of the penal establishments. In December 2007, for 275.194 places there were 422.590 inmates (34,87%), in December 2008 for 296.428 places 451.429 inmates (34,03%) and in December 2009 for 294.684 places there were 473.626 inmates(37,78%).

The deficit is even greater if we take into account the number of arrest warrants to be complied, which is said to be 350 thousand or 500 thousand, as in the Final Report of the Parliamentary Investigation Commission (CPI) on the Brazilian prison system, who visited various prisons during 2007. The Report also states that overcrowding, already identified by other CPI held in 1976, is the

main problem of the prison system (2008, p. 226). The overcrowding undermines the rights of prisoners to health, education, work, leisure, finally, the set of fundamental rights not affected by imprisonment, contributing to the recidivism within the prison and out of it.

The Brazilian prison overcrowding stems from both the appropriate and inappropriate use of prison. That means, on one hand, that investments in construction and reform of prisons are not properly planned and executed, on the other hand, that there was a hardening of criminal laws and in their implementation. Besides, there is an overuse of pretrial detention, which results in an anticipated punishment. And worse: research in four state capitals and in the Federal District revealed that “more than 70% of cases of theft in which arrests had been provisional result in an alternative to imprisonment or open prison, although defendants have remained detained during the process ” (BARRETO, 2007 p.120).

The pretrial detention became one of the direct factors contributing to prison overcrowding in Brazil. According to the DEPEN in June 2009, approximately 30% of the prison population was in this situation. This high percentage had already drawn the attention of the National Judiciary Council (CNJ), which, since 2008, promoted prison work-party, consisting of the review of all proceedings of pretrial and sentenced prisoners. At the end of 2009 it had been analyzed 93,524 proceedings. In 19,967 of them the prisoners were released and in 31,534 they obtained legal benefits. The most common benefits were the progression of prison’s regime, early release and substitution of prison penalties by restricting rights penalties. (www.cnj.jus.br). The experience made CNJ set a target to reduce the size of provisional prisoners population to a percentage below 20%.

Different surveys made in Brazil (BARRETO and CASTILHO, 2009; BOITEUX *et alii*, 2009; MACHADO, 2009) show that some crimes stand out in the composition of the prison population: theft, robbery, and drug trafficking.

According to the consolidated national data, in 2008, the robbery figures in first place among the crimes practiced by the defendants imprisoned (27,16%) and the theft in the third (22,6%). In the second place appears the drug trafficking and in the fourth the homicide (11,87%). The drug trafficking is responsible for the increase in female incarceration.

In his turn Machado (2009), in a survey restricted to the Federal District, pointed the robbery in the first place (22,6%); theft in second (18,8%) , carriage of illegal weapons in third (12,2%), and, in fifth place, the homicide (6,8%).

Regarding to the profile of prisoners is one of “a young man, brown or black, with low education level, from lower social strata, carrying out activities that require little skill and poorly paid, and also in a vulnerable work situation” (ILANUD, 2006, p. 18). With this profile, most have already passed by juvenile justice institutions before reaching 18 years. In turn, once released from prison, the likelihood of recurrence exceeds 70%.

3 The ineffectiveness of alternatives to prison in reducing imprisonment

Cohen, already in 1979 (p. 339-363), announced the risk of the use of alternative measures and penalties, rather than acts as promised to reduce the prison population, increase the punitive control. Griffiths and Murdoch (2009, p. 33) also points out: “A key concern with the development of alternatives to prison is that” netwidening “will occur, wherein additional numbers of persons are brought into the justice system (···). If this occurs, the net effect will be to increase the numbers of persons under supervision by the justice system and prison population are unlikely to be reduced.

This is what happened in Brazil. According Azevedo (2000, p.321) Law 9099, cited above, which created criminal transaction and boosted the application of alternatives, included cases considered less offensive in the formal justice system, through informal mechanisms for entry and processing. The exemption to the police investigation for crimes submitted to the Special Criminal Courts “retired

police authority, which had the prerogative to select the cases considered more 'relevant', and so close the proceedings of most of small crimes."

The Survey of ILANUD/Brazil concluded that "the alternative penalty, as provided by the law and applied by the Brazilian justice system does not comply with the aim to "empty the prisons", that is, the profile of the sentenced with an alternative penalty, specially as to the committed crime, is different from the prison population profile" (2006, p.16).

Nevertheless, the social-economic profile of the abiding-alternative penalties and measures is similar to the prisoners. This is explained by the functioning of the Brazilian penal system which reproduces social-economic and racial inequality of the society. In this unequal structure are punished with imprisonment or alternatives to it only the poor, the uneducated, the unemployed, the browns and blacks³.

Even then, the Brazilian context is insufficient to explain or justify the prison overcrowding. The principal reason for the increase in punitive control is rooted in the punitive culture and the idea of incarceration in Western societies, reinforced by globalization and the hegemonic model of American society. This model directly influences other countries in bilateral contacts as well as indirectly, in the buiding of international conventions. A comparison between statistics of the prison population in the United States and Brazil reveals similarities in its steady increase and in its profile. Note, for example, the overrepresentation of the black people.

Solutions, therefore, should not be sought only in the specific context of each country, but in the global context. Limited efforts at the national level of little use if not counting on international support and stimulus. In this sense are very important guidelines and recommendations set forth within the various UN bodies. However, there should be coherence between them. For example, the North American policy war on drugs has been internationalized by the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, resulting in an increase in prison population in confrontation with the effort to implement the policy advocated in the VI and VII United Nations Congresses on Crime Prevention and Treatment of Offenders, consolidated in the Tokyo Rules.

In Brazil, the culture of incarceration is evident in the persistence of imprisonment as the principal penalty prescribed by law for about 1,600 offences, and the amount of this penalty as a parameter to replace it by restricting rights penalties. So is permanently reinforced the idea that only the prison is an effective penalty and that replacing it by alternative penalties or admitting progression from closed to open regime show leniency of criminal justice, featuring impunity.

The law enforcers generally work in optics to maximize the indictments, the charges and sentences so that custodial sentences are calculated in amounts that exclude the granting of progression to open regime or the use of alternatives to prison (MACHADO, 2009).

It should be noted that this statement is true only for a specific set of violations, ie, the conducts against property, committed with serious threat or violence and for drug trafficking. In the context of domestic violence a serious threat and injury are curiously minimized. Crimes against property committed by fraud or crimes against consumers affecting undetermined number of victims are also treated with kindness. Regarding drug trafficking, research carried out for the Ministry of Justice (BOITEUX et alii, 2009) shows that the criminalization reaches predominantly the small traffickers and users who also traffick.

The ILANUD research confirms this idea, because observed, on the one hand, that "judges, in most

3 About this aspect see SEGATO, Rita. El color de la cárcel en América Latina: apuntes sobre la colonialidad de la justicia en un continente en desconstrucción. *Nueva Sociedad*, n. 206, marzo-abril 2007.

cases, decide by the substitution of sentences lasting up to one year, reaching significant percentages merely to two years, time that does not apply to the crimes of highest incidence in the penal system” (2006, p. 16). On the other hand, as the law excludes the possibility of alternative penalties for crimes committed by threat and violence even if the size of the penalty permits the replacement, and there is a large proportion of individuals convicted for robbery, is “reduced the impact of alternative penalties in the prison population” (p. 17).

At the time of the research there was a judicial understanding that allowed the award of restricting rights penalties for those convicted of drug trafficking. But the Law 11.343, of 2006, prohibited the concession of bail and the application of alternatives to prison⁴.

In 2007, Machado et alii (2008) crossed the number of crimes susceptible of alternative penalties with the database of the Ministry of Justice on prison population, named INFOPEN. They concluded that 25% of the population convicted, complied penalties up to four years and only 8% was in the open regime. Why these people were in closed or semi-open regime? Because they have committed crimes with violence or serious threat or were recidivists. The researchers then made simulations with the criteria “amount of the penalty” and “violence/serious threat,” and concluded that the factor that impacts the Brazilian prison population are not the long-term penalties, but the short ones, due to the restrictions limiting milder regimes of prison or the application of alternatives to prison.

Common sense that the crime of the streets and that related to drugs has the prison as only effective response is embedded in the legislation. Therefore, those accused of theft, robbery and the drug trafficking are very likely to wait trial in prison.

While acknowledging the failure of the prison penalty, the public insists on its use, trying to justify the failure with poor management, and faces alternative penalties and measures with caution, do not perceiving them as an efficient instrument to control crime.

Proponents of alternative penalties and measures argue that the recidivism rates of the abiding of penalties and alternative measures are at or below 12% (GOMES, 2009, p. 25), comparing them to high recidivism rates of released prisoners. In fact, this comparison is arguable because the alternative penalties and measures to reach a set of crimes other than that which defines the prison population. Furthermore, the much lower rate of recidivism can mean simply that is unnecessary the penal control of these conducts.

Therefore, to overcome the dispute, further research is needed. Recently, Barreto and Castilho (2009) observed that in cases of theft and robbery prosecuted in the Federal District, the more severe the prison regime, the higher the recidivism rate displayed. The defendants that have not been through pretrial detention and had suspended their process had recidivism rates significantly lower than those who experienced the prison and were perceived minor violations of their rights. Moreover, this type of penalty gave the victims a greater chance of obtaining compensation for damage caused to them.

4 The challenges and potentialities of the policy of alternative penalties and measures as a strategy to reduce the incarceration

In view of this, the success of the strategy to reduce incarceration through increasing alternatives requires a major effort to reduce the punitive paradigm itself and abandon the prison as a “reference sanction” (Machado et alii, 2008). Implies get them out of the penal system and, in some cases, even out of the State. It involves valuing the restorative paradigm not only in minor infractions.

At the moment it seems a proposal difficult to implement because the public, mainly conveyed

4 The Federal Superior Court initiated in March 2010, the judgment to state if are constitutional the provisions of the law (HC 97.526)

by the mass media, rejects it. Alternative penalties and measures to imprisonment, restorative practices, external work, temporary leavings, pardon are deemed incompatible with certain crimes, particularly those practiced with physical violence, just because in abstract, regardless of how the incident occurred. I will mention two recent events. There is a project of law in the Brazilian National Congress that provides the use of restorative procedures for all crimes and misdemeanors, since the circumstances and consequences of the event, and the personality of the author, recommend. At the end of last year (2009) the rapporteur in the Committee on Constitution and Justice and Citizenship of the House of Representatives issued an unfavorable opinion. He stated that “the country is going through a feeling of impunity, with great production of legislation in order to criminalize conducts and aggravate penalties,” so it is inconvenient to approve a project that “goes in the opposite direction, depenalizing conducts.” Also last year the Senate passed a bill that restores the conditional release, in all crimes committed with violence.

The existing international declarations, such as the Vienna Declaration on Crime and Justice to the Challenges of the Century XXI, of 2000, or the Declaration of Costa Rica on Restorative Justice in Latin America, of 2005, or the United States Standard Minimum Rules on Non-Custodial Measures (Tokyo Rules) and the Basic Principles on the Use of Restorative Justice Programs, respectively, approved by Resolution 45/110 of the General Assembly and by the Resolution 2002/12 of the Social and Economic Council, are systematically disregarded.

The contraction of the penal system must be discussed in international forums as a priority and coherently. In this sense much would contribute the abandonment of the “war on drugs”, already discredited “in the face of its inability to achieve the purposes for which was proposed, as well as of its inefficiency and human rights violations, which can be evaluated by the persistent high consumption of illicit drugs, especially in America, and by the high social costs of drug policy in the peripheral countries, like Brazil, where violence is another side effect of ‘drug war’ (Boiteux et alii, 2009, p . 106-107).

Similarly, the establishment of guidelines for countries to encourage them to limit prison places in order to compel the judges to apply to prison as a last resort would induce the choice of alternatives .

The paradigm shift must be reflected in legislative reforms. Specifically in Brazil it is necessary to expand legal opportunities for substitution and alternative penalties for crimes done with serious threats or violence or drug trafficking, and offenders, as well as for restorative practices in crimes against property done with a serious threat and also crimes against the person.

Besides, it is necessary to strengthen the alternative penalties and measures considering them as the principal penalty and provide administrative infrastructure to its implementation and monitoring.

Last but not least, it must be made an effort in implementing the right to equality in Brazilian society and in eradicating the discrimination that produces stereotypes and racism which made young people, black or brown, and the residents of slums the preferred target of the criminal justice system and specifically of the prison. So can be reached by social policies for health, education, job training, housing, employment and leisure, which can avoid the criminalization and victimization of those marginalized groups.

The Brazilian experience on the implementation of alternative penalties and measures, though not met the aimed function to reduce the rate of incarceration, presents interesting results that may eventually transform them in major sanctions and considered sufficient to prevent and punish more serious crimes. In this respect the results met the goal established by the General Coordination of the National Alternatives Penalties and Measures “to ensure mechanisms to measure the ‘certainty of punishment’ as a strategy to spread the perception that the alternative penalties and measures are a legitimate mode of criminal response.

The researchers of ILANUD (2006, p.20) evaluated that for best results it is important to exist “a specialized court in the implementation of alternative penalties and (...) a whole body of operators and technicians who provide support for the actions of this court.” The technical team must be permanent and in tune with “the purposes of the alternative penalty, especially with regard to overcoming stigmatizing practices cultivated by the community” (ibid, p. 23). In turn, Alencar (2009, p. 40) notes that the effectiveness of alternative penalties and measures depends on “a social network that offers them for services and, especially, the necessary services for structuring and monitoring its implementation.

From this perspective, it is worth remembering two recent facts favorable to the policy of alternative penalties and measures to imprisonment. The first is the policy adopted by the First National Conference on Public Safety held in Brazil in 2009, giving support to the policy which has been implemented on encouraging alternative penalties and measures. Among 40 highest rated guidelines it was voted the number 22), establishing as a priority on the political, administrative and financial agenda of governments the creation of a national system of alternative penalties and measures, with structure and mechanisms in the States and in Federal District, the structure and equipping of the Criminal Justice as well as the priority on using alternative penalties and measures, restorative justice and mediation.

The adoption of this guidance at a conference where there was direct participation of about three thousand people is surprising in view of the rapporteur’s statement to support his opinion adverse to the bill on restorative justice. In fact, there are conflicting positions within the Brazilian society that must be faced objectively. The research of Barreto and Castilho (2009) found evidence that alternatives to imprisonment are already gained social legitimacy, especially when there is a conjunction of two factors to be considered for application of this kind of sanction: the type of offence and the defendant’s history. The penalty of community services is one which got more support.

The second fact is the Resolution 101, of 15 December 2009, passed by the National Council of Justice, which is the external control organ of the judiciary in Brazil. Resolution 101 defines the institutional policy of the judiciary in the enforcement of alternative penalties and measures to imprisonment. We should remember that only the Federal Executive Branch had established a policy. Lacked to the judiciary to assume its share, which is crucial because it is the judge who applies the penalty and one of the stakeholders in the control of the sentence enforcement. The Resolution adopts the decentralized model of psychosocial monitoring, which is characterized by compliance of alternative penalties and measures in various entities and institutions, forming a network enabled and registered, and its monitoring and supervision by a multidisciplinary team, linked to a specialized court.

The Resolution legitimizes the model that has been introduced in practice: “It is characterized on the one hand, by an interdisciplinary monitoring which never was implemented in prisons, because of security reasons. On the other hand, the articulation of the traditional agents of State in the penal enforcements with a social network, which account ‘with the participation of bodies representing the community who influence and legitimizes this practice, including: OAB (Brazil Bar Association) universities and non-governmental organizations in the area of justice, social development, citizenship and human rights’ (Alencar, p. 42). The model establishes a relationship of dialogue between State and civil society that still needs to be systematically evaluated, but responds in principle the requirements for a social democratic control.

Conclusion

The Brazilian experience in implementing a national policy for alternative penalties and measures to prison presents successful results in increasing punitive control and in the way it monitor their enforcement. But it did not reduce the overcrowding, which was its stated goal. Therefore, the central issue to be discussed in Brazil and other countries is the growing demand for criminalization and incarceration. Once limited the penal intervention and concurrently withdrawn restrictions on

the use of alternatives to prison, the Brazilian experience in the enforcement of alternative penalties and measures can serve as a positive reference to its application to current customers of prisons, effectively reaching the goal of reducing the rate of incarceration.

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ESTRATEGIAS Y BUENAS PRÁCTICAS PARA REDUCIR EL HACINAMIENTO EN LAS INSTITUCIONES PENITENCIARIAS

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INTRODUCCIÓN

El rápido crecimiento de la población privada de libertad constituye uno de los mayores desafíos que enfrentan los sistemas de justicia penal. Más de 9.800.000 de personas se encuentran privadas de libertad en el mundo (entre sentenciadas y sometidas a detención preventiva), y en todas las regiones se verifica una alta tasa de crecimiento.

Por otra parte, y en base a las estadísticas disponibles, la mayoría de los países tienen superada su capacidad de alojamiento, registrándose casos de sobrepoblación y hacinamiento muy severo, lo que determina una flagrante violación a los Derechos Humanos de las personas privadas de libertad y un riesgo para la seguridad del personal penitenciario.

Definimos como sobrepoblación penitenciaria el exceso de personas privadas de libertad por sobre la capacidad de alojamiento oficialmente prevista, midiendo dicha sobrepoblación mediante la densidad carcelaria por cien plazas.

La capacidad de alojamiento es medida en forma muy diferente por cada sistema penitenciario lo que dificulta el análisis comparativo. Un indicador útil es utilizar como línea de base la capacidad declarada al momento de la construcción de cada establecimiento de reclusión.

De acuerdo a la definición utilizada por el Comité Europeo para los problemas criminales, se entiende que existe sobrepoblación crítica cuando la densidad penitenciaria es igual a 120 o más. Siguiendo la propuesta de ILANUD utilizamos la expresión *hacinamiento* como sinónimo de *sobrepoblación crítica*.

El impacto de la sobrepoblación no depende solamente del espacio disponible por cada persona privada de libertad¹, sino también del tiempo que transcurra fuera de su celda realizando diversas actividades.

Los factores que contribuyen a la sobrepoblación carcelaria son diversos pero en general el volumen de la población reclusa de un país está determinado por las políticas de justicia penal que se basan principalmente en el encarcelamiento y sentencias que conllevan largos períodos de privación de libertad, más que por ser un reflejo de las tasas reales de delincuencia.

Las medidas para reducir la sobrepoblación carcelaria dependen de la situación de cada Estado y de cada sistema de justicia penal, pero las mismas deben formar parte de una estrategia integral para asegurar que el encarcelamiento sea utilizado como último recurso, y no recurrir al incremento de la capacidad del sistema carcelario como primera y principal solución.

No existe evidencia empírica que demuestre que construir cárceles sea una estrategia exitosa a largo plazo para reducir el hacinamiento. “... algunos Estados europeos se embarcaron en exhaustivos programas de construcción de prisiones para, más tarde, darse cuenta de que sus poblaciones reclusas

1 Los instrumentos internacionales no definen “espacio mínimo” por persona privada de libertad, sin embargo, algunos organismos regionales e internacionales han sugerido estándares al respecto. (CPT, CICR).

crecían a la par de la mayor capacidad lograda. Por el contrario, en aquellos países que gozan de sistemas penitenciarios relativamente no hacinados, la existencia de políticas tendientes a limitar y/o controlar el número de personas encarceladas en general ha sido una herramienta de utilidad para mantener la población reclusa en un nivel manejable.”²

El ILANUD tomando como base la *Declaración de Viena sobre la Delincuencia y la Justicia* (A/res/55/59), ha adoptado como líneas programáticas las establecidas en la resolución A/res/56/261 de las Naciones Unidas titulada “Planes de Acción para la Implementación de la Declaración de Viena sobre el Delito y la Justicia”.

En ese marco ILANUD desarrolla programas y proyectos en materia de criminalidad y justicia penal, promoviendo un uso prudente de la justicia penal y de la prisión, como asimismo alternativas para ambas, el respeto a los derechos fundamentales de las personas privadas de libertad y de los funcionarios y funcionarias penitenciarios, el fortalecimiento de la defensa pública y de la función del juez de ejecución de la pena, así como la compilación, sistematización y análisis de información estadística sobre estas materias.

ESTRATEGIAS PARA REDUCIR EL HACINAMIENTO Y DISMINUIR SUS EFECTOS

El informe de la reunión preparatoria regional de América Latina y el Caribe para el 12do. Congreso de las Naciones Unidas sobre prevención del delito y justicia penal, celebrada en mayo de 2009 en San José de Costa Rica, examinó e identificó una serie de medidas para abordar el problema del hacinamiento en los establecimientos penitenciarios.³

En tal oportunidad, se recomendó que los Estados elaboraran estrategias y políticas amplias para reducir el hacinamiento mediante la participación de todos los organismos pertinentes de justicia penal así como de los servicios de salud y bienestar social de la comunidad, a fin de garantizar que las estrategias fuesen sostenibles, permitiesen la reinserción social y contribuyesen a la prevención de la reincidencia.

En la reunión se tomó nota de la sugerencia de que los Estados determinen el número de lugares disponibles en los establecimientos de reclusión y que se adoptasen medidas en el sistema de justicia penal a fin de no sobrepasar esos límites predeterminados.

Por otra parte, se hizo referencia a diversas opciones para reducir la población carcelaria, entre las que se incluyeron: la utilización de medidas sustitutivas al encarcelamiento según el derecho interno, medidas no privativas de libertad, penas privativas de la libertad más cortas, la utilización de la libertad anticipada, libertad condicional, libertad vigilada, el arresto domiciliario, el uso de dispositivos de vigilancia electrónica, el indulto, la amnistía, la reducción de la condena por buena conducta o por la participación en programas educativos y el diseño de medidas alternativas para grupos específicos como las mujeres embarazadas, las madres de niños pequeños, las personas de edad, y los reclusos con discapacidades.

Por otra parte, la reunión también recomendó que se examinasen medidas para despenalizar los delitos menores no violentos y para reforzar el acceso a la justicia, los mecanismos de defensa pública y el recurso a procesos de justicia restaurativa en las actuaciones penales.

Asimismo se recomendó que los Estados elaborasen políticas nacionales apropiadas para reducir el uso de la prisión preventiva que podría infringir el principio de la presunción de inocencia y que se redujera el tiempo entre el inicio y el fin del proceso con sentencia definitiva.

De la enumeración realizada se habrá de desarrollar dos de las estrategias referidas anteriormente.

2 Visita del CPT a Hungría, 2001.

3 A/CONF.213/RPM.1/1

1. DETERMINAR LA CAPACIDAD MÁXIMA DE LOS ESTABLECIMIENTOS DE RECLUSIÓN

1.1 Principios y buenas prácticas sobre la protección de las personas privadas de libertad en las Américas⁴

Luego de un proceso de discusión a nivel regional la Comisión Interamericana de Derechos Humanos adoptó los Principios y Buenas prácticas sobre la protección de las personas privadas de libertad, entre los cuales incluye una norma concreta que procura atender el problema del hacinamiento.

El principio XVII intitulado “*Medidas contra el hacinamiento*”, establece que:

La autoridad competente definirá la cantidad de plazas disponibles de cada lugar de privación de libertad conforme a los estándares vigentes en materia habitacional.

Dicha información, así como la tasa de ocupación real de cada establecimiento, deberá ser pública, accesible y regularmente actualizada. La ley establecerá los procedimientos a través de los cuales las personas privadas de libertad, sus abogados, o las organizaciones no gubernamentales, podrán impugnar los datos acerca del número de plazas de un establecimiento, o su tasa de ocupación, individual o colectivamente, previéndose en los procedimientos de impugnación la intervención de expertos independientes.

La ocupación de un establecimiento por encima del número de plazas establecido será prohibida por la ley y cuando de ello se produzca la vulneración de derechos humanos, ésta deberá ser considerada una pena o trato cruel, inhumano o degradante.

La ley deberá establecer los mecanismos para remediar de manera inmediata cualquier situación de alojamiento por encima del número de plazas establecido y los jueces competentes deberán adoptar soluciones adecuadas en ausencia de una regulación legal efectiva.

Verificado el alojamiento de personas por encima del número de plazas establecido, los Estados deberán investigar las razones que motivaron tal hecho y deslindar las correspondientes responsabilidades y adoptar medidas para la no repetición de tal situación. En ambos casos, la ley establecerá los procedimientos a través de los cuales las personas privadas de libertad, sus abogados, o las organizaciones no gubernamentales podrán participar en los correspondientes procedimientos.

1.2 Proyecto de revisión de las Reglas Mínimas para el Tratamiento de los reclusos de las Naciones Unidas.⁵

Desde el inicio de su labor, el Comité Permanente de América Latina para la Revisión de las Reglas Mínimas de Naciones Unidas para el Tratamiento de los Reclusos reconoció al hacinamiento como uno de los problemas principales de los sistemas penitenciarios de Latinoamérica y el Caribe.

Por ello el proyecto de revisión incorpora una medida concreta para el control del hacinamiento, y establece que “se encargará a un organismo imparcial que preferiblemente será una comisión especial del poder judicial, la determinación del número máximo de personas que podrán ser privadas de libertad en cada centro penitenciario, el cual no podrá ser sobrepasado”.

1.3 Proyecto de ley “Control del cupo penitenciario”. Provincia de Buenos Aires, Argentina.

4 Resolución 1/08 de la Comisión Interamericana de Derechos Humanos.

5 Elaborado por el Comité permanente de América Latina para la revisión y actualización de las Reglas Mínimas de las Naciones Unidas para el tratamiento de los reclusos, Federación Internacional Penal y Penitenciaria, con el apoyo de ILANUD.

En el marco de una reforma legislativa dispuesta por la Corte Suprema de Justicia de la Nación Argentina en un habeas corpus colectivo, el Dr. Mario Coriolano⁶ y otras personas y organizaciones, presentaron un proyecto de ley para el control del cupo penitenciario.

El proyecto recoge como antecedente una demanda de inconstitucionalidad presentada el 2 de abril de 2005 y propone la creación de un órgano que determine la capacidad de cada establecimiento, atendiendo particularmente a la “superficie mínima para cada recluso” que al efecto disponen las Reglas Mínimas para el Tratamiento de los reclusos de las Naciones Unidas.

El proyecto no solo involucra al Poder Ejecutivo sino que también vincula al Poder Judicial quien deberá velar por el cumplimiento de las garantías constitucionales, al disponer el alojamiento de las personas privadas de libertad solo en aquellos establecimientos que cuenten con capacidad carcelaria.

La Comisión se integrará por representantes del Ministerio de Justicia, Salud Pública, Infraestructura y la Secretaría de DDHH y la función será determinar el número total de plazas disponibles en cada unidad y sector del servicio penitenciario bonaerense, así como la cantidad de reclusos/as alojados en exceso de dicha capacidad.

El Ministerio de Justicia deberá establecer cuatrimestralmente, conforme a pautas preestablecidas (tiempo transcurrido en prisión preventiva, edad de la persona, estado de salud, conducta y características de la personalidad, aptitud para reinserirse) una nómina de personas que se encuentren en condiciones de acceder a medidas de atenuación o alternativas consignando las medidas propuestas para cada caso. El Poder Judicial resolverá sobre la aplicación de las medidas propuestas.

2. MAYOR USO DE MEDIDAS ALTERNATIVAS A LA PRISIÓN Y FORTALECIMIENTO DE LOS MECANISMOS DE LIBERTAD ANTICIPADA

Al momento de plantear la necesidad de incrementar el uso de medidas alternativas como estrategia eficiente para reducir la sobrepoblación carcelaria, debemos tomar como precaución, que estudios llevados a cabo en todo el mundo, demuestran que la introducción de alternativas puede no causar el efecto deseado y en lugar de que las nuevas medidas sean utilizadas en sustitución de la reclusión, se aplican a infractores/as que anteriormente no habían ido a prisión. Así, la población reclusa permanece igual o aumenta y más personas quedan bajo el control penal. A este proceso se lo denomina “ampliación de la red de control penal”.⁷

Si el objetivo es disminuir el uso del encarcelamiento para reducir el hacinamiento y mejorar las condiciones carcelarias, el desarrollo de medidas alternativas es sólo un componente de una estrategia más amplia e integral.

LEY DE HUMANIZACIÓN DEL SISTEMA CARCELARIO DE URUGUAY

A partir del año 1995, fecha en que se sancionó la ley de Seguridad Ciudadana y sus sucesivas reformas (las que básicamente crearon nuevas figuras delictivas, e incrementaron las penas) se asistió en Uruguay a una inflación legislativa en materia penal, con sus respectivos efectos y consecuencias.

La política criminal de los últimos años se había orientado a reformas legislativas de corte punitivo, pero omitió desarrollar una estrategia institucional que controlara la densidad carcelaria y minimizara las consecuencias del encierro, lo que provocó el colapso del sistema penitenciario.

Contrariamente a lo que se esperaba y pese a la severidad de las penas y la creación de nuevos delitos, la ley sólo logró aumentar el número de personas privadas de libertad (duplicándose la

6 El Dr. Mario Coriolano es Defensor de casación de la Provincia de Buenos Aires, Argentina e integrante del Subcomité contra la tortura.

7 Cárcel y Justicia Penal en América Latina y el Caribe. Elías Carranza, 2009.

población reclusa y ubicando a Uruguay dentro de los países con mayor tasa de prisionización en América Latina), pero no produjo la disminución de la criminalidad, ni el índice de reincidencia.

Con fecha 14 de setiembre de 2005, y en el marco de la declaración de “emergencia humanitaria en el sistema penitenciario” declarada por el entonces Presidente de la República, Dr. Tabaré Vázquez, el Parlamento Nacional aprobó la Ley 17.897, conocida como “Ley de humanización y modernización del sistema carcelario”.

Dicha ley estableció un conjunto de medidas orientadas a mejorar las condiciones de reclusión y jerarquizar determinadas instituciones, dando el puntapié inicial a un cambio de concepción en la política criminal del Estado uruguayo, haciendo partícipes en su elaboración a todos los operadores del sistema penal.

SÍNTESIS DE LAS PRINCIPALES DISPOSICIONES DE LA LEY 17.897

A) La ley previó un régimen excepcional y de oficio de libertades aplicable por única vez, que benefició tanto a personas sentenciadas como a personas en prisión preventiva.

Las personas beneficiarias de este régimen excepcional fueron:

- Personas procesadas y condenadas que estuvieran reclusas al 1 de marzo de 2005 y que no fueran responsables de delitos graves.
- Que hubieran cumplido un tiempo mínimo de prisión preventiva o pena, oscilando entre el cumplimiento de las dos terceras partes y la mitad de la pena.

Las personas liberadas debieron permanecer sujetas a un régimen de atención y vigilancia a cargo del Patronato de Encarcelados y Liberados, organismo dependiente del Ministerio del Interior (órgano encargado de la administración del sistema penitenciario en Uruguay), cuyo objetivo es la atención de las personas liberadas a efectos de facilitar su reintegración social.

El Patronato planificó su tarea en dos etapas bien diferenciadas:

Una primera etapa en el establecimiento de reclusión, en la cual un representante del organismo entrevistaba al futuro liberado/a dentro de los siete días previos a su liberación. En esa instancia, se realizaba un relevamiento primario de datos, y se le asignaba un funcionario referente hasta el cumplimiento de la pena impuesta.

Esta actividad previa a la libertad, permitió coordinar con los planes de apoyo social existentes en el país la atención de estas personas, así como la obtención de una plaza en algún albergue para evitar la permanencia en situación de calle.

En la segunda etapa, ya en la sede del Patronato, y junto con el técnico referente, se procedía a examinar las distintas problemáticas para el diseño de un plan personalizado a efectos de una adecuada inclusión social.

Se previó la entrega de una canasta de emergencia con alimentos, artículos de higiene y tickets para transporte colectivo a modo de préstamo.

De tratarse de una persona que deseaba ingresar en la Bolsa Laboral del organismo, se coordinaba su ingreso para la obtención de un empleo, muchos de los cuales eran en convenio con organismos públicos. De tratarse de una persona que deseaba capacitarse en algún oficio, se le proporcionaba la posibilidad de ingresar en cursos de capacitación ofrecidos por el Ministerio de Trabajo, debiendo asistir previamente a un taller educativo-laboral que ofrece el organismo.

Si el liberado/a ya tenía un oficio, pero carecía de las herramientas mínimas para poder ejercerlo,

el organismo se las proporcionaba, comprometiéndose a reintegrar su costo con el producido de su trabajo.

Las personas que incumplieron las medidas impuestas (o cometieron un nuevo delito) perdieron en forma inmediata el beneficio otorgado por la ley y fueron restituidas a prisión.

Mediante esta previsión legal se liberaron 850 personas (aproximadamente el 10% de la población reclusa del momento), de las cuales reincidieron el 25 %, porcentaje sensiblemente inferior a la tasa media de reincidencia nacional que se sitúa en un 60 %.

A efectos de dar cumplimiento a las tareas de atención y seguimiento, el Patronato se fortaleció con recursos humanos y materiales y permitió demostrar que cuando las personas reciben determinada contención, tienen mayores posibilidades de integrarse socialmente y evitar un nuevo ingreso a prisión.

B) Otra de las disposiciones de la ley modificó el régimen de la libertad anticipada, estableciéndose la preceptividad de la libertad a las dos terceras partes de la pena impuesta. La Suprema Corte de Justicia solo puede negarla por resolución fundada, en los casos en que los signos de rehabilitación de la persona condenada no sean manifiestos.

C) La ley amplió el régimen de prisión domiciliaria facultando al Juez Penal a otorgarla a personas privadas de libertad (en prisión preventiva o condenadas) portadoras de enfermedades graves, a mujeres en el último trimestre de embarazo y primer trimestre de lactancia y a personas mayores de 70 años (salvo que hubieran cometido delitos de homicidio, violación o lesa humanidad).

Entre las propuestas más novedosas que incluyó la ley se encuentra el régimen de redención de la pena por trabajo y estudio, que permite a todas las personas privadas de libertad, procesadas o condenadas, reducir la condena impuesta o a recaer, cualquiera sea el delito cometido. Se redime un día de condena por cada dos jornadas de 6 horas de estudio o por cada dos jornadas de 8 horas de trabajo.

En relación a estas últimas tres disposiciones el grado de implementación y eficacia ha sido diverso y asimétrico.

El régimen de libertad anticipada no ha tenido el impacto esperado originalmente, y el número de excarcelaciones no se incrementó a pesar de la reforma legislativa, básicamente porque las resoluciones negativas de la Suprema Corte de Justicia a las solicitudes de libertad, no han sido fundadas, y por la ausencia de protocolos idóneos que permitan una correcta apreciación de la existencia “de signos manifiestos de rehabilitación”.

El arresto domiciliario ha presentado algunas dificultades para su utilización, fundamentalmente por la falta de mecanismos para asegurar el efectivo cumplimiento del mismo. Para resolver este déficit se evalúa en la actualidad la posibilidad de utilizar dispositivos de vigilancia electrónica.

Finalmente, el régimen de redención de la pena por trabajo o estudio, ha permitido que el número de personas que trabajan y estudian se duplique y triplique respectivamente.

El beneficio ha sido múltiple: la motivación por el trabajo o el estudio permite a la persona recluida adquirir hábitos laborales o intelectuales, la realización de actividades educativas y laborales fuera del espacio propio de alojamiento ayuda a descomprimir eventuales conflictos producto del hacinamiento, y finalmente habilita el beneficio de reducir la pena por días/horas de actividad, obteniendo en forma anticipada la libertad.

CONCLUSIONES

A modo de conclusión y síntesis, debemos insistir en que el problema carcelario, tal como lo ha sostenido ILANUD en reiteradas oportunidades, debe abordarse en el contexto de la necesidad de reformas integrales y en el marco del diseño de una nueva política criminal.

Esta nueva política criminal debería consagrar como mínimo los siguientes objetivos:

- Evitar el ingreso a la justicia penal, o desviar de ella, los casos que no deberían ser motivo de esa respuesta, promoviendo mecanismos como la conciliación, mediación y reparación a la víctima.
- Implementar sanciones no privativas de libertad, reservando la cárcel sólo para los delitos violentos y que causen grave daño social.
- Asegurar que en los procedimientos judiciales o administrativos se garantice la libertad personal como regla general y se aplique como excepción la privación preventiva de la libertad, observando los criterios de estricta necesidad, proporcionalidad, temporalidad y razonabilidad.
- Encarcelar el número de personas que la capacidad del sistema carcelario habilite y construir, en caso de ser necesario, respetando las recomendaciones internacionales en la materia, considerando las necesidades de las poblaciones en especial situación de vulnerabilidad.
- Ante la constatación de los efectos criminógenos y desocializadores generados por la prisionización, reinterpretar los compromisos de “reforma” y “readaptación social”⁸ consagrados en las normas internacionales, en clave de Derechos Humanos.⁹

Estos compromisos pueden ser logrados por medio de dos mecanismos complementarios: aprovechando el encierro como una oportunidad para el ejercicio de derechos que fueron negados con anterioridad al ingreso a prisión, y procurando la reducción de los daños y el deterioro que el encierro provoca en toda persona, garantizando un trato acorde a la dignidad humana.

Tal como argumentó Alessandro Baratta, “la reintegración social del condenado no puede perseguirse por medio de la pena carcelaria, sino que debe perseguirse a pesar de ella, o sea, buscando hacer menos negativas las condiciones de la vida en prisión”. Para una política de reintegración social el objetivo inmediato no es solamente una cárcel “mejor” sino también y sobre todo menos cárcel.¹⁰

8 Pacto Internacional de Derechos Civiles y Políticos, artículo 10, apartado 3: “El régimen penitenciario consistirá en un tratamiento cuya finalidad esencial será la reforma y la readaptación social de los penados”; Convención Americana de Derechos Humanos, artículo 5, apartado 6: “Las penas privativas de libertad tendrán como finalidad esencial la reforma y la readaptación social de los condenados”.

9 ZAFFARONI, E. (1997): “Los objetivos del sistema penitenciario y las normas constitucionales”. En: AA. VV., *Jornadas sobre sistema penitenciario y derechos humanos*. Buenos Aires: Ed. del Puerto. Pág. 189.

10 BARATTA, Alessandro (1990): “Resocialización o control social”. Ponencia presentada en el seminario *Criminología crítica y sistema penal*. Lima: Comisión Andina Juristas y Comisión Episcopal de Acción Social.. BARATTA (1990: 2).

DISCUSSING EARLY RELEASE PROGRAMMES IN SINGAPORE

Soh Wai Wah
Director, the Singapore Prison Service

INTRODUCTION

The Singapore Prison Service (SPS) has undergone tremendous transformation over the last ten years. Beyond just rehabilitating offenders, we have also focused our efforts on helping them to renew and restart their lives as productive citizens, who add value to their families and society. SPS recognised that preparation for an offender's re-integration back to society starts from the onset of incarceration. Hence, a rehabilitation framework was introduced for a "throughcare" approach to be adopted towards preparing offenders for their return to the community. Not only are the offenders prepared for re-integration, concurrent efforts are also carried out to increase awareness and acceptance of offenders by their families and the community, thus preparing them for the offenders' eventual release.

SPS REHABILITATION FRAMEWORK

2. SPS' rehabilitation framework (see Figure 1 below), which sets out the rehabilitative programmes that offenders go through at each incarceration stage, is premised upon the operating philosophy that a seamless "throughcare" approach is necessary for the rehabilitation of offenders and their subsequent reintegration back into community.

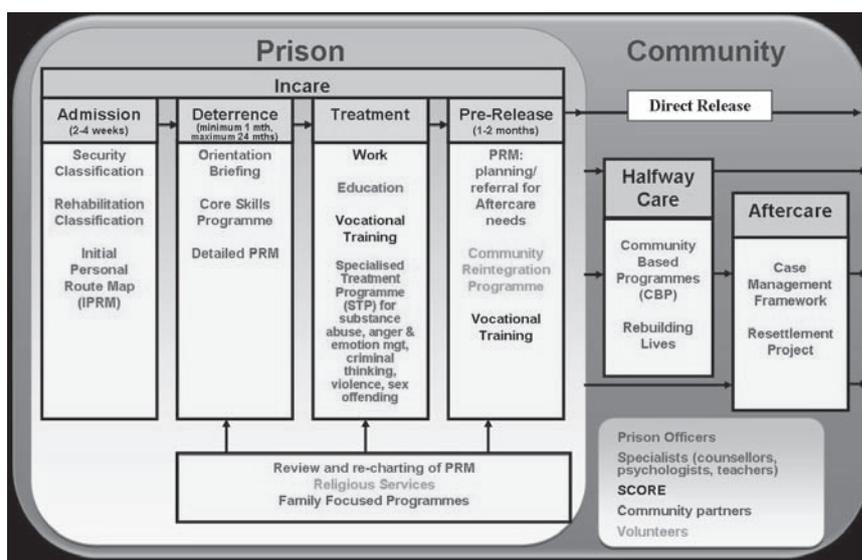


Figure 1: SPS Rehabilitation Framework

3. In order to prepare offenders for reintegration, they undergo various programmes during their period of incarceration. SPS introduced the classification system, using the Level of Service Inventory-Revised (LSI-R) as an assessment tool, to assess the risks and needs of each offender upon his admission. The offender would then be accorded specific treatment programmes based on his level of risks and needs. During the in-care phase, a personal route map is required to be charted for each offender to determine his specific treatment needs required during his incarceration.

4. After an offender's personal route map is charted, programmes that will address his treatment needs and enhance his reintegration potential will be accorded to him. SPS adopts a holistic approach in enhancing an offender's reintegration potential. Education and vocational training equip offenders with knowledge and skills. Work therapy gives opportunity for offenders to inculcate positive work habits, attitudes and responsibility. Specialised treatment programmes target the offenders' specific

criminogenic needs. The engagement of the families and community also start immediately upon admission of the offenders to ensure that family ties are not severely strained by imprisonment. Families are engaged through regular visits and family focused programmes. Volunteers from religious organisations and voluntary welfare organisations are also engaged to come into prison to befriend offenders and counsel them.

5. The transition from a highly controlled prison environment to the life outside prison walls is a big one. Hence, during the half-way care phase, early release programmes, with follow-up and supervision in the community, play an essential role to prepare inmates for gradual reintegration into community. Thus far, about 18,000 offenders have been emplaced on the various schemes in CBP and the completion rate is about 95%. CBP will be discussed in greater detail in the next section.

6. SPS acknowledges the difficulties faced by ex-offenders in seeking to reintegrate back into the community. With the help of community partners, SPS has put in place a support structure for ex-offenders upon their release. Aftercare managers from Singapore After-Care Association and Singapore Anti-Narcotics Association are assigned to guide and help source for services required by ex-offenders for up to 6 months under the Case Management Framework. Services from various agencies include financial assistance, employment assistance and accommodation arrangement.

COMMUNITY BASED PROGRAMMES

7. Incarceration punishes not just the offender but also the family. The prison environment is also a highly artificial one that does not adequately prepare an offender for life outside the prison walls. For successful rehabilitation and reintegration to take place, it must be carried out in the community and with the support of the community. Hence, rather than directly releasing an offender without any strong support network, Community Based Programmes (CBP) serve to provide a gradated approach towards reintegration of an offender.

8. The spirit of CBP is to allow suitable offenders to serve the tail-end of their sentence in the community and also to involve the community, especially the offenders' families, in their rehabilitation and reintegration. For offenders who do not have supportive families, the help of halfway houses is enlisted to provide a caring and conducive environment for gradual reintegration. There are various CBP that offenders can undergo, namely, the Home Detention (HD) Scheme, the Work Release Scheme (WRS) and the Halfway House Schemes.

9. The following is a brief description of the various CBP:

a. Work Release Scheme (WRS)

The Community Supervision Centre (CSC) is a work release camp operated by SPS which houses suitable offenders at the tail-end of their sentence. These offenders will work during the day and return to the CSC after work. The CSC also functions as a reporting centre for offenders who are on other community-based programmes. Offenders with supportive families will subsequently be allowed to return home towards the end of the WRS.

b. Halfway House Schemes

Offenders of lower risk are emplaced on this scheme and will stay in halfway houses during the tail-end of their sentence. At the halfway houses, the offenders are engaged in work and treatment programmes. The halfway houses also serve to provide a conducive environment for reintegration of offenders without supportive families.

c. Home Detention (HD) Scheme

Some low-risk offenders are allowed to serve the tail-end of their sentence at home where

their families provide a warm and supportive environment for the offenders' re-integration. Offenders would either be engaged in work or pursue academic studies while on the HD scheme. Electronic tagging and monitoring is a mandatory component of the HD scheme. Random reporting at the Community Supervision Centre may also be required of the offenders.

10. To ensure that only suitable offenders are emplaced on CBP and for them to successfully complete CBP, SPS has in place a three-prong approach towards the placement and supervision of offenders on CBP, namely:

- a. A thorough selection process;
- b. Preparation at Pre-employment Centre;
- c. Community Supervision.

Thorough Selection Process

11. All penal offenders upon admission are screened for eligibility for placement on one of the CBP. The eligibility screening is based on the criteria stipulated in the legislation.

12. Thereafter, the offender is assessed for suitability for placement on the CBP by Prison Officers of the institution in which he is housed. Principal considerations when assessing an offender's suitability are his likelihood of re-offending, propensity towards violence, sexual deviance, risk to society and his level of family support. The offender's responses towards rehabilitation during incarceration and general conduct in prison are also taken into consideration.

13. SPS also introduced the tool, Singapore Prisons Short Risk Scale¹ (SPSRS), to predict an offender's probability of re-offending. Offenders with a high risk of re-offending would usually not be considered for emplacement. For those who have known drug abuse history, an additional tool, the Drug Composite Scale² (DCS) would be administered to ascertain the offender's risk of going back to drugs. In addition, psychologists from SPS' Psychological and Counselling Services Branch would further assess the suitability of those who have exhibited violent and/or sexual tendencies.

14. The Programme Placement Panel (PPP), comprising the Superintendent of the prison as the Chairman, and other relevant officers, convenes monthly to discuss all eligible cases for placement on CBP. Thereafter the cases are forwarded to an Advisory Committee (formed by reputed members of public) for consideration. Director of Prisons then endorses the emplacement of the offenders, on the recommendations of the Advisory Committee.

Preparation at Pre-Placement Centre

15. Offenders recommended for placement will then be transferred to the pre-employment centre one month before his date of emplacement. At the pre-employment centre, he will undergo a series of programmes to prepare him for re-integration.

16. The Rebuilding Lives Programme, comprising family intervention and other relapse prevention modules, is administered to offenders during the pre-employment phase. The objectives are (i) to prepare offenders going on CBP and their families adequately for their eventual reunion by equipping them with the relevant skills and knowledge; (ii) aid the offenders and their families in coping with the various issues and stressors during their emplacement on CBP, e.g. effective communication at

1 The Singapore Prison Short Risk Scale (SPSRS) is a locally-normed tool derived from the Level of Service Inventory - Revised used to estimate risk of general re-offending. It contains 9 items of both historical and dynamic factors.

2 The Drug Composite Scale (DCS) is a tool used to estimate the risk of drug relapse for drug users. The score is calculated from the SPSRS, the Drug Abuse Screening Test, Drug Taking Confidence Questionnaire and Social Desirability Scale, some of which are locally derived scales.

home; (iii) rebuild or enhance the offenders' relationships with their families; and (iv) equip offenders with relapse prevention skills. With this programme booster, we seek to enhance the chances of these offenders successfully completing their CBP as well as reintegrating to society as responsible and contributing citizens after their full release.

17. Apart from the Rebuilding Lives programme, the offenders are also put through foundational skills training to enhance their employability and job-preparedness upon their release. These programmes include the Employability Skills training, interview skills and resum? writing, and basic IT skills training. At the pre-employment centre, potential employers will also be invited to conduct job vacancies briefing and job placement exercises to ensure that the offender is employed upon placement on CBP.

Community Supervision

18. Upon the placement of an offender on CBP, the Community Supervision Centre (CSC) undertakes his supervision throughout the placement period. Under the CSC structure, prison officers who traditionally perform their roles within a prison setting, now take on the role of Reintegration Officers and they perform multi-faceted roles in the community. This ranges from reintegrative functions such as liaison with inmates' families and community partners, engaging inmates in regular dialogues, to supervision and disciplinary roles such as conducting work site visits, halfway house visits and handling minor violations of regulations.

19. In order to ensure that the Reintegration Officers know their offenders prior to their emplacement on CBP, the officers engage the offenders one month prior to their emplacement in the pre-employment centre. Information and knowledge of these offenders would also be handed over by the officers looking after the offenders during the in-care phase to the reintegration officers through case conferences. As such, the knowledge and rapport built up over time is carried over into the community supervision phase.

STATISTICS PERTAINING TO CBP

20. The completion rates³ of offenders who had undergone CBP had been healthy, being generally maintained above 80% for the last 5 years (see Table 2 below). The healthy rates of completion enjoyed by SPS could be partially attributed to the relatively stringent criteria for emplacement on CBP. Going forward, a challenge for SPS would be to allow more inmates to benefit from a period of placement on CBP prior to release, whilst maintaining the completion rates at a healthy level.

Table 2: Completion Rates for various CBP for 2004 - 2008

CBP	Completion Rate for Year / %				
	2004	2005	2006	2007	2008
HD	98.7	96.0	96.7	98.3	98.5
RS	97.1	100.0	100.0	88.2	89.5
WRS-HWH	93.6	84.7	84.9	81.9	90.8
WRS	86.1	88.3	82.8	79.4	90.0
HWH	95.7	92.3	100.0	70.0	81.3
LT-HWH	98.8	95.8	93.3	89.6	90.9

3 Completion rate is the ratio of inmates who have successfully completed the programme over the total number of inmates emplaced on the same programme (less number of inmates who did not complete the programme due to factor(s) outside their control (e.g. medical reasons, etc)).

4 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.

21. SPS defines recidivism rate as the percentage of local offenders detained, convicted and imprisoned again for a new offence within two years from their release. Offenders who were emplaced on CBP had consistently performed better than offenders who were not placed on CBP⁴. For the latest year of comparison in 2006, recidivism rates for offenders who had been emplaced on CBP was 12.9%. The overall recidivism rate for the general population was 25.1%.

CONCLUSION

22. SPS believes that for rehabilitation and reintegration of offenders into the community to be effective, a coordinated systemic effort is required. Hence, early release programmes do not function independently, but are set within the overall Rehabilitation Framework. Within the prison system, inmates go through various rehabilitation programmes at each incarceration stage. In the community, SPS works with community partners and harnesses community resources to facilitate the ex-offenders' reintegration. At the national level, SPS endeavours to change society's mindset towards giving ex-offenders a second chance through the Yellow Ribbon Project. Through these efforts, SPS has embarked on an on-going journey with a rehabilitation focus, constantly seeking to be more effective in rehabilitating offenders and steering them towards becoming responsible citizens.

STRATEGIES TO DEAL WITH PRISON OVERCROWDING - THE ROLE OF PAROLE

Christine Glenn

Parole Commissioner of Northern Ireland and Immigration Judge

Introduction and overview

Parole is perhaps the least understood process in our criminal justice systems. Its name suggests that it focuses on the prisoner and allowing him or her a ticket out of prison before serving the full sentence meted out by the court. Little wonder that it is distrusted by many politicians, reviled by the press and disrespected by the public. Yet, as part of a multi-agency approach to public protection and prisoner rehabilitation, it can - and does - serve an invaluable purpose. I hope this short paper will cast some light on a process that was once described to me by a victim as “one of the black arts” - he changed his view once he had seen and understood the real parole.

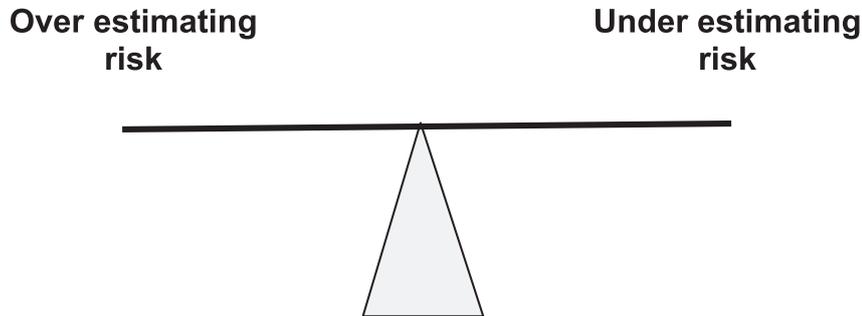
I start with a definition. What I mean by parole here is the managed release of a prisoner on set conditions before the expiry of the sentence. If released on parole, the prisoner will be on licence for the unserved part of the sentence and will be eligible to be returned to prison if he or she re-offends or breaches the conditions of the licence. A prisoner sentenced to life imprisonment will be on licence if granted parole for life and will be eligible for return to prison in the same way.

The parole decision is based on a risk assessment of the prisoner’s suitability to be safely managed in the community. I will discuss risk assessment and risk management later in this paper. At its heart is public protection as the decision is about balancing the rehabilitation of the prisoner and his reintegration back into the community against the risk to the public that this would cause. In this balancing act, the scales always fall on the side of public protection.

The role of parole has become increasingly under the scrutiny of the courts in the context of Human Rights in the United Kingdom. I will develop this further later in this paper. The ensuing media coverage has contributed to a now common misconception that parole boards consider only the rights of the prisoner, that they put a prisoner’s human rights first before public safety and that parole is a prisoner’s right, especially if they have behaved well in prison. It is considered a “soft option” and parole boards are often accused of not taking into account the rights of the victims. A linked misconception is that parole is mainly about saving money and releasing prisoners early so that prisons are not overcrowded. I aim to show that this is not the case. However, by freeing up prison places and prison resources by releasing some low risk offenders, I contend that this enables better supervision and control over those released on conditional licence as well as ensuring that prisons are less overcrowded and therefore able to respond better to the needs of those incarcerated.

Risk assessment

Offender management in the United Kingdom has at its heart the concept of risk. Risk is a familiar concept in everyday life and translates well into the field of criminal justice. The model below shows the importance of finding the right balance in making risk assessments.



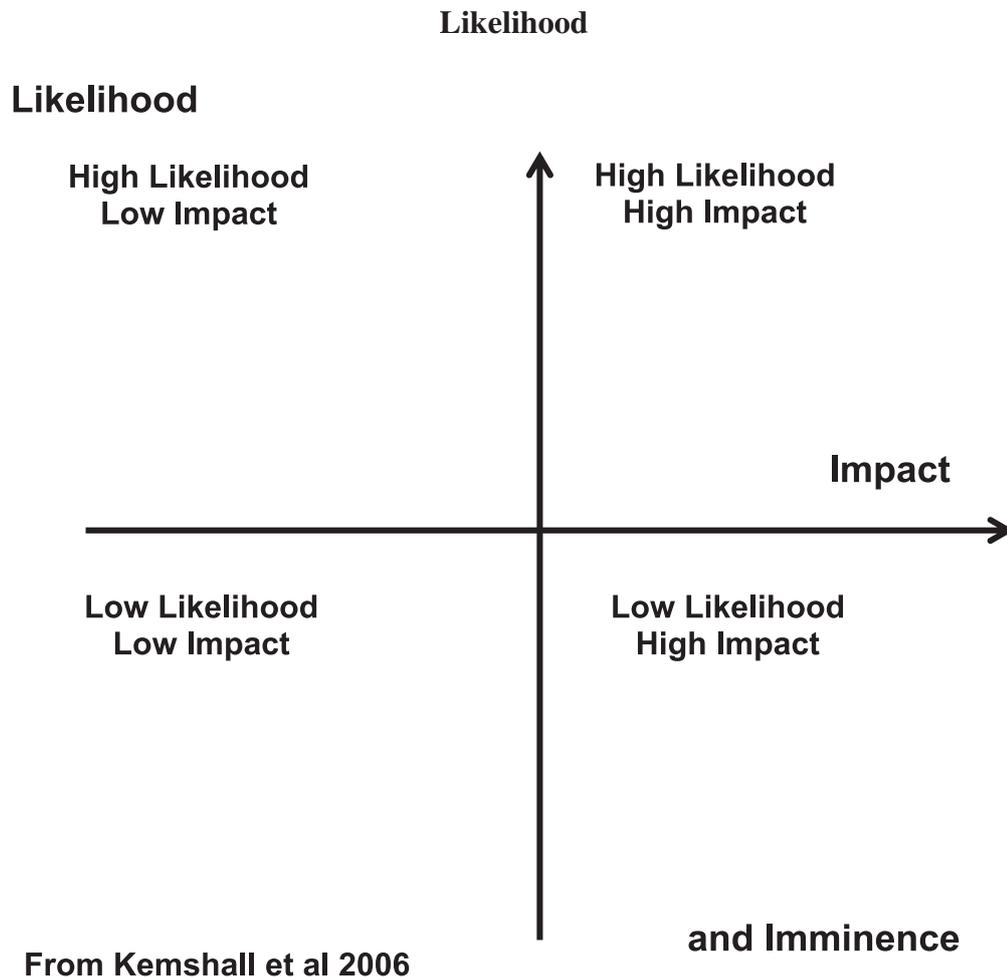
Balanced Risk Judgements

A risk assessment is a judgement about a negative (usually) event or behaviour based on likelihood (probability) and impact (the outcome). The risk will be the risk of reoffending, the risk of doing serious harm to others or the risk of doing serious harm to him/herself.

Imminence is a judgement as to how soon an offender is likely to commit his/her act. In making this judgement - some questions which are useful are:

- Is he/she more likely to do it than not
- Is he/she likely to do it as soon as an opportunity or victim presents
- Is he/she actively grooming an opportunity or a victim
- Will he/she act as soon as the risk management plan breaks down
- Is he/she already failing to attend or comply with conditions of release
- **Are past circumstances and conditions repeating**

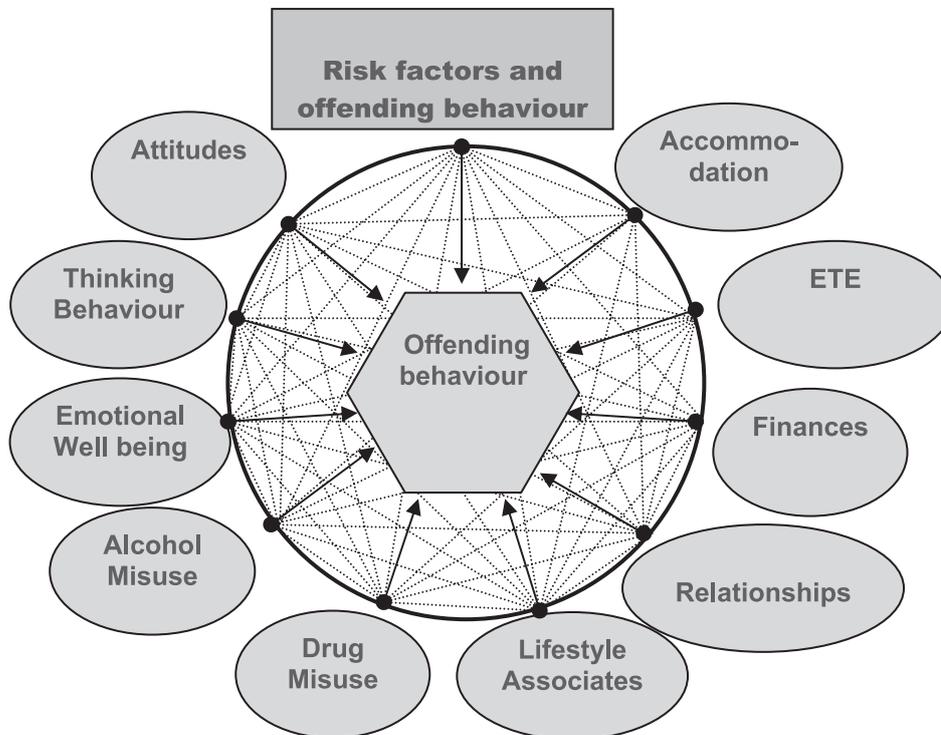
The last question is particularly pertinent as past behaviour is said to be the best predictor of future conduct. These considerations can be seen on the diagram below. This can be useful to those making risk assessments in this context.



How then is risk identified? A starting point is to determine the main risk indicators of an individual. These will usually include

- Past behaviour and convictions
- Motivation for and attitude towards offending
- Access and proximity to victims (including grooming)
- Preparedness to use weapons
- Disinhibitors (alcohol and drugs)
- Situational triggers
- Conditions and circumstances

To these must be added risk factors and offending behaviour. The diagram below shows that this process is a complex one and that factors will overlap as they contribute to offending behaviour. It will be necessary to assess and manage the risks both individually and collectively as factors may impact on each other and increase risk. For example, financial problems may lead to the loss of accommodation, relationship difficulties and affect emotional wellbeing. The analysis of risk factors requires detailed consideration.



The next step in the risk assessment, having looked at the individual’s main risk indicators and risk factors is to look at the current situation - what are the main indicators now and what are they likely to be in the future? Risk factors may be static - things that may not be changed such as the offender’s age and the previous offending record - or dynamic - things that may be susceptible to change such as substance abuse. All must be fully analysed, taken into account and balanced.

There are a number of tools to assist those charged with making these risk assessments. These include actuarial risk assessment tools as well as structured clinical risk assessments, usually by forensic psychologists. The recommended best practice is a combines approach using both static and dynamic factors. Research suggests that clinical judgement is inherently unreliable (see Campbell, 2004 for a summary) and that considering level of ‘dynamic risk’ alongside actuarial instruments can improve accuracy beyond that of current actuarial instruments alone (Thornton, 2002; Beech et al 2002).

Static risk assessment includes

- Static/actuarial historical factors which are unchangeable and predict risk, normally combined into an equation or scale.
- Involves researching the behaviour of offenders in order to establish significant differences between those who offend at high rates and those who offend at low rates
- Characteristics identified by research use thousands of subjects
- Trying to identify the characteristics associated with higher risks of reoffending
- Thornton’s Risk Matrix 2000 (for sex offenders) has been found to identify correctly 71% repeat offenders
- RM2000 includes: age; previous criminal history (sexual and general); male victims;

relationship status; stranger victims; non-contact offence

If static risk assessment is so powerful, why then use dynamic factors at all? Actuarial risk assessments deal only with groups of offenders and not individuals. Static risk assessments can be artificially low or artificially high. Static factors cannot be changed and actuarial procedures are insufficiently inclusive of risk and protective considerations (Doren, 2002). In contrast, psychological factors shown by research to be associated with risk include dynamic factors that can be changed. Identifying these correctly enables treatment targets to be set therefore promoting risk management. Structured consideration of dynamic factors improves accuracy of static instruments and give the most accurate and thorough method of risk assessment - static plus dynamic. Meaningful risk factors

- Tell you what things make it more likely that the individual will reoffend
- Tell you what the person needs to do to change
- Therefore give you an indication of which programmes might be helpful.
- Help you to assess if change has occurred

Examples of these are a sexual interest in children, attitudes promoting violence, angry rumination and wanting revenge, believing that women deserve to be raped/children are interested in sex, a need to work on improving problem solving skills and thinking of consequences, a chaotic and criminal lifestyle and a tendency to be influenced by others.

In addition to risk factors must also be considered protective factors when making a risk assessment. Protective factors, as the term suggests are:-

- Opposites of risk factors.
- Meaningful, fulfilling and pro-social life goals
- Coherent, organised and meaningful daily activity.
- Learning something in treatment that will clearly work i.e. he understands the procedure and can explain what he will do.
- Robust, respectful, loving and non-collusive social/statutory support.
- Belief in one's capacity to change

What is crucial in all risk assessment is the need for it to be evidence based. The analysis of the case must be directed at finding and weighing evidence - both positive and negative - and then balancing the factors. Where the balance is even, the scales must always fall on the side of public protection. The Parole Board must always consider

- Nature and circumstances of the original offence
- Previous offending, plus any additional measures of risk including age of offender
- Attitude and behaviour in custody and whether this indicates a willingness to address offending behaviour and to understand its causes and consequences for victims
- Progress in addressing offending behaviour
- Likely compliance with licence, including previous behaviour on licence, bail etc
- Resettlement and risk management plans

Having considered the risk factors and the protective factors, the next stage in a risk assessment will be the consideration of whether there is any evidence of behavioural change. Insight (responsibility, empathy, honesty, and understanding) is good, and is a treatment target of most Offending Behaviour Programmes but it is not the same as change: insight is the vehicle which enables change to occur. Change in attitudes, behaviours, skills must be observed in addition to insight.

Examples of such change are

- Behaviour during treatment
- Attendance at sessions and level of active participation
- Completion of between session assignments
- Evidence of application of skills
- Seeking advice and support from staff
- Going the extra mile
- Recognising when a risk factor is present

Having considered all these factors, the acid question is “How robust are the skills for managing future risk and will his strategies work?” The risk assessment will depend greatly on the plan which is to be put in place to manage the individual’s risk. The Parole Board can put in place conditions as part of the risk management plan, for example restrictions on contact with victims and other individuals or groups of people, curfews, and restrictions on going to particular places. These conditions must be both necessary and proportionate to manage the risk.

Accurate risk assessment will require all agencies involved to provide good information. This will start even pre-sentence with reports to the judge, will continue with good sentence planning and assessments in the prison and by the probation service.

Risk management

No individual will be risk free. The risk assessment will serve to inform the risk management plan which in turn will take into account protective factors. The plan will need to be monitored and supervised effectively and a multi-agency approach may well be necessary here for some offenders.

A good risk management plan will take account of both external and internal factors and include strategies to deal with both.

Risk Management Strategies

External	Internal
<ul style="list-style-type: none">■ Reducing triggers & opportunities<ul style="list-style-type: none">■ e.g. restrictive conditions■ Delivered through external limits & controls<ul style="list-style-type: none">■ includes details of programme provision	<ul style="list-style-type: none">■ Reducing triggers & opportunities<ul style="list-style-type: none">■ avoidance■ diversion■ developing thinking■ Delivered through active participation in interventions or programmes

To summarise:

- Does he acknowledge the existence of the risk factor and does he understand how it connects to his offending?
- Can he articulate a strategy for managing the risk factor?
- Is he able to recognise when the risk factor manifests itself in the present?
- Is there evidence of behavioural change? Or is there continuing evidence of the risk factor being present? Or is there no evidence either way?
- Is there any evidence that he has developed and is using healthy alternative behaviours?

- Is the risk management plan realistic and robust and will it be properly managed?

Impact of Human Rights

The Human Rights Convention has become increasingly important in the work and decision making of many Parole Boards including the Boards in England and Wales and to the Parole Commissioners in Northern Ireland.

Article 5(4) of the Human Rights Convention states that “everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided by a court and his release ordered if the detention is not lawful”.

The case of **Stafford -v- UK (2002) 35 EHRR 32** decided in 2002 by the European Court of Human Rights began the journey of the Parole Board from an advisory body to Ministers on the early release of prisoners (in that case of prisoners sentenced to a mandatory life sentence) to the court or court-like body required to oversee and decide on the lawfulness of detention in such cases under Article 5(4).

This case was followed in 2005 by a House of Lords ruling in the cases of **Smith and West -v- Secretary of State (2005) UKHL 51** that prisoners recalled to prison allegedly in breach of their licences should be granted an oral hearing in order to comply with Article 5(4) of the Human Rights Convention - prior to this, the Parole Board had handled these types of cases by considering them on paper. Subsequent cases such as **Girling -v- Secretary of State (2006) EWCA Civ 1779** and more recently **Brooke -v- Parole Board (2008) EWCA Civ 79** have underlined this principle and the overarching need for the Parole Board to be completely independent from government when making these decisions.

This line of cases has resulted in the Parole Board moving from being an advisory body, governed by Directions from the Secretary of State, to being described as a court by the higher courts and being responsible for making the decisions rather than offering advice to Ministers. This move was welcomed by the Parole Board for England and Wales and by many stakeholders. The media coverage of the change was however sometimes unhelpful and even some senior politicians commented unhelpfully about the role of human rights in the decision making process of the Board. In fact, the legal changes did not impact on the way the Board performed its risk assessment task in terms of balancing the evidence as required. They did lead to the Board holding more oral hearings with the prisoner present - and it is perhaps telling that the Board’s release figures have decreased over the last three years. There are other factors here, including a different case profile, but it may be that hearing in person from the prisoner in these cases has also contributed to these statistics.

The other important Article for Parole Boards is Article 8, the qualified right to family and private life. This generally concerns ensuring that any conditions attached to a prisoner’s licence on release are both necessary and proportionate.

Measuring and recognising success

At the risk of stating the obvious, there is no release decision that is free of risk - the only safe decision in terms of re-offending and risk of harm to the public is a refusal. This is a problem for Parole Boards where offenders do re-offend after conditional release with the inevitable media and political pressure that these incidents will bring. However, it must be considered that automatic release after serving a proportion of a prison sentence can mean that a prisoner has had no motivation to address his offending behaviour while in custody and that he may be released without effective licence conditions or sanctions back into the community. The parole option, while it does carry risk, does allow a structured condition re-entry for a prisoner who will have had to take some responsibility and ownership of his risks and make efforts to address them during his sentence.

The re-offending statistics in England and Wales show around 67% of offenders re-offend within two years. For those paroled, only 6% offend during the parole period which is typically around one year.

The figure is the same for those released on life licence - with only 1% of the re-offending being for serious sexual or violent offending. In an Annual Report, Judge David Carruthers, the Chairman of the New Zealand Parole Board refers to parole being around twice as effective in terms of re-offending as community penalties.

There is little in the way of global research here but a factor may be that prisoners have already been in custody and know what to expect on return. They will have taken active steps in trying to tackle the causes of their offending and will have had support in their re-entry into their communities. With evidence-based risk assessment by well-trained Parole Boards, based on robust information and a risk management plan backed up by effective

Supervision in the community, parole is an effective tool in managing overcrowding and in contributing to rehabilitation.

PANEL III

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**RESPONDING TO PRISON OVERCROWDING:
ANOTHER ATTEMPT FROM THAILAND**

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See p. 151 to 168

THE YELLOW RIBBON PROJECT STORY (SINGAPORE)

- Reaching Out and Touching a Nation -

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INTRODUCTION

The Yellow Ribbon Project (YRP) Singapore was established in 2004 as a community engagement campaign and catalyst to bring about societal acceptance for ex-offenders and their families. The YRP aims to provide a concerted and coordinated approach to create awareness, generate acceptance and inspire action within the community to support the rehabilitation and reintegration of ex-offenders. This is crucial to achieve a safer and more secure community for all.

2. Though a relatively new campaign, the YRP has made significant inroads in Singapore. Together with our many partners and key stakeholders, we have managed to achieve impact in our community and beyond. This paper aims to highlight our journey, how we engage the community and our progress thus far.

CONCEPTUALISATION OF THE YELLOW RIBBON PROJECT

The Singapore Prison Service (SPS) Visioning Exercise

3. In 1999, the Singapore Prison Service (SPS) took a bold step to transform the organisation with a new Vision, which reads:

OUR VISION

We aspire to be Captains in the lives of offenders committed to our custody.
We will be instrumental in steering them towards being responsible citizens, with the help of their families and the community.
We will thus build a secure and exemplary prison system.

4. By committing itself to the bold and noble vision of becoming Captains in the lives of offenders, the SPS shifted its mindset to being instrumental in steering inmates towards being responsible citizens. This laid the foundation for the launch of YRP in 2004.

The Singapore Corporation of Rehabilitative Enterprises (SCORE) Transformation

5. Working closely with the Singapore Prison Service, the Singapore Corporation of Rehabilitative Enterprises (SCORE) introduced the concept of rehabilitation through work discipline. SCORE rehabilitates offenders through vocational training and work programmes in market-relevant industries to facilitate the inmates' eventual return back to society and to keep up with the changes in the Singapore economy.

Formation of the Community Action for the Rehabilitation of Ex-Offenders (CARE) Network

Community Action for the Rehabilitation of Ex-offenders (CARE) Network

Vision: Hope, Confidence and Opportunities for Ex-Offenders



6. For many ex-offenders, the move from a controlled prison environment to the outside society as a free man is a big struggle. Many would fail if left alone to do so. It is with this in mind that the CARE Network was formed in May 2000.

7. The CARE Network was formed to improve the effectiveness of the rehabilitation of ex-offenders in Singapore. Spearheaded by the Singapore Prison Service and SCORE, the CARE Network is the first formal structure in Singapore that brings together key Government and non-government agencies involved in re-entry management.

8. The CARE Network aims to improve the effectiveness of rehabilitation of ex-offenders in Singapore. It engages the community in rehabilitation, co-ordinates member agencies' activities and develops initiatives for ex-offenders. It targets to develop a concerted and coordinated approach towards supporting rehabilitation and reintegration of ex-offenders back into society in Singapore.

Why the Yellow Ribbon Project?

9. The most significant achievement to date for the CARE Network is the development of the Yellow Ribbon Project (YRP). The key drivers of the national campaign are the Singapore Prison Service (SPS) and the Singapore Corporation of Rehabilitative Enterprises (SCORE), supported by the CARE Network agencies. It was officially launched in 2004 by the President of the Republic of Singapore, Mr S R Nathan. The YRP is an annual campaign aimed at changing society's mindset towards giving ex-offenders a second chance in life. The campaign aims to mobilize community support and prepare the community for the offender's reintegration. Our end result is to see ex-offenders reintegrated into society as responsible citizens.

10. The inspiration behind YRP was taken from the 70s hit song, "Tie a yellow ribbon round the Ole Oak Tree".

"I'm really still in prison and my love, She holds the key, a simple yellow ribbon's what I need to set me free..."

11. YRP's moniker is adapted from the 1973 hit song by the pop group *Tony Orlando and Dawn* "Tie a Yellow Ribbon Round the Ole Oak Tree", which describes a released prisoner's desire for forgiveness and acceptance. The 3 lines above from the 70s hit aptly describe the ex-offender's desire

for the acceptance and forgiveness from his loved ones and the community to set him free.

12. There is a great need for the community to be more aware of the struggles and the plight of approximately 10,000 ex-offenders that walk out of our prisons gate, wanting to start their lives afresh. Failing to get support and losing this motivation were impetus for falling back to their old criminal ways. Such a trend would then sustain the recurring vicious cycle of crime which would harm not just the ex-offender but their families and the community at large (e.g. victims of crime).

13. The community therefore plays an important part in the creation of an inclusive social environment where ex-offenders, who displayed a strong desire to change, could find the hope to start life afresh and become contributing members of society.

14. The objectives of YRP are the 3 'A's, which are:

- a. To create Awareness of giving second chances to ex-offenders.
- b. To generate Acceptance of ex-offenders and their families into the community.
- c. To inspire Community Action to support the rehabilitation and reintegration of ex-offenders.

ORGANISING THE CAMPAIGN AND ENGAGING THE COMMUNITY

Thematic Development

15. Each year, a different theme was developed for the YRP campaign to move the level of engagement upwards and build upon the successes of the preceding year. While the first few YRP campaigns focused on creating awareness, subsequent campaigns progressively widened and deepened the message by engaging the community and mobilising inmates and reformed ex-offenders to give back to society.

YRP 2004	YRP 2005	YRP 2006	YRP 2007	YRP 2008	YRP 2009
Creating Awareness	Engaging the Community	Engaging the Ex-Offenders	Giving Back	Beyond Just Words	Giving Back
Selling the Message - Help Unlock the Second Prison	Give them a second lease of life	Widening the reach, deepening the message	Extending our reach, inspiring action in inmates and ex-offenders	Going beyond awareness to action by actively engaging the community	Inmates and ex-offenders playing a role to give back to society

Branding

16. Effective brand positioning has been instrumental for the success of the YRP campaign. The simple icon of a yellow ribbon and the meaning associated with it is easily identifiable and recognisable by all strata of society. The success of the brand also lies with the consistency and discipline of the message each year. Although the events and activities may change with each YRP year, the inherent message to be relayed across remained the same - the universal values of acceptance, forgiveness and second chances.

Harnessing the Media

17. YRP leverages extensively on the media as a strategic tool for our campaign messaging. The public campaign is launched through a series of televised and printed advertisements, news and radio broadcasts, on-line mediums like internet and websites, posters placed at public locations, e.g. the public transport system. New media was also used through Youtube, Facebook, mobile phone messages and local internet forums to publicise our events.

18. YRP enjoys wide media coverage from the Singapore media. It provides the media with a fertile spread of interesting story angles ranging from human interest to ex-offender reintegration issues. The creative harnessing of the media led to the production of three local movies and a documentary-drama based on the ex-offenders and their struggles. The message of forgiveness and

second chances was weaved into stories that the man-on-the-street could understand and identify with.

Community Engagement Activities

19. Media campaigns and key community engagement activities were concentrated in the month of September each year, being designated as the Yellow Ribbon month.

20. The annual 'Wear-A-Yellow-Ribbon' activity was conceptualized to encourage the public to wear the ribbon to show their support of the campaign. Each year's campaign was kicked off with the activity; "Wear A Yellow Ribbon Activity" during the month of September.

21. An eclectic mix of activities was used each year to engage the community. These events were our delivery mechanisms to highlight the reintegration issues of ex-offenders and make the call for community acceptance and action. They were creatively organised to showcase inmates and ex-offenders' talents via prison art exhibitions, song-writing, poetry and story telling competitions, and concerts.

22. To bring together various stakeholders and partners, the Yellow Ribbon Conference was a platform for government and non-governmental organisations, academics, aftercare professionals, community partners and overseas correctional services to dialogue on rehabilitation and aftercare issues.

23. The main YRP events held were:

- a. Yellow Ribbon Concert (2004, 2006 and 2008)
- b. Yellow Ribbon Walk (2005 and 2007)
- c. Yellow Ribbon Conference (2004 to 2008)
- d. Movie Screening "One More Chance" by Jack Neo (2005)
- e. Yellow Ribbon Fairs (2004 to 2007)
- f. Yellow Ribbon Creative Festival (2004 to 2008)
- g. Yellow Ribbon Community Art Exhibition (2007 and 2008)
- h. Yellow Ribbon Job Fairs

Involvement of Inmates and Ex-offenders

24. Inmates and ex-offenders formed an integral part of our campaign. Hence, opportunities were given as much as possible to involve inmates and ex-offenders. Since the commencement of YRP, the involvement of inmates in making the two million cloth Yellow Ribbons have been central to the impact of the Wear-A-Yellow-Ribbon activity. Their effort symbolically represented their desire for acceptance from the community and their willingness to change. Inmates had also contributed through exhibiting their handicrafts or skills, stage performances, logistical support, food preparation and packing of gift packs.

25. The YRP has generated positive response from ex-offenders, some of whom were mobilised to contribute further towards the cause. They pitched in efforts by providing transportation and logistic assistance in events, distributing Yellow Ribbons, performing at events. Many were not afraid of stepping out in the open to reveal their past on national press or television to be an encouragement to others and to thank the community for the support given to them and their families.

Celebrity Engagement and Rehabilitation Ambassadors

26. Celebrities and rehabilitation ambassadors formed an important part of the engagement strategy. With their popularity and influence, they were well positioned to spread the YRP message, serve as crowd-pullers, and more importantly act as ambassadors in support of the campaign. Local and regional artistes had been featured over the past few years.

Community Partnerships

27. As the YRP was centred upon community acceptance, the community formed a significant part of the equation. The campaign was also formed with the intention of running a campaign for the community, by the community. With the iconic symbol and the strong branding, many community and corporate organisations have initiated collaboration with us. Community leaders, politicians, corporate leaders and celebrities also made time to grace the events. Community involvement and partnerships came in the form of donations and sponsorships, wearing of the Yellow Ribbons, fund-raising or participating in our YRP events.

YRP 2009 - GIVING BACK

28. YRP 2009 was a year of 'giving back' to the community. It was a year for inmates and ex-offenders to play an active role in the midst of a difficult global economic crisis. Inmate and ex-offender driven community service projects were planned to offer them the opportunity to contribute back to the community and help the less privileged in society.

29. Everyone played their part in helping ex-offenders restart their lives and become responsible and contributing members of society. The inmates, ex-offenders and community were engaged in the following ways:

- a. Inmates and ex-offenders making the first move - By participating actively in rehabilitation programmes and contributing to the community, inmates and ex-offenders were driving their own acceptance.
- b. Family and friends rendering supporting and encouragement - Family acceptance and forgiveness were the first steps towards the creation of a conducive environment for reintegration. A strong social support network for ex-offenders gave them the courage to move on in their lives and increased their chances of starting lives anew.
- c. Community offering a helping hand - Singaporeans working together to strengthen the social fabric of the nation. The acceptance of volunteers, employers and colleagues would help support the reintegration journey of ex-offenders back to society.

2009 Events Highlights

Yellow Ribbon Culinary Programme 2009: Tribute of Love I "Father's Day Luncheon" (26 May and 20 June 2009) and Tribute of Love II for the Community (26 September 2009)

30. The Yellow Ribbon Culinary Programme 2009 not only provided the opportunity for inmates to discover their culinary talents, but also paved the way for a career in the Food & Beverage industry. The programme included a culinary competition where inmate finalists were selected to attend a 26-week "Certificate in Basic Culinary Skills" training by an established culinary institute, Shatec Institutes. This training was sponsored by one of our corporate partners. The inmate finalists were also given the opportunity to present their winning dishes to their family members in a special Yellow Ribbon Tribute of Love "Father's Day Luncheon" held on the 20 June 2009. The programme culminated on 26 September 2009 with the inmates cooking for 520 less privileged elderly and children. More than 120 ex-offenders and volunteers helped serve the meals, bringing together inmates, ex-offenders and volunteers to serve the needy in the community.

Yellow Ribbon Art Competition (1 July 09) and Yellow Ribbon Community Art Exhibition (9 to 20 Sep 09)

31. Art therapy has been found to be an effective tool in rehabilitation. The Yellow Ribbon Art Competition was a platform for inmates and ex-offenders to discover their artistic talents. There were 450 artworks produced by inmates and ex-offenders along the theme of "Vision of Hope", where participants painted their hope for a new life after release. The top 30 entries were selected for the finals held on 1 July 2009. These artworks were then exhibited at the Singapore Art Museum during the Yellow Ribbon Community Art Exhibition. The exhibition was attended by 1,300 visitors and

raised about S\$36,000 for the Yellow Ribbon Fund and other agencies as part of “giving back” to the community.

Wear-A-Yellow- Ribbon (Entire Month of Sep) / Yellow Ribbon Street Donation Day (Friday, 28 Aug 09)

32. The simple act of wearing the Yellow Ribbon was an active display of the community’s support for offering second chances and acceptance for ex-offenders. Each Yellow Ribbon was handmade by an inmate and symbolised his or her hope for forgiveness and acceptance. Our signature activity, the Yellow Ribbon Street Donation Day held on 28 August 2009 saw 1,691 volunteers coming forward to distribute Yellow Ribbon Packs and raised funds for the YRF. A total of S\$37,000 was raised in the Wear-A-Yellow-Ribbon Street Donation Day.

Yellow Ribbon Prison Run 2009 - “Beyond the Run” (6 Sep 09)

33. The inaugural Yellow Ribbon Prison Run on 6 September 2009 saw the participation of more than 6,000 runners. A contingent of 80 reformed ex-offenders also participated in the Run. Aptly themed “Beyond the Run”, runners lend their collective voice to a message of encouragement for all ex-offenders to pick themselves up after having fallen down. As part of giving back to the community, reformed ex-offender turned marathoner, Mr Hanniel Choong of 48 years of age, raised S\$35,000 for YRF through his challenge of finishing the 10km race in 48 minutes.

Contributing to the Nation’s Birthday

34. On 9 August 2009, while thousands of spectators received their gift packs at the Singapore National Day Parade (NDP), some of them were surprised to find their gift packs containing a Yellow Ribbon pack. This year, 88 inmate volunteers participated in the Nation’s celebration by packing 35,000 gift packs for the NDP. Through this gesture, they showed that they are contributing citizens of Singapore even while serving time.

Yellow Ribbon Tattoo Removal Programme

35. In July 2009, YRP started a two-year tattoo removal programme costing \$1 million. The programme, fully sponsored by our corporate partner, aimed to help inmates renounce their gang membership (often signified by elaborate gang-related tattoos) and facilitated their reintegration into society as law-abiding and gainfully employed citizens. One of the inmates who received treatment on his arm said, “Many of us wanted to stay clean of gangs. However, we are easily identified by gangs because of our common tattoos. Removing our gang tattoos is more than just a symbolic act for us - it gives us the chance at a clean slate of life.” A total of 39 inmates had since undergone the programme, with 50 more waiting to have their tattoos removed and start their lives afresh.

THE IMPACT

36. The YRP has generated a lot of interest and support since its inception. Its positive outreach and message of “*Help Unlock the Second Prison*” has permeated into all levels of society. The logo of the Yellow Ribbon is now synonymously recognized as a symbol of giving hope and second chances to ex-offenders in Singapore. The Singaporean public, community leaders, ex-offenders and their families have publicly embraced the philosophy of YRP and shown their support by participating in our activities.

37. A public perception survey was commissioned in 2007 to elicit the Singaporean public’s attitudes towards ex-offenders and their awareness of the YRP. Findings showed that 94% of the respondents were aware of the YRP, indicating that our outreach and media efforts have by and large been successful in creating awareness of the YRP cause. The findings also showed that more than 60% of respondents had generally positive attitudes towards ex-offenders, with most agreeing that ex-offenders deserve a second chance and hence were willing to accept them back into society.

38. The Registration of Criminals (Amendment) Act was amended in May 2005 to help deserving ex-offenders reintegrate into society. The amended Act would allow an ex-offender convicted of a less serious crime to have his record considered spent if he met the specified criteria and stayed clean for a five-year period. Following this, the Singapore Civil Service amended their job application form on 1 April 2006. Candidates with spent records could now indicate that they did not have any criminal records, thus increasing their opportunities in their job search. In 2006, the Ministry of Transport, Land Transport Authority reviewed the guidelines for issuance and renewal of vocational licences for drivers of public service vehicles to make it more flexible for ex-offenders to get the license.

39. YRP received an international affirmation from the United Nations Department of Public Information in 2007 when, arising from SPS's work in YRP, SPS was given an Honourable Mention for outstanding achievement in public relations campaigns which best exemplify the ideals and goals of the United Nations. Locally, YRP received the National Community Safety and Security Programme Award in 2007 and 2008 for two of our community engagement programmes. The award recognises outstanding projects and community volunteers on a nation-wide level that contributes to tackling community issues and problems addressing the safety and security of the community. It also received the Public Relations in the Service of Mankind (PRISM) Excellence Award under the Public Service Campaigns category in 2008. In 2009, the Yellow Ribbon Tattoo Removal Programme received the Ministry of Home Affairs' Operational Excellence Award.

40. The key achievements of YRP from 2004 to 2009 were as follows:

- a) 1.985 million Yellow Ribbons distributed.
- b) 313,000 Singaporeans participated in our events.
- c) 807 new employers registered with SCORE's Job Bank.
- d) 908 volunteers signed up to volunteer with us.
- e) S\$7.8 million raised for Yellow Ribbon Fund.
- f) More than 400 inmates and ex-offenders mobilised for each campaign.

41. Another significant milestone for our YRP was the initiation of the Yellow Ribbon Fund (YRF). YRF is the first national charitable fund devoted entirely towards the development and implementation of rehabilitation and reintegration programmes and services for ex-offenders and their families. Registered under the National Council of Social Service, YRF was granted Institute of Public Character (IPC) status from 1 August 2004.

CONCLUSION

42. Ex-offenders need the support of their families and the community for them to reintegrate into society successfully. Rehabilitation programmes would help to reform and prepare the ex-offender for release. However, what is equally critical is to prepare the community to accept the reintegration of these ex-offenders.

43. Recognising that a prejudiced mindset and stigmatisation of criminals are impediments to the reintegration of ex-offenders, a concerted effort is required to effect a mindset change. Only with the close partnership and commitment between the Government, community partners, companies and individual members of the public will we succeed in giving ex-offenders a second chance. The Singapore community as an inclusive society would offer support to reformed ex-offenders to become contributing members of society. Ultimately, we would achieve a safer and more secure home for all.

44. The YRP bears testament of the power of garnering a group of like-minded organisations in the form of CARE Network to bring about community transformation towards ex-offenders and committing in a common purpose to help our ex-offenders reintegrate back into society.

A PROMISSING PERSPECTIVE FOR PRISONS IN AFRICA:

A More Community-based Correctional System

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INTRODUCTION

The perspective emerged out of empirical materials collected in the Democratic Republic of Congo (N. Masamba Sita, 1989); the UNAFRI and the Uganda Prisons Service (UPS) joint project on Social Rehabilitation and Reintegration of Prisoners in their Communities of origin or choice; and from a number of United Nation Instruments. It explores the prospects of getting, whenever possible, local communities' members effectively involved in the Criminal Justice System (CJS) process, at the Pre-trial, Trial and Post-trial levels. The ultimate aim of this perspective is to reduce overcrowding in prisons.

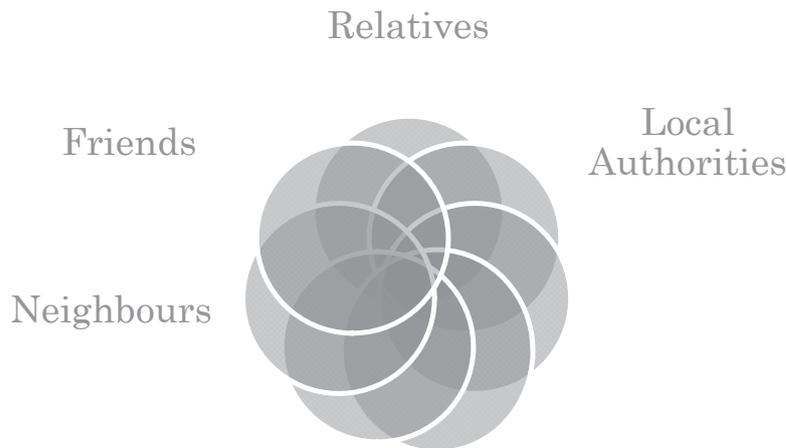
It goes beyond the CJS in exploring the downstream of the CJS, in view of getting the inmates and their local communities be prepared for reunification. This facilitates their effective social rehabilitation and reintegration. The inmate, the social worker or probation officer, members of communities (relatives, neighbours, friends and others), have been identified as key stakeholders. And to be effective, the process requires a shift from the strictly punitive, retributive logic of the penal style to compensatory/conciliatory styles of social control described by A. V. Horwitz (1990:22).

The presentation clarifies the concept of "Local communities" (Section 1), examines briefly some styles of social control (Section 2), proposes a reference framework (Section 3), and in using empirical material, it reveals the types of (human, material, socio-cultural, financial, etc.) resources available within local communities; or of contribution the members of the concerned local communities offer or may offer for the CJS to achieve its mission: the "effective social rehabilitation and reintegration" of the law breakers (Section 4). Due to its exclusive focus on a retributive justice, the CJS is unable to get access to the above resources, which pave way to restorative outcomes. The same explains the failure of alternatives measures.

SECTION 1: LOCAL COMMUNITIES

The concept "Local Communities" or "communities" in general is referred to as a micro-socio-logic level concept, that helps get access to local available (human, material, socio-cultural, financial) resources. It involves, as key social actors, relatives (of the offender and the victim), neighbours, friends, local authorities and other members sometimes difficult to categorise, but quite relevant in the healing process of the community.

DIAGRAM 1: SOCIAL STRUCTURES WITHIN LOCAL COMMUNITIES



Among others, the following has been observed:

- When there is a problem, the quality and the nature of the existing relationship will determine the way the problem will be handled.
- In case of good relationship, the involved actors will often opt for a restorative outcome, through a restorative process.
- Restorative process is mainly about compensation and/or reconciliation.
- Local community members contribute to the process, whose outcome is not only the successful handling of a problem out of the CJS; but also the successful social rehabilitation and reintegration of former prisoners in their communities of origin or choice for the cases that have gone through the CJS. On release of an offender, members of the community are kin to facilitate his/her social rehabilitation and reintegration (mainly when well prepared by a social worker or a probation officer).

The concept is in use in some International Instruments such as the *Basic Principles on the use of Restorative Justice Programmes in Criminal Matters (ECOSOC Resolution 2002/12, annex)*. Principle 20 of the Resolution posits:

“Member States should consider the formulation of national strategies and policies aimed at the development of restorative justice and the promotion of a culture favourable to the use of restorative justice among law enforcement judicial and social authorities, as well as local communities”.

These Instruments recognise the important role communities have to play for effective crime prevention. Paragraph 16 of the *ECOSOC Resolution 2002/13, annex on Guidelines for the Prevention of Crime* posits:

“In some of the areas listed below, Governments bear the primary responsibility. However, the active participation of communities and other segments of civil society is an essential part of effective crime prevention. Communities, in particular, should play an important part in identifying crime prevention priorities, in implementation and evaluation, and in helping to identify a sustainable resource base”

Our opinion is that the important part played or to be played by local communities, is not taken into consideration by policymakers and traditional stakeholders. Practices observed within local communities reveal that provisions of a number of international instruments are effectively implemented, unfortunately not reported as they do not necessary take place within the Criminal Justice System (CJS). These practices effectively contribute to the achievement of the mission of CJS:

1 This modality of justice is often wrongly referred to as informal, but in the context of those who refer to it as a recognized way of resolving local conflicts in their communities, it is a legitimate option for dispute resolution.

the successful social rehabilitation and reintegration of offenders.

Reference to public should be understood as communities' involvement. Rule 17.1 of *Tokyo Rules* stipulates that:

“Public participation should be encouraged as it is a major resource and one of the most important factors in improving ties between offenders undergoing non-custodial measures and the family and the community. It should complement the efforts of the criminal justice administration”.

Therefore, the evaluation of such practices should be seriously envisaged and the training curriculum of correctional officers in particular and of the CJS officials in general, should refer to such innovations for a more community-based Criminal Justice System, as realistic and needed penal reform in particular in Africa whereby local communities members “informally”¹ contribute to the CJS measures. This should facilitate to get the CJS aligned to the observed practices in the local communities as stipulated in a number of international instruments.

SECTION 2: STYLES OF SOCIAL CONTROL

It has been observed that to solve a conflict, and depending on the quality and nature of the existing relationship (relatives, neighbours, friends, etc.), members of a given local community often look at a restorative outcome. This leads us to the Compensatory and Conciliatory Styles of Social Control of Horwitz.

TABLE 1: ELEMENTS OF MAJOR STYLES OF SOCIAL CONTROL (A . V. HORWITZ: 1990:22)

STYLE ELEMENT	PENAL	COMPENSATORY	CONCILIATORY	THERAPEUTIC
1 HARM	VALUE	MATERIAL	RELATIONAL	PERSONALITY
2 LIABILITY	INDIVIDUAL	GROUP	SHARED	NONE
3 GOAL	RETRIBUTION	SETTLEMENT	RECONCILIATION	NORMALITY
4 SOLUTION	PUNISHMENT	PAYMENT	NEGOTIATION	TREATMENT

Under compensatory and conciliatory styles of social control, the liability is respectively on the group or shared. Settlement and/or negotiation are initiated for a restorative outcome. This leads us to state that without an effective involvement of the concerned groups (communities), access to local available resources is compromised and consequently a restorative outcome is doomed to failure or prone to serious challenges.

SECTION 3: A FRAMEWORK OF REFERENCE

The following international instruments serve the purpose:

1. The United Nations Standard Minimum Rules for non-custodial Measures (Tokyo Rules);
2. The Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters (ECOSOC Resolution 2002/12, annex);
3. The Kadoma Declaration on Community Service and recommendations (Seminar held in San José, 3-7 Febr4ary, 1997);
4. The Lilongwe Declaration on Accessing Legal Aid in the CJS measures in Africa (ECOSOC Resolution 2007/24).

These instruments introduce a new perspective in the CJS, focusing principally on the effective involvement of local communities; considered as key stakeholders, in the implementation of the CJS measures. This approach aligns the CJS to the practices observed within local communities and facilitates, among others, the implementation of the above instruments by Member States. Hereafter are some illustrations.

2 See Diagram 1, p. 2.

1. Tokyo Rules:

Tokyo Rules call for the involvement of the community. For illustration, Rule 13.4 stipulates that:

“The competent authorities may involve the community and social support system in the application of non-custodial measures”.

Let us refer among others to “Community Service Order” as non-custodial and a post-trial measure of the CJS that is mainly meant to facilitate the successful social rehabilitation and reintegration of offenders.

2. Basic Principle on the Use of Restorative Justice Programmes in Criminal Matters:

The actors of the structures identified above² often are directly affected and are parties to the problem. Operative paragraph 1.4 of the Basic Principles defines parties as follows:

“Parties” means the victim, the offenders and any other individuals or community members affected by a crime who may be involved in a restorative process.”

The victim is not necessarily an individual. Other members: relatives, neighbours, friends, etc. are also victims depending on the nature and quality of the relationship as already indicated above. Each involved actor has a status and will act accordingly consistent with his/her status. There are also facilitators. Paragraph 19 singles out a condition being met by local communities and even sometimes observed by CJS officials (e.g. social workers, probation officers), that stipulates:

“Facilitator shall possess a good understanding of local cultures and communities and, where appropriate, receive initial training taking up facilitation duties”.

UNAFRI training course for correctional officers³, as facilitators involved in the process of social rehabilitation and reintegration of prisoners, serves the purpose. The course helps them comply with the requirements mentioned in the instruments, and take advantage of the available local (human, material, socio-cultural, etc.) resource in communities for an effective social rehabilitation and reintegration of prisoners in their communities.

3. The Kadoma Declaration:

The Kadoma Declaration on “Community Service” recognises the value of traditional practices of healing the damage caused by crime as observed in local communities. Its Operative paragraph 3 posits:

“Community service is in conformity with African traditions of dealing with offenders and with healing the damage caused by crime within the community. Furthermore, it is a positive and cost-effective measure to be preferred whenever possible, to a sentence of imprisonment”.

4. The Lilongwe Declaration:

This is also an instrument that recognises traditional and community-based alternatives to formal criminal processes. Paragraph 5 stipulates:

“Traditional and community-based alternatives to formal criminal processes have the potential to resolve disputes without acrimony and to restore social cohesion within the community. These mechanisms also have the potential to reduce reliance upon the police to enforce the law, to reduce congestion in the courts, and to reduce the reliance upon incarceration as a means of resolving conflict based upon alleged criminal activity. All stakeholders should recognise the significance of such diversionary measures to the

3 UNAFRI's specialized course for correctional officers from East African sub-region took place in May 2009 at the Secretariat. The same course is proposed to other sub-regions. Workshops were organized in Kampala (Uganda), Nairobi (Kenya), Lusaka (Zambia) and in Juba (Sudan) in November-December 2008.

administration of a community-based, victim-oriented criminal justice system and should provide support for such mechanisms provided that they conform to human rights norms”.

SECTION 4: LOCAL COMMUNITIES’ MEMBERS CONTRIBUTION

The different instruments referred to above and the perspective they pave, are realistic as it is in support of practices already in use within local communities and sometimes in the CJS. Policy makers and implementers should be sensitized about such studies revealing the field social realities for needed and realistic reforms. Some few quotations hereafter show how, at Pre-trial (with a focus on pre-trial detainees) and Post-trial levels of the CJS, and even after a CJS caretaking, some of the selected instruments are implemented due to the effective involvement of local communities’ members.

1. The Pre-trial Level

Statistics at our disposal (See ICPS Report 2007) led us to consider that overcrowding in the African prisons is the consequence of long illegal detention (long periods awaiting trial, undue delay in commencement of trial). Some statistics from the Washington and Lee University project in Liberia on the implementation of the Lilongwe Declaration reveal the impact of an effective implementation of the Declaration. It is an effective implementation because it involves communities’ members in the exercise.

It is reported that the Central Prison in Monrovia, Liberia, was built to take in 300 inmates and prior to the implementation of the Lilongwe Declaration, there were 2000 inmates, as a result of the factors referred to above. About 400 participants including lawyers, magistrates, communities’ advocates, law enforcement agents, tribal and religious authorities were trained. These trainees had also trained a countless number of other people. After a year of the implementation of the project: August 2008 to April 2009, only 700 remained in the Central Prison. The project has been extended to other areas (S. Nkouli, 2009).

2. The Post-trial Level

Quotations hereafter reveal what the contribution of the members of a local community may be. In order to get access to these local available resources, social workers or probation officers should be trained to shift from exclusively penal style to compensatory and or conciliatory styles of Social control. This helps them, inter alia, to identify the local available resources within local communities. The statements here below reveal the types of contributions or assistance a neighbor, a friend and a local authority may offer for an effective implementation of the CJS measure.

1. Neighbours’ contribution:

A young woman with children, sentenced to a Community Service Order in Kadoma, Zimbabwe (···), had to serve her sentence in a hospital. When asked who was taking care of her children every time she was at the hospital. She answered that:

“I have very good neighbours. When I am here, they take care of my children. I am lucky having them”.

2. A friend’s contribution:

The second illustration is in line with the mission of the CJS: “the social rehabilitation and reintegration of prisoners”. It reveals the type of support a friend was able to offer to a former prisoner. A friend facilitated a former prisoner to get a job giving him the opportunity to practice the skills learnt in prison (N. Masamba Sita et al., 2005:27). During the social worker visit to AS (initials of the name of the former prisoner), one of his friends reported to the social worker the following:

“Truly I convinced AS to come to stay with me. He brought all his family this way. We are going to start a project with him. I have a school down here, it is a Muslim school. As is an expert in tailoring, so I would like him to teach the children tailoring ...”.

3. A Local Authority's Contribution:

This is about a "Local Council 1 Official (LC 1), the lowest administration unit in Uganda, who has connected KM, a former prisoner, to his employer who gave him the job of driver. The social worker reported the following:

"I asked him whether he was the one who had secured a job for KM. He said that since he knew that KM was a driver, he had a friend who was looking for one; so, it was easy to connect KM to him. Luckily enough he started working straight away, and informed me that everything had been a success for him and his family ever since he started working".

IN CONCLUSION

Cases referred to above reveal that the perspective sketched in the selected instruments is realistic. The exclusive focus on the traditional operation of the CJS, leaves unreported useful and innovative practices, accounting for the key role local communities have to play in support to the Correctional System in particular and to CJS mission in general.

UNAFRI calls upon Members States to internalise in their legislations the related instruments as they pave a realistic and a needed penal reform that leads to: "a more Community-based Criminal Justice System" in Africa and wherever it is appropriate. This perspective gives access to local available (human, material, socio-cultural, etc.) and crucial resources for an effective implementation of the CJS measures; and consequently facilitates restorative outcomes.

UNAFRI also calls upon its partners to reinforce their collaboration in order to offer Member States the needed technical assistance in the fields such as: action-oriented and/or evaluative research; capacity development of the CJS personnel, whose attitude generally is punitive, retributive, and reveals a conflict of caretaking logics: punitive/ retributive versus compensatory and conciliatory caretaking logics that lead to effective implementation of alternative measures for a restorative outcome.

This will definitely help to make this perspective fully operational. Such a perspective may help involve local communities even in the peace-keeping processes, in preparing both those who have been responsible for atrocities and the members of their communities of origin or of their choice, for an effective social rehabilitation and reintegration after release. The mission of the CJS, even during a post-conflict situation, does not change.

PUBLIC CONFIDENCE IN PAROLE - AND THE PAROLE BOARD

Christine Glenn

Parole Commissioner of Northern Ireland and Immigration Judge

Parole is all about risk and risk assessment. However accurate that assessment, it is inevitable that at some stage, a Parole Board will release someone who goes on to commit a serious offence. The Parole Board has a duty to do two things - the first and most important is to do all possible to ensure that its decision making and the systems that underpin it are sound; the second is to do what it can to inform and engage its stakeholders about its work.

A few years ago, when I was Chief Executive of the Parole Board for England and Wales, we had two cases in a very short period when men we had released had gone on to kill. We had already taken many actions to “up our game” in terms of quality of decision-making. We had also done quite a lot to inform and involve stakeholders. Those actions helped a little in dealing with the media storm that we faced. But we knew that they had to be built on and I set out below the key elements of our strategy - our quality agenda.

- **The four pillars of wisdom** - our starting point. This was a stringent appointment process for recruitment of new members, excellent training and mentoring arrangements, a formal (and meaningful appraisal system for members - we were the first organisation to appraise judges' performance) and lastly a review system where people we released re-offended.
- The **Review System** looked at all cases where a person we released went on to commit a violent or sexual offence. A Committee of experienced members, chaired by the Board's Vice-Chairman, a High Court Judge, considered all such cases. The system was strengthened by having distinguished external members on the Committee, including a Chief Constable. Feedback on the Committee's views was given individually to members and learning points shared both by inclusion in the Board's member newsletter as well as feeding into training. We also involved an external academic psychologist to utilise outcomes to look for patterns as well as setting up a Joint Review Process including other agencies such as the Prison Service and the Probation Service to see if there were shared learning points to improve public safety.
- **Member accreditation.** We set up a system of career progression for members so that they moved on to more challenging work only after additional training and formal accreditation. We also set up a Quality Unit which supervised the routine monitoring of panel decisions to test a sample of decisions for each Board member. Again, feedback was given to individuals and further training or mentoring arrangements made if necessary.
- **Research.** Our budget was not large but we managed to set up our lifer database which recorded the outcomes of all lifers we released with a complex coding system. We had one research project with Oxford University which considered the data and produced one important report. We co-hosted a conference with Cambridge University from which a book was published.
- **An international profile.** We joined the Association of Paroling Authorities International and attended and presented at conferences, learning much from other practices. We hosted many international visits and assisted in setting up or improving parole systems in other countries.
- **Regular stakeholder events.** We held events where we explained what we were doing and asked for input and feedback. We launched our annual reports in this way. We used the events

to involve stakeholders in policy development and to consult and share information.

- **Working with victims.** We attended many victim events - presenting where invited. We appointed one of our Directors to the Victim portfolio. We ensured that victims were included in all our stakeholder events and that they were fully involved in setting up our new website. Victim representatives were invited to observe panel hearings and contributed to member training (as did ex-prisoners).
- **Prisoners maintaining innocence.** We took the same steps here as for victims. We hosted a seminar which investigated what could be done to improve and make fairer the systems for those in prison maintaining their innocence.
- **VIP visits.** We had a programme of invitations to policy leaders, politicians, senior members of the judiciary and other VIPs to observe panels to ensure a better understanding and respect for the Board's work.
- **Media.** We appointed a full-time Head of Communications who ensured good relations with specialist journalists and led on media contact to ensure a single voice. We worked with the BBC on radio programmes about the Board and three television documentaries - "Lock them up or let them out" which were well received. The Chairman and I spoke regularly at high profile public events and conferences, on radio and TV and wrote articles for appropriate journals.
- **Website.** We won the best website award from the Chartered Institute of Public Relations. On our website, we included a short film trying to "debunk" the main criticisms levelled at the Board and showing some of our members to show that they were impressive and part of the community. There are also contributions from some of our stakeholders. This film is what I will show to delegates at the workshop.

TORTURE PREVENTION NETWORK: TOPICS FOR PLANNED ACTION

Mario Luis Coriolano

Vice President, the Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT)

1. Introduction

Efforts to ensure better protection for the rights to decent treatment and, accordingly, the rights not to be a victim of torture and other cruel, inhuman or degrading treatments, through international human rights law, are being pursued using various standards and institutions, both governmental and civil-society-based, at the local, regional and worldwide levels. These standards and institutions are inevitably changing in a *gradual and complementary way* in order to achieve this goal. And in this constant quest being undertaken by humanity and its institutions we cannot ignore the inadequacy of efforts to date, given the continued and spreading use of torture and other inhuman treatments throughout the world.

Taking into account the building of the new system for prevention of torture under the UN Convention Optional Protocol against Torture and Other Cruel, Inhuman or Degrading Treatments or Punishments (OPCAT), through periodic visits to all places of detention, is creating tension, conflict and consensus generated by new actors and new dialectics. In this process, complementarity between the work of international organizations, both regional and worldwide, and that of local institutions and organizations must be strengthened.

An analysis of what has been done in recent years to eradicate or reduce torture and other inhuman treatments reveals that the new paradigm made up of a large mass of international standards and bodies created within the United Nations, which have in different ways sparked the reform of domestic constitutions, basic codes and procedural legislation, has not been adequate. Among other problems, the fundamental institutions of the rule of law that bear responsibility in this area for ruling the law have been incapable of halting the use of torture. I am referring in particular to institutions in the law enforcement, judicial (*judges, prosecutors and defence counsel*) and penitentiary fields.

Against this background, the long struggle waged by numerous actors to achieve OPCAT's coming into force calls for each of us, within the context of our various responsibilities, to think and act in the most effective possible way, both individually and collectively, and to report our actions.

I intend to begin this article, therefore, by identifying the conceptual guidelines that run through OPCAT within a dynamic approach to the national preventive mechanisms (NPMs) in particular. I shall then analyse the mandate of the Subcommittee on Prevention of Torture (SPT) and review the issues about the desirability of creating a specific network for the prevention of torture. Thus, I suggest some thoughts about strategic planning in the context of the international human rights bodies.

2. The Three Themes

A new system for periodic visits to all places of detention cannot be put force practice effect without taking into account the mistakes made and obstacles faced by international human rights bodies, both worldwide and regional. In particular, the implications of the non-fulfilment of the repeated recommendations made by such bodies, which undermines their effectiveness, must be addressed. There is provision for this in the core elements of the well-developed text of OPCAT, the result of many years of deliberation. Hence I propose that we should look at what we might call the dynamic elements for the construction of this new system to prevent torture: such a preventive system must be *independent* in order to gather and generate relevant *information* while operating in *inter-institutional*

mode.

2.1. Independence

The two prevention institutions created by OPCAT - the SPT and the NPMs - must be structured so as to ensure their independence, mainly through the mechanisms for appointment and removal. They must respect basic rules of transparent and open elections while fostering stability and allocating material and human resources so as to ensure optimal functioning for the enhanced protection of persons deprived of their freedom against torture and other inhuman treatments.

There will be several points of tension in these structures for building a new preventive system. Sociological analysis of law enforcement, judicial and penitentiary institutions, for example, reveals that their culture, structure and procedures fall well short of humanist standards. There are great differences between formal, official functions and those that are actually carried out, with corresponding violations of human rights through actions, omissions or willingness to turn a blind eye.

We may also point out the strong impact that the leadership of such institutions has when it is in the hands of persons who are truly committed to human rights, as demonstrated through their lives and work. An example is the new Supreme Court of Argentina and the direct effect of its decisions in terms of pulling down the barriers of impunity represented by the “due obedience” and “clean slate” laws.

I also wish to point out that proper selection of members of the bodies within the new system for prison visits is essential; seeking candidates suitable for the performance of their tasks. In addition to an appropriate structure, it is necessary to include persons with multidisciplinary and cross-disciplinary knowledge. By the latter, I mean persons with knowledge of the world behind prison bars, and not necessarily formal knowledge (for example, former prisoners and their relatives, and not just lawyers). Geographical and gender diversity would likewise help to achieve the desired ends.

To this, it must be added what the SPT stated in its first annual report¹ as part of its guidelines for the ongoing development of national preventive mechanisms, many of which are relevant to the subject of independence.

Subcommittee for the Prevention of Torture: guidelines for the ongoing development of national preventive mechanisms:

- (i) The mandate and powers of the national preventive mechanism should be clearly and specifically established in national legislation as a constitutional or legislative text. The broad definition of places of deprivation of freedom, in accordance with the Optional Protocol, shall be reflected in that text;
- (ii) The national preventive mechanism should be established by a public, inclusive and transparent process, including civil society and other actors involved in the prevention of torture; where an existing body is considered for designation as the national preventive mechanism, its issue should be open for debate, involving civil society;
- (iii) The independence of the national preventive mechanism, both actual and perceived, should be fostered by a transparent process of selection and appointment of members who are independent and do not hold a position that could raise questions of conflict of interest;
- (iv) Selection of members should be based on stated criteria related to the experience and expertise required to carry out national preventive mechanism work effectively and impartially;
- (v) National preventive mechanism membership should be gender-balanced and have adequate representation of ethnic, minority and indigenous groups;
- (vi) The State shall take the necessary measures to ensure that the expert members of the national preventive mechanism have the required capabilities and professional knowledge. Training

1 First annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT/C/40/2), 25 April 2008.

- should be provided to national preventive mechanisms;
- (vii) Adequate resources should be provided for the specific work of national preventive mechanisms, in accordance with article 18, paragraph 3, of the Optional Protocol; these should be ring-fenced, in terms of both budget and human resources;
 - (viii) The work programme of national preventive mechanisms should cover all potential and actual places of deprivation of freedom;
 - (ix) The scheduling of national preventive mechanism visits should ensure effective monitoring of such places with regard to safeguards against ill-treatment;
 - (x) Working methods of national preventive mechanisms should be developed and reviewed with a view to effective identification of good practice and gaps in protection;
 - (xi) States should encourage national preventive mechanisms to report on visits with feedback on good practice and gaps in protection to the institutions concerned, and address recommendations to the responsible authorities on improvements in practice, policy and law;
 - (xii) National preventive mechanisms and the authorities should establish an ongoing dialogue based on the recommendations for changes arising from the visits and the actions taken to respond to such recommendations, in accordance with article 22 of the Optional Protocol;
 - (xiii) The annual report of national preventive mechanisms shall be published in accordance with article 23 of the Optional Protocol;
 - (xiv) The development of national preventive mechanisms should be considered an ongoing obligation, with reinforcement of formal aspects and working methods increasingly refined and improved.
 - (xv) 2.2. Information

Independence with such built-in features, stemming from and focused on human rights, will help to create substantial databases related to the prevention of torture and other inhuman treatments. A body that is independent in terms of culture, know-how and experience will set up bases with the essential major indicators. Good information leads to a diagnosis that is indispensable for planning and supporting effective action in this area.

We could say, “Show me your appointment book and I’ll see how independent you are”. The attitudes that encourage transparency and indicate timely and appropriate decision-making on the part of each of the responsible bodies will help to give visibility to progress and regression and show where responsibility lies. The opposite attitudes will foster opacity and concealment of all or part of the phenomena of the use of torture.

It should be added that bodies which are so designed and are devoted to shedding light on human rights violations, have a tendency to be subjected to harassment, obstruction and disruption. These human rights violations are prove to be canceled or denied in various ways. Hence the need for effective independence that prevents the body’s structure and operations from being affected by removals, budgetary cut-backs, dismissals from duty and similar manoeuvres. The idea has thus evolved from the original one of strictly confidential visits to one involving the mandatory publication and circulation of the annual reports of the NPMs and aims at the same for the SPT, while preserving the restricted nature of certain information in order to protect those concerned.

The abundant and important information available in several local, regional and worldwide databases needs to be compiled and systematized to facilitate its appropriate use in formulating recommendations to prevent torture and other inhuman treatments and also for follow-up activities. For all these reasons, it is advisable to have structures and know-how, both in the SPT and in the NPMs, to carry out this collection, production and systematization of suitable information and its strategic use.

2.3. An inter-institutional approach

Experience shows that weaknesses continue to exist in the current arrangements for visits to places of detention, due to several reasons. Among the main factors it should be pointed out:

- (a) Shortage of human and material resources;

- (b) Lack of clarity in objectives and appropriate training;
- (c) Duplication and gaps of various types.

In order to overcome these limitations, what is needed is appropriate *coordination* carried out rigorously enough. We can learn important lessons about coordination from other areas (for example, security) so as to avoid making the same mistakes. To start with, it is not clear who should be involved and what the shared objectives are. In addition, there is much lack of continuity among coordination bodies, which are often used as instruments for whitewashing or falsely demonstrating that everything is all right.

We can see that multisectoral efforts range from a methodology in which everyone operates in an isolated way to inter-institutional integration in which everyone brings in something new - in other words, new practices are created. Between these two extremes, however, we see hybrid situations that are not clear cut. This is because of the lack of appropriate institutional machinery and operating regulations in which all the sectors preserve their identity while integrating clearly their mandates and avoiding the above-mentioned duplications and gaps.

Coordination is necessary in order to strengthen capacities through cooperation. Confusion of roles results in duplication, which is strategically and tactically inadmissible where there is a widespread shortage of resources, while simultaneously undermining proper accountability. By way of a rule, let us say that we need to seek an appropriate *interdependence*.

Here follows few more recommendations:

2.3.1. Formalized coordination relations

While a degree of informality facilitates the free flow of information, it can also jeopardize confidentiality on certain subjects. At the same time, an informal approach may be adopted on the pretext of “getting things done”, thereby bypassing controls and hence reducing transparency. This approach ultimately leads to self-deception, sometimes for the purpose of hanging on to power; it creates false expectations and erodes trust, and thus, it is a bad approach for fostering and strengthening inter-institutional relations.

Carrying out the activities mandated by OPCAT at various levels, in various spheres and among various participants needs the establishment of relations of trust, which must be sustained through constant, conscientious and continuous effort. This I believe this is essential as it defuses tensions, avoids confusion in roles and breaks down stereotypes caused by a lack of real understanding of other institutions or their staff.

Regard this, anticipating somewhat the next point, we must promote and create, among other things, training opportunities for those who will be responsible for coordinating networks for carrying out periodic visits to places of detention with a view to overcoming misunderstandings and mistrust. The SPT has taken part in multisectoral meetings to build bridges among participants, for example during missions concerning the NPMs in Peru, Bolivia, Paraguay and Brazil, with the invaluable support of the Association for the Prevention of Torture.

2.3.2. Accountability

Proper inter-institutional work will facilitate accountability since now it is not clear who is responsible for what and to whom. Accountability directly affects the legitimacy of bodies which are guided by this regulation. In the case of the NPMs, this can be ensured, among other means, through an appropriate mechanism for appointing their members as well as the efficient administration of their resources.

2.3.3. Procedures and models

In the search for efficiency and effectiveness, we sometimes concentrate exclusively on the best institutional model, disregarding the external or contextual aspects that affect relations of cooperation (for example, brainstorming and discussions) and trust.

If we concentrate exclusively on the best model for NPMs (the same applies to the SPT, *mutatis mutandis*) in terms of efficiency and effectiveness in carrying out their respective tasks and functions, we run the risk of ignoring the transparency necessary for the development of relations of trust between the State and civil society. We must not disregard aspects that may be unquantifiable yet are key to the creation of common ground between the State and civil society, promoting relations of cooperation, reciprocity and interdependence rather than competition and isolation.

We must even add that the search for effective theoretical models must not lead to “paper NPMs”, a common phenomenon in judicial, law enforcement and imprisonment institutions, where in practice, the actual or possible functions diverge from the formal or official ones. This will mean greater political costs and a new loss of confidence due to the generation of false expectations.

3. The Subcommittee on Prevention of Torture (SPT)

The task of preventing torture and other cruel, inhuman or degrading treatments or punishments by enhancing protection of persons deprived of their freedom in concert with State parties necessitates the building of a new system for periodic visits to be carried out by international, regional and national bodies. The role of the SPT,² at this groundbreaking stage, with all the strengths, weaknesses, opportunities and risks that it represents, is to carry out its functions in a *balanced way* regarding the three conceptual cores of its mandate as laid down in article 11 of OPCAT, which states:

The Subcommittee on Prevention shall:

- (a) **Visit** the places referred to in article 4 and make recommendations to State parties concerning the protection of persons deprived of their freedom against torture and other cruel, inhuman or degrading treatments or punishments;
- (b) In regard to the **national preventive mechanisms**:
 - (i) Advise and assist State parties, when necessary, in the creation of their producers;
 - (ii) Maintain direct, and if necessary confidential, contact with the national preventive mechanisms and offer them training and technical assistance in order to a view to strengthen their capacities;
 - (iii) Advise and assist them in the evaluation of the needs and the means necessary to strengthen the protection of persons deprived of their freedom against torture and other cruel, inhuman or degrading treatments or punishments;
 - (iv) Make recommendations and observations to the States parties with a view to strengthening the capacity and the mandate of the national preventive mechanisms for the prevention of torture and other cruel, inhuman or degrading treatments or punishments;
- (c) **Cooperate**, for the prevention of torture in general, with the corresponding United Nations bodies and mechanisms as well as with the **international, regional and national** institutions or **organizations** working towards the strengthening of the protection of all persons against torture and other cruel, inhuman or degrading treatment or punishment.³

2 Current membership: Vicechairman Mr. Mario Luís Coriolano (Argentina), Mr. Emilio Ginés Santidrian (Spain), Ms. Marija Definis Gojanovic (Croatia), Mr. Zdenek Hajek (Czech Republic), Mr. Zbigniew Lasocik (Poland), Vicechairman Mr. Hans Draminsky Petersen (Denmark), Mr. Malcolm Evans (United Kingdom), President Mr. Víctor Manuel Rodríguez Rescia (Costa Rica), Mr. Miguel Sarre Iguiniz (Mexico), Mr. Wilder Tayler Souto (Uruguay).

3 Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 11 (emphasis added by the author).

Taking into account the guidelines, we can observe that, unlike other international organizations that carry out their work through the examination of reports from States and also, in some cases, through the handling of individual cases and possible visits, the Subcommittee will make recommendations and observations to State parties concerning *public policies for the prevention of torture and other inhuman treatments*. We must fulfil this function in a complementary way, and our activities must be guided by proper planning of the new system of periodic visits including and necessarily getting feedback from a network of NPMs and other international, regional and local organizations fighting torture.

This torture prevention network must be supported and sustained by the broad and intensive efforts of civil-society organizations and some State sectors which have traditionally done such work in isolation, even at very hard times. It does not mean cleaning the slate and starting again or continuing this way. The aim is to strengthen the current work being carried out by many persons and institutions to fight torture.

The mandate to carry out visits while interacting not only with States parties and the NPMs but also with various institutions, organizations and individuals chosen by the SPT because of their relevant information, as well as the freedom to choose places that are to be visited, offer a desirable new starting point. The aim is to launch a new system of independent periodic visits involving an inter-institutional approach and the provision of important information in order to make recommendations and observations designed to strengthen the protection of persons deprived of freedom against torture and other inhuman treatment.

The greater the visibility and awareness of the problems that can be generated by the various participants, the better the opportunities for achieving changes will be for preventing violations. The core of the mandate of the SPT, like that of the other international, regional and local actors (both from civil society and from the State), contains the necessary foundations to enable new efforts without undermining existing ones. This should help to strengthen the rule of law which calls for new institutions oriented and created from and for human rights, synonymo of rule of law.

4. Torture Prevention Network

The social movements that arose in connection with the struggles waged by groups associated with feminism, environmentalism, trade unionism and anti-discrimination, among others, provide examples, with distinctive regional features, of how to bring together very diverse sectors. At the same time, there has been a new approach to the relations between the new social movements and the State: on one hand, civil society has been invited to become involved in the drafting and implementation of government policies, and on the other, the State has gained certain influence in the way the appointment work of civil society are organized.

In general, we can say that the will of State parties, expressed through their ratification of OPCAT, and the strengthening of the human rights movement will be a formula enabling us to work together to build a new system of periodic visits to effectively prevent torture. OPCAT⁴ clearly refers to the need for *relations of cooperation* in such fields as advice and assistance by the SPT to State parties in the establishment of NPMs in order, where necessary, to make recommendations and observations with a view to strengthening the capacity and the mandate of the NPMs.

At the same time, work must be done to improve the *conceptualization* of specific prevention efforts in relation to torture and other inhuman treatments; it should be done in an authentic way. Extrapolation from other fields, reductionism, or falling into the trap of false antagonisms within this field, especially with regard to civil security, should be avoided.

The levels of analysis of torture and other inhuman treatments throughout the historical-political,

4 I am referring specifically to art. 2, para. 4, art. 11 (b) (i) and art. 11 (b) (iv) of OPCAT.

social-institutional and psychologico-social aspects lead us to revise the much repeated indications and recommendations focused on reformist type aspects that emphasize improvements of a structural and functional type (for instance in building matters, doctors and lawyers assistance, etc.) but neglect the underlying cultural or ideological aspects or those which give rise to structures and routines. Hence, we must move towards strategies for integral transformation involving both aspects - structural and ideological-cultural - while encouraging public debates on the subject.

Facing the challenge of articulating this new prevention network, we must avoid both the false optimism of believing that consensus will not be troublesome, and the sterile pessimism of emphasizing that the State, represented by any of its components, will always look for ways of continuing to apply torture. Both positions are subjective and prejudiced and, in my view, improperly juxtaposing conflict and consensus.

Instead, we must highlight, support and promote the semble processes of building torture prevention networks that have been generated by OPCAT in various areas. We can also identify and reject situations that involve more exclusion and opacity than inclusiveness and transparency, essential features for the new institutional framework that OPCAT is calling on us to build.

The development of NPMs of mixed origin made up of State and civil society, generates the relational dynamics already mentioned with respect to social movements. Having greater civil responsibility in handling public affairs involves certain risks concerning discipline and control which are leading civil society to wonder whether or not they should become involved in NPMs. Here, the SPT should encourage channels for dialogue and cooperation with the features we have been describing and with long-term benefits since they promote relations of trust and reciprocity without ignoring areas of tension.

We will strengthen all the sectors involved in the prevention of torture through a cooperation network that is well designed, straightforward and open, with specific contributions to be made without loss of identity. The methodology for building inter-institutional relations is a key issue. There is no single formula for creating an ideal NPM, and this will have to be determined for each specific context - applying the slogan of the new social movements in the environmental field, "thinking globally and acting locally" - . However, care should be taken to avoid rhetorics that leads to complexities in the implementation. Solitary or isolated efforts, which may be attractive in the short term because of their lower costs, mean the weakening of the struggle for preventing torture.

It seems to me that we should engage in the construction keeping in mind achievements and failures, progress and draw backs. This includes dismantling authoritarian and violent institutions, or their authoritarian past behaviours, creating new practices compatible with the culture of human rights.

5. Inter-Institutional Strategic Planning

Lastly, by way of a proposal, I should like to raise a number of ideas on how to achieve the greatest possible impact in the articulation and operativeness of the network composed of various United Nations regional international protection bodies together with local institutions - State and civil-society bodies - in the light of the different mandates of the bodies involved in fighting torture.

In addition to the network of NPMs and a multiplicity of local actors, we have a situation where the SPT must closely cooperate - in the areas of planning, action and follow-up - with the United Nations treaty bodies (Committee against Torture, Human Rights Committee, CEDAW Committee, Committee on the Rights of the Child, etc.) and with the various special procedures (Special Rapporteur on torture, Working Group on Arbitrary Detention, Special Rapporteur on summary executions, etc.), as expressly laid down in article 11 (c) of OPCAT. It is also necessary to cooperate with other international bodies (such as the International Committee of the Red Cross) and regional bodies (Inter-American Commission on Human Rights, European Committee for the Prevention of Torture, African

Commission on Human and Peoples' Rights, etc.). Similarly, close ties must be sought with institutions and agencies working in important thematic areas, such as health, and protection of vulnerable population groups - for example, against slavery or trafficking in women, to cite one example among many.

The diagnosis of the situation regarding torture, and action to combat it, which would underpin rational planning of this prevention network, could be formed as follows. Firstly, by categorizing the Member States of the United Nations in terms of whether they have ratified or signed OPCAT. Secondly, we take account of the range of activities by the various United Nations bodies and special procedures (country reports; complaints in individual cases; field visits and advocacy), supplemented by the activities of the regional human rights agencies. Thirdly, we classify the situations in each region, and country by country, on the basis of the extent of the use of torture and other inhuman treatments. Fourthly, by taking into account the existence and effectiveness of local institutions in the area, especially NPMs. The SPT will thus be able to design and carry out a set of different activities in accordance with an annual or periodic plan.

Such planning would call for basic measures of institutional engineering, such as the construction of a forum for coordination among secretariats (or if possible through the construction of a single secretariat) which, together with an inter-committee working group and special procedures, would collect and systematize all the information related to the four points mentioned above. In this way, it would be possible to create a dynamics of joint work in the evaluation, design and implementation of such action plans, which would be periodically assessed and redesigned. And in that way to make strategic use of the vast and valuable information which already exists, but is dispersed.

On this basis, the SPT will be able to better perform its tasks in a rational, strategic and planned manner. In particular, it will decide on the implementation of:

- (a) Missions to State parties to visit places of detention and make or follow up recommendations - of greater or lesser duration and greater or lesser urgency;
- (b) Missions to States parties to provide advice and support for the establishment or upgrading of an NPM;
- (c) Advocacy to foster the signing or ratification of OPCAT. It will be also possible to for promotion of the activation choose of other United Nations and regional procedures (for example, complaints in individual cases) and to report on the need to call for support from the various assistance or cooperation funds for the implementation of recommendations to prevent torture and improve conditions in detention.

In this way, the SPT will be able to achieve greater impact in the prevention of torture and other inhuman treatments, gaining through its achievements the place it deserves as a global reference in the field of *prevention* of torture.

CONCLUSIONS AND RECOMMENDATIONS

Conclusions and Recommendations of the Workshop on “Strategies and Best Practices against Overcrowding in Correctional Facilities”

The Workshop reached the following conclusions and recommendations:

1. Overcrowding in correctional facilities is one of the most serious impediments to compliance by Member States with relevant United Nations instruments and standards and norms and violates the human rights of inmates;
2. Crime is a social problem to which criminal justice systems can provide only part of the solution. Taking action against poverty and social marginalization is key to preventing crime and violence and, in turn, reducing prison overcrowding;
3. Member States should define prison overcrowding as an unacceptable violation of human rights and consider establishing a legal limit to their prison capacity;
4. 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;
5. Policies and strategies to address prison overcrowding should be evidence-based;
6. 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;
7. 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;
8. 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;
9. 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 unnecessary return to prison;
10. Member States are invited to develop parole and probation systems;
11. Member States should ensure effective implementation of alternatives to imprisonment by providing necessary infrastructure and resources;
12. Member States should promote the participation of civil society organizations and local communities in implementing alternatives to prison;
13. 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;
14. 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;
15. Relevant offices and bodies of the United Nations working on different issues relevant to the problem of prison overcrowding should strive to better co-ordinate their activities and initiatives in order to more effectively assist countries in reducing prison overcrowding; and

16. UNODC should continue to provide assistance and support to countries, upon their request, to address prison overcrowding.

CLOSING REMERKS

*Closing Remarks by Mr. Masaki Sasaki
Director, UNAFEI*

Thank you Ms. Chairperson. Distinguished delegates, and ladies and gentlemen,

First of all, I would like to express my sincere thanks to the chairperson for her guidance and chairmanship. And as the co-ordinator of this workshop, I would like to express my sincere gratitude and appreciation to the moderators, presenters and panellists for their great contribution to this workshop. I also thank the delegates for their participation.

I believe that this workshop served as a great opportunity to share the wisdom of many criminal justice specialists concerned about the problems of prison overcrowding. The strategies and best practices presented and exchanged here will contribute immensely to Member States' efforts to redress the harm caused thereby. Thus, I am glad that our workshop has become an important milestone on the road to the resolution of this significant problem.

For countries afflicted with prison overcrowding, UNAFEI, the United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders, plans to further disseminate the outcomes of this workshop. So that the insights and knowledge derived here today will have a long-lasting, practical impact, UNAFEI will incorporate them into its future training programmes and include them in its publications. As such, I genuinely hope that UNAFEI, as a co-ordinator, will be able to further contribute to advancing the achievements of the workshop.

In closing, once again, let me express my sincere gratitude to you all for your fruitful discussions and inputs.

Thank you very much.

ANNEX

List of Participants (Moderators, Speakers and Panellists)

List of Experts in the Preparatory Meetings

Photographs

List of Participant (Moderators, Speakers and Panellists)

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PHOTOGRAPHS



Preparatory Meeting at UNAFEI



The Congress Workshop



Participants of the Congress Workshop



Remarks by General Moderator, Prof. Albrecht