

EFFECTIVE COUNTERMEASURES AGAINST OVERCROWDING OF CORRECTIONAL FACILITIES

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I. INTRODUCTION

In many parts of the world prisons are little short of a humanitarian disaster. Overcrowding violates fundamental human rights, such as the right to life and to security of the person and freedom from cruel, inhuman or degrading treatment or punishment. It reduces the opportunity for a person to engage in any meaningful programme of rehabilitation. It poses potentially dangerous public health hazards (overcrowded accommodation acts as an incubator for infectious diseases such as TB and HIV/AIDS). It seriously affects the ability to control crime and violence within the prison walls. It creates a dangerous environment for prison staff and makes it impossible to deliver UN defined minimum standards of detention requiring adequate light, air, decency and privacy.

These lectures are based on my experience over the last five years as director of the International Centre for Prison Studies (ICPS). ICPS is based in the school of law at King's College London and was set up twelve years ago. Our aims are two fold: first to undertake research into the use and practice of imprisonment and to publish data, studies and other material which will be useful to people who work in the prison and criminal justice system.

Second to undertake practical projects to assist prison administrations to increase the extent to which prisons comply with the international norms and standards – particularly the human rights standards produced by the United Nations and other international and regional bodies. ICPS has undertaken projects in many parts of the world- in South and Central America, North Africa, and in both Russia and the former soviet countries in Eastern Europe. We currently have projects in Argentina, Algeria, Libya, Turkmenistan, China and Mongolia as well as work in the UK to identify lessons from other countries that could be of use. Our philosophy and way of working are centred not around imposing a pre-defined model – least of all the model of imprisonment developed in the UK – but rather on assisting governments, prison administrators, governors and staff to develop ways of working which meet international standards in ways which are appropriate to the culture, traditions and resources available. Our key texts include *A Human Rights Approach to Prison Management: Guidance Notes on Prison Reform* and *the World Prison Population List*. Our work draws heavily not on practice in the UK but the international law, norms and standards and international experience in meeting them. All our material is on www.prisonstudies.org where you will also find World Prison Brief an online database of information about prison populations in 200 countries. It is this database that I will be drawing on in the first part of this paper.

A. Trends in the World Prison Population (Including Remand Prisons)

More than 9.8 million people are held in penal institutions throughout the world, according to our latest analysis conducted at the start of this year in our *World Prison Population List*. (Walmsley 2009) This is an increase of 300,000 since our previous analysis two years ago. If prisoners in 'administrative detention' in China are included the total is over 10.6 million.

The analysis looks at the prison population and the rate per 100,000 of the national population (the prison population rate) in 218 countries and territories. (Figures are unavailable for only seven countries – Bhutan, Equatorial Guinea, Eritrea, Guinea Bissau, North Korea, Somalia and the Palestinian territories.) Almost half of the world's prisoners are in the United States (2.29 million), China (1.57 million sentenced prisoners), or Russia (0.89 million) – countries which account for just over a quarter of the world's population.

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The United States' prison total constitutes a rate of 756 per 100,000 of the national population, making it pro rata by far the biggest user of prison in the world. Almost three fifths of countries (59 per cent) have rates below 150 per 100,000. The overall world prison population rate (based on 9.8 million prisoners and a world population of 6,750 million) is 145 per 100,000.

B. Variation

The list shows that prison population rates vary considerably between different regions of the world, and between different parts of the same continent. For example in Africa the median rate for western African countries is 35 per 100,000 whereas for southern African countries it is 231. In Asia, the median rate for south central Asian countries (mainly the Indian sub-continent) is 53 whereas for (ex-Soviet) central Asian countries it is 184. Here in Japan the rate is 63 per 100,000 compared to 108 in the Philippines, 192 in Malaysia and 257 in Thailand. In the Americas: the median rate for south American countries is 154 whereas for Caribbean countries it is 324.5. Rates vary within the Caribbean from 588 in St Kitts to 78 in Haiti; in Central America 468 in Belize to 57 in Guatemala; and in South America from 365 in French Guiana to 79 in Venezuela.

In Europe the median rate for southern and western European countries is 95 whereas for the countries spanning Europe and Asia (e.g. Russia and Turkey) it is 229. The average rate in Nordic countries is lower than those in Western Europe.

In Oceania (including Australia and New Zealand) the median rate is 102.5.

C. Trends over Time

The report found that a rise in prison populations is evident in every continent. Updated information on countries included in previous editions of the shows that prison populations have risen in 71 per cent of these countries (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). In the Americas for example, according to our data prison populations have risen in the last few years in all but three of the 26 countries of Latin America and the Caribbean where the Inter American Development bank finances programmes and projects.

Particularly large rises have recently occurred in Europe, in Turkey and Georgia (both up more than 50 per cent since mid 2006). The largest recent falls in prison population in Europe are in Romania (down 2 per cent since September 2006) and the Netherlands (down 22 per cent since mid 2006, although changes in counting practices may play a part in explaining this). Notable rises elsewhere include those since mid 2006 in Chile (up 28 per cent), Brazil (up 18 per cent) and Indonesia (up 17 per cent).

D. Pre Trial Detention

One important feature of prison populations concerns the proportion of pre trial prisoners. We looked at the global situation two years ago and found that two and a quarter million people were then known to be held in pre-trial detention and other forms of remand imprisonment throughout the world. It is estimated that a further quarter of a million are so held in the countries on which such information is not available. The total includes some 476,000 in the United States; 250,000 in India; 136,000 in Russia; 122,000 in Brazil; 95,000 in Mexico; 60,000 in the Philippines; 57,000 in Pakistan; 52,000 in Turkey; 48,000 in both Bangladesh and South Africa; 47,000 in Indonesia; 43,000 in Thailand; 33,000 in Ukraine and 32,000 in Argentina. It has been estimated that there are about 100,000 in China.

In a majority of countries (59%) the proportion of the total prison population who are in pre-trial/remand imprisonment is between 10% and 40%. But in almost half of African countries a majority of the prison population are pre-trial/remand prisoners. By contrast, almost half the countries in Oceania have less than 10% of their prison populations in pre-trial/remand imprisonment. The countries with the highest proportion of the total prison population in pre-trial/remand imprisonment are: Liberia, where the prison administration reports that 97% are so held, Mali (89%), Haiti (84%), Andorra (77%), Niger (c.76%), Bolivia (75%), Mozambique (73%), Timor-Leste (71%), Democratic Republic of Congo and India (both 70%), Bangladesh, Paraguay and Peru (all 68%).

In a majority of countries (60%) the pre-trial/remand population rate is below 40 per 100,000 of the national population. However, in the Americas 80% of countries exceed that level. Panama has the highest

rate in the world, some 213 per 100,000, followed by Bahamas (198), Suriname (196), the United States (158), St. Kitts & Nevis (153), United Arab Emirates (135), Guam (129), Anguilla (124), Uruguay (115), Barbados (114), Trinidad & Tobago (108), Guyana (106), Libya (105), Lebanon (104), Honduras (102), South Africa (101) and Belize (100).

There have been falls in several countries, notably Chile with changes to criminal procedure and options available at the pre-trial stage.

E. Women

Moving on to women in prison, more than half a million women and girls are held in penal institutions throughout the world, either as pre-trial detainees (remand prisoners) or having been convicted and sentenced. About a third of these are in the United States of America (183,400), and a similar number are in China (71,280 plus women and girls in pre-trial detention or 'administrative detention'), the Russian Federation (55,400) and Thailand (28,450). No other country reports a female prison population as high as 15,000, the next highest being in India (13,350), Ukraine (11,830), Brazil (11,000), Vietnam (10,990), Mexico (10,070) and Philippines (6,860). Every other prison system has fewer than 6,000.

Female prisoners generally (in about 80% of prison systems) constitute between 2 and 9% of the total prison population. Just twelve systems have a higher percentage than that. The highest is in Hong Kong-China (22%), followed by Myanmar (18%), Thailand (17%), Kuwait (15%), Qatar and Vietnam (both 12%), Ecuador, Netherlands Antilles and Singapore (all 11%), Aruba (Netherlands), Bermuda (UK) and Laos (all 10%) and Macau-China (9.2%). The median level is 4.3%.

There are continental variations in the prevalence of women and girls within the total prison population. In African countries they constitute a much smaller percentage of the total (the median is 2.65%) than in the Americas and Asia where the median level is twice as high (5.3% and 5.4% respectively). The median levels in Europe and Oceania are 4.4% and 4.3% respectively.

F. Foreign Nationals

Two final components about which data is available. First is the proportion of foreign nationals in prison. In Asia this ranges from 46.5% in Malaysia to 7.3% here in Japan to less than 1% in several countries. In Europe, seven out of ten prisoners in Switzerland and Luxembourg are foreign nationals.

Second, the question of occupancy levels and hence overcrowding. Our data suggests that the most overcrowded prison system in the world is the Caribbean island of Grenada where population is 375% of capacity - almost four prisoners per space. Of course overcrowding can be higher still in particular prisons or parts of prisons, usually the pre trial part. In Guatemala, with a low prison population rate and a modest overall occupancy rate has particular prisons with gross levels of overcrowding- or did so when I visited in 2006. In Asia the most over-occupied system is in Bangladesh at 300%.

Before turning to the question of counter measures, it is worth a word about explanations for the variations in prison rates. A good deal of research and analysis has concluded that the proposition that imprisonment rates are related to crime levels is not supported by the evidence. Prison populations vary because criminal justice policies vary. Some countries have for example shorter sentences, no life imprisonment, special measures for juveniles and young adults and more diversion. So the question becomes, what explains a country's choice of policies?

Recent studies suggest a combination of factors characterize states with steadily rising imprisonment rates which are higher than comparable countries. These factors are related to the economic model of the country and include income inequality, level of spending on welfare, levels of fear of crime, social trust and trust in the criminal justice institutions. Also suggested have been cultural factors such as levels of punitiveness and also differences in political structure. However, whilst these explanations make it clear what the pressures are to increase imprisonment rates, they do not explain why some countries are able to resist those pressures. Information on what has happened in Canada, Finland, the Netherlands and Germany suggests it would be easier to control imprisonment in a less centralized system, with a different message about the benefits of a high imprisonment rate to the country and much greater input into the policy and media debate from the academic community.

II. COUNTERMEASURES AGAINST PRISON OVERCROWDING PRACTICED WORLDWIDE

A. Introduction

Possible solutions to the problem of prison overcrowding boil down to two. First to reduce or stabilize prison numbers or second to build more prison places. The bulk of this paper is about how to achieve the first of these. Of course some countries are busy expanding their capacity, sometimes with the help of private companies or even private capital. What is crucial in a democratic society is that a transparent debate is held about the costs and benefits of such expansion – something which has not always happened in the past.

In 1999 the Council of Europe made recommendations concerning prison overcrowding and prison population inflation, the most significant of which is that the extension of the prison estate should be exceptional. Instead policies should focus on decriminalizing offences, developing alternatives to prosecution, alternatives to pre trial detention and community sentences; on avoiding long terms of imprisonment and emphasizing parole and early release. The rise in prison numbers in many (but not all) European countries suggests that the recommendation has not had as much effect as it should, particularly in Western Europe. Other recent recommendations have been in the same vein such as the 2006 recommendation on pre trial detention stress that remands in custody should be used when strictly necessary and the 2008 rules for juveniles emphasize that deprivation of liberty of a juvenile shall be a measure of last resort and imposed for the shortest period.

Two European countries Scotland and Norway have established commissions to consider the proper role which prison should play as a measure of last resort and find ways of developing alternative policies for dealing with crime and anti-social behaviour. This is not just about alternative sentences. These may be able to play a role, but unless used properly, so-called alternatives to custody can paradoxically serve to fuel rather than reduce prison numbers. It is more about an alternative approach to the crime problem, which uses the levers of education, social, and health policy, combined with mediation and other forms of restorative justice.

Even in the USA, states have become concerned about the rising costs of imprisonment. In California, prison costs exceed those spent on higher education. The idea of Justice Reinvestment (JR) has been developed in some US states to advance fiscally-sound, data driven criminal justice policies to break the cycle of recidivism, avert prison expenditures and make communities safer. Originally coined by George Soros's Open Society Institute, JR is now being taken forward by the Council of State Governments, alarmed by the fact that over the last twenty years state spending on corrections has grown at a rate faster than nearly any other state budget item. According to National Association of State Budget Officers, states spent \$44 billion in tax revenue on corrections in 2007 compared with \$10.6 billion in 1987, while higher education expenses went up by only 21 percent.

Despite increasing corrections expenditures, recidivism rates remain high with half of all persons released from prison returning within three years. The approach has four key elements: first to analyse the prison population and spending in the communities to which people in prison often return; second to provide policymakers with options to generate savings and increase public safety; third to quantify savings and reinvest in select high-stakes communities and fourth to measure the impact and enhance accountability.

Faced with a budget crunch, California Gov. Arnold Schwarzenegger said freeing about 22,000 nonviolent criminals 20 months early would save around \$1.1 billion over two years. Early release programmes in Rhode Island could save the state \$8 billion over five years and lawmakers in Kentucky say house arrests could save at least \$30 million.

Among other practical examples of JR in the US are in:

Connecticut where persons sentenced to at least two years were required to serve no more than 85 percent of their sentence, the length of stay for people returned to prison for a technical violation was reduced, and the number of technical violations admissions was reduced by 25 percent by seeking to increase compliance among probationers and parolees.

Texas where residential and in-prison substance abuse and mental health treatment capacity was expanded enhancing the use of parole and diversion programmes.

Kansas where the creation of a performance-based grant programme for community corrections programs to design local strategies aims to reduce revocations by 20 percent; a 60-day program credit was introduced to increase the number of people who successfully complete educational, vocational, and treatment programs prior to release; and earned time credits were restored for good behavior for nonviolent offenders.

B. Specific Measures to Counter Overcrowding

The remainder of this section looks at three ways of reducing overcrowding; first by reducing pre-trial detention; second by reducing the use of prison as a sanction and third by through systems of early release.

1. Reducing Pre Trial Detention

There is also a body of international law governing the use of pre trial detention. 'Everyone charged with a penal offence has the right to be presumed innocent until proved guilty' according to the Universal Declaration of Human Rights. 'It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial' says Article 9 (3) of the International Covenant on Civil and Political Rights. 'Except in special cases provided for by law, a person detained on a criminal charge shall be entitled, unless a judicial or other authority decides otherwise in the interest of the administration of justice, to release pending trial subject to the conditions that may be imposed in accordance with the law. Such authority shall help the necessity of detention under review according to the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment'. The application of pre-trial detention and its length should be reduced to the minimum compatible with the interests of justice' according to recommendation No R (99) 22 concerning prison overcrowding and prison population inflation (Council of Europe 1999).

(i) Reform of Criminal Procedure

Several jurisdictions in Latin America have replaced an inquisitorial system of justice with a system based on the presumption of innocence, the public prosecutor and oral trials. Elements of these reforms have taken place in Chile, Venezuela and the states of Nuevo Leon and Oaxaca in Mexico. One impact has been the speeding up of trials and the reduction of the use of pre trial detention. The percentage of Chile's prison population who were awaiting trial fell from 44% in 1998 to 24% in 2007.

The reforms have proved controversial in some quarters. Police and prosecutors object that in countries where people live without forms of identity and no fixed address, risk of flight is high. On the other hand the reform has done little to reduce the overall use of prison. Chile's prison population rose from 35,000 in 2001 to 51,000 in 2008.

A more positive picture emerges from the Russian federation which saw a sustained fall in the prison population from 1998 to 2004 although it has started to rise again since. The fall in the prison population is due to three main factors. Most important has been the reform of the criminal procedure code (which entered into force in 2002) which provided for judicial control over investigations and prosecutions, the mandatory provision of defence counsel and the order of house arrest as an alternative to pre trial detention. Most significantly among its provisions was that the decision to place suspects in pre-trial detention became a matter for the courts rather than the prosecutor.

Second legislative changes have reduced the lengths of periods for pre trial detention and some prison sentences especially for women and juveniles. In addition, from 2003, time spent in custody pending trial has been deducted from the prison term. Third the Ministry of Justice has introduced some alternative sentences, such as community work and restriction on freedom of movement. There have also been periodic amnesties.

(ii) Improving the Operation of the System/Para-legal Advisory Service

In many low-income countries, high levels of pre trial detention reflect the failings of the criminal justice process. There may be insufficient prosecutors, courts, judges and defence lawyers. Courts may fail to grant bail, set the bond too high, grant unnecessary adjournments, fail to manage their case load or enforce time

limits. Sometimes there is nothing in the way of pre-trial hearings, incentives to encourage early guilty pleas or systems for taking time spent in custody into account when sentencing. Prisons may fail to alert the courts who is in prison, can be reluctant to release or turn away people who are not held lawfully, do not always facilitate the admission of legal advisers, and fail to open up to partnerships with external agencies.

A census in Chicago in 2006 found that out of 100,000 passing through jail in 2006, 15% were released after the case was dropped- they were either not guilty, there was no probable cause or they were the 'wrong defendant', 34% were released on cash bond and 18.6% ended up in a state prison. With better processes some of the 81,000 need not have been to prison at all.

In Malawi and now in Bangladesh a programme of deploying paralegals has been developed to help expedite cases through the system. Paralegals can screen cases in prisons, police and courts; filter the caseload; advise and assist those in conflict with the law; link all the actors and facilitate communication and co-ordination and refer the serious and complex case to the legal expert. Programmes have contributed to the elimination of unnecessary detention, speedy processing of cases, diversion of young offenders, reduction of backlogs, and reduction of the remand population.

Rigorously enforcing time limits on pre trial detention can also have a major impact. In Ecuador the prison population fell from 18000 to 12000 in part because greater enforcement of the rules that cases had to be completed within 6 months (12 months for more serious ones)

2. Reducing Prison Sentences

(i) *Sentencing Reform*

In a number of countries, laws have been enacted to restrain the imposition of prison sentences or the length of such sentences. Canada's criminal code for example says that "An offender should not be deprived of his liberty if less restrictive sanctions may be appropriate in the circumstances; and all available sanctions other than imprisonment [...] should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders". (Section 718.2 (d) and (e). Other jurisdictions have taken steps to ensure that sanctions are proportionate to the seriousness of the current offence, limiting the aggravating features of previous offending and/or convictions. Requiring courts to give reasons before imposing custody can also help to limit the imposition of prison.

A review by the Washington based Sentencing Project found that 17 states in the USA enacted sentencing and corrections reforms in 2008. Highlights from the report include Arizona which established a probation revocation and crime reduction performance incentive system to encourage counties to reduce commitments to prison; Kentucky which amended parole release policies and expanded home incarceration for persons convicted of certain offences, created a committee to study the state's penal code and made recommendations for reform, and rescinded certain requirements for persons seeking to have voting rights restored after the completion of sentence; and Mississippi which amended parole release policies, and expanded eligibility for compassionate release.

Some countries have sought to reduce the number of short prison sentences by abolishing sentences of under three or six months (Western Australia, Denmark) but evidence of impact is mixed.

(ii) *Alternative Sentences*

Many countries have developed a range of alternative sentencing dispositions that can be used instead of short prison sentences. As the Council of Europe put it in their Recommendation of 2000 on Community Sanctions and Measures Rec R(2000) 22: "the implementation of penal sanctions within the community rather than through a process of isolation from it may well offer in the long term better protection for society, including of course the safeguarding of the interests of victims".

Alternatives to prison are covered by international rules: the UN Standard Minimum Rules (the Tokyo Rules) and the Council of Europe Recommendation R (92) 16. The main requirements of these rules are:

- all aspects of the imposition of community sanctions and measures must be laid down in law when an offender sentenced to a community sanction or measure fails to carry out any condition or obligation the sentence shall not be automatically converted to a sentence of imprisonment;
- offenders shall have the right to appeal against decisions of the implementing authority;

- the privacy and dignity of offenders sentenced to a community sanction or measure should be respected at all times;
- existing social security rights shall not be jeopardized.

These rules cast doubt on the legitimacy of so called “creative sentencing” in which some American judges have imposed bespoke penalties on offenders which seek to provide a direct link with the offence. For example in Ohio, where a woman who had abandoned some kittens in a cold forest was sentenced to spend a night out side in the cold herself.

Further information about the UK experience will be given below. But alternatives are fairly widespread in richer and middle income countries.

Brazil introduced fast track oral hearings in special courts in 1995, which allowed for settlement of cases with community punishment where the term of imprisonment would have been one year or less. Initially take up was low because of lack of confidence by judges. Recent reports suggest a 400% increase in the use of alternatives since 2002 thanks to new laws on alternative sentencing such as Law 11,343 of 2006, which offers alternatives for drug users (but longer sentences for traffickers). Punishment for possession for personal use no longer includes prison but consists of a warning, community service or an educational programme of five months for a first offender or ten months for a repeat offender. Law 11,340 (*Lei Maria da Penha*) authorizes judges to impose programmes of re-education and rehabilitation on perpetrators of domestic violence.

Community service is organized at the state level but co-ordinated by a central agency CENAPA (*Central de Apoio e Acompanhamento a Penas e Medidas Alternativas*). In December 2007 there were as many offenders subject to community service as in prison – about 420,000 although reports suggest that 80,000 of those in prison could have been eligible for alternatives. There is variation between states with Rio de Janeiro and San Paolo making considerable use of alternatives, Parana and Minas Gerais less so. Lack of suitable staff (including *defensores*) and continuing lack of confidence on the part of judges. are the key problems which need addressing.

Other countries have developed alternatives – conditional sentences which are served at home. In Canada this is possible for prison sentences of up to two years. Suspension of prison sentences is often a possibility.

(iii) Penal Mediation

Penal Mediation, sometimes known as restorative justice, brings the victim and the offender together with a neutral third party in an interactive process to understand the crime and to develop a plan for responding to its impact. Non-governmental organizations and universities in Argentina, Mexico, Brazil, and Costa Rica developed pilot projects and pushed for enabling legislation during the 1990s. In 1998, the University of Buenos Aires Law School and the National Ministry of Justice established a pilot project, Proyecto RAC, which allowed either the victim or the offender to request mediation. After a criminal complaint is filed, the project staff assesses the conflict decides whether there is scope for mediation, conciliation or a *conferencia de conciliación con moderador* (CCM). Evidence is lacking about the effectiveness of the programme.

Colombia allows for penal conciliation. Article 38 of the *Codigo Procesal Penal* provides for the use of conciliation with adult offenders in cases such as simple assault and in property crimes with a value equal to less than 200 times the monthly minimum wage and where violence was not used.

In Chile reparative agreements are negotiated settlements between a victim and offender with approval from the presiding judge. The process allows both victim and offender to have a voice in the resolution of the crime, while meeting the victim’s need for reparation and requiring the offender to take responsibility for his/her actions. At the same time, the reparative agreement avoids the negative social and economic impact of incarceration for the offender and his or her family, thereby aiding reintegration. An agreement can include a payment to the victim, symbolic reparation through community service or gifts to local institutions, or both. In Chile, the reparative agreement was included in the *Nuevo Codigo Proceso Penal* and is used in some property crimes, fraud, or minor assaults

These processes have antecedents in indigenous traditions. Indigenous conciliators serve as judges or justices of the peace to help peacefully resolve conflicts so that social cohesion is not lost. Legislation in Colombia, Ecuador, Bolivia, Peru, and Guatemala recognizes the use of these indigenous practices in criminal matters. They have also been developed in some European jurisdictions such as Austria.

(iv) Drug Treatment

In many countries, prison populations can be heavily affected by policies towards drug use and trafficking. Much of the enormous growth in American prison numbers can be explained by the war on drugs with mandatory minimum sentences for several offences. Many countries in Asia have a zero tolerance approach to drug use as well as trafficking, resulting in long minimum prison sentences and in several countries the death penalty is mandatory for trafficking. Possession of certain quantities is deemed to signify trafficking. Reliable data is difficult to obtain for some countries such as China where in addition to prisons run by the ministry of justice, administrative detention and re-education through labour institutions have been established which include many drug users.²

Indonesian drug laws prescribe the death penalty for narcotics trafficking and up to 20 years in prison for marijuana offences. Simple possession results in prison terms of one to five years. In the Philippines, the law prescribes the death penalty for drug traffickers caught with at least 0.3 ounce of opium, morphine, heroin, cocaine, marijuana resin, or at least 17 ounces of marijuana. The Philippines has imposed a moratorium on the death penalty, but drug offenders are still punished harshly if caught – the minimum sentence is 12 years in prison for possession of 17 ounces of illegal drugs.

As in Europe women appear to be overrepresented among drug offenders in prison. Drug offenders constitute about 22% (14,847) of Japan's male prison population and 35% (1,410) of its female prison population.³

In some countries alongside a tough approach to trafficking, an approach based on rehabilitation and treatment has been introduced either within a prison setting or in other institutions. Thailand's prison population after a very rapid rise fell sharply between 2003 and 2007. This was in part due to the enforcement of a new law on the rehabilitation of drug addicts, which treats them as patients rather than criminals. According to the Ministry of Justice up to 20% of drug related offenders have been diverted from prison each year,⁴ but there have been questions raised about the type of treatment available with Human Rights Watch calling on the government to end punitive treatment of drug abusers.⁵ Forced counseling and military style drill are reportedly used in treatment settings.

3. Early Release

The third mechanism for tackling overcrowding relates to mechanisms for early release. Some countries have from time to time resorted to amnesties – Italy, South Africa and Algeria among them in recent years. Ecuador has introduced a one off programme of pardons (*indultos*) for which two categories of prisoner have been able to apply – those with terminal illnesses and also first time offenders convicted of drug trafficking of quantities less than two kilos. There are some criteria relating to the length of time served and behaviour but most of those who have applied have been approved.

Ecuador also introduced a policy of enabling prisoners to earn remission – *rebaja de penas* –. This is in the process of being implemented – 80 had been released when I visited at the end of last year. I attended a lively discussion last year between the Prisoners Committee in Prison 1 (Maximum security) and representatives from the Ministry of Justice. This focussed on how the new system would apply to the cases of current prisoners; and what impact disciplinary offences would have on the right to early release, which is to be based on merit.

Such systems are of course commonplace in many jurisdictions. Resorting too readily to early release

² See ICPS International Experience in Reform of Penal Management Systems
http://www.kcl.ac.uk/depsta/law/research/icps/downloads/International_Experience.pdf

³ <http://www.apcca.org/Pubs/26th/26th%20APCCA%20Conference%20Report.pdf>

⁴ Speech by Mr Wanchai Rouanavong at the Opening of the 9th ICPA Conference October 2007.

⁵ Press release 12 November 2008. <http://www.hrw.org/en/news/2008/11/12/thailand-new-anti-drug-campaign-risks-abuses>

can of course have a cost in terms of public confidence in the system and also in terms of the integrity and proportionality of the sentencing process. An innovative model has been developed in Venezuela which is in the process of establishing 25 Community Treatment Centres in which prisoners who have served half their sentence can pass the rest of their term. Prisoners, who must have behaved well in prison and been assessed as suitable, spend the night, weekend and holidays at the centre but during the day go out to work. The centres, which are in effect types of Open Prison contain opportunities for residents to undertake education and training and to participate in cultural and sporting activities.

Specific evaluations are lacking as yet but the initiative has promise as a way of reducing the most negative aspects of imprisonment and improving reintegration and the reduction of re-offending.

III. CONCLUSIONS

ICPS experience is that in any discussion of reducing overcrowding, it is necessary to look at alternatives to prison in its widest context rather than in the narrow sense of measures which courts can impose instead of pre-trial detention or short custodial sentences. A report we undertook about the feasibility of alternatives in Afghanistan, where there is a sharply rising prison population concluded last year that the framework for implementing alternatives needs to consider:

- limiting the circumstances under which suspects can be arrested and held in pre-trial detention;
- reducing the length of time suspects are held in pre-trial detention;
- ensuring proper, affordable legal or paralegal representation is available to all defendants;
- finding ways of reducing delay in the criminal process;
- ensuring prisoners are released no later than their due date;
- introducing measures to release from prison during their sentence those lesser offenders whose imprisonment is related to the failure of a relative to produce the money for recompense to the victim;
- finding responses to health or welfare problems outside the criminal justice process;
- developing a functioning early release system for more serious offenders;
- encouraging the use of the traditional system as an option for cases that do not reach an agreed threshold of seriousness;
- mobilizing a civil society movement concerned to improve the workings of the penal system;
- putting in place special measures for women and juveniles.

We had serious reservations about whether the country was at a stage where formal alternatives such as community service or community based supervision could be implemented or be cost-effective.

The kind of measures more likely to succeed are contained in the 10 point plan at Annex A, which I helped to draft for an organization we work closely with called Penal Reform International.

A. Effective Countermeasures against Prison Overcrowding practiced in the UK

Last Friday the prison population in England and Wales stood at 82,940 some 40,000 higher than in 1992. It is perhaps not the obvious place to look for effective countermeasures against prison overcrowding. The government plans to spend £2.3 billion on capital costs for 10,500 new prison places by 2014. The Conservative party have published plans to create 5,000 places over and above these. As well as a harsh political and media climate, the policy in England and Wales may reflect weaker systems of prosecutorial diversion; lack of judicial oversight; and shortages of treatment provision for juveniles, drug addicts and mentally ill. There are however things to learn from the UK not least from the two smaller jurisdictions of Scotland and Northern Ireland where things are taking a different turn.

In England and Wales in 2007, of the 312,258 offenders sentenced for indictable or more serious offences

- 16% were fined;
- 34% were given a community sentence;
- 33% were given prison sentences of which 8% were suspended; and
- 18% were dealt with in another way.⁵

⁵ Ministry of Justice (2008) *Sentencing Statistics, 2007, England and Wales*. London: MoJ.

As far as community sentences are concerned, the key legislative basis is the Criminal Justice Act 2003, which building on a hundred year tradition of community based supervision of offenders by the probation service, introduced a new community order which courts can impose in place of a short prison sentence. The order places one or more requirements on an offender such as undertaking unpaid work for the benefit of the community (community payback); house arrest monitored by way of electronic surveillance; drug treatment enforced by regular testing and reporting back to courts on progress.

Some experts question whether these sentences act to reduce prison numbers. Some say that they produce net widening and displace fines and other alternative sanctions rather than prisons; and that in the event of failure to comply offenders can be returned to court and sent to prison despite the original offence being unlikely to lead to imprisonment. Nonetheless England and Wales has seen a fall in the use of short prison sentences. Experience suggests that if the orders are sensibly implemented and efforts are made to inform both judges and the public about what they involve, then they can have a positive impact.

It is important to consider the context in the UK. Despite the Council of Europe Recommendation discussed earlier which proposed decriminalization, it has recently emerged that since 1997 we have created more than a thousand new imprisonable offences - not just criminal offences but the type of criminal offences for which a prison sentence can be imposed.

On the other hand we have a range of alternatives to prosecution. These have long been available for juveniles and reprimands and final warnings are widely used with under 18s. The law allows "conditional cautions" for adults, which means that in minor cases if offenders agree to make some reparation or undertake some rehabilitation, they will not be prosecuted.

Moving on to the range of sentencing options, as you will know in England judges and magistrates have a wide discretion about the sentence in a particular case. There are some mandatory sentencing arrangements e.g. burglars convicted for a third time must receive a prison sentence of at least three years. But normally, parliament sets a maximum sentence for each kind of crime.

At the bottom end of the tariff are fines and discharges are widely used at the lower end of offence seriousness.

When a case is deemed serious enough to merit what is called a community penalty, courts can impose a community order, which contain elements of Rehabilitation or treatment, community work, curfew and Surveillance.

Community orders are run by the probation service and have in recent years the content of programmes has drawn heavily on psychological research about what works in reducing offending. We have recently introduced a drug rehabilitation requirement which requires offenders to come off drugs and undergo tests whose results are reported to the courts.

Community work is also supervised in England by the probation service but the beneficiaries of the eight million hours of unpaid work done by offenders each year are schools, hospitals, charities, and environmental projects. In some low income countries community work is organized by the NGO sector.

Electronic surveillance involves a tag or bracelet fitted to an offender's ankle. Currently the surveillance is used to ensure that an offender stays at home during the hours of a curfew but soon it is expected that the technology will be used to monitor the whereabouts of an offender throughout the day. So-called tagging is used at a much higher rate in the UK than in other European countries- more than 20 times as much as in France and five times as much as the Netherlands.

In addition there are options for courts to remove rights (driving licences, attending football games), order compensation to victims and suspend sentences. There is also growing interest in restorative justice in which offenders are encouraged to accept responsibility for what they have done and apologise and make good to the victim.

With all of these alternatives available, you might conclude that the courts around the world cannot be making much use of them given the rising use of prison. In fact in 2007 the most common disposal for indictable offences was community sentences accounting for 33.7 per cent of all sentences imposed in that year. This is an increase of 5.3 percentage points since 1997. The use of suspended sentences has also increased particularly since the introduction of the new suspended sentence order in 2005; this sentence accounted for 8.7 per cent of sentences in 2007, up from 0.7 per cent of sentences in 2004. The use of fines as a disposal for indictable offences has steadily decreased from 27.6 per cent in 1997 to 15.8 per cent in 2007. The immediate custody rate for indictable offences has remained relatively stable over the past decade rising slightly from 22.5 per cent in 1997 to 23.7 per cent in 2007. This phenomenon is called net widening. Community sentences have not replaced custody but replaced other alternatives to prison particularly the fine.

The government became concerned about these developments and asked a businessman Patrick Carter to undertake a review of what we now call the correctional services. He concluded that tougher sentences have a limited impact on crime - he estimated that the increase in prison accounted for 5% of the 30% fall in crime since 1997. He recommended a strategy of diverting low risk offenders out of the courts, income related fines to boost their use, demanding community sentences, more surveillance of persistent offenders, with prison reserved for serious, dangerous and highly persistent offenders.

He also recommended that outcomes would be improved by a new National Offender Management Service bringing together the prison and probation services in one organization. The government have accepted his findings. Separately from the Carter review, a new Criminal Justice Act was passed with new elements. These include a Sentencing Guidelines Council to produce comprehensive guidelines on the expected sentence for offences. One new generic community sentence whose components will be decided by the courts plus new sentences of Custody Plus (short prison plus community supervision), Custody minus (a suspended sentence) and intermittent or weekend prison.

The experience of the law has not been altogether happy. The plan to impose a ceiling of 80,000 on the prison population was never attempted, and the prison numbers rose beyond capacity, with hundreds placed in police cells. An emergency measure had to be introduced too allow certain offenders to be released fourteen days before their expected date in order. The custody plus sentence was never implemented and the intermittent custody option did not get beyond the pilot phase. Lord Carter was invited to do a further inquiry which controversially recommended more prison places, mostly in large Titan prisons. The government initially accepted this but whether because of the outcry from professionals that such large prisons are not sensible, or whether because of the pressure on finances, new places are to be built but in smaller (1500 place) units – still bigger than anything currently in operation.

Carter also suggested a Sentencing Commission should be introduced to make the demand for prison places more predictable. The legislation is currently in the UK Parliament and many judges are unhappy that they will be faced with prescriptive guidelines.

In Scotland, a different kind of Commission was set up last year to consider the future direction of policy. The government there want to reduce Scotland's prison population from 8,000 to 6,000 but have not yet produced a convincing road map of how to do it.

I want to finish by suggesting some lessons from the UK experience. First is the obvious point about targeting community punishment so that it is used as an alternative to prison and not a lower tariff option.

Second, there is a need to work hard to ensure that as many offenders as possible comply with community sentences. This is not simply a question of tougher and tougher enforcement. A growing number of offenders are going to jail for failing to comply with community sentences. This is a particularly troubling trend if the original offence is not worthy of prison. Close working relationships with courts are crucial, as are efforts to involve members of the local community in the supervision of offenders.

Third, our experience of effectiveness is that psychological programmes are not as effective as they promised to be. Basic and vocational skills, reasonably remunerated work, stable accommodation and

supportive relationships which encourage law abiding behaviour are just as important. Supervision and assistance after release from prison may be particularly important and there is growing evidence about the possibilities of restorative justice.

Fourth, the answers to crime lie well beyond the criminal justice system. Supporting parents, helping youngsters at risk stay in school, preventing and treating drug misuse, and reducing the availability of firearms are policy measures more likely to impact on crime in the long term than changes to sentencing. In England we have 83000 prisoners about half of the men and two thirds of the women have used hard drugs in the period before imprisonment. Yet we have just over 2000 residential drug treatment beds in the whole country. Developing alternative infrastructure outside prison must be a priority for these and other vulnerable groups who we deal with in our prisons. For example in Scandinavia there tends to be much more in the way of drug treatment and mental health provision in the community than in the UK.

Finally the politics of crime and punishment is very important. The electorate are not as punitive as everybody seems to think. Asked a simple question, a majority will *always* tell pollsters that sentencing is too soft, whatever the objective sentencing levels are. This is largely because the public systematically underestimate the severity of sentencing. When respondents are properly informed about sentencing levels, and given detailed information about cases, a different picture emerges. Work undertaken for Rethinking Crime and Punishment (www.rethinking.org.uk) has shown that when given options, the public do not rank prison highly as a way of dealing with crime. Most think that offenders come out of prison worse than they go in, only two per cent would choose to spend a notional ten million pounds on prison places and when asked how to deal with prison overcrowding, building more prisons is the least popular option, with the support of only a quarter of people. Over half think residential drug treatment and tougher community punishments are the way forward. Only one in ten people think putting more offenders in prison would do most to reduce crime in Britain. Better parenting, more police, better school discipline and more constructive activities for young people all score much more highly. This suggests that public punitiveness is largely a myth and public confidence need not stand in the way of a bolder strategy of replacing imprisonment with more constructive alternatives. Appendix A contains a plan of how this can be done.

APPENDIX A

TEN POINT PLAN

1. Inform Public Opinion

Increasing use of imprisonment is often blamed on public demand for punishment. Yet the public are often misinformed about how the system operates and will support effective non-custodial measures. Keeping the public better informed, involving them more in the criminal justice process and encouraging a more rational and less emotive debate about crime and punishment are all-important tasks. There is a need to alter the perception of prison in the public mind so that rather than seeing it as the answer to crime, people come to view it as playing a very limited and specialist role in respect only of the most dangerous and incorrigible offenders.

2. Look at the Justice System as a Whole

A sentence of imprisonment is the result of a long chain of decisions involving police, prosecutors, courts and corrections. Other agencies such as probation, health and welfare also play a key role. Co-ordinating and streamlining the work of agencies at a practical level needs to be a priority so that cases are not delayed unnecessarily. At a policy level the various ministries involved need to work closely together in order to ensure that the aim of using imprisonment as a last resort is understood by everyone involved in the system. Some former colonial systems just do not work and result in large prison populations. Changes to these systems, including revision of out-dated and alien penal and procedural codes and the decriminalization of certain offences would also result in fewer offences being committed, leading to less sanctions and so, fewer prisoners.

3. Increase Space

Building new capacity can be necessary when prisons are dilapidated and crumbling; but there is no evidence that building additional prison places as a long term strategy for reducing overcrowding can succeed. Prisons are expensive to build and maintain. There is no evidence either that private finance initiatives provide a cost effective option. Better use can be made of existing structures, areas of the prison can be reclassified, more time can be allowed for prisoners to spend outside the cell, classification of prisoners means that those who require less supervision can be transferred to more open prison establishments.

4. Divert Minor Cases away from the Criminal Justice System

Many cases can be effectively dealt with outside the formal criminal justice system. Informal and traditional systems may be much more effective, provided that they respect the requirements of human rights. Within the formal system, warnings, cautions or other informal responses by the police or prosecutor may be appropriate for most minor offences. In more serious cases where offenders are prepared to offer compensation to victims or otherwise make amends to the community, prosecution may not be in the public interest. Systems should be in place for diverting particular groups of offenders into more appropriate forums.

5. Reduce Pre-trial Detention

In some countries as much as three quarters of the prison population may be awaiting trial. People can spend months or years on remand only to find that their case is dropped or that they are acquitted. There is a need for: systems to maximize the use of unconditional or conditional release such as bail programmes; strictly enforced time limits; efforts to speed up the process; and regular reviews of remand cases. These measures can help ensure that pre trial detention is used as a last resort and for the shortest possible time.

6. Develop Constructive Alternatives to Custodial Sentences

Courts need access to community-based sanctions as an alternative to short prison sentences as well as the ability to suspend sentences. The Zimbabwe model of community service enables offenders to restore the harm they have done by unpaid work for the benefit of local people rather than wasting scarce resources in prison. These can be combined with education and rehabilitation programmes designed to equip offenders to make a positive contribution. Ordinary members of the public should be encouraged to play a role in community sentences.

7. Reduce Sentence Lengths and ensure Consistent Sentencing Practice

Guidance to sentencers should be produced which tackles inconsistent sentencing practice and takes account of the costs of different sentences and their relative effectiveness. Many systems are characterised by disparities between different courts and different judges. Efforts should be made to achieve consistency around the norm of the less punitive courts. Minimum sentences should be avoided. Substantial use should be made of supervised or conditional release particularly for non-violent offenders. Where people have been imprisoned during political conflict, amnesties or early release should be considered as part of the process of achieving reconciliation.

8. Develop Special Arrangements for Youth Offenders that Keep them Out

The number of juveniles sent to prison should be kept to an absolute minimum in line with the UN Convention on the Rights of the Child. Juvenile justice systems need to comply with the Convention and consider the case for raising the minimum age for the adjudication of children, introducing alternatives to formal adjudication, especially restorative justice (as above point 2), and the adequacy of the range of alternatives to custodial sentences.

9. Treat rather than Punish Drug Addicts, Mentally Disordered and Terminally Ill Offenders

Courts should be able to order treatment for drug misusing offenders, whose crimes are often committed to feed their addiction. The health care and social welfare system should develop the necessary programmes for non-violent offenders. Hospitals or asylums are the right settings for mentally disordered people who need to be in an institution. The village is the humane place in which to allow the terminally ill to pass away. Mechanisms at police stations and at court should divert such offenders out of the criminal justice system.

10. Ensure the System is Fair to All

Imprisonment impacts disproportionately on the poor, the dispossessed and minorities who face discrimination outside. Monitoring should take place at every stage of the criminal justice system to ensure that discrimination does not take place and that the efforts to reduce imprisonment suggested in this plan are made in respect of all members of the community.