Input to OHCHR report on the causes and human rights implications of over-incarceration and overcrowding, and ways to remedy such situations, including alternatives to detention and other relevant good practices or experiences.

Following the participation of the Open Society Justice Initiative in the half day panel on the Rights of Persons Deprived of Liberty at the Human Rights Council in September 2014 we are pleased to build on the discussions during the panel and contribute to this report to be presented at the Human Rights Council in September 2015.

OVERVIEW

In assessing the causes and human rights implications of over-incarceration and overcrowding we see three key areas to take into consideration:

- the **NATURE, SCALE and CONSEQUENCES** of over-incarceration including information on who is in detention and the consequences for detainees, their communities and the justice system;
- the **POLICIES and PRACTICE** that lead to the overuse of detention; and
- a range of practical options to ensure accurate information and systemic **REFORM**.

Our inputs will focus on pretrial detention for three main reasons:

- the fact that in many countries an excessive and arbitrary recourse to pretrial detention contributes significantly to over-incarceration and to overcrowding of detention facilities;
- the importance of tackling the entry point to the system as decisions on pretrial detention influence all further steps along the criminal justice chain; and
- the significant focus that the Open Society Justice Initiative has placed on pretrial justice over the last six years including a Global Campaign for Pretrial Justice that involved research, advocacy and practical interventions and led to a number of legislative reforms. Reports include:
    - Presumption of Guilt The Global Overuse of Pretrial Detention;
    - A series of publications on pretrial detention and torture, health, and the socioeconomic impacts of detention; and
    - Country case studies and pilot projects in Sierra Leone, Nigeria, Mexico and Malawi.

Our inputs below draw on this body research. They highlight findings from the *Presumption of Guilt*, show illustrative graphics from the publication and provide sources for further information.

THE NATURE, SCALE AND CONSEQUENCES OF AN EXCESSIVE RECOURSE TO PRETRIAL DETENTION

The Scope of Pretrial Detention

At this moment, an estimated 3.3 million people are in pretrial detention worldwide. This is according to information provided by national prison systems – the real figure is likely to be higher, in particular as official figures do not usually include detainees held in police custody.

The overuse of pretrial detention contributes significantly to the numbers of people detained and to overcrowding. The *Presumption of Guilt* examines the scope of pretrial detention by looking at pretrial detainees as a proportion of the total prison population, the rate of pretrial detention per 100,000 and the length of time spent in pretrial detention.

The figures show that, depending on the region, on average, 18 – 40% of detainees are in pretrial detention. In some countries, as shown below, the figure is considerably higher reaching up to 89% in Libya.

TABLE 6:

Countries with the highest number of pretrial detainees as a proportion of the total prison population, 2012*

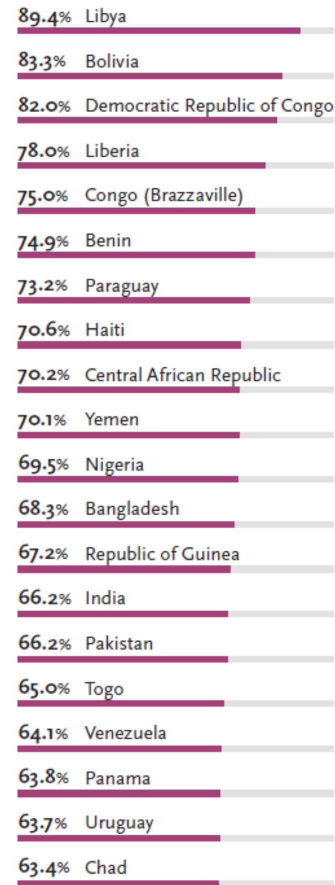


TABLE 1:

Pretrial detainees as a proportion of the total prison population, by region, 2012

Europe	Oceania	Americas	World	Africa	Asia
18.8%	22.3%	27.9%	32.0%	34.7%	40.6%

Sources: World Prison Brief, International Centre for Prison Studies.

The rate of pretrial detention again varies considerably per region from 28 people per 100,000 in Oceania to 107 per 100,000 in the Americas.

TABLE 8:

Number of pretrial detainees per 100,000 of the general population, by region, 2012

Oceania	Africa	Europe	Asia	World	Americas
28.0	33.7	38.6	43.1	50.4	107.4

Sources: World Prison Brief, International Centre for Prison Studies.

And the length of time spent in pretrial detention also contributes both to over-incarceration and overcrowding where suspects are held for long periods of time in under-resourced facilities. The average in the Council of Europe is 146 days of 4.8 months. In Nigeria the average is reported to be 3.7 years as dramatically shown in the graphic below:

In Nigeria, the average length of pretrial detention nationally has been reported at 3.7 years.[54]

In 2010, half of Nigeria's pretrial detainees had been detained for between 5 and 17 years.[55]

A detailed analysis with a breakdown by region can be found from pages 11-32 of *Presumption of Guilt*.

Who is in Pretrial Detention

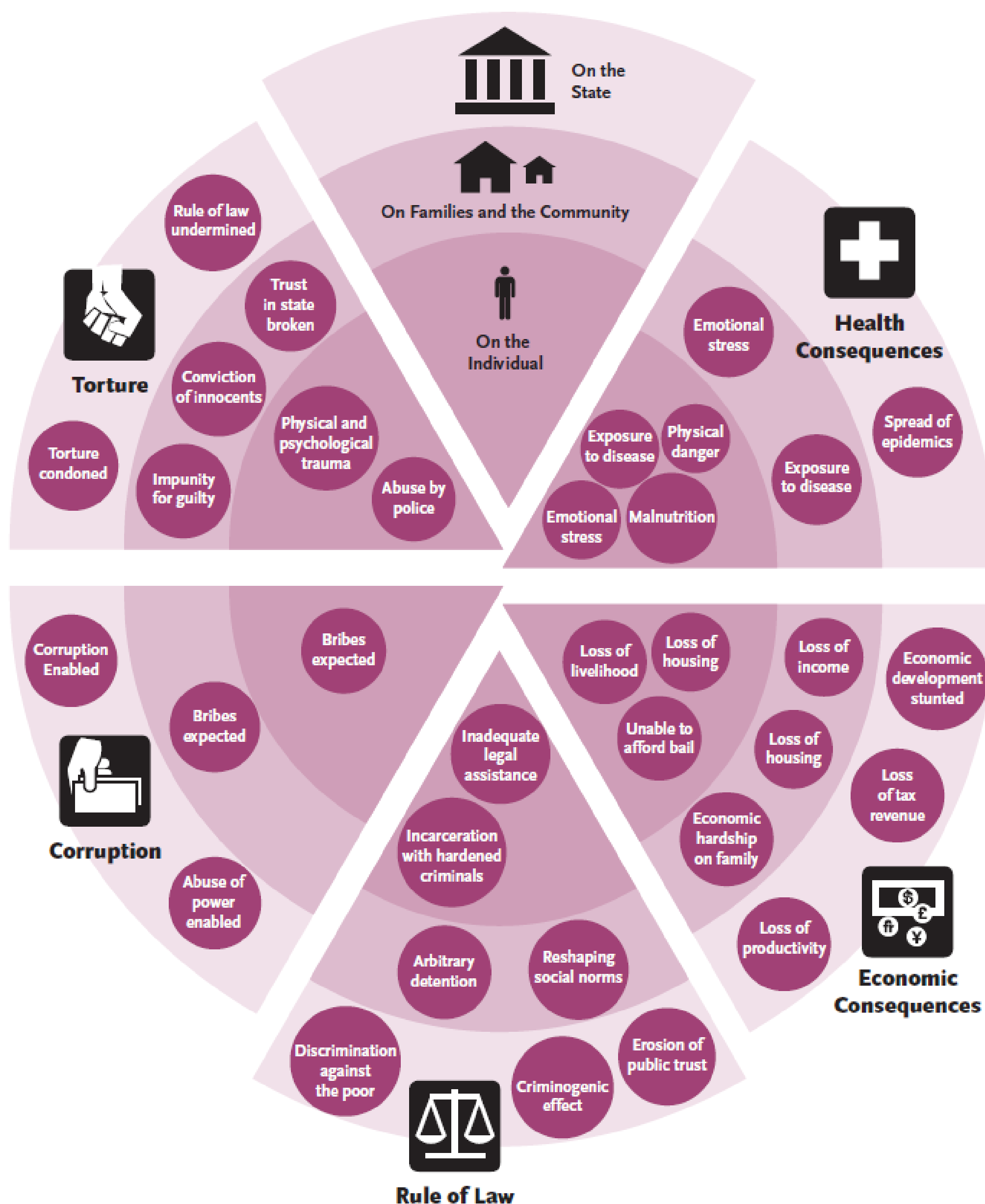
The *Presumption of Guilt* seeks to explain why certain groups and individuals are overrepresented amongst the world's pretrial detainees. Predominantly pretrial detainees are poor and end up in pretrial detention not because they are likely to abscond, reoffend or threaten witnesses, but simply because they are poor: they are unable to comply with onerous bail conditions; afford money bail; are unlikely to be able to pay a lawyer; and can't afford to pay bribes.

In some places discrimination is a significant factor. For example in Nepal the work of NGOs found that in some areas 65 percent of detainees were Dalits, even though Dalits only constitute around 13 percent of the overall population.

Further details related to foreigners, persons with disabilities and persons accused of minor offences can be found from pages 33-56 of the report.

The Consequences of Excessive Pretrial Detention

Overcrowding is a clear and visible consequence of an excessive use of pretrial detention. For example in Bangladesh a prison designed to hold 200 detainees was housing 1700 detainees – making the possibility to uphold UN minimum standards impossible. But the consequences reach much further and impact individuals, families and the state. The Presumption of Guilt explores the consequences in detail, as summarized in the graphic on the next page.



THE POLICIES AND PRACTICE THAT LEAD TO EXCESSIVE OR ARBITRARY PRETRIAL DETENTION

International standards require that states only use pretrial detention in limited circumstances, when reasonable grounds exist to believe that the arrestee has been involved in the commission of the alleged offence, and there is a demonstrable risk that the person concerned will abscond, interfere with the course of justice, or commit a serious offence. The reality is that states use pretrial detention excessively rather than as the last resort it is intended to be.

The *Presumption of Guilt* explores the myriad factors that drive the global overuse of pretrial detention and the politics and public pressure that play a role. These include:

- Imprecise laws that lead to arbitrary application;
- Restrictive laws that promote pretrial detention;
- Practice that flouts time limits on detention;
- Police and prosecutorial influence;
- Corruption;
- Procedural factors that inadvertently favor pretrial detention;
- Inefficiencies and lack of coordination between criminal justice agencies;
- Limited resources directed at the pretrial phase of the criminal justice system;
- Inadequate access to legal assistance; and
- Public pressure and populist policy responses, coupled with a lack of political will;

For a detailed analysis see pages 95-116.

PROPOSALS FOR REFORM

There are a number of different approaches to ensure a more rational and rights based use of pretrial detention. The Presumption of Guilt outlines six key areas as well as some of the political conditions that can help support reforms:

Laws and Policies to Reduce Pretrial Detention – these might include laws that provide judicial officers with wide discretion to release defendants, laws that prohibit the use of pretrial detention if the potential sentence excludes imprisonment and laws that require mandatory review of bail decisions. Recently a number of regional guidelines and recommendations have been adopted that aim to translate broad international standards into practical and regional specific guidance. These include:

- 2014 ACHPR Guidelines on the Use and Conditions of Arrest, Police Custody and Pretrial Detention in Africa; and
- 2014 Report on the Use of Pretrial Detention in the Americas.

The Role of Data in Assessing the Problem – As highlighted in the first section a variety of information is needed in order to build a complete picture of the use of pretrial detention. Frequently reform programs have relied on one indicator – or on partial information – resulting in misguided interventions. The Open Society Justice Initiative, together with partners in Latin America, has identified a basket of indicators that can help track and assess the use of pretrial detention. For details see attached document on Measuring Pretrial Justice.

Coordination between Criminal Justice Agencies – In many countries, a lack of coordination and cooperation between the various criminal justice agencies contributes to the use and duration of pretrial detention. When criminal justice agencies work together to identify bottlenecks and ways in which they can be addressed significant change can be achieved with minimal resources. Successful

programs have, for example, achieved results in Uganda under the Chain Link Initiative and through Malawi's Court User Committees.

Reducing the Number of People who Come into Conflict with the Law – In many countries significant results have been achieved through well thought out crime prevention programs and initiatives that target recidivism. Other approaches include decriminalization, especially for outdated offences such as loitering or being a 'rogue and vagabond' and a variety of initiatives to divert people away from the criminal justice system.

The Role of Lawyers and Paralegals – Examples from across the globe show that early intervention by lawyers and paralegals can reduce the use of pretrial detention. With access to legal assistance suspects are more likely to successfully apply for bail or be released if there are no credible charges against them. The report details examples from the Justice Initiatives pilot projects – more information can also be found in these reports on Sierra Leone and Nigeria.

Government Programs that Reduce Pretrial Detention – A number of different programs implemented by criminal justice agencies have effectively reduced the use of pretrial detention. These include programs to introduce the use of police bail, pretrial service programs, camp courts and judicial review initiatives.

Details and examples of all of these programs can be found on pages 130-173 of the report.

CONCLUSION

The above provides a very brief outline of the detailed information in *The Presumption of Guilt* and highlights what is a global, yet overlooked human rights crisis. In addition to the six areas identified for reform, we recommend a number of steps that could be taken at a UN level to build on the conclusions of the Panel on the Rights of Persons Deprived of Liberty:

- The UN Special Procedures and Treaty Bodies should address systemic issues related to the over-use of detention and where relevant conduct joint missions and reports. As no single mandate holder covers issues related to detention this information should be regularly compiled (for example on a bi-annual basis) from the different reports. The findings and recommendations should then be discussed in a dedicated session with all relevant mandate holders.
- A number of new international and regional standards have been adopted over the last years. Steps should be taken to ensure the implementation of these standards and to include them in country programs and field operations. For further details see an attached document that details 10 steps for the implementation of standards.
- Particular emphasis should be placed on efforts to support the gathering and assessment of accurate statistics. This should include a basket of indicators as well as information that disaggregates information about who is in detention.