

## Informal contribution to the report of OHCHR on the human rights implications of over-incarceration and overcrowding

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This paper covers:

1. Human rights impact of overcrowding and the overuse of imprisonment
2. Main causes of overcrowding
3. Solutions and recommendations

### 1. Human rights impact of overcrowding and the overuse of imprisonment

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The overuse of imprisonment constitutes a challenge for penal policy, but also has a significant impact on human rights. The high numbers and increase of prison populations is one of the major underlying causes of overcrowding, resulting in conditions that infringe upon human rights, and sometimes even amount to ill-treatment and torture.

More than 10.2 million men, women and children are in prison around the world every day.<sup>1</sup> Overcrowding is a global problem. Data suggests that the number of prisoners exceeds official prison capacity in at least 114 countries. 24 national prison systems hold more than double their capacity, with a further 27 countries holding between 150 and 200 per cent more.<sup>2</sup> For example the UN Working Group on Arbitrary Detention denounced the severe overcrowding in El Salvador prisons which were at more than 313 per cent capacity when they visited in 2013.<sup>3</sup>

The human rights impact of the overuse of imprisonment and the corresponding overcrowded conditions are vast. As the European Committee to Prevent Torture (CPT) has stated,<sup>4</sup>

*'[an] overcrowded prison entails cramped and unhygienic accommodation; a constant lack of privacy (even when performing such basic tasks as using a sanitary facility); reduced out-of-cell activities, due to demand outstripping the staff and facilities available; overburdened health-care services; increased tension and hence more violence between prisoners and between prisoners and staff.'*

In pre-trial detention, human rights concerns include the undermining of a fair trial and of the presumption of innocence, as well as the risk of a confession or statement being coerced by torture or ill-treatment. These concerns are exacerbated without early access to legal counsel, a risk increased by the fact of detention. In Argentina for example the Working Group on Arbitrary Detention noted that the overcrowded and poor conditions 'could, and in fact do, restrict the right of persons deprived of their liberty to a proper defence during their trial.'<sup>5</sup>

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<sup>1</sup> International Centre for Prison Studies, see

[www.prisonstudies.org/sites/prisonstudies.org/files/resources/downloads/wppl\\_10.pdf](http://www.prisonstudies.org/sites/prisonstudies.org/files/resources/downloads/wppl_10.pdf)

<sup>2</sup> International Centre for Prison Studies, see [www.prisonstudies.org/highest-to-lowest/occupancy-level?field\\_region\\_taxonomy\\_tid=All](http://www.prisonstudies.org/highest-to-lowest/occupancy-level?field_region_taxonomy_tid=All).

<sup>3</sup> UN Working Group on Arbitrary Detention, Mission to El Salvador, A/HRC/22/44/Add.2, 11 January 2013, Summary

<sup>4</sup> CPT Standards: Extract from the 7th General Report [CPT/Inf (97) 10], Para. 13.

<sup>5</sup> UN Working Group on Arbitrary Detention, Mission to Argentina, E/CN.4/2004/3/Add.3 23 December 2003, Para 62.

The right to liberty and the right to dignity may be infringed by unnecessary and excessive use of imprisonment, for both pre-trial detention and prison sentences. As imprisonment disproportionately affects poor and marginalised groups, including racial and ethnic minorities, there is also a concern of discrimination in the deprivation of liberty.

Due to prison conditions, the common lack of adequate healthcare in detention and the higher risk of infection with communicable diseases imprisonment also has a considerable, if not irreversible, impact on the right to health. For instance the Working Group on Arbitrary Detention found that in Morocco overcrowding ‘inevitably leads to serious violations, such as denial of or insufficient access to medical care, nutrition, sanitation, security and rehabilitation services’<sup>6</sup>; and in Georgia found cases of overcrowding ‘that could adversely affect the health of detainees’.<sup>7</sup>

In overcrowded prisons it is also more likely that corrupt prison officers extort money from prisoners in exchange for access to rights and services and that crime flourishes within prison walls.<sup>8</sup> The Office of the High Commissioner for Human Rights in Tunisia reported that overcrowding was one of the main issues for the prison system, and quoted a released prisoner who explained the corrupt practices: *‘If you have money you get everything; you have to bribe the prison’s agents to shower and to see the doctor. You give them money or cigarettes. There are people who had Tuberculosis and could not see the doctor until the illness had advanced to a late stage. We beg them to shower and during the summer the situation gets much more difficult.’*<sup>9</sup>

The Subcommittee for Prevention of Torture has noted that ‘[W]here the general conditions of detention fall below minimum acceptable standards, it is more likely that corrupt prison officers may extort money from inmates with financial means in order for those detainees to have access to certain privileges, services or benefits’, and have encountered ‘situations in which the few who can pay are able to have a place in less overcrowded or better equipped cells’.<sup>10</sup> The Working Group on Arbitrary Detention found in Armenia that ‘[O]vercrowding seems to facilitate corruption in prison in several ways, including payment for moving to less overpopulated cells.’<sup>11</sup>

Moreover, the right to personal safety and security is frequently violated, as overcrowding increases the risk of violence, prisoner protests and other disturbances. Suicides also tend to increase as a result of overcrowding.

In its 2014 report on ‘World crime trends and emerging issues and responses in the field of crime prevention and criminal justice’ UNODC noted that the ‘mortality rate in prison settings (which includes both deaths from natural causes and those resulting from external causes) tends to be higher than the rate for the general population’, including homicide and suicide. In the seven countries in the Americas for which data was available, for example, the homicide rate among prisoners (56.7 per 100,000 prisoners) was three times higher than the homicide rate for the general population (on average 19.1 per 100,000 population).<sup>12</sup>

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<sup>6</sup> UN Working Group on Arbitrary Detention, Mission to Morocco, A/HRC/27/48/Add.5, 4 August 2014, Para 49.

<sup>7</sup> UN Working Group on Arbitrary Detention, Mission to Georgia, A/HRC/19/57/Add.2, 27 January 2012, Para 95; see also Mission to Mauritania, A/HRC/10/21/Add.2, 21 November 2008, Para 64.

<sup>8</sup> See for example: ‘Huge profits on offer in El Salvador prison economy’, *InSightCrime*, 7 January 2014, <http://www.insightcrime.org/news-briefs/huge-profits-on-offer-in-el-salvadorprison-economy>

<sup>9</sup> OHCHR, ‘Prisons in Tunisia: International Standards versus Reality’, April 2014, available in Arabic at <http://www.ohchr.org/EN/NewsEvents/Pages/ReportsOnStateOfPrisonsInTunisia.aspx>

<sup>10</sup> Annual Report of the Subcommittee for Prevention of Torture, 20 March 2014, UN Doc. CAT/C/52/2, Paras 84 and 97.

<sup>11</sup> UN Working Group on Arbitrary Detention, Mission to Armenia, A/HRC/16/47/Add.3, 17 February 2011, Para 99.

<sup>12</sup> Commission on Crime Prevention and Criminal Justice Twenty-third session, World crime trends and emerging issues and responses in the field of crime prevention and criminal justice, Note by the Secretariat, 12 February 2014, UN-Doc. E/CN.15/2014/5, para. 36.

Suicide among prisoners was established as frequent, accounting for over 13 per cent of all deaths in prison in Europe, likely influenced by a number of stress factors 'including overcrowding, length of pre-trial detention, harshness of treatment, etc.'<sup>13</sup>

The Working Group on Arbitrary Detention has reported that '[O]vercrowding has led to inmate unrest and a rising number of riots and killings in prisons.'<sup>14</sup> The global economic crisis appears to have had a deleterious impact on prison conditions, resulting in reduced staffing and inadequately maintained infrastructure. For example the UK government is looking to reduce substantially the amount spent on prisons so that they are 'spartan but humane' and the reduced staffing has led to increases in suicides, self-harm and assaults.<sup>15</sup>

The lives of both prisoners and staff are put at risk in overcrowded facilities, for instance as described by the Inter-American Commission on Human Rights on the Situation of Persons Deprived of Liberty:

*'Overcrowding produces constant friction among inmates and increases the levels of violence in the prisons; it makes it difficult for inmates to have a minimum of privacy; it reduces space for access to showers, bathrooms, the yard, etc.; it paves the way for the spread of disease; it creates an environment in which health and hygiene conditions are deplorable; it is a risk factor for fires and other emergencies; it makes it difficult to classify inmates by categories, and it produces serious problems in the management of medical services and the exercise of security arrangements. It also breeds systems of corruption in which prisoners have to pay for space and access to basic resources.'*<sup>16</sup>

Other rights of prisoners are impacted on by overcrowding, as noted by the Special Rapporteur on Torture, Juan Méndez, such as opportunities for visits, exercise, and work.<sup>17</sup>

With regard to drug policies UN bodies such as UNAIDS have highlighted the harmful impacts of criminalisation upon the realisation of fundamental human rights.<sup>18</sup>

*For further information on the human rights impact of the overuse of imprisonment and overcrowding see PRI's Submission to the Human Rights Council on this subject (August 2013).*

## **2. Main causes of overcrowding**

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In the majority of countries around the world the prison population is rising. This is driven by 'tough on crime' policies and the misperception that prison sentences are the only sanction available, while non-custodial alternatives are mistakenly perceived as 'soft option'. Misconceptions also prevail about which measures are effective and appropriate in preventing crime and ensuring public safety.

As a consequence international standards and norms addressing criminal justice, including the UN Tokyo Rules<sup>19</sup> and the UN Bangkok Rules<sup>20</sup>, are not implemented properly.

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<sup>13</sup> Twelfth United Nations Congress on Crime Prevention and Criminal Justice, Report of the Secretary-General, State of Crime and Criminal Justice Worldwide, 12 December 2014, UN-Doc. A/CONF.222/4, para. 60.

<sup>14</sup> UN Working Group on Arbitrary Detention, Mission to Brazil, A/HRC/27/48/Add.3, 30 June 2014, para 94.

<sup>15</sup> Penal Reform International, Global Prison Trends 2015.

<sup>16</sup> Report of the Inter-American Commission on Human Rights on the Situation of Persons Deprived of Liberty in Honduras, 18 March 2013, Doc: OEA/Ser.L/V/II.147, Paragraph 66.

<sup>17</sup> Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, Addendum Follow up report: Missions to the Republic of Tajikistan and Tunisia, A/HRC/28/68/Add.2, 27 February 2015, para. 104.

<sup>18</sup> International Drug Policy Consortium (IDPC), Drugs, crime and punishment, Series on Legislative Reform of Drug Policies Nr. 20, June 2012, p. 4.

<sup>19</sup> United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules), adopted by General Assembly resolution 45/110 of 14 December 1990.

The wide range of community sanctions or diversion measures that could be used instead of imprisonment fail to be considered and the length of sentences is increasing in many countries, resulting in a larger overall prison population. External factors too are pushing prison populations upwards, such as economic and demographic change, fast urbanisation, public opinion, the media and the reaction of politicians to public expressions of concern.<sup>21</sup>

**The following are key drivers of overcrowding globally:**

- 2.1. The excessive use of pre-trial detention**
- 2.2. Prison sentences for minor, non-violent offences**
- 2.3. Disproportionate sentencing practices including mandatory sentencing policies, long-term imprisonment and life imprisonment (without the possibility of parole)**
- 2.4. The criminal justice response to the so-called 'war on drugs'**

### **2.1. Pre-trial detention (excessive use and length)**

As the Subcommittee on Prevention of Torture (SPT) stated in its 2014 Annual Report 'it is known that the excessive use and length of pre-trial detention is a major cause of overcrowding'.<sup>22</sup> The Working Group on Arbitrary Detention (WGAD) has also drawn the link between excessive pre-trial detention and overcrowding, for example in Morocco<sup>23</sup>, El Salvador<sup>24</sup>, and in Greece where the Working Group observed the 'relatively long periods spent by the accused in pretrial detention', and noted that '[T]his is one of the main reasons for the serious overcrowding in Greek prisons, which has intensified and is now a chronic problem'.<sup>25</sup> In Brazil the Working Group reported that '[T]he excessive use of pretrial detention contributes to overcrowding, the lack of effective separation between convicted prisoners and pretrial detainees, and excessive resort to condemnatory sentences'.<sup>26</sup>

Excessive pre-trial detention is in violation of international law that requires it to be used only as a last resort (Article 9 and 14 ICCPR, see also Rules 6.1 and 6.2 of the UN Tokyo Rules). See also Human Rights Committee, General comment No. 35: Article 9 (Liberty and security of person), 16 December 2014, UN-Doc. CCPR/C/GC/35.

The SPT has stated that '[I]t is a recognized norm of international law that pre-trial detention must be used as a last resort, for the shortest time possible, and only for the most serious offences'.<sup>27</sup> The WGAD also underlined this norm stating unequivocally, that '[U]nder international law, detention prior to conviction must be the exception, not the rule'<sup>28</sup> and also finding that 'the non-application of alternatives to detention, lack of effective judicial review, and the excessive length of detention may render the detention of an individual arbitrary'.<sup>29</sup> The Working Group stated that 'suspicion that a person has committed a crime is not sufficient to justify detention pending investigation and indictment'.<sup>30</sup>

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<sup>20</sup> United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules), adopted by General Assembly resolution A/RES/65/229 of 21 December 2010.

<sup>21</sup> Penal Reform International, 'Making Law and Policy that Work', 2010, p12.

<sup>22</sup> Eighth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, CAT/C/54/2, 26 March 2015, paras 76 and 77.

<sup>23</sup> UN Working Group on Arbitrary Detention, Mission to Morocco, A/HRC/27/48/Add.5  
4 August 2014, Summary.

<sup>24</sup> UN Working Group on Arbitrary Detention, Mission to El Salvador, A/HRC/22/44/Add.2, 11 January 2013, Summary.

<sup>25</sup> UN Working Group on Arbitrary Detention, Mission to Greece, A/HRC/27/48/Add.2, 30 June 2014, Summary.

<sup>26</sup> UN Working Group on Arbitrary Detention, Mission to Brazil, A/HRC/27/48/Add.3, 30 June 2014, para 82.

<sup>27</sup> Eighth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, CAT/C/54/2, 26 March 2015, paras 76 and 77.

<sup>28</sup> Report of the Working Group on Arbitrary Detention, E/CN.4/2006/7, 12 December 2005, para 64.

<sup>29</sup> UN Working Group on Arbitrary Detention, Mission to Greece, A/HRC/27/48/Add.2, 30 June 2014, Summary.

<sup>30</sup> UN Working Group on Arbitrary Detention, Mission to Georgia, A/HRC/19/57/Add.2, 27 January 2012, Para 86.

'Excessive recourse to pretrial detention also contradicts basic rule of law principles, and also has greater implications for detainees, who are exposed to threats against their life, physical integrity and health, and of abuse and ill-treatment by guards and police officers.' (UN Working Group on Arbitrary Detention)<sup>31</sup>

However, pre-trial detention is employed systematically in many countries in every region, rather than as a last resort in violation of the right to be presumed innocent until proven guilty among a whole range of other rights.

The Open Society Justice Initiative reported in 2014 that 3.3 million people are in pre-trial detention worldwide; noting that that figure is a conservative estimate because official data ignores the tens of thousands of people detained in police stations.<sup>32</sup> This means that one out of three people in prison has not been found guilty of a crime, and in many countries pre-trial detainees exceed the number of convicted prisoners.

In Asia, 40.6% of the prison population were awaiting trial in 2012, 34.7% in Africa, 25% in the Americas and in Europe around 1 in 5 prisoners. The length of pre-trial detention varies greatly, with detainees held an average 4.8 months in the 27 Council of Europe countries in 2012, compared to a reported average of 3.7 years in Nigeria (2008).<sup>33</sup>

The size of the pre-trial population is an indicator of the efficiency of the criminal justice system as a whole, as also highlighted in the Secretary-General's report on the 'State of Crime and Criminal Justice Worldwide' to the UN Crime Congress.<sup>34</sup> Misuse of pre-trial detention is often caused by a failure to adhere to statutory limitations on the time persons spend in pre-trial detention. It is also associated with ineffective and inefficient justice administration, including poor strategic planning and weak case management. The Subcommittee on Prevention of Torture describes the complexities of pre-trial detention stating:

*'The excessive use and misuse of pre-trial detention is a complex problem caused by a variety of factors, such as the legal framework; structural and resource deficiencies in the criminal justice system; corruption; interference with judicial independence; and deeply rooted attitudes, not only within the criminal justice system but at the broader societal level.'*<sup>35</sup>

Poor case management is a key contributor to the excessive use of pre-trial detention. It can result in detainees spending longer in pre-trial detention than the prescribed maximum sentence for the alleged crime.<sup>36</sup> The Working Group on Arbitrary Detention found in Brazil that many prisoners remained in detention beyond the term of their sentences owing to poor record keeping and systemic and bureaucratic failings.<sup>37</sup> In Sierra Leone pre-trial detainees spend an average of three to five years in detention before a court examines their cases or files formal charges, and one contributing factor for these excessive periods is the fact the relevant agencies do not collect data and there is no tracking of case preparation and progression in a systematic way.<sup>38</sup>

While pre-trial detention may be necessary in some cases where there is a real and established risk of flight, commission of another offence or interference with the course of justice, in a large

<sup>31</sup> UN Working Group on Arbitrary Detention, Mission to Brazil, A/HRC/27/48/Add.3, 30 June 2014, para 138.

<sup>32</sup> Open Society Foundations, 'Presumption of guilty: the global overuse of pretrial detention', Executive Summary and Recommendations, 2014, p1.

<sup>33</sup> *Ibid.*

<sup>34</sup> Twelfth United Nations Congress on Crime Prevention and Criminal Justice, Report of the Secretary-General, State of Crime and Criminal Justice Worldwide, 12 December 2014, UN-Doc. A/CONF.222/4, para.

<sup>35</sup> Eighth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, CAT/C/54/2, 26 March 2015, Para 83.

<sup>36</sup> *Ibid.*, Para 90.

<sup>37</sup> UN Working Group on Arbitrary Detention, Mission to Brazil, A/HRC/27/48/Add.3, 30 June 2014, para 83.

<sup>38</sup> Advocaid 'Women, Debt & Detention: An Exploratory Report on Fraudulent Conversion and the Criminalisation of Debt in Sierra Leone', July 2012, p10.

number of cases pre-trial detention is imposed in a systemic way, simply based on the suspicion of the commission of an offence, often petty offences, and resulting in individuals being held on remand longer than their possible prison sentence.

For example, in Pakistan, many defendants 'spend more time behind bars awaiting trial than the maximum sentence they would receive if eventually convicted.'<sup>39</sup>

In Tanzania, during an assessment visit by PRI to a community service placement in a Dar es Salaam park, all 16 offenders had been convicted of breaching city bylaws, 12 by parking their wheelbarrows in the wrong zone and the remaining four by touting for custom on their buses. They ultimately received community sanctions, however all 16 had spent two weeks on remand in prison.<sup>40</sup>

To address such problems, in a landmark ruling in September 2014, the Indian Supreme Court ordered prisons to release pre-trial detainees who had been held for more than half of the maximum term they could be sentenced to if they were found guilty. The Supreme Court ruling ordered the implementation of Article 436A of the Code of Criminal Procedure, requesting local judges and magistrates to 'hold one sitting each week in each jail/ prison for two months commencing from 1<sup>st</sup> October, 2014 for the purposes of effective implementation of 436A of the Code of Criminal Procedure'. The objective was to identify those pre-trial prisoners benefiting from this provision and 'pass an appropriate order in jail itself for release (...) immediately'. Furthermore, the Supreme Court requested to receive reports of these sittings.<sup>41</sup>

Where alternatives to pre-trial detention exist such as bail or surety provisions, these are in practice frequently 'out of reach for many detainees because, for example, they are unaffordable or because detainees may lack access to legal representation to make such a request', as noted by the Subcommittee for Prevention of Torture.<sup>42</sup>

The Working Group on Arbitrary Detention has noted that 'poverty and social marginalization appear to disproportionately affect the prospects of persons chosen to be released pending trial.' It explains that the criteria set for bail or surety by courts usually involves 'having stable residence, stable employment and financial situation, or being able to make a cash deposit or post a bond as guarantee for appearance at trial', and this criteria 'of course are often difficult to meet for the homeless, drug users, substances abusers, alcoholics, the chronically unemployed and persons suffering from mental disability, who thus find themselves in detention before and pending trial when less socially disadvantaged persons can prepare their defence at liberty. As empirical research in many countries has shown defendants who are not detained pending trial have significantly better chances to obtain an acquittal than those detained pending trial...'<sup>43</sup> In Hungary the Working Group observed that 'many of the detainees it interviewed would have benefitted from alternatives to detention, also prescribed by law, because they did not meet the criteria that rendered pre-trial detention necessary.'<sup>44</sup>

Women in particular may be more likely to be placed in pre-trial detention than men because of gender-based discrimination in the criteria for bail or surety usually set by courts, such as secure employment and owning or renting property in one's own name. In Sierra Leone, for example, the basic legal procedure of bail requires a surety and as the national law requires sureties to be property owners this excludes women from bail given the historic inability of women to own property in Sierra Leone. In practice this means that women prisoners are

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<sup>39</sup> Adnan Aziz, "Penal Reform," The News, May 7, 2011, available at <http://www.thenews.com.pk/TodaysPrintDetail.aspx?ID=45633&Cat=9> (accessed Oct. 3, 2013), as quoted in Open Society Foundations, 'Presumption of guilty: the global overuse of pretrial detention', 2014, p26.

<sup>40</sup> Penal Reform International, 'Alternatives to imprisonment in East Africa Trends and challenges', 2012, p18.

<sup>41</sup> See Supreme Court of India, Writ. Petition (Crl.) No. 310 of 2005 titled as 'Bhim Singh Versus Union of India & Ors.', 24 September 2014, Endst No. 29613 Gaz. II(17).

<sup>42</sup> Eighth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, CAT/C/54/2, 26 March 2015, Para 89.

<sup>43</sup> Report of the Working Group on Arbitrary Detention, E/CN.4/2006/7, 12 December 2005, para 66.

<sup>44</sup> UN Working Group on Arbitrary Detention, Mission to Hungary, A/HRC/27/48/Add.4, 3 July 2014, para 59.

effectively dependent on wealthy male relatives or associates to step forward as sureties, but as many are in conflict with the law due to issues relating to family disputes, domestic violence or poverty, this complicates any attempts at securing a surety, and thus women often remain in pre-trial detention.<sup>45</sup>

## 2.2. Prison sentences for minor, non-violent offences

In many countries prisons are filled with persons who are convicted for minor and non-violent offences. For a large percentage of convicted prisoners their sentence is not proportionate to their crime.

The Working Group on Arbitrary Detention noted, that ‘Public policies that are “tough on crime” lead to a harsh trend of mass incarceration, while most States have neither the capacity nor the structure to deal with the consequences.’ They note that this ‘[E]ndemic overcrowding leads to the mistreatment of prisoners and inadequate facilities for inmates.’<sup>46</sup>

Proportionality is one of the key principles of the rule of law and international standards prescribe that deprivation of liberty should be used only when necessary and proportionate.

The principle of proportionality requires that any infringement to individual’s rights must be limited to the extent that is appropriate and necessary for achieving a legitimate aim. Where measures restrict a right protected under the ICCPR, it ‘must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights.’<sup>47</sup> The Human Rights Committee has clarified that ‘Restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected.’<sup>48</sup>

The Human Rights Committee has also noted that ‘the notion of “arbitrariness” of detention is not to be equated with “against the law”, but must be interpreted broadly to include elements of inappropriateness, injustice, (...) as well as elements of reasonableness, necessity and proportionality.’<sup>49</sup>

The principle has also been reflected in international jurisprudence, such as the Inter-American Court of Human Rights. The Court has ruled, in the context of sentencing, that ‘no one may be subjected to arrest or imprisonment for reasons and by methods which, although classified as legal, could be deemed to be incompatible with the respect for the fundamental rights of the individual because, among other things, they are unreasonable, unforeseeable or lacking in proportionality’.<sup>50</sup>

With regard to sentencing policies, the principle of proportionality requires a range of available sentencing options, and that prison sentences are imposed only when no other sanction would be proportionate to the seriousness of the offence and the nature of its commission, taking into account any aggravating and mitigating factors.

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<sup>45</sup> Advocaid ‘Women, Debt & Detention: An Exploratory Report on Fraudulent Conversion and the Criminalisation of Debt in Sierra Leone’, July 2012, p15.

<sup>46</sup> UN Working Group on Arbitrary Detention, Mission to Brazil, A/HRC/27/48/Add.3, 30 June 2014, para 92.

<sup>47</sup> Human Rights Committee (2004), *General comment No 31 on the nature of the general legal obligation imposed on state parties to the Covenant*, U.N. doc. CCPR/C/21/Rev/1/Add.13

<sup>48</sup> Human Rights Committee (1999), *General comment No 27 on freedom of movement (Article 12)*, U.N. Doc CCPR/C/21/Rev.1/Add.9

<sup>49</sup> Human Rights Committee, General Comment No. 35: Article 9 (Liberty and security of person), 16 December 2014, UN-Doc. CCPR/C/GC/35, para. 12

<sup>50</sup> Inter-American Court of Human Rights, *Gangaram Pandey Case*, 21 January 1994, para. 48

The Standard Minimum Rules for Non-custodial Measures (Tokyo Rules) clarify, in Rule 2.3 that, 'In order to provide greater flexibility consistent with the nature and gravity of the offence, with the personality and background of the offender and with the protection of society and to avoid unnecessary use of imprisonment, the criminal justice system should provide a wide range of non-custodial measures, from pre-trial to post-sentencing dispositions. The number and types of non-custodial measures available should be determined in such a way so that consistent sentencing remains possible' (see also Rule 2.7 and 9.1).<sup>51</sup>

In the words of the UN Working Group on Arbitrary Detention, 'All measures of detention should be justified, adequate, necessary and proportional to the aim sought.'<sup>52</sup> The Working Group emphasised that 'States should have recourse to deprivation of liberty only insofar as it is necessary to meet a pressing societal need, and in a manner proportionate to that need'; and went on to state that '[I]t is doubtful therefore that a sentencing policy resulting in an incarceration rate of 500 out of every 100,000 residents can find an objective and acceptable explanation, when the sentencing policy of another State produces a 100 out of every 100,000 rate.'<sup>53</sup>

The principle of proportionality is frequently violated causing a huge number of low-risk and minor offenders being detained in all corners of the globe, rather than making use of non-custodial sanctions. 'As a result of such excessive detention, detention facilities are usually overcrowded', as found by the Working Group on Arbitrary Detention.

The Working Group on Arbitrary Detention have stated, for instance with regard to their mission in Armenia, that 'The issue of proportionality of court sentences is a matter of concern to the Working Group... A number of women interviewed at Abovyan prison reported that they were serving sentences of between 10 and 13 years for crimes such as trafficking, theft, swindling and embezzlement, all of which carry maximum sentences,' which seemed to exceed even the statutory provisions for these crimes.'<sup>54</sup>

In Brazil the Working Group found that 'deprivation of liberty was imposed even in situations where the offence was regarded as minor, such as petty non-violent theft or for non-payment of child support, raising serious concerns with regard to the application of the principle of proportionality.'<sup>55</sup> Furthermore it was informed of many cases where minors had been placed in detention for minor offences or infractions that did not justify deprivation of liberty.<sup>56</sup> In its report on a mission to Hungary the Working Group noted that in one year 'there was a drastic increase in the conversion of non-payment of fines to confinement' recommending that '[T]he principle of proportionality should be applied in these situations and, importantly, alternative measures to confinement such as community work should be utilized'.<sup>57</sup>

In Greece, the Working Group was informed that, although alternative sentencing for non-violent offenders was available, courts did not use their prerogative.<sup>58</sup>

In a 2009 survey by UNODC of 30 African countries prison administrations were asked to estimate the proportion of prisoners charged with or convicted of minor offenses (the survey conflated pre-trial detainees and sentenced prisoners). 'According to the survey results, the proportion of prisoners who have been detained or sentenced for "minor" crimes" is strikingly high in many countries. In Ghana it is 90 percent, followed by Malawi and Swaziland (85

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<sup>51</sup> See also European Rules on Community Sanctions and Measures, Rule 12.

<sup>52</sup> Report of the Working Group on Arbitrary Detention, A/HRC/27/48, 30 June 2014, para 88.

<sup>53</sup> Report of the Working Group on Arbitrary Detention, E/CN.4/2006/7, 12 December 2005, para 63.

<sup>54</sup> UN Working Group on Arbitrary Detention, Mission to Armenia, A/HRC/16/47/Add.3, 17 February 2011, Para 78.

<sup>55</sup> UN Working Group on Arbitrary Detention, Mission to Brazil, A/HRC/27/48/Add.3, 30 June 2014, paras 82 and 85.

<sup>56</sup> UN Working Group on Arbitrary Detention, Mission to Brazil, A/HRC/27/48/Add.3, 30 June 2014, paras 124.

<sup>57</sup> UN Working Group on Arbitrary Detention, Mission to Hungary, A/HRC/27/48/Add.4, 3 July 2014, para 114.

<sup>58</sup> UN Working Group on Arbitrary Detention, Mission to Greece, A/HRC/27/48/Add.2, 30 June 2014, para 52.

percent), Zambia (79 percent), Djibouti (75 percent), and Burkina Faso, Burundi, Cameroon, and Mali (all 60 percent or higher).<sup>59</sup>

In Tanzania, official statistics analysed in 2012 suggested that thousands of offenders are sentenced each year for periods of six months or less, for the following typical offences: using abusive language, operating a small business without a valid business licence, reckless driving, possession of illicit 'liquor', entering protected areas, desertion of a child, unlawful departure outside the country, simple theft, intimidation, contempt of court, escaping from lawful custody, abandoning one's family, assault, affray, neglecting to prevent felony, environmental destruction, coining, cheating, shop breaking and stealing, impersonating a public servant, disobedience of lawful order, criminal trespass and unlawful gambling.<sup>60</sup>

In Kenya, a survey in March 2015 showed that 94 per cent of prisoners serving terms of less than three years were petty offenders convicted of crimes such as causing disturbance in public, hawking, possessing 'bhang', attempted suicide, and theft. Of the convicted prisoners over one third qualified to be considered for either Community Service Orders or probation since they are serving less than three years, or have less than three years remaining to complete their terms. Data from the Prison Department showed that the total inmate population in March 2015 stood at 54,154, double the prisons' capacity of 26,757.<sup>61</sup>

As regards the female prison population PRI's research from a six-country survey of women prisoners showed that women are disproportionately convicted of petty and non-violent offences relating to poverty. In Georgia and Armenia the largest proportion of offences were property offences (42 per cent and 33 per cent respectively). In Georgia, Armenia, Kazakhstan, Jordan and Tunisia more than 75 per cent of women surveyed were charged or convicted of non-violent offences.<sup>62</sup> In China, 48.17 per cent of women prisoners were convicted of non-violent crimes.<sup>63</sup>

The concept of proportionality has been invoked occasionally by courts, however application has tended to be limited to cases of very long sentences (see below under long-term imprisonment).

Lack of early release (parole) schemes constitute another contributing factor to overcrowding. In Armenia, for example, although the law provides for a system, the Working Group on Arbitrary Detention reported, that 'bail is not sufficiently applied in practice. [Note that the term 'bail' refers to schemes that are usually referred to as 'conditional early release' or 'release on parole']. Prisoners are thus required to serve the totality of their sentences, even when the law provides for the possibility of conditional release. This has consequences not solely for the overcrowding of prisons, but also the penitentiary regime, given that prisoners are deprived of both a key element of motivation to observe good behaviour while in prison and the possibility to advance the process of reintegration into society.'<sup>64</sup>

### **2.3. Mandatory sentencing policies and life/long-term imprisonment**

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<sup>59</sup> Access to Legal Aid in Criminal Justice Systems in Africa: Survey Report, UNODC, Vienna, 2011, p. 35, available at [http://www.unodc.org/pdf/criminal\\_justice/Survey\\_Report\\_on\\_Access\\_to\\_Legal\\_Aid\\_in\\_Africa.pdf](http://www.unodc.org/pdf/criminal_justice/Survey_Report_on_Access_to_Legal_Aid_in_Africa.pdf) (accessed Oct. 7, 2013), as quoted in Open Society Foundations, 'Presumption of guilty: the global overuse of pretrial detention', 2014, p53.

<sup>60</sup> Penal Reform International, *Alternatives to Imprisonment in East Africa: Trends and Challenges*, 2012, p. 7.

<sup>61</sup> Penal Reform International and the National Crime Research Centre, 'A Baseline Survey On The Delivery Of Community-Based Sentences: The Case Of Community Service Orders In The Meru High Court Administrative Jurisdiction, Kenya, March 2015. An activity under PRI's Excellence in Training on Rehabilitation in Africa (Extra) Project

<sup>62</sup> Penal Reform International, 'Who are women prisoners?' series, 2013-14. See the three reports at: <http://www.penalreform.org/priorities/women-in-the-criminal-justice-system/bangkok-rules-2/research/>

<sup>63</sup> Cheng Lei, Lü Xiaogang, and Chen Jianjun, 'Research Report on the Treatment of Women Detainees in China — Using the Bangkok Rules as the Starting Point of Analysis' 2014, pp.20-21.

<sup>64</sup> UN Working Group on Arbitrary Detention, *Mission to Armenia*, A/HRC/16/47/Add.3, 17 February 2011, Para 73.

Another cause of rising prison populations are mandatory sentencing policies and the increase of long-term imprisonment and life sentences, often without the possibility of parole.

### **Mandatory sentencing policies**

A mandatory sentence is one where judicial discretion is limited by law. It is usually applied to a specific offence, and requires the judicial authority to hand down a sentence (usually a prison term) regardless of the circumstances of the case, gravity of the crime or personal characteristics of the offender. Mandatory sentencing policies are usually justified by lawmakers in that they seek to ensure a severe (minimum) sentence for particularly grave crimes, whatever the circumstances, to act as a deterrent and to ensure consistency within a jurisdiction. However the inability to take into consideration the circumstances of the case and the background of the offender means that judges cannot use their discretion to make decisions that are tailored and proportionate to the individual case.<sup>65</sup>

Such policies may include mandatory pre-trial detention for certain offences. In Bolivia, Brazil, Ecuador, Mexico and Peru, for example, pre-trial detention is/ was mandatory for drug offences.<sup>66</sup>

The UNODC Handbook on strategies to reduce overcrowding in prisons notes that '[L]egislation may also include mandatory pre-trial detention for certain categories of crime, contrary to international standards which require that pre-trial detention be used in exceptional and narrowly defined circumstances only'.<sup>67</sup>

'Tough on crime' policies have led to an increase in mandatory sentencing which result in sentences disproportionate to the crime by not taking account of the specific circumstances of the offence and/ or the individual offender. Mandatory sentences are often applied to life offences (murder, manslaughter and assaults) as well as drug-related offences. Mandatory life sentences are handed down, for example for murder offences in New Zealand, Germany and the UK.<sup>68</sup>

One example of mandatory sentencing are 'three strikes' laws, which require judges to pass a prescribed prison sentence on a third offence committed by the same person.

In the US the 'three strikes' policy means that a person is sentenced to life imprisonment after committing a third crime, which in some states must be violent and in others can also include non-violent offences.<sup>69</sup> For instance, based on this policy a sentence of life without parole was upheld in the US state of Texas for the fraudulent use of a credit card to obtain \$80 worth of goods or services, passing a forged cheque in the amount of \$28.36, and finally, obtaining \$120.75 under false pretences.<sup>70</sup> A fifty-year sentence was upheld in California for stealing videotapes on two separate occasions after three prior offences.<sup>71</sup>

Mandatory sentencing is a common feature in Latin American legislation, too, including in Brazil where 96 per cent of 1,688 existing offences have minimum sentences. This correlates to the high rate of imprisonment of 261 per 100,000 and a prison occupancy rate of 165.7 per cent.<sup>72</sup>

New Zealand, for example also passed a controversial 'three strikes' law in May 2010 as part of a Sentencing and Parole Reform Bill.<sup>73</sup>

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<sup>65</sup> Penal Reform International, 'Alternatives to the death penalty information pack, 2<sup>nd</sup> edition', 2015, p14.

<sup>66</sup> Transnational Institute & Washington Office on Latin America Systems Overload: Drug Laws and Prisons in Latin America, 2011, p. 6. (Bolivia, Brazil, Ecuador, Mexico and Peru)

<sup>67</sup> UNODC, 'Handbook on strategies to reduce overcrowding in prisons', 2013, p. 24.

<sup>68</sup> Penal Reform International, 'Alternatives to the death penalty information pack, 2<sup>nd</sup> edition', 2015, p14.

<sup>69</sup> Ashley Nellis and Ryan S. King, No Exit: The Expanding Use of Life Sentences in America, The Sentencing Project, USA, 2009, p. 30

<sup>70</sup> Rummel v Estelle, 445 U.S. 263 (1980).

<sup>71</sup> Lockyer v Andrade, 538 U.S. 63 (2003)

<sup>72</sup> UNODC, 'Handbook on strategies to reduce overcrowding in prisons', 2013, p26, footnote 55.

This type of sentencing policy is prone to violate the principle of proportionality and is not compliant with Rule 3.3 of the Tokyo Rules which requires discretion of the judicial authorities. The Human Rights Committee expressed concern that mandatory minimum sentencing can lead to the imposition of punishments that are disproportionate to the seriousness of the crimes committed, raising issues of compliance with various articles of the ICCPR.<sup>74</sup>

### Life and long-term imprisonment

There is also an increase in the numbers of prisoners serving life and long-term imprisonment, contributing to overcrowding, as recognised for example by the Council of Europe.<sup>75</sup>

'Life' sentences comprise different conditions from country to country. It may comprise:

- Imprisonment until (natural) death, with no possibility of release, either with or without the possibility (theoretical or realisable) of a pardon. This is sometimes called life without parole (LWOP).
- Life sentence for a minimum number of years, after which, at a certain defined point, the prisoner may be considered for release, but may never be granted release.
- Life or long-term sentence for a determinate number of years, after which the prisoner is released either with or without further restrictions/ conditions (such as requirements to report to the police at regular intervals).<sup>76</sup>

Examples include long, indeterminate and preventive sentences for 'dangerous offenders', (Germany) and harsh penalties for gang members (*mano dura* policies in Latin America). Offences that commonly lead to long-term and life imprisonment are murder, manslaughter, serious sexual offences, robbery, kidnapping, drug trafficking, involvement in organised crime, crimes against the security of the realm and against humanity.<sup>77</sup>

The numbers of prisoners serving life imprisonment, often without the possibility of parole (LWOP), has increased significantly, partly as the default alternative sentence to the death penalty in the course of abolition. Moreover, the replacement of the death penalty by LWOP has resulted in a widening net, applying life sentences beyond the 'most serious crimes' and no longer confined to formerly capital offences.<sup>78</sup> (See also PRI, 'Life after death: what replaces the death penalty', 2012<sup>79</sup>)

Some countries impose both the death penalty and LWOP. It has been calculated that in the USA in 2012, there were 3,278 prisoners serving LWOP for non-violent drug and property crimes in the federal system and in nine states that provided such statistics.<sup>80</sup>

In South Africa, the number of life-sentenced prisoners increased from 443 to 5,745 between 1995 and 2005.<sup>81</sup> The overall prison population growth was 60 per cent during the same

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<sup>73</sup> Controversy continues after three strikes bill passed, New Zealand Herald, (26 May 2010), <[http://www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=10647501&pnum=2](http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10647501&pnum=2)>.

<sup>74</sup> Concluding observations of the Human Rights Committee: Australia. 24/07/2000. A/55/40, paras.498-528. (Concluding Observations/Comments), as quoted in UNODC, 'Handbook on strategies to reduce overcrowding in prisons', 2013, p49.

<sup>75</sup> Council of Europe, Committee of Ministers, Recommendation Rec (2003) 23 on the management of by prison administrations of life-sentence and long-term prisoners, October 2003.

<sup>76</sup> Penal Reform International, 'Alternatives to the death penalty information pack, 2<sup>nd</sup> edition', 2015, p10.

<sup>77</sup> Council of Europe, Committee of Ministers, Recommendation Rec (2003) 23 on the management of by prison administrations of life-sentence and long-term prisoners, October 2003, Report: para10.

<sup>78</sup> PRI, Global Prison Trends 2015, p10.

<sup>79</sup> <http://www.penalreform.org/resource/life-death-replaces-death-penalty/>

<sup>80</sup> American Civil Liberties Union, 'A Living Death Life Without Parole for Non-violent Offenses, November 2014, referenced in PRI, Global Prison Trends, 2015, p11

<sup>81</sup> C. Giffard and L. Muntingh, The effect of sentencing on the size of the South African prison population, Open Society Foundation for South Africa, South Africa, 2006, (The effect of sentencing on the South African prison population) p. 10.

period.<sup>82</sup> In Uganda, the number of lifers grew from 37 in 2008 to 329 in 2010. This number only includes those sentenced for periods of up to 20 years (the former definition of life imprisonment in Uganda) – it does not include the 37 people on new ‘natural life’ (whole life) sentences or on determinate sentences of over 20 years (which may in effect act as life sentences).<sup>83</sup> The United Kingdom has more life-sentenced prisoners than the other Council of Europe member states put together (approximately 12,500 lifers in the UK and approximately 8,000 in the rest of Europe, according to figures available in 2012).<sup>84</sup>

The length of time served in prison by life-sentenced prisoners appears also to be rising in some countries. In the USA, the average length of time served in prison by lifers increased from 21.2 years to 29 years between 1991 and 1997.<sup>85</sup> In England and Wales, the average minimum term imposed for those receiving life sentences (excluding whole life sentences) rose from an average of 12.5 years in 2003 to 21.1 in 2013.<sup>86</sup>

The increasing number of prisoners serving life and long-term sentences is a contributing fact to overcrowding, and is in breach of the principle of proportionality. UNODC recommends as a strategy to reduce overcrowding that legislators should:

*‘ensure that all life sentenced prisoners have the possibility of release at some point, after a fixed term of the prison sentence has been served, and to put in place measures which enable the decision on such release to be based on objective risk assessments by a qualified body, such as a parole board.’<sup>87</sup>*

The concept of proportionality has also been recognised by the European Court of Human Rights. In 2013 the Grand Chamber of the ECtHR ruled in the case of *Vinter and Others v. The United Kingdom* that imprisonment for the whole of one’s life without the possibility of any review or release constitutes a violation of the right not to be subjected to inhuman or degrading punishment as human dignity requires that all prisoners must have the hope of release. When they are sentenced they should therefore know what their prospects of release are and what they can do to enhance them. This does not mean that whole life sentences cannot be imposed or that people have to be released at some point. The Court did not state how or when a review has to be carried out, but did require that a review happen. However, it did note that ‘comparative and international law ... show clear support for the institution of a dedicated mechanism guaranteeing a review no later than twenty-five years after the imposition of a life sentence, with further periodic reviews thereafter’.<sup>88</sup>

A subsequent judgement in the 2014 case of *László Magyar v. Hungary* found that Hungary’s system for the review of life sentences did not guarantee a proper consideration of the changes in the life of prisoners and their progress towards rehabilitation. The Hungarian government was required to reform its ‘system of review of whole life sentences to guarantee the examination in every case of whether continued detention is justified on legitimate grounds and to enable whole life prisoners to foresee what they must do to be considered for release and under what conditions’.<sup>89</sup>

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<sup>82</sup> *Ibid.*, p1.

<sup>83</sup> Information regarding Uganda from Foundation for Human Rights Initiative, for PRI, Alternatives to the death penalty: information pack, second edition, 2015.

<sup>84</sup> PRI, ‘Life after death: what replaces the death penalty’, 2012, p. 1.

<sup>85</sup> M. Mauer et al., ‘The Meaning of “Life”: Long Prison Sentences in Context’, The Sentencing Project, 2004, p3.

<sup>86</sup> Information obtained from UK Ministry of Justice by Jonathan Bild, Freedom of Information Request 89346, 7 April 2014. See Penal Reform International, ‘Alternatives to the death penalty information pack, 2<sup>nd</sup> edition’, 2015.

<sup>87</sup> UNODC, ‘Handbook on strategies to reduce overcrowding in prisons’, 2013, p61.

<sup>88</sup> ECtHR, *Vinter and others v the United Kingdom*, 2012, Applications nos. 66069/09, 130/10 and 3896/10, para 120.

<sup>89</sup> Registrar of the Court, *Press Release: Hungary should reform its system for reviewing whole life sentences*, European Court of Human Rights, Strasbourg, 20 May 2014 (*Hungary should reform its system for reviewing whole life sentences*); ECtHR, *László Magyar v Hungary*, 2014, Application no. 73593/10, [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-144109#\[{"itemid":\["001-144109"\]}\]](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-144109#[{)

Similarly, in *Harkins and Edwards v. the United Kingdom* and *Rrapo v. Albania* the European Court of Human Rights recognised the principle of proportionality as constituting an essential part of human dignity, and ‘grossly disproportionate’ sentences can be found to breach Article 3 of the European Convention on Human Rights.<sup>90</sup>

See also Mary Rogan, ‘Out of balance’, August 2014, <http://www.penalreform.org/blog/balance-disproportionality-sentencing/>

International law also makes provisions for life sentences to be subject to review, by stating that the objective of the penitentiary system ‘shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation’ (ICCPR Article 10(3)). In this context it is also noteworthy that even for the most heinous crimes under the Rome Statute, war crimes, crimes against humanity and genocide, sanctions do not include LWOP, but provide that sentences of life imprisonment, the maximum sentence available to the court, must be reviewed after 25 years (Article 110(3) of the Rome Statute).

The Council of Europe has held, that ‘a crime prevention policy which accepts keeping a prisoners for life even if he is no longer a danger to society would be compatible neither with modern principles on the treatment of prisoners during the execution of their sentence nor with the idea of the reintegration of offenders into society.’<sup>91</sup>

Problems are also common with regard to independence and due process in early release procedures. In its report on ‘Life Imprisonment’, already in 1994, UNODC has noted that common problems in decision-making on the release of life-sentence prisoners ‘include lack of communication between the assessors and the body with which the final release prerogative lies, lack of prisoner participation or representation, closed-door release decisions and politically motivated review bodies’ and that ‘grounds for refusal of [conditional] release are rarely given to the life-sentenced prisoner’. The conclusions of the report therefore recommended that consideration of long-term prisoners for release should be based on ‘comprehensive, well-informed release decisions’, which ‘may only be reached if there are independent, non-arbitrary assessment procedures’. Such procedures ‘necessitate minimum safeguards to avoid personal or political manipulation of life-sentence prisoners’.<sup>92</sup>

With regard to juveniles, international law specifies that LWOP shall not be imposed for offences committed by persons below eighteen years of age (Article 37(a) of the UN Convention on the Rights of the Child<sup>93</sup>, Human Rights Council Resolution ‘Human rights in the administration of justice, including juvenile justice’, 23 September 2013, UN-Doc. A/HRC/24/L.28).

## 2.4. Drugs policies

The ‘war on drugs’ has fuelled a huge expansion of prison populations over the last fifty years, and contributed to the increase in long-term prison sentences resulting in overcrowded prisons globally. It has brought unwavering application of punitive criminal sanctions for drug offenders, with **little differentiation** between use and possession, at one end of the scale, and large-scale trafficking with links to organised crime, at the other end.

It has been estimated that amongst the approximately 10 million prison population, at least one million people are in prison for a drug-related offence.

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<sup>90</sup> Mary Rogan, ‘Out of balance: disproportionality in sentencing’, 25 August 2014: a blog for Penal Reform International, see: <http://www.penalreform.org/blog/balance-disproportionality-sentencing/>

<sup>91</sup> European Committee on Crime Problems, Treatment of Long-Term Prisoners, Council of Europe, 1977, quoted in: UNODC, Life Imprisonment, 1994, UN-Doc. ST/CSDHA/24, <http://www.penalreform.org/wp-content/uploads/2013/06/UNODC-1994-Lifers.pdf>, para.16.

<sup>92</sup> UNODC, Life Imprisonment, 1994, UN-Doc. ST/CSDHA/24, <http://www.penalreform.org/wp-content/uploads/2013/06/UNODC-1994-Lifers.pdf>, paras. 47, 52 and 60.

<sup>93</sup> All but two countries (Somalia and the USA) in the world have ratified the CRC.

A 2013 UNODC study suggests that offences related to drug possession currently comprise more than eight out of ten of total global drug-related offences. The study states that the global increase in drug-related crime is driven mainly by a rising number of offences related to drug possession, particularly in Europe and Africa. As a result of such trends, offences related to drug possession currently comprise 83 per cent of total global drug-related offences.<sup>94</sup> In his report on the 'State of Crime and Criminal Justice Worldwide' the Secretary-General noted that while '[c]riminal offences related to drug trafficking remained relatively stable over time' 'drug possession offences showed a marked increase since 2003 (+13 per cent)'.<sup>95</sup>

At the same time, minor drug offences (such as low-level dealing or smuggling) are often punished with harsher penalties than that cause such as murder and rape.<sup>96</sup>

In the US approximately 40 per cent of all drug arrests in 2005 were for simple possession of marijuana, and in the 1990s marijuana possession arrests accounted for 79 per cent of the growth in drug arrests.<sup>97</sup> In most US States possession is classed as a felony leading to harsh prison terms which in many cases is mandatory.<sup>98</sup>

Recent figures show that in England and Wales in 2013-14 almost 2,000 people received immediate prison sentences for possessing Class C drugs which include tranquillisers, valium and anabolic steroids.<sup>99</sup>

In Latin America nearly one-third of all detainees are incarcerated for non-violent drug-related crimes.<sup>100</sup> In its report on Nicaragua the Working Group on Arbitrary Detention reported the 'disproportionate severity of criminal penalties handed down for offences relating to the use and sale of narcotics; it notes the unreasonably high minimum of 1 million cordobas (approximately 61,000 United States dollars) prescribed as a fine for such offences, which, given the general inability of offenders to pay it, is converted to an additional year's imprisonment'.<sup>101</sup>

Argentinian drug-trafficking laws, for example, do not distinguish between trafficking activity in small amounts of drugs (micro-trafficking) as opposed to large scale trafficking or involvement in organised crime. There is a four to fifteen year custodial penalty for all trafficking offences that can be raised to 20 years in cases of 'aggravated trafficking'.<sup>102</sup> In 2009, the Supreme Court of Argentina ruled unconstitutional the repression of possession for personal use.<sup>103</sup>

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<sup>94</sup> UNODC, *World crime trends and emerging issues and responses in the field of crime prevention and criminal justice*, 2013, as quoted in Penal Reform International, 'Global Prison Trends 2015', 2015.

<sup>95</sup> Twelfth United Nations Congress on Crime Prevention and Criminal Justice, Report of the Secretary-General, State of Crime and Criminal Justice Worldwide, 12 December 2014, UN-Doc. A/CONF.222/4, para. 8.

<sup>96</sup> International Drug Policy Consortium (IDPC), *Drugs, crime and punishment*, Series on Legislative Reform of Drug Policies Nr. 20, June 2012. P. 2.

<sup>97</sup> Bryan Stevenson, *Drug Policy, Criminal Justice and Mass Imprisonment*, Working Paper Prepared for the First Meeting of the Global Commission on Drug Policies, Geneva, 24-25 January 2011

<sup>98</sup> 'Penalties and sentencing', <http://www.drugabuse.net/drug-policy/penalties-for-drug-abuse/>, <accessed 27 January 2015>.

<sup>99</sup> UK Ministry of Justice, *Drugs: Misuse*, <http://www.theyworkforyou.com/wrans/?id=2014-09-09.208713.h&s=drugs#g208713.r0> <accessed 27 January 2015>.

<sup>100</sup> Luciana Pol, *Failed drug policies in Latin America: the impact on prisons and human rights*, Blog for Penal Reform International, 24 April 2015, <http://www.penalreform.org/blog/failed-drug-policies-in-latin-america-impact-on/>

<sup>101</sup> UN Working Group on Arbitrary Detention, *Mission to Nicaragua*, A/HRC/4/40/Add.3

9 November 2006, Summary.

<sup>102</sup> International Drug Policy Consortium (IDPC), *Drugs, crime and punishment*, Series on Legislative Reform of Drug Policies Nr. 20, June 2012, p. 6.

<sup>103</sup> Case of Arriola, Argentinian Supreme Court, 25 August 2009; see Corda. A., *Imprisonment for drug-related offenses in Argentina*, pp. 11–20, in Transnational Institute & Washington Office on Latin America (2011), *Systems overload – Drugs and prisons in Latin America*, <http://druglawreform.info/en/publications/systemsoverload>

Before its recent reforms, in Ecuador also, a small-scale drug trafficker could end up with a longer sentence than a convicted murderer (maximum sentence for homicide 16 years).<sup>104</sup> In Ukraine, the possession of minimal amounts of drugs (from 0.005g) can lead to three years in prison.<sup>105</sup> Under the notorious ‘three strikes laws’ that have become popular in the USA, drug offenders with no history of violence may face mandatory minimum sentences in excess of 25 years in prison. Thousands of low-level drug offenders have been sentenced to life imprisonment with no opportunity of parole as a result of these sentencing laws.<sup>106</sup>

Drug offences sometimes attract mandatory application of **pre-trial detention**<sup>107</sup> or exclusion from **non-custodial alternatives** available for other types of offences. For instance a ban on early release for drug offences (among other offences ) was found to be disproportionate in comparison with other offences for which early release was possible by the Working Group on Arbitrary Detention.<sup>108</sup> In Brazil, a 2006 law prohibited replacement of imprisonment with alternative sentences for drug offences, even though Brazilian law allows alternatives in the case of sentences up to four years for all other offences perpetrated without violence or grave threat, which would be the case for many instances of drug offences.<sup>109</sup>

Punitive drug policies have been identified as one leading cause for the growing population of **female prisoners** (which is growing at a faster rate than the male prison population).<sup>110</sup> Research in 2012 found that across 51 European and Central Asian countries 28 per cent – or 31,400 of the 112,500 women prisoners – were in prison for drug offences. This represented more than one in four incarcerated women in the region.<sup>111</sup>

In Argentina a report found that ‘The harsh sentences imposed on drug mules – individuals, usually women, who are low on the drug cartels hierarchy who transport small amounts of drugs across borders – have led to an increase in the number of women in prison and length of pre-trial detention.’<sup>112</sup> In Ecuador, 77% of women in prison were incarcerated for drug-offences compared to 33.5% of the male prison population, indicating a gendered disparity.<sup>113</sup> An older study in the US also found that women were over-represented among low-level non-violent drug offenders, with minimal or no prior criminal history and not representing principal figures in criminal organisations or activities. Nevertheless they received sentences similar to high-level drug offenders under the mandatory sentencing policies.<sup>114</sup>

The high proportion of drug-offences among the female prison population in part has been attributed to the fact that they usually play a minor role in the drug chain such as mules and are thereby easily caught and prosecutable. Other research has indicated that more serious offenders, mainly male, escape imprisonment or have their sentences reduced by entering plea-

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<sup>104</sup> Systems Overload: Drug Laws and Prisons in Latin America, Transnational Institute and Washington Office on Latin America, 9 December 2010, p. 52.

<sup>105</sup> Golichenko, M., and Merkinaite, S., In breach of international law: Ukrainian drug legislation and the European Convention for the Protection of Human Rights and Fundamental Freedoms, Discussion Paper, 2011.

<sup>106</sup> Drug Policy, Criminal Justice and Mass Imprisonment, *supra* at n. 2.

<sup>107</sup> Systems Overload: Drug Laws and Prisons in Latin America, *supra* at n. 11, p. 6. (Bolivia, Brazil, Ecuador, Mexico and Peru)

<sup>108</sup> UN Working Group on Arbitrary Detention, Mission to Mexico, E/CN.4/2003/8/Add.3, 17 December 2002, Para 44.

<sup>109</sup> Systems Overload: Drug Laws and Prisons in Latin America, *supra* at n. 11, p. 35

<sup>110</sup> The number of women in prison increased between 2000 and the beginning of 2013 by over 40 per cent, compared to an increase in the world population of 16 per cent in the same period, according to analysis by the International Centre for Prison Studies, Walmsley R, ‘Variation and Growth in Levels of Female imprisonment’, ICPS, 12 March 2014.

<sup>111</sup> Eka Iakobishvili, Cause for alarm: The Incarceration of Women for Drug Offences in Europe and Central Asia, and the need for Legislative and Sentencing Reform, Harm Reduction International, 2012.

<sup>112</sup> Cornell Law School’s Avon Global Center for Women and Justice and International Human Rights Clinic, Defensoría General de la Nación Argentina and The University of Chicago Law School International Human Rights Clinic, ‘Women in Prison in Argentina: Causes, Conditions, and Consequences’, (2013) p33.

<sup>113</sup> Special Rapporteur on violence against women, A/68/340 (2013), para. 26.

<sup>114</sup> Amnesty International, Women in Prison Factsheet (2005), citing Department of Justice, Bureau of Justice Statistics, Prisoners (1997)

bargaining deals and providing assistance to the prosecution, which women are usually unable to provide.<sup>115</sup>

In some States, **ethnic minorities and marginalised groups** living in poverty are disproportionately targeted by drug enforcement efforts.<sup>116</sup> In the US, African Americans make up 13 per cent of the population. Yet they account for 33.6 per cent of drug arrests and 37 per cent of people sent to state prison on drug charges. Black people are 3.7 times more likely to be arrested for marijuana possession than white people despite comparable usage rates.<sup>117</sup> Similar racial disparities have been observed elsewhere including the UK, Canada and Australia.<sup>118</sup>

Drug policies have resulted in **overcrowded facilities** in all regions of the world and lead to human rights violations, and in some cases ill-treatment.<sup>119</sup> As the former UN High Commissioner for Human Rights, Navanethem Pillay, stated,

*'Individuals who use drugs do not forfeit their human rights. Too often, drug users suffer discrimination, are forced to accept treatment, marginalized and often harmed by approaches which over-emphasize criminalization and punishment while under-emphasizing harm reduction and respect for human rights.'*<sup>120</sup>

Even more worrying, the **death penalty** was imposed in 33 countries for drug-related offences in 2013,<sup>121</sup> including China, Indonesia, Iran, Laos, Malaysia, Pakistan, Qatar, Saudi Arabia, Singapore, Thailand, UAE, Viet Nam and Yemen.<sup>122</sup> Around 1,000 people are executed every year as a result.

For example, China has carried out mass public executions of drug offenders, using the UN International Anti-Drugs Day on 26 June in recent years.<sup>123</sup> According to Iran Human Rights, in the first months of 2013 Iran publically executed by hanging at least 40 people convicted of drug offences, including one woman. 900 prisoners awaiting execution in Malaysia in October 2012 were drug offenders.<sup>124</sup> In October 2014, 111 prisoners on death row in Pakistan were drug offenders.<sup>125</sup>

Research suggests that punishment has a **limited impact upon reducing illicit drug use**, with countries which impose severe penalties for possession and personal consumption of drugs being no more likely to deter drug use in the community than countries imposing less severe sanctions.<sup>126</sup> A recent survey conducted by the UK government found that 'evidence from other countries show that levels of drug use are influenced by factors more complex and nuanced

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<sup>115</sup> Special Rapporteur on violence against women, A/68/340 (2013), para. 26.

<sup>116</sup> UN High Commissioner for Human Rights, 16 June 2014.

<sup>117</sup> 'New ACLU Report Finds Overwhelming Racial Bias in Marijuana Arrests', *ACLU website*, 4 June 2013, <https://www.aclu.org/criminal-law-reform/new-aclu-report-finds-overwhelming-racial-bias-marijuana-arrests> <accessed 27 January 2015>.

<sup>118</sup> Global Commission on Drug Policy, *Counting the costs*, 2014.

<sup>119</sup> See for instance ECHR judgment, *Varga and Others v. Hungary*, March 2015.

<sup>120</sup> Office of the United Nations High Commissioner for Human Rights (2009), High Commissioner calls for focus on human rights and harm reduction in international drug policy, Geneva: United Nations [http://www.ohchr.org/documents/Press/HC\\_human\\_rights\\_and\\_harm\\_reduction\\_drug\\_policy](http://www.ohchr.org/documents/Press/HC_human_rights_and_harm_reduction_drug_policy). Pdf, as quoted in the report of the Global Commission on Drug Policy, 'War on drugs', June 2011, p5.

<sup>121</sup> The Death Penalty for Drug Offences: Global Overview 2012, Harm Reduction International, 2012.

<sup>122</sup> Amnesty International, *Death sentences and executions*, 2013; see also The Death Penalty for Drug Offences: Global Overview 2011, International Harm Reduction Association, 2011.

<sup>123</sup> The Death Penalty for Drug Offences: Global Overview 2010, International Harm Reduction Association, 2010.

<sup>124</sup> 'Possible moratorium on death sentence pending govt's final decision', *New Straits Times*, 20 October 2012, <http://www.nst.com.my/latest/possible-moratorium-on-death-sentence-pending-govt-s-final-decision-1.159690>, <accessed 27 January 2015>

<sup>125</sup> 'Britain urged to suspend aid to Pakistan as hangings loom', *The Daily Telegraph*, 23 October 2014, <http://www.telegraph.co.uk/news/worldnews/asia/pakistan/11181240/Britain-urged-to-suspend-aid-to-Pakistan-as-hangings-loom.html> <accessed 27 January 2015>.

<sup>126</sup> UNODC, *From coercion to cohesion: Treating drug dependence through health care, not punishment*, Discussion Paper, New York, 2010,

than legislation and enforcement alone'.<sup>127</sup>

At the same time, there is a growing recognition of the disproportionality of current penalisation and the need to meet standards of **proportionality for drug offences** has been stressed repeatedly, including by the International Narcotics Control Board (INCB) in its 2007 Annual Report<sup>128</sup> as well as in a statement of the United Nations Office on Drugs and Crime (UNODC) in 2010.<sup>129</sup> UNODC's human rights guidance note of 2012 also emphasises the principle of proportionality, stating that: 'Responses to drug law offences must be proportionate' and that 'For offences involving the possession, purchase or cultivation of illicit drugs for personal use, community-based treatment, education, aftercare, rehabilitation and social integration represent a more effective and proportionate alternative to conviction and punishment, including detention.'<sup>130</sup> The UNODC also urged countries to abolish the death penalty for drug offences in line with the ICCPR.<sup>131</sup>

Owing to doubts about the appropriateness of indiscriminately harsh drug laws, a number of countries including UK, Argentina, Brazil and the EU reviewed their sentencing practices for drug offences in recent years.<sup>132</sup>

In the UK, the Sentencing Council developed new guidelines in 2011, advising the evaluation of an offender's culpability in committing the offence (role of the offender from a leading to a significant or lesser role) as well as the harm caused by the offence (introducing quantity thresholds). The review also took into consideration the fact that sentences based on quantity and purity of drugs resulted in 'vulnerable couriers receiving sentences at the same level as more serious, organised traffickers'.<sup>133</sup>

In Argentina, draft legislation was introduced in 2012, following deliberations of an advisory committee, that proposed to decriminalise possession for personal use and lowering the minimum penalty range for drug smuggling.<sup>134</sup>

The Supreme Court of Brazil held unconstitutional, in September 2010, the denial of alternative penalties for small time traffickers, and emphasised that sentences should include case-by-case consideration of whether drug treatment or other interventions are more appropriate than prison.<sup>135</sup>

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<sup>127</sup> UK Home Office, Drugs : International comparators, October 2014, [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/368489/DrugsInternationalComparators.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/368489/DrugsInternationalComparators.pdf), <accessed 27 January 2015>.

<sup>128</sup> International Narcotics Control Board (2008), Annual Report 2007, Chapter 1 (Vienna: INCB), <http://www.incb.org/incb/annual-report-2007.html>

<sup>129</sup> United Nations Office on Drugs and Crime, UNODC and the promotion and protection of human rights, UNODC Guidance Note – Human Rights, May 2012, [http://www.unodc.org/documents/justiceand-prison-reform/HR\\_paper\\_UNODC.pdf](http://www.unodc.org/documents/justiceand-prison-reform/HR_paper_UNODC.pdf)

<sup>130</sup> United Nations Office on Drugs and Crime, UNODC and the promotion and protection of human rights, UNODC Guidance Note – Human Rights, May 2012, [http://www.unodc.org/documents/justiceand-prison-reform/HR\\_paper\\_UNODC.pdf](http://www.unodc.org/documents/justiceand-prison-reform/HR_paper_UNODC.pdf), quoting International Drug Policy Consortium (IDPC), Drugs, crime and punishment, Series on Legislative Reform of Drug Policies Nr. 20, June 2012, p. 2.

<sup>131</sup> United Nations Office on Drugs and Crime, *Drug control, crime prevention and criminal justice: A Human Rights perspective—Note by the Executive Director*, March 2010, paras 25 and 26, quoting International Drug Policy Consortium (IDPC), Drugs, crime and punishment, Series on Legislative Reform of Drug Policies Nr. 20, June 2012, p. 2.

<sup>132</sup> quoting International Drug Policy Consortium (IDPC), Drugs, crime and punishment, Series on Legislative Reform of Drug Policies Nr. 20, June 2012, p. 2, pp. 5 et seq.

<sup>133</sup> Sentencing Council (2011), *Drug offences guideline professional consultation*, [http://sentencingcouncil.judiciary.gov.uk/docs/Drug](http://sentencingcouncil.judiciary.gov.uk/docs/Drug_Offences_Guideline_Professional_Consultation.pdf)

[\\_Offences\\_Guideline\\_Professional\\_Consultation.pdf](http://sentencingcouncil.judiciary.gov.uk/docs/Drug_Offences_Guideline_Professional_Consultation.pdf), quoting International Drug Policy Consortium (IDPC), Drugs, crime and punishment, Series on Legislative Reform of Drug Policies Nr. 20, June 2012, p. 5.

<sup>134</sup> International Drug Policy Consortium (IDPC), Drugs, crime and punishment, Series on Legislative Reform of Drug Policies Nr. 20, June 2012, p. 6.

<sup>135</sup> International Drug Policy Consortium (IDPC), Drugs, crime and punishment, Series on Legislative Reform of Drug Policies Nr. 20, June 2012, p. 7.

Various bodies attempt to develop proportionate sentencing rules for ‘drug mules’, as it is felt these cases should be distinguished from those involving ‘professional traffickers’. The rules should recognise the low-level role and culpability in the drugs market as well as the fact that heavy sentences for ‘drug mules’ ‘has little deterrent effect as criminal organisations can easily replace them and do ‘not address the desperate poverty and lack of socio-economic opportunities which motivate people to become “mules”’.<sup>136</sup>

The UN Special Rapporteur on the Right to the Highest Attainable Standard of Physical and Mental Health published a report exploring the option of decriminalisation.<sup>137</sup>

### 3. Solutions and recommendations

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#### General observations

Limited resources place constraints on all criminal justice institutions in a variety of ways. However, cost effective and sustainable solutions can be implemented and states should look at a variety of measures to decrease overcrowding. As stipulated by the UN Subcommittee for Prevention of Torture:

*‘A coherent strategy to reduce the number of people in prison should include a range of measures other than prison building: increased use of bail, reduction in pretrial periods, inclusion of time served on custodial remand in sentence calculation, increased use of non-custodial sentences, opportunities for remission/release on parole/other forms of release and programmes for re-integration of prisoners into the community and drug rehabilitation programmes so as to reduce the risk of re-offending, inter alia.’<sup>138</sup>*

Furthermore the Subcommittee noted with regard to pre-trial detention and low-resource solutions, that *‘Some solutions to the problems created by the excessive use and misuse of pretrial detention can be implemented with minimal financial expenditure, in a cost-effective and sustainable manner. Furthermore it is recognized that the excessive use and misuse of pretrial detention has a significant social and economic impact on the wider community, exacerbating poverty and misdirecting State resources.’<sup>139</sup>*

While **the construction of new prisons** may provide short-term relief to overcrowding, it does not constitute a sustainable strategy to address overcrowding. Alongside resource restrictions, which go beyond the mere construction of a prison but include considerable running costs, it has been widely acknowledged that ‘where there are prisons they will be filled’. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) emphasised:

*‘To address the problem of overcrowding, some countries have taken the route of increasing the number of prison places. For its part, the CPT is far from convinced that providing additional accommodation will alone offer a lasting solution. Indeed, a number of European States have embarked on extensive programmes of prison building, only to find their prison populations rising in tandem with the increased capacity acquired by their prison estates. By contrast, the existence of policies to limit or modulate the number of*

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<sup>136</sup> International Drug Policy Consortium (IDPC), Drugs, crime and punishment, Series on Legislative Reform of Drug Policies Nr. 20, June 2012, p. 8.

<sup>137</sup> Report of the Special Rapporteur on the Right to Health, UN-Doc. (A/65/255), <http://www.ohchr.org/EN/HRBodies/SP/Pages/GA65session.aspx>.

<sup>138</sup> Subcommittee on Prevention of Torture, Report on the Maldives CAT/OP/MDV/1, 26 February 2009, para. 220

<sup>139</sup> Eighth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, CAT/C/54/2, 26 March 2015, Para 88.

*persons being sent to prison has in certain States made an important contribution to maintaining the prison population at a manageable level.*<sup>140</sup>

Similarly periodic **amnesties and pardons** employed by some countries<sup>141</sup> only relieve overcrowding on a short-term. They do not offer a sustainable solution and can erode public confidence in the criminal justice system. The Working Group on Arbitrary Detention has expressed its concern at clemency measures, in its report on Italy, stating that it ‘risks undermining the perception of the rule of law.’<sup>142</sup>

Looking at **cost-effectiveness** of imprisonment as compared to non-custodial alternatives the cost of imprisoning someone is generally far higher than the costs of a non-custodial sentence. On top of the direct costs of imprisonment (building and administering prisons as well as prisoner-related costs), ‘there are also significant indirect or consequential costs, of imprisonment [that] may affect the wider community in various negative ways’, including on public health, as explained by UNODC.<sup>143</sup> For example, a study in the US by the National Center on Addiction and Substance Abuse at Columbia University of a drug treatment alternative to prison programme found, among other things, that the average cost of placing a participant in the non-custodial programme, including the costs of residential treatment, vocational training and support services was USD32,974, constituting half the average cost of USD64,338 if the participant had been sent to serve the average term of imprisonment for participants of 25 months. It also found that the programme reduced recidivism, achieving more cost savings for the state.<sup>144</sup>

**The following non-exhaustive list presents a number of solutions and recommendations to address the causes of overcrowding as described above:**

### **1) Reducing pre-trial detention:**

- **Widen the options and implement alternative measures to pre-trial detention**, including ordering an accused person to remain at a specific address, report on a periodic basis to an authority, surrender passports, pledge financial or other forms of property as security to assure attendance at trial, accept supervision by an authority, submit to electronic monitoring.<sup>145</sup> The Working Group on Arbitrary Detention recommends that ‘Alternative and non-custodial measures, such as reporting requirements, should always be considered before resorting to detention.’<sup>146</sup>
- **Utilise bail and increase the accessibility of bail to those with limited resources.** For example, in South Africa a scheme was set up enabling those who could not afford even very small bail fees to nonetheless be released pending trial. This reduced the number of persons in pre-trial detention and improved the functioning of the courts at several of the pilot sites.<sup>147</sup> The Working Group on Arbitrary Detention recommended to Morocco, for

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<sup>140</sup> Extract from the 7th General Report [CPT/Inf (97) 10]

<sup>141</sup> For instance the prison population in Georgia more than halved from 24,000 to 11,000 in early February 2013 mainly due to a broad amnesty in which 7,985 prisoners were released. See PRI’s Global Prison Trends 2015, p34.

<sup>142</sup> UN Working Group on Arbitrary Detention, Mission to Italy, A/HRC/10/21/Add.5. 26 January 2009, Para 26.

<sup>143</sup> UNODC, Handbook of basic principles and promising practices on alternatives to imprisonment, 2007, p4.

<sup>144</sup> Doug McVay, Vincent Schiraldi, and Jason Ziedenberg, P, ‘Justice Policy Initiative Treatment or Incarceration? Treatment or Incarceration?: National and State Findings on the Efficacy and Cost Savings of Drug Treatment Versus Imprisonment’, 2004, p5.

<sup>145</sup> UNODC, Handbook of basic principles and promising practices on alternatives to imprisonment, 2007, p19-20.

<sup>146</sup> UN Working Group on Arbitrary Detention, Mission to Greece, A/HRC/27/48/Add.2, 30 June 2014, para 124.

<sup>147</sup> The International Centre for Criminal Law Reform and Criminal Justice Policy, *Strategies and best practices against overcrowding in correctional institutions*, Griffiths, Curt Taylor and Murdoch, Danielle; as referenced in Penal Reform International, Making Law and Policy that Work, 2010.

example, to reduce the number of pre-trial detainees by devising a system for ‘arranging bail.’<sup>148</sup>

- **Improving coordination of all criminal justice actors.** For example, in Bangladesh, the Madaripur Legal Aid Association (MLAA) participates monthly in a Case Coordination Committee meeting designed to manage cases efficiently, thus reducing backlogs and prison overcrowding. At these meetings, the MLAA’s paralegals present the Committee with cases that need immediate attention.<sup>149</sup>
- **Establish effective systems of case management,** including by making better use of new technologies, to ensure detainees are delivered to court on time and to collate data which can be used to identify levels of risk and needs of offenders. Computerised systems are being developed in low-income countries including Tanzania and Kenya currently and in India a pilot system is being tried out at the Tihar Jail in Delhi.<sup>150</sup> See also UNODC Handbook on prisoner file management, 2008.<sup>151</sup>

## 2) Re-thinking sentencing policies, particularly for minor and non-violent offences

- **Non-custodial sanctions should be employed in the first instance,** particularly for first-time and non-violent offenders, young offenders and women, in line with the UN Tokyo Rules, UN Beijing Rules, UN Bangkok Rules and the principle of proportionality. The Working Group on Arbitrary Detention considers that ‘overcrowding should be reduced by increasing the use of alternative measures of constraint and alternative sentences, **particularly for less serious offences**’,<sup>152</sup> and that states should ‘[e]nsure the use of alternative measures that do not involve deprivation of liberty in cases where it is justifiable to do so, **taking into account the principle of proportionality.**’<sup>153</sup>
- The UN Tokyo Rules list a **wide range of alternatives to imprisonment for the sentencing stage,** including conditional discharges, probation and judicial supervision, a community service order, house arrest or an economic sanction such as fines.<sup>154</sup> Systems of diversion can also be used for minor offences, such as police warnings or cautions, restorative justice or mediation options, referral to drug treatment programmes or prosecutorial fines. The Working Group on Arbitrary Detention also recommends ‘reducing overcrowding by making use of alternative measures such as (...) release on bail, parole, house arrest, night imprisonment, daytime imprisonment, and furlough’<sup>155</sup> and as regards bail requires ‘due regard for the economic situation of the person concerned, even when the applicable penalty exceeds three years’.<sup>156</sup> It also recommends the ‘[I]ntroduction of suspended sentences for minor offences which are currently punishable only by terms of imprisonment.’<sup>157</sup>
- **Fines should be applied in a non-discriminatory manner.** The Working Group on Arbitrary Detention recommends measures to ‘sensitise judges to the need, when imposing

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<sup>148</sup> UN Working Group on Arbitrary Detention, Mission to Morocco, A/HRC/27/48/Add.5, 4 August 2014, Para 50.

<sup>149</sup> Open Society Foundations, ‘Presumption of guilty: the global overuse of pretrial detention’, 2014, p142.

<sup>150</sup> See PRI’s Global Prison Trends 2015, p30, with reference to footnote 205.

<sup>151</sup> [http://www.unodc.org/documents/justice-and-prison-reform/Prison\\_management\\_handbook.pdf](http://www.unodc.org/documents/justice-and-prison-reform/Prison_management_handbook.pdf)

<sup>152</sup> UN Working Group on Arbitrary Detention, Mission to Brazil, A/HRC/27/48/Add.3, 30 June 2014, paras 82 and 95.

<sup>153</sup> UN Working Group on Arbitrary Detention, Mission to Georgia, A/HRC/19/57/Add.2, 27 January 2012, Recommendation 98(b).

<sup>154</sup> See UNODC, Handbook of basic principles and promising practices on alternatives to imprisonment, 2007, pp27-39.

<sup>155</sup> UN Working Group on Arbitrary Detention, Mission to Argentina, E/CN.4/2004/3/Add.3

23 December 2003, Para 68.

<sup>156</sup> UN Working Group on Arbitrary Detention, Mission to Nepal, E/CN.4/1997/4/Add.2, 26 November 1996, Recommendation (e).

<sup>157</sup> UN Working Group on Arbitrary Detention, Mission to Nepal, E/CN.4/1997/4/Add.2, 26 November 1996, Recommendation (c).

fines, to take into account not only the seriousness of the offence but also the financial circumstances of the person concerned.<sup>158</sup> One good practice is found in Sweden where a system of 'day fines' or 'unit fines' was adopted. This means the seriousness of the offence is first expressed in terms of a number of days, and then the average daily income of the offender is determined. For example, if a crime is valued at 20 'days', each day might be valued at \$1 for a poorer person and \$20 for a wealthier person.<sup>159</sup>

- **Non-custodial sanctions should be developed that respond to the root causes of offending.** For instance programmes in the community for substance dependency, anger management or assistance with employment. In low-income countries, or over-stretched prison systems, low-resource intensive alternatives to imprisonment can be developed. For example in Kenya and Uganda volunteers assist in the work of probation officers and community service offers. Inspired by the example of Japan where volunteer probation officers outnumber professionals by a ratio of 5:1, Kenya has recruited and trained more than 300 volunteers since 2005. The volunteers have increased the reach of the probation service, reportedly reduced absconding and helped to speed up the writing of reports for courts and thus contributing to reducing prison. In Uganda in the light of the staffing inadequacies the Community Service Department has engaged volunteers at various courts to fill the gap.<sup>160</sup>
- The Working Group on Arbitrary Detention has recommended **decriminalising certain offences** to reduce overcrowding.<sup>161</sup> See, for example, offences with prison terms such as 'operating a small business without licence, possession of 'illicit liquor', abandoning one's family in Tanzania.<sup>162</sup>
- **Shorten prison sentences in appropriate cases, particularly for less severe crimes**, as recommended by the Working Group on Arbitrary Detention.<sup>163</sup> The UNODC also recommends: *'Using imprisonment unnecessarily is a poor use of resources which could be utilized in other ways, for example, to prevent crime and to provide better rehabilitation programmes in prisons, to prevent recidivism. Shortening prison sentences in appropriate cases is one of the simplest ways of reducing the size of the prison population, while also enabling substantial financial savings.'*<sup>164</sup>
- International standards require that deprivation of liberty constitutes a **measure of last resort** for minors. The Working Group reiterated **in the case of minors** that 'All necessary measures should be taken to ensure that persons below 18 are only deprived of liberty as a last resort (...); and to implement alternative measures to deprivation of liberty, such as probation, community service and suspended sentences.'<sup>165</sup> The Human Rights Committee has also emphasised that 'a child may be deprived of liberty only as a last resort and for the shortest appropriate period of time' and that such decision 'must be subject to periodic review of its continuing necessity and appropriateness'.<sup>166</sup>
- **Rehabilitation programmes and post-release after-care/reintegration should be invested in.** The UNODC explain that 'the success of efforts to assist prisoners with their

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<sup>158</sup> UN Working Group on Arbitrary Detention, Mission to Nepal, E/CN.4/1997/4/Add.2, 26 November 1996, Recommendation (f).

<sup>159</sup> UNODC, Handbook of basic principles and promising practices on alternatives to imprisonment, 2007, p30.

<sup>160</sup> Penal Reform International, 'Alternatives to imprisonment in East Africa', Trends and challenges, 2012, p26.

<sup>161</sup> UN Working Group on Arbitrary Detention, Mission to Greece, A/HRC/27/48/Add.2, 30 June 2014, para 118 and Mission to Morocco, A/HRC/27/48/Add.5, 2014, Recommendation I.

<sup>162</sup> Penal Reform International, Alternatives to Imprisonment in East Africa: Trends and Challenges, 2012, p.7

<sup>163</sup> UN Working Group on Arbitrary Detention, Mission to Ukraine, A/HRC/10/21/Add.4, 9 February 2009, Para 97.

<sup>164</sup> UNODC, 'Handbook on strategies to reduce overcrowding in prisons', 2013, p51.

<sup>165</sup> UN Working Group on Arbitrary Detention, Mission to Hungary, A/HRC/27/48/Add.4, 3 July 2014, Recommendation I.

<sup>166</sup> Human Rights Committee, General Comment No. 35: Article 9 (Liberty and security of person), 16 December 2014, UN-Doc. CCPR/C/GC/35, para.62, with reference also to General Comments No. 17, para. 1 and No. 32, paras. 42-44.

social reintegration can reduce the return of former prisoners to prison once again, thereby reducing the size of the prison population in the long term.’ They point out that rehabilitation and reintegration efforts need to be ongoing however, and be accompanied with other measures to sustainably reduce imprisonment.<sup>167</sup>

- Mechanisms for **early (conditional) release such as parole** should be put in place, as recommended, for example, by the Working Group on Arbitrary Detention<sup>168</sup>, to not only reduce prison numbers, but to facilitate re-integration into the community, thus reducing recidivism. The Council of Europe noted in their Recommendation on prison overcrowding and prison population inflation that parole be recognised as one of the ‘most effective and constructive measures, which not only reduces the length of imprisonment but also contributes substantially to a planned return of the offender to the community.’<sup>169</sup>

### 3) Reform of long-term/ mandatory prison sentences

- The **principle of proportionality** should be the underlying premise of sentencing policies and implemented throughout the criminal justice chain. This requires the sentence to be proportionate in length and type to fit the crime and the circumstances of the offender.
- Ensure that life imprisonment without the possibility of release is **not imposed on juveniles** under 18 years of age.<sup>170</sup>
- **End mandatory life sentences and life sentences without the possibility of parole**, in accordance with emerging international jurisprudence.<sup>171</sup>
- **Ensure that life imprisonment is imposed with the possibility of parole and ‘only when strictly needed to protect society and to ensure justice and (...) only on offenders who have committed the most serious crimes’**<sup>172</sup>
- **Establish non-arbitrary and independent judicial procedures for review and assessment of (conditional) release** of life-sentenced prisoners in line with UNODC’s recommendation ‘that all life sentenced prisoners have the possibility of release at some point, after a fixed term of the prison sentence has been served, and to put in place measures which enable the decision on such release to be based on objective risk assessments by a qualified body, such as a parole board.’<sup>173</sup> As UNODC’s 1994 report on ‘Life Imprisonment’ has concluded, ‘International instruments on imprisonment and human rights suggest that the deprivation of liberty may only be justified if accompanied by review and assessment procedures that operate within commonly accepted judicial standards’ and that ‘independent, non-arbitrary procedures and programmes for preparing prisoners for eventual release should be implemented’.<sup>174</sup>

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<sup>167</sup> UNODC, ‘Handbook on strategies to reduce overcrowding in prisons’, 2013, p146.

<sup>168</sup> UN Working Group on Arbitrary Detention, Mission to Ukraine, A/HRC/10/21/Add.4, 9 February 2009, Para 97.

<sup>169</sup> Committee of Ministers Recommendation NO° R (99) 22 on prison overcrowding and prison population inflation, 1999

<sup>170</sup> Article 37 Convention on the Rights of the Child; UNODC, Life Imprisonment, 1994, UN-Doc. ST/CSDHA/24, <http://www.penalreform.org/wp-content/uploads/2013/06/UNODC-1994-Lifers.pdf>, para. 71; Human Rights Council Resolution ‘Human rights in the administration of justice, including juvenile justice, 23 September 2013, UN-Doc. A/HRC/24/L.28.

<sup>171</sup> See the Inter-American Court of Human Rights case *Mendoza et al v. Argentina* (2013) prohibiting life imprisonment for offences committed when someone was below 18 years of age, and *Vinter and Others v. The United Kingdom* (2013) in the European Court of Human Rights which deemed life sentences without the possibility of review have been deemed to constitute cruel or inhuman treatment.

<sup>172</sup> UNODC, Life Imprisonment, 1994, UN-Doc. ST/CSDHA/24, <http://www.penalreform.org/wp-content/uploads/2013/06/UNODC-1994-Lifers.pdf>, para. 71.

<sup>173</sup> UNODC, ‘Handbook on strategies to reduce overcrowding in prisons’, 2013, p61.

<sup>174</sup> UNODC, Life Imprisonment, 1994, UN-Doc. ST/CSDHA/24, <http://www.penalreform.org/wp-content/uploads/2013/06/UNODC-1994-Lifers.pdf>, paras. 69 and 70.

- 'Guarantee that any individual sentenced to life imprisonment has the **right to appeal** to a court of higher jurisdiction and to seek a pardon or commutation of sentence'.<sup>175</sup>

#### 4) Reducing the number of prisons detained for drug-related offences

- **Abolish the death-penalty for drug-related offences.**
- Drug control policies should be re-balanced through alternative development, prevention, treatment and fundamental human rights.<sup>176</sup> **Community-based (treatment) alternatives to penalisation and imprisonment should be developed** as a response to drug use. As UNODC's 2012 World Drug Report stated, 'There is growing recognition that treatment and rehabilitation of illicit drug users are more effective than punishment'.<sup>177</sup> (See also Yuri Fedotov, UNODC Executive Director stated in 2010, 'Drug dependency is a health disorder, and drug users need humane and effective treatment – not punishment.')
- **Laws, sentencing guidelines** and practices for drug offences **should be reviewed** to evaluate and ensure proportionality. Proportionate sentencing policies should distinguish between the type of drugs and the scale of illicit activity, as well as the role and motivation of the offender. The socio-economic circumstances in which an offence was committed and the financial gains of the offender should be considered when determining the sentence.<sup>178</sup> UNODC recommends that legislation is reviewed to 'make a clear distinction between the different actors in the drug market, including those involved in large-scale drug trafficking, street corner dealing, and different levels of participation in drug production and trafficking, and in this context consideration may be given to reducing the severity of sanctions for minor drug offences not covered by diversion'.<sup>179</sup>
- One viable response to drug-related crimes by offenders with substance dependencies and related criminal behaviour are **drug treatment courts**. Drug Courts can reduce substance abuse through a combination of treatment and supervision. They were first introduced in the US, but have since been adopted by countries all over the world, including Australia, Canada, the UK, Belgium, Chile, Jamaica, Mexico and Suriname on a smaller scale.<sup>180</sup> Their sanctions provide a judicially supervised programme of substance dependency treatment and other services, addressing not only an individual's immediate offence, but their longer-term reintegration into the community, thereby helping to prevent reoffending.<sup>181</sup>

End./

<sup>175</sup> UNODC, Life Imprisonment, 1994, UN-Doc. ST/CSDHA/24, <http://www.penalreform.org/wp-content/uploads/2013/06/UNODC-1994-Lifers.pdf>, para. 71.

<sup>176</sup> See UNODC's World Drug Report 2012.

<sup>177</sup> UNODC, World Drug Report 2012, p. iii.

<sup>178</sup> International Drug Policy Consortium (IDPC), Drugs, crime and punishment, Series on Legislative Reform of Drug Policies Nr. 20, June 2012. p. 1

<sup>179</sup> UNODC, 'Handbook on strategies to reduce overcrowding in prisons', 2013, p57.

<sup>180</sup> UNODC, 'Handbook on strategies to reduce overcrowding in prisons', 2013, p126.

<sup>181</sup> Mitchell O et al, 'Assessing the effectiveness of drug courts on recidivism: A meta-analytic review of traditional and non-traditional drug courts', *Journal of Criminal Justice*, 40, 2012, pp60–71, [http://www.courtinnovation.org/sites/default/files/documents/Assessing\\_Efectiveness.pdf](http://www.courtinnovation.org/sites/default/files/documents/Assessing_Efectiveness.pdf) <accessed 27 January 2015>.