



Promoting fair and  
effective criminal justice

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## Statement of Penal Reform International

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### The human rights impact of the overuse of imprisonment

22 August 2013

PRI welcomes the initiative of the Secretary-General's report, on 'Latest developments, challenges and good practices in human rights in the administration of justice' (A/HRC/24/28), analysing the international legal and institutional framework for the protection of all persons deprived of their liberty, as requested in the UNGA Resolution on human rights in the administration of justice,<sup>1</sup> and would like to submit the following observations.

#### Increasing numbers of prisoners

The size of the prison population throughout the world is growing, placing an enormous financial burden on governments and significantly impacting human rights.

More than 10.1 million people are imprisoned globally, pending trial or following conviction, and the numbers are growing considerably.

Between 2008 and 2011, prison populations grew in 78 per cent of countries, and in 71 per cent of countries between 2006 and 2008.<sup>2</sup> To list a few examples, Colombia's prison population has increased by 322 per cent. In Indonesia, it has risen by 277 per cent, and by 250 per cent in Thailand. In Oceania, prison populations in Australia and New Zealand have more or less doubled since the early 1990's. Before its recent large-scale amnesty Georgia's prison population had trebled since the early 1990's due to harsh sentencing policies. The 70 per cent growth in the US prison population looks relatively modest in comparison, although it started from a higher baseline with the start of its prison expansion occurring in the 1970's.<sup>3</sup>

The actual figure of persons detained worldwide is far higher, as these statistics reflect imprisonment in relation to criminal proceedings only.

While some increase is to be expected given the growth in the world's population, the rise of prisoners exceeds this factor by far. Rather, the increase reflects a trend of criminalisation, prompted by the popular trend of being 'tough on crime'. More and more offences are subjected to prison sentences, including minor, non-violent offences, and the length of prison sentences are also increasing.

While imprisonment certainly has an important role in securing accountability and public

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<sup>1</sup> A/RES/67/166, para. 31

<sup>2</sup> See note above and World Prison Population List, Eighth Edition (2008)

<sup>3</sup> ICPS World Prison Brief at [www.prisonstudies.org](http://www.prisonstudies.org)

security, academic studies have not found a clear link between crime and violence on the one hand and the use of prison on the other.<sup>4</sup>

To put it bluntly, high rates of prisoners do not necessarily point to countries with a particularly 'criminal' population. Experience, such as seen recently in New York City, has also shown that a fall in crime can be achieved at the same time as a reduction in the prison population.<sup>5</sup>

Moreover, a large percentage of the global prison population is awaiting trial, while presumed - and often found - to be innocent. An estimated three million people are held in pre-trial detention on any given day. For example, an overall 36.3 per cent of the prison population in Africa, totalling 857,994 inmates as of 2011, were held in pre-trial detention, reaching 80-90 per cent in some countries.<sup>6</sup> Many of these people spend months and even years in detention - without being tried or found guilty.<sup>7</sup>

The length of pre-trial detention contributes to the increase, even though it varies largely, with an average of 5.5 months in 19 of the then 25 member states of the European Union<sup>8</sup> (2003), as compared to an average of 3.7 years in Nigeria.<sup>9</sup>

### **Human rights impact**

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 constitutes one of the major underlying causes of overcrowding, resulting in conditions that infringe upon human rights, and may even amount to ill-treatment and torture.

This is not surprising taking into account that based on the last set of comprehensive figures available (2011), 118 countries had a prison occupancy rate above 100 per cent. Out of these, 15 jurisdictions had rates of overcrowding above 200 per cent and 33 had rates between 150 and 200 per cent.<sup>10</sup>

Overcrowding has become one of the major problems facing prison systems across the globe. While the construction of new prisons may provide short-term relief, 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 widely been acknowledged that 'where there are prisons they will be filled'.

As the Subcommittee for the Prevention of Torture (SPT) stated, '[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,

<sup>4</sup> Van Dijk, Jan J.M., Robert Manchin, John van Kesteren, Sami Nevala and Gergely Hideg, 'The Burden of Crime in the EU', Research Report, 2007; EU ICS, 'A Comparative Analysis of the European Survey of Crime and Safety', 2005

<sup>5</sup> Jacobsen M., 'Downsizing Prison, How To Reduce Crime And End Mass Incarceration', 2005

<sup>6</sup> Joint NGO Statement at the 50<sup>th</sup> Session of the African Commission on Human and Peoples' Rights in Banjul, 25 October 2011; referring to International Centre for Prison Studies; World Prison Brief; [http://www.soros.org/initiatives/justice/articles\\_publications/publications/achpr-pretrial-20111025/pretrial-detention-statement-10252011.pdf](http://www.soros.org/initiatives/justice/articles_publications/publications/achpr-pretrial-20111025/pretrial-detention-statement-10252011.pdf); <http://www.prisonstudies.org/info/worldbrief/>

<sup>7</sup> Open Society Justice Initiative, The Socioeconomic Impact of Pretrial Detention, October 2011, p. 12.

<sup>8</sup> Accompanying document to the Proposal for a Council Framework Decision on the European supervision order in pre-trial procedures between Member States of the European Union, SEC(2006)1079 (Brussels: European Commission, August 29, 2006), 10-11.

<sup>9</sup> Anthony Nwapa, Building and Sustaining Change: Pretrial Detention Reform in Nigeria, in Justice Initiatives: Pretrial Detention (New York: Open Society Institute, 2008), 86.

<sup>10</sup> World Prison Brief of the International Centre for Prison Studies, <http://www.prisonstudies.org/info/worldbrief/>

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>11</sup>

### **Prison conditions amounting to torture and ill-treatment**

As the European Committee to Prevent Torture (CPT) has stated, '[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.'<sup>12</sup>

In its Forth Annual Report, the SPT has quoted that it 'continues to be bemused by the complacency which seems to surround the routine use of pretrial detention for prolonged periods and the resulting chronic overcrowding, and all its associated problems'. It suggested that '[r]ather than wait for the Subcommittee to come and recommend the obvious — such as, that the use of pretrial detention be used as the last resort, and only for the most serious offences or where there are serious risks that can only be mitigated by the use of pretrial detention — there is no reason why States parties should not embark on such strategies immediately, thus giving life to their obligation to prevent torture.'<sup>13</sup>

### **Fair trial implications**

Where suspects are held in pre-trial detention, human rights concerns include the undermining of a fair trial and of the presumption of innocence. Pre-trial detention increases the risk of a confession or statement being coerced by torture or ill-treatment, and - as the SPT has stressed - 'lessens a suspect's possibilities of defence, particularly when the person is poor and cannot rely on a defence counsel or support to obtain evidence in his favour'.<sup>14</sup>

The Working Group on Arbitrary Detention emphasised that detention prior to conviction 'must be the exception, not the rule', which 'finds its explanation in the presumption of innocence principle'.<sup>15</sup> The Working Group referred to empirical research in many countries, which has shown 'that defendants who are not detained pending trial have significantly better chances to obtain an acquittal than those detained pending trial'.<sup>16</sup>

The then Council of Europe's Commissioner for Human Rights, Thomas Hammarberg, labelled the underuse of non-custodial measures a 'human rights dilemma' and recalled that '[t]here are more humane and effective alternatives to pre-trial detention which would be suitable in many cases.'<sup>17</sup>

### **Right to liberty/ Proportionality of sentences**

Beyond concerns listed above in relation to pre-trial detention, any form of imprisonment touches upon the right to liberty, as enshrined in Article 9 ICCPR and other standards.

<sup>11</sup> SPT, Report on the Maldives CAT/OP/MDV/1 Report dated 26 February 2009, para. 220

<sup>12</sup> CPT Standards: Extract from the 7th General Report [CPT/Inf (97) 10], Para. 13.

<sup>13</sup> Subcommittee to Prevent Torture (SPT), Forth Annual Report on 'Overcrowding and Pre-trial Detention', para. 52

<sup>14</sup> SPT, Report on Paraguay, 7 June 2010, CAT/OP/PRY/1, para. 64

<sup>15</sup> Working Group on Arbitrary Detention, Report to the Commission on Human Rights, 12 December 2005, UN-Doc. E/CN.4/2006/7, para. 64

<sup>16</sup> Working Group on Arbitrary Detention, Report to the Commission on Human Rights, 12 December 2005, UN-Doc. E/CN.4/2006/7, para. 66

<sup>17</sup> Thomas Hammarberg, Council of Europe Commissioner for Human Rights, [http://commissioner.cws.coe.int/tiki-view\\_blog\\_post.php?postId=169](http://commissioner.cws.coe.int/tiki-view_blog_post.php?postId=169), 18 August 2011

Human rights standards require that any deprivation of liberty must be necessary and proportionate, for the purpose of protecting the person in question or preventing injury to others, and that it must take into consideration less restrictive alternatives.

Yet, in many countries the practice of imprisonment - pre-trial as well as convicted - exceeds this threshold. Often pre-trial detention is used in a systematic way, prompted by a suspicion of an offence alone. A risk of escape or interference with the course of justice is deduced from this suspicion or allegation as a matter of course, and consideration is rarely given to less intrusive measures than detention.

At the level of criminal law and sentencing, imprisonment has become a default response rather than a last resort. Penal policies resort to prison sentences as if they were the only way to ensure accountability of offenders, making little or no use of non-custodial alternatives, such as fines, conditional sentences, community service orders or restorative justice programmes.

While for serious offences, prison may be a suitable response, in many countries offenders are sent to prison for a wide array of minor offences, examples ranging from using abusive language to operating without a valid business licence and unlawful trespassing.

For example, in one country PRI has recently conducted research in, official statistics suggest that about 3,500 offenders are sentenced each year for periods of up to six months, 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 and abandoning one's family.<sup>18</sup>

Where imprisonment is imposed for such minor and non-violent offences it may constitute an unnecessary and disproportionate infringement upon the right to personal liberty.

As the Working Group on Arbitrary Detention has stated the right to liberty 'requires 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'. The Human Rights Committee, in its draft General Comment on Article 9, argues that '[d]etention must not be arbitrary, a notion not equated with against the law', but to be interpreted 'more broadly to include elements of inappropriateness (and) injustice, (...) and requiring remand in custody to be reasonable and necessary in all the circumstances'.<sup>19</sup>

Acknowledging the margin of discretion of states in shaping their penal policies, the occurrence of extreme discrepancies of sentences in different countries also raises concern. The Working Group on Arbitrary Detention elaborated that 'it is doubtful (...) 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'.<sup>20</sup>

## **Discrimination**

Imprisonment also prompts concerns with regard to non-discrimination. The Working Group on Arbitrary Detention, for example, has raised 'great concern' that 'in numerous countries certain ethnic and social groups are grossly overrepresented among the prison population',

<sup>18</sup> Penal Reform international, Alternatives to imprisonment in East Africa: trends and challenges, 2012, <http://www.penalreform.org/resource/alternatives-imprisonment-east-africa-trends-challenges/>

<sup>19</sup> Human Rights Committee, Draft General Comment on Article 9 - Liberty and security of person, 28 January 2013, UN-Doc. CCPR/C/107/R.3, para. 13

<sup>20</sup> Working Group on Arbitrary Detention, Report to the Commission on Human Rights, 12 December 2005, UN-Doc. E/CN.4/2006/7, para. 63

and has noted that ‘these are often groups that are particularly vulnerable, either as a result of past or current discrimination (racial minorities, indigenous people) or because they are otherwise marginalized, such as those affected by mental disability or substance abuse. (...) Actual discrimination and de facto inequality, such as “racial profiling” in law enforcement, as well as insufficient steps to protect and enforce social and economic rights of the members of these vulnerable groups, significantly contribute to their over-representation in the penal system’.<sup>21</sup>

The impact of discrimination and marginalisation has also been highlighted with regard to access to non-custodial alternatives to pre-trial detention. Where pre-trial detention is ‘ultimately linked to bail, poverty and social marginalization appear to disproportionately affect the prospects of persons chosen to be released pending trial. Bail courts base their decision whether to release an accused person also on his or her “roots in the community”. People 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 are considered as well-rooted. These criteria of course are often difficult to meet for homeless, drug users, (...or) the chronically unemployed (...) who thus find themselves in detention before and pending trial when less socially disadvantaged persons can prepare their defence at liberty.’<sup>22</sup>

### **Impact on other human rights**

Imprisonment also impacts on a range of other human rights, such as the right to private and family life. For female prisoners especially, imprisonment may mean the loss of parental rights. As a consequence of imprisonment, detainees lose their employment, and are facing the prolonged negative impact on finding a job following release.

Deprivation of liberty has also been shown to cause or exacerbate mental health issues, and exposes detainees to a higher risk of infection with communicable diseases, such as HIV/AIDS, tuberculosis and hepatitis, the contagion rate of which has been found to be between 10 to 100 times higher in prisons than among the general population. Thereby, imprisonment also has a considerable, if not irreversible, impact on the right to health.

### **Impact on development**

Enquiring into the rates of homicide, a study published recently by the UN Office on Drugs and Crime (UNODC) found a relation between development and the levels of violence. ‘Higher levels of homicide are associated with low human and economic development. The largest shares of homicides occur in countries with low levels of human development, and countries with high levels of income inequality are afflicted by homicide rates almost four times higher than more equal societies.’<sup>23</sup>

This suggests that increasing the use of imprisonment plays a relatively modest role in preventing and reducing violence and other forms of crime.

Lastly, due to the high costs of imprisonment, the impact on human rights is also an indirect one. Alternative approaches to imprisonment, in particular for minor, non-violent offenses, are known to be more effective in preventing re-offending and to be more cost-effective, while they would prevent the negative human rights impact described above. Over-imprisonment, on the other hand, diverts resources from just and fair criminal justice systems, spending them on prison management rather than on thorough investigations, more

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<sup>21</sup> Working Group on Arbitrary Detention, Report to the Commission on Human Rights, 12 December 2005, UN-Doc. E/CN.4/2006/7, para. 65

<sup>22</sup> Working Group on Arbitrary Detention, Report to the Commission on Human Rights, 12 December 2005, UN-Doc. E/CN.4/2006/7, para. 66

<sup>23</sup> United Nations Office on Drugs and Crime, ‘Global Study on Homicide’, 2011

judges, legal aid, expedited procedures and improved prison conditions.

### **The Human Rights Council and imprisonment**

While deplorable prison conditions amounting to torture and ill-treatment are raised by human rights mechanisms more frequently, the link to overcrowding as one of the systemic causes of deplorable prison conditions is less addressed.

Furthermore, the overuse of imprisonment as one of the major causes of overcrowding is often regarded as an issue of criminal law rather than a human rights issue.

This phenomenon also finds its expression in a relatively robust framework of standards and monitoring bodies relating to procedural safeguards in criminal procedures and prison conditions, while comparable standards on non-custodial alternatives to imprisonment lack the recognition of informing the human rights framework on the right to liberty.

For example, the UN Standard Minimum Rules for the Treatment of Prisoners are routinely referenced by UN human rights fora and mechanisms (despite having been adopted as a criminal justice framework), while the United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules) are relatively unknown and unused. Yet, providing a framework for alternatives to both, pre-trial detention and custodial sanctions, the Tokyo Rules should constitute a point of reference in assessing the necessity of imprisonment.<sup>24</sup>

As the Council of Europe's Commissioner for Human Rights suggested, '[t]he phenomenon of ill-treatment in prisons should not be viewed in isolation from the penitentiary system and criminal justice policy in general', reiterating 'the importance of adopting a more humane and human rights oriented criminal justice policy and reducing resort to detention on remand and imprisonment.'<sup>25</sup>

A focus on the human rights impact of criminal justice policies in a comprehensive way is lacking to date, and while the Human Rights Council and its mechanisms have expressed concern over prison overcrowding time and again, no mechanism has yet been established to address its causes.

In order to adopt a preventive approach, the links between criminal justice and human rights should be made more explicit and raised comprehensively. States should be encouraged to make use of non-custodial alternatives to imprisonment as a means to address human rights concerns relating to detention. This would, at the same time, free resources to improve prison conditions and procedural safeguards.

A mechanism specifically tasked with highlighting these links could have a positive impact to this end, recommending approaches to reduce the prison population compliant with human rights standards, and compiling good practice in non-custodial measures and prison decongestion.

Without addressing the issue of overcrowding and the overuse of detention, the existing human rights mechanisms will continue to report on deplorable detention conditions across the globe without ever being able to effectively remedy them.

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<sup>24</sup> Adopted by General Assembly resolution 45/110 of 14 December 1990

<sup>25</sup> Nils Muižnieks, Council of Europe Commissioner for Human Rights, in a letter to Prime Minister Ivanishvili of Georgia, 4 December 2012, <https://wcd.coe.int/ViewDoc.jsp?id=2011345&Site=CM>