

**MAX PLANCK INSTITUTE
FOR FOREIGN AND INTERNATIONAL
CRIMINAL LAW**

**Prison Overcrowding – Finding Effective Solutions
Strategies and Best Practices Against Overcrowding
in Correctional Facilities***

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1. Introduction: General Remarks

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

¹ See for example United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules) A/RES/45/110, 14 December 1990; Prison Overcrowding Project: Etiology of Prison Populations – Implications for Prison Population Projection Methodology. National Institute of Corrections, United States 1984; National Institute of Corrections: Our Crowded Prisons. The ANNALS of the American Academy of Political and Social Science 478 (1985); United Nations Economic and Social Council: International cooperation aimed at the reduction of prison overcrowding and the promotion of alternative sentencing. Resolution 1998/23, 44th plenary meeting, 28 July 1998.

² *Mullen, J.*: Prison Crowding and the Evolution of Public Policy. National Institute of Corrections: Our Crowded Prisons. The ANNALS of the American Academy of Political and Social Science 478 (1985), pp. 31-46, p. 31.

³ Governor of the State of California: Prison Overcrowding State of Emergency Proclamation. Office of the Governor, 10/04/2006.

⁴ See United Nations Economic and Social Council: Reform of the Criminal Justice System: Achieving Effectiveness and Equality. Use and Application of United Nations Standards and Norms, Especially Concerning Juvenile Justice and Penal Reform. Report of the Secretary-General, 2002.

On the one hand overcrowding sometimes seems to emerge as a problem which remained hidden for a long time until it all of sudden puts policy makers under pressure, be it as a consequence of activities of human rights watchdogs or court decisions which find serious violations of constitutional rights⁵. On the other hand, rapid declines of the prison population seem to come often also as a surprise for criminal justice administrators. The patterns of turning points in the course of prison populations reflect to a certain extent the degree of stability of criminal justice policies and criminal sentencing and the extent of their insulation from outside pressures.

Policies aimed at reducing prison overcrowding are faced with problems of how to introduce and to explain changes in sentencing practices or parole decision-making to a public which demands increasingly for more security and often equates security with long prison sentences, incapacitation and restrictive parole⁶. Many countries are exposed to economic and financial hardships which bring with it conflict-laden choices on where to direct scarce resources. Furthermore, policy makers have to respect separation of power principles and thus are subject to normative constraints which contribute to problems of effective planning, close coordination and rapid adjustments of the use of prison sentences and the flow of prisoners⁷. The subsystems of criminal justice are independent from each other, the operations of subsystems like criminal courts in terms of sentencing decisions do not consider the possible impact such decisions will have on the prison system⁸. Despite such problems overcrowded prisons have stimulated attempts to develop instruments which provide projections or forecasts of the course prison populations will take in

⁵ See for example Amnesty International: Amnesty International's Concerns in Serbia, including Kosovo: January-June 2009; www.amnesty.org/en/library/asset/EUR70/016/2009/en/f2e02aae-bf9a-4989-9d3d-3545d077e604/eur700162009en.pdf, p. 4; CPT: Report to the Government of the United Kingdom on the visit to the United Kingdom carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 18 November to 1 December 2008. Strasbourg 2009, pp. 20-21; European Court of Human Rights, Judgment as of 22 October 2009 in the cases *Orchowski v. Poland* (application no. 17885/04) and *Norbert Sikorski v. Poland* (no. 17599/05) holding that the conditions under which the applicants are detained establish a breach of Art. 3 of the ECHR and that where prison overcrowding reached a certain level, the lack of space in a prison could constitute the central factor to be taken into consideration under Article 3; see also the judgment as of 26 May 2008 of the Polish Constitutional Court: The serious and chronic nature of prison overcrowding in Poland can in itself be qualified as inhuman and degrading treatment; Article 248 of the Polish Code of Execution of Criminal Sentences (which allows for departing from the minimum space of 3 m² per prisoner) was incompatible with Article 40 (prohibiting inhuman and degrading treatment) of the Constitution.

⁶ See for example CAT: Summary record of the 622nd meeting: Argentina, 22/11/2004. CAT/C/SR. 622, no. 22.

⁷ *Kaufman, G.*: The National Prison Overcrowding Project: Policy Analysis and Politics – A New Approach. The ANNALS of the American Academy of Political and Social Science 478 (1985), pp. 161-172.

⁸ *Albrecht, H.-J.*: Particular Difficulties in Enforcing the Law Arising out of Basic Conflicts Between the Different Agencies Regarding the Best Suited Reactions upon Highly Sensitive Kinds of Crime, in: Council of Europe (ed.), Interactions within the Criminal Justice System. Strasbourg 1988, pp. 41-82.

order to be able to make sound decisions on whether to provide for more prison capacity or to close prisons⁹. But, projections of prison populations are faced with well-known problems of predicting the future, point to uncertainty and ultimately also to self-fulfilling prophecies. Prison projections have been developed as a basis for policy making in particular in the United Kingdom¹⁰, in the United States¹¹, Canada¹², Australia¹³ and New Zealand¹⁴. Prison projection methodology, however, has not received much attention in other parts of the world.

Prison overcrowding can come as the result of a slow, steady and long term increase in the number of prisoners, developing into a culture of “chronic overcrowding”¹⁵; it can come also in a rapid move upwards for example in the wake of collective violence and as a consequence of detaining scores of perpetrators for serious crimes as it was (and evidently still is) the case in Rwanda¹⁶. In the wake of the Rwandan genocide 1994, approximately 120.000 persons suspected being involved in mass murder have been detained in a prison system designed only for a small fraction of this number and in face of a criminal justice system capable to deal with only a few thousand cases per year¹⁷. Systems may be affected by prison overcrowding for short periods of time and manage to deal with it quickly; in some countries overcrowding appears as an ebb and flow phenomenon¹⁸ others suffer from overcrowding for extended periods of time and do not seem to find effective, sustainable solutions.

⁹ *Miller, D.*: Prison population projections. A review of methods used by state correctional agencies. Illinois Dept. of Corrections, Bureau of Policy Development 1981; *Blumstein, A.*: Research on Sentencing. National Research Council, Washington 1983, p. 239.

¹⁰ Ministry of Justice: Prison Population Projections 2009-2015, England and Wales. London, Ministry of Justice Statistics Bulletin, 28 August 2009.

¹¹ See for example Minnesota Department of Corrections: Minnesota Prison Population Projections. Fiscal Year 2008 Report. St. Paul 2008; according to PEW: Public Safety, Public Spending. Forecasting America’s Prison Population 2007-2011. Washington 2007, V, 42 states and the Federal prison administration have adopted prison projections as instruments to instruct policy makers.

¹² *Boe, R.*: A Medium-Term Federal Offender Population Forecast: 2001 to 2004. Correctional Service of Canada, February 2001.

¹³ *Fisher, G.*: Victoria’s Prison Population: 2001 to 2006. Sentencing Advisory Council, Melbourne 2007.

¹⁴ <http://www.justice.govt.nz/publications/global-publications/c/2009-2017-criminal-justice-forecast-report> [14.04.2012].

¹⁵ Report to the Government of the United Kingdom on the visit to the United Kingdom carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 18 November to 1 December 2008. Strasbourg, 8 December 2009, pp. 20, 22, 68.

¹⁶ Amnesty International: Rwanda. The enduring legacy of the genocide and war. London 2004, pp. 3-4.

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

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

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

2. How is Overcrowding Explained?

2.1 Introduction: Overcrowding Defined

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

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

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

principles for the Protection of All Persons under Any Form of Detention or Imprisonment” or the European Prison Rules²¹.

The problem of defining overcrowding is due to the lack of an internationally consented set of criteria which could be used to construct an instrument that can be applied uniformly in measuring overcrowding. In the evaluation of prisons with regard to overcrowding courts have adopted a case by case approach which does not rely on a single indicator (like for example square meters available for an individual prisoner), but consider a wide range of aspects in a process which after all weighs interests of the prison administration, security, economics and individual rights of the prisoner. Overcrowding, of course, then refers to a multi-dimensional assessment as the core of the overcrowding problem is located in the judgment whether proper prison regimes, related programs of rehabilitation, health care, safety of prison inmates as well as staff and public security, kitchen and sanitary facilities, as well as visiting programs and facilities for work and education and outdoor exercise may be operated and delivered according to established standards under certain conditions of occupancy. Decisions of the European Court of Human Rights on the space which should be available refer to guidelines set by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment²². The CPT has stressed that a standard of 3 m² per prisoner does not offer a satisfactory amount of living space and has recommended to adopt a standard of at least 4 m² per prisoner. It advised also that cells with less than 6 m² should be taken out of service as prisoner accommodation²³. The Special Rapporteur has underlined that four square meters are in particularly not acceptable if (remand) prisoners are confined for most of the time within the cell and remain in remand prisons for extended periods of time²⁴. 7 m² per prisoner might serve as an approximate and desirable guideline for a detention cell, but establishing overcrowding

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

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

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

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

from the perspective of an infringement of Art. 3 of the European Convention on Human Rights will be dependent on more than just an observation of less than 7 square meters being available for one prisoner. Length of time spent in an overcrowded prison facility, possibilities to spend time outside the cell, participation at furlough programs, the delivery of rehabilitative services and medical treatment as well as security issues will be taken into account, too. Insofar, overcrowding will also be dependent on the normative and cultural framework within which overcrowding (in terms of infringements on basic rights) is assessed. The European Court of Human Rights, however, has made clear that falling under a certain amount of space will always raise an issue under the prohibition of torture and inhumane and degrading treatment or punishment. The finding that a prisoner was placed in a cell which left 0.9-1.9 m² of space per inmate evidently results in inhumane conditions of confinement. In the judgment reference was made to aggravating circumstances coming with overcrowding, in particular the necessity to sleep in turns, disturbance through general commotions and noise from a large number of inmates as well as the lack of “real privacy” and risks of catching diseases as well as the length of confinement under overcrowded conditions, while it was noted that a lack of intent to put prisoners into such conditions would not exclude a finding of violation of the prohibition of inhumane and degrading treatment or punishment (Art. 3 ECHR)²⁵. The European Court on Human Rights in recent cases in fact has stressed that space itself could represent the central factor indicating an overcrowded situation which establishes an infringement on the prohibition of inhuman treatment/punishment²⁶. It does not come as a surprise then that concerns for systemic overcrowding and the risk of a violation of Art. 3 ECHR have been raised in European Arrest Warrant proceedings²⁷.

Approaches to the assessment of overcrowding under international and national laws and standards amount roughly to a “totality of conditions” test²⁸ which essentially provides for a multi-dimensional scale. This scale includes “core conditions” of adequate circumstances of detention/imprisonment²⁹, including the space available for a prisoner (and it embraces also a “prison space per se” test). The smaller the space available, however, the more important becomes space in itself. The ruling of the Polish Constitutional Court³⁰ holding that an emergency provision in the prison law which allows suspension of the statutorily determined minimum space of 3 square meters is unconstitutional, underlines that a minimum amount of space

²⁵ ECHR: *Kalashnikov v. Russia*, Application no. 47095/99, Judgment, Strasbourg, 15 July 2002.

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

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

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

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

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

determines a baseline of overcrowding. In most countries in Western Europe, where the tradition has been that each prisoner should be kept in a single cell, overcrowding generally means having two or three prisoners living in a cell that was originally constructed to hold one person. However, single cell accommodation is not the rule in other regions. In some countries in Eastern Europe throughout the 1990s overcrowding meant three prisoners having to share one bed, sleeping in turns. The size of living accommodation is, of course, only one element to be taken into account when considering whether a prison is overcrowded. The Anti-Torture Committee of the Council of Europe has moreover stated that even with an occupancy level of 95 % of the total design capacity of a prison estate, it becomes difficult or even impossible to deliver those services which are required to ensure respect for inmates' human dignity³¹. Insofar, the definition of overcrowding and its relevance for cruel, inhuman, degrading treatment/punishment as well as human dignity is subject to an ongoing discourse which reflects various concerns and interests.

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

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

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

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

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

rule³⁴ or communal cells and on the general prison designs and culture³⁵, on the economic resources available and the degree of elasticity which is demanded from prison administration by politicians, law makers and the judiciary. However, imprisonment (and prisons) refers to criminal punishment which is the least elastic when contrasting it with probation, day fines or other community sanctions. The question of how much “double bunking” (or triple bunking) can be tolerated and for which time demonstrates the apparent need for elasticity and the corresponding need to monitor tightly its use in order to avoid that short-term relief strategies turn into long term overcrowding. Prison capacity therefore has been assumed to be a “slippery concept” which expresses the need for elasticity and can be used to make overcrowding more or less apparent³⁶.

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

2.2 Causes of Overcrowding

2.2.1 *Where and When Does Overcrowding Occur?*

Explanations of overcrowding have been preoccupied with the excessive use of prison sentences and the overall growth of prison populations³⁷. Insofar research has dealt rather with explaining prison growth than finding answers to the question of how overcrowding may be explained. Evidently, it is assumed widely that overcrowding is strongly correlated with a heavy use of imprisonment³⁸. The most prominent example these days certainly concerns California exhibiting even by US standards an extremely high rate of imprisonment and at the same time extreme overcrowding which has resulted in a court decision obliging the state of California to reduce its prison population by some 55,000 prisoners within three years in order to re-establish prison conditions not infringing on constitutional rights of prison

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

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

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

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

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

inmates (8th Amendment)³⁹. In Europe, England/Wales may serve as an example for a prison system which on the one hand is characterized by a strong increase in the number of prisoners and top-ranked in Western Europe as regards the prisoner rate, and, on the other hand experiences during the last years overcrowding in many prisons⁴⁰.

However, a closer look at prison systems reveals that the correlation between the rate of imprisonment and overcrowding is rather weak. Data from the Council of Europe Penal Statistics 2006 can be used for an analysis of prison occupancy rates of 42 European countries which are members of the Council of Europe⁴¹. Data for 2006 allow for a basic description of occupancy rates and the under or over capacity operation of correctional systems. The data show that 17 correctional systems in 2006 had occupation rates which are less than 95 % of the actual capacity (Latvia, Monaco, Northern Ireland, Turkey, Switzerland, Armenia, Azerbaijan, Republic Srpska, Iceland, Lithuania, Liechtenstein, Luxemburg, Malta, Moldova, Russian Federation, San Marino, Slovakia). 14 countries report occupation rates which fall in between 95 % and 105 % of the official prison capacity (Albania, Bosnia, Czech Republic, Denmark, Estonia, Germany, Netherlands, Norway, Portugal, Romania, Slovenia, Sweden, Macedonia, Scotland). Minor overcrowding (of less than 10 %) is noted for two countries (Austria, Georgia), while seven countries had a number of prisoners which exceeded prison capacity by 10 to 30 % (Ukraine, Poland, Belgium, Croatia, Finland, France, England/Wales). Three countries are affected by occupation rates ranging between 30-50 % over the capacity (Spain, Italy, Hungary) and the rates of another three (Greece, Cyprus, Bulgaria) were 50 % above the number of prisoners which officially can be accommodated in available prison cells.

The correlation between prison occupancy rates and prisoner rates calculated for all countries covered by the Council of Europe prison statistics amounts to $-.153$ (Pearson's R) indicating a negative correlation (which means that with an increasing prisoner rate occupancy rates are decreasing). However, this is due to many of the Eastern European countries still providing for significant official prison capacity despite significant decreases in the number of offenders actually sent to prison⁴². This results in many of the Eastern European countries experiencing a rather low average utilization of prison capacity. When taking Eastern European countries out

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

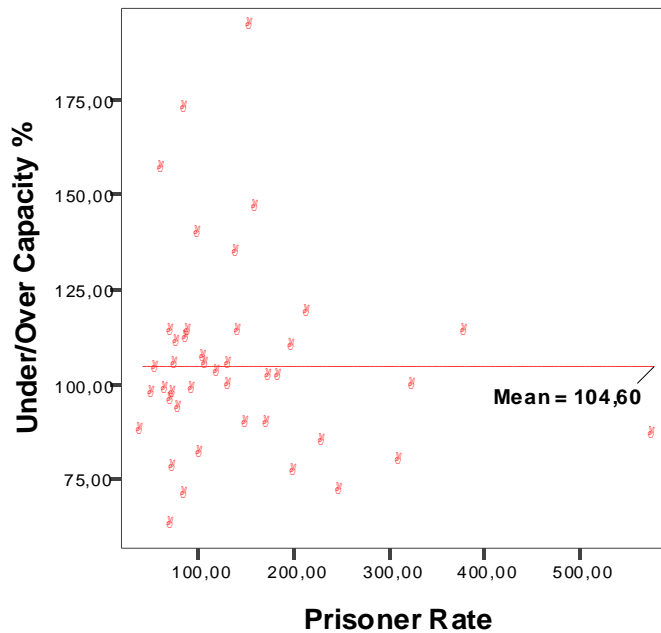
⁴⁰ *Gray, C. & Elkins, M.*: Projections of Long Term Trends in the Prison Population to 2008 8/01. England and Wales. London 2001.

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

⁴² See for example CPT: Report to the Latvian Government on the visit to Latvia carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 27 November to 7 December 2007. Strasbourg 2009, pp. 21-22, noting a significant reduction of the number of prisoners since the last visit of the CPT to Latvia (from 8,231 into 6,530 in 2007) and a number of prisoners well below the maximum capacity of Latvian prisons.

of the calculation then, the correlation coefficient turns into the positive direction (.204). But, the coefficient is not significant and should be interpreted as demonstrating that overcrowding can come with both, low and high levels of prisoner rates.

Graph 1: Prisoner Rates (100,000) and Overcrowding in Europe



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

2.2.2 Occupancy Rates and Their Correlates

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

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

the Gross National Product life expectancy, the rate of literacy as well as other economic and education related indicators. Finally, effectiveness and legitimacy indices refer to security, economic, political and social dimensions which add up to the (total of) state fragility index⁴⁴.

Table 1: Correlates of Prison Occupancy Rates

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

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

* R = Pearson's Correlation Coefficient

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

The correlations on display in table 1 reveal nothing unexpected for the data at large. Overcrowding is correlated with the rate of pretrial detainees, the size of the GDP per capita, the degree of inequality as measured by the Gini index, democracy, the extent of perceived corruption, state fragility and its subcomponents as well as violence. Overcrowding is neither significantly correlated with the prisoner rate at large nor with the share of foreign prison inmates. On the basis of this pattern of correlations it can be concluded that overcrowding problems essentially are associated with problems of governance, a weak economy and obvious problems in the criminal justice systems (expressed in the share of pretrial detainees). When it comes to the regions it is also to be expected that due to small numbers correlation coefficients only rarely get significant. Most of the correlations which are found for world regions follow expectations. A significant correlation between pretrial detention and occupancy rates is not found for South America. This means that there is not much variation in the share of pretrial detainees in South American countries; all prison systems are affected to more or less the same extent.

2.2.3 Overcrowding in World Regions

2.2.3.1 Clusters of Overcrowding

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

Table 2: Clusters of Overcrowding

Final Cluster Centers			
	Cluster		
	1	2	3
Occupancy Rate %	105,14	110,83	144,68
Pretrial Detainees %	26,73	24,74	40,01
GDP Capita US\$	32331,82	15604,35	3894,94
Violent Death / 100,000	1,41	8,34	15,13
State Fragility Index 2008	1,05	2,17	11,37
Prisoner Rate / 100,000	156,32	197,22	140,80
Human Development Index	954,09	867,57	656,78
Democracy Index	8,36	7,03	5,08
Corruption Index 2009	7,90	4,88	2,90
Share of Regions at Clusters () percent of countries from a region falling in clusters 1-3	23 % (100) N. Europe 36 % (90) W. Europe 5 % (10) S. Europe 5 % (33) Far East 5 % (10) S.E. Asia 5 % (20) Near East 5 % (20) Middle East 8 % (100) N. America 8 % (100) Oceania	9 % (25) S. Africa 4 % (10) S.E. Asia 39 % (53) E. Europe 13 % (40) S. Europe 4 % (10) W. Europe 4 % (33) Far East 9 % (40) Middle East 18 % (25) S. America	8 % (75) S. Africa 9 % (100) E. Africa 14 % (100) W. Africa 5 % (100) N. Africa 8 % (100) Centr. Asia 11 % (80) S.E. Asia 4 % (100) Caribbean 11 % (47) E. Europe 5 % (50) S. Europe 1 % (33) Far East 3 % (40) Middle East 5 % (80) Near East 16 % (75) S. America

2.2.3.2 Overcrowding in Europe

When looking at prison occupancy rates as they unfolded after the last account in the Council of Europe Prison Statistics 2006, it can be observed that in many cases of overcrowding on display in the data from 2006 there were no improvements made. For Greece, the CPT noted at the occasion of a visit in 2007 that despite plans to implement a prison construction program and a criminal policy which should encourage alternatives to imprisonment and early release/parole, prison overcrowding had not lost its momentum⁴⁵. The problem of overcrowding persists

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

also in Bulgaria⁴⁶ although Bulgaria has experienced a significant reduction in the prison population over the last years⁴⁷. Albania made progress in reducing overcrowding problems, though over capacity operation of facilities for remand and sentenced prisoners still is observed⁴⁸. Other European countries have evidently slipped deeper into overcrowding problems (Belgium⁴⁹, France⁵⁰, Italy⁵¹). Since mid 2008, overcrowding affects Irish prisons. In face of a “design capacity” of 2,969 places counted in July 2008 3,589 prisoners had to be accommodated and the Irish prison population reached almost 4,000 at the end of May 2009⁵². In England/Wales approximately a quarter of prisoners since the beginning of the new millennium is detained under conditions of overcrowding⁵³. On the other side, some countries have managed to reduce prison populations significantly (Portugal, Romania, The Netherlands, Germany)⁵⁴.

The situation in Central/Eastern Europe and Russia looks rather mixed. For Georgia, serious problems of overcrowding are reported, evidently as a consequence of a rapid increase in the number of prisoners between 2004 and 2008. The number of prisoners tripled in this period from some 6,500 to almost 20,000⁵⁵.

⁴⁶ United States Department of State, 2009 Country Reports on Human Rights Practices – Bulgaria, 11 March 2010; <http://www.unhcr.org/refworld/docid/4b9e530d2.html> [14.04.2012].

⁴⁷ Round Table on detention conditions, Prison population in the European Union, Brussels, 8 December 2009; <http://www.kcl.ac.uk/depsta/law/research/icps/worldbrief/?search=europe&x=Europe>, the number of prisoners in Bulgaria stands at approximately 9,400 in 2009, a significant decrease from some 11,500 in 1998.

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

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

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

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

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

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

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

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

Overcrowding as a problem has been raised for Poland and Hungary⁵⁶ (which is also visible in the number of cases pending before the European Court on Human Rights). The most dramatic reduction in prison numbers in any member state of the Council of Europe over the last decade occurred in Russia, where the prison population stood at over one million in 1998 and had fallen to 763,000 by the beginning of 2005⁵⁷. While the reduction has been explained by a mix of grounds, among them political will, legislative changes, the systematic involvement of key players of the criminal justice process, especially judges and prosecutors, re-assurance of the public and the media that the changes in the prison system will not threaten public safety, in recent years the prison population has increased again and stands in 2008 at approximately 900,000 prisoners (however still well below prisoner rates in the 1990s)⁵⁸. In other Central and Eastern European countries overcrowding has been linked to remand prisons and the vast use of pretrial detention. In Moldova efforts to reduce prison overcrowding have been launched through implementing alternatives to imprisonment, but overcrowding persists in remand prisons⁵⁹. Also, in the Ukraine problems of overcrowding are felt especially in pre-trial detention centers⁶⁰.

2.2.3.3 North America

Prison growth has been particularly marked in the United States where a policy of mass incarceration⁶¹ has resulted in imprisonment and prisoner rates that go far beyond what is observed in other countries⁶². With one among 100 adults in prison at any given day costs for incarceration are placing increasing pressure on public budgets and experiences of imprisonment are far more prevalent among Hispanic and Afro-American men (with one in nine black men aged 20–34 years behind bars)⁶³. However, prison rates, prison growth and prison crowding vary widely in

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

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

⁵⁸ Coyle, A.: Managing prison overcrowding: A European perspective. Rencontre Européenne des Directeurs d'Administration Pénitentiaire, Ministère de Justice. Place Vendôme, Paris, 11 July 2008. International Centre for Prison Studies. London 2008, p. 8; Russian Research Center for Human Rights (fn. 57), p. 3.

⁵⁹ Human Rights Council: Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, *Manfred Nowak*, Mission to the Republic of Moldova, A/HRC/10/44/Add. 3, 12 February 2009, pp. 30-48.

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

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

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

⁶³ The PEW Center (fn. 61), p. 6.

the United States⁶⁴. While rates of imprisonment continued to grow for almost four decades between 1973 and 2008, the pace of growth slowed down during the last years and 2009 saw the first time a decline – though small and amounting to -0,4 % for the United States at large⁶⁵. The overall decline did not reduce the divide between states with decreasing numbers of prisoners on the one hand and states with an expanding system of imprisonment. Rather, this divide is deepening, showing for example states with extreme drops in the number of prisoners and states with evenly extreme increases. Overcrowding in the American prison system can be studied on the basis of official accounts and statistics which provide for an accurate picture of occupancy of most prison systems in the United States⁶⁶. Canada, in contrast to the United States, has a far lower prisoner rate and less capacity problems despite a development of crime rates that corresponds to that in the United States.

2.2.3.4 Latin America

Latin America displays a mixed picture as regards the size and growth of prison population⁶⁷ but virtually all countries in this region have been plagued by prison overcrowding for decades. Recent reports of the Inter-American Commission on Human Rights have revealed overcrowding problems in the Chilean prison system⁶⁸. In Mexico overcrowded prisons have been linked to prison riots and severe impediments to successful re-entry programs⁶⁹. Argentina reports critical prison conditions in particular from the province of Buenos Aires. In 2009, the overpopulation in provincial prisons worsened with 77 % of detainees placed in pretrial detention⁷⁰ and despite a landmark ruling of the Argentine Supreme Court from May 2005 which declared that all prisons in the country must abide by the United Nations Standard Minimum Rules for the Treatment of Prisoners there are no signs of significant changes. Brazil's prisons are plagued by severe overcrowding, too. Delays within the justice system contribute to overcrowding; some 45 % of all inmates in Brazil are pretrial detainees. The Brazilian National Justice Council reported in 2009 that approximately 60,000 inmates were being held arbitrarily⁷¹. For Uruguay plans to address overcrowding have been developed in a response to a

⁶⁴ The PEW Center (fn. 61), p. 7.

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

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

⁶⁷ *Walmsley, R.*: World Prison Population List (eighth edition). King's College. London 2009, p. 3.

⁶⁸ Inter-American Commission on Human Rights: Rapporteurship on the Rights of Persons Deprived of Liberty. No. 39/08.

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

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

⁷¹ Human Rights Watch (fn. 70), p. 203.

mission of the Special Rapporteur⁷². Paraguay, in spite of a rather low prisoner rate, displays heavy overcrowding in the prison system⁷³.

2.2.3.5 Overcrowding in Africa

Africa seems to be particularly exposed to overcrowding⁷⁴. The most recent figures show for all African countries (below the Sahara) for which information is available elevated rates of overcrowding⁷⁵. Overcrowding and related precarious conditions of prisons had been made a central point in the Kampala Declaration 1996 which draws on experiences from the 1970s and 1980s⁷⁶. In addition to chronic overcrowding problems, several African countries have experienced substantial growth of prison populations in recent years as well as deterioration of capacity problems coming with that. Uganda reports for October 2009 approximately 31,000 prisoners (up from around 20,000 in 2007). More than 50 % of these are remand prisoners⁷⁷. As the prison capacity was established at around 10,000 beds in 2007, capacity problems evidently have significantly worsened. The optimistic assessment in the 2007 Uganda census report which assumed a further decline in the prison population growth, was certainly unfounded⁷⁸. The Tanzanian Prison Service is responsible for the custody and care of more than 45,000 inmates while its official accommodation capacity is 22,669. This implies that the prison facilities are overcrowded by more than 100 %⁷⁹. Overcrowding then is reported from the Democratic Republic of Congo⁸⁰ as well as from countries of Southern Africa. For

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

⁷³ Human Rights Council: Seventh session Item 3 of the agenda Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development. Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, *Manfred Nowak*, Addendum: Mission to Paraguay, A/HRC/7/3/Add. 3, 1 October 2007, p. 17.

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

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

⁷⁶ Kampala Declaration on Prison Conditions in Africa; www.penalreform.org/english/pna_declarationkampala.htm [14.04.2012].

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

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

⁷⁹ www.moha.go.tz/index.php?option=com_content&view=article&id=20&Itemid=11 [14.04.2012].

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

South Africa a prison population of 40 % over the official capacity was noted for 2009. Among prisoners figured some 16,000 who were detained because they could not afford bail or paying a fine of 1,000 Rand (102 €) or less⁸¹. Namibia is affected by prison capacity problems since independence at the beginning of the 1990s⁸². Overcrowding has been reported from the central prison in Windhoek⁸³ as well as from police detention facilities⁸⁴.

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

2.2.3.6 Overcrowding in Asia

Prison growth and prison overcrowding are reported from virtually all South-East Asian countries. There were approximately 90,000 prisoners in Indonesia in 2006; three years later more than 140,000 inmates have been counted in face of an official prison capacity of 80,000⁸⁸. The Special Rapporteur has noted that a large share of the Indonesian prison population concerns drug offenders and that pretrial detainees are outnumbering sentenced prisoners⁸⁹. Overcrowding has a negative impact on efforts to control tuberculosis and other transmittable diseases (in particular HIV) in Indonesian prisons⁹⁰.

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

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

⁸³ *The Namibian*, April 18, 2008.

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

⁸⁵ See *Muntingh* (fn. 75), pp. 184-185.

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

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

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

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

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

For Jakarta prisons it was stated that in face of an official capacity of 5,000 inmates these prisons housed in 2009 nearly 12,000 detainees, among them some 6,900 who were detained for drug related crime⁹¹. Sri Lankan prisons hold some 28,000 prisoners although the official capacity was established with 8,200 prison beds⁹². Overcrowded prisons have been reported from the Philippines⁹³, from Vietnam⁹⁴, Thailand (200,000 prisoners in prisons and detention facilities designed to hold 100,000)⁹⁵ and Pakistan (95,000 prisoners are detained in 72 prisons originally built to hold 36,000 persons)⁹⁶. Most of Central Asian countries as well as countries of the Far East (for example Japan) are less affected by prison overcrowding.

2.2.3.7 Post-Conflict and Conflict-Affected Countries

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

In Afghanistan a rapidly increasing prison population is assumed to be the result of serious shortcomings in the criminal justice system which faces a heavy increase in cases coming to courts (also as a consequence of new criminal laws, in particular

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

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

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

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

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

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

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

criminal drug law)⁹⁸. The prison population is predicted to reach 110,000 in 2010 (up from 9,600 in 2007⁹⁹).

The Haitian prison system suffers from significant problems¹⁰⁰. The prison system is overburdened, understaffed and severely overcrowded. As of December 2008, Haiti's 8,204 prisoners were held in facilities with a capacity of 2,448¹⁰¹. The number of prisoners has skyrocketed from some 2,500 in 2005 to more than 6,000 in 2007. The physical infrastructure of criminal corrections has been partially destroyed in violent conflicts. The National Penitentiary, in April 2007, housed more than 2,500 prisoners although it was built to accommodate 800 detainees. Approximately four fifths of the prisoners are not sentenced but pretrial detainees¹⁰². The rate of pretrial detainees is particularly high among young prisoners¹⁰³. Prison conditions certainly are not in line with the United Nations Minimum Standards as basic needs of prisoners such as access to potable water, health services, food etc. allegedly are not catered to in an adequate way. Security problems in the prison are responded to by reducing the number of prison visits and keeping prisoners locked up in their cells¹⁰⁴.

2.2.3.8 Prison Overcrowding: A Mixed Picture

Data on prison capacity and overcrowding reveal also that overcrowding may affect a country's prisons selectively with some prisons showing over capacity occupancy while others operate below the level of accommodation capacity¹⁰⁵. A prison system at large may not exhibit a situation of overcrowding, but nonetheless overcrowding restricted to certain regions or individual prison facilities may occur¹⁰⁶.

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

⁹⁹ *Walmsley, R.*: World Prison Population List (8th ed.). King's College, London 2009, p. 4.

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

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

¹⁰² Inter-American Commission on Human Rights (IACHR), Press Release No. 32/07 "Rapporteur on the Rights of Persons deprived of Liberty Concludes Visit to the Republic of Haiti"; <http://www.cidh.oas.org/Comunicados/English/2007/32.07eng.htm> [14.04.2012].

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

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

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

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

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

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

States Parties Under Article 19 of the Convention. Conclusion and recommendations of the Committee against Torture (Extracts for follow-up), Guyana.

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

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

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

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

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

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

Finland may serve then as (a rather unique) example for a long term trend of falling numbers of prisoners¹¹² as are examples Germany, Portugal and The Netherlands for a more recent short-term but significant decline of the prison population and questions linked to significant vacancy in prison facilities.

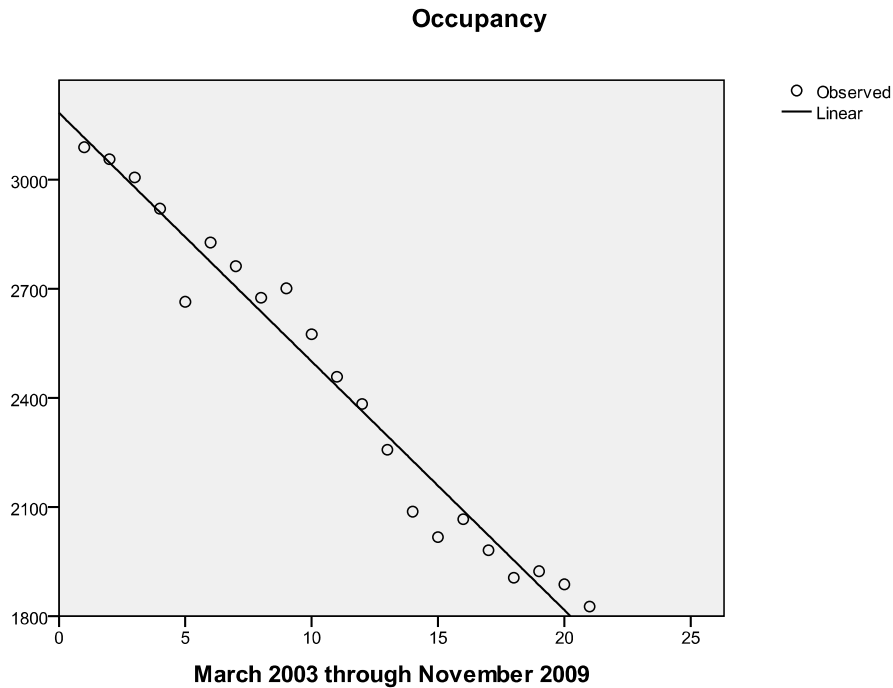
In Germany a steady decline brought down the prison population from 81,176 (March 31, 2003) to 73,592 in 2009 (March 31), a drop of almost 10 %. The General Accounting Office of the State of Hamburg recently has advised the state government to respond to the dramatic decline in the Hamburg prison population (2003: N = 3,120; 2008: 2,030) through adjusting the prison budget and reducing the prison capacity accordingly¹¹³. The decline in the Hamburg prison population is due to reductions in both, the number of pretrial detainees and sentenced prisoners. In the case of sentenced prisoners, the reduction, which is particularly marked for prison sentences above one year, was rather due to a drop in prison admissions and not to release on parole (which has rather decreased between 2003 and 2009). Data demonstrate clearly that early release does not explain the decrease in the occupancy of the Hamburg prison system. The trend is rather towards a decrease in early release on the basis of parole which is consistent with a general trend to tighten rules and practices of parole. The sharp decrease in prison admissions of remand and sentenced prisoners has more than neutralized an increase in the use of indeterminate (incapacitating) measures of security and more restrictive parole decisions.

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

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

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

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



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

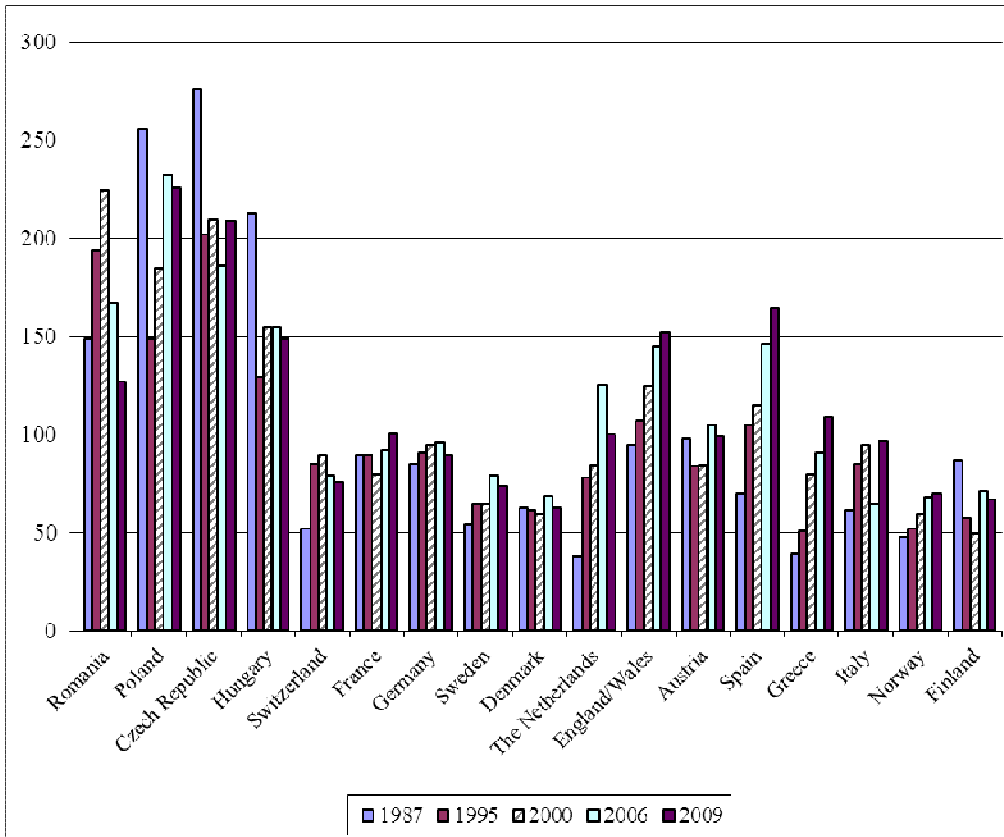
Source: Statistisches Bundesamt: Rechtspflege, Bestand der Gefangenen und Verwahrten in den deutschen Justizvollzugsanstalten nach ihrer Unterbringung auf Haftplätzen des geschlossenen und offenen Vollzugs jeweils zu den Stichtagen 31. März, 31. August und 30. November eines Jahres. Wiesbaden 2010.

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

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

The Dutch ministry of justice in May 2009 announced the closing down of 8 prisons and the loss of some 1,200 prison related jobs due to a rapid decline in the number of prisoners which is assumed to be the result of declining crime rates¹¹⁵. Other European countries experienced also decreases in prison populations as can be seen in graph 3, while some display a certain degree of stability in prison admissions and prisoner rates.

Graph 3: Prisoner Rates in Europe 1987-2009



Sources: *Walmsley, R.*: World Prison Population List (8th ed.). King's College, London 2009, as well as updated prison data from national correctional services.

¹¹⁵ www.nrc.nl/international/article2246821.ece/Netherlands_to_close_prisons_for_lack_of_criminals [14.04.2012]; the ministry announced as well that The Netherlands will sell prison capacity (500 beds) to Belgium which is suffering from overcrowding.

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

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

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

¹¹⁶ *Hartney, C.*: US Rates of Incarceration: A Global Perspective. Research from the National Council on Crime and Delinquency. Washington, November 2006; *Coyle, A.*: Managing prison overcrowding: A European perspective. Rencontre Européenne des Directeurs d'Administration Pénitentiaire, Ministère de Justice. Place Vendôme, Paris, 11 July 2008. International Centre for Prison Studies, London 2008, p. 7; *Cox & Rhodes* (fn. 36), p. 135, presenting data from a survey of correctional administrators which show that overcrowding is explained by administrators rather by stricter sentencing codes and more punitive public opinion than by increases in crime or the inability to build new prison space.

¹¹⁷ *Cohen, S.*: Folk Devils and Moral Panics. 1972; *Goode, E. & Ben-Yehuda, N.*: Moral Panics: The Social Construction of Deviance. Cambridge 1994.

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

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

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

crime waves which are felt in already strained correctional systems¹²¹. Evidence from the United States shows also a strong link between drug policies, drug arrests and increases in prison populations¹²².

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

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

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

Increases in prison entries as well as increases in sentence length (and increases in the subsequent length of stay in the prison system) have been specified as major contributors to the inflation of prison population and overcrowding¹²⁴. However, it

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

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

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

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

has been argued on the basis of cross-national research also that sentence length is not necessarily correlated strongly with prison inflation and that diversity prevails which makes it difficult to generalize “longer prison sentences – more overcrowding” assumptions¹²⁵.

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

Life imprisonment in some countries has been introduced to respond to a broad range of offences going far beyond its conventional use for first degree murder¹³⁰ and expanding the group of prisoners serving life sentences sometimes extremely¹³¹. The introduction of “Truth in Sentencing” policies, determinate sentencing, mandatory minimum penalties, three and two strikes laws and ultimately the move towards a new architecture of security which assigns security a prominent role within the goals of criminal law and criminal punishment have been interpreted as indicating a paradigm shift¹³². Attention shifted away from the offender and individualization of punishment to seriousness of crime and deterrent punishment (or had never changed from being directed at punishment¹³³). The new concern for the victim and protection of potential victims certainly is a visible expression of such changes. These changes have been interpreted also as indicating a “pervasive penal populism” on the side of politicians pushing for harsher penalties especially for re-

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

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

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

¹²⁸ *Miyazawa* (fn. 126), p. 59 for Japan; *Terblanche, S. & Mackenzie, G.*: Mandatory Sentences in South Africa: Lessons for Australia? *The Australian and New Zealand Journal of Criminology* 41 (2008), pp. 402-420.

¹²⁹ *Terblanche & Mackenzie* (fn. 128), p. 410.

¹³⁰ *van Zyl Smit, D.*: Taking Life Imprisonment Seriously. The Hague 2002; *Steinberg* (fn. 29).

¹³¹ See *Nellis, A. & King, R.S.*: No Exit. The Expanding Use of Life Sentences in America. Washington 2009, where it is reported that in the United States 140,610 prisoners are serving life sentences, out of which 41,095 do not have the possibility of parole, the highest proportion of life sentences relative is reported from California, where 20 % of the prison population is serving a life sentence.

¹³² *Tonry* (fn. 62), pp. 353-354.

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

civists¹³⁴ and as a gap between criminal justice practitioners and researchers interested in evaluating the substance of criminal justice policies on the one hand and politicians interested in sending out messages to the public on the other hand¹³⁵. But, it is rather a fragmentation of theory and politics of criminal punishment once uniformly organized around prevention through rehabilitating and re-integrating criminal offenders which characterizes today systems of criminal justice. While security orientation and punitive responses in fact prevail with respect to offender groups deemed dangerous and a threat to public security (such as sexual and violent offenders), alternatives to imprisonment, community sanctions, intermediate penalties, mediation and restorative justice approaches, most recently a new interest in designing effective re-entry programs for ex-convicts still figure prominently on crime policy agendas¹³⁶.

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

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

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

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

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

¹³⁷ *Mauer, M.*: The Hidden Problem of Time Served in Prison. *Social Research* 74 (2007), pp. 701-706; Blogs.findlaw.com/blotter/2009/06/100-year-sentence-for-teen-sex-offender-with-47-iq-concurrent-sentences-fair.html [14.04.2012]; *Terreblanche, S.*: Sentencing: Changes and effect since 1994; www.csvr.org.za/wits/confpaps/terreblanche.htm [14.04.2012].

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

¹³⁹ For a review of positions of the South African and Namibian Supreme Courts on life without parole see *Terreblanche, S.*: Sentencing: Changes and effect since 1994; www.csvr.org.za/wits/confpaps/terreblanche.htm [14.04.2012].

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

2.5 Failed Alternatives to Imprisonment and Recalls for Parole Violations

Alternatives to imprisonment such as fines, day fines, community service, electronically monitored house arrest and probation/suspended sentences have been incorporated into systems of criminal sanctions successfully during the last decades. Despite its abolition in some countries, early release on parole remains an important instrument in most correctional systems. Alternatives to imprisonment and parole, however, carry a risk of imprisonment in case of failure to pay a fine, violations of conditions coming with alternatives or re-offending. Fines are particularly prone to be converted into substitute imprisonment under conditions of poor economic circumstances and large-scale poverty. Reports from countries where extreme poverty prevails demonstrate that significant numbers of offenders are imprisoned because they could not pay even small fines¹⁴¹. Recalls to prison of parolees have contributed in some countries to the increase of prison populations. For England/Wales it has been observed that a growing number of prisoners are in prison because parole has been revoked. Parole violators make up for almost 40 % of prison admissions in California¹⁴². The majority of revocations takes place after technical violations, few are the result of further offending¹⁴³. Research shows also that changes in revocation patterns are rather explained by changes in the sensitivity towards parole violations than to changes in the actual behavior of parolees¹⁴⁴. In face of clear evidence that returning parolees to prison for technical violations of parole (which essentially will be the consequence of the intensity of supervision) will not lead to a decrease in recidivism¹⁴⁵, particular attention should be given to the statutory framework of revocation of suspended sentences and parole.

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

¹⁴¹ [www.pfi.org/Home/Centre for Justice and Reconciliation/News/Partnership for Addressing Prison Overcrowding in South Africa](http://www.pfi.org/Home/Centre%20for%20Justice%20and%20Reconciliation/News/Partnership%20for%20Addressing%20Prison%20Overcrowding%20in%20South%20Africa).

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

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

¹⁴⁴ *Reitz, K.*: Questioning the Conventional Wisdom of Parole Release Authority, in: M. Tonry (ed.), *The Future of Imprisonment in the 21st Century*. New York 2004, pp. 199-235; *Padfield & Maruna* (fn. 143), p. 337.

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

ceived as particular risks in decisions on pretrial detention and in decisions on alternatives to imprisonment.

2.6 Pretrial Detention

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

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

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

But, despite a strong correlation between pretrial detention rates and overcrowding measures such a correlation does not establish a causal relationship. Pretrial detention practices will not have an effect on overcrowding if such an effect would be confined to a more rapid move from the status of a remand prisoner to the status of a sentenced prisoner. An impact of pretrial detention on the occupancy rate can only be expected if a decrease in admission rates or a decrease in the length of stay in remand detention affect those pretrial detainees who will not receive a custodial sentence. A more or less important share of pretrial detainees will in fact be sentenced to community sanctions (or will be acquitted). However, it is also well-known that in some of these cases community sanctions will be applied because the defendant has already spent some time in prison.

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

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

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

2.7 Summary: The Need for Country Specific Research

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

Policy recommendations addressing measures against prison overcrowding therefore should be based on careful analysis of individual systems and cover the pretrial phase, in particular pretrial detention, sentencing (and factors influencing sentence length), post adjudication and post release decision making (including also pardon and amnesty practices). Substantive knowledge on how offenders are processed, information on sentencing and on post adjudication processes as well as correctional decision-making is needed in order to tailor policies to the specific configurations found in a specific country. Cross-cultural research on crime, punishment and corrections, however, indicates that national data sources exhibit “fun-

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

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

¹⁵¹ *Spelman* (fn. 109).

¹⁵² *Spelman* (fn. 109), p. 73.

damental problems and inadequacies”¹⁵³, which make it difficult (if not impossible) to draw and to generalize conclusions.

What remains also unaccounted for concerns the questions why prison populations remain stable or decrease and why criminal justice systems evidently do not learn from past experiences. Prison overcrowding refers to an old policy and research issue. As early as in the 1970s (when in particular new criminal offence statutes and long prison sentences imposed for drug offences resulted in a wave of admissions to prison facilities) research has focused on the problem of overcrowding and how to respond to overcrowding. There is a wealth of research reports and policy proposals, all of which basically suggest the same remedies (against prison overcrowding as well as against prison inflation)¹⁵⁴. However, despite the calls for alternatives to imprisonment, better rehabilitation programs, alternative measures for drug addicts and the mentally ill, less reliance on imprisonment and the recognition of the last resort principles, policy makers sometimes adopt instruments which propel criminal justice systems deeper into capacity problems. So, for example in the 1990s, the impact of three strike laws and harsher sentencing in general on the Californian criminal justice system was correctly predicted¹⁵⁵. Research predicted huge costs and few returns in the form of more security¹⁵⁶. In general, it is well established through research that prison does not pay off in terms of less recidivism or more deterrence compared with alternatives to imprisonment¹⁵⁷. However, it was only after the financial burden became too heavy and courts started to demand for immediate and effective reductions of the prison population that politicians initiated significant changes. In fact, there do not seem to exist many “windows of opportunity” for passing knowledge from research to the political system¹⁵⁸ in order to develop “evidence based” correctional policies.

¹⁵³ *Tonry & Farrington* (fn. 150), p. 11.

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

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

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

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

¹⁵⁸ *Tonry* (fn. 135), p. 54.

3. Effects of Overcrowded Prisons

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

Small prison health budgets, a high share of prisoners with infectious diseases (especially drug offenders) and overcrowding reinforce each other¹⁶⁵. Higher rates of suicide have been assumed to follow conditions of overcrowding¹⁶⁶. The fall of staff/inmate ratios may have adverse consequences for personal security, the implementation of prison visits and the admission to prison leave programs. A nega-

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

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

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

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

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

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

¹⁶⁵ The PEW Center (fn. 61), p. 12.

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

tive impact on family visits and an infringement on the right to family life (see for example Art. 8 ECHR) may come as a side effect of overcrowding relief policies which result in the transfer from overcrowded facilities to less crowded but far away prisons¹⁶⁷. Higher levels of prison violence indeed have been reported from many countries¹⁶⁸. The General Rapporteur in a report on the prison situation in Paraguay has hinted to a prison where 3,000 detainees are guarded by 40 guards per shift and has pointed to severe safety problems coming through inter-prisoner violence, but also through uncontrolled drug trafficking within prison walls¹⁶⁹.

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

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

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

¹⁶⁸ *Baker et al.* (fn. 33), pp. 33-34.

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

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

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

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

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

¹⁷⁴ *Steinberg* (fn. 29), p. 7.

¹⁷⁵ International Centre for Criminal Law Reform and Criminal Justice Policy: International Prison Policy Development Instrument. Vancouver 2001; *Baker et al.* (fn. 33), p. 36; The Correctional Investigator Canada: Annual Report of the Office of the Correctional Investigator 2008-2009. Ottawa 2009, p. 31.

4. Addressing Prison Overcrowding Effectively

4.1 Overcrowding and Remedies Against Overcrowding: Well-Known Agendas

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

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

Full consent then seems to exist on a two pronged approach of implementation which on the one hand identifies the measures with which to reduce/combat etc. prison overcrowding and on the other hand "gets the measures accepted". Of course, strategies have to be implemented and the "key players" must understand,

¹⁷⁶ See for example Report on the Conference to Develop Strategies to Combat Overcrowded Prisons. Held at Pretoria/Tshwane from 14 to 16 September 2005; European Federation of Public Service Unions, Trade Unions and Prison Services in Europe: Seminar on 19 May 2005, Luxembourg Discussion Document. Brussels 2005; *Dankwa* (fn. 74), p. 89.

¹⁷⁷ The PEW Center (fn. 61), p. 20.

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

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

“must be convinced”, must be helped to understand (the cost of prisons)¹⁸⁰, however, the course prison overcrowding takes during the last decades and in particular in recent years underline that criminal justice and prison policy is dependent on political will and social and economic conditions which evidently provide for differential structures of opportunities. Overcrowding evidently is recognized and understood to represent a grave problem; however, policy options which inflate prison populations are obviously more attractive. Overcrowded prisons and prison reform are not dealt with as priority issues in political systems¹⁸¹. Moreover, cultural contexts have to be considered when developing policies to deal with overcrowded prisons. Solutions to overcrowding have to deal with the complexity of the decision making processes which have generated overcrowding¹⁸². Such complexities are certainly due to the elaborate normative structure which determines limits of powers of individual state actors and fragmentizes criminal justice. Insofar, proposals to address prison overcrowding on the basis of a system-wide approach¹⁸³, rather than one centered only on the prison system alone, are limited. Comprehensive approaches, furthermore, generate and boost the very complexity they are intended to deal with.

4.2 Normative Guidelines

Prisons and other places of deprivation of liberty fall under a normative framework of national and international law on the basis of which overcrowding and its implications for prisoner human rights situations are evaluated. International human rights instruments such as the International Covenant on Political and Civil Rights and the UN Convention Against Torture contain prohibitions of inhuman and degrading punishment and treatment as do regional human rights instruments like the European Convention on Human Rights (Art. 3), the European Convention Against Torture, the American Convention on Human Rights (Art. 5) or the African Charter on Human and People’s Rights (Art. 5). Hard international law is supplemented by soft law which comes in the form of Minimum Standards, recommendations, moreover the United Nations have published Best Practice Handbooks which shall provide for guidance in developing and implementing prison reform and alternatives to imprisonment. Apart from norms which give human dignity and the prohibition of cruel, inhuman and degrading punishment a central place in the operation of prisons and prison reform, international instruments contain other rules which are of relevance for developing responses to overcrowding. Among such rules the “last resort” principle when it comes to imprisonment certainly plays

¹⁸⁰ See for example *Walmsley, R.*: Global Incarceration and Prison Trends. Forum on Crime and Society 3 (2003), pp. 65-78, p. 75.

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

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

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

a significant role as it expresses (for example in the Child Convention or in the UN Standard Minimum Rules for Non-Custodial Measures) a clear message that deprivation of liberty must be specifically justified and should not be used as routine punishment. Furthermore, the United Nations Conventions, Standards and Guidelines give clear priority to the goal of rehabilitation; they embrace a set of procedural principles which adopt relevance in the context of overcrowding (pretrial detention as a last resort, presumption of innocence, speedy trial rules etc.).

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

There is no shortage of proposals as to which remedies are available to reduce prison overcrowding. The Council of Europe has issued a fully elaborated set of recommendations with respect to responses to prison overcrowding as early as 1999¹⁸⁴. Recommendations as regards prison overcrowding are part of the Kampala Declaration and various other documents. These recommendations reiterate many principles which have been outlined in United Nation Conventions, Standards and Rules. A common perspective concerns that prison overcrowding and prison population growth represent a major challenge to prison administrations and the criminal justice system (in terms of human rights and of the efficient management of penal institutions). Reference is made then to factors driving prison growth such as the crime situation in general, system of criminal sanctions and sentencing practices favoring imprisonment, community sanctions, pretrial detention practices, effectiveness of criminal justice and public attitudes. The need for embedding measures aimed at combating prison overcrowding in a coherent and rational crime policy is stressed. Particular attention is paid to the basic principles of rule of law and democracy while underlining also the need for support by criminal justice practitioners and the public and finally also the need for balanced information on the effectiveness of criminal punishment and the reality of prisons. When it comes to concrete recommendations, a standard principle concerns classification of prison sentences as a last resort restricted to crimes of a degree of seriousness which “would make any other sanction clearly inadequate”. Prison construction programs as a response to overcrowding are considered exceptional measures which do not offer a

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

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

¹⁸⁵ See in particular *Spelman* (fn. 109).

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

4.3 The Public, Imprisonment and Prison Overcrowding

Research rarely addresses public attitudes towards prison overcrowding and acceptable instruments to resolve such problems. In general, it was found that the public is not interested in prison policy¹⁸⁸. The constituency for prisons is evidently narrow, specialized and not influential. A study from the 1980s revealed for the United States that substantive support was voiced for community sanctions and good time policies in prisons. The public rather disapproved prison construction programs as well as more discretionary power for parole boards and rejects reduction in sentence length¹⁸⁹. The International crime survey provides for comparative attitudes on sentencing. The data for 2005 show that there is a divide with some regions favoring community service over imprisonment¹⁹⁰ while other show significant support for imprisonment¹⁹¹. On the other hand public opinion in Europe certainly does not adopt the view that more imprisonment will reduce crime¹⁹².

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

4.4.1 Recommendations and General Restraints

There are certainly no states of denial on the side of states and criminal justice officials when it comes to recognizing overcrowding problems. State parties to human rights instruments usually acknowledge the facts and problems found by Rapporteurs and Commissions, although sometimes debates arise on the issue of how overcrowding should be defined. Clues for understanding the response of states to

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

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

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

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

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

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

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

overcrowded prisons possibly can be found in the process of monitoring and the reactions to findings and decisions of Human Rights Courts, Commissions and Rapporteurs. The European Court on Human Rights when dealing with situations of overcrowding first recognized the structural problems which are evidently behind sustained and long term overcrowding which are neither denied nor intended by the state party. The European Court encouraged the development of an efficient system of complaints to the Prison Service and the authorities supervising detention facilities, which were best placed to take appropriate measures speedily¹⁹³. It is therefore rather the responses to problems which are consented, which are interesting and which possibly can provide for clues as to why overcrowding persists and available strategies of problem solving are not implemented.

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

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

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

¹⁹⁵ Human Rights Council: Tenth session. Agenda item 3. Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, *Manfred Nowak*. Addendum. Follow-Up to the Recommendations Made by the Special Rapporteur. Visits to China, Georgia, Jordan, Nepal, Nigeria and Togo, A/HRC/10/44/Add. 5, 17 February 2009, p. 83-84; Human Rights Council: Seventh session. Item 3 of the agenda. Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, *Manfred Nowak*. Addendum. Mission to Paraguay, A/HRC/7/3/Add. 3, 1st October 2007, p. 17, referring to a case a detainee who had spent one and a half years in pretrial detention on suspicion of having stolen a bicycle; see also Michigan Task Force on Jail and Prison Overcrowding Task Force on Jail and Prison Overcrowding Presents Report. April 22, 2005.

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

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

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

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

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

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

¹⁹⁹ *Dankwa* (fn. 74), p. 85.

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

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

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

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

and parole procedures, alternatives to pretrial detention and imprisonment etc. are rather dependent on political will.

4.4.2 *Organization, Intelligence and Financial Incentives*

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

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

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

Analysis of overcrowding, identification of conditions under which overcrowding emerges as well as evaluation of approaches to contain or reduce overcrowding are in need of reliable and valid data on police recorded crime, sentencing, the prison population and the flow of cases. Demands for good data and proper evaluation research are not new²⁰⁷. However, most of the penitentiary systems do not provide for meaningful data; moreover research on prison and imprisonment is limited, in

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

²⁰⁵ International Centre for Prison Studies (fn. 204), No. 39.

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

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

particular as regards research comparing various sentencing options (including imprisonment). This has been stressed recently in a meta-analysis of empirical research comparing recidivism after custodial and community sanctions²⁰⁸. It is particularly those sentencing options which are deemed to carry a high potential in replacing imprisonment and responding effectively to overcrowding (suspended prison sentences, probation and parole) which are seriously under-researched²⁰⁹.

Research is not evenly distributed but demonstrates concentration on a few countries. This coincides largely with countries where prison projections have been part of an intelligence producing process in the correctional system. Prison projections are perceived to represent an instrument which in principle can advise and guide policy. Prison projection methodology, however, is developed and implemented in particular in countries where overcrowding affects the prison system. But as prison projections and prediction methodology are in need of complete and valid data on offenders as they pass through the criminal justice system and corrections, they provide rich information on various subpopulations within the prison system which can be used to study causes and consequences of overcrowding.

Prison projections essentially are based on past developments in the criminal justice and prison system, but any projection will depend on future developments in crime policies, sentencing and administrative practices. This means that any prison population forecast will project to a certain extent past trends which means that projections become less accurate the further out the prediction horizon and the more instable developments in crime policies. Insofar, it does not come unexpected that all official prison projections accessible (in England/Wales, Scotland and in the United States) predicted during the last decade further increases in the size of the prison populations²¹⁰. An analysis of prison projections for the United States at large shows the prediction of a far faster growth of the prison population, forecasting 2006 that the prison population will jump by 104,000 by 2009. But the actual increase was 40,000 less than predicted²¹¹. For California, prison projections predicted for 2010 a prison population of some 183,000²¹². However, the actual prison

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

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

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

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

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

population 2010 in California stood at 169,000²¹³. The problem, of course, concerns unpredictable changes which affect sentencing and parole decisions²¹⁴. The difficulty for projections of the prison population is that trends observed over a number of years cannot be assumed to continue. In England it was found that no projection made between 1990 and 1994 predicted the rapid rise in the prison population emerging since 1994²¹⁵.

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

4.4.3 *Prison Construction Programs*

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

²¹³ The PEW Center (Fn. 65), p. 7.

²¹⁴ California Department of Corrections (fn. 212).

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

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

²¹⁷ See *Spelman* (fn. 109).

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

ment²¹⁹. In other cases, announcements of prison building programs have resulted in criticism because of alternative measures not exhausted and new prison designs too much focused on providing additional space and less guided by delivering adequate rehabilitative services²²⁰.

4.4.4 Prison Litigation

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

²¹⁹ www.correctionsreporter.com/2010/01/15/italy-prison-overcrowding-emergency/ [14.04.2012].

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

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

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

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

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

²²⁵ *Levitt* 1996 (fn. 224).

²²⁶ *Boylan, R.T. & Mocan, N.H.*: Intended and Unintended Consequences of Prison Reform. National Bureau of Economic Research, Cambridge, Working Paper 15535, November 2009; www.nber.org/papers/w15535 [15.04.2012].

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

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

4.4.5 Decriminalization, Depenalization and Diversion

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

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

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

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

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

²²⁹ *Steinberg* (fn. 29).

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

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

²³² The PEW Center (fn. 61), p. 18; *Smith-Heisters, S.*: The Nonviolent Offender Rehabilitation Act: Prison Overcrowding, Parole and Sentencing Reform (Proposition 5). Reason Foundation, Los Angeles 2008.

search which addresses the impact of restitution, restorative justice or victim-offender-reconciliation programs on sentencing and the prison population²³³.

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

4.4.6 *Dealing with Pretrial Detention*

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

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

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

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

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

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

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

A significant share of pretrial detainees at the prison population at large points to several issues which can be made points of departure for approaches to reduce the number of suspects who are placed in pretrial detention, and second, the length of time suspects spend in pretrial facilities²³⁹. Inflation of the pretrial detainee population may be caused by a normative framework which does not provide for adequate consideration of standards set for pretrial detention or does not include those alternatives to pretrial detention which may reduce the risk of absconding or obstruction of justice, that is bail, seizure of passport or other identity papers, notification requirements as regards traveling, changes of residence etc., obligations to report at certain times to the office of the judge, the prosecuting authority or police, restrictions on free movement (backed up by electronic monitoring). The use of pretrial detention may be boosted by lengthy and ineffective criminal proceedings which may be due to shortcomings in procedural law or practices related to processing cases²⁴⁰.

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

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

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

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

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

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

absence of data abetted a counter reform which took place before the reform was fully implemented did not allow to communicate reform effects to the public, justice practitioners and politicians²⁴³.

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

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

Studies demonstrate then that the risk of escape is often misjudged and as a consequence many false positives are held in pretrial detention. In the 1990s a study was carried out in Germany of which the results demonstrate the potential for reducing pretrial detention without affecting rule of law and criminal proceedings. The study analyzed all decisions made in the Hamburg High Court in cases of extended pretrial detention (beyond 6 months). German criminal procedural law prescribes that pretrial detention may not extend over a period of 6 months if there are no compelling grounds for not carrying through a criminal trial before expiration of the 6 months period. In 23 cases the Hamburg High Court found no compelling grounds which would have justified pretrial detention of more than 6 months. So, 27 suspects had to be set free for whom the risk of absconding had been established by lower courts. However, 17 of these suspects voluntarily showed up for the criminal trial which took place some time after their release. Only six suspects actually absconded and did not comply when summoned by the trial court. Almost all of

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

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

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

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

these were suspected of drug trafficking (and were foreign nationals)²⁴⁷. From the viewpoint of accuracy of prediction these results say simply that for any one suspect rightly predicted to represent an escape risk four others are falsely predicted to abscond. This amounts to a rate of false positives of some 80 %, a rate which sounds plausible when taking into account the poor performance in criminal justice predictions at large.

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

Assigning a defense council very early in criminal proceedings seems to be correlated with shorter periods of pretrial detention²⁴⁹. An experiment carried out in German court districts could demonstrate that early assignment of a defence council through the court results in detention periods two months shorter on the average than those experienced by pretrial detainees who did not have a lawyer²⁵⁰. Systematic assignment of lawyers, it was concluded could reduce time spent in pretrial detention by 16 %²⁵¹. Effective, early defense projects have been implemented in the Ukraine which proved successful²⁵².

In the same line of practices fall approaches which, also for budgetary reasons, install assistance through paralegals²⁵³. The Malawi based Paralegal Advisory Service supports pretrial detainees in particular in practical matters concerning release from detention (filling out bail applications, finding relatives who can serve as sureties, channeling relevant information to police and prosecutors)²⁵⁴. On the basis

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

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

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

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

²⁵¹ *Schöch* (fn. 250), p. 73.

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

²⁵³ Uganda Human Rights Commission: *11th Annual Report of the Uganda Human Rights Commission*. Kampala 2009.

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

of pretrial detention figures the service is assessed to be successful in diverting suspects from pretrial detention. The remand population has been stabilized in Malawi after implementation of the paralegal advisory scheme at some 22 % (down from 50 % before the scheme)²⁵⁵.

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

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

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

4.4.7 *Systems of Sanction: Alternatives to Imprisonment*

The principle of reserving prison for serious crime and understanding imprisonment as a last resort can be taken from the Standard Minimum Rules for Non-Custodial Measures which list furthermore a range of alternatives (or community sanctions).

²⁵⁵ *Msiska* (fn. 254), p. 78.

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

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

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

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

²⁶⁰ Uganda Human Rights (fn. 253); see also a promising example of backlog reduction projects in Manila presented in ICRC: Philippines: Protecting life and dignity in places of detention. ICRC Bulletin No. 01/2010, 3 February 2010.

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

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

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

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

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

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

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

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

²⁶⁷ See e.g. Home Office: Punishment, Custody and the Community. London 1988, p. 2.

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

Yet, although alternatives to imprisonment have been introduced since the 1960s/1970s in many regions and in spite of their apparent success alternatives have not or could not be implemented in a way which had prevented further prison growth and overcrowding²⁶⁹. The UNODC Handbook of basic principles and promising practices on Alternatives to Imprisonment outlines various alternatives and elaborates the conditions under which alternatives may effectively replace prison sentences²⁷⁰. It mentions good practice examples and provides information on a legislative project in Kazakhstan which is assessed to have had a significant impact on the prison population though the increased use of non-custodial sentences²⁷¹. However, the rates of imprisonment remain extremely high in Kazakhstan²⁷².

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

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

²⁷⁰ UNODC: Handbook of Basic Principles and Promising Practices on Alternatives to Imprisonment. United Nations, New York 2007.

²⁷¹ UNODC (fn. 270), p. 26.

²⁷² 2009 Human Rights Report: Kazakhstan; www.state.gov/g/drl/rls/hrrpt/2009/sca/136088.htm [15.04.2012].

²⁷³ *Muntingh* (fn. 75), p. 186.

²⁷⁴ *Stern, V.*: Alternatives to Prison in Developing Countries: Some Lessons from Africa. *Punishment & Society* 1 (1999), pp. 233, 238; UNODC (fn. 270), p. 37.

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

²⁷⁶ Daily Nation: 50,000 to be released in prison decongestion plan. March 16, 2010.

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

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

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

4.4.8 Sentencing Policies

Sentencing policy and the statutory framework of sentencing refer to a crucial factor in determining the size of a prison population and the extent of overcrowding. In this respect sentencing guidelines and sentencing commissions which set priorities for prison eligible offences and take into account available prison capacity had been assumed to represent effective controls of prison growth²⁸². However, the ex-

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

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

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

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

²⁸² *Kennedy, E.M.*: Prison Overcrowding: The Law's Dilemma. *The ANNALS of the American Academy of Political and Social Science* 478 (1985), pp. 113-122; *Frase, R.S.*: The Minnesota

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

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

Sentencing Guidelines, in: A. Freiberg & K. Gelb (eds.), *Penal Populism, Sentencing Councils and Sentencing Policy*. Cullompton 2008, pp. 83-102, p. 99.

²⁸³ *Tonry, M.*: Mandatory penalties, in: M. Tonry (ed.), *Crime and Justice: A Review of Research*, Vol. 16. Chicago 1992, pp. 243-273.

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

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

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

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

whether changes in sentencing laws may be sustained without causing unacceptable problems in the correctional system.

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

Sentencing laws and sentencing practices have to respect the Child Convention which demands for custody to be used as a last resort and requires effective and specific implementation of this principle²⁸⁸. Furthermore, Article 37(a) provides for a standard of neither applying capital punishment nor life imprisonment without the possibility of release. However, current practices demonstrate that children sometimes are exposed to a high risk of imprisonment. Debates in England/Wales on children in custody for example point to a strong increase in the number of children sent to custodial facilities despite findings that such custodial sentences are neither in the interest of lowering rates of re-offending nor in the interest of public protection²⁸⁹. The vast majority of children/juveniles placed in custody have not been convicted for violent crime²⁹⁰. Furthermore, concerns have been raised with respect to the age of criminal responsibility as well as the age from which on children may be sentenced to imprisonment²⁹¹. The Standard Minimum Rules for the Administration of Juvenile Justice advise not to fix the age of criminal responsibility too low and if resorting to custodial sentences to impose only the minimum necessary period (which allows for education and reform of juvenile offenders). While the wide and sometimes indiscriminate use of life imprisonment has been discussed above, special attention should be paid to life imprisonment for the juvenile offender²⁹². According to recent statistics from North America there are 6,807 juveniles serving life sentences; 1,755 of whom are serving sentences of life without parole²⁹³.

Women, representing a minority among prisoners at large everywhere are at risk of being neglected when it comes to prison reform. The challenges posed by this largely vulnerable group²⁹⁴ have been summarized recently in a report submitted to

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

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

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

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

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

²⁹³ *Nellis & King* (fn. 292), p. 3.

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

the English government²⁹⁵. The report advises the government to radically change correctional policies for women offenders with non-custodial sentences for non-violent women being the rule and replacing women's prisons by dispersed, small and multifunctional facilities. Such a strategy is considered to provide partial solution to persistent overcrowding problems.

Foreign nationals run particular risk of receiving prison sentences or being detained prior to trial²⁹⁶. Research from Europe has stressed that in many countries alternatives to imprisonment or pretrial detention do not work properly for foreign offenders (or illegal immigrants) due to a strong bias in community sanctions and alternatives to remand prison towards settled offenders with bonds to the community²⁹⁷. The European Union has responded to this problem with initiating Framework Decisions on the mutual recognition of pretrial supervision orders (Framework Decision 2009/829/JHA of 23 October 2009) and the Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions. The framework decisions establishing mutual recognition of alternatives to pretrial detention and imprisonment have been introduced in order to compensate for the increased risk of not being eligible for non-custodial measures due to a lack of bonds in the territory where proceedings are held and sanctions are executed. While this policy has emerged under the particular conditions of the European Union, the general approach of transferring enforcement and supervision of non-custodial measures to the home country of an offender provides for a reasonable option for the particularly vulnerable group of foreign offenders and hence an additional option in the control of overcrowding.

4.4.9 *Post Adjudication Measures Against Overcrowding*

Standard Minimum Rules for Non-Custodial Measures²⁹⁸ assign the post adjudication stage an important function in the process of implementing rehabilitation and to assist offenders in the process of re-integration. Parole is the core of a set of measures which ranges from reductions in the original prison sentence, early release under supervision to various forms of prison regimes (open prison, work furloughs, home detention etc.). Parole and good time approaches are among the conventional instruments to reduce the time which has to be spent actually in prison. Parole and organization of parole are furthermore important as recidivism research shows that of those who recidivate (and are re-imprisoned); a majority does so with-

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

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

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

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

in the first year after release)²⁹⁹. Parole therefore serves as a bridge between incarceration and return to the community and represents the most important instrument in tackling the problem of “revolving doors”. It is based on the consideration that a gradual and supervised release provides a more effective way of protecting the public than a sudden release at sentence expiry. Parole over the last decades has partially lost ground, though, in countries where parole was abolished good time credits serve as an alternative which results in reductions of the original prison sentence.

Parole comes in different forms. While some systems have adopted automatic parole after statutorily fixed periods of imprisonment, most criminal codes still provide for a decision which is based on an assessment of risk and which can result in early release after a certain part of the prison sentence has been served³⁰⁰. Parole decisions normally point to three elements: a statutorily fixed part of the prison sentence has to be served (special rules usually apply to prisoners serving life sentences or being subject to measures of security), a parole commission or a judge assesses the risk of relapse into crime and specifies conditions the parolee has to comply with and which will be monitored by parole/probation officers. The parole commission/judge then will fix a period of time of parole supervision. While these elements explain why parole is an elastic instrument which lends itself to respond to prison overcrowding³⁰¹, they refer also to an explanation why changes in parole decision making may lead to prison growth and overcrowding. In fact, during the last decades prison growth has been explained also by more restrictive, caused by concerns for public security, paralleled by a trend of parole supervision away from a social service orientation to a surveillance oriented instrument of public protection³⁰². The latter has been made responsible for a tightening of conditions and orders coming with early release from prison. Stricter surveillance of conditions of parole has in some systems led to a sharp increase in the return of parolees because of technical violations of parole, surpassing prison sentences as a driver of prison growth³⁰³ and resulted in additional strain placed on overcrowded prisons³⁰⁴. Intensive supervision, originally designed to reduce the risk of relapse into crime and to expand the use of early release, thus can turn into a mechanism which adds to the

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

³⁰⁰ Les Documents de Travail du Sénat: La Libération Conditionelle. Série Législation Comparée, no. LC 152, Paris, Novembre 2005; *Padfield, N. et al.* (eds.), Release from Prison. European Policy and Practice. Cullompton 2010.

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

³⁰² *Padfield & Maruna* (fn. 143), p. 338.

³⁰³ *Travis, J. & Petersilia, J.*: Reentry Reconsidered: A New Look at an Old Question. *Crime & Delinquency* 47 (2001), pp. 291-313; *Petersilia, J.*: When Prisoners Come Home: Parole and Prisoner Reentry. Oxford 2003; *Weiman, D.R.*: Barriers to Prisoners' Reentry into the Labor Market and the Social Costs of Recidivism. *Social Research* 74 (2007), pp. 575-611, p. 599; The PEW Center (fn. 61), p. 18.

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

problem of overcrowding. Research on electronically monitored house arrest corroborates this view³⁰⁵.

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

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

4.4.10 *Amnesties and Collective Pardons*

When addressing prison overcrowding sometimes amnesties and collective pardon are applied which are deemed to be problematic from the viewpoint of recommendations as well as the perspectives of principles of sustainability, rule of law and separation of powers. Amnesties usually have rather short-lived effects on prison populations. They do not affect root causes of growth and result in short-term improvements which fade away shortly after implementation if nothing else changes. Large-scale amnesties reportedly have been used in Zimbabwe several times during the 1980s and 1990s to bring down the size of the prison population, however, despite significant short-term decreases in the population, empty prison cells have been filled³⁰⁸. Italy saw a major amnesty in 2006 as a response to prison capacity problems which in fact emptied the prisons, but resulted also in mistrust and insecurity in the public³⁰⁹. A policy of granting amnesty had been implemented in South Africa. Here, too, the impact was short-lived³¹⁰.

Amnesties certainly have their role to play as an instrument to settle large-scale conflicts and to pacify a country where a significant potential of conflict escalation

³⁰⁵ *Dodgson, Goodwin, Howard et al.* (fn. 281).

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

³⁰⁷ *Padfield & Maruna* (fn. 143), p. 347.

³⁰⁸ *Stern* (fn. 274), p. 236; see also *Dankwa* (fn. 74), p. 84.

³⁰⁹ *Maffei, S. & Merzagora Betsos, I.*: Crime and Criminal Policy in Italy. Tradition and Modernity in a Troubled Country. *European Journal of Criminology* 4 (2007), pp. 461-482.

³¹⁰ *Dissel, A. & Ellis, S.*: Reform and Stasis: Transformation in South African Prisons. Center for the Study of Violence and Reconciliation. Capetown 2002.

looms. In the wake of major political transitions amnesties may be a tool supporting reconciliation (as it was the case at some occasions in the new democracies in Central and Eastern Europe)³¹¹. However, the regular use of amnesties as a response to prison overcrowding seems to undermine confidence in the criminal justice system. The issue of a possibly negative impact on confidence is also raised by the Human Rights Council when faced with large-scale amnesties³¹². Despite such concerns, it has been argued that amnesties may play a useful role in controlling overcrowding if other measures are not available at all³¹³. Although, such a situation is in principle imaginable (for example in the case of a sudden, unexpected and drastic increase in the number of prisoners), the routine practice of amnesties and collective pardons until now is observed in countries with long histories of overcrowding. As a rule, amnesties and collective pardons are only legitimate under the goal of achieving reconciliation in a society affected by severe conflicts.

5. Summary and Conclusions

5.1 Findings

1. Prison overcrowding is a serious problem and an elusive phenomenon. Overcrowding seems to represent a characteristic that has troubled the modern prison since its invention in the 19th century.
2. Overcrowding sometimes emerges as a problem which remained hidden for a long time; rapid declines of the prison population seem to come often also as a surprise for criminal justice administrators.
3. The patterns of turning points in the course of prison populations reflect to a certain extent the degree of stability of criminal justice policies and criminal sentencing and the extent of their insulation from outside pressures.
4. The problem of prison overcrowding is located at an intersection where several important policy and crime research related topics converge. These topics concern criminal sentencing, the role of prison sentences and imprisonment in the system of criminal sanctions, prison standards, the course of crime, prison budgets, economic restraints and general criminal policy determining the course of criminal law and punishment in a society.
5. Prison overcrowding can come as the result of a slow, steady and long term increase in the number of prisoners, developing into a culture of “chronic overcrowding”; it can come also in a rapid move upwards for example in the wake of collective violence correctional systems may be affected by prison

³¹¹ *Albrecht, H.-J.*: Braucht die Politik die Amnestie? Anmerkungen zum Problem der Amnestie aus der Perspektive der Rechtsentwicklung im Ausland, in: W. Greve (ed.), *Amnestie, Gnade, Politik*. Loccum Protokolle. Loccum 1990, pp. 67-95.

³¹² Human Rights Council: Tenth session. Agenda item 3. Report of the Working Group on Arbitrary Detention. Addendum. Mission to Italy. A/HRC/10/21/Add. 5, 26 January 2009, p. 9.

³¹³ *Walmsley, R.*: Global Incarceration and Prison Trends. *Forum on Crime and Society* 3 (2003), pp. 65-78, p. 74.

overcrowding for short periods of time; in others overcrowding appears as an ebb and flow phenomenon.

6. Approaches to the assessment of overcrowding under international and national laws and standards amount roughly to a “totality of conditions” test. The smaller the space available, however, the more important becomes space in itself.
7. Prison capacity is a “slippery concept” which expresses the need for elasticity and can be used to make overcrowding more or less apparent.
8. A closer look at prison systems reveals that the correlation between the rate of imprisonment and overcrowding is rather weak.
9. Overcrowding is correlated with the rate of pretrial detainees, the size of the GDP per capita, the degree of inequality, democracy, the extent of perceived corruption, state fragility as well as violence. Overcrowding is not significantly correlated with the prisoner rate at large. On the basis of the pattern of correlations found it can be concluded that overcrowding problems essentially are associated with problems of governance, a weak economy and obvious problems in the criminal justice systems.
10. Three distinct clusters of overcrowding can be distinguished, displaying differences in economic, social, governance and criminal justice related dimensions. Low overcrowding is correlated with a high GDP per capita, a low violence rate, low state fragility, high achievements in human development and democracy and a low extent of perceived corruption. A slightly higher rate of overcrowding comes with a low rate of pretrial detainees and a high rate of imprisonment. High overcrowding is correlated with a rather low prisoner rate, a high rate of violence, low per capita GDP, democracy and human development values as well as manifest signs of weak governmental structures.
11. Particular problems of overcrowding are observed in countries which undergo rapid social change and significant transitions or find themselves in a post-conflict situation and in a difficult process of state building. Here, prisons and prison conditions should become an integral part of the general reform of the security sectors and general security policies.
12. Data on prison capacity and overcrowding reveal also that overcrowding may affect a country’s prisons selectively with some prisons showing over capacity occupancy while others operate below the level of accommodation capacity.
13. Particular problems of overcrowding are observed for prisons serving large cities where various social problems converge.
14. Although, there are but few longitudinal studies on prison overcrowding, it can be assumed on the basis of research and reports that distinct patterns of careers in overcrowding exist which can be modeled along various economic, cultural and political conditions. Turning points in the course prison populations take reflect the impact of amnesties, changes in sentencing policies or in the sensitivity towards certain types of crime.

15. Prison populations are growing in some parts of the world. However, in some regions/countries marked decreases in prison populations have been observed in the last decade. There is evidently no uniform trend. Even within (Federal) states prisoner rates take completely different courses.
16. Prison population drops sometimes come unexpectedly. Recent prison population drops in Germany and in The Netherlands are explained by a decline in crime. Others (Portugal) are a consequence of deliberate planning.

5.2 Explanations

1. According to many voices changes in crime rates do not contribute significantly to prison growth and overcrowding. While this assumption may hold true for changes in crime rates in general, increases in (sensitive) crime categories which attract prison sentences, in particular long prison sentences, during the last decades have been identified as drivers of overcrowding in prisons.
2. New social problems (drugs), the eruption of large-scale violence or systemic violence may influence the course prison populations take. In some countries another potential for crime impacting on prisons is found in general public order offences.
3. In many criminal justice systems minimum and maximum penalties have been raised and minimum sentences have been introduced. Extended minimum sentences will have lagged effects on prison populations.
4. Statutory frameworks of sentencing which allow for grossly inflated periods of imprisonment and the imposition of consecutively running prison sentences for multiple crimes add to the rise of long prison sentences. Particular attention should be devoted to life prison sentences, and here especially to those without parole.
5. While security orientation and punitive responses in fact prevail with respect to offender groups deemed dangerous, alternatives to imprisonment, community sanctions, intermediate penalties, mediation and restorative justice approaches, most recently a new interest in designing effective re-entry programs for ex-convicts still figure prominently on crime policy agendas.
6. Alternatives to imprisonment and parole, however, carry a risk of imprisonment in case of failure to pay a fine, violations of conditions coming with alternatives or re-offending. Fines are particularly prone to be converted into substitute imprisonment under conditions of poor economic circumstances and large-scale poverty.
7. During the last decades prison growth has also been explained by more restrictive measures, caused by concerns for public security, paralleled by a trend of parole supervision away from a social service orientation to a surveillance oriented instrument of public protection. The latter has been made responsible for a tightening of conditions and orders coming with early release from prison. Stricter surveillance of conditions of parole has in some systems led to a sharp

increase in the return of parolees because of technical violations of parole, surpassing prison sentences as a driver of prison growth.

8. Poor and unsettled offenders turn out to fuel prison inflation in different contexts. In developing countries poverty is at the core of the problem of failure due to persons not being able to pay even small amounts of fines or bail.
9. Root causes of overcrowding have been identified in statutory frameworks and practices of pretrial detention.
10. Developments in prison populations and overcrowding are diverse and reflect idiosyncracies which necessitate careful analysis of individual national systems of criminal justice.
11. In a recent comprehensive analysis of US prison data covering the period 1977 to 2005 it was concluded that the best predictors of the size of prison populations are crime, sentencing policy, prison overcrowding and state spending (on prisons). Prison overcrowding thus may be part of the onset of a political process where due to a lack of imagination of other options than building new prisons spending on prisons results in a dynamic which reiterates political decisions and at the same time boosts the potential for overcrowding.
12. There do not seem to exist many “windows of opportunity” for passing knowledge from research to the political system in order to develop “evidence based” correctional policies.

5.3 Conclusions

1. Overcrowding has been on international and national policy agenda since decades. Insofar, it does not come as a surprise that strategies to reduce overcrowding have been extensively discussed and widely disseminated.
2. In general, approaches to deal with prison overcrowding refer to reduction of admissions to prison and detention and reduction in the length of the stay.
3. Full consent exists on a two-pronged approach of implementation which on the one hand identifies the measures with which to reduce/combat etc. prison overcrowding and on the other hand “gets the measures accepted”.
4. Research rarely addresses public attitudes towards prison overcrowding and acceptable instruments to resolve such problems. In general, it was found that the public is not interested in prison policy. The constituency for prisons is evidently narrow, specialized and not influential.
5. There are certainly no states of denial on the side of states and criminal justice officials when it comes to recognizing overcrowding problems.
6. Analysis of overcrowding, identification of conditions under which overcrowding emerges as well as evaluation of approaches to contain or reduce overcrowding are in need of reliable and valid data on police recorded crime, sentencing, the prison population and the flow of cases.

7. Most of the penitentiary systems do not provide for sufficient data; moreover research on prison and imprisonment is limited, in particular as regards research comparing various sentencing options (including imprisonment).
8. Prison projections represent an instrument which in principle can advise and guide policy.
9. In spite of limitations of prison projections, implementation of this approach will result in information systems which can inform research, the public and politicians and thus improve the basis for impact assessments and political discourses around sentencing and other crime related policies.
10. Prison construction programs or the acquisition of additional space through privatization can provide relief in case of overcrowding. However, prison construction programs must be placed under financial restrictions. Second, additional prison capacity may in fact worsen the problem of overcrowding in the long run and furthermore reinforce a policy of reliance on imprisonment and the deprivation of liberty.
11. Prison litigation can become a means to and a part of prison reform. As prisons and prisoner do not have a strong constituency, strengthening inmates rights in litigation cases could be an effective tool in de-crowding prisons through the empowerment of inmates and NGOs.
12. Public order offences, small drug offences and criminal offences committed by addicted offenders are candidates for either complete decriminalization or for transformation into administrative offences which do not carry prison sentences.
13. Drug addicted prisoners and the mentally ill represent in some correctional systems significant groups which not only contribute to overcrowding but also to additional problems as regards the risk of transmitting infectious diseases.
14. Restorative justice and mediation programs may be useful to reduce the length of prison sentences. Serious efforts for reconciliation between offender and victim are in some systems considered as mitigating factors. But it is difficult to assess the potential of restorative justice, mediation and restitution due to the absence of evaluation research which addresses the impact of restitution, restorative justice or victim-offender-reconciliation programs on sentencing and the prison population.
15. Traditional or customary approaches to deal with crime certainly have a potential as an alternative to formal criminal proceedings. The wide use of (informal) reconciliation procedures in African and Asian countries demonstrate effectiveness but also risks related to equal treatment and fairness.
16. With respect to pretrial detention it seems to be promising to place the emphasis first on the normative framework of pretrial detention and alternatives to pretrial detention. Of utmost importance for a normative framework geared towards minimizing pretrial detention is the principle of proportionality and the way proportionality is translated into the conditions set for pretrial detention. Placing a strict statutory cap on the length of pretrial detention certainly

plays a decisive role in limiting pretrial detention as does a general clause which prevents that petty offences (which will most probably result in non-custodial sentences) will lead to detention prior to trial.

17. Studies demonstrate then that the risk of absconding is often misjudged in decisions on pretrial detention and as a consequence many false positives are held in remand prisons.
18. Assigning a defense council very early in criminal proceedings seems to be correlated with shorter periods of pretrial detention. In the same line of practices fall approaches which, also for budgetary reasons, install assistance through paralegals.
19. Experiences with electronic monitoring have not yet been evaluated systematically in the context of replacing pretrial detention; however, reports describe electronic monitoring as an important element in packages designed to bring down the prison population.
20. The European Supervision Order seeks to compensate a particular risk of foreign nationals to be placed in pretrial detention and at the same time to strengthen the principle of presumption of innocence. Through mutual recognition of pretrial (non-custodial) supervision orders it is sought in the European Union context to create an additional option in the strategy to reduce pretrial populations.
21. Case backlog reduction programs may serve to raise awareness for giving priority to cases where pretrial detention was ordered and reduce the time suspects spend in pretrial detention.
22. Remarkable success stories can be reported from creating and successfully implementing alternatives to imprisonment. There is clear evidence that day fines succeeded in the past to replace to a quite considerable though differing extent in particular short-term imprisonment.
23. Suspended prison sentences and probation turned out to be quite successful as alternatives to immediate imprisonment.
24. Although alternatives to imprisonment have been introduced since the 1960s/1970s in many regions and in spite of their apparent success, alternatives have not or could not been implemented in a way which has prevented further prison growth and overcrowding.
25. Community service programs have been introduced in many countries which seem to work quite well. Community service evidently can be implemented also in face of strained budgets. Some of the new community service programs demonstrate a significant potential and exhibit interesting and innovative features. These community service programs are integrated with professional training and with the idea of restitution and paying back to the immediate community (“neighborhood community service”).
26. The emergence of “three and two strikes laws” and truth in sentencing policies, general approaches to enhancing penalties in case of recidivism and min-

imum penalty legislation have been discussed as major drivers of long prison sentences and as an area where reforms should be focused on implementing the principle of proportionality.

27. The wide and indiscriminate use of enhanced prison sentences does not improve public safety but rather contributes to the deterioration of crime and crime control problems. This should result in considering strictly the internationally endorsed principles of proportionality and imprisonment as a last resort in sentencing legislation.
28. Sentencing legislation should leave enough room for judges to adjust the penalty to individual characteristics of offence and offender. This would mean to re-consider mandatory minimum sentencing laws, truth in sentencing policies and in particular “three strikes and you’re out” policies. Sentencing should be better insulated from penal populism.
29. Parliaments when reforming sentencing laws have to pay attention to the question whether a specific sentencing policy can be sustained. It is primarily the task of the legislator to take into consideration possible consequences (and side effects) of legislation and to base legislation on thorough impact assessments. Impact assessments have found a wide field of application and are today an essential element in good governance.
30. Parole is the core of a set of measures which ranges from reductions in the original prison sentence, early release under supervision to various forms of prison regimes (open prison, work furloughs, home detention etc.). Parole and good time approaches are among the conventional instruments to reduce the time which has to be spent actually in prison.
31. Parole therefore serves as a bridge between incarceration and return to the community and represents the most important instrument in tackling the problem of “revolving doors”.
32. There is not much known about best practices as regards revocation of parole and recalls to prison. As a minimum recalls to prison should be based on the principle of consistency and they should reflect recognition of the basic standards applied to the use of imprisonment in general. This means also that recalls should be used as a last resort and in a proportional manner and after tightening and adjustment of conditions have failed. In general, revocation for technical violations of parole should be restricted to repeated and substantial violations and violations which indicate a danger to the public.
33. Amnesties usually have rather short-lived effects on prison populations. They do not affect root causes of growth and result in short-term improvements which fade away shortly after implementation if nothing else changes. Amnesties certainly play a legitimate role as an instrument to settle large-scale conflicts and to pacify a country where a significant potential of conflict escalation looms, not as a routine technique in response to overcrowding.

5.4 Open Questions

Crucial and still open questions concern the explanation of success and the explanation of failure of measures to control overcrowding. If the acid test of reform should be rather what can be sustained than what can be attained³¹⁴, then, well designed longitudinal research is needed. For most of the projects and approaches described in this report such research is not available. The assessment of success and failure is based on a mix of limited data, selective and systematic observation, narratives and assessments based on practical experiences. But, beyond that, theoretical underpinning is required which structures the complexity which comes with the onset and disappearance of prison overcrowding, reconciles normative and empirical approaches and ultimately provides guidance for political decisions.

When looking at explanations of success a diverse picture can be drawn which essentially fits the assumption of rather unique configurations which in the context of a countries history explain why certain approaches work (and others not). Successful reforms and changes in pretrial detention practices in the Ukraine for example are explained by placing pretrial detention reform into a larger policy of moving away from a repressive Soviet style system and to become an accepted member of the Council of Europe³¹⁵. Specific incentives insofar have been perceived to exist and have been linked to prison conditions. Successful reduction of remand and sentenced prison population in Portugal over the last years is linked to a comprehensive reform of substantive and procedural criminal law; the reason for this was evidently the political will to contain prison growth and to improve prison conditions. Political will as to what place prison sentences should play in a system of criminal sanctions and how prison sentences should be enforced certainly have a central place in explanations. A major impact on the size of prison populations can be expected from deliberate political decisions to cut down the use of imprisonment. Examples can be drawn from decisions made by Austrian and German parliaments to reduce the use of short-term prison sentences (up to six months) in the 1960s. Finland opted also for a major change in the use of prison sentences when making a decision to adjust to practices implemented in other Scandinavian countries. Both examples, the German/Austrian as well as the Finnish, demonstrate also what is needed to initiate political discourses and ultimately political changes which reduce the prison population effectively: a justificatory system or a narrative which is politically acceptable and which endorses decarceration policies or alternatives to imprisonment³¹⁶. In Germany/Austria the narrative drawn from the program of *Franz v. Liszt* was very successful when implementing in the 1960s a policy which gave priority to fines and cut back drastically short prison sentences. In Finland it was evidently the wish to fall in line with the rest of the Scandinavian countries which resulted in adopting a decarceration policy which decreased the

³¹⁴ Varenik, R.O.: Mixing Politics, Data, and Detention: Reflections on Reform Efforts, in: Open Society Institute (ed.), Justice Initiatives. Pretrial Detention. New York 2008, pp. 172-183, p. 174.

³¹⁵ Naimark-Rowse, Schönteich, Sorochinsky & Tomasini-Joshi (fn. 252).

³¹⁶ Jacobs, J.B.: Finding Alternatives to the Carceral State. Social Research 74 (2007), pp. 695-699.

prison population significantly. However, it is not clear how such justifications are made to work and why under certain conditions they seem to be successful and under other conditions they are not.

The Finnish case shows that discourses on the role of prison sentences and the size of the prison population may be also initiated by placing prison figures into a comparative perspective. In Australia in the 1990s the question was raised why New South Wales would experience a much higher prisoner rate than the demographically similar state of Victoria³¹⁷. Research came up with a mix of grounds. In New South Wales more imprisonment for fine default, longer prison sentences, and in particular a higher rate of custodial sentences can be observed, while Victoria disposes of an additional alternative, periodic detention. Such comparisons seem to become effective within clusters of countries (or political entities) which are due to various reasons close to each other. However, comparisons may also result in discourses headed towards increasing the size of the prison population. The Chairman of a Northern Irish political party in 2005 and at the occasion of the publication of English prison figures expressed surprise when noticing that Northern Ireland had prison population figures half of those in England/Wales³¹⁸. Referring to violence and security it was then stated that the public would not understand that Northern Ireland resorts that rarely to imprisonment.

Financial crises and budgetary problems are sometimes cited as causing political change and encouraging decisions to revisit sentencing policies and early release procedures. A direct causal relationship, however, is contended. Case studies from the United States are interpreted as showing that states began to re-evaluate security policies and recognized that prison populations can be reduced without a negative impact on public security³¹⁹.

Answers to the question how to explain why reforms fail in producing sustained and durable changes in prisons are diverse, too. It is often assumed that failure of new options in reducing prison overcrowding is the consequence of deep rooted attitudes and beliefs of criminal justice officials who continue to rely on deprivation of liberty, even if plausible alternatives are available³²⁰. In Chile, the absence of data showing an impact of the reform of rules and practices of pretrial detention have been noted as an explanation why a counter reform succeeded after a public debate on whether security had been compromised by strengthening proportionality in decisions on pretrial detention.

³¹⁷ *Gallagher, P.*: Why does NSW have a higher imprisonment rate than Victoria? NSW Bureau of Crime Statistics and Research, Crime and Justice Bulletin, May 1995.

³¹⁸ www.allianceparty.org/news/001618/surprise_at_prison_population_figures.html (10th September 2005).

³¹⁹ The PEW Center (fn. 65), p. 2.

³²⁰ *Schwartz, O.*: Ebb Tide: The Russian Reforms of 2001 and Their Reversal, in: Open Society Institute (ed.), Justice Initiatives. Pretrial Detention. New York 2008, pp. 103-119, p. 317.

Financial problems certainly play a crucial role in achieving sustainability. Projects are sometimes based on resources which are available for a limited period of time. Failure of finding permanent funding may explain why quite some projects discontinue or cannot be expanded.

Prisons then are regarded to be low priority issues in all political systems and that there is little awareness of prison conditions among the public³²¹. Moreover, criminal justice and correctional systems may be more or less exposed to partisan politics dependent on the political system and the extent of insulation of the judiciary from political pressure. It can be assumed that partisan politics bring more instability in the course practices of sentencing, early release, amnesties, prison construction and prison regimes take. The question then arises how political will and political practices can be initiated³²² which are in line with international standards and the body of principles which, in theory, provide for blueprints, models and all instruments needed to contain prison populations. A similar question may be raised with respect to how the community and social elites can be made interested in prison reform. There are interesting cases which describe that interest can be raised³²³ and in fact placing the focus on practices instead of norms (which are a field for legal specialists) could provide more opportunities and perhaps more incentives for participation at justice and prison reform³²⁴.

If political will is in fact decisive for success or failure of prison reform, then general theoretical approaches to the explanation why state actors comply with rules and standards should be pursued³²⁵.

³²¹ *Dankwa* (fn. 74), p. 87.

³²² *Gottschalk* (fn. 122), p. 102.

³²³ The PEW Center on the States: Right-Sizing Prisons: Business Leaders Make the Case for Corrections Reform. January 2010.

³²⁴ *Foglesong, T.*: Grand Ambitions, Modest Scale, in: Open Society Institute (ed.), *Justice Initiatives. Pretrial Detention*. New York 2008, pp. 4-10, p. 7.

³²⁵ See *Hathaway, O.A.*: Do Human Rights Treaties Make a Difference? *The Yale Law Journal* 111 (2002), pp. 1935-2042; *Cole, W.M.*: Sovereignty Relinquished? Explaining Commitment to the International Human Rights Conventions, 1966-1999. *American Sociological Review* 70 (2005), pp. 472-495.

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