

Overcrowding in prisons: Health and legal implications

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Key points of interest

- No universal definition of overcrowding exists.
- More than 120 countries have prison systems that exceed their own occupancy capacity, some with more than 250%.
- Overcrowding can lead to ill-treatment, other human rights violations and deterioration of the health of people in prison.
- While alternatives to detention exist, they remain underutilised.
- Some countries have successfully reduced prison overcrowding.

Abstract

Introduction: Prison overcrowding can be defined in different ways, and no universal definition exists. More than 120 countries report prison occupancy rates above their own capacity. This paper provides an overview of legal and health implications of overcrowding, analyses potential causes, and provides examples of how different countries utilised non-custodial measures to reduce overcrowding to disseminate good practices as inspiration for other contexts. **Methods:** Desk study based on literature searches in medical (Pubmed and Medline) and legal sources, including Google Scholar on legal opinions, Global Lex and decisions of UN treaty bodies and regional human rights mechanisms supplemented by online searches for grey literature. In addition, examples from other countries were sought to corroborate and illustrate the points made. **Results:** A range of international standards exist that provide for the conditions and treatment of people in prisons to prevent prison overcrowding and protect them from its consequences. Nonetheless, overcrowding is persistent across many countries. It is often associated with violations of human rights, including, among others, the right to be free from torture and ill-treatment, the right to health, and the right to liberty and security. The underlying factors contributing to overcrowding vary and include, among others, overuse of imprisonment, excessive use of pre-trial detention, lack of access to a lawyer and underutilisation of non-custodial measures as an alternative to detention. Non-custodial measures can be applied throughout the criminal justice process, and some countries have successfully managed to reduce their prison populations by implementing such measures. **Discussion:** Overcrowding affects many aspects of prison life, impeding the provision of a humane and rehabilitative environment. Beyond the harm caused to persons in prisons, this may negatively impact society at large in terms of security, public health, and economy. Political will is essential in reducing prison overcrowding.

Keywords: overcrowding, detention, torture and ill-treatment, right to health, prison.

Introduction

The number of persons deprived of liberty is increasing every year. Currently, more than 11.5 million people worldwide are incarcerated (Penal Reform International [PRI] & Thailand Institute of Justice [TIJ], 2024). Prison overcrowding threatens the achievement of the stated purposes of imprisonment, i.e., to deter, incapacitate, rehabilitate and punish (United Nations Office on Drugs and Crime [UNODC], 2019).

Punitive policies, criminalisation of poverty and status, as well as systemic racism and discrimination, are the key drivers of imprisonment (PRI & TIJ, 2024). In many parts of the world, states have adopted strict laws based on “tough on crime” policies, contributing to a rise in criminalisation and higher incarceration rates with more frequent and longer use of remand detention, the imposition of mandatory minimum sentences, longer prison sentences and limited recourse to non-custodial alternatives (PRI, 2018; European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment [CPT], 2022a). Currently, on a global level, only one in three countries’ prison systems operate within capacity. The overcrowding level varies from country to country, with 59 countries reporting that they operate at 150% capacity and eight countries exceeding 300% (PRI & TIJ, 2024). Within the European region, twelve countries reported overcrowding in 2023 (Aebi & Cocco, 2024).

No universal definition of overcrowding has been adopted yet. The most common definition relates to spatial density such as living space per person or number of beds (CPT, 2015; Simpson et al., 2019). According to the CPT, minimum cell standards in European prisons are 6m² for single-occupancy, in addition to the sanitary facility and 4m² per person for multiple-occupancy cells, in addition to a “fully-partitioned” sanitary facility. All cells should have no less than 2m between their walls and measure at least 2.5m in height (CPT, 2015). Similar standards do not exist at the regional level outside Europe.

Overcrowding has also been defined based on operational capacity, i.e., the ratio of prison population to staffing levels (Tartaro, 2002). This ratio focuses on the extent to which a prison can adequately function in a safe and humane manner (UNODC, 2013). Overcrowding has also been defined in social science literature based on social density, emphasising the extent to which people are forced to socialise with others. Such a definition can, for example, be the number of persons per cell or the percentage of persons housed in group versus single cells (Tartaro, 2002). The lack of a common definition of overcrowding, together with the absence of publicly available data, hinders access to precise knowledge on the magnitude of global prison overcrowding and comparison across countries. Moreover, pub-

lished data often lack the necessary disaggregation to understand the composition of the prison population and, thereby, the needs of people in prison and eligibility for non-custodial measures. In some instances, states with repressive governments withhold data or hinder access to it (Sarkin, 2009).

Overcrowding is rarely uniform across different prisons in one country or even within prisons. For various reasons, some prisons may experience severe overcrowding in the same country while others are occupied under capacity. Overcrowding is rarely static, varying from one day to another as persons are released and admitted.

Prison authorities, human rights advocates, researchers, and international bodies have long recognised prison overcrowding as a problem impacting the overall functioning of the penitentiary system.

This paper aims to provide an overview of legal and health implications of overcrowding and examine its consequences for prisoners and in relation to rights and standards. It also discusses factors that may contribute to overcrowding and provides examples of how different countries have utilised non-custodial measures to reduce overcrowding to disseminate some of the good practices that may serve as inspiration for other contexts.

The impact of overcrowding and the rights of persons in prisons

Overcrowding is not just a matter of lack of space. It affects almost every aspect of prison life, hampering efforts to create safe and effective prison systems. An overcrowded prison is less safe, secure and humane, especially for those in situations of in-

Figure 1. Prison overcrowding

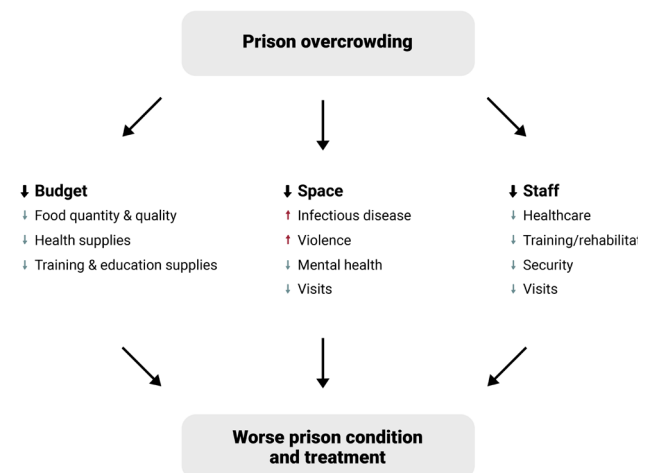


Table 1: *Standards related to prison overcrowding and non-custodial measures*

- UN Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules) (United Nations General Assembly [UNGA], 2015)
- UN Standard Minimum Rules for Non-Custodial Measures (Tokyo Rules) (UNGA, 1990)
- Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (Bangkok Rules) (UNGA, 2011)
- Ouagadougou Declaration and Plan of Action on Accelerating Prisons' and Penal Reforms in Africa (African Commission on Human and Peoples' Rights [ACHPR], 2002)
- Principles on the Decriminalization of Petty Offences in Africa (ACHPR, 2018)
- Guidelines on Conditions of Arrest, Police Custody and Pretrial Detention in Africa (Luanda Guidelines) (ACHPR, 2015)
- Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas (Inter-American Commission on Human Rights [IACHR], 2015)
- Dhaka Declaration on Reducing Overcrowding in Prisons in South Asia (South Asian Association for Regional Cooperation [SAARC], 2010)
- Recommendation No. R (99) 22 concerning prison overcrowding and prison population inflation (Council of Europe [CoE], 2015)
- Recommendation CM/Rec (2017) 3 on community sanctions (CoE, 2017)

creased vulnerability. Overcrowding may have more adverse consequences when prison conditions are already compromised.

Prison overcrowding often translates into reduced budget, staff and space per person, resulting in a range of adverse effects and worsening of prison conditions (MacDonald, 2018; HRC, 2015; Egelund, 2020; Aon et al., 2021). Thus, we perceive the mechanism through which overcrowding affects prison life as per Figure 1.

The institutional capacity to provide services to people in prison and organise meaningful activities and individualised programs often does not match demand in overcrowded prisons. As a result, persons in prison spend more time locked in their cells with fewer opportunities to access appropriate pro-

grams that would foster their rehabilitation and reintegration. This ultimately undermines the stated objectives of imprisonment: to keep society safe and to rehabilitate persons in prison (UNODC, 2019).

The Test of Totality of Conditions used by some courts considers how conditions affect persons in prison in a particular prison setting. It specifically examines whether it is possible to ensure a reasonable degree of privacy, adequate hygiene, sanitary conditions, nutrition, appropriate out-of-cell activities and rehabilitation and other programs for reintegration into society (Kamber, 2022). It also provides a multi-dimensional scale which includes core conditions of adequate circumstances, such as the space available for people (Albrecht, 2011).

The United Nations and regional human rights bodies have adopted minimum standards for prison management and the rights of persons in detention. For details, see textbox.

The standards mentioned above guide states regarding prison overcrowding and non-custodial measures. States have obligations to prevent human rights violations as provided by various international human rights conventions. They have a special duty of care for those deprived of liberty and must ensure that those persons are able to enjoy all human rights except those related to the deprivation of liberty.

Impact on the right to freedom from torture and ill-treatment

Freedom from torture and other cruel, inhuman or degrading treatment or punishment is one of the fundamental rights, and an absolute prohibition of torture and ill-treatment is enshrined in several international and regional human rights treaties.¹ Conditions and treatment in prisons may amount to torture or ill-treatment when they do not meet minimum standards and, therefore, cause suffering. However, in most cases, when the international and regional bodies reviewed situations in prisons, they noted that while overcrowding can on its own amount to torture or ill-treatment, the consequences of overcrowding often intersect with other forms of ill-treatment, which may cumulatively amount to torture.

The United Nations Committee against Torture (CAT) has, in several cases, found that overcrowding may be among the elements leading to a violation of Article 1 and Article 16 of the Convention against Torture and Other Cruel, Inhuman

1 Article 5 of the Universal Declaration of Human Rights (UHDR), Article 7 of the International Covenant on Civil and Political Rights (ICCPR), and the regional conventions, such as the European Convention on Human Rights, the African Charter on Human and Peoples' Rights and the American Convention on Human Rights, all protect the right to be free from torture.

or Degrading Treatment or Punishment. In the *case of A.N. v Burundi*, the complainant alleged that he shared a cell with 80 other persons in a poorly lit room with only a few small windows, where he slept on the cold cement floor without a mattress. The Committee concluded that the complainant's claims must be fully considered. They reviewed not only the conditions in prisons but also the treatment that the complainant suffered by the police, including being violently beaten for half an hour, causing him extreme pain and mental suffering, and the committee found that the abuse inflicted upon him constituted acts of torture within the meaning of article 1 of the Convention (CAT, 2017, §7.4. & 8.2). Similarly, in *Gallardo Martínez et al. v. Mexico*, the complainant alleged that during his detention, he was forced to live in overcrowded conditions (six persons in an area measuring 2 by 4 m), placed in solitary confinement, deprived of sleep and confined to his cell for 22 hours per day. The Committee found that the facts in his case regarding the conditions in prison and during arrest, including beatings and threats of rape and killing his daughter and partner, constituted acts of torture under article 1 of the Convention (CAT, 2022a, §§7.3-7.4).

The regional human rights bodies and courts have also repeatedly found that overcrowding in prisons violates the right to humane treatment and freedom from torture and cruel, inhuman or degrading treatment.

In a call to reduce prison overcrowding, the CPT noted that "Prison overcrowding undermines any efforts to give practical meaning to the prohibition of torture and other forms of ill-treatment since it can result in a violation of human rights." (CPT, 2022b). The European Court of Human Rights (ECtHR) has also repeatedly found that overcrowding can amount to a violation of Article 3 of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. For example, in the case of *Mursic v. Croatia*, the Court explored three elements to determine whether lack of personal space reaches a violation of article 3: i) whether each detainee has an individual sleeping space, ii) whether each detainee has a space of at least 3m² and iii) whether the overall surface space is sufficient to allow persons in detention to move freely between furniture items (ECtHR 2016, §148). Further, the Court noted that personal space less than 3m² is considered so severe that a strong presumption of violating Article 3 arises (ECtHR, 2016, §137). However, in certain circumstances, that strong presumption could be rebutted by the cumulative effects of other factors, such as the short, occasional and rare nature of the reduction of space and having sufficient freedom of movement outside the cell while being detained in an appropriate detention facility where there are no other aggravating condi-

tions present (ECtHR, 2016, § 140). In 2020, the same Court reaffirmed the strong presumption of a violation of Article 3 when a person in detention in Ukraine had less than 3m² of personal space over a considerably long duration [ranging between 82 and 1113 days]. The Court found that the situation had been aggravated by the fact that the applicant had been confined to the cell for most of the day except for one-hour daily walk, improper isolation of the toilet, lack of fresh air, poor ventilation, dampness, and insects in the cells (ECtHR, 2020, §§ 94-97).

In the case of *Boyce et al. v Barbados*, the Inter-American Court of Human Rights (IACtHR) found "that the combined conditions of detention, particularly the use of slop-bucket, the lack of adequate lighting and ventilation (...) as well as the overcrowded conditions, together amount to treatment contrary to the dignity of every human being and thus constituted a violation of Articles 5 (1) and 5 (2) of the American Convention." (IACtHR, 2007, §86). In 2012, the same court reviewed a case of prison conditions in Honduras, finding that cell conditions were contrary to human dignity due to, among other factors, overcrowding and emphasised that its previously established case law on the main standards on prison conditions and obligations found that overcrowding is a violation of personal integrity that hinders essential prison functions (IACtHR, 2012, §§65, 67a).

Impact on the right to health

The right to health is enshrined in the Constitution of the World Health Organization as a fundamental right "*of every human being without distinction of race, religion, political belief, economic or social condition*" (WHO, 1948, preamble). This is further affirmed in various forms, including the Universal Declaration of Human Rights (UNGA, 1948), the International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966), and the Declaration of Alma-Ata (WHO, 1978). Health is also strongly present in the Sustainable Development Goals (goal three in addition to health indicators in all other goals) (UNGA, 2015b, p. 14) and the Nelson Mandela Rules.

A relative shortage of human resources due to overcrowding would violate Nelson Mandela Rule 25.2, which calls for "sufficient qualified personnel...". Overcrowding is also a significant challenge to the conduct of timely and effective initial medical assessments as medical personnel struggle to see all new persons as stipulated in Rule 30: "A physician or other qualified health-care professionals...shall see, talk with and examine every prisoner as soon as possible following his or her admission...". In one country, during a training on the topic, prison staff cited overcrowding as a challenge to the initial medical assessment (Aon et al., 2021). Similarly, this is

frequently mentioned during monitoring visits by independent monitoring bodies of which two authors are members. Prison medical staff with competing priorities are likely to neglect less urgent duties such as those stipulated in Rule 35, namely the “regular inspect[ion]” of food, hygiene, ventilation and bedding (UNGA, 2015a).

Overcrowding poses a particular risk for transmission of air-borne infections. For example, a study of tuberculosis in a central prison in the Democratic Republic of Congo found that persons in overcrowded cells (defined as >50 persons per 40m²) were almost ten times more likely to be infected than those in less crowded cells (odds ratio: 9.8, CI: 3.1,31.6) (Kalonji et al., 2016). In a Russian study, the odds of tuberculosis infection were about six times higher in overcrowded cells (defined as >2 persons per bed) compared to normal occupancy cells (Lobacheva et al., 2007). The COVID-19 pandemic provides another example: Overcrowding renders social distancing nearly impossible and complicates the quarantine of those exposed and the isolation of those infected. The higher the prison occupancy rate in Texas state prisons, the larger the COVID-19 outbreak (Vest et al., 2021).

The first systematic literature review of the relationship between cell spatial density and infectious disease was published in 2019, with only seven articles meeting its inclusion criteria (Simpson et al., 2019). This is a testament to the dearth of rigorous research into the association between overcrowding and infectious disease in prisons. Although the systematic review found a statistically significant association between overcrowding and some infectious diseases, such as pneumococcal disease and infectious dermatoses, the authors assessed the evidence as mostly fair or poor quality (Simpson et al., 2019).

Evidence is even more scant regarding the effect of overcrowding on non-communicable diseases and mental health. Suicide is posited as the leading cause of prison mortality, and self-harm has been demonstrated to constitute a significant morbidity burden (Favril et al., 2020; Fazel et al., 2017). However, there exists no evidence of an association between prison overcrowding and suicide (Fazel et al., 2017; Leese et al., 2006; Van Ginneken et al., 2017). Fazel et al.’s review of 20 countries found no statistically significant association between overcrowding (based on prison population versus capacity) and suicide (β :0.99, CI: -0.45,2.4). However, evidence is more mixed regarding the association between self-harm and prison overcrowding. Two studies examining data over extended years in a Swiss prison found a statistically significant association (Baggio et al., 2018; Wolf et al., 2016), but a systematic review and meta-analysis of 35 studies from 20 countries found no statistically significant association between single-cell occupancy

and self-harm (OR:1.5, CI:0.8,2.9). This may be related to how overcrowding is defined across studies.

Nevertheless, persons in prison were found to be more likely to suffer depression in overcrowded prisons (β :0.05, $p<0.01$) when controlling for other factors, such as security level, in a study of all state prisons in the US. Overcrowding was defined as an index combining the ratio of prison population to design capacity and staffing (Edgemon & Clay-Warner, 2019).

In many prisons across the world, the number of health staff is insufficient to cover the needs of persons in prison who tend to have a higher demand for health care due to poor detention conditions and over-representation of vulnerable groups. For example, in Zambia, which has a prison population of 21,000, there was only one prison physician in 2020 (Egelund, 2020). As a result, persons in prison either do not receive care at all or receive delayed or substandard care. In many contexts, persons in prison must be taken to a clinic outside the prison, which requires escorts, which is a serious challenge for understaffed prisons. As such, missed medical appointments become a standard feature. Further, the administration of psychoactive medication, which should take place under observation, is complicated due to staff shortages, especially during the night shift. This can negatively affect treatment effectiveness and quality of life for people (MacDonald, 2018). Where direct observation of medication consumption is not observed, a black market in psychoactive medications may flourish.

In overcrowded prisons, people may need to take turns sleeping due to a lack of space or sleep only in certain positions that allow them to lie down in limited space (PRI, 2012a). Sleep deprivation has been shown to result in impaired neurocognitive and motor functioning, increased anxiety, and increased sensitivity and response to pain (Schneider et al., 2021). Chronic sleep deprivation has been associated with physiological changes such as increased blood pressure and inflammatory markers (Schneider et al., 2021).

Most research into the health consequences of overcrowding focuses on Western countries, especially the US. The effects of overcrowding on health may manifest differently across contexts, and research into the health effects of overcrowding in different contexts is needed. That said, there is already sufficient evidence that prison overcrowding has adverse health effects and must be avoided.

Impact on the right to liberty and security

Article 9 of the International Covenant on Civil and Political Rights (ICCPR, 1966) prohibits arbitrary arrest or detention and stipulates that deprivation of liberty should always be by the law. The Working Group on Arbitrary Detention stated

that the principle that deprivation of liberty shall be imposed proportionately to meet a pressing public need is most relevant to detention pending trial. This implies that pretrial detention should be a measure of last resort. However, international and regional bodies have expressed their concern over the increasing use of pretrial detention and its excessive length, noting its significant contribution to overcrowding, leading to a situation where, in some prisons, pretrial detainees constitute the majority of the population (Human Rights Council [HRC], 2015). In addition, a lack of staff resources in prison may result in necessary documents supporting a request for early release not being produced on time.

The Nelson Mandela Rule 1 states that “The safety and security of prisoners, staff, service providers and visitors shall be ensured at all times.” (UNGA, 2015a). However, inadequate staffing levels due to overcrowding may lead to serious breaches of the right to security of detainees and instances where authorities fail to protect detainees from inter-prisoner violence (HRC, 2015). Various studies have examined the relationship between crowding and misconduct in prisons with mixed results (Franklin et al., 2006; Glazener & Nakamura, 2020). Franklin et al.’s meta-analysis of 16 studies in the US concluded that overcrowding did not predict misconduct, whereas Glazener and Nakamura found that overcrowding did predict misconduct in a study of 24 institutions in Pennsylvania (Franklin et al., 2006; Glazener & Nakamura, 2020). Interestingly, the relationship between misconduct and crowding was not found to be constant, diminishing as crowding increased. This suggests the existence of a threshold of overcrowding, after which misconduct is not affected. Glazener and Nakamura did not find a statistically significant relationship between overcrowding and *violent* misconduct (Glazener & Nakamura, 2020).

A study of the association between institutional factors and prison violence in Switzerland concluded that more violence occurred when both overcrowding and turnover increased (Baggio et al., 2020). Overcrowding has also been associated with self-reported hostility among persons in prison in a study examining national US data from 5,552 persons across 214 prisons (Edgemon & Clay-Warner, 2019).

Overcrowding may be a burden not only on persons in prisons but also on prison staff. In a survey among 66 correctional officers in three Alabama prisons in the US where occupancy ranged from 154% to 206%, all officers reported high levels of stress, “impaired job performance”, increased violence, and that they were “fearful of inmates” (Martin et al., 2012).

Impact on the right to equality and non-discrimination

Another right often violated due to prison overcrowding is the right to equality and non-discrimination. Article 26 of ICCPR (1966) prescribes that “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law.” Nonetheless, several human rights bodies attest to how overcrowding is associated with failure to address the needs of vulnerable groups such as racial minorities, indigenous populations, women, juveniles as well as migrants and persons with mental illness. Facilities may lack the resources to separate groups according to international standards, e.g., children from adults; persons with physical disabilities may be held in environments that do not accommodate them; and those with mental illness may not receive adequate care and treatment. ((HRC, 2015).

Impact on the right to privacy and family life

The right to privacy and family life is enshrined in the Universal Declaration of Human Rights (UHDR, art. 12), ICCPR and other regional instruments guaranteeing that “no one shall be subject to arbitrary or unlawful interference with his privacy and family” (ICCPR, 1966, art. 17). Human rights bodies have documented several instances of violation of privacy in detention due to overcrowding.

In addition to the lack of privacy, prison overcrowding affects the right to family life. In some cases, persons may need to be moved far away from their families due to lack of space in prisons located close to the family. This severely impacts families’ ability to visit their loved ones as many cannot afford the cost of long-distance travel. In other instances, a lack of sufficient staff hinders the smooth operation of visits, thus reducing the time people in detention can spend with loved ones.

Causes of overcrowding

While Europe has seen a decrease of 27% in its prison population between 2000 and 2021, prison populations grew by 43% in Asia and 38% in Africa (PRI & TIJ, 2022). The section below explores some of the main factors that have affected the growth of prison populations worldwide.

Excessive use of pretrial detention

Article 9(3) of the ICCPR (1966) states: “It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and should occasion arise, for execution of the judgement”. Nonetheless, around one-third of the global prison population is detained on remand (PRI & TIJ, 2023).

Pre-trial detention has risen by over 30% globally in the last decade (Walmsley, 2020), and even when non-custodial alternatives are provided in legislation, they remain underused. For example, around 40% of people in Kenyan prisons are being held pre-trial, many arrested for petty offences which would attract sentences of less than six months, despite provisions in the Constitution (2010) which state that a custodial remand is not permissible if the alleged offence is punishable only by a fine or short-term imprisonment (Jacobson et al., 2017). While Jordan has reduced its population on remand from 47,9% in 2005 to 36,8% in 2019, many persons in prisons are still detained in pre-trial detention despite the country having laws i) stating that detention should be exceptional and unavoidable, ii) providing alternatives to detention and iii) requiring that the competent judge must be satisfied that the detention is a means to prevent real danger (Abuanzeh, 2022).

Longer sentences and delayed release

In some countries, legislation provides a mandatory minimum sentence for specific offences. In the United States, for example, the most common mandatory sentences are for five and 10 years based on the weight of the drug or the presence of a firearm. Such laws prevent judges from considering other relevant factors, such as the defendant's role in the offence or the likelihood of committing a future offence. Mandatory sentencing laws disproportionately affect people of colour and contribute to prison overcrowding (Families Against Mandatory Minimums, 2002).

In some cases, sentencing legislation also provides for serving more extended periods of the sentence before one is eligible for early release or probation. For example, in South Africa, the law prescribes that those who have received a minimum sentence need to serve 80% of their sentence or 25 years, whichever is shorter, to be released on parole, although a shorter period of two-thirds of the sentence may be stipulated by the sentencing court (*Correctional Services Act No 111 1998 (SA)*, S 73(5)(b)(5)).

Deficiencies in the criminal justice system

In many countries, the criminal justice system is under increasing pressure to process a rising number of cases due to overcriminalisation. States that implement 'tough on crime' policies do not always invest equally in their criminal justice system. The system requires sufficient judges, effective file management, speedy procedures and workable alternatives to detention. Many cases require years to reach a final verdict while those accused languish in prisons on remand. For example, a 2017 audit of the criminal justice system in Kenya showed that 38% of criminal cases

were completed within 308 to 1060 days (National Council on the Administration of Justice, 2016).

Lack of effective implementation of alternatives to imprisonment

Even if countries have adopted laws that provide alternatives to imprisonment, especially in the pre-trial stage, the implementation of such laws is lacking. For example, the government of Uganda has adopted the Community Service Act 2000 (UG), which sets up a National Service Committee with the aim of rehabilitating persons convicted of petty offences, decongesting prisons, and promoting the rights and dignity of persons in prison (PRI, 2012b). However, implementation is lacking due to limited resources or community service not being seen as a priority (PRI, 2012b).

Similarly, Kenya adopted the Community Service Order Act in 1998 to regulate and introduce community service for persons whose sentences do not exceed three years of imprisonment, with or without the option of a fine (*The Community Service Orders Acts No.10 1998 (KE)*). In addition to the community service option, Kenyan laws also provide for the option of bail and bonds (Article 49 (1) of the Constitution, 2010). The use of community service options was quite widespread in early 2000 in Kenya, shortly after the introduction of the Act, but has since not been used as regularly because of a lack of awareness about the law as many magistrate judges who received training upon the introduction of the Act were either promoted or replaced (PRI, 2005).

The Sierra Leone *Criminal Procedure Act No. 32 1965 (SL)* section 79 provides bail for persons charged with certain felonies. Many judges are reluctant to grant bail (ILRAJ, 2023).

The Philippines has one of the highest overcrowding rates despite a Community Service Act stating that "the court in the discretion may, in lieu of service in jail, require that the penalties of arrest minor and arrest mayor may be served by the defendant by rendering community service in the place where the crime was committed, under such terms as the court shall determine, taking into consideration the gravity of the offence and the circumstances of the case, which shall be under the supervision of a probation officer." (Community Act, 2019).

Criminalisation of poverty and drug offences

Criminalisation of poverty and status remains one of the key drivers of imprisonment (PRI & TIJ, 2024). "Criminalization of poverty" refers to the fact that persons living in poverty are over-represented in detention (PRI & TIJ, 2024). This is partly due to laws that lead to incarceration for acts related to poverty, such as the inability to repay small debts or begging. For ex-

ample, 42 out of 54 African countries criminalise people with no fixed address or means of subsistence (PRI & TIJ, 2022).

Further, laws that impose strong criminal sanctions for drug offences have led to the imprisonment of millions worldwide (PRI & TIJ, 2022). For example, in the Philippines, 53% of women in prisons are incarcerated mostly for low-level offences such as possession of small quantities of drugs, and sentences are going up to 20 years or life imprisonment. In Kenya, a person in possession of 1-5 grams of a drug (other than cannabis) faces life imprisonment and a fine of no less than 20 million shillings (more than 150,000 USD) (International Drug Policy Consortium, 2018; Narcotics, Drugs and Psychotropic Substances (Control) Amendment Bill 2020 (KE)).

Detention of persons with mental disabilities

The United Nations Convention for the Rights of People of Disabilities guides states regarding the enjoyment of rights of persons with disabilities when deprived of liberty. In particular, Article 14 provides for deprivation of liberty on an equal basis (disability should not be used as a ground for detention), and when a person with disabilities is detained, states should treat such individuals in compliance with international human rights law, including by providing reasonable accommodation (UN-CRPD, 2006). The Nelson Mandela Rules caution against the imprisonment of those with severe mental disability “for whom staying in prison would mean an exacerbation of their condition” (UNGA, 2015a). Nonetheless, about 14% of persons in prisons worldwide have a mental illness, and this number is as high as almost 50% in the US, much higher than in the general community (Horne & Newman, 2015; PRI & TIJ, 2018). A systematic review in low and middle-income country prisons estimated the prevalence of mental illness to be much higher than national rates, 16 times higher for non-affective psychosis and six times higher for major depression (Baranyi et al., 2019). This suggests that mentally ill people are more likely to be incarcerated, but conditions of incarceration may also exacerbate or even create mental illness (Quandt & Jones, 2021).

Lack of access to legal aid

The United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems note that states, when designing legal aid schemes, should ensure that “vulnerable groups such as persons with mental disabilities have access to criminal justice, including promoting the use of alternatives and sanctions to deprivation of liberty and deprivation of liberty should be used as the last resort (UNODC, 2013). Once in prison, the Nelson Mandela Rules provide that persons in detention shall have “adequate opportunity, time and facilities to be vis-

ited by and to communicate and consult with a legal advisor of their own choice or legal aid provider, without delay” (UNGA, 2015a, rule 61.1). Yet, many are unable to challenge their detention owing to a lack of access to legal representation and legal aid and even the unavailability of judges (HRC, 2015).

Even countries that adopted the laws to provide legal aid are behind in the effective implementation. For example, Kenya adopted the Legal Aid Act in 2016 to facilitate access to justice by providing affordable, accessible, sustainable, credible and accountable legal aid services in accordance with the Constitution (2010), including a legal aid scheme to Indigenous persons as well as legal awareness (*Legal Aid Act 2016 (Kenya)*). However, the UN Committee against Torture expressed concerns that many face difficulties in obtaining free legal assistance (CAT, 2022b). The Constitution of the Philippines provides for access to legal aid, specifically noting that free access to the courts and quasi-judicial bodies shall not be denied to any person because of poverty. Further, the Constitution also tasks the Commission on Human Rights to provide adequate legal aid services to the underprivileged whose rights have been violated or need protection (Philippines, 1987). Despite the Constitution guaranteeing a right to legal aid, the 2018 World Justice Survey project found that only 20% of the population had access to legal assistance. The cost of services, inconvenience due to traffic and distance as well as lack of communication with lawyers were cited as reasons for failing to obtain legal assistance (Thomson Reuters Foundation, 2021). In recent years, Jordan has prioritised access to legal aid by enacting the Legal Aid Regulation in 2018 to assist persons from vulnerable communities, those charged with felonies, and individuals with large families in obtaining legal services. While Jordan has made progress, in the latest Universal Periodic Review (UPR) in January 2024, several countries recommended that the government continue strengthening the legal aid system and implementing the alternatives. (UNGA, 2024).

Alternatives to imprisonment

The Commentary on the Tokyo Rules defines a non-custodial measure as “any decision made by a competent authority to submit a person suspected of, accused of or sentenced for an offence to certain conditions and obligations that do not include imprisonment; such decision can be made at any stage of the administration of criminal justice.” (UN Centre for Social Development and Humanitarian Affairs, 1993). The scope of the application of non-custodial measures should apply without discrimination at all stages of criminal proceedings. Non-custodial measures should be used by the principle of minimum intervention and with the person’s consent, while the decision to impose

Table 2. Overview of common non-custodial measures at each stage of the justice process

Stages in the criminal justice process	Pre-trial Stage	Trial and sentencing stage	Post-trial Stage
Non-custodial measures	<ul style="list-style-type: none"> – Home arrest – Reporting obligation – Restriction on leaving or entering a specific space – Retention of travel documents – Bail or bond – Electronic monitoring 	<ul style="list-style-type: none"> – Fines – Suspended/deferred sentence – Probation, judicial supervision – Community service – Diversion to treatment – Restrictions on movement – Electronic monitoring 	<ul style="list-style-type: none"> – Parole or early conditional release – Temporary release – Compassionate release – Pardon or amnesty – Electronic monitoring
Justice actors responsible for deciding on custodial and non-custodial measures	<ul style="list-style-type: none"> – Police – Prosecution – Judiciary 	<ul style="list-style-type: none"> – Prosecution – Judiciary 	<ul style="list-style-type: none"> – Executive – Prison services – Parole boards – Judiciary

non-custodial measures must be reviewed by judicial or other independent authority (UNGA, 1990, Rule 2.1, 2.2 and 3).

The UN High Commissioner for Human Rights has called for the application of alternatives to detention to - among other reasons - decongest prisons. In a 2015 report, he urged states to revisit their eligibility criteria and widen their scope of application while noting the importance of alternatives for vulnerable groups (HRC, 2015).

Legislation should provide for various non-custodial measures and consider them throughout the criminal justice process (pretrial, trial, sentencing, and post-sentencing stages).

States must ensure such measures are human rights compliant, target the most vulnerable and allow application at all stages of criminal proceedings (UNODC, 2011). A range of justice actors are in a position to promote and implement non-custodial measures. Table 2 provides an overview of common non-custodial measures at each stage and the responsible actors taking relevant decisions.

Most recently, it has been suggested to deduct days from the prison sentence for persons experiencing overcrowding to allow for earlier release (Forero-Cuellar A., 2023).

Non-custodial measures should be prioritised for persons meeting certain conditions, including pre-trial detainees who do not pose a serious threat or risk, those convicted of minor offences or technical violations of probation/parole or who are low-risk, and those nearing the end of their sentence as well as those with severe mental disabilities or serious health conditions, seniors, juveniles, pregnant or victimised women and those with special caretaking responsibilities.

However, while these alternatives to detention are seen as opportunities to reduce overcrowding, some states implement alternatives arbitrarily to repressively restrict fundamental freedoms. For example, in Tunisia, various non-custodial measures have been applied in the context of a national emergency without proper judicial oversight, and persons have been placed under house arrest and ordered to report regularly to the police through administrative processes without a trial (Amnesty International, 2016).

Furthermore, the use of electronic monitoring has been widely criticised as an in-home type of deprivation of liberty, too restrictive, allowing only limited time outside of the house and not allowing individuals to participate in everyday activities, missing family events, or being unable to work or attend schools (Schenwar, 2020).

Overall, research points towards the risk of “net-widening” when alternatives are applied to persons who would not otherwise have received a criminal sanction (Aebi, M. F. et al. 2015). Therefore, a critical approach towards the way non-custodial alternatives are being used in practice is necessary.

Despite the challenges and risks, various countries have successfully implemented alternatives to reduce overcrowding in detention facilities.

Estonia has decreased its prison population through legal reforms, including decriminalisation, not punishing misdemeanour attempts and broader reliance on probation and community services (CPT, 2018).

Ukraine decreased its prison population from 218,800 in 2000 to 49,823 in 2021 by introducing laws that stipulate the

use of pre-trial detention only as a last resort, reducing sentences and increasing the use of non-custodial alternatives (Pravo Justice, 2019).

Malawi reduced the proportion of people in prison on pre-trial detention from 40% to 17% through improved access to legal aid. The paralegal program allows trained non-lawyers to provide legal advice and assistance (UNODC, 2013).

In 2022, Jordan judges handed down 4,193 rulings with alternative punishments, including sentencing 1,400 for first-time offences to community service. This comes on the heels of a reformed criminal justice code allowing the application of non-custodial measures, including behaviour rehabilitation programs, community service, travel bans, and electronic monitoring for less serious crimes (The Arab Renaissance for Democracy and Development, 2023).

In 2022, 73% of Liberian prisoners were on pre-trial (United Nations Development Programme [UNDP], 2022). To address the severe overcrowding, the Chief Justice of Liberia issued a directive with orders to release persons who had served their sentence but had outstanding restitution to settle the amount due, stop admission of new persons accused of minor offences, and release all persons on pre-trial held for offences triable at magistrate courts who had been in jail beyond 30 days (UNDP, 2022).

The COVID-19 pandemic is a case in point, as many states implemented measures that significantly reduced prison populations. The Moroccan King issued pardons for 5,645 persons in prison as a preventive measure based on the criteria of age, precarious health, the length of their sentence and good behaviour displayed (Africa News, 2020). In Uganda, the Prison Services, along with the Attorney General and the President, ordered the release of 2,000 persons in prisons to decongest prisons. Among those eligible for release were persons who had completed three-quarters of their sentence, breast-feeding women and persons above the age of 60 (CGTN Africa, 2023). Jordan released 1,500 persons (Luck, 2020), and the Philippines released around 10,000 persons whose sentences did not exceed 6 months, as well as elderly and sick (Al Jazeera, 2020). The Kenyan prison population decreased by 25% in March-August 2020 when more than 12,000 persons were released and ordered to conduct community service or pay bond or bail. The National Council on the Administration of Justice in Kenya imposed several rules, including police bonds for minor offences, suspension of new admissions to prison and supervision of persons on probation by phone instead of physical reporting (UNODC, 2021).

Conclusion

Many countries struggle to address overcrowding, and prison populations worldwide continue to rise. Various UN and re-

gional bodies have urged States to alleviate prison overcrowding. Overcrowding negatively affects the enjoyment of human rights by persons in prisons, including their right to be free from torture and other ill-treatment and the right to health. Overcrowding is associated with reduced space and often reduced budget and staff per person, which affects all aspects of prison life, leading to prisons not offering an environment conducive to their stated purpose of rehabilitation. When prisons fail to rehabilitate and prepare persons for reintegration upon release, this may negatively impact society in terms of security, public health, and economy.

Some countries have successfully reduced overcrowding, including through the use of non-custodial measures. Various elements have played a role in this success. Firstly, a policy shift away from deploying imprisonment as the predominant way to prevent and reduce crime. This policy shift, when applied through legal and policy reforms related to decriminalisation and the provision of non-custodial alternatives to detention, has shown positive results in terms of reducing overcrowding and, thus, the risk of human rights violations inside prisons. In addition, similar legal reforms targeting marginalised populations, such as those living in poverty and petty and status offences, can ease overcrowding, especially in pre-trial detention.

Reducing prison overcrowding is a shared responsibility of law makers, prosecutors, judges, prison and probation services, and other relevant criminal justice actors. Measures need to be adopted and applied at all stages of the criminal justice process to reduce admissions and accelerate releases from prisons to ensure positive and significant outcomes.

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