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Thematic discussion

Economic fraud and identity-related crime; and penal reform and the reduction of prison overcrowding, including the provision of legal aid in criminal justice systems

Note by the Secretariat**

Summary

The present note has been prepared by the Secretariat as a discussion guide for the thematic discussions of the Commission at its eighteenth session. In its decision 2008/245, the Economic and Social Council decided that the topics for the thematic discussions at the eighteenth session of the Commission would be the following: (a) “Economic fraud and identity-related crime” and (b) “Penal reform and the reduction of prison overcrowding, including the provision of legal aid in criminal justice systems”. The guide poses a series of questions for discussion by the Commission, outlines some issues for shaping the discussion and further elaborates on the relevant sub-themes.

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Contents

	<i>Page</i>
I. Introduction	3
II. Economic fraud and identity-related crime	4
A. Issues for discussion	4
B. Background	5
III. Penal reform and the reduction of prison overcrowding, including the provision of legal aid in criminal justice systems	12
A. Issues for discussion	12
B. Background	13

I. Introduction

1. In its decision 2008/245, entitled “Report of the Commission on Crime Prevention and Criminal Justice on its seventeenth session and provisional agenda and documentation for its eighteenth session”, the Economic and Social Council decided that the topics for the thematic discussion at the eighteenth session of the Commission would be the following: (a) “Economic fraud and identity-related crime” and (b) “Penal reform and the reduction of prison overcrowding, including the provision of legal aid in criminal justice systems”.

2. The structure and focus of the thematic discussion were considered at the intersessional meeting of the Commission held on 12 December 2008, as well as the meetings of the extended Bureau held on 28 October 2008, 2 December 2008 and 20 February 2009. Sub-themes were agreed by the extended Bureau to guide the thematic discussions, as described below.

Economic fraud and identity-related crime

3. After an introduction by the United Nations Office on Drugs and Crime (UNODC) on the nature and extent of and trends in such crimes, and the presentation of relevant documentation, the discussion would be guided by the following sub-themes:

(a) Defining and criminalizing identity-related crime and fraud in civil and common law systems, taking into account criteria of the United Nations Convention against Transnational Organized Crime.¹ The following issues could be addressed by panellists during the discussion on this sub-theme:

(i) Definition of identity-related crime, application of existing offences and formulation of new offences;

(ii) Basic meaning of fraud and consensus on criminalization, and current initiatives, including the Council of Europe Convention on Cybercrime;²

(iii) Possible approaches of common law and civil law systems: criminalization that supports international cooperation;

(b) Criminal justice responses: investigation, prosecution and international cooperation;

(c) Prevention and cooperation with the private sector, covering cooperation in prevention, investigation and prosecution, and technical assistance in addressing fraud and identity-related crime;

(d) International cooperation in the prevention of economic fraud and identity-related crime, particularly awareness-raising and technical assistance (directed especially at decision makers and relevant officials).

¹ United Nations, *Treaty Series*, vol. 2225, No. 39574.

² Council of Europe, *European Treaty Series*, No. 185.

Penal reform and the reduction of prison overcrowding, including the provision of legal aid in criminal justice systems

4. The discussion would be guided by the following sub-themes:
 - (a) Respect for human rights in penal establishments, including as regards pretrial detention and the principle of fair trial;
 - (b) Restorative justice and alternatives to incarceration, including avoiding imprisonment through social reintegration;
 - (c) Case management in penal establishments.
5. The present note has been prepared by the Secretariat as a discussion guide at the request of the Commission at its seventeenth session. The guide poses a series of questions for discussion by the Commission, followed by background information.

II. Economic fraud and identity-related crime

A. Issues for discussion

6. It is suggested that Member States and delegations consider including experts on economic fraud and identity-related crime in the discussion to address the issues provided.

1. Questions on domestic criminal justice responses to economic fraud and identity-related crime

7. Questions on domestic criminal justice responses to economic fraud and identity-related crime might include:
 - (a) What considerations should be taken into account to ensure adequate conceptualization and criminalization of economic fraud and identity-related offences?
 - (b) What practices and techniques have proved effective in investigating such crime and gathering and preserving related evidence?

2. Questions on international cooperation

8. Questions on international cooperation might include:
 - (a) What are the main difficulties encountered when cooperating with other States in combating economic fraud and identity-related crime?
 - (b) What measures have proved effective to foster law enforcement cooperation and the exchange of information?
 - (c) How can cooperation between States parties on the verification of the legitimacy and validity of identification information be improved?

3. Questions on preventive measures and cooperation between the public sector and the private sector

9. Questions on preventive measures and cooperation between the public sector and the private sector might include:

(a) What good practices exist in relation to awareness-raising and dissemination of information about fraud and identity-related crime for potential victims?

(b) What experiences have there been in putting in place a range of technical means of prevention, both for economic fraud and identity-related crime? What measures have been taken to make documents and identification information more secure and more difficult to alter or falsify?

(c) What ways are there to promote closer collaboration between relevant entities in the public sector and the private sector in developing and implementing preventive and reactive measures against economic fraud and identity-related crime?

4. Questions on capacity-building and technical assistance

10. Questions on capacity-building and technical assistance might include:

(a) What are the priority technical assistance needs in the field of preventing and combating economic fraud and identity-related crime?

(b) What practices and techniques have proved effective in training law enforcement and other relevant agencies in the detection and investigation of economic fraud and identity-related crime?

B. Background

1. Mandate and work of the United Nations Office on Drugs and Crime in the field of economic fraud and identity-related crime

11. The problems posed by economic fraud and identity-related crime have acquired a prominent place in the crime prevention and criminal justice agenda of the United Nations. In particular, in paragraph 27 of the Bangkok Declaration on Synergies and Responses: Strategic Alliances in Crime Prevention and Criminal Justice (General Assembly resolution 60/177, annex), Member States expressed their awareness of the crucial importance of tackling document and identity fraud in order to curb organized crime and terrorism and stated their aim of improving international cooperation, including through technical assistance, to combat document and identity fraud, in particular the fraudulent use of travel documents, through improved security measures, and encouraged the adoption of appropriate national legislation.

12. Pursuant to Economic and Social Council resolution 2004/26, the Secretary-General convened the Intergovernmental Expert Group to Prepare a Study on Fraud and the Criminal Misuse and Falsification of Identity. The Expert Group held two meetings in Vienna, on 17 and 18 March 2005 and from 16 to 19 January 2007. The

study was brought to the attention of the Commission at its sixteenth session (E/CN.15/2007/8 and Add.1-3).

13. The Economic and Social Council, in its resolution 2007/20, welcomed the results of the study; recalled its request that the Expert Group use the information gained by the study to develop useful practices, guidelines or other material in the prevention, investigation and prosecution of fraud and the criminal misuse and falsification of identity; encouraged Member States to avail themselves of the recommendations of the study when developing effective strategies for responding to related problems; requested UNODC to provide legal expertise or other forms of technical assistance to Member States reviewing or updating their laws dealing with transnational fraud and identity-related crime, in order to ensure that appropriate legislative responses to such offences were in place; and also requested UNODC to facilitate cooperation between public and private sector entities through initiatives aimed at bringing together various stakeholders and facilitating the exchange of views and information among them.

14. Pursuant to Economic and Social Council resolution 2007/20, UNODC launched a consultative platform on identity-related crime. A group of experts from the public and private sectors, international and regional organizations and academia were brought together to exchange views on the best course of action and the most appropriate initiatives to be pursued under the platform. The group of experts has held three meetings: in Courmayeur, Italy, on 29 and 30 November 2007 and in Vienna on 2 and 3 June 2008 and from 20 to 22 January 2009. The group of experts has prepared a set of guidelines to direct future activities, which include the undertaking of further research, enhanced consultations with the private sector, the preparation of research papers, the compilation of examples of relevant legislation, the development of material on the best ways and means of promoting international cooperation to combat identity-related crime and the compilation of best practices in the protection of victims.

15. To implement the recommendations of the group of experts, UNODC has prepared a research paper on legal approaches to criminalizing identity-related crime and a research paper on issues relating to victims of identity-related crime. The content of the two papers and the reports on all the meetings of the group of experts³ will be brought to the attention of the Commission for its information and consideration during the thematic discussion.

2. Defining and criminalizing identity-related crime and fraud in civil and common law systems, taking into account the criteria and requirements set forth in the United Nations Convention against Transnational Organized Crime

(a) Definition of identity-related crime, application of existing offences and formulation of new offences

16. The fact that identity-related crime has become perhaps the defining crime of the information age is itself an indication of the huge challenges that need to be addressed when developing appropriate domestic and international criminal justice responses to the problem. From a terminological point of view, the UNODC study used the general term “identity-related crime” to cover all forms of illicit conduct

³ All to be issued as conference room papers of the Commission.

involving identity, including identity theft and identity fraud. The reason for using such a generic term was the diversity in definitional approaches followed in national jurisdictions, in that the same conduct designated as “identity theft” in some countries is considered “identity fraud” in others.

17. The study further specified that the term “identity theft” refers to occurrences in which information related to identity (basic identification information/other personal information) is taken in a manner analogous to theft or fraud, including theft of tangible documents and intangible information and deceptively persuading individuals to surrender documents or information voluntarily. The term “identity fraud” generally refers to the subsequent use of identification or identity information to commit other crimes or avoid detection and prosecution.

18. The present state of legislation and policymaking in most States is such that they are limited to dealing with identity problems primarily in terms of the further crimes that can be committed through identity abuses, such as the forgery or falsification of specific identity documents and impersonation. However, some States have begun to consider the problem from the perspective of identity itself and treat identity abuses as new and distinct forms of crime. The criminalization of identity-based offences recognizes that the primary abuse of identity can lead to a range of secondary crimes, requiring the intervention of the criminal justice system at an earlier stage. This approach results in broadening the scope of victims to include those whose genuine identity is used to commit other crimes and those targeted by subsequent crimes.

19. With regard to the European legal framework, no specific criminal provision targeting identity theft or identity fraud as such exists, nor does the Convention on Cybercrime or Council of the European Union decision 2005/222/JHA on attacks against information system⁴ contain provisions on identity-specific crimes. At the national level, most European Union member States, in view of the lack of specific legislation, cover most or all incidents of identity theft under other headings within criminal law, such as forgery or data abuse. The European Commission has proposed, however, that European Union law enforcement cooperation would be better served were identity theft criminalized in all Member States.⁵ This proposal paved the way for consultations on whether specific legislation is necessary in Member States.

20. The UNODC study recommended that States consider the establishment of new identity-based criminal offences, recognizing that basing offences on abuses of identity represents a fresh approach for most States. For this reason, lawmakers need to develop appropriate concepts, definitions and approaches to the criminalization of a broad range of conducts, including identity theft, identity fraud and other identity-related crimes. It is also critical for most States to ensure consistency with their respective private and public identity systems and with other already established crimes.

⁴ *Official Journal of the European Union*, L 69/67, 16 March 2005.

⁵ European Commission, “Communication from the Commission to the European Parliament, the Council and the Committee of the Regions: towards a general policy on the fight against cybercrime”, COM (2007)267, 22 May 2007 (<http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52007DC0267:EN:NOT>).

(b) Basic meaning of fraud and consensus on criminalization, current initiatives, including the Convention on Cybercrime

21. In most Member States, the legislative definition of fraud is considered criminal law with economic elements. There is also a high degree of consistency in the elements of the fraud offences, which usually involve dishonesty or deception, economic loss or transfer and the need for a causal connection between the two. The economic element covers a wide range of financial or other material benefits or losses, including in the form of tangible property, financial or other interests, and less tangible losses, such as exposure to risk or loss of expectation value, even if these do not materialize. The elements of dishonesty or deception are consistently present. Some States require active conduct intended to mislead, while others also include deception through withholding information, failing to provide information or taking advantage of victims who do not have relevant information.

22. In terms of criminalization provisions in domestic laws, the UNODC study demonstrated that Member States provided for a wide range of specific offences of fraud and related or preparatory conduct. Many of them have found it necessary to expand established offences or adopt new ones to deal with recent innovations by offenders, especially in the area of computer-related fraud, foreseen in article 8 of the Convention on Cybercrime, and a number of States reported computer-related crime offences that could apply in fraud cases. These include possession of, trafficking in or use of instrumentalities for computer-related fraud and offences relating to computer hacking or unauthorized access to or use of computer or telecommunication systems.

23. As far as the applicable sanctions are concerned, many States provide for either a series of fraud offences of escalating seriousness or for single offences accompanied by aggravating circumstances. Almost all States that provided feedback for the study reported that some or all of their serious fraud offences fall within the category of “serious crime” as defined in article 2, paragraph (b), of the Organized Crime Convention. Most States also provide for fines or confiscation, both as a punishment for less serious cases and as a sanction for legal persons, especially where the legislative framework extends full criminal liability only to natural persons.

(c) Possible approaches of common-law and civil-law systems: criminalization that supports international cooperation

24. The rapidly growing number of transnational fraud and identity-related crime cases appears to be associated with the increased opportunities provided by the expansion of global trade and commerce and the increasing availability of information, communications and commercial technologies. This element of transnationality requires the existence and use of efficient international cooperation mechanisms. The first step towards enhancing such cooperation is the adoption, to the greatest extent possible, of common approaches to criminalization, which could bridge differences between common-law and civil-law systems and further form a solid basis for mutual legal assistance and extradition. This is of particular importance in cases of identity-related crimes, where only a few States of common-law tradition have to date established domestic crimes to address identity abuses per se.

25. The UNODC study put emphasis on the need for enhancing international cooperation in order to address the substantial increases in transnational fraud. It was stressed, in this connection, that the existing international legal instruments, including the Organized Crime Convention, the United Nations Convention against Corruption,⁶ the Convention on Cybercrime, where appropriate, and other regional and bilateral instruments, were sufficient as a legal basis for cooperation, focusing on finding and disseminating ways to use the available instruments effectively as opposed to creating new ones.

26. With respect to identity-related crimes, it seems highly likely, in view of the sophisticated criminal expertise involved, that future legislative action will treat such crimes as offences falling within the definition of “serious crime” contained in article 2, subparagraph (b), of the Organized Crime Convention. Another factor that calls for the application of this instrument in relevant cases is the existence of links between identity-related crime and organized crime, highlighted in the UNODC study. Many organized criminal groups specialize in stolen or fabricated identity documents and may well develop the expertise to fabricate sophisticated identity documents or exploit weaknesses in issuance schemes in order to obtain documents, which can then be sold or exchanged for use in crime.

3. Criminal justice responses: investigation, prosecution and international cooperation

27. Most serious cases of economic fraud and identity-related crime involve a degree of sophistication that challenges even the most developed and well-equipped States and poses an even more serious challenge for developing countries and for international cooperation. Such criminal activities tend to be increasingly transnational in nature and to evolve and spread rapidly as offenders take advantage of new technological opportunities.

28. A fundamental aspect of the problem has been the ability of offenders to rapidly exploit new technologies, find new ways to commit offences, reduce risks of prosecution and maximize proceeds. Therefore, a key element of effective law enforcement is the ability to react quickly, in order to gather evidence while offences are ongoing, and to intervene to stop ongoing fraud and identity-crime schemes in order to reduce the numbers of victims. In addition, the misuse of information, communications and commercial technologies makes the forensic expertise needed to investigate, gather and preserve evidence of crime essential. Furthermore, substantive knowledge of legitimate financial and economic systems, accounting, and money-laundering techniques and identity systems is also important. In transnational cases, expertise and capacity are needed to support international cooperation.

4. Prevention and cooperation with the private sector, covering cooperation in prevention, investigation and prosecution, as well as technical assistance in addressing fraud and identity-related crime

29. Economic fraud and identity-related crime have a substantial impact on private as well as public interests. Fraud affects both individual commerce and commerce as a whole: large-scale fraud can bankrupt companies and erode confidence in

⁶ United Nations, *Treaty Series*, vol. 2349, No. 42146.

markets. Identity-related crime affects public identification, such as passports, and private credit cards and similar documents.

30. In providing information for the UNODC study, a number of Member States noted the importance of cooperation between law enforcement and commercial entities in detecting, investigating and prosecuting crimes such as economic fraud and related abuses of commercial identification. It was also highlighted that commercial entities were often in the best position to monitor commercial traffic and identify suspicious or suggestive patterns and that, in many cases, victims were more likely to report specific crimes to companies than to law enforcement agencies in the hope of recovering losses. On the other hand, it was further pointed out that the proactive cooperation between commercial entities and law enforcement authorities could affect competitive interests or customer privacy, or result in civil liability. Therefore, one of the key recommendations of the study was that law enforcement authorities and private sector entities consult with a view to developing useful practices for key areas such as the reporting of crimes and investigative cooperation, taking into account the need for appropriate safeguards to ensure the independence of investigative, prosecution and judicial functions.

31. In the field of prevention of economic fraud and identity-related crime, investments in promoting cooperation between the public and private sectors can also generate substantial benefits. Given the nature of identity infrastructures, holistic approaches to prevention and security have gained increased importance: as documents are becoming more secure, emphasis is being placed on the security of the entitlement and issuance process to help prevent and detect identity abuses and fraudulent practices associated with them. To prevent economic fraud and identity-related crime, it is important that security countermeasures be developed to make it more difficult to tamper with identification documents, subvert identification systems and obtain identification data. This requires consultation between public entities and private interests, including companies that produce and sell new technologies and those that will use them.

32. Another key element of prevention that can benefit from the close collaboration between public and private sectors is the education and training of persons who are in a position to identify and report economic fraud and identity-related crime, in particular employees of banks and financial institutions.

5. International cooperation in the prevention of economic fraud and identity-related crime, particularly awareness-raising and technical assistance, directed especially at decision makers and relevant officials

33. The globalization of commerce, transportation and information and communications technology has created an increasing need for international cooperation in the prevention of economic fraud. Moreover, while some documents and elements of identity infrastructures reflect primarily domestic needs and are based on domestic laws and institutional practices, even purely domestic identity documents have become a factor in transnational crime. Thus, the development and implementation of effective preventive measures need to be considered at both the national and international levels.

34. In this context, the dissemination of information about economic fraud and identity-related crime to potential victims is of particular importance. Such

information could include both general information to raise awareness of the threat and timely information about specific forms of fraud and identity-related crime based on accurate and up-to-date monitoring of criminal activities by appropriate entities in both the public and private sectors. Information campaigns could be directed at the general population and at specific groups considered to be particularly vulnerable.

35. Collaboration at the international level in identification matters is also significant for ensuring the security of identification information. All Member States share a collective interest in assisting one another in two basic areas: first, the development of secure documents and institutions that protect the integrity of documents and associated records in the course of their issuance and use; and second, the provision of speedy and reliable verification of the identities of their nationals and long-term residents.⁷

36. One of the issues to which the UNODC study devoted particular attention was the need to provide training and technical assistance to cope with economic fraud and identity-related crime. The secretariat has already been mandated to engage in the development and delivery of technical assistance, and further work is needed to assess the relevant needs of Member States. Priority could be accorded to the development of materials for training (manuals, compilations of useful practices or guidelines) for law enforcement, investigative and prosecution authorities to enhance their expertise and capacity in the fight against economic fraud and identity-related crime. Such materials could provide assistance to Member States in modernizing fraud offences, developing new identity-crime offences and using existing international instruments, including the Organized Crime Convention, for international cooperation to combat these offences. In other areas of technical assistance, the role of the secretariat could be more in the nature of a broker involved in identifying needs and assembling experts from the public and private sectors to respond accordingly.

37. In the field of training, the UNODC study offered a set of concrete recommendations for enhancing the efficiency and effectiveness of related programmes and activities. Thus, it was stressed that Member States should cooperate collectively in sharing information relevant to the development of training programmes and materials. That is important not only to ensure that useful practices are transferred from one State to another, but also to guarantee that officials responsible for fighting fraud at the national level are able to cooperate effectively to counter the growing number of transnational fraud cases. Member States should also exchange information regarding the availability of existing training programmes on the investigation of computer crime and computer-related fraud and should increase and further systematize such training. Furthermore, there should be

⁷ Article 13 (Legitimacy and validity of documents) of both the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (United Nations, *Treaty Series*, vol. 2237, No. 39574), and the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (United Nations, *Treaty Series*, vol. 2241, No. 39574), requires States parties, upon request, to verify within a reasonable time the legitimacy and validity of travel or identity documents issued or purported to have been issued in their name and suspected of being used for trafficking in persons or the smuggling of migrants.

effective collaboration among those involved in providing training to counter fraud, money-laundering, corruption, terrorism and cybercrime and similar types of training, including in the private sector, with a view to exploiting synergies, ensuring consistency and avoiding duplication.

III. Penal reform and the reduction of prison overcrowding, including the provision of legal aid in criminal justice systems

38. Concerning the thematic discussion on penal reform and the reduction of prison overcrowding, including the provision of legal aid in criminal justice systems, the following sub-themes were selected to guide the discussion:

- (a) Respect for human rights in penal establishments, including as regards pretrial detention and the principle of fair trial;
- (b) Restorative justice and alternatives to incarceration, including avoiding imprisonment through social reintegration;
- (c) Case management in penal establishments.

A. Issues for discussion

1. Questions on respect for human rights in penal establishments, including as regards pretrial detention and the principle of fair trial

39. Questions on respect for human rights in penal establishments, including as regards pretrial detention and the principle of fair trial, might include:

- (a) What are the main reasons for overcrowding and where is overcrowding most acute (for pretrial or sentenced prisoners)? What are the rates of recidivism?
- (b) Have there been any national studies on crime and imprisonment rates? Have crime rates declined or increased in recent years? What about imprisonment rates, including for minor offences?
- (c) Legal aid: is it available? How many lawyers provide legal aid in the country? What needs to be done to ensure that the system works more efficiently?
- (d) Are there any informal or non-State actors involved in providing legal aid and assistance, such as paralegals, university law clinics, houses of justice, non-governmental organization (NGO) service providers? If so, how do they work? If not, what are the obstacles?
- (e) Is there mandatory or minimum sentencing in the country's legislation? When such legislation was introduced, what was the impact on crime rates and prison population?

2. Questions on restorative justice and alternatives to incarceration, including avoiding imprisonment through social reintegration

40. Questions on restorative justice and alternatives to incarceration, including avoiding imprisonment through social reintegration, might include:

(a) Are bail or any other alternatives to pretrial detention available in legislation? Are these measures implemented in practice? Are there any good practice examples?

(b) Alternatives to prison: what is there in legislation? Is legislation applied? If not, why not? Are there any examples of good practice?

(c) How is the treatment of offenders with mental illness addressed? What are the provisions in legislation for diversion or alternatives for such offenders? What should be done to reduce the imprisonment of offenders with mental illness?

(d) What is the law relating to imprisonment of drug users? What is the percentage of drug-related offenders in prison? What is the percentage of prisoners with drug or other substance-abuse problems? Are there any examples of good practice relating to alternatives for drug offenders?

(e) Is there any diversion to non-State justice systems (informal justice)? If so, which safeguards are in place against human rights violations and discrimination against women and other vulnerable groups?

3. Questions on case management in penal establishments

41. Questions on case management in penal establishments might include:

(a) Information systems: how efficient is the registration of detainees and prisoners? What measures have been taken to improve the system?

(b) What coordination mechanisms exist between criminal justice agencies?

(c) What effective strategies are available to treat and monitor offenders in the community, including intensive supervision programmes, therapeutic communities and drug courts? How can such strategies best be implemented?

B. Background

1. World prison populations and overcrowding

42. The rapid growth of the prison population constitutes one of the most challenging problems faced by criminal justice systems worldwide. As at the end of October 2006, more than 9.25 million people, including sentenced and pretrial prisoners, were held in penal institutions throughout the world.⁸ Information from the International Centre for Prison Studies shows that prison populations have risen in 73 per cent of the countries surveyed in its World Prison Brief (in 64 per cent of countries in Africa, 84 per cent in the Americas, 81 per cent in Asia, 66 per cent in Europe and 75 per cent in Oceania). Also, prison population rates vary considerably among different regions of the world, and among different parts of the same region. According to the World Prison Brief, 112 of the 184 countries for which data had been collected had a rate of prison occupancy above 100 per cent (indicating overcrowding).

⁸ World Prison Population List, seventh edition, International Centre for Prison Studies.

2. Pretrial detention

43. International instruments limit the use of pretrial detention. The International Covenant on Civil and Political Rights (General Assembly resolution 2200 A (XXII), annex), article 9, paragraph 3, provides that it shall not be the general rule that persons awaiting trial shall be detained in custody. It also provides that anyone arrested or detained on a criminal charge shall be entitled to trial within a reasonable time or release. According to rule 6.1 of the United Nations Standard Minimum Rules for Non-Custodial Measures (the Tokyo Rules) (General Assembly resolution 45/110, annex), pretrial detention shall be used as a means of last resort in criminal proceedings, with due regard for the investigation of the alleged offence and for the protection of society and the victim.

44. Pretrial detention is used frequently, often without proper justification, and the pretrial prison population in many countries is growing rapidly. At the end of October 2007, 2.25 million people were known to be held in pretrial detention and other forms of remand imprisonment throughout the world.⁹

3. Consequences of mass imprisonment and overcrowding

45. Overcrowding in prisons affects not only the amount of space available for each prisoner, but also the physical conditions of detention and care for vulnerable groups, while exacerbating existing mental and physical health problems. Overcrowding causes challenges in prison systems.

(a) Imprisonment and poverty

46. Imprisonment tends to disproportionately affect individuals and families living in poverty. The impact can be especially severe in poor, developing countries where the State does not provide financial assistance to the indigent and where it is not unusual for one breadwinner to financially support an extended family network. When released, often with no prospects for employment, former prisoners may be subject to socio-economic exclusion and are thus vulnerable to a cycle of poverty, criminality and imprisonment. Thus, imprisonment can contribute to impoverishment by creating future victims and reducing potential economic performance.

(b) Imprisonment and health

47. Prisons may have serious health implications for prisoners with health problems on entry to prison, as they are predominantly from sectors of the population with minimal access to adequate health services. Their health conditions may further deteriorate in overcrowded prisons, where nutrition is poor, sanitation is inadequate and there is no access to fresh air and exercise. Tuberculosis is a major health issue in prisons around the world. In most countries, the prevalence of HIV infection in prisons is significantly higher than the population outside of prison. Once released, former prisoners are likely to spread any diseases contracted in prisons to the community.

⁹ Roy Walmsley, "World Pre-trial/Remand Imprisonment List" (<http://www.kcl.ac.uk/depsta/law/research/icps/downloads/WPTRIL.pdf>).

(c) Cost of imprisonment

48. Imprisoning large segments of society puts a significant burden on State budgets. In developing countries, where budgets rarely meet the needs of all citizens, the burden of a large prison population is likely to further reduce the funds available for health and social services. Thus, when discussing the cost of imprisonment, account needs to be taken not only of the actual funds spent on the upkeep of each prisoner, which is usually significantly higher than what is spent on a person sentenced to non-custodial sanctions, but also of the indirect costs, such as the social, economic and health-care costs.

4. Growing number of vulnerable prisoners, including prisoners with mental illness

49. In tandem with the growth of the prison population, the number of prisoners with special needs is also increasing in many countries worldwide. Such groups include prisoners with mental-health needs, drug-dependent prisoners, foreign-national prisoners, racial and ethnic minorities, older prisoners and prisoners with disabilities. The special treatment requirements of these groups are rarely met in prisons, especially in facilities that are overcrowded and underresourced.

50. Attention needs to be drawn to the growing number of mentally ill prisoners. The World Health Organization estimates that as many as 40 per cent of prisoners in Europe suffer from some form of mental disability and are up to seven times as likely to commit suicide as people outside of prisons.¹⁰ The conditions in which such prisoners are held and their treatment in some countries exacerbate and even generate mental illness. In some countries, the transfer of prisoners with mental illness to mental health-care facilities does not occur, owing to the lack of medical professionals, the lack of legal knowledge and/or the lack of lawyers to apply for such decisions.

5. Causes of overcrowding in prisons

51. The reasons for the growth of prison populations worldwide are multiple, and they vary from region to region and from country to country. The key causes of prison overcrowding may be summarized as follows: (a) the overuse of pretrial detention; (b) long delays in processing cases; and (c) the unavailability of legislation providing for non-custodial measures and sanctions, compounded by the reluctance in many jurisdictions to use alternatives to prison, leading to an increase in sentences of imprisonment and longer sentences in a number of countries.

52. A cross-cutting underlying cause for the overuse of detention and imprisonment is detainees' lack of access to legal counsel, which affects in particular the poor and vulnerable.

(a) Overuse of pretrial detention

53. The overuse of pretrial detention is widespread, often because of punitive criminal justice policies and legislation, which allow limited possibilities for alternatives to pretrial detention and/or encourage a strategy of arresting first and investigating later. In some countries pretrial detention is regularly used as a

¹⁰ *Penal Reform International*, Penal Reform Briefing No. 2, 2007 "Health in prisons: realising the right to health", p. 3.

preventive measure. Other key factors include the lack of training of criminal justice officials, defendants' inability to afford bail and their lack of access to legal counsel.

54. Where legislation foresees an alternative to pretrial detention, this is often limited to monetary bail, requiring the defendant to provide a certain amount of funds (or another form of material guarantee, such as a piece of land or a house) as surety in order to be released. Inevitably, indigent people face great difficulties in affording bail, with the result that deprivation of liberty results not from any relevant factor in criminal justice but rather as a consequence of poverty.¹¹

(b) Delays in processing cases

55. The delays encountered in the processing of cases before a final sentence is passed have a significant impact on the size of the prison population in many countries. These delays are due to a combination of many factors, which include delays in investigation by police or prosecutors (which itself may be due to lack of training, resources, corruption and so on), as well as practical problems, such as lack of transport or of fuel or security for transport (e.g., in some post-conflict countries). A key concern is the lack of cooperation and exchange of information between criminal justice actors (police, prosecutors and courts), which becomes more problematic when various levels of administration and legislation are involved. In such situations it is not unusual for the files of detainees to be lost in the system.

56. An underlying cause that compounds many of these challenges is the lack of accurate and up-to-date information about the individuals held in penal establishments. Without accurate records, prison authorities do not have information about the identities of prisoners and are unable to track their cases. The presence of a complete, accurate and accessible prisoner-file system is a prerequisite for effective policymaking and prison management.

(c) Lack of alternatives to prison; punitive criminal justice policies and sentencing

57. In many countries the only alternatives to prison available in legislation are fines and, sometimes, suspended sentences. Other alternatives that take into account the socio-economic status of the offender and his or her rehabilitative requirements – such as treatment, counselling or vocational training – are most often lacking. Fines generally disadvantage the poor, and suspended sentences are rarely used. Alternatives requiring the supervision of the offender by a special administrative body, such as a probation system, work only as long as enough funding, staff and training are available. Even where a sufficient number of alternatives exist in legislation there is often a reluctance to use them, for reasons such as lack of confidence in their effectiveness; lack of the necessary infrastructure, organizational mechanism and cooperation among criminal justice agencies; lack of public support; fear of being regarded as soft on crime; and a general punitive approach to criminal justice.

58. Punitive criminal justice policies have had an impact on the growth of prison population and prison overcrowding. Research in some countries indicates that the

¹¹ In South Africa, for instance, approximately 40 per cent of pretrial detainees are remanded because of their inability to pay bail demands of as little as \$7.

rise in the prison population has taken place for reasons often unrelated to crime rates. Thus, the growth in the use of imprisonment often appears to be a consequence of politically driven punitive penal policies. In these contexts, courts are more likely to sentence offenders to imprisonment and impose longer sentences. In many countries, non-violent offenders who have committed minor crimes are imprisoned rather than dealt with at the first stage of the criminal justice process by way of a caution, fine, suspended sentence or restorative justice measure. Community-based non-custodial alternatives, including community service, are often overlooked in favour of the deprivation of liberty.

59. Mandatory sentencing laws allow very limited or no discretion to judges, who are thus prevented from taking into account the circumstances of the offence or the vulnerability of the offender in passing a sentence. This can often lead to minor offenders being sent to prison. Although there is no specific international law that expressly prohibits mandatory sentencing, the Human Rights Committee of the United Nations has expressed concern that it can lead to the imposition of punishments that are disproportionate to the seriousness of the crimes committed, raising issues of compliance with various articles of the International Covenant on Civil and Political Rights.¹²

6. Strategies and good practices in reducing overcrowding

60. Experience shows that trying to overcome prison overcrowding through the construction of new prisons does not provide a sustainable solution. In addition, building and maintaining new prisons puts pressure on valuable resources. Instead, numerous international instruments recommend a rationalization of sentencing policy, including alternatives to imprisonment. The Tokyo Rules encourage the use of alternatives to detention and imprisonment, as a measure to reduce overcrowding and to meet more effectively the social reintegration needs of offenders in the community at the pretrial, sentencing and post-sentencing stages.

61. Pursuant to Economic and Social Council resolution 2006/22, entitled “Providing technical assistance for prison reform in Africa and the development of viable alternatives to imprisonment”, UNODC has published two handbooks on alternatives to imprisonment and restorative justice, which may be used in policy development and training to introduce and effectively implement appropriate programmes of alternatives to imprisonment worldwide.¹³

(a) Diversion from the criminal justice system

62. One of the most effective ways of reducing the burden on the criminal justice system is to prevent cases from coming to trial, when they are minor and non-violent in particular, by diverting offenders to a suitable treatment or rehabilitation programme that addresses the root cause of the offence. Another option is to reach reconciliation between victim and offender, through mediation and restorative

¹² See *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 40 (A/55/40)*, vol. I, paras. 498-528.

¹³ *Handbook of Basic Principles and Promising Practices on Alternatives to Imprisonment* (United Nations publication, Sales No. E.07.XI.2); and *Handbook on Restorative Justice Programmes* (United Nations publication, Sales No. E.06.IV.15).

justice programmes designed for referrals from different points within the criminal justice process.¹⁴

63. Diversion to non-State justice systems has also been effective in reducing the number of cases being processed by the courts in some countries, but the possible human rights implications need to be taken into account and vulnerable groups, such as women, children and the poor, protected from abuse or discrimination if linkages with non-State justice systems are to be forged. In Bangladesh the NGO-coordinated *shalish* provides a good example of how traditional dispute resolution mechanisms can be used to resolve conflicts at the village level, thereby reducing the number of cases being referred to the formal system.¹⁵

(b) Reducing pretrial detention

64. The reduction of the number of pretrial detainees can be achieved through a combination of measures. In some countries time limits have been introduced requiring that a case come to trial within a certain length of time and that the detainee be released when this does not take place. Another measure is to prohibit the use of pretrial detention for less serious crimes, unless the suspect is likely to escape, interfere with the witnesses or commit another crime. A third measure successfully introduced in some jurisdictions is the review of the legality of detention by visiting judges, lawyers or prison personnel. Imposing supervision and certain restrictions as an alternative or release on personal recognizance are options that have been used in some jurisdictions.

65. For such measures to be used in practice, judges need guidance and training, within the framework of a policy that emphasizes presumption of innocence and facilitates cooperation between criminal justice agencies. Regular monitoring, including through prison inspections, is required to ensure that time limits set by law are not violated.

66. Establishing mechanisms of cooperation between criminal justice actors can significantly help reduce the pretrial prison population by speeding up the processing of cases and ensuring that defendants are brought before the court on time, and that those who have overstayed time limits are released. The Ouagadougou Declaration on Accelerating Prison and Penal Reform in Africa, adopted in September 2002, recommends specifically that criminal justice agencies work together more closely to make less use of imprisonment through a concerted strategy, targeting both sentenced and unsentenced prisoners. Effective and up-to-date information-gathering and file management systems are preconditions for the implementation of such a recommendation.

67. Some good practices have emerged. For example, the Chain Linked Initiative significantly improved cooperation among courts, prosecutors and prisons, as well as with social services, local community leaders and NGOs, in Kenya, Malawi, Uganda and the United Republic of Tanzania, through regular meetings, joint prison visits and the development and distribution of agreed performance standards, which

¹⁴ It should be noted that restorative justice can be used at different stages of the criminal justice process and not only before sentencing.

¹⁵ "Index of good practices in providing legal aid services in the criminal justice system", Penal Reform International, February 2006, p. 9 (available at www.penalreform.org).

were successful in speeding up the processing of cases and release of detainees who were found to be imprisoned unlawfully.¹⁶ In Nigeria, a comprehensive cooperation mechanism between criminal justice agencies and lawyers, which includes the monitoring of detainees' cases and the provision of legal assistance to detainees at the point of arrest, has reportedly been successful in reducing by 72 per cent the pretrial prison population in the pilot states where the project is being implemented.¹⁷

68. UNODC, together with Penal Reform International, developed a handbook on prisoner file management and has incorporated the setting up of and training on prisoner-file management systems as a key component of projects supported in Africa and elsewhere.

(c) Sentencing: non-custodial sanctions

69. International instruments recommend the availability of a wide range of non-custodial sanctions in criminal legislation, suitable for different types of offences and applicable to the individual circumstances of each offender (e.g. the Tokyo Rules, rule 8.1). The availability of a range of alternatives to prison is a first step towards increasing the use of non-custodial sanctions in practice.

70. It is essential to ensure that systemized cooperation among all agencies responsible for delivering and supervising the sanctions is developed, that cooperation with social and health services is established to provide care and support for offenders and that adequate supervision of staff and training for staff involved are provided. The confidence of judges in the effectiveness of alternatives to prison and public support have proved crucial for success.

71. The introduction of a system of fines may prove to be effective provided it takes into account the income of the offender. Where fines are provided for in penal statutes as an alternative to prison, introducing a day-fine system may improve the credibility, fairness and effectiveness of this alternative. Community service has also proved successful in a number of countries, including in Africa.¹⁸

(d) Post-release alternatives

72. Another effective measure in the reduction of prison populations is early conditional release, which is available in the legislation of most countries. Adequate social support networks, the continuation of care following any treatment received in prison and coordination between prison administrations and services in the community are pivotal measures for early conditional release to achieve its aim of enabling the offender's gradual social reintegration following release.

73. In Kazakhstan the new legislation that came into force in 2003 increased the use of alternatives to imprisonment, reduced sentences for certain offences and relaxed the requirements for gaining the right to early conditional release. Crucially,

¹⁶ "Index of good practices in reducing pre-trial detention", Penal Reform International (available at www.penalreform.org).

¹⁷ Anthony Nwapa, "Building and sustaining change: pretrial detention reform in Nigeria", *Justice Initiatives: Pretrial Detention* (Open Society Justice Initiative, 2008).

¹⁸ *Handbook of Basic Principles and Promising Practices on Alternatives to Imprisonment*, op. cit., pp. 37-38.

it also included a comprehensive public-awareness campaign. A very significant reduction of the prison population was achieved as an outcome of these initiatives. The figure for prisoners released on parole more than doubled after the new law came into force. The general rate of recidivism decreased by 7.8 per cent between 2002 and 2003, despite the increase in the number of those being released from prison.¹⁹

(e) Offenders with mental illness

74. The Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care (General Assembly resolution 46/119, annex) clarify that persons with mental illness should have the right to be treated and cared for, as far as possible, in the community in which they live and in accordance with the vital principle of the least restrictive environment.²⁰ The objectives of social reintegration and the prevention of re-offending can be better achieved with treatment and care, rather than punitive measures, in the case of most offenders with mental disabilities, and especially those who have committed non-violent offences. Therefore, mechanisms for diversion, non-custodial sanctions and the provision of treatment for offenders with mental illness are important.

75. UNODC provides guidelines for the treatment of offenders with mental health-care needs in the criminal justice system in a forthcoming handbook on prisoners with special needs. It stresses that punitive sentencing policies, which lead to the increasing imprisonment of disadvantaged groups, need to be reassessed to reverse the dramatic increase of offenders with mental disabilities in institutions that were not designed to cater for the social reintegration needs of this vulnerable group.

(f) Access to legal counsel

76. Putting in place mechanisms to ensure that all defendants have access to legal counsel immediately on arrest is a requirement of policies that aim to reduce the prison population.

77. In its resolution 2007/24, entitled “International cooperation for the improvement of access to legal aid in criminal justice systems, particularly in Africa” the Economic and Social Council noted the Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa.²¹ The Lilongwe Declaration encourages Governments to adopt measures and allocate sufficient funding to ensure effective and transparent delivery of legal aid to the poor and vulnerable. It underlines that legal aid should be provided at all stages of the criminal justice process, whereas legal aid schemes (including pro bono services) and providers should be diversified to reach a larger number of people. It also stresses the importance of human rights education and legal literacy programmes.

78. Many African countries face a shortage of lawyers, and detainees – especially in rural areas – are unable to obtain professional legal services. In some countries,

¹⁹ T. Atabay, V. Laticevski and T. Vasil’eva, *Human Rights and Health in Prisons: a Review of Strategy and Practice* (Penal Reform International and Royal Netherlands Tuberculosis Foundation, 2006, p. 71).

²⁰ See E/CN.4/2005/51, para. 14.

²¹ *Official Records of the Economic and Social Council, 2007, Supplement No. 10* (E/2007/30/Rev.1), chap. I, sect. B, draft resolution VI, annex I.

in the absence of lawyers and legal aid services, paralegals have had considerable success in assisting detainees and their families. The success achieved by the Paralegal Advisory Service in Malawi by following up cases of detainees, facilitating cooperation among criminal justice agencies and expediting bail for those unnecessarily remanded to prison has had a considerable impact in reducing the number of those held in pretrial detention.²²

²² “Index of good practices in providing legal aid services in the criminal justice system”, Penal Reform International, February 2006, p. 18 (available at www.penalreform.org).