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**Promotion and protection of all human rights, civil,
political, economic, social and cultural rights,
including the right to development**

Non-discrimination and the protection of persons with increased vulnerability in the administration of justice, in particular in situations of deprivation of liberty and with regard to the causes and effects of overincarceration and overcrowding*

Report of the United Nations High Commissioner for Human Rights

Summary

The present report is submitted pursuant to Human Rights Council resolution 30/7, in which the Council requested the United Nations High Commissioner for Human Rights to submit a report on non-discrimination and the protection of persons with increased vulnerability in the administration of justice, in particular in situations of deprivation of liberty and with regard to the causes and effects of overincarceration and overcrowding, drawing on the experience of United Nations and regional human rights mechanisms and seeking the views of States, including on their policies and best practices, civil society and other relevant stakeholders.

* The present report was submitted late to reflect the most recent developments.



I. Introduction

1. In its resolution 30/7, the Human Rights Council requested the United Nations High Commissioner for Human Rights to submit to the Council, at its thirty-sixth session, a report on non-discrimination and the protection of persons with increased vulnerability in the administration of justice, in particular in situations of deprivation of liberty and with regard to the causes and effects of overincarceration and overcrowding, drawing on the experience of United Nations and regional human rights mechanisms and seeking the views of States, including on their policies and best practices, civil society and other relevant stakeholders. In preparation for the report, the Office of the United Nations High Commissioner for Human Rights (OHCHR) sought contributions from Member States, international and regional organizations, national human rights institutions and non-governmental organizations, in particular, on the causes and effects of overincarceration and overcrowding with regard to non-discrimination and persons with increased vulnerability in the administration of justice, and information on the policies and best practices of States.¹ In addition to the information received from those States and entities, the report draws on a range of public sources, including United Nations human rights mechanisms, and the work of civil society organizations.

2. Equality before the law, equal protection of the law and non-discrimination are key tenets of international human rights law. The preamble, articles 1 (3) and 55 of the Charter of the United Nations and article 2 (1) of the Universal Declaration of Human Rights prohibit discrimination in the enjoyment of civil, cultural, economic, political and social rights. Several international human rights law instruments provide for protection against discrimination, such as the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the Convention on the Rights of Persons with Disabilities, the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, and the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.

3. Equality and non-discrimination are even more important in circumstances where persons with increased vulnerability are deprived of their liberty, as they are even less able to challenge their detention and take action against discriminatory situations. The present report addresses the nexus between non-discrimination and situations of deprivation of liberty.² It highlights first the impact of discrimination on overcrowding and

¹ Submissions were received from Austria, Azerbaijan, Chile, Egypt, El Salvador, Georgia, Germany, Haiti, Hungary, Iraq, Ireland, Kazakhstan, Lebanon, Madagascar, Malta, Monaco, Qatar, the Russian Federation, Saudi Arabia, Senegal, Serbia, Uzbekistan, Venezuela (Bolivarian Republic of), State of Palestine, United Nations Children's Fund Australia (UNICEF Australia), United Nations Office on Drugs and Crimes (UNODC), Aboriginal Legal Service of Western Australia (ALSWA), Aboriginal Peak Organizations Northern Territory, Advocacy for Inclusion, Australian Centre for Disability Law, Australian Child Rights Taskforce, Australian Cross Disability Alliance, Association for the Prevention of Torture (APT), Bureau International Catholique de l'Enfance (BICE), Centre For Human Rights-Niš, Child Rights International Network (CRIN), Conseil Supérieur National des Personnes Handicapées, Danila Dilba Health Service, Deakin University (Australia), Disabled People's Organisations Australia, First Peoples Disability Justice Consortium, Human Rights Law Centre (HRLC), International Drug Policy Consortium (IDPC), International Legal Foundation (ILF), Justice Project-Pakistan, National Aboriginal and Torres Strait Islander Legal Services (NATSILS), Monash University Castan Centre for Human Rights Law, Open Society Justice Initiative, Penal Reform International (PRI), Sisters Inside Inc., University of Tsukuba (Japan). The submissions may be consulted in the files of the Secretariat.

² In the present report, "deprivation of liberty" involves severe restriction of movement within a small space as set out in Human Rights Committee, general comment No. 35 (2014) on liberty and security of person, para. 5.

overincarceration, before focusing on the particular impact that overcrowding and overincarceration in places of detention have, in turn, on persons with increased vulnerability.³

II. Impact of discrimination on overincarceration and overcrowding

A. Role of legislation in the overincarceration of persons with increased vulnerabilities

4. According to article 26 of the International Covenant on Civil and Political Rights, States should ensure that “all persons are equal before the law”. However, laws may target specific groups in a discriminatory manner, or criminalize certain behaviours attributable primarily to specific groups of persons, even without explicitly identifying them. In such cases, legislation may have a disproportionate and discriminatory impact on persons with increased vulnerability, resulting in their overincarceration.⁴

5. Legislation concerning the age of criminal responsibility may be an important factor contributing to the overincarceration of children. Many countries have recently proposed or adopted laws or amendments lowering the age of criminal responsibility from 18 to 16 years⁵ or even 12 years and below,⁶ while others do not specify a minimum age of criminal responsibility.⁷ At the same time, a number of laws related to the juvenile justice system have been proposed or adopted to increase the maximum length of prison sentences⁸ — which could reach 20 years⁹ or even life imprisonment without parole¹⁰ — or to abolish the limit on the length of prison sentences.¹¹ The duration of pretrial detention has been increased in a number of States¹² and the extension of pretrial detention periods is also being allowed.¹³ Children are specifically targeted by laws imposing curfews, resulting in their arrest and detention simply for being in the street during curfew hours.¹⁴ In some contexts, children are detained in prison-like conditions for homelessness, vagrancy and absenteeism from school.¹⁵ Truancy laws and vagrancy offences penalize children for being in public places and so-called disobedience laws transform activities that would be lawful for an adult into a criminal offence for a child.¹⁶ Children are often charged for minor offences¹⁷ or offences against property.¹⁸ Anti-gang laws or anti-maras measures, forbidding illicit association, also contribute to the arrest and detention of children owing, for example, to them wearing certain items of clothing or to other aspects of their physical appearance.¹⁹

³ See A/HRC/30/19 for a detailed analysis of the linkage between overincarceration and overcrowding.

⁴ Submission from UNODC.

⁵ CRC/C/BRA/CO/2-4, para. 87.

⁶ CRC/C/PAN/CO/3-4, para. 74 (a); CRC/C/IRQ/CO/2-4, para. 86 (b); CRC/C/FJI/CO/2-4, para. 71 (a); CRC/C/ZMB/CO/2-4, para. 63 (a); also CRC/C/MRT/CO/2 and Corr.1, para. 81.

⁷ CRC/C/COG/CO/2-4, para. 80 (a); and CRC/C/MHL/CO/2, para. 70.

⁸ CRC/C/BRA/CO/2-4, para. 87; and CRC/C/DOM/CO/3-5, para. 71.

⁹ CRC/C/BFA/CO/3-4, para. 76 (e); and CRC/C/DZA/CO/3-4, para. 81 (a).

¹⁰ CERD/C/USA/CO/6/Add.1, para. 21.

¹¹ CRC/C/DNK/CO/4, para. 65 (c).

¹² CRC/C/PER/CO/4-5, para. 69.

¹³ CRC/C/PAN/CO/3-4, para. 74 (b).

¹⁴ *Ibid.*, para. 41.

¹⁵ CRC/C/KGZ/CO/3-4, para. 66 (c).

¹⁶ CRIN “Non-discrimination and the protection of persons with increased vulnerability in the administration of justice”, 28 February 2017.

¹⁷ Submission from Australian Child Rights Taskforce.

¹⁸ CRC/C/GTM/CO/3-4, para. 98 (c).

¹⁹ CRC/C/HND/CO/3, para. 31.

6. While some legislation may be drafted in a gender-neutral manner, its application may affect predominantly women²⁰ and result in their overincarceration. This is, for instance, the case with laws criminalizing consensual sexual relations between adults outside marriage²¹ or adultery.²² Even when they are victims of rape, trafficking, sexual exploitation and abuse, women may be imprisoned on charges of adultery or fornication.²³ Provisions criminalizing prostitution often prohibit prostitution regardless of gender. In practice, however, they often affect mostly women, who face fines and lengthy prison sentences²⁴ of between five years to life imprisonment.²⁵ The criminalization of abortion de facto criminalizes a procedure that can only be performed on women.²⁶ Abortion, even in cases of rape,²⁷ can lead to the sentencing of women or girls²⁸ on the grounds of infanticide or murder.²⁹ In some States, the use of drugs during pregnancy is also criminalized, while in other States, women who use drugs may be subject to detention during their pregnancy.³⁰ Gender discrimination also affects children, as some States have different ages of criminal responsibility depending on the child's gender, resulting in girls being at times detained at a lower age than boys.³¹

7. Legislation can also be discriminatory with regard to the sentencing of women. Laws may criminalize “forms of behaviour that are not criminalized or punished as harshly if they [were] performed by men”.³² Regarding so-called honour crimes, for example, when the justification for a killing is the perpetrator's or family's “honour”, legislation of certain States provides for different sentences depending on the gender of the perpetrator. A man would receive a fine or a low prison sentence while a woman could face life imprisonment.³³ Even when legislation for so-called moral crimes is not overtly discriminatory against women, in practice, it applies mostly — if not only — to women.³⁴ Procedural rules, such as evidence requiring corroboration in rape cases, may lead to women not being able to prove rape and therefore being sentenced for “moral crimes” more frequently than men.³⁵

8. Laws criminalizing private behaviour also lead to the overincarceration of persons belonging to specific groups. In 2016, 73 countries criminalized same-sex relationships,³⁶ and 44 of those countries specifically criminalized lesbian relationships.³⁷ Also, so-called “public scandal”, “morality” and “debauchery” laws disproportionately target transgender people.³⁸ This is also the case for laws criminalizing cross-dressing and sex reassignment

²⁰ Submission from UNODC.

²¹ A/68/340.

²² Sometimes the law directly targets married women and not married men, see CEDAW/C/THA/CO/5, para. 19; E/C.12/1/Add.45, para. 17; and UNODC, *Handbook on Women and Imprisonment*, 2nd ed. (New York, 2014), p. 123.

²³ UNODC, *Handbook on Women and Imprisonment*, p. 123.

²⁴ CEDAW/C/BRN/CO/1-2, para. 24.

²⁵ CEDAW/C/IRQ/CO/4-6, para. 31; and CEDAW/C/QAT/CO/1, para. 25 (d).

²⁶ Committee on the Elimination of Discrimination against Women, general recommendation No. 33 (2015) on women's access to justice, para. 47.

²⁷ CEDAW/C/QAT/CO/1, para. 39 (a).

²⁸ CRC/C/MLT/CO/2, para. 49.

²⁹ CEDAW/C/MEX/CO/7-8, para. 32.

³⁰ A/HRC/30/65, para. 53.

³¹ Ensemble Contre la Peine de Mort (ECPM), “Annual report on the death penalty in Iran”, 2016.

³² Committee on the Elimination of Discrimination against Women, general recommendation No. 33, para. 47.

³³ CEDAW/C/KWT/CO/3-4, para. 30; and E/CN.4/2002/83, para. 34.

³⁴ ILF, “Effects of mass incarceration on minorities/vulnerable groups”.

³⁵ A/HRC/13/39/Add.5, para. 219; A/68/340, para. 16; and E/C.12/1/Add.45, para. 17.

³⁶ APT, “LGBTI persons deprived of their liberty: a framework for preventive monitoring”, 2nd ed. (2015).

³⁷ OHCHR, *Living Free and Equal: What States are doing to tackle violence and discrimination against lesbian, gay, bisexual, transgender and intersex people* (New York and Geneva, 2016), p. 55.

³⁸ *Ibid.*, p. 56; also A/HRC/29/23, para. 43.

surgery.³⁹ While the trend seems to be towards decriminalization of consensual same-sex relationships, some States have, nevertheless, created new criminal sanctions, increased penalties or broadened their application.⁴⁰ The difference between the age of consent for same-sex and heterosexual relations⁴¹ results in a higher age for the same conduct for same-sex relations.

9. In some States, legislation facilitates detention⁴² or requires mandatory detention of children⁴³ or adults who are asylum seekers, refugees or in an irregular migration situation.⁴⁴ Some States have also criminalized irregular entry.⁴⁵ Lack of a valid identity document or suspicion of false identity can also be grounds for being remanded in custody.⁴⁶ In some States, legislation does not provide time limits for immigration detention,⁴⁷ which may result in the detention of migrant workers for weeks, months or even years.⁴⁸ Asylum seekers are also affected by long periods of detention when States have provisions for extending detention periods.⁴⁹

10. In certain cases, specific legislation on religion may, by its very nature, negatively affect members of minority religious communities and “non-believers” or dissenters. For instance, the Special Rapporteur on minority issues noted that “particular provisions of substantive criminal law may have a discriminatory effect, for instance, when the practice of a minority religion may be interpreted as an offence against a majority religion”.⁵⁰ The criminalization of blasphemy, which, in at least 49 countries, is punishable with a prison term,⁵¹ as well as anti-apostasy laws, are an example of legislation that has a discriminatory impact on people who do not share the “official” religion. The Special Rapporteur on freedom of religion or belief reiterated that it seems difficult, if not impossible, to conceive of an application of the concept of an official “State religion” that, in practice, does not have adverse effects on religious minorities, thus discriminating against their members.⁵²

11. Some States continue not to recognize or fully implement the right to conscientious objection to military service, in practice, which has a negative impact on members of religious minorities. In some States where there are no or inadequate alternative service arrangements available, refusal to perform military service is punishable by imprisonment. In that context, the Human Rights Committee expressed concern at the lack of recognition of the right to conscientious objection to compulsory military service and the repeated prosecution and imprisonment of members of religious minorities who refuse to perform compulsory military service.⁵³

12. The criminalization of petty offences can lead to overincarceration of poor and minority populations, children and women.⁵⁴ According to the Committee on the

³⁹ Human Rights Watch, “‘I’m scared to be a woman’: Human rights abuses against transgender people in Malaysia”, September 2014. Available at <https://www.hrw.org/report/2014/09/24/im-scared-be-woman/human-rights-abuses-against-transgender-people-malaysia>.

⁴⁰ OHCHR, *Living Free and Equal*, p. 57.

⁴¹ APT, “LGBTI persons deprived of their liberty: a framework for preventive monitoring”, 2nd ed. (2015); also OHCHR, *Living Free and Equal*, p. 58.

⁴² CRC/C/MYS/CO/1, para. 82.

⁴³ CRC/C/AUS/CO/4, para. 80 (a); and CRC/C/MLT/CO/2, para. 57 (a).

⁴⁴ CRC/C/MLT/CO/2, para. 57 (a); CMW/C/GIN/CO/1, para. 21 (a); CERD/C/USA/CO/7-9, para. 18; and CERD/C/CAN/CO/18, para. 15.

⁴⁵ OHCHR, *Raoufi and others v. Greece*, Intervener brief filed by the United Nations High Commissioner for Human Rights, 2 September 2016. Available at www.ohchr.org/Documents/Issues/Migration/Raoufi_v_Greece.pdf.

⁴⁶ A/62/18, para. 79.

⁴⁷ CRC/C/MLT/CO/2, para. 57 (b); also A/HRC/27/48, para. 76.

⁴⁸ CMW/C/GIN/CO/1, para. 21.

⁴⁹ CMW/C/BIH/CO/2, para. 25 (a).

⁵⁰ A/70/212, para. 29.

⁵¹ A/HRC/34/50, para. 40.

⁵² A/HRC/19/60, para. 66; A/67/303, para. 47; and A/HRC/34/50, para. 32.

⁵³ CCPR/C/TKM/CO/2, para. 40; also CCPR/C/KOR/CO/4, paras. 44-45; and A/HRC/35/4, paras. 6-7, 42, 45 and 65.

⁵⁴ ILF, “Effects of mass incarceration”.

Elimination of Discrimination against Women, “women are more likely than men to be incarcerated for non-violent offences”⁵⁵ and laws criminalizing minor offences have, in practice, a discriminatory impact on women.⁵⁶ Women are sometimes imprisoned for non-payment of television licences,⁵⁷ for their inability to pay bail⁵⁸ or for indecent behaviour in a private or public setting.⁵⁹ Criminalization of activities that persons living in poverty undertake to survive, such as street vending, begging or panhandling,⁶⁰ can also result in their overincarceration.

13. Legislation to address and counter drug-related offences can have a disproportionately high impact on specific groups. Foreign nationals are particularly vulnerable to detention, and may sometimes face the death penalty, for drug-related offences. Often, they do not speak the language in which the legal proceedings take place, are unfamiliar with the laws under which they are charged, have inadequate access to legal assistance and support, and may be forced to sign confessions.⁶¹ A large number of women worldwide are currently imprisoned or have been sentenced for drug offences,⁶² in many cases for transporting drugs (as mules),⁶³ having a secondary role in the commission of crimes⁶⁴ or performing low-level high-risk tasks,⁶⁵ often at the request of their partners.⁶⁶ Women are imprisoned worldwide for this kind of offence more than for any other crime. For example, 60 to 80 per cent of women incarcerated in Latin American countries were sentenced for drug-related offences.⁶⁷ In one country, 77 per cent of women in prison were incarcerated for drug offences, whereas those offences concerned 33.5 per cent of men in prison.⁶⁸ Since women accused of low-level drug offences do not usually provide “substantial assistance” to the prosecution, they are less likely to be offered plea bargains, contrary to more serious offenders who may be able to reduce or escape sentences through plea-bargaining.⁶⁹ The type of role played by women in relation to drug-related offences, when linked to factors such as the need to make ends meet and to take care of their families, may also explain why these laws have a particularly high impact on women, and ultimately contribute to their overincarceration. This assessment is also relevant for members of ethnic minorities — “in particular those who are poor and live in marginalized communities” — who may be “particularly subject to discrimination in the context of drug enforcement efforts”.⁷⁰ Mandatory minimum sentencing for drug-related offences and “tough-on-crime” legislation, such as repeat offender laws, also contribute to the overincarceration of racial and ethnic minorities.⁷¹

⁵⁵ CEDAW/C/GBR/CO/7, para. 54.

⁵⁶ Submission from UNODC.

⁵⁷ CEDAW/C/UK/CO/6, para. 266.

⁵⁸ Committee on the Elimination of Discrimination against Women, general recommendation No. 33, para. 47.

⁵⁹ CEDAW/C/YEM/CO/6, para. 42.

⁶⁰ A/66/265, para. 42.

⁶¹ A/70/304, para. 77.

⁶² Submission from the NGO consortium made up of International Drug Policy Consortium (IDPC), Washington Office on Latin America (WOLA) and Centro de Estudios Legales y Sociales (CELS).

⁶³ CEDAW/C/BRA/CO/7 and Corr.1, para. 32.

⁶⁴ Submission from the Permanent Mission of Chile in Geneva.

⁶⁵ WOLA and others, *Women, Drug Policies, and Incarceration: A Guide for Policy Reform in Latin America and the Caribbean*. Available at <https://www.wola.org/sites/default/files/WOLA%20WOMEN%20FINAL%20ver%2025%2002%201016.pdf>; and Open Society Foundations, “For women swept up in the drug trade, legal help that starts early”, 22 June 2016. Available at <https://www.opensocietyfoundations.org/voices/women-swept-drug-trade-legal-help-starts-early>.

⁶⁶ CEDAW/C/BRA/CO/7 and Corr.1, para. 32; Submission from the NGO consortium made up of IDPC, WOLA and CELS.

⁶⁷ A/HRC/30/65, para. 52.

⁶⁸ A/68/340, para. 26.

⁶⁹ Ibid.

⁷⁰ A/HRC/30/65, para. 51.

⁷¹ CERD/C/USA/CO/7-9, para. 20; and NATSILS, “Senate Legal and Constitutional Affairs Committee inquiry into justice reinvestment in Australia”, March 2013.

B. Discrimination in practice

1. Impact of poverty

14. Incarceration rates for persons living in poverty are extremely high⁷² and poverty is, at all stages of the criminal justice system, an important contributing factor to incarceration. First of all, persons living in poverty tend to come into greater contact with, and be under increased scrutiny of, the police as a result of spending more time on the street, in markets and on public transport,⁷³ and are thus more likely than those not living in poverty to enter the criminal justice system and be detained.

15. Once accused of a crime, persons living in poverty are also more likely to be placed, and to remain, in pretrial detention and to face a custodial sentence. They often lack the money to hire a lawyer,⁷⁴ face unrealistic sums set as part of bail conditions and, where the justice system is affected by corruption, are not in a position to pay a bribe that would ensure the granting of bail. During the trial phase, persons living in poverty may not have the means for the costly collection of exculpatory or mitigating evidence or expert testimony.⁷⁵ At the sentencing stage, although fines may be imposed, persons living in poverty are more likely not to be able to pay the fine, which ultimately leads to their incarceration. In certain contexts, it is reported that more than 30 per cent of women entering prison do so for fine default.⁷⁶ This could be addressed by ensuring that courts imposing fines take into account a person's financial circumstances and that community service, instead of detention, be imposed in case of failure to pay a fine.⁷⁷

2. Bias in the administration of justice

16. Police officers, court staff and other justice sector personnel often reflect the discriminatory attitudes of the wider society and may not be adequately trained to perform their roles without discrimination or bias.⁷⁸ This reinforces the vulnerability of certain groups and contributes to their overincarceration. Biased policing or law enforcement leads to a disproportionately high number of individuals belonging to certain vulnerable groups coming into contact with the administration of justice and facing the possibility of detention. If a disproportionate number of individuals from a specific group come into contact with the police owing to discrimination, they will similarly be excessively represented throughout the process, even if all the other steps of the judicial process function impartially.⁷⁹

17. According to reports, persons belonging to an ethnic minority, including those of African descent and Roma, are more likely to be stopped by police, searched, abused during the stop and subsequently arrested.⁸⁰ Sometimes children are disproportionately targeted by police and arrested and detained on the mere allegation that they may belong to a gang because of their appearance — either their way of dressing or the presence of tattoos or symbols.⁸¹ According to the Special Rapporteur on extreme poverty and human rights, persons living in poverty are also disproportionately arrested, detained and imprisoned as a result of law enforcement officials' perception of poverty as an indicator of criminality.⁸²

⁷² A/67/278, para. 48.

⁷³ Submission from Open Society Justice Initiative.

⁷⁴ Ibid.

⁷⁵ A/67/278, para. 74.

⁷⁶ Submission from Aboriginal Legal Service of Western Australia.

⁷⁷ Submission from the Government of Ireland.

⁷⁸ A/67/278, para. 45.

⁷⁹ A/70/212, para. 18.

⁸⁰ OHCHR, *Moving Away from the Death Penalty: Arguments, Trends and Perspectives* (New York, 2014), p. 107; CERD/C/CAN/CO/19-20, para. 11; CERD/C/RUS/CO/19, para. 12; CERD/C/USA/CO/6, para. 20; A/62/18, para. 105; and A/70/212, para. 21.

⁸¹ CRC/C/HND/CO/3, para. 80.

⁸² A/67/278, para. 48.

18. Bias in the judiciary also aggravates the overincarceration of groups with increased vulnerability and results in the overrepresentation of certain ethnic or indigenous groups in detention.⁸³ Members of minorities face more frequent or longer periods of pretrial detention, in part owing to discriminatory attitudes of prosecutors, judges and even the lawyers appointed to defend them.⁸⁴ In many cases, women are exposed to harmful stereotypes and biases by criminal justice officials and often face a heavier burden of proof than men.⁸⁵ Bias in the justice system also affects sentencing. Members of minorities and indigenous peoples are often more likely to be sentenced to longer prison terms.⁸⁶ In many contexts, persons of African descent receive more severe sentences than White persons,⁸⁷ and youth belonging to minorities are disproportionately sentenced to life imprisonment.⁸⁸

19. The Committee on the Elimination of Racial Discrimination raised concerns in relation to the failure to prosecute and punish violations of the prohibition of racial discrimination by law enforcement personnel.⁸⁹ Considering such violations as petty offences, even though they may result in overincarceration of groups with increased vulnerabilities, fails to send the appropriate message to law enforcement personnel.

3. Lack of access to justice

20. Access to justice for individuals in or facing detention is often negatively affected by policies, practices and lack of resources. Insufficient or inadequate access to legal counsel, lack of effective judicial review and limited access to information have a particular impact on certain groups and results in an increased risk of overincarceration.

21. The most basic element in ensuring adequate access to justice is that those individuals whose right to liberty may be affected, have all the information needed to be able to challenge their detention. Migrants, persons belonging to indigenous or linguistic minorities and foreign nationals often do not know their rights or do not understand why they are being detained, owing to language barriers and a lack of interpreters. For instance, members of linguistic minorities may fail to appear in court because they were unable to read and understand the legal documents requiring them to do so. As a result, they may face an order for arrest and detention.⁹⁰ Migrants in detention are often unaware of their right to contact a lawyer⁹¹ or the possibility of challenging the lawfulness of their detention. For foreign nationals, unfamiliarity with the criminal justice system, which is sometimes further compounded by denial of consular assistance or its unavailability,⁹² may also contribute to their overincarceration. Parents are sometimes not made aware that their children are being detained for petty offences,⁹³ which may unduly prolong the child's detention.

22. While lack of or inadequate access to legal assistance affects all those facing detention, individuals with increased vulnerabilities appear to be particularly affected, thereby contributing to their overincarceration. Children are often not provided with legal assistance⁹⁴ and, even when it is provided, it may be of poor quality,⁹⁵ resulting in long periods of preventive detention.⁹⁶ Human rights mechanisms have also noted the difficulties

⁸³ A/62/18, para. 454.

⁸⁴ A/70/212, para. 30.

⁸⁵ Submission from UNODC.

⁸⁶ A/70/212, para. 53.

⁸⁷ OHCHR, *Moving Away from the Death Penalty*, p. 107; also submission from International Centre for Prison Studies.

⁸⁸ CERD/C/USA/CO/7-9, para. 20.

⁸⁹ CERD/C/AUT/CO/18-20, para. 13.

⁹⁰ A/HRC/30/36, para. 31.

⁹¹ OHCHR, *Raoufi and others v. Greece*, Intervener brief.

⁹² CMW/C/URY/CO/1, para. 25.

⁹³ CRC/C/GIN/CO/2, para. 85 (e).

⁹⁴ CRC/C/BFA/CO/3-4, para. 76 (b); and CRC/C/ZMB/CO/2-4, para. 63 (d).

⁹⁵ CRC/C/TUR/CO/2-3, para. 66 (b).

⁹⁶ CRC/C/BEN/CO/3-5, para. 68.

faced by women in detention in obtaining legal assistance and free legal aid.⁹⁷ Minorities are also often unaware of the availability of legal aid or how to access it.⁹⁸

23. A key component of access to justice is the ability to access an adequate system of judicial review of detention. However, asylum seekers and migrants are often confronted with a lack of effective judicial review⁹⁹ or only have access to review mechanisms that lack the required procedural safeguards.¹⁰⁰ Children in certain contexts face an increased risk of overincarceration owing to an ineffective juvenile justice system, including an insufficient number of juvenile courts¹⁰¹ or professionals with specialized training on juvenile justice.¹⁰²

4. Protective detention

24. Detention as a protective measure is only used with regard to certain specific groups with increased vulnerabilities. The practice of protective detention mainly concerns girls and women who are deprived of their liberty for the purpose of protecting them from the risk of serious violence, including so-called honour crimes or gender-based violence.¹⁰³ In some countries, women are put in protective custody, instead of being provided with shelter and other appropriate services.¹⁰⁴ It is typically done as a matter of practice, without any legal basis or procedural safeguards; according to the Working Group on Arbitrary Detention such custody constitutes a discriminatory deprivation of liberty.¹⁰⁵

5. Pretrial detention

25. Throughout the world, some groups with increased vulnerabilities tend to be overrepresented in pretrial detention.¹⁰⁶ This is in large part owing to the fact that they often do not qualify for alternatives to detention. For instance, most foreign nationals fail to satisfy the conditions for conditional release owing to a lack of a permanent residence in the State concerned¹⁰⁷ and, as mentioned above, persons living in poverty are not in a position to procure bail. Women are often automatically put in pretrial detention, even though a majority of women in detention worldwide are first-time offenders or charged with non-violent crimes.¹⁰⁸ Additionally, in some contexts there is systematic recourse to pretrial detention for children.¹⁰⁹

26. The overuse of pretrial detention adds to the vulnerability of some individuals and can have a negative impact on the rest of the criminal procedure and eventual custodial sentence. Indeed, pretrial detention places persons living in poverty in a position in which they are more likely to plead guilty and accept plea deals, even when the charges they face are unfair or unfounded, in order to secure an earlier release.¹¹⁰

6. Lack of alternatives to detention for persons with increased vulnerability

27. Lack of or inadequate alternatives to detention have a particular impact on certain groups with increased vulnerabilities and often result in unnecessary detention or a higher

⁹⁷ CEDAW/C/GRC/CO/7, para. 34; and CEDAW/C/IRQ/CO/4-6, para. 48 (c).

⁹⁸ A/70/212, para. 40.

⁹⁹ CEDAW/C/GRC/CO/7, para. 34.

¹⁰⁰ CMW/C/BIH/CO/2, para. 25.

¹⁰¹ CRC/C/DOM/CO/3-5, para. 71 (b).

¹⁰² CRC/C/TZA/CO/3-5, para. 72 (b); and CRC/C/BEN/CO/3-5, para. 68.

¹⁰³ A/HRC/27/48, para. 78; A/HRC/31/57, para. 24; and A/68/340, para. 21.

¹⁰⁴ Submission from UNODC.

¹⁰⁵ A/HRC/27/48, para. 79.

¹⁰⁶ A/70/212, para. 29.

¹⁰⁷ CERD/C/AUT/CO/18-20, para. 13.

¹⁰⁸ A/HRC/31/57, para. 20.

¹⁰⁹ CRC/C/HND/CO/3, para. 80.

¹¹⁰ A/67/278, para. 49.

incarceration rate. Members of minorities have a greater likelihood of being incarcerated rather than offered alternatives to detention such as probation or conditional release.¹¹¹

28. Additionally, while deprivation of liberty should always be a measure of last resort, and even more so for children, alternatives to detention are often unavailable,¹¹² and, when they are available, they are seldom used¹¹³ or are not applied effectively.¹¹⁴ Where alternatives to detention are ineffective and the same children come back before the courts, this may encourage judges to resort to incarceration. Alternatives to detention also seem to be often overlooked with regard to women. Although the crimes committed by the majority of women are of a non-violent nature, custodial sentences continue to be imposed on many women. Limited availability of programmes of alternatives to detention in remote areas has a particular impact on persons living in those areas, and they end up with a custodial sentence, whereas for the same offence, persons living in an urban area might receive a non-custodial sentence.¹¹⁵ In some contexts, the majority of those affected by this are persons belonging to indigenous communities. Owing to difficulties in fulfilling early-release requirements such as post-release work¹¹⁶ or attending required courses, older prisoners also have less access to alternatives to detention.

7. Administrative detention

29. Policies providing for and practices resulting in the automatic and systematic detention of migrants in an irregular situation and asylum seekers, including families and children,¹¹⁷ lead to their overincarceration. The initial detention decision is often followed by lengthy periods of administrative detention.¹¹⁸ Such practices have a particular impact on asylum seekers, who often face detention that lasts throughout the process from arrival to expulsion, if their asylum claims are rejected.¹¹⁹

30. The limited number of separate places of detention for migrants and asylum seekers,¹²⁰ combined with the high numbers being detained, has resulted in administrative detainees being placed in detention with ordinary prisoners accused or convicted of having committed a crime.¹²¹ The widespread and routine detention of migrants and asylum seekers therefore not only results in their overincarceration but also contributes to the overcrowding of detention facilities linked to the criminal justice system.

III. Impact of overcrowding and overincarceration on persons with increased vulnerabilities

A. Poor and inadequate conditions of detention

31. One of the major impacts of overincarceration and overcrowding on persons with increased vulnerabilities is their disproportionate exposure to poor and inadequate conditions of detention. These include situations where there is an absence of out-of-cell activities, poor natural light and ventilation, extreme temperatures, poor hygiene and

¹¹¹ A/70/212, para. 53; OHCHR, *Moving Away from the Death Penalty*, p. 107.

¹¹² CRC/C/STP/CO/2-4, para. 60 (c).

¹¹³ CRC/C/KHM/CO/2, para. 76 (c).

¹¹⁴ CRC/C/BRA/CO/2-4, para. 87; CRC/C/HND/CO/3, para. 80(a); and CRC/C/AZE/CO/3-4, para. 75 (e).

¹¹⁵ Submission from NATSILS.

¹¹⁶ Submission from PRI.

¹¹⁷ CAT/C/AUS/CO/3, para. 11; CAT/C/GRC/CO/5-6, para. 20; and CMW/C/TUR/CO/1, para. 47 (a).

¹¹⁸ CAT/C/GRC/CO/5-6, para. 20.

¹¹⁹ CERD/C/AUT/CO/17, para. 17; CERD/C/SEN/CO/16-18, para. 18; CERD/C/JPN/CO/7-9, para. 23; CAT/C/LTU/CO/3, para. 17; and CERD/C/EGY/CO/17-22, para. 25.

¹²⁰ CMW/C/ECU/CO/1, para. 23.

¹²¹ CMW/C/SEN/CO/2-3, para. 26(c); CMW/C/SEN/CO/16-18, para. 18; CMW/C/MRT/CO/1, para. 34; and CMW/C/TLS/CO/1, para. 31.

sanitation standards, and infestation of insects and vermin.¹²² International and regional human rights mechanisms have established that overcrowding, leading to situations where detainees are required to live for long periods in deplorable material conditions that are unsuitable for a humane and dignified existence,¹²³ breaches the prohibition of torture. Furthermore, lack of space resulting from overcrowding may result in pretrial detainees being placed with convicted prisoners, in contravention of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules).¹²⁴

32. Overcrowding exacerbates already harsh conditions for both detainees and people working in places of detention. Moreover, in some cases, a lack of resources leads to children being detained in facilities designed for and populated by adults. Older prisoners and persons with disabilities are also particularly affected by overcrowding. Persons with disabilities are often held in environments with areas that are inaccessible to them.¹²⁵ As a result of overcrowding, ground-floor cells or floor-level bedding are unavailable and resources to adapt the facilities, such as showers for those with special needs, and to provide the required specialized health care are insufficient.¹²⁶

33. The detention of migrants and the lack of adequate detention conditions for them, including in relation to space, food, water and sanitation, has been an issue of concern.¹²⁷ The Working Group on Arbitrary Detention considered that the imprisonment of migrants or asylum seekers for up to 18 months in conditions that were worse than in regular prisons could be regarded as punishment imposed on a person who had not committed any crime, which would be a serious violation of the principle of proportionality and may render the deprivation of liberty arbitrary.¹²⁸

34. Furthermore, many places of detention have insufficient female¹²⁹ or minority¹³⁰ staff members which adversely impacts upon the particular needs of female detainees¹³¹ and members of minority groups. This situation is exacerbated by the fact that many detention facilities are designed to accommodate a male population and therefore fail to meet the basic needs of female detainees. In certain contexts, the special needs of young children detained with their mothers have been neglected.¹³² In other situations, children may be unable to stay with their mothers owing to lack of space in mother and baby units or unsuitable overcrowded prison conditions, leading to negative developmental impacts for children.

B. Violence and ill-treatment

35. Violence and abuse are by-products of situations where people are detained in overcrowded conditions and where prison personnel are forced to work in situations of overcrowding. Poor and inadequate conditions contribute to difficult and tense relationships among detainees and between detainees and personnel, which increase the risk of ill-treatment in places of detention.¹³³ Lesbian, gay, bisexual, transgender and intersex detainees are among the persons most exposed to sexual violence from fellow inmates,¹³⁴ and victims do not generally report such acts to the authorities owing to fear of reprisals and distrust of complaints mechanisms. Furthermore, in seeking to protect lesbian, gay,

¹²² A/HRC/30/19, paras. 16 and 19.

¹²³ *Ibid.*, para. 16.

¹²⁴ General Assembly resolution 70/175, annex, rule 11 (b).

¹²⁵ A/68/295, para. 45.

¹²⁶ Submission from PRI.

¹²⁷ A/HRC/31/35, para. 40.

¹²⁸ A/HRC/27/48/Add.2, para. 75.

¹²⁹ CAT/C/KHM/CO/2, para. 19; Council of Europe, European Committee on the Prevention of Torture, Report of the Committee's visit to Hungary from 3 to 12 April 2013, CPT/Inf (2014) 13, para. 53.

¹³⁰ Council of Europe, CPT/Inf (2014) 13, para. 53.

¹³¹ *Ibid.*

¹³² CAT/C/KEN/CO/2, para. 12; CAT/C/RWA/CO/1, para. 19; and CAT/OP/MEX/1, para. 187.

¹³³ CAT/OP/MDV/1, para. 210.

¹³⁴ OHCHR, *Living Free and Equal*, p. 40.

bisexual, transgender and intersex detainees from discrimination, abuse and violence in detention, the authorities too often resort to solitary confinement, sometimes for weeks or even months.¹³⁵

36. The Special Rapporteur on minority issues observed that United Nations human rights mechanisms are regularly informed of the subjection of minorities to excessive use of force by police, torture or other ill-treatment in detention and the lack of prompt and impartial investigations of such cases.¹³⁶

37. Migrants in detention often suffer violence, including sexual violence, and a deterioration in their physical and mental health.¹³⁷ Concern about violence and abuse suffered by persons with increased vulnerability also stems from a failure to separate pretrial detainees from others,¹³⁸ adults from children¹³⁹ and men from women.¹⁴⁰ Overincarceration and the resulting overcrowding put pressure on detention facilities and make it more difficult to provide separate accommodation. The failure to ensure safe and separate accommodation has been alleged to lead to exploitation and sexual violence.¹⁴¹

C. Lack of access to adequate health care

38. United Nations and regional human rights bodies have highlighted the link between overcrowding and negative health impacts on detainees. They pointed to a range of issues such as denial of¹⁴² or inadequate access to medical treatment,¹⁴³ insufficient mental health services,¹⁴⁴ lack of health-care professionals in places of detention¹⁴⁵ and failure to implement effective harm-reduction programmes and drug-dependence treatment.¹⁴⁶ Overincarceration and overcrowding often result in a lack of access to adequate and properly adapted health care for detainees with particular health-care needs; and where such services exist, they are frequently overstretched and inadequate.

39. Overcrowding has also been found to be a root cause of preventable medical conditions.¹⁴⁷ The Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health noted the link between overcrowding and the spread of infectious and communicable diseases such as tuberculosis¹⁴⁸ and hepatitis C.¹⁴⁹ Overcrowded and overstretched facilities can also aggravate and lead to mismanagement of existing health conditions, and increase the risk of suicide and self-harm.

¹³⁵ APT, Note to the United Nations Special Rapporteur on Torture, 4 November 2015, p. 5. Available at www.apr.ch/content/files/UN/APT_Briefing%20Note%20to%20UNSRT_report_gender.pdf.

¹³⁶ A/70/212, para. 25.

¹³⁷ A/HRC/31/35, para. 40; also OHCHR, *Raoufi and others v. Greece*.

¹³⁸ CAT/C/GAB/CO/1, para. 17; CAT/C/MUS/CO/3, para. 14; CAT/C/LKA/CO/3-4, para. 14; and CCPR/C/MOZ/CO/1, para. 14.

¹³⁹ E/C.12/LKA/CO/2-4, para. 32; African Commission on Human and Peoples' Rights, Report of the Committee for the Prevention of Torture in Africa on its promotion mission to Mauritania, 26 March to 1 April 2012, para. 19. Available at www.achpr.org/files/sessions/12th-eo/mission-reports/promotion_mission-2012/mission_report_mauritania_cpta_eng.pdf; CAT/C/BLR/CO/4, para. 19; and CAT/C/SYR/CO/1, para. 30.

¹⁴⁰ CAT/C/KHM/CO/2, para. 19; CCPR/C/BDI/CO/2 and Corr.1, para. 18.

¹⁴¹ Inter-American Court of Human Rights, *Juvenile Reeducation Institute v. Paraguay*, judgment of 2 September 2004, para. 175; CAT/C/BOL/CO/2, para. 18; and A/HRC/28/68, para. 58.

¹⁴² A/HRC/22/53/Add.2, para. 66.

¹⁴³ CEDAW/C/GRC/CO/7, para. 34; CAT/C/BLR/CO/4, para. 19; CAT/C/ECU/CO/3, para. 24; CAT/C/GAB/CO/1, para. 17; and CAT/C/LKA/CO/3-4, para. 14.

¹⁴⁴ A/HRC/23/41/Add.2, para. 40; and CAT/C/AUS/CO/4-5, para. 11.

¹⁴⁵ CAT/C/GRC/CO/5-6, para. 14; and CAT/C/PER/CO/5-6, para. 10.

¹⁴⁶ A/65/255, para. 29.

¹⁴⁷ A/HRC/25/60/Add.1, para. 54; also African Commission on Human and Peoples' Rights, Report on mission to Mauritania, para. 76. Available at www.achpr.org/files/sessions/12th-eo/mission-reports/promotion_mission-2012/mission_report_mauritania_cpta_eng.pdf.

¹⁴⁸ A/HRC/23/41/Add.1, para. 43.

¹⁴⁹ A/65/255, para. 29.

40. In many cases, prisoners with psychosocial disabilities are not separated from others and their needs are not or are insufficiently taken into account.¹⁵⁰ Overcrowding and related conditions of detention may also exacerbate underlying mental health conditions and can lead to the development of psychosocial disabilities. Furthermore, persons with increased vulnerabilities are at risk of developing mental health care needs while in detention owing to a range of factors, including discrimination and abuse, isolation because of their nationality, race, ethnicity or descent, terminal illness, age or facing the death penalty.¹⁵¹

41. Lack of access to adequate nutrition and health services,¹⁵² in particular antenatal health services for pregnant women, is a cause for concern for female detainees. The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment highlighted instances where no additional budgetary allocation has been made for supplementary food for pregnant or breastfeeding women.¹⁵³ The health needs of detained women and girls can easily be disregarded¹⁵⁴ and the needs of pregnant women and girls and nursing mothers require particular attention.¹⁵⁵

D. Inadequate or insufficient training, educational or religious facilities

42. The Special Rapporteur on the right to education emphasized that overcrowding puts available resources under strain, as demand exceeds available staff and facilities.¹⁵⁶ Being locked in overcrowded cells for up to 23 hours a day with limited out-of-cell activities,¹⁵⁷ rehabilitation programmes, possibilities to pursue education or skill development/vocational programmes¹⁵⁸ are all common in situations of overcrowding and make the possibility of rehabilitation harder for those already facing intersecting issues of discrimination. The Special Rapporteur also highlighted how people with learning disabilities and difficulties are made even more vulnerable to stigma and discrimination by penal systems that invariably fail to recognize, understand or support their specific needs. He underlined the need for their complex and multifaceted needs to be more properly understood,¹⁵⁹ which is clearly difficult to do in circumstances where the number of prisoners is high and staff lack the resources to focus on the needs of each individual.

43. Since overcrowding has an adverse effect on all aspects of detention, it also negatively impacts detainees' freedom of religion or belief.¹⁶⁰ While all persons deprived of their liberty continue to enjoy the right to freedom of religion or belief, the Special Rapporteur on freedom of religion or belief noted undue restrictions on the possibility to observe collective prayers, the lack of availability of religious scripts and issues regarding the suitability of meals for members of different faith groups.¹⁶¹

44. The Special Rapporteur on minority issues noted that minorities tended to experience discrimination in pretrial detention and post-conviction imprisonment owing to poorer treatment or conditions than those provided to others or failure of the authorities to respect important standards relating to religious and cultural practices, dietary

¹⁵⁰ CAT/OP/HND/1, para. 191.

¹⁵¹ UNODC, *Handbook on Prisoners with Special Needs* (New York, 2009), p. 18.

¹⁵² A/HRC/25/60/Add.1, para. 85.

¹⁵³ *Ibid.*, para. 66.

¹⁵⁴ CEDAW/C/BRA/CO/7 and Corr.1, para. 32; and African Commission on Human and Peoples' Rights, Report on mission to Ethiopia to monitor prisons and conditions of detention, 15 to 29 March 2004, p. 33. Available at www.achpr.org/files/sessions/37th/mission-reports/ethiopia/misrep_specmec_priso_ethiopia_2004_eng.pdf.

¹⁵⁵ CEDAW/C/BRA/CO/7 and Corr.1, paras. 32-33.

¹⁵⁶ A/HRC/11/8, para. 12.

¹⁵⁷ Council of Europe, European Committee for the Prevention of Torture, 7th General Report on the Committee's activities for the period 1 January to 31 December 1996, CPT/Inf (97) 10, para. 13.

¹⁵⁸ A/HRC/30/19, para. 24.

¹⁵⁹ A/HRC/11/8, paras. 35-36.

¹⁶⁰ A/HRC/30/19, para. 26.

¹⁶¹ A/60/399, paras. 70 and 73; A/HRC/4/21/Add.1, paras. 23 and 58-60; and A/HRC/10/8/Add.2, para. 53.

requirements, family relations and the need for interpretation services.¹⁶² The Special Rapporteur also noted that the failure to accommodate a convicted minority prisoner's particular needs may cause so much additional suffering, compared with that of non-minority prisoners in an equivalent position, as to render the punishment discriminatory.¹⁶³

E. Excessive length of detention

45. As already mentioned, lack of access to justice, including adequate legal advice and representation, judicial oversight, fair trials and appropriate sentencing, contributes to the overincarceration of persons with increased vulnerability. In turn, overincarceration and overcrowding and the related high number of detainees seeking legal assistance and access to justice further compound the difficulties faced by persons with increased vulnerability in obtaining access to justice and increases their risk of being subjected to lengthy detention, including pretrial detention. The impact of overcrowding on pretrial detainees can be serious as access to legal representation is more difficult when the client is in detention, especially if the client is being held far from the lawyer's office or if over-stretched personnel restrict visiting opportunities for lawyers to consult with their clients. In addition, there may be inadequate numbers of vehicles or staff to accompany pretrial detainees to court appearances, leading to a possible negative impact on the progress of their case.

46. Various human rights mechanisms have raised concerns about the excessive length of detention of migrants¹⁶⁴ and the lack of procedural safeguards concerning decisions on detention, including limited access to information and legal assistance or consular services and little or no professional interpretation services.¹⁶⁵ The pressure on resources resulting from overincarceration and overcrowding makes it even more difficult for the authorities to address these issues and improve access to justice for foreign nationals detained administratively or in the criminal justice system.

IV. Conclusions and recommendations

47. **States must take steps to protect the human rights of all individuals detained, and should pay specific attention to the additional challenges faced by persons with increased vulnerability in situations of deprivation of liberty, including as a result of over-incarceration and overcrowding.**

48. **States should also ensure that those working in the administration of justice receive adequate human rights training to develop their awareness of and to prevent prejudice and bias that may result in the overincarceration of persons with increased vulnerability and lead to situations of overcrowding.**

49. **States should ensure that all detainees, including those with increased vulnerability, fully enjoy their right to challenge their detention and to receive legal assistance. They should also ensure that independent oversight and complaints mechanisms respond to the specific situations and needs of persons with increased vulnerability in detention.**

50. **States should take all necessary steps, in full consideration of international norms and standards, in particular the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules) and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) to ensure that particular attention is given to conditions of detention and the treatment of detainees with**

¹⁶² A/70/212, para. 54.

¹⁶³ Ibid., para. 57.

¹⁶⁴ CMW/C/CHL/CO/1, para. 26; A/HRC/20/24, para. 21; CEDAW/C/MYS/CO/2, para. 27; and A/HRC/7/4, para. 46.

¹⁶⁵ CMW/C/BIH/CO/2, paras. 25-27; and A/HRC/23/46/Add.4, para. 54.

increased vulnerability, including in relation to access to appropriate medical care, interpretation services, adequate food, clothing and hygienic conditions. Respect for their religious, cultural and educational needs should be ensured. They should be allocated sufficient living space while in detention, including outdoor exercise, and particular attention should be paid to the needs and conditions of detention of persons with disabilities.

51. States should also establish effective rehabilitation services, taking into account the specific circumstances of persons with increased vulnerability, and pay greater attention to the development of alternatives to detention.

52. When reporting on progress made on the fulfilment of their commitments under the 2030 Agenda for Sustainable Development,¹⁶⁶ States should take into consideration the causes and effects of overincarceration and overcrowding with regard to non-discrimination and persons with increased vulnerability in the administration of justice. In particular, States should pay specific attention to the implementation of Sustainable Development Goal 10, in particular target 10.3 which aims to “ensure equal opportunity and reduce inequalities of outcome, including by eliminating discriminatory laws, policies and practices and promoting appropriate legislation, policies and action in this regard”.¹⁶⁷ Full consideration also needs to be given to the implementation of Sustainable Development Goal 16, with target 16.3 requiring States to ensure equal access to justice for all and target 16.b requiring States to promote and enforce non-discriminatory laws and policies for sustainable development.

53. In order to implement the above recommendations and more fully understand the causes and effects of overincarceration and overcrowding with regard to non-discrimination and persons with increased vulnerability in the administration of justice, States should collect up-to-date, comprehensive, disaggregated and transparent data on persons with increased vulnerability who are deprived of their liberty.

54. Such data should include the number of detainees from different groups of persons with increased vulnerability; the duration of detention by groups of persons with increased vulnerability; the conditions of detention of groups of persons with increased vulnerability; the languages used by detainees; and other factors pertinent to the individual characteristics of detainees with increased vulnerability. Data should be disaggregated based on offences or, in the case of administrative detention, reasons for detention; gender and sexual orientation; nationality and immigration status; economic and social status; and the profile of lawyers assigned to provide counsel.

55. The data gathered should be used by States to analyse the potential for and to eliminate actual discrimination, in law and in practice; to assess the effectiveness of legal aid provisions; and to enhance compliance with international human rights norms and standards in the administration of justice, including norms and standards related to equality and non-discrimination. They should also help to produce information for the public and policymakers about the negative impacts of overincarceration and overcrowding on persons with increased vulnerability, and to assess the need for relevant human rights training of law enforcement, prison and judicial officers.

¹⁶⁶ See <https://sustainabledevelopment.un.org/post2015/transformingourworld>.

¹⁶⁷ E/CN.3/2017/2, annex III.