



UNITED NATIONS
Office on Drugs and Crime



Handbook of
basic principles and
promising practices on
**Alternatives
to Imprisonment**

CRIMINAL JUSTICE HANDBOOK SERIES

UNITED NATIONS OFFICE ON DRUGS AND CRIME
Vienna

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UNITED NATIONS
New York, 2007

Acknowledgements

The Handbook on Alternatives to Imprisonment was prepared for the United Nations Office on Drugs and Crime (UNODC) by Dirk van Zyl Smit, Professor of Comparative and International Penal Law, University of Nottingham, United Kingdom, formerly Professor of Criminology and Dean of the Faculty of Law, University of Cape Town, South Africa.

The handbook was reviewed at an expert group meeting held at UNODC in Vienna from 31 October to 1 November 2005. UNODC wishes to acknowledge the valuable contributions received from the following experts who participated in that meeting: Alvaro A. Burgos Mata, Yvon Dandurand, Curt T. Griffiths, Nashaat H. Hussein, Kittipong Kittayarak, Tapio Lappi-Sepälä, Benjamin Naimark-Rowse, Adam Stapleton, and Vera Tkachenko. Also contributing throughout the development of the Handbook were Mark Shaw, Ricarda Amberg, Anna Giudice, Claudia Baroni, Bernardo Camara, and Miriam Magala of UNODC. Following the expert group meeting, the handbook was revised by Suzanne Schneider and Sharman Esarey, consultants to UNODC.

UNODC also wishes to acknowledge the support provided by the governments of Canada, Sweden, and Norway toward the development of the handbook.

United Nations publication Sales No. E.07.XI.2 ISBN 978-92-1-148220-1

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Introduction



This handbook is one of a series of practical tools developed by UNODC to support countries in the implementation of the rule of law and the development of criminal justice reform. It can be used in a variety of contexts, including as part of UNODC technical assistance and capacity building projects. The handbook introduces the reader to the basic principles central to understanding alternatives to imprisonment as well as descriptions of promising practices implemented throughout the world. A companion *Handbook on Restorative Justice Programmes* is also available from UNODC.

This handbook offers easily accessible information about alternatives to imprisonment at every stage of the criminal justice process; important considerations for the implementation of alternatives, including what various actors must do to ensure its success; and examples of systems that have reduced imprisonment. The handbook has been written for criminal justice officials, non-governmental organizations, and members of the community who are working to reduce over-reliance on imprisonment; to improve the delivery of justice, including rehabilitation and reintegration; and to integrate international human rights-based standards and norms into local policies and practices.

The handbook considers general strategies to reduce the reach of the criminal justice system and thus indirectly avoid the use of imprisonment. It also examines various aspects of alternatives to imprisonment that one may wish to consider when assessing the needs and demands of a country's criminal justice system. Importantly, the handbook focuses

systematically on the implementation of alternatives at the following phases of the criminal justice system:

- Pre-trial;
- Sentencing;
- Early release of sentenced prisoners.

The handbook also highlights strategies to reduce imprisonment in four major groups for whom imprisonment has especially deleterious effects and who can benefit from alternatives at every level:

- Children;
- Drug users;
- The mentally ill;
- Women.

Finally, the handbook presents the critical components that must be considered in developing a strategy for the development and implementation of a comprehensive range of alternatives to imprisonment in order to reduce the prison population, listing not only key factors and elements, but also potential pitfalls and ways to avoid them. The handbook is not intended to serve as a policy prescription for specific sentencing alternatives, but rather, seeks to provide guidance on the implementation of various sentencing alternatives that integrate United Nations standards and norms.

1. Introducing alternatives to imprisonment



1.1 Why consider alternatives to imprisonment?

Prisons are found in every country of the world. Policy-makers and administrators may therefore simply come to regard them as a given and not try actively to find alternatives to them. Yet imprisonment should not be taken for granted as the natural form of punishment. In many countries the use of imprisonment as a form of punishment is relatively recent. It may be alien to local cultural traditions that for millennia have relied on alternative ways of dealing with crime. Further, imprisonment has been shown to be counterproductive in the rehabilitation and reintegration of those charged with minor crimes, as well as for certain vulnerable populations.

Yet, in practice, the overall use of imprisonment is rising throughout the world, while there is little evidence that its increasing use is improving public safety. There are now more than nine million prisoners worldwide and that number is growing.¹ The reality is that the growing numbers of prisoners are leading to often severe overcrowding in prisons. This is resulting in prison conditions that breach United Nations and other standards that require that all prisoners be treated with the respect due to their inherent dignity and value as human beings.

¹R. Walmsley, *World Prison Population List*, International Centre of Prison Studies, King's College, London, 2005.

There are several important reasons for the primary focus to be upon alternatives that reduce the number of people in prison and for imprisonment to be used only as a last resort:²

Imprisonment and human rights

Individual liberty is one of the most fundamental of human rights, recognized in international human rights instruments and national constitutions throughout the world. In order to take that right away, even temporarily, governments have a duty to justify the use of imprisonment as necessary to achieve an important societal objective for which there are no less restrictive means with which the objective can be achieved.

The loss of liberty that results from imprisonment is inevitable but, in practice, imprisonment regularly impinges several other human rights as well. In many countries of the world, prisoners are deprived of basic amenities of life. They are often held in grossly overcrowded conditions, poorly clothed and underfed. They are particularly vulnerable to disease and yet are given poor medical treatment. They find it difficult to keep in contact with their children and other family members. Such conditions may literally place the lives of prisoners at risk.

Increasingly, human rights courts and tribunals have recognized that subjecting prisoners to such conditions denies their human dignity. Such conditions have been held to be inhuman and degrading. All too often, the majority of these prisoners may be low-level offenders, many of whom may be awaiting trial, who could be dealt with using appropriate alternatives instead of being imprisoned. Implementing effective alternatives to imprisonment will reduce overcrowding and make it easier to manage prisons in a way that will allow states to meet their basic obligations to the prisoners in their care.

Imprisonment is expensive

The cost of imprisonment worldwide is hard to calculate, but the best estimates are in the region of US\$ 62.5 billion per year using 1997 statistics.³ Direct costs include building and administering prisons as well as housing, feeding, and caring for prisoners. There are also significant indirect or consequential costs, for imprisonment may affect the wider community in various negative ways. For example, prisons are incubators of diseases such as tuberculosis and AIDS, especially so when they are overcrowded. When prisoners are released, they may contribute to the further spread of such diseases.

²See also Matti Joutsen and Uglješa Zvekic, "Noncustodial sanctions: Comparative Overview" in Uglješa Zvekic (ed.), *Alternatives to Imprisonment in Comparative Perspective*, UNICRI/Nelson-Hall, Chicago, 1994, pp. 1-44.

³G. Farrell and K. Clark, *What does the world spend on criminal justice?* (HEUNI Paper No. 20) The European Institute for Crime Prevention and Control affiliated to the United Nations, (Helsinki, 2004).

Targeting prison overcrowding

Penal Reform International estimates nine million people are in prison or detained often in conditions below applicable international human rights standards and which seriously undermine the chances for their productive return to society. Overcrowding often poses public health hazards, undermines the control of violence inside prison, creates a dangerous environment for prison staff and makes it impossible to deliver United Nations-defined minimum standards of detention requiring adequate light, air, decency and privacy.

The Ouagadougou Declaration on Accelerating Prison and Penal Reform in Africa 2002 calls for action against overcrowding: "Criminal justice agencies should work together more closely to make less use of imprisonment. The prison population can only be reduced by a concerted strategy."

Penal Reform International suggests a ten-point plan to reduce overcrowding: informed public debate, using prison as a last resort throughout all stages of the criminal justice system, increasing prison capacity, diverting minor cases, reducing pre-trial detention, developing alternatives, reducing sentence lengths and ensuring consistent sentencing, developing solutions to keep youth out of prison, treating rather than punishing drug addicts, the mentally disordered and terminally ill offenders and ensuring fairness for all.

Source: Penal Reform International.

The cost of imprisonment

In Brazil:

Average cost of a prisoner:

R\$ 800 per month

Average construction cost per prisoner:

R\$ 12,000 (medium security facility)

R\$ 19,000 (high security facility)

In comparison:

Average cost of a public school student (south-east region):

R\$ 75 per month.

Average cost of construction of a house for the poor:

R\$ 4,000 to R\$ 7,000

Source: Public National Security Plan, National Secretary of Public Security, Ministry of Justice, Brazil, 2002 (English version, Instituto Cidadania)
<http://www.mj.gov.br/senasp/biblioteca/documentos/PUBLIC%20SECURITY%20NATIONAL%20PLAN%20ingl%C3%AAs.pdf>

Imprisonment is overused

It is essential that policy-makers take a close look at who is being held in prison, why they are there, and for how long they are being detained. Where such data are not immediately available, steps should be taken to ensure that they are regularly reported to policy-makers and to other senior stakeholders in the criminal justice system. Invariably the data will reveal that prisoners are disproportionately drawn from the poorest and most vulnerable groups in the community. Such prisoners may be serving sentences for petty or non-violent offences or may be awaiting trial for unacceptably lengthy periods of time. For them, imprisonment may not be suitable at all. Alternatives to imprisonment offer a variety of strategies for dealing appropriately with such persons that do not involve imprisonment at all. Alternatives should therefore be the primary point of departure in order to avoid over-reliance on imprisonment.

Alternatives may be more effective

Several social objectives are claimed for imprisonment. It keeps persons suspected of having committed a crime under secure control until a court determines their culpability. Equally importantly, it punishes convicted offenders by depriving them of their liberty after they have been convicted of an offence, keeps them from committing further crime while they are in prison, and, in theory, allows them to be rehabilitated during their period of imprisonment. Finally, imprisonment may be thought to be acceptable for detaining people who are not suspected or convicted of having committed a crime, but whose detention is justified for some other reason.

Most of the objectives of imprisonment can be met more effectively in other ways.

Given that imprisonment inevitably infringes upon at least some human rights and that it is expensive, is it nevertheless such an effective way of achieving these objectives that its use can be justified? The reality is that most of the objectives of imprisonment can be met more effectively in other ways. Alternatives may both infringe less on the human rights of persons who would otherwise be detained and may be less expensive. Measured against the standards of human rights protection and expense, the argument against imprisonment, except as a last resort, is very powerful.

What are the special justifications advanced for different forms of imprisonment?

In the case of *unconvicted prisoners*, the loss of liberty requires particular justification, as they must be presumed to be innocent of the charges until proven otherwise. The question of effectiveness in this regard must be linked closely to why the detention is regarded as necessary. If there is reason to believe that the suspect will flee to avoid standing trial, for example, the question that must be asked is whether this could be prevented by other, less costly means that would not deprive the person of as

much liberty as imprisonment. If the justification for imprisonment is the concern that a suspect might intimidate potential witnesses, the same question should be asked, though the effective alternative may be a different one to that employed to ensure appearance in court.

Moreover, imprisonment of persons who are awaiting trial may bring with it disadvantages for the criminal justice system as a whole. Preparation of a defence becomes more difficult when the accused is detained awaiting trial. Difficulty in gaining access to defence counsel and other resources to prepare for trial may cause delays and undermine the efficiency of the administration of justice.

The vast majority of prisoners will return to the community, many without the skills to reintegrate into society in a law-abiding manner.

In the case of *sentenced prisoners*, the issue of effectiveness is complicated by the multiple objectives that the sentence of imprisonment is designed to achieve. If the primary objective is to attempt to ensure that offenders desist from future crime, there is no evidence that imprisonment does that more effectively than community-based alternative punishments. On the contrary, studies on the comparative impact of different forms of punishment on recidivism suggest that imprisonment makes it hard for offenders to adjust to life on the outside after release and may contribute to their re-offending. Using imprisonment to incapacitate offenders works only to the extent that while they are serving their sentences, they are not re-offending in the community. However, the vast majority of prisoners will return to the community, many without the skills to reintegrate into society in a law-abiding manner. Offenders are incapacitated while serving their sentences, but on release are more likely to commit further crime than those who are not imprisoned as part of their sentence. Thus, relying on sentences of imprisonment to prevent criminal re-offending is not an effective strategy in the long term.

1.2 What is to be done?

One of the challenges facing authorities who are seeking to develop the use of alternatives to imprisonment as a way of reducing the prison population is ensuring that, conceptually, alternatives should not be drawn too narrowly. Alternatives are an essential part of all levels and stages of the criminal justice system.

How this handbook will help

This handbook provides concrete help to authorities looking for guidance on the best practices in using alternatives throughout the criminal justice system to reduce imprisonment. The handbook:

- Considers general strategies to reduce the reach of the criminal justice system and thus indirectly avoid the use of imprisonment and

examines different aspects of the issue that one may wish to consider when assessing the needs and demands of a country's criminal justice system (chapter 2);

- Focuses systematically on the implementation of alternatives at all phases of the criminal justice system: the pre-trial phase (chapter 3); the sentencing phase (chapter 4); and the phase at which early release of sentenced prisoners may be considered (chapter 5);
- Highlights strategies to reduce imprisonment in four major groups: children, drug users, the mentally ill and women, for whom imprisonment has especially deleterious effects. They can benefit from alternatives at every level (See the box below for an example of a country reducing imprisonment for drug addicts through the use of alternatives.) (chapter 6);
- Presents the critical components that must be considered in developing a strategy for the development and implementation of a comprehensive range of alternatives to imprisonment in order to reduce the prison population, listing not only key factors and elements, but also the potential pitfalls and ways to avoid them (chapter 7).

Alternatives for drug addicts cut prison numbers

Until a comprehensive reform initiative in 2002, Thailand relied heavily on imprisonment as a means of criminal sanction. By May 2002, some 260,000 inmates, more than double the total capacity, were housed in Thai prisons. Of these, two thirds had been convicted of drug charges and the majority of these inmates were also drug addicts. Of those suspected or accused of drug offences, nine per cent were held awaiting investigation; 14 per cent were held waiting trial; and 12 per cent held pending appeal. Statistics showed that 13 per cent of those convicted of drug offences received terms of less than one year, while 46 per cent were sentenced to from one to five years. With the implementation of successful drug addicts' pre-trial diversion and early release programmes involving strong community participation; the increasing and innovative uses of probation and community-based treatment programmes; and restorative justice initiatives, the prison population has been reduced dramatically. As of August 2005, there were approximately 160,000 inmates, with the population continuing to decline.

Source: For more information, see, e.g., Kittipong Kittayarak, *Diversion Programs for Drug Addicts, Restorative Justice and New Community-based Treatment Measures in Thailand*, a paper submitted to the nineteenth International Conference of the International Society for the Reform of Criminal Law held at Edinburgh, Scotland, 26-30 June 2005 (<http://www.isrcl.org/Papers/2005/kittayarak.pdf>). See also the website of the Department of Corrections at www.correction.go.th.

1.3 Who should develop the strategy to alternatives to imprisonment?

A particular challenge is to ensure that there is a coherent strategy to develop alternatives to imprisonment. Legislators, judicial officers, lawyers, and administrators all have a role to play. They must work together. There is no point in pressing courts, for example, to use alternatives to prison sentences if there is no law allowing such alternatives to be imposed and no administrative structure to implement them.

Political leadership is essential; alternatives to imprisonment cannot be left only to the “experts”. Non-governmental organizations can help ensure that these issues are kept on the political agenda.

Community involvement is equally important. There are many ways in which members of the community can assist in implementing community-based alternatives to imprisonment without putting the rights of offenders at risk. Involving members of the community has the additional advantage that they experience the benefits of keeping people out of prison wherever possible and become more supportive of alternatives to imprisonment generally.

This handbook helps clarify what can be expected of these different actors at each level.

1.4 Potential challenges

Alternatives to imprisonment, though comparatively inexpensive and efficient, may themselves treat offenders in inhuman and degrading ways and would therefore be fundamentally unacceptable.⁴ Others may not inherently infringe human dignity but may still be unacceptable when implemented inappropriately. The alternatives may be problematic not only for offenders. They may not, for example, pay sufficient attention to the concerns of victims of crime or to the legitimate interests of others in society. To help avoid these potential pitfalls, this handbook points out the trouble spots at every level.

A second danger is that initiatives adopted as alternatives to imprisonment may result not in fewer people being held in prison but in additional measures against suspects and offenders who would not otherwise have been subject to the control of the criminal justice system at all. (This is sometimes referred to as “widening the net”.) The handbook emphasizes

⁴Dirk van Zyl Smit, “Legal standards and the limits of community sanctions” (1993), 1 *European Journal of Crime, Criminal Law and Criminal Justice*, pp. 309-331.

the importance of guarding against increasing social control in this way. Programmes that are designed to reduce prison populations must be carefully targeted to ensure that they have the intended effect and avoid unintended widening of the net of social control.

1.5 The role of the United Nations

Given that imprisonment is a restriction, if not an infringement, of fundamental human rights of the prisoner, it is not surprising that that major United Nations treaties limit carefully the circumstances under which imprisonment is justified. The International Covenant on Civil and Political Rights (ICCPR) is perhaps the most important of these multilateral treaties. Other multilateral instruments, such as the United Nations Convention on the Rights of the Child, contain stricter limitations applicable to specific categories of potential prisoners.

Since the mid-1950s, the United Nations has developed and promoted standards and norms to encourage the development of criminal justice systems that meet fundamental human rights standards. These standards and norms represent a collective vision of how to structure a criminal justice system. Although non-binding, they have helped to significantly promote more effective and criminal justice systems and action. Nations use these standards and norms to provide the framework for and to foster in-depth assessments that may lead to needed reforms. They have also helped countries to develop sub-regional and regional strategies. Globally and internationally, they delineate “best practices” and assist countries to adapt them to their specific needs.

The earliest of these, the United Nations Standard Minimum Rules for the Treatment of Prisoners,⁵ deals only with imprisonment. While imprisonment has remained an important aspect of the standards and norms, the range of instruments has increased to cover all aspects of the criminal justice system and crime prevention. Today, the standards and norms cover a wide variety of issues such as juvenile justice, the treatment of offenders, international cooperation, good governance, victims’ protection and violence against women.

Of particular importance, as far as alternatives to imprisonment are concerned, are the United Nations Standard Minimum Rules for Non-Custodial Measures (the Tokyo Rules), which were adopted in 1986.⁶ These Rules have as one of their fundamental aims the reduction of the use of imprisonment.⁷ The specific proposals that the Tokyo Rules make

⁵E.S.C. Resolution 663C(XXIV) of 31 July 1957 U.N. Doc. E/3048 (1957) and 2076(LXII)(1957).

⁶United Nations Doc. A/RES/45/110.

⁷Rule 1.5.

for alternative, non-custodial measures form the basis for a reductionist criminal justice policy. The development of non-custodial measures goes together with a call on States to “rationalize criminal justice policies, taking into account the observance of human rights, the requirements of social justice and the rehabilitation needs of the offender”.⁸ At the same time the fundamental aims of the Rules recognize that States have considerable flexibility in deciding how to implement the Rules.⁹ They emphasize that States should “endeavour to ensure a proper balance between the rights of individual offenders, the rights of victims and the concern of society for public safety and crime prevention”.¹⁰ (For more on the Tokyo Rules, see the box below.)

The Tokyo Rules

The United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules) were first discussed at the Seventh Congress on Crime Prevention and Criminal Justice and were later adopted by the General Assembly (resolution 45/110 of 14 December 1990).

The Rules present a set of recommendations that take into account the views of legal scholars, experts in the field and practitioners. They emphasize that imprisonment should be considered a last resort and encourage the promotion of non-custodial measures with due regard to an equilibrium between the rights of individual offenders, the rights of the victims and the concern of society. The Rules set forth a wide range of non-custodial measures at various stages of criminal procedures. They also contain rules on implementation of non-custodial measures, staff recruitment and training, involvement of the public and of volunteers, research, planning, policy formulation and evaluation, thus providing a comprehensive set of rules to enhance alternative measures to imprisonment.

The Tokyo Rules are not the only United Nations instruments that are directly applicable to alternatives to imprisonment. Others include:

- Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power¹¹
- Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters¹²

⁸Ibid.

⁹Rule 1.3.

¹⁰Rule 1.4.

¹¹United Nations. Doc. A/RES/40/34.

¹²Adopted by the United Nations Economic and Social Council on 24 July 2002, United Nations Doc. E/2002/99.

In specialist areas, considerable attention has been given to alternatives to imprisonment for:

- Juveniles: the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules);¹³
- Drug users: the Guiding Principles on Drug Demand Reduction of the General Assembly of the United Nations;¹⁴
- The mentally ill: the United Nations Principles for the Protection of Persons with Mental Illness;¹⁵ and
- Women: the Seventh United Nations Conference on the Prevention of Crime and the Treatment of Offenders. All of these instruments are considered in more detail in chapter 6.

In addition, the United Nations has published practical guides. The *Criminal Justice Assessment Toolkit*, for example, contains a tool on alternatives called *Alternatives to Incarceration* as well as the cross-cutting issues tool, *Juvenile Justice*. There are also handbooks, such as the *Handbook on Victims*, that deal in passing with the issue of alternatives to imprisonment.

This handbook is designed to build on all these United Nations sources, as well as regional and international best practices, in order to provide a basis for technical assistance on how best to introduce and sustain alternatives to imprisonment.

¹³United Nations Doc. A/RES/40/33.

¹⁴United Nations Doc. A/RES/S-20/3.

¹⁵Principle 7.1 of the United Nations Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care. General Assembly Resolution of 17 December 1991, United Nations Doc. A/RES/46/119.

2. Limiting the criminal justice system's reach



2.1 Decriminalization

The first question is: do particular types of conduct need to fall within the scope of the criminal justice system at all?

Since criminal justice systems are the main consumers of prison resources throughout the world, the first question to ask when tackling the issue of imprisonment is whether particular forms of conduct must fall within the scope of the criminal justice system. Not all socially undesirable conduct needs to be classified as a crime. Decriminalization is the process of changing the law so that conduct that has been defined as a crime is no longer a criminal act.

Various societies have decriminalized vagrancy in whole or in part, significantly reducing rates of imprisonment. Even less-known offences, such as the illicit brewing of liquor, in some countries, may produce a disproportionate number of prisoners. In such cases, decriminalizing the behaviour and dealing with it outside the criminal law does not produce a negative impact on public safety.

Authorities must also take steps to ensure that decriminalization does not result in continued incarceration by an indirect route. Even where conduct is completely decriminalized, there is a risk that officials may still arrest those who are “guilty” of it before handing them over to welfare or medical authorities.

The box below highlights an example of a potential pitfall of decriminalization:

Unintended consequences of decriminalization

Various countries have decriminalized public drunkenness in recent years. This should mean that drunks who once would have been detained pending prosecution are now referred to welfare agencies instead.

Australia decided that indigenous people were grossly over-represented in the prison population and that the system should address this by decriminalizing public drunkenness, a crime for which members of this group were often detained. However, the number of detentions related to public drunkenness increased after the decriminalization. Why? Before handing those found drunk in public over to a welfare agency, authorities now arrested them more freely than in the past before because they did not have to prepare for prosecutions.*

*R. Sarre, *An Overview of the Theory of Diversion: Notes for Correctional Policy Makers*, paper presented at the Best Practice Interventions in Corrections for Indigenous People Conference convened by the Australian Institute of Criminology Adelaide, 13-15 October 1999.

2.2 Diversion

Under diversion strategies, authorities focus on dealing in other ways with people who could be processed through the criminal justice system. In practice, diversion already happens as a matter of course, without recourse to specific strategies. Criminal justice systems typically process only a small proportion of the criminal law offences committed in any country. If countries investigated, prosecuted, tried and convicted all offenders, the various parts of the system, including the prisons, would soon be unable to cope with the numbers. As a result, police and prosecutors, who introduce offenders into the system, have to exercise a degree of discretion in deciding whom to take action against and whom to ignore.

The key question in all criminal justice systems is how to structure this discretion. Members of police services need to have clear instruction on when they can themselves issue warnings and take no further action, when they may be able to divert qualifying offenders to alternative programmes without referring the case to the prosecuting authorities, and when they must refer alleged offences to prosecuting authorities. Similarly, prosecutors need clear guidelines. Both police and prosecutors need to consider the views of victims of the alleged offences, although victims have no veto over state action in the criminal justice sphere.

Strategies of restorative justice, the subject of a separate United Nations handbook, can play a crucial part in decisions about diversion. Where existing mechanisms allow for dispute settlement by restorative means, they may also encourage the use of alternatives to imprisonment. The use

of mediation and alternative dispute resolution in meetings with offenders, victims and community members to deal with matters that would otherwise be subject to criminal sanctions has the potential to divert cases that might otherwise have resulted in imprisonment both before trial and after conviction.

Community-based mediation diverts cases

The legal system of Bangladesh is extremely formal, complex, urban-based, time consuming and financially draining. As a result, many Bangladeshis, particularly the poor, illiterate and disadvantaged living in rural areas, have had difficulty enforcing their rights through the formal justice system. Where conflicts arise and no means exist to resolve them within the community, even relatively minor issues may escalate into disputes involving criminal behaviour.

To improve the situation, the Madaripur Legal Aid Association turned to a traditional system of mediation and dispute resolution in rural Bangladesh. In this system, disputants, community members and village elders gathered to mediate conflicts. The Association agreed to revitalize and reform the system, which had fallen into disrepute, based on the principles of fairness, equality, and non-discrimination.

Donor and support agencies collaboratively trained 1,500 mediation committee members in 1999-2000. To ensure that mediation committees observe international human rights standards and maintain a high level of professionalism in mediating disputes, the Association facilitates several training sessions each year.

In 2001-2002, the Association handled 7,175 applications for mediation. Of these, 4,711, or 66 per cent, were resolved amicably by mediation, 26 per cent were dropped or remained pending at year's end and eight per cent were referred for litigation. The successful mediations dealt with such issues as marriage and divorce, dowry, land ownership and financial disputes.

Source: Alternative Dispute Resolution: Community-based mediation as an auxiliary to formal justice in Bangladesh: the Madaripur Model of Mediation (MMM). Penal Reform International, 2003.

The problem of determining which crimes to investigate and whom to prosecute is particularly acute in states where a new democratically elected government has replaced a repressive regime, members of which may have committed a wide range of serious crimes with impunity. Some of these crimes may represent grave offences against international human rights law, which all states have a duty to prosecute. On the other hand, it may be beyond the powers of the incoming government to investigate all the offences that its predecessors committed.

One solution is to have a truth commission investigate past abuses in general terms. In some instances such commissions have been combined with prospective conditional amnesties, which can be granted even to offenders who have not been convicted of any crime. Such offenders are required, however, to make a full and public disclosure of their crimes in order to qualify for an amnesty. The amnesty means that they will not be prosecuted. However, the disclosure means that crimes that they committed do not go unrecognized, as would be the case if immunity from prosecution were to be granted without requiring any response from those benefiting.

Conditional amnesties of this kind are a radical form of diversion. They should not be confused with blanket amnesties that are not supported by international instruments.¹⁶ While not uncontroversial, they offer a compromise solution that can be used in a period following regime change.

2.3 Who should act?

The involvement of the following individuals and groups is essential:


Legislators must be willing to introduce legislation to the law to decriminalize certain forms of conduct.

Public advocacy groups and **non-governmental organizations** may bring public interest litigation in appropriate cases, helping trigger legislative reform of existing criminal codes. Such groups can be effective in driving change because they represent both the human rights interests of those whose conduct has been criminalized as well as the greater community's interests in the improvement of the criminal justice system.

Legal drafters and **law reform commissions** must ensure unnecessary criminal provisions are not added to general legislation. National law reform commissions should also keep criminal codes under review and draw the attention of the political authorities to criminal provisions against forms of conduct than can be controlled just as or more effectively in other ways. In such cases, the legislature should repeal such criminal provisions and develop enabling legislation for alternative measures.

Police and the **prosecuting authorities** should take the lead in diverting suspects out of the criminal justice system. Where the diversion is linked to mediation or even full restorative justice processes, a separate administrative structure is needed to facilitate these processes, provided either by the state or by non-governmental organizations partnering with criminal justice agencies.

¹⁶2005/81.



3. Pre-trial, pre-conviction and pre-sentencing processes

3.1 General

Despite decriminalization and diversion strategies, some persons accused of crimes will be formally charged and prosecuted. Authorities must decide whether to detain those accused prior to and during their trials. Rule 6.1 of the Tokyo Rules clearly states the relevant principle:

“Pre-trial 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.”¹⁷

The detention of persons who are presumed innocent is a particularly severe infringement of the right to liberty. The question of what justifies such detention is very important. While Rule 6.1 is somewhat vague in this regard and its qualifications incomplete, it is reinforced by the International Covenant on Civil and Political Rights (ICCPR), which provides guidance for those involved in a criminal process but who have not yet been convicted or sentenced. Article 9.3 of the ICCPR provides that:

“It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.”

¹⁷Rule 6.1. Emphasis added. There is a variation in state practice in this area. In some states prisoners are not regarded as sentenced prisoners until all avenues of appeal have been exhausted. In others they are treated as sentenced prisoners once a sentence has been imposed. For the purpose of this chapter, all prisoners who are not treated as sentenced prisoners are regarded as being in a form of “pre-trial” detention.

In addition, Article 14.3 of the ICCPR stipulates that those tried on a criminal charge are entitled to a trial without undue delay. Requiring a speedy trial minimizes the period of pre-trial detention. In addition, accused persons may only be detained before trial where there is reasonable suspicion that they have committed an offence and where the authorities have substantial reasons to believe that, if released, they would abscond or commit a serious offence or interfere with the course of justice. The criminal justice system should resort to pre-trial detention only when alternative measures are unable to address the concerns that justify the use of such detention.

Using pre-trial detention as a preliminary form of punishment is never acceptable.

Decisions about alternatives to pre-trial detention should be made at as early a stage as possible. When the decision is to keep a person in pre-trial detention, the detainee must be able to appeal the decision to a court or to another independent competent authority.¹⁸

Authorities must also regularly review the initial decision to detain. This is important for two reasons. First, the conditions that initially made detention necessary may change and may make it possible to use an alternative measure that will ensure that the accused person appears in court when required.

Second, the longer the unjustified delay in bringing a detainee to trial, the stronger such a detainee's claim for release from detention and even for dismissal of the criminal charges against him or her. The decision to detain an accused person awaiting trial is essentially a matter of balancing interests. The suspect has a right to liberty, but the combination of circumstances described above may mean that the administration of justice might require its temporary sacrifice. The longer the suspect is detained, the greater the sacrifice of that fundamental right. In applying constitutional or statutory guarantees of fundamental rights, including freedom and speedy trial, a reviewing body may well decide that continued detention is no longer justified and order a detainee's release or that the case be dismissed in its entirety.

In many countries, unacceptably large numbers of prisoners continue to await trial and sentence inside prison. A highly effective way to reduce their numbers is to ensure that their right to a speedy trial, which is guaranteed in various international instruments, is observed in practice. How is this best achieved?

Countries may need to review trial procedures to make the system function more efficiently. The early disclosure of the prosecution case, for example, may eliminate many delays.

¹⁸Rule 6.2.

Speedy trials depend on inter-agency cooperation. Police and the prosecuting services must communicate at the earliest possible stage of the criminal process. In systems that have investigating judges, they, too, need to become involved at that earliest possible stage. Administrative liaison can achieve a great deal, but countries may also need to amend the rules of criminal procedure to eliminate bottlenecks.

Finally, judicial control of the criminal justice process allows the judiciary to ensure the right to a speedy trial by applying procedural rules strictly. Postponements of cases for further investigation or long delays in bringing them to trial should be the rare exceptions when the suspect or accused person is detained in custody.

3.2 Alternatives to pre-trial detention

The focus up to this point has been avoiding unnecessary pre-trial detention without necessarily putting anything in its place. In many instances, however, avoiding pre-trial detention requires that alternative measures replace it. Such measures ensure that accused persons appear in court and refrain from any activity that would undermine the judicial process. The alternative measure chosen must achieve the desired effect with the minimum interference with the liberty of the suspect or accused person, whose innocence must be presumed at this stage.

Those deciding whether to impose or continue pre-trial detention must have a range of alternatives at their disposal. Tokyo Rule 6.2 mentions the need for alternatives to pre-trial detention but neither the Rules nor the official Commentary explains what such alternatives might be.

Possible alternatives include releasing an accused person and ordering such a person to do one or more of the following:

- to appear in court on a specified day or as ordered to by the court in the future;
- to refrain from:
 - interfering with the course of justice,
 - engaging in particular conduct,
 - leaving or going to specified places or districts, or
 - approaching or meeting specified persons;
- to remain at a specific address;
- to report on a daily or periodic basis to a court, the police, or other authority;
- to surrender passports or other identification papers;
- to accept supervision by an agency appointed by the court;

- to submit to electronic monitoring; or
- to pledge financial or other forms of property as security to assure attendance at trial or conduct pending trial.

3.3 Considerations in implementing alternatives to pre-trial detention

Alternatives to pre-trial detention do restrict the liberty of the accused person to a greater or lesser extent. This burden increases when authorities impose multiple alternatives simultaneously. Those deciding must carefully weigh the advantages and disadvantages of each measure to find the most appropriate and least restrictive form of intervention to serve as an effective alternative to imprisonment.

In cases where a person is known in the community, has a job, a family to support, and is a first offender, authorities should consider unconditional bail. In all cases where the offence is not serious, unconditional release should be an option. Under unconditional release, sometimes known as personal recognizance, the accused promises to appear in court as ordered (and, in some jurisdictions, to obey all laws). Sometimes a monetary amount may be set by the court that would be paid only if the court determines that the accused has forfeited what is known in some jurisdictions as an “unsecured personal bond” by failing to appear in court or committing a new offence while in the community pending trial. In other cases, pre-trial release may be predicated upon additional requirements. Courts may require the accused, a relative or a friend to provide security in the form of cash or property, a measure designed to ensure that the accused has a financial stake in fulfilling the conditions imposed regarding court appearance and behaving in other specified ways. This form of bail affords an immediate sanction if the accused fails to obey the conditions set for releasing him from pre-trial detention: the bail money or property is forfeited to the state.

In many countries, this security takes the form of monetary *bail*, or money that the accused pays to a court as a guarantee that he or she will conform to the conditions set for pre-trial release. Variations on this are possible. For example, the accused may not necessarily have to pay the money over directly to the court (or in some instances to the police), but rather provide a so-called bail bond or surety that guarantees that he, or someone acting on his behalf, will pay the money if called upon to do so.

Authorities should confirm that the accused person is able to meet the requirements that are set. If not, it is likely that the accused person will return to pre-trial detention. The following should be considered when evaluating the various requirements that might be imposed:

- A requirement to appear in court as ordered may appear on its face a minimal requirement. Even so authorities should ensure that required court appearances are not excessive in number and that the scheduled hearings are meaningful in that they move a case toward completion. Long delays in finalizing cases are unacceptable even when the accused is not in pre-trial detention.
- While common law countries in particular make widespread use of monetary bail as a precondition for release, it can be argued that the measure unfairly discriminates against the poor. Well-to-do accused persons are better able to post bail than the poor. Courts can help minimize this potential unfairness by setting realistically proportionate bail amounts to the accused person's means, where bail is considered necessary to ensure the appearance of the accused for trial. In practice, however, courts tend to set the amount of bail with the seriousness of the offence in mind, so that those facing a long term of imprisonment may receive a higher bail requirement than they are able to meet financially. The result is that a court may decide that an accused person should be released subject to the posting of a bail, but in practice that person remains in jail, unable to meet the stipulated bail, even where the amount may seem modest but exceeds the accused person's means. This undermines the court's finding that, in principle, the accused person is not someone who needs to be kept in prison pending trial.
- Orders restricting certain activities of the accused may effectively counter specific threats posed by the accused person in the community. However, they may also hinder the accused person's legitimate activities. An order to refrain from certain forms of conduct or to stay away from a specific location or district, may, for example, make it difficult or impossible for the person to work while awaiting trial. Authorities should avoid such restrictions whenever possible or tailor such restrictions as narrowly as possible. If necessary, they should search for a way to compensate for the loss of the ability to earn a living.
- A requirement to surrender identity documents such as passports is an effective tool to prevent the flight of an accused person. Such a requirement may cause unintended consequences. Authorities should consider whether the accused needs the documents to work, withdraw money, or interact with the state bureaucracy. In some countries, courts may order that the defence counsel for the accused take possession of such documents, with leave to allow their appropriate use.
- Direct supervision in the community by a court-appointed agency gives the authorities considerable control over the accused person, but it is an intrusive alternative that greatly limits freedom and privacy. Direct supervision is also expensive, as the agency that performs it has to provide a resource intensive service.

- Electronic monitoring serves as an additional means of surveillance that can monitor compliance with other measures. It can determine, for example, whether a person is obeying an order to remain at a specific address or to keep away from a specific district. It is, however, relatively intrusive, requires considerable technological sophistication to implement, and can be subject to legal challenges as to its proper functioning in the event of data associated with violations being used as the basis of revocation of pre-trial release.
- Finally, the collision of long trial delays with a lack of public understanding of pre-trial release and of the presumption of innocence prior to trial as fundamental rights may produce, among developing countries and elsewhere, the misapprehension that an accused has “gotten away” with the crime and will go unpunished. This has unfortunately led to some in the community to take justice into their own hands when the accused has been released pre-trial—sometimes with fatal results. In addition to the prompt and meaningful resolution of pending criminal cases, public education regarding pre-trial release and the presumption of innocence is essential to promote safety in the community.

Pre-trial release in Latin America

Some Latin American countries allow for the release of accused persons on their own recognizance. Although this measure may be available in theory, conditional release secured by cash or other property is used far more often. As a result, pre-trial prisoners unable to meet the terms required for their release make up a large proportion, sometimes even an absolute majority, of all prisoners held. Such a population can be reduced by careful examination of individual cases to determine who might qualify for personal recognizance pending trial.* Empirical research in Costa Rica suggests that to employ this measure successfully, courts need ready access to comprehensive information about the accused, set regular court dates, and maintain close and regular contact with the accused and, possibly, with their relatives.**

*Elias Carranza, Nicholas J. O. Liverpool and Luis Rodriguez-Manzanera, “Alternatives to Imprisonment in Latin America and the Caribbean” in Zvekic (ed.) op. cit., pp. 384-438.

**Elias Carranza, Mario Houwed and Luis Paulino Mora “Release on Personal Recognizance in Costa Rica: An experimental Research Study” in Zvekic (ed.) op. cit., pp. 439-462.

3.4 Infrastructure requirements for alternatives to pre-trial detention

The advantages and disadvantages of various alternatives to pre-trial detention are often debated in the abstract, as if the deciding authority

could choose freely among various options. But for alternatives to function properly, the state must first create the appropriate framework. For some alternatives, the state needs only a formal legal authorization that allows their use; in other cases, it must set up a more elaborate infrastructure.

For a limited number of alternatives to pre-trial detention, a legislative framework is all that is needed. With that in place, an authority can release an accused person pending trial on the basis of a pledge that he or she will appear before a court. Similarly, no supervisory mechanisms are needed to impose requirements that the accused person not interfere with the course of justice, not engage in particular conduct, not leave or enter specified places or districts, not meet specified persons or remain at a specific address.

In most cases, however, the authority that makes the decision to release a person into the community will want to ensure that there are mechanisms in place to assure compliance with the conditions set. These mechanisms also help reassure and protect victims of crime. Each of the following conditions for release needs some development of infrastructure:

- Reporting to a public authority requires that the authority—the police or the court, for example—is accessible at reasonable times to the accused person and that it has in place an administrative structure that is capable of recording such reporting reliably.
- Surrendering identity documents also requires a careful bureaucracy that can ensure that such documents are safely kept and returned to the accused when the rationale for retaining them is no longer supported by the circumstances.
- Direct supervision requires that there be an entity that can conduct such supervision.
- Electronic monitoring requires a considerable investment in technology and the infrastructure to support it.
- Provision of monetary security requires sophisticated decision-making to determine the appropriate level of security as well as a bureaucracy capable of receiving and safeguarding monetary payments.

3.5 Who should act?

The involvement of the following individuals and groups is essential:

Law enforcement officials typically have the first contact with the suspects. They have a particular duty to keep any detention as short as possible. By conducting investigations speedily, they can ensure that the time for which suspects and persons awaiting trial are incarcerated is kept to a minimum.

Prosecuting authorities also have an important role in ensuring speedy trials and thus minimizing pre-trial detention. They act as the

link between the police and the courts, which puts them in a crucial position to speed up the criminal process and to suggest or urge, where appropriate, the use of alternatives to pre-trial detention.

Defence lawyers have the obligation to advocate vigorously on behalf of their clients and to assert their clients' rights, including pre-trial release and prompt resolution of the investigation and any resulting charges against them. Where fully qualified defence lawyers are not readily available to represent criminal suspects and the accused, paralegals may perform this function.

The judiciary must foster recognition of the right of accused persons to the presumption of innocence; that pre-trial detention should be the exception rather than the norm; and where detention is ordered, that the status of detained defendants and suspects must be reviewed; and finally that the conduct of criminal trials and related proceedings be expeditious, as required by law.

Administrators have a crucial role to play in creating both an infrastructure that makes it possible to implement suitable alternatives to pre-trial detention and a case management system that provides sufficient resources for the timely and meaningful resolution of criminal cases.

4. Sentencing and alternative punishments



4.1 Sentencing

*Key questions at sentencing:
Is imprisonment absolutely necessary?
What minimum imprisonment period will suffice?*

The sentencing of convicted offenders constitutes the most deliberate and frequent use of imprisonment. The key guiding principle to be used, if imprisonment is to be reduced, is that of parsimony, that is, the imposition of imprisonment as sparingly as possible, both less often and for shorter periods. A careful examination of each case is necessary to determine whether a prison sentence is required and, where imprisonment is considered to be necessary, to impose the minimum period of imprisonment that meets the objectives of sentencing.

The focus should not be only upon changing the practices of the judiciary in sentencing, however. Many criminal systems operate within a legal framework that imposes mandatory minimum terms of imprisonment for certain offences without further consideration of the facts of a case. As a first step in reducing the use of imprisonment, reformers should review the legal framework for sentencing. Not only should judges be encouraged to consider alternatives to imprisonment, they must have the legal authority to exercise discretion in sentencing and the ability to consider alternatives under the law. Specific legislative reforms may also reduce the number of prisoners. For example, a legislative requirement to take into consideration at sentencing the time an offender spent in pre-trial detention might promote shorter overall imprisonment. The box below details a practical example of revising legislation.

Legislating the use of alternatives

A working group on alternatives to imprisonment in Kazakhstan, facilitated by Penal Reform International, brought together representatives from all relevant governmental departments and non-governmental organizations to formulate suggestions to amend criminal legislation. The group's recommendations exerted significant influence on a new law that took effect on 21 December 2002, which increased the use of alternatives to imprisonment, rationalized sentencing policy, and relaxed the requirements toward gaining early conditional release, among other measures.

The prison service, recognizing the need for public support for penal reform, to be successful, conducted a massive public awareness campaign on the harmful effects of imprisonment and the benefits of alternatives.

The reform reduced the prison population and increased use of non-custodial sentences. Just as notably, during the period of decreasing use of imprisonment (since 2002), the crime rate also steadily decreased with the rate in 2005 lower than the crime rate in 2000.

The legislative basis for alternatives and other measures seeking to reduce the prison population should lead at least to a stabilization of the prison population in coming years, a significant achievement when prison population figures are rising in many countries of the world.

Parsimonious use of imprisonment can be achieved when courts impose non-custodial sentences. Such alternatives will first be discussed in detail below, followed by a discussion focusing on the potential role such alternatives have on the sentencing process. It is important to note that non-custodial sentences should serve as *alternatives* to imprisonment, rather than as *additional* penalties imposed on people who would not have been sentenced to imprisonment in the first place. This principle is clearly stated in the Tokyo Rules: “Non-custodial measures should be used in accordance with the principle of minimum intervention.”¹⁹

“Non-custodial measures should be used in accordance with the principle of minimum intervention.”

—Tokyo Rules

4.2 Possible alternatives to sentences of imprisonment

Alternatives to imprisonment, like imprisonment and other forms of punishment, may not be cruel, inhuman, or degrading. Even if they are not inherently so, alternatives may violate human rights standards and norms if used inappropriately or improperly. Moreover, no matter what the

¹⁹Rule 2.6.

motivation for the imposition of a particular alternative may be, it should be recognized that the offender receiving it will experience it as punitive.

What is an acceptable punitive element for an alternative to a sentence of imprisonment? A penal philosopher has suggested that community sanctions, which make up an important part of such alternatives, should “be of a kind that can be endured with self possession by a person of reasonable fortitude”.²⁰ As a general test, this is a sound point of departure. It excludes corporal punishment, for example, because it directly attacks the offender’s health and/or well-being. It would also rule out sanctions that, while they pose no threat to the physical integrity of offenders, would nevertheless humiliate them. The Tokyo Rules require that “[t]he dignity of the offender subject to non-custodial measures shall be protected at all times.”²¹ This Rule is complemented by a further provision protecting the right to privacy of both the offender and his family in the application of non-custodial measures.²²

Imprisonment has an obvious punitive element: the loss of liberty. The punitive element of alternative sanctions may not be so easily identifiable, all the more so if the alternative sanction itself is not clearly defined by the legal framework. Where a court imposes a general sentence of community service, but delegates to another entity the extent and conditions of that service, the sentence is both undefined and unpredictable, undermining basic rule of law principles. The Tokyo Rules recognize the danger of such arbitrary sentencing and require, in peremptory terms: “The introduction, definition and application of non-custodial measures shall be prescribed by law.”²³ The rule limits the power of courts to create and impose what are known as bespoke sentences, that is, unique non-custodial punishments that do not derive from an established penal framework.

The legal definition of sentencing alternatives also helps avoid excesses in otherwise acceptable sentences. Where the law provides for some form of community work as a non-custodial punishment, it should also require the court to determine total hours to be worked, and where an appropriate protocol (one that complies with human rights standards and norms) has not been approved by the judiciary, limit the maximum number of hours per day and week a person under such sentence may be required to work. The court should also stipulate precisely and communicate clearly the conditions that individual offenders must meet.²⁴ Like other alternative sanctions, community service also requires the formal consent of the offender on whom it is being imposed.

²⁰A. von Hirsch, “The Ethics of Community-Based Sanctions” (1990) 36, *Crime and Delinquency*, pp. 163-173.

²¹Rule 3.9.

²²Rule 3.11.

²³Rule 3.1.

²⁴Rules 12.1 and 12.2.

The Tokyo Rules list a wide range of dispositions other than imprisonment for the sentencing stage and which, if clearly defined and properly implemented, have an acceptable punitive element:

- (a) Verbal sanctions, such as admonition, reprimand, and warning;
- (b) Conditional discharge;
- (c) Status penalties;
- (d) Economic sanctions and monetary penalties, such as fines and day-fines;
- (e) Confiscation or an expropriation order;
- (f) Restitution to the victim or a compensation order;
- (g) Suspended or deferred sentence;
- (h) Probation and judicial supervision;
- (i) A community service order;
- (j) Referral to an attendance centre;
- (k) House arrest;
- (l) Any other mode of non-institutional treatment;
- (m) Some combination of the measures listed above.²⁵

The Tokyo Rules list alternative sentencing dispositions, but they neither describe the substance of these dispositions nor do they elaborate on the administrative structures needed to implement them as realistic sentencing alternatives to imprisonment, not the least of which is a decision-making process that is supported by key stakeholders in the criminal justice system as well as the public in general. Alternative dispositions to sentencing will be discussed in greater detail in section 4.3 below, with a discussion in section 4.4, which follows, of the general umbrella of administrative support and infrastructure structure needed to implement sentencing alternatives so that they are readily available and accessible.

4.3 Specific non-custodial sentences

Because the terminology used to describe non-custodial sentences varies greatly across the world, the terminology in this handbook is consistent with that used in the Tokyo Rules in describing the substance of alternative sentencing dispositions and their administrative requirements. However, other terms, and indeed other non-custodial sentences, may also be acceptable if their punitive elements meet the standards of human dignity and the rule of law discussed above.

²⁵Rule 8.2.

These include:

- (a) **Verbal sanctions**, such as admonitions, reprimands, warnings or unconditional discharges accompanied by a formal or informal verbal sanction are some of the mildest responses that a court may upon a finding of guilt or legal culpability. Where the appropriate legal frameworks are in place, such a sentencing disposition may be imposed without further ado. Although they are formally sanctions, they have the effect in practice of ensuring that the criminal justice system is not further involved in the matter. They require no administrative infrastructure.
- (b) **Conditional discharges** are also easy to impose. However, authorities may need to set up some mechanism in the community to ensure that the conditions that a court may set when discharging the offender without imposing a further penalty are met. If authorities task the existing police force with this responsibility, they should recognize the additional administrative burden it entails.
- (c) **Status penalties** deny the offender specified rights in the community. Such a penalty might, for example, prevent someone convicted of fraud from holding a position of trust as a lawyer or director of a company. It might prevent a doctor convicted of medical malpractice from continuing to practice medicine. Status penalties should relate the loss of status to the offence and not impose restrictions on offenders that are unconnected to the offence committed.

On their face, status penalties are also less expensive alternatives to imprisonment. The court can impose them easily if it has the relevant information about the status of the offender. Status penalties, however, can have hidden costs. They may prevent the offender from earning a livelihood, and, if the offender's skills are scarce, the whole community may suffer from his/her professional ban.

- (d) **Economic penalties** are among the most effective alternatives in keeping many offenders out of prison. Fines also appear relatively simple to use, but the imposition of fines and their implementation require some administrative support.

Some believe that setting fixed fines for specified offences avoids difficult questions about what the amount of the fine should be in a particular case. However, a fixed fine hits the poor much more harshly than the rich. Courts should therefore reserve fixed penalties for relatively petty offences for which imprisonment would not normally be considered or where it may be assumed that all offenders have some income from which to pay the fines. Speeding fines—where the amount of the fine is linked directly to the extent to which the speed limit was exceeded—are examples of the latter.

In other cases, the requirements of equality demand that an attempt should be made to ensure that the fine is also related to the income of the offender so that the fine should have an equal “penal bite”. Often the court can manage this by inquiring into the income of the offender and then adjusting the fine upwards or downwards as warranted. This method can, however, only provide a rough equivalence between offenders of differing financial means. The box below gives an example of how to deal with this issue.

Striving for equality in fines: day fines

A more sophisticated way of relating fines to the ability of offenders to pay them is by means of a system of day fines (sometimes also known as “unit fines”). In this form of fining, the seriousness of the offence is first expressed in terms of a number of “days” or “units”. The average daily income of the offender or the average daily surplus of the offender is then determined. The actual fine is calculated by multiplying the number of days (units) by the average daily income or average daily surplus of the offender.*

*Hans Thornstedt, “The Day-Fine System in Sweden”, 1975 *Criminal Law Review*, pp. 307-312; Gary M. Friedman “The West German Day-Fine System: A Possibility for the United States” (1983), 50 *University of Chicago Law Review*, pp. 281-304; Tapio Lappi-Seppälä “Public Perceptions of the Dayfine System; An evaluation of the 1999 dayfine reform” *JFT* 3-4/2004.

The administration of a system of fines requires a relatively complex bureaucracy attached to the court system. The bureaucracy must provide for the receipts from fines as well as transferring payment to the state. Inadequate monitoring provides fertile ground for corruption. Further, for a day-fine system to function fairly, the bureaucracy must have an accurate way to determine the income of offenders. Where a state has a tax system that generates reliable data about individual incomes and where the law allows such data to be used by the courts, this might not be a problem. However, in many countries, accurate information of personal income is difficult to obtain without considerable effort and expense.

Fine defaulters should not face automatic imprisonment if they fail to pay their fines. Authorities should pay attention to other possible solutions to deal with defaulters. For example, they may work in the community, or the state may provide them with work, so that they can pay their fines with the proceeds of their labour.

- (e) **A confiscation or an expropriation order** is mentioned by the Tokyo Rules as a type of sentencing case disposition. However, many jurisdictions do not regard this as a sentence to be imposed by a court at all, but merely as a consequence that follows a crime. In some jurisdictions, the confiscation and forfeiture mechanisms may reside beyond the jurisdiction of the criminal courts. The statutory framework, wherever it resides, may direct that authorities confiscate the proceeds of crime and, upon liquidation of non-monetary assets, forfeit the money to the state. To implement confiscation orders fairly, however, courts need detailed evidence showing that particular monies found in the possession of an offender are the product of the crime rather than legitimate income from other sources.

Expropriation orders must be linked closely to the crime or they can become problematic. In fact, expropriation is more comparable to a fine paid in kind rather than in money. For an expropriation order to be proportionate to the crime, a careful investigation must be made in the same manner as for a day fine (above). The attendant effort in assessing the material position of the offender is similar, but the state has the added burden of dealing with the goods or property that might be expropriated from the offender.

- (f) **Restitution to the victim or a compensation order** both overlap to some extent with a fine in that, from the perspective of the offender, they are economic penalties. They are also subject to similar challenges in determining an amount proportionate to the ability of the offender to pay. The box below provides a practical example of compensation.

Tradition favours compensation

Research in Nigeria and other African countries shows that there is a long tradition of paying compensation to victims in lieu of other punishment for even the most serious of crimes. Often such compensation is simply paid outside the formal legal process and the criminal law is not invoked at all. In part, this happens because the criminal law is not flexible enough to recognize the need for compensation. Additional provision for such orders is required, which would also help avoid situations where offenders privately buy their way out of publicly taking responsibility for their crimes.*

*Adedokun A. Adeyemi, "Personal Reparation in Africa: Nigeria and Gambia" in Zvekic (ed.) *op. cit.* pp. 53-66.

From a wider perspective, restitution and compensation fulfil other important criminal justice goals. Experts recognize provisions for victims as an important objective of criminal justice. Of particular significance in this regard is the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, which provides that, where appropriate, offenders should make restitution to victims, their families or dependants.²⁶ Such restitution, the Declaration explains, “should include the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of victimization, the provision of services and the restoration of rights”.²⁷

The Tokyo Rules do not define compensation orders; however, compensation orders can be taken to refer to victim restitution as well, in particular in a sentencing order in which a payment is required to be made to a state-run victim compensation fund. In this manner, the victim is guaranteed redress without having to wait for the offender to complete payment of the order.

The *Handbook on Justice for Victims* elaborates on the general value of restitution and compensation, pointing out that this is a socially constructive sentence that also offers “the greatest possible scope for rehabilitation”.²⁸

From the specific perspective of alternatives to imprisonment, the court must pay careful attention to the assessment of victim loss when imposing restitution, whether directly or by formal compensation order to which the state must contribute. It can do this in various ways. The *Handbook on Justice for Victims* suggests the following:

In some jurisdictions, the prosecutor negotiates directly with the defence counsel, after substantiating all losses with the victim. In other cases, assessments of the loss may be made solely by the probation officer as part of the pre- [trial] *sic* sentencing investigation. No matter how the process occurs, the victim is generally required to present receipts or other evidence to substantiate the actual losses suffered. In Canada, the Criminal Code provides that restitution can be ordered as an additional sentence to cover “readily ascertainable” losses.²⁹

²⁶Article 8 of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.

²⁷Article 8.

²⁸*Handbook on Justice for Victims*, p. 47.

²⁹*Ibid.*

In jurisdictions that follow a French or German model, the victim, represented as *parti civile* or *Nebenkläger* by counsel, assists the court at the trial. Such a representative should help provide the information on which such restitution or compensation can be based, but the court bears the ultimate responsibility in this regard. If compensation claims can be considered at the time of the criminal trial, this will bring victims relief and means that they do not have to bring a subsequent civil action. In some jurisdictions, however, there are legal obstacles to adopting this practice.

The implementation of restitution to the victim may require a degree of supervision by the state. In practice, it may be difficult for the court that orders such restitution to supervise its payment, and it may need the involvement of the probation service (see below) or a similar bureaucracy involved in the administration of sentences to put it into practice. Alternatively, a court may be able to rely on the community to ensure that the compensation is actually made as ordered. Care must be taken however, to ensure that the authority given to a community to enforce compensation is strictly limited.

A victim compensation scheme, particularly if it is paid by the state in the first instance, requires a major investment in administrative infrastructure. The form that this takes will vary according to the social welfare or criminal justice systems in place when such a scheme is introduced. It may be possible, for example, to make compensation payments through an existing system. Other countries have found it more effective to set up a separate victim compensation fund with its own administration. Such a fund can then consolidate payments from fines, compensation paid by offenders, and other sources, using them to guarantee compensation to victims. One drawback is that offenders are very often so poor that the amount they are able to contribute is negligible. The difficulty in finding the additional resources to provide adequate compensation and to pay for the administration of the fund may make it an unrealistic proposition in developing societies.

- (g) **Suspended or deferred sentences** are dispositions that a court can impose without much difficulty. The suspended sentence, where a sentence of imprisonment is pronounced, but its implementation suspended for a period on a condition or conditions set by the court, is ostensibly an attractive alternative to imprisonment. The threat of imprisonment is made (and heard by the public) and, it is hoped, has a deterrent effect, but ideally the sentence will not need to be imposed because the conditions have been complied with by the person under sentence.

Even suspended and deferred sentences create some extra administrative obligations at the implementation stage. If the conditions of suspension or deferral are not met, an administrative structure must ensure that the suspended or deferred sentence is imposed, including the scheduling of a hearing to determine whether the terms have been violated. While this may seem relatively simple, a degree of sophistication is required in the procedures when sentence is imposed for a subsequent offence, if that is also the basis for the revocation of the deferral or suspension of sentence. The administrative structure must take steps to ensure that, if necessary, earlier suspended sentences are brought to the attention of the court or the earlier process of sentencing that may have been deferred is revived. Suspended sentences should, however, not be triggered automatically; the authorities should decide in each instance whether imposition of the sentence is appropriate.

If the conditions of suspension or deferral are more complex, an entire bureaucracy may be required to ensure that infringement of such conditions is brought to the attention of the court so that it can decide whether to bring the suspended sentence into effect or impose a sentence where it has earlier deferred from doing so.

- (h) **Probation and judicial supervision** are not defined in the Tokyo Rules or even discussed in the official commentary on the Rules. Perhaps this is not surprising as there are different understandings of probation. In many jurisdictions, the function of probation historically was almost exclusively one of welfare. Placing an offender “on probation” meant only that a social welfare service would pay particular attention to an offender’s welfare and other needs. While this is still the case in many countries, in others, the probation service has evolved into an agency that is primarily responsible for ensuring that offenders carry out orders of the court about what they must or must not do to remain in the community instead of being imprisoned. This “intensive probation”, as it is sometimes called,³⁰ may form part of the probation order and may help protect victims of crime against offenders. Alternatively, the probation order may relate to other sentencing dispositions that are implemented in the community. For the purposes of this handbook, we will characterize the probation service as the entity of government that provides information to the criminal justice system, particularly on sentencing, and/or monitors whether offenders meet the requirements of community sentences imposed upon them, while assisting them with problems they might face.

³⁰See N. Morris and M. Tonry, *Between Prison and Probation: Intermediate Punishments in a Rational Sentencing System*, Oxford University Press, New York, 1990.

Whatever the emphasis in probation, a court cannot order probation without the existence of an appropriate service infrastructure. The probation service must provide the court with the information it needs. These may be known as the social inquiry reports to which the Tokyo Rules refer.³¹ Such reports describe the background of offenders, detail the circumstances of their lives relevant to understanding why they committed their offences, and recommend sentencing alternatives, such as treatment for substance abuse, which may help the offender change the behaviour that triggers offending. They must also include information about how the offender is likely to cope in the community as well as with any conditions or restrictions the court might consider imposing.

Most importantly, the probation service must be able to implement the probation order of the court by providing the service support and supervision of other conditions of probation that the court imposes. This may include the implementation of other community dispositions such as restitution to a victim, conditionally suspended and deferred sentences, and even community service orders and house arrest. The Tokyo Rules refer to judicial supervision in the same context as probation. While the courts cannot carry out supervision directly, they may be able to involve community organizations in this function.

- (i) **A community service order** requires an offender to do unpaid work for a specified number of hours or to perform a specific task. As its name suggests, the work should provide a service to the community. Before imposing such an order, the court needs reliable information that such work is available under appropriate supervision. The box entitled “Using community service orders, to address drunk driving” provides a practical example of the use of community service orders.

Community service requires close supervision to verify that the offender does the work required and that he or she is neither exploited nor forced to work beyond what is required or under unacceptable conditions. In many jurisdictions, the probation services or officials performing an equivalent function bear primary responsibility for ensuring that these requirements are met.

The importance of public participation in the implementation of non-custodial measures is emphasized in the Tokyo Rules³² and community service orders can be a good place to contemplate such participation. Members of the community can provide work opportunities for offenders; they should not, however, perform enforcement or disciplinary functions. For

³¹Rule 7.1 and section 4.4 below.

³²Rule 17.

example, they should not make the final decision on whether an offender has failed to perform community service as ordered by the court, as this may well determine whether further steps are taken against him. The box entitled “Helping local institutions through community service” illustrates a case study of a member of the public helping develop a work opportunity that serves the community.

Using community service orders to address drunk driving

The Thai Department of Probation, in close cooperation with the courts, conducted a successful campaign against drunk driving, long a major cause of road accidents. In this initiative, drunk drivers, who would normally have received three-month imprisonment terms, were instead given suspended sentences and put on probation with the requirement that they perform 24 hours of community service. The authorities selected community service activities designed to sensitize drunk drivers to the kinds of injuries they might cause themselves or others. They included assisting the victims of car accidents, working in hospitals, and volunteering for road accident emergency rescue units.

The Department worked hard to get the campaign’s message to the public. In addition to TV advertisements and short film contests, some celebrities who had been arrested for drunk driving and placed on probation participated in the campaign to reduce the number of deaths and injuries during the holidays. Such efforts produced additional dividends. Recently, the Bangkok-based ABAC poll found that 91 per cent of the public polled agreed with the idea that drunk drivers should receive community service orders. When asked whether they had heard of the Department of Probation, once the least known organization in the criminal justice system, 83 per cent of those polled answered in the affirmative, a steep rise from the 48 per cent logged in an October 2000 survey.

Note: For more information, see, for example, “Hospital duty for drink drivers” in *The Nation*, March 11, 2005; “Drunk driving: Bars ought to lay on cars” in *The Nation*, April 10, 2005 (<http://www.nationmultimedia.com>); “Tough campaign launched against drink driving” in the *Bangkok Post*, December 17, 2004 (<http://www.bangkokpost.com>).

Helping local institutions through community service

In the early 1990s, Zimbabwean authorities working to reduce both prison overcrowding as well as to contain burgeoning costs associated with maintaining the growing population of prisoners conducted a survey to obtain a profile of the prison population. The survey showed that some 60 per cent of prisoners were serving sentences of six months or less and fully 80 per cent were serving sentences of 12 months or less, and many were serving sentences despite having been given the option to pay fines. It became clear to the authorities that most of these prisoners were not serious offenders, that most should not have been sent to prison, and that Zimbabwe was in need of alternative sentencing options, particularly for first and youthful offenders. The Ministry of Justice drafted legislation that was passed in 1992 amending the criminal procedure code to allow, among other alternatives, the courts to order community service as a sentencing option.

Even though Zimbabwe had no probation service, the community service scheme was implemented via a hierarchy of a national, provincial and district committees, on an entirely voluntary basis, in 1994, with funding provided for a limited number of staff. Critical to the success of programme was the involvement of the local community at the district committee level, where representatives of local institutions provide community service opportunities for offenders. In the absence of probation officers, these placement institutions, such as clinics, schools or hospitals, request the court send offenders on community service orders to perform work at the institution. Offenders are sentenced to perform a number of community services hours by magistrates based upon a protocol that ranges from 35 to a maximum of 420 hours, providing a rough equivalent of what might have been a prison sentence of one to 12 months. Community service officers monitor the implementation of the order and communicate breaches to the court. Approximately 91 per cent of the 18,000 probationers sentenced to community service in the first four years of the programme successfully completed their service, with initial results showing a much lower rate of recidivism. The scheme costs \$20 per person per month, one-fifth to one-sixth of the estimated cost of imprisoning an offender for one month.

Due to its success and, in part, also because the community service scheme reflects a more traditional approach to justice of community service and reparation, several other countries in Africa and beyond have adopted the Zimbabwe model of community service.*

*See "The Zimbabwe Community Service Scheme", Justice Paddington Garwe, Text of Speech, Beyond Prisons Symposium – Kingston, Ontario, Canada, March, 1998 on Canada Correctional Service website: http://www.csc-scc.gc.ca/text/forum/bprisons/speeches/10_e.shtml; "Community Service in Practice", Penal Reform International, 1997, on Governance and Social Development Resource Centre website: <http://www.gsdrc.org/docs/open/SSAJ27.pdf>

- (j) **Referral to an attendance centre**, a facility where the offender spends the day, returning home in the evenings. Attendance centres, also known as day reporting centres, may provide a centralized location for a host of therapeutic interventions. Many offenders have considerable need for therapy or treatment, with drug addiction the predominant need in many jurisdictions. (See the section on drug courts, chapter 6, section 6.3, “Special categories, drug offenders”.) Other programmes such a centre could offer a range from anger management to skills training. Offenders are more likely to respond positively to such programmes when they are conducted under the relative freedom of attendance centres in communities as compared to a prison setting.

Use of attendance centres by the courts assumes foremost that a jurisdiction has invested in an infrastructure of attendance centres that offer the range of programmes determined to be necessary. Judges need to be regularly informed and updated as to what such centres offer, whether programmes have vacancies, are at capacity, or have waiting lists, as well as what may be available in a particular community. Finally, in order to require a particular offender to attend a centre, judges need particular information about the offender and his or her needs, which may require a medical and/or psychological assessment in addition to an investigation of the offender’s social history. (See social inquiry report below.)

- (k) **House arrest** is a relatively harsh sentence, but it is still less intrusive than imprisonment. Homes of offenders vary enormously. In some countries, many live on the streets, others in grossly overcrowded conditions. If house arrest were imposed for the full 24 hours of the day, it would place an intolerable burden on the offender’s many housemates. It would also mean that an offender’s home would become his prison, except that, unlike prison, he would be responsible for meeting his own basic needs. Various means of electronic monitoring discussed below could further increase the oppressiveness of house arrest.

To avoid excesses, the court can restrict the hours of house arrest. This could, for example, allow an offender to remain gainfully employed during the day but leave him confined to his house at night. With a supply of good information, the court should be able to distinguish between cases where house arrest may be imposed without too severe a disruption to the lives of other inhabitants of the same house. It can also tailor enforcement measures accordingly.

- (l) **Other modes of non-institutional treatment** are allowed by the Tokyo Rules. They give states the flexibility to develop new forms of non-institutional treatment or to reinvigorate customary alternatives that may have fallen into disuse. Such alternatives must not infringe on fundamental human rights standards. They should also be articulated clearly in law.
- (m) **Some combination of the measures listed above** is a common sense indication that a court is not limited to a single disposition. In practice, courts often set a list of conditions that may refer to more than one category. The important principle is that the overall punitive effect should not be excessive.

4.4 Infrastructure requirements for sentencing alternatives

For courts to be able to select from a range of alternatives, they need a considerable amount of information. To this end, the Tokyo Rules provide specifically for “social inquiry reports”³³ to be made available to the courts.³⁴ The Rules contemplate formal official reports from a “competent authorized official or agency”. Rule 7 stipulates that such reports should contain both information about the offender and “recommendations that are relevant to the sentencing procedure”. In many countries, however, such formal reports may not be available. This does not mean that other sources of information cannot be used for this purpose as long as they meet the standards of the rules of evidence with respect to accuracy and reliability. Recommendations, too, may be received from other sources but the court will need to evaluate such recommendations all the more carefully to ensure that they are sound and objective.

Similarly, the implementation of some, although not all, alternatives requires an infrastructure in the community. This may be provided by specialist bodies, such as a probation service, which may play a role in several alternative sentencing dispositions already discussed. Use may also be made of other official structures, such as the police, for whom a degree of responsibility for the implementation of sentences will be only one responsibility among many.

A modern development is the increasing use of technology to monitor the implementation of sentences in the community. For example, offenders

³³Social inquiry reports, also known as pre-sentencing or pre-disposition reports, are descriptions of the background of offenders and the circumstances of their lives relevant to understanding why they committed their offences, are made available to courts before they impose sentence. Such reports may also include recommendations on sentencing alternatives.

³⁴Rule 7.1.

can be required to telephone regularly from home to ensure that they are obeying a house arrest order. They may even have a device attached to their telephones that measures whether they have been using alcohol when they call in.

Tagging offenders to reduce imprisonment

Sweden adopted a system of intensive supervision by electronic monitoring during the 1990s (ISEM). On the offender's request, correctional authorities could commute a prison sentence of up to three months to electronic monitoring. The days under electronic tagging were matched one-to-one with the days the offender would have been served in prison. Sweden expanded tagging as a means of earlier release in 2001; four years later, it made this option permanent. All offenders serving a sentence of at least 1.5 years may apply to serve the last four months under electronic monitoring. In 2005, Swedish authorities also raised the length of the application of electronic monitoring to six months from three.

Under this electronic monitoring programme, the offender is under house arrest except for time allowed by the probation service for employment, training, health care, or participation in therapeutic programmes. The probation service draws up a detailed schedule. Monitoring is carried out principally by means of an electronic tagging device. In addition, authorities make unannounced visits to the person's home, and the convicted person must visit the probation service at least once a week and take part in the programmes provided.

The number of prison sentences commuted to electronic monitoring rose rapidly to 4,000 a year in 1998. Since then, the number has fallen to about 2,500. This is mainly due of a new combination of conditional sentence and community service that has replaced some of the short-term prison sentences.

Overall, Sweden has found the experience a positive one. Although those sentenced to electronic monitoring and their family members experienced some of the restrictions imposed by ISEM as stressful and threatening to their personal integrity, they perceived the restrictions of prison as far less attractive. As a corrective measure, electronic monitoring is considerably cheaper than prison. It also yields substantial economic gains for all parties, since the sentenced person can usually continue working at his ordinary place of employment.

Source: For more information: Intensiv-övervakning med elektronisk kontroll Brå-rapporter 1999:4. Electronic tagging in Sweden – Report from a trial project conducted between 2001 and 2004. Brå rapporter 2005:8.

Electronic monitoring is being used increasingly not only to keep track of people who are awaiting trial, but also as a means of enforcing a range of

sentences that are implemented in the community.³⁵ In some jurisdictions, its use in the latter role has been controversial. On the positive side, it is an effective way of keeping track of offenders who are serving their sentences in the community. It also saves on personnel costs and avoids potentially confrontational interactions with the offenders.

There are several other considerations, however. The technology may be expensive. In less developed societies, it may not be possible to use electronic monitoring, as there is not the technical infrastructure to implement it. In other societies, technical difficulties will mean that it is a solution for some offenders but not for others. This may result in unfair discrimination. (The same applies to other technological solutions such as those that require the use of a fixed telephone, which may discriminate against those offenders who do not have access to such a telephone.)

In any event, it may be more desirable to have supervision conducted by human beings rather than by machines. In many developing societies where labour costs are low, it may even be more economical to employ such supervisors rather than set up and maintain the complex technology needed for electronic monitoring. Most fundamentally, the objection may be made that the fitting of an electronic bracelet to an offender is an infringement of privacy, if not of human dignity, that is itself a punishment and not merely a technique for ensuring compliance with other restrictions. Improvements in technology, such as the increased use of mobile telephones as a means of monitoring, may allow some of these considerations to weigh less heavily in the future.

4.5 Choosing alternatives to imprisonment at the sentencing stage

The Tokyo Rules deal with the objective of sentencing in general terms only. Rule 3.2 provides: “The selection of non-custodial measures shall be based on an assessment of established criteria in respect of both the nature and gravity of the offence and the personality, the background of the offender, the purposes of sentencing and the rights of victims.”

Courts can implement the use of alternatives in a manner that meets these multiple sentencing objectives, at least to some extent. This is particularly true where a non-custodial sentence has an arguably equivalent punitive effect to what the judge would otherwise seek to achieve with a prison sentence. Those who emphasize that the key purpose of sentencing is to give offenders their just desserts deal with this problem by scaling

³⁵See Mike Nellis, “Electronic monitoring and the community supervision of offenders” in Anthony Bottoms, Sue Rex and Gwen Robinson (eds.), *Alternatives to Prison: Options for an insecure society* Willan, Cullumpton 2004 pp. 224-247; Annesley K. Schmidt “Electronic Monitoring in the United States” in Zvekic op. cit. pp. 363-383.

punishments to their penal impact. They have found that the punitive impact of some custodial punishments overlaps with that of a range of non-custodial punishments. (Different non-custodial sentences, such as a substantial day-fine and a period of intensive probation, for example, may also overlap.) This is typically most true for crimes of medium seriousness; very serious offences are typically punished with imprisonment, while lesser offences do not attract imprisonment. For offences in the middle range of seriousness, non-custodial penalties can best be used. Given the imperatives for finding alternatives to imprisonment, they should be imposed in lieu of imprisonment wherever appropriate.

Community service replaces short prison sentences

Community service was introduced into the Finnish penal system during the 1990s and is ordered when unconditional (actual rather than suspended or deferred) sentences of imprisonment of up to eight months would have been imposed. In order to ensure that community service will really be used in lieu of unconditional sentences of imprisonment, a two-step procedure was adopted.

First the court is supposed to make its sentencing decision in accordance with the normal principles and criteria of sentencing, without even considering the possibility of community service. If the result is unconditional imprisonment, the court must state both the type of sentence and the length of the prison term in its decision. After that, the court may commute the prison term into community service under certain conditions defined more specifically in the law.

The amount of community service varies between 20 and 200 hours. In commuting imprisonment into community service, one day in prison equals one hour of community service. Thus, two months of custodial sentence should be commuted into roughly 60 hours of community service. If the conditions of the community service order are violated, the court normally imposes a new unconditional sentence of imprisonment.

The intent of the Finnish law was that community service was to be used only in cases where the offender would have received an unconditional sentence of imprisonment, rather than widening the net to include offenders who would otherwise not have received this level of sentence. That goal was achieved. In the first few years after legislative adoption of the new sanction, some 3,500 community service orders were imposed annually, replacing approximately 35 per cent of the prison sentences of up to eight months. This corresponds to a reduction of some 400 to 500 prisoners (10-15 per cent of the prison population) in the daily prison population. At its height, the number of such community service sentences imposed climbed to 4,000 annually. At the same time, the number of sentences of imprisonment fell from around 10,000 to 6,000 annually.

Source: For more information: see Tapio Lappi-Seppälä, "Sentencing and Punishment in Finland: The Decline of the Repressive Ideal." in *Sentencing and Sanctions in Western Countries*, edited by Michael Tonry and Richard Frase, New York: Oxford University Press, 2001.

In practice, the difficulty is to ensure that this occurs to the extent possible. One means is to require, via legislation, judges to impose a non-custodial sentence in all cases where they would have imposed short prison sentences, that is, a sentence of six months or less. A number of countries have used this strategy to good effect. See the entitled “community service replaces short prison sentences” for an example of such a use.

If judges do not regard available non-custodial alternatives as realistic options, however, there is a risk that they will respond by imposing sentences of imprisonment that are just beyond the reach of the statutory mandate, a sentence of eight months and one day under the legislation in the case study above, for example, making such an initiative counterproductive. Constant emphasis on the sparing use of imprisonment and the substitutability of meaningful alternative sentences for medium severity offences is the best antidote to this. The box below provides a practical example of an alternative sanction achieving credibility.

Fines as an alternative to short-term prison sentences

In 1969, West Germany overhauled its penal code in order to reduce the use of custodial measures. To achieve this, it restricted the use of short-term imprisonment. To this day, what is now the German Penal Code strongly discourages the imposition of sentences of imprisonment of fewer than six months, with judges being required to specify their reasons for imposing such sentences.

As a result, courts have turned to alternative sanctions to replace short-term prison sentences and have, just as importantly, increased the length of prison sentences. Fines became the most influential alternative after the adoption of a day-fine system in 1969. The day-fine system increased both the amount and credibility of fines as an alternative, much as it happened in the Scandinavian countries that originally developed this system.

The use of fines was among the key factors that explained the radical fall of annually imposed short-term prison sentences. In 1968, the courts imposed a total of 119,000 prison sentences of fewer than nine months. By 1976, that number had fallen to 19,000. During the same period, the use of fines rose to 490,000 from 360,000. The expanded use of suspended sentences enabled the courts in the following years to hold the number of prison sentences stable despite a steep increase in crime between the late 1960s and the early 1990s.

Source: For more information: Thomas Weigend, “Sentencing and Punishment in Germany” in *Sentencing and Sanctions in Western Countries*, edited by Michael Tonry and Richard Frase, New York: Oxford University Press, 2001.

Traditional practices may also serve as a model for alternative sentencing:

Considering traditional alternatives: sentencing circles

Circle sentencing uses traditional Aboriginal healing practices and a process of reconciliation, restitution and reparation to address the needs of victims and offenders, their families and community. Circle sentencing began in several Yukon communities.

In circle sentencing, participants—judge, defence, prosecution, police, victim/offender and family, and community residents—sit facing one another in a circle. Discussion is aimed at reaching a consensus about the best way to resolve the case, focusing on both the need to protect the community and the rehabilitation and punishment of the offender.

Circle sentencing is focused mainly on those offenders who plead guilty. Although these offenders may still serve time in prison, there are many other sanctions available, such as community service.

Circle sentencing differs markedly from courts. Circle sentencing focuses, for example, on the process of reaching a sentence, rather than the punishment itself, and helps shape the relationships among the parties. It looks to the present and the future, rather than the past offence, and takes a larger, more holistic view of behaviour.

Source: C. T. Griffiths, *Canadian Criminal Justice: A Primer*, third edition, published by Thomson Nelson (2006).

Given that the reason for considering non-custodial sentences in this handbook is to create real alternatives to imprisonment, attention must also be paid to the provision that is made for what happens if the offender fails to fulfil the conditions of the non-custodial penalty. If, for example, a fine is imposed that is beyond the means of the offender and the penalty for failure to pay is an automatic term of imprisonment, the fine is not really an alternative sentence.

Non-custodial sentences should be tailored to avoid this outcome. Fines, for example, may be made payable in instalments, or community service orders may have some flexibility in how many hours the offender must work each week.

Most importantly, imprisonment should not be the automatic default sentence for failure to fulfil the requirements of the non-custodial sentence.³⁶ Where, for example, an offender fails to meet the conditions of a community service order fully or fails to make all the restitution to a victim that was required, a hearing should be held to determine the causes of the failure. In deciding what further action is to be taken against the offender, partial fulfilment must be seen as a proportionately positive

³⁶Rule 14.1 of the Tokyo Rules.

factor. A custodial sentence should not necessarily follow, but careful consideration should be given to replacing the original non-custodial sentence by another such sentence that will meet the objectives sought in fashioning the original sentence.³⁷

Finally, in considering the implementation of non-custodial sentences, it should be noted that there is an ongoing risk that the sentences developed as alternatives to imprisonment will not be used for that purpose. They may be imposed instead as additional penalties in cases where imprisonment would not have been seriously considered in the first instance, thus widening the net of social control under the jurisdiction of the criminal justice system. In terms of the principle of parsimony in sentencing, this is generally an undesirable development, and steps should be taken to prevent it.

4.6 Who should act?

The involvement of the following individuals and groups is essential:

Judges and courts, terms we use interchangeably in this section, are the key players in the use of sentences that are alternatives to imprisonment. They must exercise discretion to impose alternatives wherever possible and, when imprisonment is unavoidable, to impose it for the shortest possible period.

Legislators must create a framework of sentencing law that provides for alternatives and encourages the sparing use of the sentence of imprisonment.

Administrators help create suitable alternatives. Some alternatives require a comprehensive administrative infrastructure before judges can use them.

Probation officers must provide a consistent service to reassure judges—and the public—that the alternative sentences they impose will be adequately implemented.

Community leaders help persuade the public to accept offenders who serve sentences in their midst and encourage the public to assist in the implementation of such sentences.

Volunteers can also help implement community-based sentences. The Tokyo Rules emphasize this with provisions for the training of volunteers and their reimbursement. They also call for their public recognition. However, as the official commentary on the Tokyo Rules notes: “It should be clear that volunteers are not being employed in order to take on work that ought to be carried out by professional staff fully accountable to the implementing authority.”³⁸

³⁷Rule 14.3.

³⁸Commentary to Rule 19 of the Tokyo Rules.

5. Early release



5.1 Forms of early release

Most countries in the world have mechanisms in place that allow prisoners to be released before they have completed their full prison terms, but these are not always conceived of as alternatives to imprisonment. Some forms of early release, such as parole, are often not used in developing countries because of a lack of resources.

Early release potentially has considerable practical importance in reducing prison numbers and in ensuring that imprisonment is used as sparingly as possible.

A strategy to develop such alternatives must seek to incorporate such mechanisms, for early release potentially has considerable practical importance in reducing prison numbers and in ensuring that imprisonment is used as sparingly as possible. Care must be taken, however, to ensure that power to grant early release is not abused.

Early release can take a number of forms. These vary from measures that range from relaxations of the prison regime that allow the prisoner a limited amount of access to free society through conditional release in the community to early unconditional release. Only conditional release in the community is genuinely a matter of putting something in place of imprisonment, but all these strategies are relevant to the wider objective of reducing the use of imprisonment.

The Tokyo Rules also adopt a wide-ranging approach to this issue. The official Commentary on the Tokyo Rules observes that the Rules relating to the post-sentencing stage deal with “measures to reduce the length of

prison sentences or to offer alternatives to enforcing prison sentences.”³⁹ Rule 9.2 lists “post-sentencing dispositions” that should be available to achieve these objectives. They are:

- Furlough and halfway houses;
- Work or education release;
- Various forms of parole;
- Remission; and
- Pardon.

Strictly speaking, the first two of these are not fully alternatives to imprisonment. Prisoners who are granted furloughs, that is, short periods of leave from prison in the course of terms of imprisonment, or who live in halfway houses before being released into the community, remain prisoners in terms of the law and subject to the rules of prison discipline. Similarly, prisoners who are temporarily allowed out of prison to work or for educational purposes do not lose their “prisoner” status. These dispositions are still of value in allowing prisoners to improve themselves and in easing their transition back to the community. See the box below for an example of prisoners living in open prisons.

Beyond the walls: open prisons

Prisoners between the ages of 30 and 46 who are serving prison terms in the Rajasthan state of India may transfer to an open prison camp at Sanganer, Jaipur after completing one third (including remission) of their sentence, which, for a life sentence, is calculated to be seven years. In addition, prison authorities must ensure that the prisoners meet established criteria, including that they are free from mental or physical infirmity, have demonstrated good conduct while in prison, and are residents of Rajasthan. Many have committed murder, though professional assassins are excluded from eligibility.

Once at the open prison camp, these prisoners construct their own dwellings, where they live with their families, who are encouraged to join them. Their children attend local schools. Prisoners cultivate the camp’s land, do public works, conduct independent businesses, or work for outside employers. They self-govern their camp community through an elected council of village elders, with the handful of camp officials focusing on facilitating employment and other matters, rather than on security. The prisoners receive remission credited against their sentences, and having completed them, are then released. This model is being replicated by other states in India as well as attracting regional interest.

Source: See Khushal I. Vibhute, “Open Peno-correctional Institutions in India: A Review of Fifty-five Years”, Max Planck Institute for Foreign and International Criminal Law, March, 2006; “Jailhouse Rocks” in *The Telegraph*, September 5, 2004, Calcutta; “A Village in a Village” in the *Deccan Herald*, March 28, 2004, Bangalore.

³⁹Commentary to Rule 9 of the Tokyo Rules.

As in the case of alternative sentences, the Tokyo Rules do not define the different dispositions they list at the post-sentencing stage. In what follows, an attempt is made to detail each of these categories:

Various forms of parole: The term “parole” is not found in all criminal justice systems; the term “conditional release” may be preferable. Conditional release, however, connotes various meanings to different jurisdictions. For some, conditional release implies only that the prisoner is released with the routine condition of obeying all laws and perhaps remaining in regular contact with the authorities. For others, conditional release may be limited to the release of prisoners with individualized post-release conditions, thereby excluding cases where the only condition routinely set is that the offender is to comply with all laws, and perhaps as well, where conditions are set automatically.

In many parts of the world, however, the only conditions imposed are that an offender does not commit a further offence during the remainder of the sentence and/or that they report routinely to the authorities. These are also the only conditions that some countries can realistically enforce. The disadvantage to such conditions is that they are not related specifically to the needs of the individual offender and are less likely to assist him or her in transitioning from prison to a law-abiding life in the community.

Given these differences, we will define parole (or conditional release) as the release of an offender on conditions that are set prior to release and that remain in force, unless altered, until the full term of the sentence has expired.

Conditional release can be mandatory when it takes place automatically after a minimum period or a fixed proportion of the sentence has been served, or it can be discretionary when a decision has to be made to release a prisoner conditionally. In jurisdictions where prisoners have to apply for parole before it is considered, they should be encouraged to do so.

Remission, in which a prisoner is released unconditionally before the end of the sentence, is a form of unconditional release. Remission is usually awarded automatically after the offender has served a fixed proportion of a sentence, but it may also be a fixed period that is deducted from a sentence. Sometimes remission is made dependent on good behaviour in prison. It can be limited or forfeited in part or whole if the prisoner does not behave appropriately or commits a disciplinary offence.

Pardon, which ordinarily means release following the setting aside of the conviction or sentence, is also a form of unconditional release. It is usually an act of grace and favour by the head of state. A pardon takes two forms. In one, a pardon releases the offender and entirely sets aside his conviction and sentence. The other form, also known as amnesty, moves

forward the release date of an offender or class of offenders. A head of state would also order an amnesty. This terminology is not fixed, though, and pardon and amnesty are used interchangeably.

Some countries have considered broad-scale early release programmes. The box below presents a practical example.

Nigeria to free half its inmates

Up to 25,000 people, including the sick, the elderly and those with HIV will be freed, said Justice Minister Bayo Ojo.

Those who have been awaiting trial for longer than the sentences they face and those whose case files have been lost by the authorities will also benefit.

Correspondents say many people wait up to 10 years, often in awful conditions, for their case to come to trial.

Human rights groups say death rates are unacceptably high for inmates who endure overcrowded and unsanitary conditions.

“The issue of awaiting-trial inmates has become an endemic problem in Nigeria ... The conditions of the prisons are just too terrible. The conditions negate the essence of prison which is to reform,” Mr Ojo said.

There are currently some 40,444 inmates held in 227 prisons across Nigeria.

Some 65 per cent of these are awaiting trial.

The government will build six “halfway houses” to provide those being freed with education and training, Mr Ojo said.

“By the time the process is completed, we hope to have reduced the inmates to between 15,000 and 20,000,” Mr Ojo told a news conference.

Source: BBC NEWS: <http://news.bbc.co.uk/go/pr/fr/-/2/hi/africa/4583282.stm>, 2006/01/05 09:59:40 GMT/.

5.2 Early release: concerns and responses

Even though early release, whatever its form, reduces prison populations, it is met with a number of concerns. Not all of these apply with equal force to all forms of early release.

Concern: Early release undermines the authority of the sentencing court and thus of public trust as it results in the offender serving a different sentence to that which was publicly imposed.

Authorities need to make clear to all concerned that a sentence includes the possibility of early release. They must spell out openly the basis for

such a release and what conditions would apply to it. They should explain these issues at the time of sentencing, when public attention is most focused on the justness of the penalty. Offenders should also know at an early stage what they must do to qualify for early release and how they need to behave to ensure that they do not lose eligibility for such a release.

Concern: Early release reduces the protection that a prison sentence offers the public, for at least a time, from offenders who are incarcerated.

The vast majority of offenders are released at some stage. A planned conditional release that facilitates their integration into the community offers the public better protection because it makes it less likely that former offenders will continue their criminal behaviour.

Restrictions placed on potentially dangerous offenders after their release into the community may also help reassure the public. But this route requires a delicate balancing of interests. Restrictions the public may regard as necessary may not be those that will best allow the offender to reintegrate into society. This is particularly true if restrictions continue beyond the duration of the originally imposed sentence. Such restrictions are no longer alternatives to imprisonment, but are instead additional burdens on an offender who has already finished his full sentence. If the law allows these further restrictions, courts should impose them only on highly dangerous offenders and then only for the shortest possible period.

Concern: Early release is unfair to offenders. It is sometimes granted or refused arbitrarily.

Authorities must put in place procedures to ensure fairness in such decisions. The simplest approach is to grant early release automatically when a fixed proportion of the sentence has been served. This, however, removes authorities' discretion in evaluating whether an offender is ready for release on the basis of prison behaviour and the risk he or she may still pose to society at large. In practice, particularly where the prisoner is serving a short sentence, it may be unrealistic to attempt an evaluation, in which case the prisoner should be released when a set minimum period has been served.

Where early release is conditional on good behaviour in prison, it is important that the presence or absence of such behaviour be determined fairly. The European Court of Human Rights has recognized that a penalty of loss of remission for a disciplinary infringement may be regarded as the equivalent of an additional sentence of imprisonment.⁴⁰ The disciplinary procedure resulting in such an outcome must therefore

⁴⁰*Ezeh and Connors v United Kingdom* nos. 39665/98 and 40086/98 ECHR 2003-X (19.10.2003).

meet the procedural standards of due process required for a criminal trial even if it is not formally labelled as such.

Pardons and amnesties are particularly vulnerable to the criticism that they may be arbitrary and lead to abuse of power and corruption. The traditional view is that these powers exercised by the head of state are not subject to judicial review. This is also expressed in the Tokyo Rules, which provide that “post sentencing dispositions, *except in the case of pardon*, shall be subject to review by a judicial or other competent independent authority, upon the application of the offender”.⁴¹ More modern administrative law in a number of jurisdictions recognizes, however, that, while heads of state have very wide discretion when exercising these (pre-rogative) powers, they are still bound by constitutional principles that outlaw arbitrariness and unfair discrimination. If they infringe against these principles, they, too, can be challenged in court.

What powers should leaders have to grant amnesties?

Can a president decide to grant a general amnesty to all women prisoners who have young children but not to men who are in the same position?

In South Africa, President Nelson Mandela granted such an amnesty shortly after coming to power in 1994. It was challenged as discriminating unfairly against men. This challenge was upheld by the High Court. On appeal, the Constitutional Court confirmed that the Constitution did not allow the President to discriminate unfairly, even when exercising his power to pardon. It held, however, that it was not unfair to release the women as, in practice, they bore the main burden of looking after young children.*

Where general amnesties are used as a solution to prison overcrowding, careful planning can avoid some of the potentially negative effects on the administration of justice. For example, amnesties need not imply unconditional release as those who are granted amnesty may legitimately be subjected to some control in the community in the same way as prisoners who are released conditionally. However, an amnesty may bring about a great increase in the number of prisoners subject to these controls.

**President of the Republic of South Africa and another v Hugo* 1997 (1) SACR 567 (CC).

Concern: Conditions set on release may impose an additional burden on the sentenced prisoner that was not envisaged at the time of his sentence, thus exposing him to the risk of being punished twice.

The authorities must choose the conditions carefully. Not all the alternatives to imprisonment suitable for the sentencing stage are appropriate as

⁴¹Rule 9.3. Emphasis added.

conditions of release. A court may not release a prisoner on condition that he pay a fine, for example, if it did not impose a fine in the original sentence. The conditions that are imposed should relate either to assisting the reintegration of the prisoners into society or to exercising a measure of control on them while they are subject to such conditions.

The offender may still perceive the conditions of release as additional punishment, even if they were imposed to further the objectives noted above. To help alleviate these concerns, the authorities should give prisoners the choice of whether to accept early release on the conditions proposed by the authorities. The authorities should also review the conditions regularly to determine whether the restrictions imposed on the offender's liberty continue to be necessary.

5.3 Early release on compassionate grounds

An established system of early release provides the prison system with alternatives for dealing with offenders who may be particularly vulnerable to the rigours of imprisonment, a vulnerability that may emerge after initial sentencing.

Terminally ill prisoners targeted for early release

In South Africa, to assist the parole board, physicians submit monthly medical reports for all offenders under consideration for early release:

- A thorough medical examination should be conducted to assist decisions by parole boards.
- Two independent medical doctors must examine the prisoner who is to be considered for early release.
- Social work reports should also be submitted to indicate the availability of aftercare and care providers.
- In all cases of referrals to other care providers, the offender must give an informed consent.
- Early identification of the relatives and other service providers for HIV/AIDS infected prisoners is important to facilitate placement after release. This can be achieved through partnership with other service providers including the families.
- Each prison must identify community structures to assist with placement after release. Such services should include hospice care, social workers, and others to assist in training relatives.

The terminally ill are a category of prisoner for whom early release would be considered appropriate, if not automatic. Some criminal justice systems have special procedures to consider accelerated parole for the terminally ill; others might make use of special pardons. Once it is established that these inmates have no hope of recovery, the criminal justice system should release them without delay and make arrangements for their continued medical treatment in the community. As they are highly unlikely to re-offend, courts generally need not set strict conditions governing their release. The box entitled “Terminally ill prisoners targeted for early release” highlights a practical example of guidelines for the early release of the terminally ill.

Criminal justice systems should also consider releasing the very elderly on compassionate grounds, even if they are not terminally ill. Prisons are not suitable institutions for old people. A practical difficulty is that the elderly may not have a ready-made support network when they return to society. The criminal justice system should therefore pay particular attention to finding them appropriate accommodation on release.

5.4 Conditional release and its administrative infrastructure

The Tokyo Rules do not specify the conditions that may be set for the release of sentenced prisoners, and, therefore, provide no guidance on the institutional arrangements necessary to facilitate this alternative to imprisonment. The Council of Europe’s 2003 recommendation on conditional release (parole) offers some assistance. It suggests the inclusion, in addition to the standard requirement that the offender does not re-offend during the remainder of the sentence, of individualized conditions such as:

- the payment of compensation or the making of reparation to victims;
- entering into treatment for drug or alcohol misuse or any other treatable condition associated with the commission of crime;
- working or following some other approved occupational activity, for instance, education or vocational training;
- participation in personal development programmes;
- a prohibition on residing in, or visiting, certain places.⁴²

The infrastructure required to implement these conditions is similar to that required for the implementation of non-custodial sentences discussed in sections 4.3 and 4.4 of chapter 4. A probation service can assist

⁴²Recommendation Rec(2003)22 of the Committee of Ministers of the Council of Europe on conditional release (parole), adopted on 24 September 2003, para. 8.

offenders who are conditionally released in meeting the conditions that are set for them, while also ensuring that they do so. Courts can also use electronic technology, including tagging, to monitor aspects of conditional release, such as the requirement that a person resides at a fixed address or does not visit a particular place. The advantages and disadvantages of the use of probation officers and electronic monitoring apply in the support of conditional release just as they did in the use of non-custodial sentences.

The community must cooperate to make some early release conditions viable. A chief concern is finding work for offenders who are subject to conditional release. Ideally, private employers would offer offenders work of the type that they would be likely to continue after completing their sentences. Educational or vocational training and personal development programmes offered to conditionally released offenders must also be available in the community. Even if the state does not directly provide work for conditionally released offenders or the training and programmes they may need, it plays a crucial coordinating role to ensure that knowledge of what is available is conveyed to the authorities who decide on conditional release.

An infrastructure that supports proper decision-making about early release must exist. In many countries, a parole board, a body loosely affiliated with the authority responsible for execution of sentences, makes these decisions. Such a parole board should be able to make its decisions independently. In some others, the judicial authority makes these decisions, helping to ensure that they are independent.

Authorities increasingly recognize the need to ensure that decisions on early release, whoever makes them, are handled in a way that is procedurally fair to the offender. This means that the infrastructure must provide the decision-maker with the necessary information about the prisoner, his or her prospects upon early release, and what conditions may be appropriate for early release. The offender must be provided with an opportunity to be heard during into the decision-making process.

The same infrastructure must have the ability to modify the conditions of release. An established, fair, and impartial procedure must exist for judging alleged infringements of the conditions of release, particularly where such infringements could result in withdrawal of early release and re-imprisonment. Authorities should not order withdrawal for trivial breaches of conditions. Where possible, they should instead modify the conditions. Where they consider withdrawal unavoidable, they should consider the period of time served on conditional release when deciding for how long an offender is to return to prison.

Finally, as noted above, an appellate structure needs to exist to review decisions relating to early release. Specialist tribunals or the national court

system may conduct the reviews. Whatever form these reviews take, the structure must allow prompt action to review any decision resulting in early release that substantially affects the rights and duties of offenders. In practice, this means that reviews may not be required for minor modifications of release conditions; however, prompt and effective reviews are critical for decisions on the following matters: release, conditions of release, significant alteration of the conditions of release, and decisions to withdraw release.

5.5 Who should act?

The involvement of the following individuals and groups is essential:

Legislators must create a procedural framework that allows early release and the decision making and review processes that allow its use.

Prison authorities are key players in the process of early release, unless release is triggered automatically. They refer early release candidates to the bodies that decide whether to release them and prepare prisoners for early release if granted.

Administrators must provide an institutional infrastructure that allows for the imposition of suitable conditions of release.

Probation officers, or officials playing a similar role, assist offenders. They ensure that they meet the conditions set for their release. To do this effectively, they need to cooperate with prison authorities to coordinate the release process and to ensure that prisoners are suitably prepared for life in the community.

The police, too, should be encouraged to play a supportive role in the contact with offenders who have been released conditionally.

Non-governmental organizations and **members of the wider public** can help by offering work to prisoners who are conditionally released and assisting with their integration into the community.

Heads of state make major strategic decisions when deciding to use their powers of pardon and amnesty. These are particularly important when mass amnesty may be the only way of reducing or avoiding the drastic overcrowding that produces prison conditions that impinge on fundamental human rights.

6. Special categories



6.1 General

Prisons are particularly poorly placed to provide the care these special categories of prisoners need.

Prisons primarily detain adults who are awaiting trial on criminal charges or who are serving sentences of imprisonment, but they may also detain mentally ill adults, those who are addicted to drugs, or children involved in crime or delinquency. Such persons may be in prison as a result of formal proceedings. However, where this is not the case, their imprisonment poses grave human rights concerns. Whatever their legal status, prisons are particularly poorly placed to provide the care these prisoners need. Accordingly, this handbook focuses on the urgent need to develop alternatives to imprisonment for these special categories of prisoners.

6.2 Children

The United Nations Convention on the Rights of the Child underlines the urgency of finding alternatives to the imprisonment of children by providing: “The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as *a measure of last resort and for the shortest appropriate period of time.*”⁴³ The Convention, together with other instruments such as the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules), also indicates how this can be done in all the major areas covered by this handbook.

⁴³Art 37 (b). Emphasis added.

The Convention defines a child as a person under the age of 18. Other United Nations instruments use the term “juvenile”. This handbook uses that term interchangeably with “child”. Many of the principles we discuss in this section may also apply to young adults older than 18 years. They should be applied to them wherever possible.

Keeping children out of the criminal justice system

The children most at risk of imprisonment are those who are seen as criminally responsible, who are suspected of committing crimes, or who have been convicted of offences that are crimes when committed by adults. The decriminalization of such offences should, at a stroke, reduce the number of children in prison. However, authorities can address the *decriminalization* of children in two other ways. They may address the question of whether children are criminally responsible. A radical approach would adjust the minimum age of criminal responsibility. Legal systems set a minimum age below which children are not held responsible for what they do. These minimum ages vary enormously, from the age of seven in countries such as Ireland or South Africa, to 14 in Germany, Japan and Vietnam, to 18 in Brazil and Peru.⁴⁴ No international standards exist that establish the minimum age of criminal responsibility, but the Beijing Rules stipulate that the age should not “be fixed at too low an age level bearing in mind the facts of emotional, mental and intellectual maturity”.⁴⁵ If authorities raise the minimum age to 13 years from seven, they automatically exclude a number of children from the criminal justice system who therefore cannot be legally held in a prison. Authorities must also ensure that children who are not subject to the criminal law are not held in other institutions, which, although technically not prisons, are equally harsh.

In a more graduated approach, legislation on criminal responsibility can require that, for children of a certain age group, the individual child’s capacity to understand the difference between right and wrong be assessed. For this age range, the state would bear the burden of proving that the child had the capacity to differentiate between right and wrong at the time of the offence and was able to conform his or her behaviour to that understanding. This solution is attractive, because it allows for the consideration of the child’s capacity and does not rely on an arbitrary cut-off point. The practical danger is, however, that authorities might too easily presume the child’s criminal responsibility and children continue to fall within the criminal justice system. Where authorities adopt this approach, the standard of proof must be enforced.

The box below provides an example of juvenile penal code reform.

⁴⁴United Nations *Implementation of United Nations Mandates on Juvenile Justice* New York 1994.

⁴⁵Rule 4.1.

Juvenile penal code reforms focus on alternatives

With the legal reform of 6 July 2002, Lebanese legislators sought to ensure for juveniles the pre-eminence of protection, education and rehabilitation measures over imprisonment. Although earlier legislation provided for rehabilitation and reintegration measures, they were rarely applied. Some were impossible to implement due to the vagueness of their content.

Authorities analysed data from the courts and discovered that the phenomenon of increasing juvenile delinquency rates in the wake of the 1975-1990 civil war was essentially one of low-level delinquency and not of serious crime. Three-quarters of the cases reviewed involved less serious or petty offences.

Among other changes, the reform, which was supported by the United Nations Office on Drugs and Crime, expanded the range of measures available to the courts as sentencing dispositions for juveniles and defined them with precision. The expanded sentencing dispositions focus on rehabilitating the minor in his or her home environment.

The Lebanese experience of reform has been a small step in the evolution of justice for juvenile offenders and has contributed to an improvement in conditions for children and adolescents in the country.

When definitions of juvenile offences drive imprisonment

In the Democratic Republic of Congo, a 1950 decree on juvenile delinquency lists the following situations in which young persons put themselves in conflict with the law:

1. Children who beg or are vagrant.
2. Children who by misconduct or lack of discipline create serious cause for dissatisfaction from their parents, tutors or other people charged with their care.
3. Children who engage in immoral acts or seek resources from gambling, trafficking in goods, activities that expose them to prostitution, begging, vagrancy or criminality.
4. Children who have committed an act considered a criminal offence in the adult criminal justice system.

As a result of this decades-old decree, in 2003, only one of all of the children who were adjudicated by the courts and sent to the Etablissements de Garde et d'Education de l'Etat (EGEE) had committed an act that would have been considered a criminal offence had it been committed by an adult. The remainder fell under the provisions set out above for parental disobedience, deviance or failing to attend school.

Authorities may decriminalize some conduct by children that is regarded as criminal when committed by adults. On the other hand, in many societies, authorities criminalize conduct by children that is not considered criminal when committed by adults. Truancy from school, runaway and, more vaguely, anti-social behaviour, are so-called status offences in which children may be prosecuted under criminal law. There is also a danger that such children are detained but never prosecuted. In the case of status offences, detention is used improperly as the substitute for what is too often an inadequate or non-existent social welfare system.

Sometimes the criminalization is indirect. Children who commit status offences may be the subject of a court order forbidding them from repeating the conduct underlying the status offence. If they then re-offend, they are prosecuted for violating the court's order (contempt of court). They then fall within the criminal justice net and may eventually go to prison. Authorities should take action to guard against this indirect criminalization and to keep children out of prison.

Diversion of offenders from the criminal justice system is a strategy that is particularly applicable to children. The Beijing Rules provide specifically that “[c]onsideration shall be given, wherever appropriate, to dealing with juvenile offenders without resorting to a formal trial”.⁴⁶ The police and the prosecution or other agencies are directed to ensure that this occurs.⁴⁷

The Beijing Rules also provide that those involved in dealing with children who may be in conflict with the law should have as much discretion as possible in making decisions about how to deal with them.⁴⁸ The authorities can then direct children away from the criminal justice process when it would be in the children's best interests to do so. The authorities must exercise such discretion, however, in a fair and accountable manner.⁴⁹

Further, the Rules emphasize the importance of obtaining the child's and his or her parents' or guardian's consent for such diversion in order to protect them from being pressured into admitting offences that he or she may not have committed.⁵⁰ Finally, community-based programmes should be developed to provide sufficient capacity to provide children with the appropriate treatment and services they may require.⁵¹

Alternatives for children in the criminal justice system

The Beijing Rules are explicit about the approach to be adopted regarding the pre-trial detention of children: “Detention pending trial shall be used

⁴⁶Rule 11.1.

⁴⁷Rule 12.2.

⁴⁸Rule 6.1.

⁴⁹Rule 6.2.

⁵⁰Rule 11.3.

⁵¹Rule 11.4.

only as a measure of last resort and for the shortest possible period of time.”⁵² This Rule is identical to the one to be adopted for adults and is underpinned by the same thinking: the presumption of innocence and other procedural safeguards, with the added emphasis that the detention of children is inherently harmful to them.

As in the case of adults, authorities must search for alternatives to pre-trial detention, but they have additional alternatives at hand for children. The Beijing Rules provide that “[w]henever possible, detention pending trial shall be replaced by alternative measures, such as close supervision, intensive care or placement with a family or in an educational setting or a home.”⁵³

These additional alternatives share a common feature: an adult authority figure, who may possibly, but not necessarily, be a parent or foster parent who takes responsibility for the child. Authorities must ensure that when they place children in some form of supported accommodation,⁵⁴ that this is not incarceration under another name. An educational institution, for example, may seem a harmless enough alternative to imprisonment, but, if the institution fundamentally restricts the liberty of the child, it might share many of the shortcomings of imprisonment. On the other hand, a prison for adults, even if children are kept in a separate section, is never a desirable place for children while they await trial. Other secure accommodation may be the lesser of two evils where detention of a child is essential.

Parsimony, or the sparing use of imprisonment, is a particularly important principle for children. Authorities should reach for alternatives whenever possible. The Beijing Rules clearly limit the offences for which children can be incarcerated following a finding that they have committed the offence:

Deprivation of personal liberty shall not be imposed unless the juvenile is adjudicated of a serious act involving violence against another person or of persistence in committing other serious offences and unless there is no other appropriate response.⁵⁵

When authorities imprison children, they should do so for the shortest period possible, even for the serious offences. Again, children should never be housed with adult prisoners.⁵⁶ The Convention on the Rights of the Child forbids sentencing children to life imprisonment without the prospect of release.⁵⁷ Courts should not subject children to indeterminate sentences, but if they do so, they should also set a nearby date at sentencing

⁵²Rule 13.1.

⁵³Rule 13.2.

⁵⁴See Art 17 of Recommendation (2003)20 of the Council of Europe concerning new ways of dealing with juvenile delinquency and the role of juvenile justice, which recognises this alternative to remand in custody.

⁵⁵Rule 17.1.(c).

⁵⁶Rule 26.3

⁵⁷Art 37(a).

to consider the child's release. The courts should review the sentence regularly as the child's moral sense is developing.

The Beijing Rules make it quite clear that the institutionalization of children should be avoided.⁵⁸ Apart from human rights concerns, it is often counterproductive as a measure to re-educate children. The Rules list various dispositions that can be applied to children.⁵⁹ They are essentially similar to the specific non-custodial sentences for adults discussed in chapter 4.3. However, they also emphasize "care, guidance and supervision orders"⁶⁰ as well as "orders concerning foster care, living communities or other educational settings".⁶¹ These dispositions underline the particular importance of welfare-oriented alternatives to sentences of imprisonment in the case of children.

Authorities can relatively easily justify the early release of children, and young offenders generally, on the basis that they deserve another opportunity to live a crime-free life in the community. They may apply general amnesties, for example, in the case of children without too much public outcry. The Beijing Rules provide specifically that "[c]onditional release from an institution shall be used by the appropriate authority to the greatest possible extent and shall be granted at the earliest possible time".⁶² Children who are released must be prepared adequately for life outside prison. Both the state authorities and the wider community should provide them with support.⁶³

Who should act?

The involvement of the following individuals and groups is essential:

Key players mentioned with regard to adults can also act to reduce child imprisonment as the alternatives cover the full range of strategies used for adults. The imprisonment of children is an emotive issue and campaigns aimed at alternatives often have more purchase when the focus is on children.

The work of **civil society organizations** may lend support to national initiatives led by children's charities and advocacy groups to mobilize national opinion in favour of children's release from prison.

6.3 Drug offenders

Offenders imprisoned for drug-related offences make up a large proportion of the prison population in most countries. In part this stems from

⁵⁸Rule 19.1.

⁵⁹Rule 18.1.

⁶⁰Rule 18.1.(a).

⁶¹Rule 18.1.(c).

⁶²Rule 28.1.

⁶³Rule 28.2.

national and international efforts to combat the trafficking in illicit drugs. Many, if not most of these offenders, are not major players in the drugs trade, and often addicted to illicit drugs themselves. Alternatives to imprisonment targeted at these lower level drug offenders could deal more effectively with these offenders' issues. The major international instruments, including the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances⁶⁴ and the Guiding Principles on Drug Demand Reduction of the General Assembly of the United Nations⁶⁵ recognize this. Their focus is combating drug trafficking, but they also call on governments to take multidisciplinary initiatives.⁶⁶ Alternatives to imprisonment are a key part of these.

Keeping drug users out of the criminal justice system

Alternatives to imprisonment in the context of drug users follow the same general reductionist strategies as for other crimes, albeit with different emphases.

Decriminalization is a controversial strategy in the drugs sphere. As an analogy, some states have prohibited alcohol in the past, then, as social attitudes changed, substituted more nuanced controls for the total ban. Sometimes, states may decriminalize partially, by downgrading a drug to a less dangerous status compared to others, or by decriminalizing possession but still considering trafficking an offence.

Diversion has a major role to play as an alternative to imprisonment. Authorities recognize that many offenders who violate drug laws, and indeed many offenders who commit other criminal acts, commit their crimes because they are themselves addicted to drugs. Authorities find that treating offenders for their addictions is more effective than processing and eventually punishing them through the criminal justice system.

Police divert drug offenders

When Australian police find individuals who have little or no past contact with the criminal justice system for drug offences in possession of small quantities of an illicit drug, they may ask whether the offender would agree to participate in a diversion programme. Such a programme is based on drug education and, if necessary, treatment. Offenders who elect to join the programme must participate fully in the education or treatment offered. They may be called upon to contribute financially to their treatment, if, for example, it includes residential rehabilitation. If they fail to participate fully, they risk return to the criminal justice system.*

* Australian Government *Illicit Drug Diversion Initiative: How Does Diversion Work*. Full report at <http://www.gov.health.au/internet/wcms/publishing.nsf>

⁶⁴United Nations Doc. E/CONF.82.15.

⁶⁵A/RES/S-20/3 of 8 September 1998.

⁶⁶See in general Neil Boister, *Penal Aspects of the United Nations Drug Conventions*, Kluwer, The Hague 2001.

Diversion of drug users can take different forms. It can follow the same pattern as other offences where police and prosecutors use their discretion not to arrest or prosecute suspects. In these cases, offenders may need to take part in a drug education or a more formal treatment programme. The box entitled “Police divert drug offenders” provides one example of a programme of diversion for drug users.

In a number of countries, drug treatment courts formalize the diversion process.⁶⁷ These “drug courts”, as they are widely known, are part of the criminal justice system but they operate as a diversion strategy. Offenders may be required to plead guilty in order to have their cases considered by a drug court, although this is not necessarily the case in all legal systems. The class of offenders who are targeted by drug courts may vary. In the United States of America, where the drug court movement originated over 15 years ago, participants initially were mostly first-time offenders, though most programmes now focus on far more involved substance abusers.⁶⁸ Similarly, in Australia, drug treatment courts are intended for drug-addicted offenders who have a long history of committing property offences. These latter drug courts are used as a final option before incarceration.

Instead of imposing a conventional sentence of imprisonment, the drug court requires a comprehensive treatment programme for the addiction and other issues confronting the participant, and backs it with monitoring and support of the offender. To aid this monitoring process, the court receives reports on offenders’ progress.

From the perspective of the offender, such treatment, which does not necessarily take place in a closed institution, is a desirable alternative to imprisonment. Offenders, particularly those who plead guilty in order to have their cases dealt with by drug courts, need to have good legal advice on the nature of the process before they consent to an order for their compulsory treatment.

Initial results suggest that drug court programmes are more effective in preventing re-offending than imprisonment and that while they are resource-intensive, cost less than imprisonment in many jurisdictions.⁶⁹ The box below details the 12 characteristics of successful drugs courts.

⁶⁷See, for example, J. Scott Sanford and Bruce A. Arrigo, “Lifting the Cover on Drug Courts: Evaluation Findings and policy Concerns” (2005) 49 *International Journal of Offender Therapy and Comparative Criminology* pp. 239-259 on drug courts in the USA; Australian Institute of Criminology, “Drug Courts: reducing drug-related crime” *AI Crime Reduction Matters* No. 24, 3 June 2004; S. Ely et al. “The Glasgow drug Court in Action: The First Six Months” *Crime and Criminal Justice Research Programme Research Findings* no. 70/2003 of the Scottish Executive; and an online brochure *Drug Treatment Court: Program Information* by Public Safety and Emergency Preparedness Canada at <http://www.prevention.gc.ca/en/library/features/dtc/brochure.htm> accessed on 30 September 2005.

⁶⁸“What is a Drug Court?” website of the National Association of Drug Court Professionals, <http://www.nadcp.org/> accessed January 19, 2007.

⁶⁹J. Scott Sanford “Lifting the Cover on Drug Courts: Evaluation, Findings and Policy Concerns” (2005) 49 *International Journal of Offender Therapy and Comparative Criminology*, pp. 239-259.

UNODC assists the establishment of drug courts

The United Nations Office on Drugs and Crime set up an expert working group to assist in the establishment of drug courts. It identified twelve factors of successful courts:

1. Effective judicial leadership of the multidisciplinary drug court programme team.
2. Strong interdisciplinary collaboration of judge and team members while each also maintains his respective professional independence.
3. Good knowledge and understanding of addiction and recovery by members of the court team who are not health care professionals.
4. Operational manual to ensure consistency of approach and ongoing programme efficiency.
5. Clear eligibility criteria and objective eligibility screening of potential participant offenders.
6. Detailed assessment of each potential participant offender.
7. Fully informed and documented consent of each participant offender (after receiving legal advice) prior to programme participation.
8. Speedy referral of participating offenders to treatment and rehabilitation.
9. Swift, certain and consistent sanctions for programme non-compliance coupled with rewards for programme compliance.
10. Ongoing programme evaluation and willingness to tailor programme structure to meet identified shortcomings.
11. Sufficient, sustained and dedicated programme funding.
12. Changes in underlying substantive and procedural law if necessary or appropriate.

Alternatives for drug users in the criminal justice system

While drug courts are powerful tools for making use of alternatives to imprisonment, there are also other methods to ensure that drug addicts who enter the criminal justice system are not imprisoned unnecessarily. This is important because, despite authorities' best efforts, drugs are often freely available inside prisons.

Courts must bear this reality in mind when they decide whether or not to remand a vulnerable suspect into prison. When imposing sentence on offenders who are addicted, ordinary courts must also consider that drug treatment in the community is more effective than that offered in prison. In marginal cases, this could become a key factor in deciding whether to impose a conditional sentence of imprisonment or a community penalty

in which submitting to drug treatment is a condition of sentence. Conditional release of sentenced prisoners should also make provision for treatment and monitoring of drug addicts after their release.

Who should act?

The alternative strategies for dealing with drug-addicted offenders outside prison all depend on the availability of treatment for addicts in the community. This presupposes a network of *drug counsellors* and treatment centres staffed by specialist *medical practitioners* and *psychologists* to whom they can be referred. These experts need to work closely with key criminal justice actors—the police, prosecutors, judges and probation officers—in providing appropriate treatment for addicted offenders. Clearly, government must play a key role both in providing services and in coordinating them. The volunteer sector can assist too, not least by ensuring that services for drug addicts that are available in the community can be accessed by the criminal justice system, too.

6.4 Mental illness

In general, mentally ill persons are better treated outside than inside prison. Ideally, they should remain in their community, a principle recognized by the United Nations Principles for the Protection of Persons with Mental Illness.⁷⁰ Should they require treatment in a mental health facility, it should also be as near to their homes as possible. It should never be a prison.⁷¹

Mentally ill persons sometimes commit criminal acts, some of which may pose a threat to society. If no other procedures are in place, they end up in prisons, which are not designed to care for them. What can be done to avoid this?

Keeping the mentally ill out of the criminal justice system

Decriminalization of the actions of the mentally ill raises many complicated questions about their criminal responsibility. For the purposes of the handbook, it is important that legal definitions of insanity are broad enough to keep those who are not criminally responsible for their actions from falling under criminal law.

⁷⁰Principle 7.1 of the United Nations Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care. G A Res 46/119 of 17 December 1991.

⁷¹Ibid. Principle 7.2.

The criminal law of most countries draws these distinctions. The difficulty lies in their application. Often an accused person whose mental state is suspect is detained for a period to determine two key issues: first, whether he or she is mentally fit (competent) to stand trial (and able to assist in his or her defence) and whether he or she was criminally responsible for his or her actions. Such individuals should be held in a mental health facility and not in prison while undergoing mental health evaluations.

Diversion of the mentally ill raises wider issues than determining criminal responsibility. Many persons suspected or convicted of criminal offences suffer from mental illness. Authorities may find that the illness is not severe enough to free them from responsibility for their criminal actions, but the mental illness must be taken into account in deciding how to deal with such offenders. The police and the prosecuting authorities should make special efforts to divert persons in this intermediate category from the criminal justice system entirely.

Mental health and prisons

The World Health Organization estimates that some 450 million people worldwide suffer from mental or behavioural disorders. Prison populations have a disproportionately high rate of those suffering from such disorders.

Many of these disorders may be present before admission to prison, and prison may further exacerbate them. Others may develop during imprisonment. Prisons may undermine mental health through factors such as overcrowding, violence, enforced solitude, lack of privacy, and/or insecurity about future prospects.

Good prison management should focus on detecting, preventing and treating mental disorders. For example, the criminal justice system can divert people with mental disorders toward the mental health system. Prisons can provide appropriate treatment and access to acute care in psychiatric wards of general hospitals. They can, among other things, provide psychosocial support, train staff, educate prisoners and ensure that they are included in national mental health plans.

There are a number of benefits to responding to mental health issues in prison. Not only will such a response improve the health and quality of life of the prisoner and the entire prison population, but addressing mental health issues can also relieve some demands on staff forced to deal with prisoners with unrecognized or untreated mental health issues. The community benefits as well, from ongoing interchange between the prison and the broader community through guards, the administration, health professionals and prisoners, before prisoners are released into the community.

Source: "Mental Health and Prisons" Information Sheet, World Health organization (WHO) and the International Committee of the Red Cross (ICRC): http://www.euro.who.int/Document/MNH/WHO_ICRC_InfoSht_MNH_Prisons.pdf

The courts have a particularly important role to play here. The United Nations Principles for the Protection of Persons with Mental Illness encourage the creation of a legislative framework that allows the courts to intervene where the sentenced prisoners or remand detainees are suspected of having a mental illness. Such legislation “may authorize a court or other competent authority, acting on the basis of competent and independent medical advice, to order that such persons be admitted to a mental health facility”⁷² instead of being held in prison. The box entitled “Mental health and prisons” outlines some of the related issues.

Alternatives for the mentally ill in the criminal justice system

Mentally ill offenders who remain within the criminal justice system should, as a matter of routine, be given special consideration to determine whether they would not be better placed outside prison. This is an especially an important factor when alternatives to pre-trial detention are being considered. Similarly, a community sentence with a treatment element for the offender’s mental illness should be considered in appropriate cases. It should also be recognized that the mental health of offenders may change over time. The mental health of prisoners should be a factor when deciding whether to release them before the completion of their sentences.

Who should act?

The involvement of the following individuals and groups is essential:

States need mental health systems that provide treatment both in closed mental health facilities and in the community.

Psychiatrists and **psychologists** who specialize in the treatment of mental illness need to work closely with the police, prosecutors, judges and probation officers in providing appropriate treatment for mentally ill offenders.

Government must play a key role both in providing and coordinating mental health services.

The **volunteer sector** can also assist, not least by ensuring that the criminal justice system can access services for the mentally ill in the community.

6.5 Women

In all prison systems, women are a minority of the inmates. This may create the impression that there is relatively little need to press for alternatives to imprisonment for them, but that would be false. In many

⁷²Ibid. Principle 20.3.

countries, the number of woman prisoners is increasing rapidly. The Seventh United Nations Conference on the Prevention of Crime and the Treatment of Offenders recognized this reality as far back as 1985. It also noted that programmes, services and personnel in prisons remained insufficient to meet the special needs of the increased number of women prisoners. It therefore invited criminal justice authorities “to examine the alternatives to the confinement of female offenders at each stage of the criminal justice process.”⁷³

Keeping women out of the criminal justice system

As in the case of other groups, *decriminalization* has a particular role to play in reducing the number of women in prison. Some non-violent offences committed mostly by women or that apply specifically to women may be decriminalized. Focusing a decriminalization strategy on such offences will significantly reduce the number of women in prison.

Arrest referral and diversion plans in Scotland tackle issues for female offenders

Scotland has achieved considerable success with arrest referral and diversion from prosecution schemes for women.

Under arrest referrals, such drug-using accused are offered treatment and related services at the point of arrest. It is aimed at people whose offending may be linked to drug use and is entirely voluntary on the offenders' part. In practice, arrest referral workers visit the accused in a custody cell or less often in a court setting, offer advice and information on her addiction and may refer her to the appropriate services.

Arrest referral feeds into Scotland's drug strategy, which is committed to increasing the number of drug users in contact with drug treatment and care services by ten per cent every year until 2005. Drug treatment considerably reduces criminal behaviour, with every dollar spent on treatment saving three dollars of enforcement.

Scotland piloted diversion from prosecution schemes in 18 local authorities for two years from April 1997. In diversion, the accused are referred to social workers or other agencies, where appropriate, rather than routing them through criminal justice proceedings. After reviewing the pilot, Scotland opted to focus the programme on specific groups, including female accused. Beginning in 2003-2004, females represented 48 per cent of all diversion cases.

Source: <http://www.scotland.gov.uk/Topics/Justice/criminal/16928/7127>
<http://www.scotland.gov.uk/Topics/Justice/criminal/16906/6827>

⁷³Seventh Congress on the Prevention of Crime and the Treatment of Offenders; see G. Alfredsson and K. Tomaševski, *A Thematic Guide to Documents on the Human Rights of Women*, p. 348, Mirtinus Nijhoff Publishers, The Hague, 1995.

Diversion strategies for women operate best when they seek to offer social assistance both to the women and to their families. Many women who come into contact with the criminal justice system are responsible for young children, so that their detention in prison will cause great disruption of those vulnerable lives as well.

Overall crime patterns of women differ from those of men. Women are often used as drug couriers to smuggle drugs across international borders. Although technically guilty of drug trafficking, authorities need to understand the pressures that may have been brought to bear on them to commit the crime and should adjust their sentences accordingly. The previous box provides a practical example of a programme targeted at female offenders.

Alternatives for women in the criminal justice system

The disproportionately severe effects of women's imprisonment require additional efforts in finding alternatives to imprisonment at all stages of the criminal justice process. The techniques at authorities' disposal are similar to those recommended for others. However, courts may find that some alternatives are easier to apply to women than to other groups. For example, a high percentage of women are detained for non-violent offences, thus making it easier to release them conditionally prior to trial.

Courts must bear in mind the position of women in society when considering alternatives to sentences of imprisonment. The requirements of community sentences may require modification to meet their needs and to allow them to cope with responsibilities for child rearing. As women tend to be poorer than men overall, particular attention may need to be focused upon ensuring that, if they default on fines, they do not end up in prison automatically.

Women are often good candidates for early release, be it conditionally or unconditionally. Systems that use amnesties or pardons by the head of state may give them special consideration.

Who should act?

The involvement of the following individuals and groups is essential:

The **criminal justice system** as a whole needs to work to find and implement alternatives to imprisonment for women.

Governmental and **non-governmental organizations** that focus on women's issues should be encouraged to consider the issue of women's imprisonment and to contribute to discussions on how alternatives to it can best be found.

6.6 Over-represented groups

In addition to the groups discussed above, the over-representation of certain other groups in prisons raises the question about whether authorities should pay special attention to providing alternatives for them. In some societies, two of these groups are indigenous minorities and foreign nationals.

Indigenous peoples

In some countries, indigenous minorities are grossly over-represented in the criminal statistics and in prisons. Canada and Australia, for example, have adopted formal strategies for dealing with this issue. They include diversion and the provision of alternatives that make more use of these communities' traditional punishments. The box below provides a concrete example.

Avoiding prison for Aboriginal offenders

The Canadian Criminal Code requires "that all available sanctions other than imprisonment that are reasonable in the circumstances, should be considered for all offenders, with particular reference to the circumstances of Aboriginal offenders."

This established the principle of imprisonment as last resort, particularly for Aboriginal offenders, a group that is over-represented in prisons. While comprising some three per cent of the Canadian population, Aboriginal persons represent 15 and 17 per cent, respectively, of the population of provincial and federal correctional institutions. In some provincial correctional facilities in the country's western regions, Aboriginal persons compose 60 to 70 per cent of institutional populations.

This sentencing principle was reaffirmed by the Supreme Court of Canada in the case of *R. v. Gladue* [1999] 1 S.C.R. 688. Subsequently, an Aboriginal Persons Court was created in Toronto, Ontario.

The Ontario Court of Justice deals exclusively with bail hearings, remands, trials and sentencing of Aboriginal offenders. Convening twice a week, the court deals with the cases of Aboriginal persons charged in downtown Toronto. The judge, Crown (prosecutors), defence lawyers, court clerks, and court workers are all Aboriginal. In processing the cases, the court makes every attempt to explore all possible sentencing options and alternatives to imprisonment.

Source: C. T. Griffiths. 2006. *Canadian Criminal Justice: A Primer*, third edition. Toronto: Thomson Nelson. Forthcoming; Criminal Lawyers' Association, "Gladue (Aboriginal Persons) Court, Ontario Court of Justice—Old City Hall, Fact Sheet." Retrieved from www.criminallawyers.ca/gladue.htm.

Foreign nationals

Foreign nationals make up a large percentage of the prison population of several countries. For various reasons, it is sometimes assumed too easily that alternatives to imprisonment are not applicable to them. There may be an assumption, for example, that all foreign prisoners present an escape risk and that therefore none can ever be granted conditional release. Such blanket assumptions should be avoided; each case should be treated on its particular characteristics.

7. Toward a coherent strategy



This handbook has demonstrated how to develop alternatives to imprisonment both to keep people out of the criminal justice system entirely, as well as how to introduce changes at every level of the system to ensure the most sparing use of imprisonment. To achieve the best results possible, authorities must put together a coherent strategy that focuses and constantly refocuses attention and resources on using alternatives to imprisonment to reduce the prison population. A number of countries in recent years have pursued such strategies and succeeded in cutting their overall prison populations. Two such examples are provided below.

Community service orders make an impact

A country of southern Africa, Malawi shares with its neighbours the problems of poverty, underdevelopment, food shortages and HIV/AIDS, as well as social and economic inequities. These circumstances foster some of the highest crime rates in the world.

To help deal with prison overcrowding, Malawi instituted a community service order plan in 2000. By late September 2004, Malawi had placed 5,225 offenders on community service orders. They performed 838,000 hours of work, and completed 87 per cent of the tasks assigned.

For offenders who completed their community service obligation, the rate of re-offending fell to 0.25 per cent, or just one of out of every 400 offenders. In addition, the Malawi government saved \$227,717 by using community service rather than imprisonment.

Reforms reduce prison populations

Finland reduced its prison population by adopting a coherent long-term reform policy. In the 1960s, Finnish authorities realized its prison numbers, at 150 prisoners to every 100,000 inhabitants, were disproportionately high compared to its Scandinavian neighbours, which had just 50 to 70 prisoners to every 100,000 inhabitants. Politicians reached a consensus that they should and could deal with prison overcrowding. Systematic legislative reforms aimed at releasing prisoners began after the mid-1960s, and continued up through the mid-1990s.

In the 1960s, Finland reduced the number of prisoners through an amnesty; by decriminalizing public drunkenness; and by restricting the use of imprisonment as a default penalty for unpaid fines. Next, Finland lowered the penalties for traditional property offences and drunken driving, by strengthening the role of non-custodial sanctions and by extending the use of early release. It raised fines in order to provide credible alternatives to short-term prison sentences. It extended the use of conditional imprisonment and expanded the system of early release by, for example, lowering the minimum time to be served before a prisoner is eligible for parole to 14 days from six months. Finland abandoned automatic increases in sentences for offenders with criminal records. It restricted the use of unconditional sentences for young offenders, and, in the 1990s, extended the scope of community sanctions further by introducing community service. These reforms contributed to a systematic long-term decline in prison figures. By the 1990s, Finland had fallen to the bottom of the west European list of prisoners per 100,000 inhabitants, down from its top slot in the 1970s.

The Finnish experience proves that cutting prison numbers is possible. Based on their experience, the Finns stress the importance of the political will to act and the development of a systematic strategy that employs the means available at different stages of the criminal justice process. They also underline the value of consensus-based decision-making and extensive participation of different interest groups in legal drafting. Such an approach makes it less likely that a single high-profile case will galvanize public opinion and result in short-term criminal justice legislation. A reasonable, well-informed, and high-quality media also advances this agenda. Finland found that cooperation between the judiciary, practitioners, police and the research community, as well as the organized exchange of information and different training courses and seminars proved valuable in implementing law reforms. The Finns found that a humane and rational criminal policy is promoted by an in-depth understanding of the nature of the crime problem, the effective functioning of the criminal justice system, and general strategies of crime prevention.*

*For more information: Tapio Lappi-Seppälä, "Sentencing and Punishment in Finland: The Decline of the Repressive Ideal." In Michael Tonry and Richard Frase (eds.) *Sentencing and Sanctions in Western Countries*, New York: Oxford University Press, 2001.

It is not possible to prescribe a formula that will work to reduce the prison populations in all societies as such processes of change are highly complex. Any coherent strategy for reducing the prison population would include the following essential factors:

7.1 Knowledge base

Authorities need sufficient information about the entire range of criminal justice activities that involve imprisonment and its alternatives as well as a careful analysis of the prison population. They must have readily available answers to questions like these:

- What are the social characteristics of persons held in prison?
- For what offences are they being held, if any?
- For how long are they being held awaiting trial?
- How long are sentences for various offences?
- What are the costs of imprisonment?

A similar analysis of alternatives to imprisonment must complement this information. If alternatives are not yet in force, and authorities cannot therefore answer questions about their applicability or cost, they should make careful use of projections and hypothetical costs for the use of certain alternatives.

7.2 Political initiative

Politicians should use this information base to introduce and develop a clear policy on alternatives to imprisonment that will reduce the prison population. Ideally, leading politicians and senior policy-makers will share an ideological commitment to reducing the prison population and to exploring alternatives to imprisonment. To gain the public's backing for this policy, authorities need to raise awareness of the shortcomings and costs of imprisonment and the advantages, morally, practically and financially, of alternatives to it.

7.3 Legislative reform

To develop a strategy on alternatives, authorities need to review legislation to ensure that, unless it is essential to do so, the law does not criminalize conduct and unnecessarily contribute to the prison population.

Authorities should assure that a legal framework for alternatives is in place at every level and that there are statutory requirements to implement it.

The law should mandate a preference for alternatives over imprisonment, with imprisonment considered the option of last resort.

New legislation is not self-implementing and should be accompanied by seminars and training programmes designed to facilitate implementation. They should first target judges, but then should include all those who will be involved in implementing newly legislated alternatives.

7.4 Infrastructure and resources

The creation of some, but not all, alternatives to imprisonment requires new resources. Authorities should carefully cost project requirements and consider the need for new resources when introducing new legislation.

To implement community sentences and treatment-based alternatives, it is particularly important that authorities make sure the necessary infrastructure is in place and earmark the resources required, not only for its start-up but also for its continued operation.

In implementing community sentences, the state can and should enter into partnerships with community organizations. Such partnerships are not only inherently desirable, but may also provide crucial help where finances might otherwise constrain the introduction of alternatives.

The state may also seek to reduce the prison population indirectly by providing resources for initiatives outside the criminal justice system. Such initiatives should seek to address the conditions that cause crime in society. They might also encourage less use of imprisonment by providing non-penal programmes of treatment within the welfare or health systems, which would encourage diversion.

7.5 Net-widening

Enthusiasm for community sentences and treatment-based options can lead to their use as an addition to, rather than instead of, imprisonment. States must ensure that they keep their focus firmly on the overall objective of creating alternatives to imprisonment that reduce the prison population.

7.6 Monitoring

Authorities must continually review the various strategies adopted to implement alternatives. One approach is to set deadlines for specific benchmarks so that they can celebrate success and take note of failures. Where benchmarks are not met, they should take swift remedial action. They must ensure alternatives are implemented correctly to maintain their credibility.

They should pay attention to motivating offenders to take part in community sentences, not just in order to avoid imprisonment but as an opportunity to make life better for themselves. Community support for alternatives will help produce a climate of cooperation and mutual trust where this can best be done.

7.7 Promotion of alternatives

Research has shown that while the public often appears to be highly punitive when asked about the punishment of offenders in general, it becomes significantly less so when given more detailed information.

Authorities have the responsibility of putting the advantages of an overall strategy that uses alternatives to reduce imprisonment at the forefront of public understanding.⁷⁴ Various strategies can achieve this. The state can begin by making its own knowledge base more widely available so that the public becomes aware of the costs of imprisonment and the advantages that alternatives may hold. Public education is essential.

In publicising and promoting the use of alternatives, the state should enter into partnerships with organizations of professionals working in the criminal justice sector, and with non-governmental organizations that are active in the field of crime and punishment. The state should focus upon gaining the support of victims' groups by showing them how alternatives to imprisonment hold out advantages for victims as well.

The state must carefully assess public opinion on the desirability of alternatives.

Research has shown that while the public often appears to be highly punitive when asked about the punishment of offenders in general, it becomes significantly less so when given more detailed information.⁷⁵

The state should develop a strategy for placing sufficient information in the public domain so that members of the public can make an informed

⁷⁴See in general, Lappi-Seppala, T. (2003) "Enhancing the Community Alternatives—Getting the Measures Accepted and Implemented" in *UNAFEI Annual Report for 2002 and Resource Material Series No. 61*, Fuchu, Japan. pp. 88-97, http://www.unafei.or.jp/english/pdf/PDF_rms_all/no61.pdf

⁷⁵Mike Hough and Julian V. Roberts, "Sentencing trends in Britain: Public knowledge and public opinion" (1999) 1 *Punishment and Society* 11-26; Julian V. Roberts, et al, *Penal Populism and Public Opinion: Lessons from five countries*, Oxford University Press: Oxford and New York, 2003.

contribution to the debate about alternatives. This must include information about current sentencing practices, for members of the public are often uninformed about sentences in general and aware of only a few atypical cases.

The state should conduct sophisticated public opinion research to counter claims that the public is inherently punitive. Senior politicians and civil society leaders must shape public opinion rather than follow it, for their influence is potentially very great.

7.8 The media and alternatives to imprisonment

The various media have a crucial role to play in informing the public about attitudes to imprisonment. It is necessary that they be carefully briefed about the overall efficacy of alternatives so that they are able to put occasional failures into a broader perspective context. The relevant authorities should cultivate relationships with the media over a long period by updating them about developments in the field with information in an accessible, non-technical form. If some journalists propose harsher punishments such as the extended use of imprisonment, for example, authorities should respond by asking them to cost their proposals and spell out what extra resources would be required.

7.9 Justice and equality

Authorities should refrain from presenting the benefits of alternatives only in terms of potential savings to the state. They must also emphasize the justice of community-based alternatives. It is important, too, that they focus on the principle of equality to avoid the misperception that these alternatives are available only to a selected few.

Conclusion



Because imprisonment has a number of serious disadvantages, the consensus represented by United Nations standards and norms is to urge member states to use alternatives to imprisonment to reduce prison populations. United Nations standards and norms advocate the use of imprisonment only as a last resort and that its use be as sparing as possible.

Alternatives to imprisonment are often more effective at achieving important public safety objectives, such as greater security for the population, than imprisonment. Properly designed and implemented, they may infringe less on human rights while costing less in the short and/or long term. This handbook has focused on the alternatives to imprisonment throughout the criminal justice process that are consistent with United Nations standards and norms.

A first strategy is keeping offenders out of the criminal justice system entirely. Not all socially undesirable conduct must be classified as a crime or dealt with via the criminal justice process; decriminalization legally redefines conduct once regarded as a crime so that it is a crime no longer. Next is diversion, in which options for dealing with offenders by sending them to treatment or other programmes rather than formally adjudicating them in the criminal justice system.

At each stage of the criminal justice process (pre-trial, pre-conviction, pre-sentencing, sentencing and early release), the handbook has examined the issues surrounding imprisonment, described in detail the types of alternatives that are available, and outlined the infrastructure needed to

make these alternatives a realistic option, including identifying the key players who need to act to make these changes happen. Throughout these sections are examples of alternatives at work.

At the pre-trial stage, the detention of persons presumed innocent is a particularly severe infringement of the right to liberty. Only in extremely limited circumstances is such detention justified. The handbook has provided examples of alternatives to pre-trial detention that address both public safety and human rights concerns. Some of the options discussed included releasing an accused person and ordering them to carry out, or to avoid, certain activities. These orders might include requirements such as appearing in court on a given day or remaining at a specific address as well as many other possibilities.

At the sentencing stage, the handbook has suggested a careful examination of each case to determine whether a prison sentence is required at all. If so, the handbook has further suggested that sentences be for the minimum period of imprisonment that meets the objective for which imprisonment is being imposed. The handbook has also discussed in depth a number of alternatives to imprisonment, including, but not limited to, verbal sanctions, conditional discharge, status penalties and community services orders as suggested by the Tokyo Rules.

Early release also has considerable practical importance in reducing prison numbers and in ensuring that imprisonment is used as sparingly as possible. The handbook has examined various alternatives to imprisonment including various forms of parole, remission and pardon, as well as furloughs and halfway houses.

The handbook has also focused upon specific categories of offenders who may be especially vulnerable to the negative impact of prisons, such as children, women, the mentally ill and those who commit drug-related offences, to examine what particular alternatives to imprisonment might apply and be most appropriate for these special groups.

Finally, the handbook has provided a framework to help readers develop a coherent strategy to reducing the prison population. It is hoped that the materials in this handbook will assist governments and communities in their consideration and implementation of alternatives to imprisonment.

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7 8 9 2 1 1 4 8 2 2 0 1

United Nations publication

ISBN-13: 978-92-1-148220-1

Sales No. E.07.XI.2

V.07-80478—April 2007—1,400