

DIGNITY Guidance Document

# REDUCING OVERCROWDING IN PRE-TRIAL DETENTION AND PRISON IN THE CONTEXT OF COVID-19

## INCREASING THE USE OF NON-CUSTODIAL MEASURES

By Therese Maria Rytter and Kalliopi Kambanella

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## EXECUTIVE SUMMARY

The COVID-19 pandemic has exposed and accelerated the detrimental effects of prison overcrowding, and it presents a historic opportunity combat the devastating phenomenon of chronic prison overcrowding. States must take decisive and urgent action and put in place measures to reduce the prison population and alleviate overcrowding, in order to effectively prevent and manage COVID-19 in the custodial context.

### WHY is it necessary to address prison overcrowding?

1. Prison overcrowding may in itself amount to inhuman or degrading treatment or punishment, as it inhibits safe and humane conditions of detention and treatment of prisoners, and it often triggers other human rights violations. It also hampers re-socialisation and re-integration of prisoners into society upon release, and it seriously challenges prison management.
2. In the COVID-19 context, overcrowding renders it virtually impossible to effect public health measures. Prisons are incubators of infectious diseases due to prisoners' multiple health problems, unavoidable close contact, and poor access to sanitation and health care. Therefore, prisoners are at higher risk of infection, which is exacerbated by overcrowding. As prison health is public health, an outbreak of COVID-19 in prison will also pose a serious health risk to the general population.

### WHICH measures are available?

3. **Decreasing prisoner intake:** Efforts should be made to reduce new admissions to pretrial detention and prison through the use of non-custodial measures at the pretrial and sentencing stage.
4. **Increasing prisoner releases:** Accelerating release of remand and sentenced prisoners through the use of early unconditional or conditional release schemes and other non-custodial measures.

### WHAT are non-custodial measures?

5. Any decision by a competent authority to submit a person suspected of, accused of or sentenced for a criminal offence to certain conditions and obligations, which do not include detention or imprisonment; such decisions can be made at any stage of the criminal justice process.

## HOW should these measures be applied?

6. Adhere to international law and standards on decreasing the use of detention and imprisonment, and give early consideration to applying non-custodial measures, where appropriate.
7. Decisions on whether to apply custodial or non-custodial measures should be anchored in:
  - a) Principles of legality, necessity and proportionality
  - b) Principle of non-discrimination and attention to vulnerability
  - c) Principle of humane treatment

## WHO should decide upon these measures?

8. **At the pre-trial stage:** The police, prosecution and judiciary should consider resorting to non-custodial alternatives to pre-trial detention taking into account issues related to COVID-19.
9. **At the trial stage:** The judiciary should consider increasing the use of non-custodial sanctions as an alternative to imprisonment and suspension of prison sentences in light of COVID-19.
10. **At the post-trial stage:** Prison authorities, judiciary, parole boards and other parts of the Executive should consider resorting to early or temporary release schemes in light of COVID-19.

# OVERVIEW OF COMMON NON-CUSTODIAL MEASURES AND CATEGORIES OF ELIGIBLE PERSONS

STAGES IN THE CRIMINAL JUSTICE PROCESS	PRE-TRIAL STAGE	TRIAL AND SENTENCING STAGE	POST-TRIAL STAGE
<b>Non-custodial measures</b>	<ul style="list-style-type: none"> <li>• Home arrest</li> <li>• Reporting obligation</li> <li>• Restriction on leaving or entering a specific space</li> <li>• Retention of travel documents</li> <li>• Bail or bond</li> <li>• Electronic monitoring</li> </ul>	<ul style="list-style-type: none"> <li>• Fines</li> <li>• Suspended or deferred sentences</li> <li>• Probation or judicial supervision</li> <li>• Community service</li> <li>• Diversion to treatment</li> <li>• Restrictions on movement</li> <li>• Electronic monitoring</li> </ul>	<ul style="list-style-type: none"> <li>• Parole or early conditional release</li> <li>• Temporary release</li> <li>• Compassionate release</li> <li>• Pardon or amnesty</li> <li>• Electronic monitoring</li> </ul>
<b>Persons to be considered for liberty pending trial, non-custodial measures or release</b>	<ul style="list-style-type: none"> <li>• Pretrial detainees, unless there is specific reason to believe that they will (a) interfere with the investigation; (b) reoffend; or (c) abscond.</li> <li>• Pretrial detainees, unless they pose a serious and concrete threat to others.</li> <li>• Juveniles.</li> <li>• Women, taking into account victimization or caretaking responsibilities.</li> </ul>	<ul style="list-style-type: none"> <li>• Persons convicted of minor, drug or non-violent offences.</li> <li>• Juveniles.</li> <li>• Women offenders with a history of victimization.</li> <li>• Pregnant women and women with dependent children.</li> </ul>	<ul style="list-style-type: none"> <li>• Prisoners convicted of minor, drug or non-violent offences.</li> <li>• Low-risk prisoners nearing the end of their sentence.</li> <li>• Prisoners jailed for technical violations of their probation or parole.</li> <li>• Persons with severe mental disabilities or health conditions, for whom staying in prison would mean an exacerbation of their condition.</li> <li>• Juveniles.</li> <li>• Pregnant women and women with care-taking responsibilities.</li> </ul>
<b>Persons at high-risk due to COVID-19, cf. WHO, to be considered for non-custodial measures or release</b>	<ul style="list-style-type: none"> <li>• Persons 65 years or older</li> <li>• Persons of all ages with underlying medical conditions, particularly if not well controlled, including: <ul style="list-style-type: none"> <li>• Chronic lung disease or moderate to severe asthma</li> <li>• Serious heart conditions, chronic kidney disease undergoing dialysis or liver disease</li> </ul> </li> <li>• Persons who are immuno-compromised (e.g. due to cancer treatment, organ transplantation, immune deficiencies, poorly controlled HIV/AIDS, and prolonged use of immune weakening medications)</li> <li>• Severe obesity (BMI of 40 or higher) or diabetes</li> </ul>		
<b>Justice actors responsible for deciding on custodial and non-custodial measures</b>	<ul style="list-style-type: none"> <li>• Police</li> <li>• Prosecution</li> <li>• Judiciary</li> </ul>	<ul style="list-style-type: none"> <li>• Prosecution</li> <li>• Judiciary</li> </ul>	<ul style="list-style-type: none"> <li>• Executive</li> <li>• Prison services</li> <li>• Parole boards</li> <li>• Judiciary</li> </ul>

## DEFINITIONS OF NON-CUSTODIAL MEASURES

**Non-custodial measure:** any decision made by a competent authority to submit a person suspected of, accused of or sentenced for an offence to certain conditions and obligations that do not include imprisonment; such decision can be made at any stage of the administration of criminal justice.

### Pre-trial stage

- **Home arrest:** An obligation to live in a certain place, normally at home, under the supervision of a specialized agency. One cannot change place of residence, work or education, without permission of the supervisory agency.
- **Reporting obligations:** An obligation to report daily or periodically to a court, the police or other public authority.
- **Restrictions on leaving or entering a specific space without authorization:** Such restrictions may include the requirement not to leave or enter specified places or districts or to remain at a specific address.
- **Retention of travel documents:** Obligation to surrender passport or other identification documents.
- **Bail:** Bail is a set of pre-trial restrictions that are imposed on a suspect to ensure that he complies with the judicial process. Bail is the conditional release of a defendant with the promise to appear in court when required. It is typically set in cash or securities or real property, which is temporarily placed in the possession of the court, or other entity granting bail. The assets are subject to forfeiture if the suspect or defendant absconds.
- **Supervision by specific agency:** Obligation to accept supervision by an agency appointed by the court.
- **Electronic monitoring:** Electronic monitoring enables judicial authorities to regulate and monitor a suspect's spatial and temporal activity (their locations, movements and schedules), at a distance. The offender wears an electronic tag or bracelet on the ankle or wrist, which notifies monitoring services if the person is absent during the curfew hours.



## Trial and sentencing stage

- **Fines:** The obligation to pay a certain amount of money specified by the court as an alternative sanction.
- **Suspended sentences (with or without supervision):** Custodial sentences given after the formal conviction for a crime that the convicted person is not required to serve. They can be conditional (not to engage in criminal activity for a period of time) or unconditional.
- **Deferred sentences (with or without supervision):** A decision not to pass sentence on condition that the offender undertakes particular action, such as undergoing treatment for drug addiction or receiving psychological counselling. Depending on the result, the offender may not receive a sentence. The conditions may be supervised by an agency specified by the court.
- **Probation or judicial supervision:** Under a probation order, the convicted person is not incarcerated but is placed under supervision of a judicial authority, probation service or similar body for a specified length of time. A person who violates the probation order will likely have the probation revoked and will have to serve the original sentence.
- **Community service:** A community service order requires an offender to do unpaid work and under supervision for a specified number of hours or to perform a specific task of benefit to the community.
- **Diversion to treatment for specific offenders (mentally ill, drug users):** The court can divert the offender to receive treatment for a set period of time.
- **Restrictions on movement:** Restrictions are imposed as to residence, movement or travel to certain places specified by the court.
- **Electronic monitoring:** See above.

## Post sentencing stage

- **Parole or early conditional release:** It is the early release of sentenced prisoners under individualized post-release conditions. It can be mandatory, taking place automatically, or discretionary. It is always conditional on the released person not engaging in criminal activities. Other conditions may also be imposed.
- **Temporary release:** The serving of a sentence is interrupted, and the prisoner is temporarily released on certain conditions. This is usually granted due to exceptional circumstances.
- **Compassionate release:** Release is decided on compassionate grounds, for instance due to terminal illness.
- **Pardon:** Pardon is granted by the Executive (presidential or royal) and is usually an act of clemency.
- **Electronic monitoring:** See above.

# 1. INTRODUCTION

The world is facing an unprecedented public health emergency due to the COVID-19 pandemic. The pandemic comes at a time when the global prison population is record high with 11 million prisoners worldwide and with over 124 states reporting prison overcrowding. Globally, the pandemic has exposed and accelerated the detrimental consequences of chronic overcrowding in places of detention.

The COVID-19 pandemic warrants resolute action by states to reduce the prison population as an imperative for preventing an outbreak within the prison and, in turn, within society. Without compromising public safety, states must therefore limit new admissions to prison and accelerate the release of certain categories of prisoners. While priority should be given to vulnerable groups in relation to COVID-19, this may not be sufficient to allow effective management of COVID-19. As a result, states are encouraged to consider using non-custodial measures<sup>1</sup> in relation to a broader range of persons eligible for non-custodial measures.

Prisons are known to be epicentres of infectious diseases, hatching and spreading viruses, and this is even more so in overcrowded prisons. In a COVID-19 context, overcrowding impedes the effective implementation of measures to prevent and manage the outbreak in detention facilities. Overcrowded custodial settings offer limited space, often with unsanitary facilities and poor access to health care. Physical distancing, regular hand washing, and disinfection are extremely difficult, if not impossible. The risk of mass infection is therefore high for detainees and custodial staff alike. As prisoners generally have a poorer health condition than the rest of the population, they are also at greater risk of complication and COVID-19 mortality. As of early June 2020, there has been 68,989 confirmed COVID-19 cases in prisons reported in 78 countries and 1,106 prison deaths in 33 countries.<sup>2</sup> These figures are in all likelihood conservative due to scarcity of testing and underreporting.

Prison health is widely considered as interlinked with public health. Prisons may act as incubators and amplifiers of infectious disease, spreading it beyond their walls. An outbreak of COVID-19 in prison will ultimately impact the spread of the virus in society and cause a huge burden on the healthcare system.

This Guidance Document aims to assist criminal justice actors in preventing the spread of COVID-19. To this end, it outlines the key principles to be observed when considering non-custodial alternatives, as seen through a COVID-19-lens. Focus is placed on the three stages of the criminal justice process at which non-custodial measures may be applied: (a) pretrial stage, (b) trial and sentencing stage, and (c) post-trial stage.

Since prison overcrowding has been one of the most serious problems facing prison systems in past decades, this Document also aims to illustrate the broad spectrum of effective alternatives to imprisonment, which are available to justice actors to tackle overcrowding in a systemic way. Such alternatives help ensure effective management of prisons, public safety, human rights and cost-effectiveness.

**The Guidance Document builds on the relevant international instruments, including:**

- International Covenant on Civil and Political Rights (ICCPR)<sup>3</sup>
- UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT)<sup>4</sup>
- UN Standard Minimum Rules for the Treatment of Prisoners (The Nelson Mandela Rules)<sup>5</sup>
- UN Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules)<sup>6</sup>
- UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (The Bangkok Rules)<sup>7</sup>
- UN Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules)<sup>8</sup>

## 2. GUIDING PRINCIPLES

Decisions on whether to apply custodial or non-custodial measures call into question and require the balancing of three sets of interests: the rights of the defendant or offender (liberty, security, fair trial and health), the rights of victims (security, justice and reparation) and the legitimate concerns of society (public safety, public order and public health).

In striking this balance, prosecutors, judges, prison services and other justice actors must base their decisions firmly on fundamental principles of international law, particularly on international human rights law. In the exercise of their duties, criminal justice actors often face public pressure or undue interference in the criminal justice process, and this may be even more pronounced in times of crisis. However, it is imperative that they do not succumb to such pressure or interference but instead preserve the integrity of the justice process and uphold human rights.

The majority of states worldwide have long been marred by an overuse of pretrial detention and imprisonment and by persistent levels of overcrowding. This is largely the result of states resorting to deprivation of liberty as the first response to all sorts of criminality and social phenomena, disregarding fundamental human rights principles. The COVID-19 crisis has accentuated these shortcomings.

To deal effectively with the pandemic, it is paramount that states and their criminal justice institutions abide strictly by those principles, which constitute the backbone of societies based on the rule of law and respect for human rights. This will require giving precedence to non-custodial measures in accordance with the United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules). When deciding on the appropriate sanction or measure for a given misconduct, states should make rigorous assessments, guided by the following core principles:

### A. Principles of legality, necessity and proportionality

Any restriction of human rights must be prescribed by law, necessary in a democratic society and proportionate to the legitimate aim pursued.

The principles of legality, necessity and proportionality should lie at the core of any decision to detain, imprison or subject a person to a non-custodial measure. Deprivation of liberty should always be imposed exceptionally, based on the *grounds* and in accordance with such *procedures* as established by law. These grounds and procedures shall be clearly defined, so as to avoid vague definitions that may open the door to excessive or arbitrary detention. Further, any custodial or non-custodial measure shall be necessary and proportionate to the gravity of the offence. Pretrial detention should always be a measure of last resort, imposed only after a thorough assessment of other effective and less restrictive measures.

Furthermore, any deprivation of liberty should be such that the individual is protected from arbitrariness. The notion of 'arbitrariness' is interpreted to include elements of inappropriateness and injustice as well as lack of predictability, due process of law, reasonableness, necessity and proportionality. For example, the decision to keep a person in pretrial detention will be arbitrary, if it is not subject to periodic re-evaluation of the justification for continuing the detention. Similarly, the decision to impose a prison sentence for a minor offence could be considered arbitrary in terms of reasonableness and proportionality, if the person is in poor health and thus vulnerable due to COVID-19.

**COVID-19 considerations:** In the current context, authorities responsible for deciding on pretrial detention should pay additional attention in applying the principles of necessity and proportionality. Moreover, circumstances that may lead to increased vulnerability of suspects or defendants due to their old age or underlying health conditions should be given due consideration in assessing the proportionality of detention in conjunction with other important factors, such as public safety. At the sentencing and post-sentencing stage, authorities should also aim to impose the least restrictive measures to achieve the legitimate aims as outlined above. Given the increased limitations on health care, contact with the outside world and purposeful activities, imprisonment would amplify the punishment beyond the prison sentence. This also has implications for proportionality considerations. For instance, it may not be proportionate to place a person with a very short prison sentence in prison, if his/her poor health condition would be exacerbated in prison due to COVID-19.

## **B. Principle of non-discrimination and attention to vulnerability**

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

*(International Covenant on Civil and Political Rights, Article 26)*

In the criminal justice context, the prohibition of discrimination is relevant across a series of rights, notably the right to fair trial, liberty and security, and freedom from torture and other inhuman or degrading treatment or punishment. Decisions related to detention or imprisonment should not be based on discriminatory grounds such as race, colour, sex, age, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>9</sup> Discrimination here implies any distinction, exclusion, restriction or preference that is based on any of the listed grounds, and which has the purpose or effect of nullifying or impairing the recognition or exercise of rights, on an equal footing.

Moreover, the principle entails an obligation to take affirmative action in order to diminish or eliminate conditions, which cause or help to perpetuate discrimination. To this end, states must pay particular attention to vulnerability, e.g. poor health, and afford differentiated treatment to persons in different situations so as to correct factual inequalities. Measures related to the prevention and control of COVID-19 in prisons should also strictly observe the prohibition of discrimination.

**COVID19 considerations:** No decision regarding detention, imprisonment or non-custodial measures during the pretrial, sentencing and post-sentencing stages of the criminal justice process should be discriminatory. For example, the general exemption of particular prisoners from early release or pardon due to their religion or political opinion would amount to discrimination. Such decisions should only be based on lawful criteria and a thorough individual risk and vulnerability assessment.

Moreover, the specific circumstances, which may render an individual particularly vulnerable during COVID-19, should be given due consideration when deciding on admitting or releasing persons from custody. In this respect, children, pregnant women and the elderly as well as those with serious underlying medical conditions linked to high-risk of severe illness from COVID-19 should be considered as particularly vulnerable groups. Affirmative action needs to be taken in relation to these high-risk groups, as indicated by the World Health Organisation (WHO).<sup>10</sup>

### C. Principle of humane treatment

**No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.**

*(International Covenant on Civil and Political Rights, Articles 7 and 10)*

Justice administrators must observe the fundamental principle of treating detainees with respect due to their inherent dignity and value as human beings at all times, regardless of whether a person is suspected, charged or convicted of an offence. This entails that no one shall be subjected to torture or other inhuman or degrading treatment or punishment at any time. Instead, everyone should be protected from such ill-treatment and be treated with respect for their human dignity. This absolute principle must be observed throughout the criminal justice process from the moment of arrest and until final release.

States and their criminal justice system must also take specific measures to prevent any form of ill-treatment of persons in their custody. Such measures are particularly important to counter the heightened risk of inhuman or degrading treatment in detention, and even more so in conditions of chronic overcrowding. If the state cannot guarantee the humane treatment of persons in its custody, for instance because a possible deprivation of liberty would inflict severe pain and suffering to the person due to his or her pre-existing medical condition, then non-custodial sanctions should be considered and prioritized instead of pretrial detention or imprisonment.

**COVID-19 considerations:** In the current COVID-19 context, the principle of humane treatment should, for instance, be observed when the responsible authorities assess the risk of causing pain and suffering or other serious harm to a person, if they are admitted to or remain in detention. To ensure humane treatment, authorities should also consider the current conditions of detention, such as chronic levels of overcrowding, poor sanitation, the risk of infection and any individual health risk factors.

### **3. NON-CUSTODIAL MEASURES AT THE PRE-TRIAL STAGE<sup>11</sup>**

The general rule is that a person must enjoy personal liberty and not be held in detention pending trial.<sup>12</sup> Pretrial detention should be applied as a measure of last resort<sup>13</sup> and only where it is lawful, necessary and proportionate.<sup>14</sup> Respect for this fundamental principle is even more important in the efforts to prevent the spread of COVID-19. However, in many countries worldwide pre-trial detention is not used exceptionally but often excessively and arbitrarily. As a result, remand prisoners represent more than half of the prison population worldwide.<sup>15</sup>

Authorities responsible for deciding on pretrial detention should duly consider aspects relating to the judicial process and public safety, as well as the specific circumstances linked to the COVID-19 context. In particular, when assessing the necessity and proportionality of detention, they should take into account the state of health of the defendant, including whether he/she is a confirmed or suspected case of COVID-19 infection, whether he/she belongs to a high-risk group and the possible consequences of detention on the defendant's health. Moreover, due consideration should be afforded to the capacity of the prison to admit new detainees and the implications new admissions may have on the conditions of detention affecting everyone in the place of detention. The imperative of considering unprecedented public health concerns should render the measure of pretrial detention even less frequent in times of COVID-19.

Decisions on whether or not to impose or prolong pretrial detention, must be subject to periodic review by a judicial or other competent authority. Such judicial reviews should establish, without delay, whether pretrial detention – or continued pretrial detention - is lawful, necessary and proportionate, whether non-custodial alternatives should be applied or whether the person shall be released. Detainees should, equally, be afforded the right to request a review of the legality of their detention in light of the COVID-19 situation in prisons. As the COVID-19 outbreak is evolving rapidly and the situation may suddenly change in terms of public health measures and prison conditions, authorities should closely monitor the developments and adjust their decisions to respond to them in an effective way with respect to human rights and public health.

In order to limit the use of pretrial detention, effective non-custodial alternatives should be sought and implemented, as appropriate. Non-custodial alternatives to pre-trial detention include:



### Non-custodial alternatives to pre-trial detention

- a. Home arrest
- b. Reporting obligations
- c. Restrictions on leaving or entering a specific space without authorization
- d. Retention of travel documents
- e. Bail or bond
- f. Supervision by specific agency
- g. Electronic monitoring

*Examples of non-custodial measures adopted in the COVID-19 context:*

**India:** Prisons across India are set to **release** at least 34,000 prisoners, both undertrials and convicts, on **interim bail and emergency parole** after the Supreme Court ordered all states to consider these forms of early release to reduce overcrowding.<sup>16</sup>

**Jordan:** 1,500 **detainees awaiting trial for national security offences** have been **released** by the State Security Court.<sup>17</sup>

**The Netherlands:** **Pretrial detention has been suspended** for some individuals, who have successfully argued for release on an individual basis for health reasons.

## 4. NON-CUSTODIAL MEASURES AT THE TRIAL AND SENTENCING STAGE<sup>18</sup>

The trial and sentencing stage of criminal proceedings provides an important opportunity to apply non-custodial measures. Such measures are particularly appropriate in cases of misdemeanours, minor drug offences and minor non-violent offences. Decisions on non-custodial measures should be made by the judicial authority, taking into account the rehabilitative needs of the offender, the protection of society and the interests of the victim.<sup>19</sup>

Replacing short prison sentences with non-custodial (community) sanctions can directly and significantly contribute to the reduction of persons admitted to prison. Imprisonment is to be applied only when the seriousness of the offence would render any other measure inadequate.<sup>20</sup> For less serious offences, a wide range of non-custodial sanctions in criminal legislation, suitable for different types of offences and applicable to the individual circumstances of each offender, should be considered.

In the current COVID-19 context, many states have chosen to criminalize breaches of public health measures, such as lockdown and curfew restrictions, and have sanctioned persons with imprisonment for such offences. Since prisons are hotspots for infections, such measures run contrary to the purpose that they aim to serve, namely, to protect public health, as they increase the number of new admissions to prisons. Breaches of COVID-19 measures should not lead to imprisonment; instead, they should be addressed through the use of proportionate non-custodial sanctions, such as fines.

The judicial authority may make use of a range of alternative non-custodial measures at its disposal, depending on the circumstances of each case, notably:

### **Non-custodial alternatives to imprisonment at the trial and sentencing stage**

- a. Fines
- b. Suspended or deferred sentences (with or without supervision), including
  - Unconditionally suspended sentences (unconditional discharge)
  - Conditionally suspended sentences (conditional discharge)
- c. Probation or judicial supervision
- d. Community service
- e. Diversion to treatment for specific offenders (mentally ill, drug users)
- f. Restrictions on movement
- g. Electronic monitoring

*Examples of non-custodial measures adopted in the COVID-19 context:*

**Malaysia:** The authorities have **stopped pronouncing custodial sentences** as punishment for violations of the Movement Control Order.<sup>21</sup>

**Norway:** The **intake** of convicted persons to prisons has been **suspended**.<sup>22</sup>

**Thailand:** The Dept of Corrections has **suspended the serving of jail sentences**.<sup>23</sup>

**USA:** The Attorney General directed the federal Bureau of Prisons to **expand** its use of **home confinement** for inmates in appropriate cases.<sup>24</sup>

## 5. NON-CUSTODIAL MEASURES AT THE POST-TRIAL STAGE<sup>25</sup>

The use of non-custodial measures at the post-sentencing stage is an essential tool for decreasing the prison population. Competent authorities shall have at their disposal a range of post-sentencing alternatives in the national legal framework. The possibility of reducing the length of imprisonment and releasing offenders from prison to a non-custodial programme shall be considered at the earliest possible stage, especially in the light of the COVID-19 pandemic.

At the same time, every decision on the release of an offender should be the result of a thorough risk assessment, determining the risk to the offender, if he/she remains in prison, and the risk that the offender could pose to society, if he/she is released. Although the pandemic calls for a rapid response in reducing prison populations, the decision should follow clear procedures and criteria and should not be arbitrary.

Priority for release should be given to particular at-risk groups such as children, pregnant women and the elderly as well as persons with underlying medical conditions that increase the risk of COVID-19. Meanwhile, the use of non-custodial measures should also be extended to other prisoners as part of an overall plan to reduce the prison population in order to enhance the possibility of effectively preventing and managing COVID-19 within prisons and in society in general.

Well-defined criteria for the granting of early release or parole should be drawn up, and clearly explained to the prisoners. Such criteria also reduce the risk of abuse of the discretionary power of the competent authorities to a minimum, and it enables prisoners to work towards release knowing what criteria they need to satisfy. This is particularly important when prisoners are pardoned by the executive without the involvement of the judiciary or prosecution.

It is imperative that prisoners are adequately informed, orally and in writing, of the procedures and conditions that need to be met in order to be eligible for any non-custodial measure or release. If release is conditional, then the affected individual should provide their informed consent. The prisoner should also be informed of his right to request a review of relevant decisions.

Finally, the relevant authorities are encouraged to establish a system of review of the legal status of prisoners, for example by judicial inspection. Such reviews help identify those whose sentences have been completed and vulnerable prisoners, such as high-risk prisoners for COVID-19, juveniles and women with young children, whose imprisonment should be avoided as far as possible.

The most common non-custodial measures, which could be considered and applied are:

### Non-custodial alternatives to imprisonment as the post-trial stage

- a. Parole or early conditional release
- b. Temporary release
- c. Compassionate release
- d. Pardon or amnesty
- e. Electronic monitoring

## A. Parole or early conditional release

Parole or early conditional release is the early release of sentenced prisoners under individualized post-release conditions. It 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 whether to release a prisoner conditionally, after a certain period of the sentence has been served. Conditional release or parole is always accompanied by a general condition that the prisoner should refrain from engaging in criminal activities. Other conditions may be imposed, to the extent that these are appropriate for his/her successful social reintegration.

Within the COVID-19 context, it is a good practice to issue early release of prisoners with 1-6 months remaining of their sentence, provided that they are low-risk prisoners.

*Example of non-custodial measures adopted in the COVID-19 context:*

**Indonesia:** 36,500 prisoners have been released early, notably **drug convicts** who have served 5-10 years of their sentence, inmates **over 60 years**; crime convicts with **chronic illness**; prisoners who had served **two-thirds** and juveniles who have served **half their sentence**.<sup>26</sup>

**Lebanon:** 559 prisoners with **less than 6 months left** of their sentence have been released early.<sup>27</sup>

**Nigeria:** 3,751 prisoners who have served 3 years or more of their sentence with less than **6 months left** to serve; prisoners **over 60 years**; those with **mental health issues** or **terminal illness**; **pregnant women**; prisoners with **options of fines** not exceeding N50.000 with no pending case have been released early.<sup>28</sup>

**Scotland:** 450 prisoners, who have been **sentenced to 18 months or less** and have **90 days or less left** to serve, will be eligible for early release.

## B. Temporary release

Prisoners may be temporarily released, interrupting the serving of their prison sentence. Such release is granted exceptionally, for instance when the prisoner's health situation requires that he/she cannot complete the sentence, or continued detention will severely affect their health.

In the current COVID-19 context, good practices include the temporary conditional release of prisoners for a limited period of time, as long as the pandemic remains a serious threat to their health. This may be applied to prisoners with longer sentences, who have serious underlying medical conditions (e.g. heart, liver, kidney or lung diseases, diabetes, or other diseases classified by WHO), which would endanger their health in case they contract COVID-19. Temporary release requires that the prisoner is considered to pose no or a low risk to society.

*Example of non-custodial measures adopted in the COVID-19 context:*

**Colombia:** 10,850 prisoners will be released temporarily and placed under house arrest. Those eligible are **pregnant women** and **mothers with children under the age of 3**.<sup>29</sup>

**Ireland:** 585 prisoners, who are **assessed not to pose a threat to the public**, have been granted temporary release.<sup>30</sup>

## C. Compassionate release

Prisons are generally not suitable places for accommodating and caring for prisoners who have serious health problems or disabilities, who are elderly and therefore have special needs, or who have been diagnosed with a terminal illness. Release on compassionate grounds should be considered for those who do not pose a threat to society and whose age, disability or health condition lead to serious challenges for them to cope with prison conditions, especially in the COVID-19 context, thus increasing the severity of the sentence.

Within the current pandemic context, it is a best practice to consider compassionate release of prisoners who are either terminally ill or whose medical condition is so serious that a potential infection with COVID-19 may have very serious or even lethal consequences.

*Example of non-custodial measures adopted in the COVID-19 context:*

**USA:** Individual prisoners have been granted compassionate release by national courts partly due to COVID-19 as they suffer from **chronic sinusitis** affecting their breathing,<sup>31</sup> **chronic obstructive pulmonary disease**,<sup>32</sup> or a combination of **asthma, high blood pressure**, and **diabetes**.<sup>33</sup>

## D. Pardon or amnesty

In many countries, presidential or royal pardoning schemes exist, and in other countries prisoners may be pardoned and released on the basis of a specific law targeting selected categories of prisoners or offences. Pardons are usually individual acts of clemency, for instance for persons who are unsuited for continued detention due to serious physical disability or short-term fatal prognosis.

Pardons may result in the release of a prisoner, once a certain, often considerable, proportion of the sentence has been served or in the commuting of a death sentence into life imprisonment. In order to be effective, rules and procedures relating to applications for pardon must be clear, and prisoners shall have access to legal counsel and, where appropriate, legal aid, to enable them to complete their applications. Pardons may never be granted to persons convicted of genocide, crimes against humanity or grave human rights violations, as this would effectively lead to impunity.<sup>34</sup> Nor may they be applied on discriminatory grounds, unjustifiably excluding certain categories of prisoners, such as political prisoners.

In the COVID-19 context, the possibility of a pardon should be examined for those convicted of non-violent or minor offences as well as for persons with underlying medical conditions that will be exacerbated by COVID-19.

*Examples of non-custodial measures adopted in the COVID-19 context:*

**Burkina Faso:** 1.207 prisoners have been pardoned on the basis of **advanced age, state of health** and **completion of half sentence**, excluding those convicted of organized crime or terrorism.<sup>35</sup>

**Ethiopia:** 4,011 prisoners convicted of **minor crimes** who were serving sentences of **up to 3 years**, and **those who were about to be released** were pardoned by the President.<sup>36</sup>

**Morocco:** The King has pardoned 5.645 prisoners as a preventive measure based on the criteria of **age, precarious health condition**, the **length of their sentence** and **good behavior** displayed.<sup>37</sup>

## **E. Electronic monitoring**

Electronic monitoring is a method of supervising or keeping track of those who have been issued early conditional release and temporary release. This measure is mostly applied to persons convicted of minor, non-violent crime, and it is mostly used in medium and high-income countries as the measure is rather costly.

In the COVID-19 context, electronic monitoring would be particularly relevant to the categories of prisoners who have underlying medical conditions, which are identified as risk factors by the WHO, who pose no risk to society and whose home sentencing would not run counter to the legitimate interests of the victim or society.

*Examples of non-custodial measures adopted in the COVID-19 context:*

**Poland:** Up to 12.000 prisoners **serving sentences** of **up to one year** may have their stay in prison converted to serving their sentence at home under electronic supervision.<sup>38</sup>

## 6. CONCLUSION

The vast majority of prisons worldwide remain overcrowded, despite long standing calls on states by international, regional and national institutions to take effective measures to reduce prison populations. Overcrowding impacts negatively on the conditions of detention and possibilities for ensuring humane treatment of persons deprived of their liberty. It also affects the physical and mental well-being of prisoners, exacerbating pre-existing mental and physical health problems, and increases the risk of transmission of communicable diseases. Due to all these factors, COVID19 poses immense challenges for prison administrations worldwide.

The reduction of the population in detention and prison is an imperative for the effectiveness of any strategy to prevent and control a COVID-19 outbreak. In congested prisons, it is impossible to apply public health measures without first implementing a series of effective measures throughout the criminal justice process to address overcrowding. The options available will depend on the legal framework of each country as well as the political, economic and social conditions on the ground.

Reducing prison overcrowding is a shared responsibility of prosecutors, judges, prison and probation services and other relevant criminal justice actors. Measures need to be adopted and applied at all stages of the criminal justice process. Therefore, states need to include such measures in their policies and plans to prevent and manage COVID-19 in prisons and in society in general.

**This pandemic has accentuated and accelerated pre-existing inequalities and disparities in our societies, both inside and outside of prison walls. These have exposed shortcomings of criminal justice practices, paradigms and logics across the globe, revealing dead-ends and the dire human costs of our current dependence on imprisonment.**

**The pandemic also presents a historic opportunity for states marred by excessive recourse to pre-trial detention and imprisonment, to review their criminal justice practices in order to ensure that deprivation of liberty becomes the exception, not the rule. It is incumbent on all concerned to take action now and vision anew.**



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**DIGNITY Guidance Document**

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IN THE CONTEXT OF COVID-19**

**INCREASING THE USE OF  
NON-CUSTODIAL MEASURES**

By Therese Maria Rytter and Kalliopi Kambanella

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