



**HANDBOOK OF
INTERNATIONAL STANDARDS
ON
SENTENCING PROCEDURE**

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INTRODUCTION

In many countries, overreliance on detention is a major problem both at pretrial and dispositional stages of criminal proceedings. International standards strongly encourage the imposition of non-custodial measures during investigation and trial and at sentencing, and hold that deprivation of liberty should be imposed only when non-custodial measures would not suffice. The overuse of detention is often a symptom of a dysfunctional criminal justice system that may lack protection for the rights of criminal defendants and the institutional capacity to impose, implement, and monitor non-custodial measures and sanctions. It is also often a cause of human rights violations and societal problems associated with an overtaxed detention system, such as overcrowding; mistreatment of detainees; inhumane detention conditions; failure to rehabilitate offenders leading to increased recidivism; and the imposition of the social stigma associated with having been imprisoned on an ever-increasing part of the population. Overuse of pretrial detention and incarceration at sentencing are equally problematic and both must be addressed in order to create effective and lasting criminal justice system reform.

Drawing on the American Bar Association Rule of Law Initiative's (ABA ROLI's) 20 years of experience providing technical legal assistance to promote the rule of law in more than 70 countries worldwide, ABA ROLI has developed the *Handbook of International Standards on Sentencing Procedure* to serve as a reference for members of the legal community interested in ensuring their country's compliance with international norms and best practices for pretrial detention. This handbook compiles standards and best practices on sentencing from all over the globe in a convenient format, with the goal of providing a framework for legislative and procedural reforms. A second handbook focuses on international standards on pretrial detention procedure.¹ These handbooks will find their greatest utility in countries where ABA ROLI's *Detention Procedure Assessment Tool* (DPAT) has been implemented in order to analyze all aspects of the country's detention regime and identify the areas in which the country is out of compliance with internationally-accepted norms and best practices for detention; the handbooks will serve as an invaluable tool for the local legal community to design and implement reforms targeting the problem areas identified in the DPAT. However, the handbooks can also be used on their own by anyone interested in learning about the international standards relevant to detention procedure.

In implementing criminal law reform programs, ABA ROLI was struck that, while many academics, governmental institutions, and non-governmental organizations had heavily documented and evaluated issues of prisoners' rights, including issues such as overcrowding, mistreatment, detention conditions, rehabilitation, and social stigma, no organization or study had sought to directly address the legislative and structural causes of these problems. ABA ROLI, in developing the DPAT and the handbooks on international standards, thus aimed to evaluate the procedural and legislative framework that contributes to the overuse of detention and incarceration, as well as the actual practices of criminal justice sector actors charged with implementing detention procedure and legislation. It is ABA ROLI's belief that, by promoting the rule of law through transparent and effective procedural reforms, a country is likely to improve the human rights situation in its detention facilities. This handbook, therefore, focuses narrowly on the procedures and practices regarding deprivation of liberty and alternatives thereto, from the moment an offender is found criminally liable until such time as the offender is returned to full liberty.

¹ AMERICAN BAR ASSOCIATION RULE OF LAW INITIATIVE, *HANDBOOK OF INTERNATIONAL STANDARDS ON PRETRIAL DETENTION PROCEDURE* (2010).



This handbook relies on many international and regional legal instruments pertaining to criminal procedure, prisoners’ and detainees’ rights, juvenile justice, sentencing, and alternatives to detention. These include major international human rights treaties as well as regional conventions from the European, Inter-American, and African human rights systems; guidelines, rules, declarations, and best practices developed by the United Nations, regional intergovernmental bodies, bar associations, and civil society organizations; jurisprudence from international, regional, and domestic judicial or quasi-judicial bodies; and books and manuals by academic or civil society experts. The table of authorities at the end of the handbook provides the list of original sources of law as well as resources for further reading on detention procedure. The handbook considers the roles played by all actors and institutions involved in criminal detention, including police, investigators, prosecutors, judges, defense advocates, court personnel, corrections staff, parole board members, defendants, detainees, prisoners, victims, witnesses, and, when applicable, others. It covers both detention arising from lawful processes, such as the court-supervised arrest of a criminal suspect by a state actor, and unlawful processes, such as forced disappearance or apprehension of a suspect without judicial supervision.

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1. The Penalty Phase

1.1. Imposing a Sentence

Fundamental Principles

Deprivation of liberty should be regarded as a sanction of last resort, and should be imposed only when the seriousness of the offense would make any other sanction or measure clearly inadequate. The law should provide for an appropriate array of community sanctions and measures, and prosecutors and judges should be urged to use them as widely as possible.² The judicial authority should have a range of non-custodial measures at its disposal, and should consider the rehabilitation of the offender, the protection of society, and the interests of the victim when making a sentencing decision.³

Uniformity in sentencing is crucial. Similarly situated defendants should receive similar punishment, as disparity in sentencing may erode the public's confidence in the integrity of the criminal justice system. Sentencing should be entirely neutral as to the race, sex, national origin, creed, or socioeconomic status of the offender.

In order to protect the right to a fair trial, it is essential that courts give reasons for their decisions in a timely manner.⁴ Decisions imposing detention on an individual, including at a sentencing hearing, are no exception.⁵ A sentence should be imposed in open court in the presence of the offender. The sentencing court should state or summarize the court's findings of fact, the precise terms of the sentence imposed, and the reasons for selection of the type and severity of the sanction. The court should inform the offender of the right to appeal, and of the time limits and procedures for initiating an appeal.⁶

Considerations in Choosing a Penalty

The U.N. Minimum Rules of Non-Custodial Measures (the Tokyo Rules) state that the judicial authority may avail itself of a report prepared by a competent, authorized official or agency which contains relevant social information on the offender, including past and current offenses, mental health and addiction issues, and information and recommendations relevant to the sentencing procedure.⁷ The sentencing court should make express findings of fact on issues material to the sentence to be imposed, using a standard of a preponderance of the evidence, for facts that were not proven at trial or established on the record of the acceptance of a plea.⁸ The ABA Criminal Justice Standards on Sentencing require that sentences be imposed by a judge, not a jury.⁹ If feasible, the judge who presided over the guilt determination phase of the case should also preside over sentencing.¹⁰ Multiple offenses within the jurisdiction of the sentencing court should be

² Council of Europe Recommendation No. R(99)22 para. I (1), (3).

³ Tokyo Rules 8.1.

⁴ ECHR Article 6(1) has been interpreted as requiring courts to give reasons for their decisions., Reid, A Practitioner's Guide to the European Convention of Human Rights, (Sweet and Maxwell, 1998) at126. The African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa describe this right as "an essential element" of a fair hearing, paragraph A(2)(i).

⁵ American Human Rights Commission, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas state that: "orders of deprivation of liberty shall be duly reasoned", Principle IV.

⁶ Standard 18-5-19.

⁷ Rule 7.1.

⁸ ABA Standard 18-5.18.

⁹ Standard 18-1.4.

¹⁰ Standard 18-5.13.



consolidated in a single sentencing proceeding when possible.¹¹ The sentencing court should be authorized upon its own motion or upon request of either party to call for a pre-sentence investigation and a written report of its results,¹² which should be disclosed to the parties.¹³

In the United States, the factors to be considered when imposing a sentence include the grade of the offense; mitigating or aggravating factors; that nature and degree of harm caused by the offense (including whether it involved property, irreplaceable property, a person, a number of persons, or a breach of public trust); the community view of the gravity of the offense; the public concern generated by the offense; the deterrent effect a particular sentence may have on the commission of the offense by others; and the current incidence of the offense in the community and in the Nation as a whole.¹⁴ The primary aim of deprivation of liberty should be the reform and social re-adaptation of the offender.¹⁵ Many actors consider that deterrence and retribution should also be aims of deprivation of liberty, but this is increasingly rejected by international norms.

The ABA Criminal Justice Standards on Sentencing expound on the international norms. Sentences should be authorized and imposed taking into account the gravity of the offense, and should be no more severe than necessary to achieve the societal purposes for which they are authorized.¹⁶ Sentencing courts should be authorized to exercise substantial discretion to determine sentences in accordance with the gravity of offenses and the degree of culpability of particular offenders, including by taking into account facts and circumstances that aggravate or mitigate the seriousness of the offense. Neither the legislature nor any intermediate agency should assign weights to aggravating or mitigating factors; this should be done by the sentencing court on a case-by-case, comprehensive basis. Courts should also be authorized to take into account individual characteristics not material to an offender's culpability that may justify imposition of a different type of sanction.¹⁷ The legislature or other intermediate agency should identify mitigating or aggravating factors and guide sentencing courts in the use of discretion to choose a level of severity or type of sanction different from the presumptive sentence.¹⁸

Detention While Awaiting Sentence

There is no widely-accepted international norm on the issue of whether the offender may remain at liberty while awaiting sentencing. Although most states confine convicted offenders prior to sentencing, the decision to confine an offender awaiting sentencing should not be automatic, but should be made by a competent authority, generally the authority that oversaw the guilt phase of trial. In Europe, the Council of Europe treats detainees who have been remanded in custody prior to sentence as “untried prisoners” who are subject to the same treatment as detainees awaiting trial or conviction, and even allows states extend this treatment to convicted persons pursuing an appeal.¹⁹ Generally, offenders should not be sent to a prison facility (as opposed to a pretrial

¹¹ Standard 18-5.16.

¹² Standard 18-5.2.

¹³ Standard 18-5.7.

¹⁴ 28 U.S.C. § 994(c).

¹⁵ Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa art.(N)(9)(a)

¹⁶ Standard 18-2.4.

¹⁷ Standard 18-2.6. These are defined in Standard 18-3.4 to include physical, mental, social, and economic characteristics, for example, taking into account an offender's financial state in determining the amount of a fine to be imposed, but must not include race, gender, sexual orientation, national origin, religion, marital status, or political views.

¹⁸ Standard 18-3.2, 18-3.3.

¹⁹ Council of Europe – European Prison Rules § 94.



detention facility or holding cell) until after a sentence has been imposed, as this may interfere with their right to participate in the sentencing proceeding.

Consideration of Time Spent on Remand

The period of remand in custody prior to conviction should be deducted from the length of any sentence of imprisonment subsequently imposed, and should also be taken into account in imposing any non-custodial measures.²⁰

Non-Retroactivity

No one should be sentenced for an act that was not a legally punishable offense at the time it was committed, and no sanction may be imposed that is more severe than the sanction applicable at the time of the commission of the offense.²¹

1.2. Alternatives to Incarceration

According to the Tokyo Rules, as well as regional standards from the Americas, Africa, and Europe, states should develop non-custodial measures in order to provide greater flexibility to make sentences proportional to the nature and gravity of the offence and reduce the use of imprisonment.²² The personality and background of the offender and the protection of society should be taken into account, with an eye to avoiding the unnecessary use of imprisonment. The number and types of non-custodial measures available should be determined in such a way that consistent sentencing remains possible.²³ The introduction, definition, and application of non-custodial measures must be prescribed by law, and the imposition of a non-custodial measure must be based on an assessment of established criteria regarding the nature and gravity of the offence and the personality and background of the offender, the purposes of sentencing, and the rights of victims. The sentencing authority must be able to exercise discretion, but with full accountability and in accordance with the rule of law.²⁴ Non-custodial dispositions may include: (a) verbal sanctions, such as admonition, reprimand and warning; (b) conditional discharge; (c) status penalties; (d) economic sanctions and monetary penalties; (e) confiscation or an expropriation order; (f) restitution to the victim or a compensation order; (g) suspended or deferred sentencing; (h) probation and judicial supervision; (i) community service orders; (j) referral to an attendance center; (k) house arrest; (l) any other mode of non-institutional treatment; or (m) some combination of the measures listed above.²⁵ The sentencing authority may impose practical and precise conditions on the offender during the non-custodial sentence, aimed

²⁰ Council of Europe Recommendation (2006)13 on the Use of Remand in Custody, the Conditions in which it takes Place and the Provision of Safeguards against Abuse, para. 33; *see also* ABA Standard 10-5.14, 18-3.21.

²¹ ICCPR Art. 15, ECHR Art. 7, Inter-American Principles, V, African Charter Art. 7(2), African Commission Principles N(7)(a).

²² Rule 1.5.

²³ Rule 2.3.

²⁴ Rule 3.1-3.3.

²⁵ Rule 8.2. *See also* Council of Europe Recommendation (2000)22 on Improving the Implementation of the European Rules on Community Sanctions and Measures para. 1-3, Recommendation (99)22 Concerning Prison Overcrowding and Prison Population Inflation para. 14-17, Recommendation (85)11E on the Position of the Victim in the Framework of Criminal Law and Procedure, para. 10-11, Recommendation (92)16 on the European Rules on Community Sanctions and Measures, 3-6, 12, 23; Inter-American Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas III(4); Kampala Declaration on Prison Conditions in Africa (1996); UN Implementation of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (8), (9), (10) (on restitution); ABA Standard 18-2.2.



at reducing the likelihood of recidivism and increasing the chance of social reintegration, but taking into account the interests of the victim.²⁶

In order to make non-incarcerative sanctions, including financial penalties, credible alternatives to imprisonment, they must be effectively implemented and monitored.²⁷ An effective monitoring program allows the sentencing tribunal to impose non-incarcerative sentences knowing that, if the conditions imposed to mitigate the risk posed by the offender's release are breached, the relevant authorities will be made aware of it and will have the option, where appropriate, of imposing an incarcerative sentence.

A threshold requirement, for example, is that the agencies responsible for implementation and monitoring, and the duties and responsibilities of those agencies, are specified in law.²⁸ The United Nations Minimum Rules of Non-Custodial Measures, supplemented by Council of Europe, Recommendation (92)16 on the European Rules on Community Sanctions and Measures and the ABA Criminal Justice Standards on Sentencing, provide further details on the benchmarks that this facet of a national sentencing regime must achieve to be effective.²⁹

Implementation

At the outset of a non-incarcerative sentence, it is vital that the implementing agency make the offender aware of his obligations and rights during the period of his sentence. The United Nations Minimum Rules state that, "at the beginning of the application of a non-custodial measure, the offender shall receive an explanation, orally and in writing, of the conditions governing the application of the measure, including the offender's obligations and rights."³⁰ The offender should also be informed of the consequences for failure to comply with his obligations, and of the rules under which he may be returned to the sentencing authority for non-compliance or inadequate compliance with the requirements of the sentence.³¹

The obligations imposed on the offender by the agency responsible for implementing the sentence should be no more onerous than those that were authorized by the competent authority rendering the initial sentencing decision.³² The duration of the obligations should not exceed the period authorized in the sentencing decision, although non-incarcerative sentences may be terminated early if the offender has fully satisfied his obligations or has responded favorably to his sentence.³³

The offender should be entitled to make a request or complaint to a judicial or other competent independent authority on matters affecting the implementation of non-incarcerative measures, including that a restriction imposed upon him is unlawful or incompatible with the original

²⁶ Rule 12.1-12.2.

²⁷ Council of Europe, Recommendation (99)22 Concerning Prison Overcrowding and Prison Population Inflation, para. 22.

²⁸ United Nations Minimum Rules of Non-Custodial Measures, para. 10.2; Council of Europe, Recommendation (92)16 on the European Rules on Community Sanctions and Measures, Rule 7.

²⁹ Note that, although the European Rules on Community Sanctions and Measures do not apply to monetary sanctions, "any supervisory or controlling activity undertaken to secure their implementation falls within the scope of the rules" (Appendix – Glossary, para. 1). The sections cited from the European Rules should be taken to apply to financial sanctions.

³⁰ para. 12.3.

³¹ Council of Europe, Recommendation (92)16 on the European Rules on Community Sanctions and Measures, Rule 76.

³² United Nations Minimum Rules of Non-Custodial Measures, para. 3.10.

³³ United Nations Minimum Rules of Non-Custodial Measures, para. 11.1-2.



sentencing decision.³⁴ Even if an offender does not complain, the implementing agency should, for sentences involving supervision or treatment, ensure that the supervision and treatment program is periodically reviewed and adjusted as necessary.³⁵

Monitoring

For each offender, a case record shall be established and maintained by the authority implementing and monitoring the sentence.³⁶ There should be clearly defined procedures which indicate the steps to be taken when an offender's record or actions indicate non-compliance or inadequate compliance with the conditions or obligations imposed.³⁷ Minor transgressions against instructions of the implementing agency, or against conditions or obligations which do not require the use of a procedure for revocation of the sanction or measure, should be promptly dealt with by the implementing agency through discretionary means or, if necessary, by an administrative procedure.³⁸ Any significant failure to comply with the conditions or obligations imposed on the offender should be promptly reported in writing to the sentencing authority.³⁹ Such reports should give an objective and detailed account of the manner in which the failure occurred, and the circumstances under which it took place.⁴⁰

Once a sentencing authority has received notification of a significant failure to comply with a condition imposed, it must decide what action to take against the offender.⁴¹

The fair trial and due process considerations discussed in section 3.1 below apply to a decision to revoke a non-incarcerative sentence as much as they do to a post-conviction sentencing decision. The offender should, for example, be given the opportunity to examine the documents on which the request for modification or revocation is based and to present his comments on the alleged violation.⁴² The sentencing authority should then make a detailed examination of the facts reported by the implementing authority.⁴³ The ABA Criminal Justice Standards on Sentencing state that the prosecution should bear the burden of proving a violation.⁴⁴

Failure to comply with the obligations imposed by a non-incarcerative measure should not automatically lead to the imposition of a sentence of incarceration.⁴⁵ Furthermore, such a failure should not, in and of itself, constitute an offense.⁴⁶ The sanctions available to a sentencing

³⁴ para. 3.6. See also Council of Europe, Recommendation (92)16 on the European Rules on Community Sanctions and Measures, Rule 14.

³⁵ United Nations Minimum Rules of Non-Custodial Measures, para. 10.3.

³⁶ United Nations Minimum Rules of Non-Custodial Measures, para. 13.6.

³⁷ Council of Europe, Recommendation (92)16 on the European Rules on Community Sanctions and Measures, Rule 77.

³⁸ *Id.*, Rule 78.

³⁹ *Id.*, Rule 80.

⁴⁰ *Id.*, Rule 81.

⁴¹ The Council of Europe, as discussed above, requires only "significant failures" to comply with the conditions imposed to be reported to the sentencing authority. Similarly, the ABA Criminal Justice Standards on Sentencing state that a sentencing court should be empowered to re-sentence an offender only for "a substantial violation of a material requirement or condition of the previous sentence".

⁴² Council of Europe, Recommendation (92)16 on the European Rules on Community Sanctions and Measures, Rule 83; ABA Criminal Justice Standards on Sentencing, Standard 18-7.4(f)-(g).

⁴³ *Id.*, Rule 82.

⁴⁴ Standard 18-7.4. The standard suggested is "the preponderance of the evidence", but the appropriate standard will presumably vary depending on the jurisdiction. Certainly the standard should not be lower than "the balance of probabilities."

⁴⁵ United Nations Minimum Rules of Non-Custodial Measures, para. 14.3.

⁴⁶ Council of Europe, Recommendation (92)16 on the European Rules on Community Sanctions and Measures, Rule 84.

authority should include all those that were available at the time of the initial sentencing.⁴⁷ In deciding whether to impose a sentence of incarceration, the sentencing authority should adopt the same decision making process discussed in section 1.1. In other words, as at the initial sentencing phase, a sentence of incarceration may be imposed only in the absence of other suitable alternatives.⁴⁸ The sentencing authority should, for example, consider whether an offender's noncompliance is excusable and whether substantial performance of the initial sentence can be achieved by exercise of legal power to compel or induce performance, particularly by the use of measures, including civil contempt, for enforcement of economic sanctions.⁴⁹ The sentencing authority should also consider the manner and extent of the offender's compliance up to that point.⁵⁰

2. Challenging a Sentence

An individual sentenced to incarceration should have at least three avenues available to challenge his detention: ordinary appeals, extraordinary remedies challenging the lawfulness of the sentence, and the right to apply for amnesty, clemency, or pardon.

Right to Appeal

ICCPR Article 14(5) guarantees every person convicted of a crime (this includes both minor and serious offenses) the legal right to have his or her conviction or sentence reviewed by a higher tribunal. The right to appeal also applies where a non-incarcerative sentence is revoked and replaced with detention.⁵¹ The appeal must review both the factual and legal aspects of the previous decision.⁵²

Appellate procedures should share the same fair trial and due process requirements as first instance decisions⁵³, although given that appeal processes take different forms in different legal systems, the manner in which the interests of the parties are protected may depend on the structure and functioning of the appellate body.⁵⁴

If procedural shortcomings prevent the use of what would otherwise be an effective appeal, there may be a violation of the right to appellate review. In *Hill v. Spain*, the HRC cited the lack of an available lawyer to submit an appeal as a violation.⁵⁵ Similarly, the failure to provide the offender with a timely and reasoned judgment has consistently been deemed to violate Article 14(5).⁵⁶ However, in *Bailey v. Jamaica*, the HRC did find "notes of the oral judgment" to be sufficient "even if less than desirable."⁵⁷

⁴⁷ ABA Criminal Justice Standards on Sentencing, Standard 18-7.3(c).

⁴⁸ United Nations Minimum Rules of Non-Custodial Measures, para. 14.4.

⁴⁹ ABA Criminal Justice Standards on Sentencing, Standard 18-7.3(c)(i).

⁵⁰ Council of Europe, Recommendation (92)16 on the European Rules on Community Sanctions and Measures, Rule 8; ABA Criminal Justice Standards on Sentencing, Standard 18-7.3(c)(iii).

⁵¹ United Nations Minimum Rules of Non-Custodial Measures, para. 14.6. Council of Europe, Recommendation (92)16 on the European Rules on Community Sanctions and Measures, Rule 13; ABA Criminal Justice Standards on Sentencing, Standard 18-8.1.

⁵² *Domukovsky, et. al. v. Georgia*, Communication Nos. 623/1995, 624/1995, 626/1995, and 627/1995 (29 May 1998) para. 18.11, CCPR/C/62/D/623/1995, CCPR/C/62/D/624/1995, CCPR/C/62/D/627/1995, and CCPR/C/62/D/628/1995.

⁵³ Human Rights Committee General Comment 13, para. 17; *ECT.HR Delcourt v Belgium*, January 17, 1970, Series A, No. 11, para's 25-26.

⁵⁴ Reid, *A Practitioner's Guide to the European Convention of Human Rights*, (Sweet and Maxwell, 1998) at 72.

⁵⁵ *Hill v. Spain*, Communication No. 526/1993 (2 April 1997) para. 14.3, CCPR/C/59/D/526/1993.

⁵⁶ *Currie v. Jamaica*, Communication No. 377/1989 (31 March 1994) para. 13.5, CCPR/C/50/D/377/1989.

⁵⁷ *Bailey v. Jamaica*, Communication No. 709/1996 (17 September 1999) para. 7.4, CCPR/C/66/D/709/1996.



A right to legal representation may be required during appeals, depending on the nature of the proceedings and the capabilities of the applicant. The European Court has required legal representation in cases involving juveniles, detention on grounds of mental health, and substantive questions of law.⁵⁸

Limitations

The absolute right to an appeal is limited to one appeal, though if the domestic legal system provides for additional appeals, the offender must have equal access to them.⁵⁹ The particularities on appeal need not always be favorable to the offender. Some civil law systems provide for the “aggravation” of a sentence at the appellate level on the basis of a prosecutorial “nullity” appeal.⁶⁰

Right to Review of Legality

A review of lawfulness during the conviction and appeal process is built into the requirements of ECHR Article 5(1), which specifies that deprivation of liberty is permitted in the case of the lawful detention of a person after conviction by a competent court.⁶¹ The European human rights system has extended the right to judicial recourse under ECHR Article 5(4) when imprisonment was imposed by an administrative body, and to persons under special types of sentences, including persons initially not sentenced to incarceration whose non-incarcerative sanction was revoked; persons sentenced to discretionary life imprisonment based not only on the gravity of the offenses but also on considerations of risk and dangerousness which are susceptible to change over time; and minors sentenced to indeterminate terms of incarceration.⁶²

The Inter-American Commission on Human Rights’ Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas state that persons deprived of liberty shall have the right to petition before a judicial, administrative, or other authority, including a national or international human rights body.⁶³ These principles also stipulate that the petitioner is entitled to a response from the body of judicial recourse.

The African Commission Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa provide that everyone convicted in a criminal proceeding has the right to have his conviction and sentence reviewed, and that this right must include review of the facts and the law. Additionally, if exculpatory evidence is discovered after a person is tried and convicted, the right to an appeal or other post-conviction procedure must permit the possibility of changing the verdict.⁶⁴

Executive Clemency

There are few international standards pertaining to executive clemency. The Tokyo Rules specify that the competent authority must have at its disposal a range of post-sentencing alternatives in

⁵⁸ Reid 358

⁵⁹ Nowak at 266-68.

⁶⁰ *Id.* at 268.

⁶¹ ECHR Art. 5(1); *see also* Reid 355.

⁶² Reid 356.

⁶³ Principle VII.

⁶⁴ Principle N(10)(a).



order to avoid institutionalization, which may include pardon.⁶⁵ The African Commission Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa further specify that persons convicted of a crime have a right to seek pardon or commutation of sentence, and that clemency, commutation of sentence, amnesty, or pardon may be granted in the case of capital punishment.⁶⁶ Executive clemency should not be a substitute for an established parole or alternative disposition procedure.

3. Considerations During Detention

3.1. Procedural Fairness

There are three due process rights that impact detention procedure at all stages of the criminal justice process: review by a competent tribunal, the right to counsel, and the right to effective participation.

Review by a Competent Tribunal

All detainees are entitled to equal treatment before courts and tribunals. Anyone facing criminal charges is entitled to a fair and public hearing by a competent, independent, and impartial tribunal established by law. Proceedings should generally be open to the public and press, but may be closed for reasons of public order, national security (in a democratic society), substantial and compelling privacy concerns, or to the extent strictly necessary, as determined by the court, in special circumstances where publicity may prejudice the interests of justice. Judgments in criminal cases must be made public except to protect the interests of juveniles,⁶⁷ and defendants have the right to be tried without undue delay.⁶⁸ Additionally, persons convicted of a crime have the right to have the conviction reviewed by a higher court established by law.⁶⁹ No person may be retried or repunished based on charges of which they have already been finally convicted or acquitted.⁷⁰

Right to Counsel

All international and regional human rights instruments stipulate that persons accused of crimes have the right to consult with and be represented by legal counsel. This right applies from the moment of detention⁷¹ through trial, sentence, and appeal.⁷²

The right to counsel encompasses three guarantees: (1) the right to defend one's self; (2) the right to be informed of the right to counsel; and (3) the right to choose one's counsel or, where the interests of justice or indigent status of the accused so require, to elect to have legal counsel appointed and paid for by the state.⁷³ Whenever a state does appoint counsel free of charge for a

⁶⁵ Rule 9.1-9.2.

⁶⁶ Principle N(10)(d).

⁶⁷ ICCPR art. 14(1).

⁶⁸ Art. 14(c).

⁶⁹ *Id.* art. 14(5).

⁷⁰ *Id.* art. 14(7).

⁷¹ See HANDBOOK OF INTERNATIONAL STANDARDS ON PRETRIAL DETENTION PROCEDURE § 2.2.

⁷² United Nations Basic Principles on the Role of Lawyers, Right to Counsel, para. 1. African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, para. N(2)(c). Inter-American Commission on Human Rights, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, Principle V, Due Process of Law.

⁷³ ICCPR Article 14(3)(d), see Lawyers Committee for Human Rights, What is a Fair Trial? (1995), at 3 and Nowak, Manfred, U.N. Covenant on Civil and Political Rights: CCPR Commentary 160 (N.P. Engel, 1993) at 258. Both the



detainee, the appointed lawyer must be able to provide “effective” legal assistance, and as such, must be “of experience and competence commensurate with the nature of the offence.”⁷⁴

Implicit within the right to obtain legal counsel, whether free or otherwise, is the guarantee of adequate time and facilities for confidential consultation with that counsel. The right to communicate confidentially with counsel should not be suspended or restricted “save in exceptional circumstances, specified in law or lawful regulations, and only when considered indispensable by a judicial or other authority in order to maintain security and good order.”⁷⁵

Right to Effective Participation

It is an essential element of due process that a detained person and/or his legal counsel are able to effectively participate in proceedings, beginning with pretrial detention and throughout the sentencing stage. Several discrete rights guarantee effective participation.

First, a detainee has the right to be present at all court hearings regarding his case.⁷⁶ Second, a detainee has the right to an interpreter, provided free of charge, at all stages of legal proceedings.⁷⁷ This right does not, however, constitute a right to express oneself in the language of one’s choice if sufficiently proficient in the language customarily used within the nation’s legal system.

Third, effective participation requires that the detainee be given adequate opportunity to prepare his case. Implicit in this right is the requirement that the accused have access to the documentation relevant to the proceedings, as well as adequate time to review that documentation.⁷⁸ The previously mentioned right to an interpreter does not necessarily extend to translation of all court documents, according to the *travaux préparatoires* of the ICCPR. The European Court of Human Rights, however, has interpreted the analogous ECHR provision, Article 6(3)(e), to require the translation of written materials,⁷⁹ and the African Commission on Human and Peoples’ Rights has done the same for the African Charter on Human and Peoples’ Rights.⁸⁰

Fourth, the detainee, or his legal representative, must be given an adequate opportunity to present arguments and evidence and to challenge or respond to opposing arguments or evidence.⁸¹ This includes but is not limited to the ability to call witnesses to present relevant testimony at court proceedings, and to confront and cross-examine witnesses called by the opposition, including at sentencing hearings.⁸² Finally, there must be “equality of arms” between the parties, such that

ICCPR Article 14(3)(d) and the ECHR Article 6(3)(c) require legal assistance free of charge where the “interests of justice” so require.

⁷⁴ United Nations Basic Principles on the Role of Lawyers, Principle 6.

⁷⁵ United Nations Body of Principles for the Protection of All Persons under Any Form of Detention, Principle 18(3).

⁷⁶ ICCPR art. 14(d).

⁷⁷ United Nations Body of Principles for the Protection of All Persons under Any Form of Detention, Principle 14.

⁷⁸ *Id.*, para. N3(e)(iv). In the context of pre-detention, see Council of Europe, Recommendation (2006)13 on the Use of Remand in Custody, the Conditions in which it takes place and the Provision of Safeguards against Abuse, para. 26.

⁷⁹ Nowak, Manfred, U.N. Covenant on Civil and Political Rights: CCPR Commentary 160 (N.P. Engel, 1993) at 263.

⁸⁰ African Commission on Human and Peoples’ Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, para. A(4).

⁸¹ African Commission on Human and Peoples’ Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, para. A(2)(b). ABA Criminal Justice Standards on Sentencing, Standard 18-5.17(a).

⁸² *Id.*, Standard 18-5.17(a)(iv). Council of Europe, Recommendation (2006)13 on the Use of Remand in Custody, the Conditions in which it takes place and the Provision of Safeguards against Abuse, para. 28.



both the prosecution and defense are treated equally and have access to equal resources.⁸³ The defense must have reasonable opportunity to present their case under conditions which do not place them at a substantial disadvantage against the prosecution.⁸⁴

Finally, nations may claim that they cannot respect due process rights due to states of emergency or threats to public order. The ICCPR allows this only when public emergency is officially proclaimed and threatens the life of the nation, and only to the extent required by the exigencies of the situation.⁸⁵

Arbitrariness

Under ICCPR Article 9(1), a decision to detain an individual should not be arbitrary. According to the *travaux préparatoires* of the ICCPR, the prohibition against “arbitrary” detentions is broad. The term “arbitrary” captures “elements of inappropriateness, injustice, lack of predictability.”⁸⁶

Prominent international and regional human rights standards require that the circumstances and procedures under which a person can be lawfully detained be enshrined in domestic law.⁸⁷ States must establish national laws indicating which officials are authorized to impose detention, and establishing the conditions under which detention may be imposed.⁸⁸ Such laws should generally be issued by the legislature; administrative laws or regulations will not suffice.⁸⁹ These laws also must be sufficiently accessible and precise to allow a citizen to regulate his conduct with knowledge of the consequences his actions will entail.^{90 91} Legislatures should not, therefore, enact laws that allow individuals to be detained for vague reasons.⁹²

At both pretrial and sentencing stages, it is particularly important to ensure that detention decisions are not arbitrary. Consequently, these determinations should be made according to established criteria, which provide structure and predictability to a decision maker’s exercise of discretion.⁹³ For both pretrial detention and sentencing decisions, the United Nations Minimum Rules for Non-Custodial Measures state that “selection of a non-custodial measure shall be based on an assessment of established criteria.”⁹⁴ The ABA Criminal Justice Standards on Sentencing state that sentencing criteria should “sufficiently guide the exercise of sentencing courts’ discretion to the end that unwarranted and inequitable disparities in sentences are avoided.”⁹⁵

⁸³ Nowak, Manfred, U.N. Covenant on Civil and Political Rights: CCPR Commentary 160 (N.P. Engel, 1993) at 258. The ECHR and the ACHR contain similar concepts.

⁸⁴ ECHR, *Dombo Deheer B.V. v Netherlands*, October 27, 1993, Series A, No. 274-A, para. 33.

⁸⁵ ICCPR art. 4.

⁸⁶ *Van Alphen v Netherlands*, Communication No. 305/1988, para. 5.8.

⁸⁷ ICCPR, Article 9; ECHR, Article 5; African Charter on Human and Peoples’ Rights, Article 6; American Convention on Human Rights, Article 7.

⁸⁸ African Commission on Human and Peoples’ Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, para. M(1)(c).

⁸⁹ Bossuyt, Marc, Guide to the “Travaux Préparatoires” of the International Covenant on Civil and Political Rights, A/C.3/SR.863, §36 (Martinus Nijhoff Publishers, 1987).

⁹⁰ Dinstein, Yoram, Right to Life, Physical Integrity, and Liberty, in Louis Henkin, *The International Bill of Rights: CCPR Commentary* 130 (Columbia University Press, 1981). ECt.HR, *Amuur v France*, June 10 1996.

⁹¹ See *Silver v United Kingdom* (1983) 2 E.H.R.R. 347, para. 87-89, discussing the “in accordance with law” requirement in the context of Article 8(1).

⁹² African Commission on Human and Peoples’ Rights, Communication 48/90, Amnesty International, Sudan, para. 59. Detention based on general terms, such as “national security,” may violate international human rights laws, Human Rights Committee, Concluding Observations: Sudan, CCPR/C/79/Add.85 (1998) para. 13.

⁹³ Council of Europe, Recommendation (2006)13 on the Use of Remand in Custody, the Conditions in which it takes place and the Provision of Safeguards against Abuse, para. 8(1).

⁹⁴ Rule 2.

⁹⁵ Standard 18-2.5.

Of course, the existence of laws regulating the circumstances in which lawful detention occurs and the procedures under which it is authorized does not, in and of itself, guarantee that arbitrary detentions will not take place. Where, despite the presence of these laws, a person is detained on grounds not provided for in law, or without proper procedure, an arbitrary arrest and detention and unlawful deprivation of liberty will result.⁹⁶

3.2. Resources and Independence

The need for adequate financial, institutional, personnel, and other resources affects all aspects of pretrial detention and sentencing. The success or failure of each element of a sentencing regime depends, in part, on whether there are sufficient resources to maintain it.

When applying alternative or substitute measures for deprivation of liberty, states shall also provide the necessary and appropriate resources to ensure their availability and effectiveness.⁹⁷ State actors implementing post-trial orders for incarceration shall have adequate financial means provided from public funds. Third parties may make a financial or other contribution, but implementing authorities shall never be financially dependent on them.⁹⁸

Adequate services for the implementation of community sanctions and measures should be established, given sufficient resources, and developed as necessary to secure the confidence of judicial authorities in the usefulness of community sanctions and measures, ensuring community safety, and effecting an improvement in the personal and social situations of offenders.⁹⁹ In the event that the legislature fails to provide adequate funds, the agency performing the intermediate function should ensure that the number of sentences imposed does not exceed the system's capacity to properly and legally execute those sentences.¹⁰⁰

The legislature should appropriate the funds necessary for each component of the sentencing system to effectively perform its prescribed role. In particular, the legislature should provide adequate funding for alcohol and drug treatment, as well as effective diversion programs. The legislature should recognize the consequences of not appropriating necessary funds, including the possibility that offenders will not serve appropriate and just sentences.¹⁰¹

In addition to the provision of sufficient resources for the efficient operation of the criminal justice system, all actors within the criminal justice system must be able to operate independently and free from undue influence.

⁹⁶ Human Rights Committee, Communication No. 90/1981, L. Magana ex-Philibert v. Zaire (Views adopted on 21 July 1983), in UN doc. GAOR, A/38/40, p. 200, paras. 7.2 and 8.

⁹⁷ Inter-American Commission on Human Rights, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, Section 4.

⁹⁸ Council of Europe, Recommendation (92)16 on the European Rules on Community Sanctions and Measures, Chapter VI – Financial resources, Rule 42.

⁹⁹ Council of Europe, Recommendation (2000)22 on Improving the Implementation of the European Rules on Community Sanctions and Measures.

¹⁰⁰ ABA Criminal Justice Standards on Sentencing, Standard 18-2.3, Costs of criminal sanctions; resources needed (e).

¹⁰¹ ABA Criminal Justice Standards on Sentencing, Standard 18-2.3, Costs of criminal sanctions; resources needed (b)(d).

Tribunals and Judges

International and regional human rights standards require that tribunals adjudicating matters relating to pretrial detention and sentencing are “independent and impartial.”¹⁰² The United Nations Basic Principles on the Independence of the Judiciary elaborate on the contents of this requirement. Tribunals must be free from outside influence, such that their decisions are based only on the facts and laws applicable to the case.¹⁰³ Judges should not engage in corrupt practices, and must be protected from outside pressures, including “restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason”.¹⁰⁴ Judges should also be immune from liability in civil or criminal proceedings for improper acts or omissions in the exercise of their judicial functions, so long as they act in good faith.¹⁰⁵ Their decisions may, however, be subject to appellate review by higher courts, and sentences may be commuted by the executive, provided the procedures for doing so are enshrined in law.¹⁰⁶

Prosecutors and Lawyers

Like judges, prosecutors should both refrain from corrupt practices and be able to perform their duties free from outside influences. The United Nations Guidelines on the Role of Prosecutors require states to ensure that “prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability.”¹⁰⁷ Similar obligations and protections apply to lawyers, including defense counsel. Lawyers should, particularly, “not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics”.¹⁰⁸

Police

States should, where possible, ensure law enforcement officials are protected from outside influence. States should, particularly, take steps to prevent law enforcement officials from committing acts of corruption.¹⁰⁹ The Commentary to the United Nations Code of Conduct for Law Enforcement Officials urges states to adopt an expansive definition of corruption that encompasses the “commission or omission of an act in the performance of or in connection with one’s duties in response to gifts, promises or incentives demanded or accepted or the wrong receipt of these once the act has been committed or omitted.”¹¹⁰

3.3. Special Groups

Within the criminal justice process, there are two groups which must receive special consideration: victims and juveniles.

¹⁰² ICCPR, Article 14; ECHR, Article 6(1); American Convention on Human Rights, Article 8; African Charter on Human and People’s Rights, Article 7.

¹⁰³ United Nations Basic Principles on the Independence of the Judiciary, Principle 2.

¹⁰⁴ *Id.*

¹⁰⁵ In relation to civil proceedings, *Id.*, Principle 15.

¹⁰⁶ *Id.*, Principle 4.

¹⁰⁷ United Nations Guidelines on the Role of Prosecutors, Principle 4.

¹⁰⁸ United Nations Basic Principles on the Role of Lawyers, Principle 16.

¹⁰⁹ United Nations Code of Conduct for Law Enforcement Officials, Article 7.

¹¹⁰ Commentary to Article 7, para. (b).



Victims should be kept well informed during the criminal process, including at the sentencing and appellate phases. The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power states, “victims should be informed of their role and the scope, timing and progress of the proceedings and of the disposition of the case, especially where serious crimes are involved and where they have requested such information.”¹¹¹ The information provided to the victim should include the date and place of all hearings,¹¹² as well as details of any sentence imposed on the offender.¹¹³ It should also include information about victims’ rights to participate in any part of the proceedings. Victims should, however, be given the opportunity to indicate that they do not wish to receive this information.¹¹⁴ The responsibility for ensuring victims are kept sufficiently well-informed lies with all actors in the criminal justice system, but particularly with prosecutors¹¹⁵ and judicial officers.

The importance of providing information to the victim becomes particularly acute when a decision is made that results in an accused or an offender being released from detention. A number of international standards emphasize the importance of informing victims that an accused or an offender is to be released. For example, the United Nations Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice require that, “a woman subjected to violence is notified of any release of the offender from detention or imprisonment where the safety of the victim in such disclosure outweighs invasion of the offender’s privacy”.¹¹⁶ The United Nations Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime require that child victims, their parents or guardians, and their legal representatives should “be promptly and adequately informed, to the extent feasible and appropriate, of...the custodial status of the accused and any pending changes to that status”.¹¹⁷

The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power notes that states should allow “the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system.”¹¹⁸

At sentencing, the crime’s effect on the victim is a valid consideration when determining the appropriate punishment for an offense. At this juncture, it is important to hear or obtain evidence from victims as to the impact of the offense before making a sentencing determination. For example, the ABA Criminal Justice Standards on Sentencing require that victims be legally allowed to submit written statements concerning the physical, psychological, economic, or social effects of an offense prior to the sentencing hearing.¹¹⁹ Procedural rules should also allow victims to make oral statements to the same effect at sentencing hearings.¹²⁰ The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power suggests that evidence of the impact of an offense on victims should be solicited prior to issuing a sentence.

¹¹¹ Para. 6.

¹¹² Council of Europe, Recommendation (85)11E on the Position of the Victim in the Framework of Criminal Law and Procedure, para. 9.

¹¹³ Council of Europe, Recommendation (2006)8 on Assistance to Crime Victims, para. 6.5.

¹¹⁴ *Id.*

¹¹⁵ United Nations, Guidelines on the Role of Prosecutors, para. 13.

¹¹⁶ Para. 9(b).

¹¹⁷ Para. 20(a).

¹¹⁸ Para. 6(b).

¹¹⁹ Standard 18-5.10-11.

¹²⁰ *Id.*



The United Nations Declaration goes on, however, to state that the requirements it imposes concerning victim's rights should be implemented "without prejudice to the accused and consistent with the relevant national criminal justice system." This language could imply that, if a criminal justice system makes no provision for the introduction of evidence of a crime's impact on its witnesses, the Declaration does not require a change in that system's functioning to accommodate such evidence. In such cases, for the purposes of the Declaration, perhaps it suffices that the [presumed] impact of the offense on the victim is accounted for in sentencing. The United Nations Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice support this view. The Model Strategies require states only to "take into account in the sentencing process the severity of the physical and psychological harm and the impact of victimization,"¹²¹ although they recommend the use of victim impact statements "where such practices are permitted by law."

A final point relating to sentencing concerns compensation for offenses. At the sentencing stage, all relevant information concerning the injuries and losses suffered by the victim should be made available to the court so that it may take into account the victim's entitlement to compensation, as well as previous compensation efforts by the offender, when deciding upon the form and the quantum of the penalty.¹²² The victim's need for compensation should be taken into account when considering financial penalties, in that priority should be given to the need to compensate the victim.¹²³

Juvenile Victims

The United Nations Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime state that "age should not be a barrier to a child's right to participate fully in the justice process."¹²⁴ Juvenile victims have the same rights to information and to input into the pretrial detention and sentencing processes as adults, and ensuring that those rights are protected involves consideration of the special needs of juvenile victims.¹²⁵ The United Nations Guidelines state that all interactions with juvenile victims "should be conducted in a child-sensitive manner in a suitable environment that accommodates the special needs of the child, according to his or her abilities, age, intellectual maturity, and evolving capacity. They should also take place in a language that the child uses and understands."¹²⁶

Juvenile Defendants

While some standards specify that an individual under of 18 is to be recognized under the law as a juvenile,¹²⁷ others simply state that if a person comes within the jurisdiction of a juvenile court,

¹²¹ Para. 9(c).

¹²² Council of Europe, Recommendation (85)11E on the Position of the Victim in the Framework of Criminal Law and Procedure, para. 12.

¹²³ Council of Europe, Recommendation (85)11E on the Position of the Victim in the Framework of Criminal Law and Procedure, para. 13.

¹²⁴ Para. 18.

¹²⁵ Para's. 19 and 20 of the United Nations Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime discuss the right of juveniles to be properly informed during the criminal justice process. Para. 21 concerns the right of juveniles "to express their views and concerns related to their involvement in the justice process."

¹²⁶ Para. 14.

¹²⁷ UN Human Rights Committee, citing ICCPR Article 6(5). United Nations Rules for the Protection of Juveniles Deprived of their Liberty. African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa. Council of Europe, Recommendation (2008)11 on European Rules for Juvenile Offenders Subject to Sanctions and Measures-21.1. Inter-American Court of Human Rights. See c. Definition of the child in the Inter-American Human Rights System.



he shall be treated as a juvenile.¹²⁸ In addition, the Council of Europe has created an additional category of “young adult offenders,” who are afforded unique due process protections.¹²⁹ Regardless of the specific definition selected, a clear legislative standard should be in place.

The principle aims of juvenile justice and associated measures for tackling juvenile delinquency should be: (1) to prevent offending and re-offending; (2) to (re)socialize and (re)integrate offenders; and (3) to address the needs and interests of victims.

Culpability should reflect the age and maturity of the offender, with criminal measures being progressively applied as maturity and individual responsibility increase.¹³⁰ Put differently, the juvenile justice system should emphasize the well-being of the juvenile, and shall ensure that any sentences are proportional to the circumstances of both the offender and the offense. Legal systems in which juvenile offenders are tried by family courts or administrative authorities are valuable tools in this regard, but the well-being of the juvenile should also be emphasized in legal systems that follow the criminal court model, in order to avoid purely punitive sanctions.¹³¹

A broad range of alternative and educational measures should be available at all stages in order to prevent recidivism and promote social rehabilitation. Informal dispute resolution mechanisms, including mediation and restorative justice practices (particularly those involving victims) should be utilized whenever appropriate.¹³²

States must ensure that law enforcement and judicial officials are adequately trained to deal sensitively and professionally with children who interact with the criminal justice system, whether as suspects, accused, complainants or witnesses.¹³³ Also, states must ensure that procedures involving juveniles take account of their age and the goal of promoting their rehabilitation.¹³⁴

Alternatives to Sentencing

Mediation and other restorative justice measures shall be encouraged at all stages of juvenile criminal justice proceedings.¹³⁵

A large variety of disposition measures shall be made available to the competent authority in order to facilitate flexibility and avoid institutionalization to the greatest extent possible. Such measures, some of which may be combined, include: (a) care, guidance and supervision orders; (b) probation; (c) community service orders; (d) financial penalties, compensation and restitution; (e) intermediate treatment and other treatment orders; (f) orders to participate in group counseling and similar activities; (g) orders concerning foster care, living communities or other educational

¹²⁸ United Nations Standard Minimum Rules for the Treatment of Prisoners, para. 5(2). United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules).

¹²⁹ (Council of Europe, Recommendation (2008)11 on European Rules for Juvenile Offenders Subject to Sanctions and Measures-21.2).

¹³⁰ Council of Europe, Recommendation (2003)20 on new ways of Dealing with Juvenile Delinquency and the role of Juvenile Justice Sections 1 and 9.

¹³¹ United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) 5.1.

¹³² United Nations Guidelines for Action on Children in the Criminal Justice System Section 15.

¹³³ African Commission on Human and Peoples’ Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa Section O (c).

¹³⁴ ICCPR Article 14(4).

¹³⁵ Council of Europe, Recommendation (2008)11 on European Rules for Juvenile Offenders Subject to Sanctions and Measures, Section 12.

settings; and (h) other relevant orders.¹³⁶ No juvenile shall be removed from parental supervision, whether partly or entirely, unless the circumstances of her or his case make this necessary.¹³⁷

Punitive Sentencing

In the resolution of a case involving a child who has violated the law, the authorities shall be guided by the following principles:

- Action taken against a child shall always be in proportion to the circumstances and gravity of the offence, taking into account the best interests of the child and the interests of society.¹³⁸ Authorities shall consider the child's age, physical and mental well-being, development, and capacities and personal circumstances as ascertained by psychological, psychiatric or social inquiry reports.¹³⁹ Authorities should also consider social integration, education, and recidivism concerns.¹⁴⁰
- A child shall not be sentenced to imprisonment unless convicted at trial of committing a serious act involving violence against another person, or of repeatedly committing other serious offences. A child shall not be sentenced to imprisonment unless there is no other appropriate response;¹⁴¹ deprivation of liberty shall be applied as a measure of last resort and for the minimum necessary period. In addition to a prohibition on the application of the death penalty to minors, "the State party should ensure that no ... child offender is sentenced to life imprisonment without parole."¹⁴²
- Sanctions and measures shall be imposed by a court. If imposed by another legally recognized authority; they shall be subject to prompt judicial review,¹⁴³ without precluding the possibility of a child offender's early release.¹⁴⁴
- The placement of children in closed institutions should be reduced. Such placement of children should only take place in accordance with the provisions of article 37 (b) of the Convention on the Rights of the Child, as a matter of last resort and for the shortest possible period of time.¹⁴⁵

¹³⁶ United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) Section 18.1. African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa Section O (o).

¹³⁷ United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules), Section 18.2.

¹³⁸ African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa Section O (o). United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) Section 17.1.

¹³⁹ Council of Europe, Recommendation (2008)11 on European Rules for Juvenile Offenders Subject to Sanctions and Measures Section 5.

¹⁴⁰ Council of Europe, Recommendation (2008)11 on European Rules for Juvenile Offenders Subject to Sanctions and Measures.

¹⁴¹ African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa Section O (o).

¹⁴² ICCPR Article 10(2)(b).

¹⁴³ Council of Europe, Recommendation (2008)11 on European Rules for Juvenile Offenders Subject to Sanctions and Measures Section 3.

¹⁴⁴ United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) Section 10.1. African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa Section O (g).

¹⁴⁵ United Nations Guidelines for Action on Children in the Criminal Justice System Section 18.



- Children under the age of 18 should not be detained in a prison for adults, but in an establishment specially designed to accommodate them.¹⁴⁶
- A juvenile's rights to education, vocational training, physical and mental health care, safety and social security shall not be limited by the imposition or implementation of sanctions or measures.
- If juveniles do not comply with the conditions and obligations of the community sanctions or measures imposed on them, this shall not lead automatically to deprivation of liberty. Where possible, modified or new community sanctions or measures shall replace the previous ones.¹⁴⁷
- Juvenile justice systems shall take due account of the rights and responsibilities of parents and legal guardians, and shall involve them in the selection and execution of sanctions or measures to the extent possible, except if this is not in the best interests of the juvenile. Where the offender is over the age of majority, the participation of parents and legal guardians is not compulsory. Where appropriate, members of the juveniles' extended family, as well as the wider community may also be associated with the proceedings.¹⁴⁸
- Young adult offenders may, where appropriate, be regarded as juveniles and treated accordingly.¹⁴⁹

3.4. Practices During Detention

The following practices should be followed at all times when an individual is held in state custody.

Segregation

Different categories of prisoners shall be kept in separate institutions or parts of institutions, considering their sex, age, criminal record, reason for detention, and treatment needs.¹⁵⁰ The Inter-American Commission on Human Rights adds additional considerations: the reason for deprivation of liberty, the need to protect the life and integrity of persons deprived of liberty or personnel, special needs of attention, or other circumstances relating to internal security.¹⁵¹

Men and women, as much as possible, shall be detained in separate institutions. An institution which receives both men and women shall keep the whole of the premises allocated to women entirely separate.¹⁵² The African Commission adds the mandate that, while in custody, women

¹⁴⁶ Council of Europe - European Prison Rules 11.1.

¹⁴⁷ Council of Europe, Recommendation (2008)11 on European Rules for Juvenile Offenders Subject to Sanctions and Measures Sections 28 and 30.1.

¹⁴⁸ Council of Europe, Recommendation (2008)11 on European Rules for Juvenile Offenders Subject to Sanctions and Measures Section 14.

¹⁴⁹ Council of Europe, Recommendation (2008)11 on European Rules for Juvenile Offenders Subject to Sanctions and Measures Section 17.

¹⁵⁰ United Nations Standard Minimum Rules for the Treatment of Prisoners, para. 8.

¹⁵¹ Inter-American Commission on Human Rights, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas.

¹⁵² United Nations Standard Minimum Rules for the Treatment of Prisoners, para. 8.



shall receive care, protection and all necessary individual assistance – psychological, medical and physical – that they may require in view of their sex and gender.¹⁵³

Untried prisoners shall be kept separate from convicted prisoners.¹⁵⁴ The Council of Europe adds that a state may elect to regard prisoners who have been convicted and sentenced as “untried prisoners” if their appeals have not been disposed of finally.¹⁵⁵ Article 10(2)(a) of the ICCPR states that not only shall accused persons be segregated from convicted persons (save extraordinary circumstances), they shall also be subject to separate treatment appropriate for their non-convicted status.¹⁵⁶ This provision is designed to emphasize and protect the status of accused persons who have not yet been convicted of a crime. Accused persons should enjoy the right to be presumed innocent as provided in Article 14(2) of the ICCPR.¹⁵⁷ Article 10(2) focuses on “accused persons,” as opposed to persons in custody, and it could be argued that prior to being formally charged this provision does not apply. However, the inherent logic of the article argues in favor of its application to all persons taken into criminal custody by the State.¹⁵⁸ The drafting history of Article 10(2) implies that “strict segregation” between the accused and the convicted was intended.¹⁵⁹ Any derogation from this rule under 10(2)(a) should only be in the case of “exceptional circumstances,” and there is no exception provided for in 10(2)(b) with regard to the separation of adults and juveniles. In *Pinkney v. Canada*, the HRC addressed whether segregation requires that the two classes of detainees be housed in separate buildings. At least insofar as 10(2)(a) is concerned, the HRC concluded that lodging in “separate quarters” is sufficient to satisfy the requirements of 10(2)(a); segregation by building is not required.¹⁶⁰ Untried detainees should be separated from convicted juveniles.¹⁶¹

Juveniles shall be kept separate from adults,¹⁶² whether in detention awaiting trial or in an institution,¹⁶³ and be accorded treatment appropriate to their age and legal status.¹⁶⁴ Male and female juveniles shall normally be held in separate institutions or separate units within an institution. If juveniles are held in an institution for adults under extraordinary circumstances, they shall be accommodated separately unless this would be patently against their best interest.¹⁶⁵ Juveniles shall not be held in adult institutions, but in institutions specially designed for them. Juveniles who reach the age of majority and young adults dealt with as if they were juveniles shall normally be held in institutions for juvenile offenders or in specialized institutions for young

¹⁵³ African Commission on Human and Peoples’ Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa Section M (7).

¹⁵⁴ United Nations Standard Minimum Rules for the Treatment of Prisoners, para. 8. Inter-American Commission on Human Rights, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas. United Nations Body of Principles for the Protection of All Persons under Any Form of Detention Principle 8.

¹⁵⁵ Council of Europe - European Prison Rules § 94.2; Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (The Robben Island Guidelines).

¹⁵⁶ ICCPR Article 10(2)(a).

¹⁵⁷ Gen. Cmt. 21, *supra* note 2, ¶ 9.

¹⁵⁸ ICCPR LII, p. 107.

¹⁵⁹ TRAVAUX PRÉPARATOIRES, *supra* note 8, A/4045 § 80, at 227.

¹⁶⁰ *Pinkney v. Canada*, Communication No. 27/1978 (29 October 1981) ¶ 30, CCPR/C/14/D/27/1977.

¹⁶¹ United Nations Rules for the Protection of Juveniles Deprived of their Liberty Section 17.

¹⁶² United Nations Standard Minimum Rules for the Treatment of Prisoners, para. 8.

¹⁶³ United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) Sections 13.4 and 26.3. African Charter on the Rights and the Welfare of the Child Section 17(2)(b). African Commission on Human and Peoples’ Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa Section O. American Convention on Human Rights, Children and their Rights in the Inter-American System of Human Rights. Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (The Robben Island Guidelines) Section 17(2)(b).

¹⁶⁴ ICCPR Article 10(3).

¹⁶⁵ Council of Europe, Recommendation (2008)11 on European Rules for Juvenile Offenders Subject to Sanctions and Measures Section 59 (1).



adults, unless their social reintegration can be better effected in an institution for adults.¹⁶⁶ Separation between male and female juveniles need not be applied in welfare or mental health institutions. Even where male and female juveniles are held separately, they shall be allowed to participate jointly in organized activities.¹⁶⁷

Special considerations may apply where non-criminal detainees are housed with criminal offenders or accused criminals. Asylum or refugee status seekers and persons deprived of liberty due to migration issues shall not be deprived of liberty in institutions designed to hold persons convicted of criminal charges.¹⁶⁸ Persons imprisoned for debt and other civil prisoners shall be kept separate from persons imprisoned for criminal offences.¹⁶⁹

Persons convicted of a crime who are suffering from mental illness and whose state of mental health is incompatible with detention in a prison should be detained in an establishment specially designed for that purpose. If such persons are nevertheless held in prison due to extraordinary circumstances, there shall be special regulations to account for their status and needs.¹⁷⁰ In cases of confinement of offenders with mental disabilities, it shall be ensured that the means of confinement is authorized by a competent physician; carried out in accordance with officially approved procedures; recorded in the patient's individual medical record; and immediately transmitted to the patient's family or legal representatives. Persons with mental disabilities who are secluded shall be under the care and supervision of qualified medical personnel.¹⁷¹

Solitary Confinement

The United Nations Basic Principles for Treatment of Prisoners encourages the abolition of solitary confinement as a punishment, or at least restriction of its use.¹⁷² The Inter-American Commission on Human Rights states that domestic law should prohibit solitary confinement in punishment cells, and it shall be strictly forbidden to impose solitary confinement for pregnant women; for mothers held in detention with their children; and for children held in detention. Solitary confinement shall only be permitted as a measure of last resort. It should be used for only a strictly limited time when it is necessary to ensure legitimate institutional interests of internal security and the fundamental rights of detainees or personnel. In all cases, the use of solitary confinement must be authorized by the competent authority and shall be subject to judicial control. Prolonged, inappropriate, or unnecessary use of solitary confinement amounts to acts of torture, or cruel, inhuman, or degrading treatment or punishment.¹⁷³

Overcrowding

Exceeding maximum capacity shall be prohibited by law. In cases where such overcrowding results in human rights violations, it shall be considered cruel, inhuman or degrading treatment or

¹⁶⁶ Council of Europe - European Prison Rules Sections 59.1 and 59.3.

¹⁶⁷ Council of Europe, Recommendation (2008)11 on European Rules for Juvenile Offenders Subject to Sanctions and Measures Section 60.

¹⁶⁸ Inter-American Commission on Human Rights, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas.

¹⁶⁹ United Nations Standard Minimum Rules for the Treatment of Prisoners, para. 8. Inter-American Commission on Human Rights, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas.

¹⁷⁰ Council of Europe - European Prison Rules Sections 12.1 and 12.2.

¹⁷¹ Inter-American Commission on Human Rights, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas Principle XXII, Disciplinary regime 3.

¹⁷² The United Nations Basic Principles for Treatment of Prisoners Section 7.

¹⁷³ Inter-American Commission on Human Rights, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas Principle XXII, Disciplinary regime 3.

punishment. A competent authority shall determine the maximum capacity of each place of detention according to international standards on living conditions. Information on maximum capacity, occupation ratio, and standards of living conditions shall be public, accessible and regularly updated. The law shall establish the procedures through which detained persons, their legal representatives, or non-governmental organizations may dispute the data regarding the maximum capacity or the occupation ratio. In these dispute proceedings, independent experts shall be permitted.

The law shall establish remedies to address overcrowding. The competent judicial authorities shall establish adequate measures in the absence of legal regulation. Once overcrowding is observed, States shall investigate and determine remedial responsibilities of detention institution authorities. Moreover, States shall adopt measures to prevent future overcrowding of detention institutions. In all cases, the law shall establish the procedures through which detained persons, their legal representatives, or non-governmental organizations can participate in creating preventative laws.¹⁷⁴

Complaints

Under the UN Standard Minimum Rules for the Treatment of Prisoners, every prisoner must be provided with information on the regulations governing the treatment of prisoners of this category, the institution's disciplinary requirements, methods of seeking information and making complaints, and other information necessary to his understanding of his rights and obligations.¹⁷⁵ Prisoners must have the opportunity to make requests or complaints to the director of the institution or his representative, as well as to the inspector of prisons outside the presence of prison staff.¹⁷⁶ Prisoners also must be permitted to make an uncensored request or complaint to the central prison administration, the judicial authority, or other competent authorities.¹⁷⁷ Unless a request is frivolous or groundless on its plain face, it must be addressed diligently and without undue delay.¹⁷⁸ ICCPR Article 10(1) also encompasses a right to an investigation and remedy of violations.^{179 180}

The UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment requires that a detained or imprisoned person or his representative have the right to make a request or complaint to the authorities responsible for the administration of the place of detention, to higher authorities and, when necessary, to authorities vested with reviewing or remedial powers.¹⁸¹

¹⁷⁴ Inter-American Commission on Human Rights, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas Principle XVII

¹⁷⁵ Standard 35(1), (2)

¹⁷⁶ Standard 36(1), (2)

¹⁷⁷ Standard 36(3)

¹⁷⁸ Standard 36(4)

¹⁷⁹ *Collins v. Jamaica*, Communication No. 240/1987 (14 November 1991) ¶ 8.6, CCPR/C/43/D/240/1987.

¹⁸⁰ The above rights also apply to juveniles. See UN Rules for the Protection of Juveniles Deprived of their Liberty 75-78.

¹⁸¹ Principle 33, Complaints Procedure. See also African Commission Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa M(7)(g), (h); Council of Europe Recommendation 2006(13) on the Use of Remand in Custody, the Conditions in which it takes Place and the Provision of Safeguards against Abuse 44; Inter-American Commission Principle V.

4. Early Release

Article 10(3) of the ICCPR details standards for treatment of prisoners following conviction. It emphasizes that such treatment should not be retributive in nature; but rather, it should be aimed at achieving reformation and social rehabilitation.¹⁸² While the European Convention for Human Rights does not set forth an absolute right to obtain a release on parole, the ECHR Practitioner's Guide states that all deprivations of liberty must be consistent with the rationale of the decision of the sentencing court. Therefore, a prisoner should have the right to review whether his detention is consistent with the sentencing court's decision.¹⁸³ The Tokyo Rules affirmatively set forth a preference to move an offender from an institutional setting to a noncustodial setting at the earliest possible stage.¹⁸⁴

The Council of Europe goes a step further: individualized measures that reduce the actual length of the sentence served should be promoted. This gives preference to early conditional release or parole over collective measures for the management of prison overcrowding, such as amnesties or collective pardons.¹⁸⁵

The Tokyo Rules state that the competent authority shall have at its disposal a wide range of post-sentencing alternatives. This will avoid institutionalization and assist offenders in their early reintegration into society. Post-sentencing dispositions may include (a) furlough and halfway houses; (b) work or education release; (c) various forms of parole; (d) remission; and (e) pardon.¹⁸⁶

Benefits of Conditional Release

Conditional release or parole is the most effective and constructive means of preventing re-offending and promoting resettlement and providing the prisoner with planned, assisted and supervised reintegration into the community. It should be used in ways that are adapted to individual circumstances and that are consistent with the principles of justice and fairness.¹⁸⁷ It should be regarded as one of the most effective and constructive measure to reduce the length of imprisonment and to contribute substantially to a planned return of the offender to the community. To promote and expand the use of parole, judicial and administrative authorities should be prompted to consider parole a valuable and responsible option. The best conditions for parole include treatment, both during and after detention, and community supervision after release. These conditions are created by programs devised to boost judicial, administrative, and prosecutorial confidence in measures aimed at reducing the actual length of sentences and in community sanction measures. Effective programs also should aim to facilitate resettlement of offenders, to reduce recidivism, and to provide public safety and protection.¹⁸⁸

The financial cost of imprisonment can place a severe burden on society and it is questionable whether extended detention promotes the rehabilitation of offenders. To reduce the harmful effects of imprisonment and to promote the resettlement of prisoners while guaranteeing the safety of the outside community, the law should make conditional release available to most if not

¹⁸² TRAVAUX PRÉPARATOIRES, *supra* note 8, A/4045, § 75-77, 44-5, 81, at 231-2.

¹⁸³ ECHR Practitioner's Guide

¹⁸⁴ United Nations Minimum Rules of Non-Custodial Measures (The Tokyo Rules) Section 9.4.

¹⁸⁵ Council of Europe, Recommendation (99)22 Concerning Prison Overcrowding and Prison Population Inflation.

¹⁸⁶ United Nations Minimum Rules of Non-Custodial Measures (The Tokyo Rules) Section 9.4, 9.2.

¹⁸⁷ Council of Europe, Recommendation (2003)22 concerning Conditional Release.

¹⁸⁸ Council of Europe, Recommendation (99)22 concerning Prison Overcrowding and Prison Population Inflation.



all sentenced prisoners (including life-sentence prisoners¹⁸⁹). If prison sentences are so short that conditional release is not possible, other ways of achieving these aims should be considered.

The Council of Europe recommends that governments of member states introduce conditional release in their legislation if it is not already provided.¹⁹⁰

Special Considerations for Juveniles

A criminal disposition in juvenile cases tends to influence the offender's life for a long period of time. Thus, it is important that the competent authority or the independent body with qualifications equal to those of the competent authority that originally disposed of the case (parole board, probation office, youth welfare institutions or others) should monitor the implementation of the final disposition. Some countries have a *juge de l'exécution des peines* for this purpose. The composition, powers and functions of such an authority must be flexible.¹⁹¹

Mechanics of Conditional Release

Conditional release should assist prisoners to make a transition from life in prison to a law-abiding life in the community through post-release conditions and supervision. Conditional release also should not interfere with public safety or the reduction of crime in the community. Prisoners should be informed at the beginning of their time served of the following: (1) when they are eligible for release by virtue of having served a minimum period of time, as defined in absolute terms and/or by reference to a proportion of the sentence; (2) when they are entitled to release by virtue of having served a fixed period of time, as defined in absolute terms and/or by reference to a proportion of the sentence ("mandatory release system"); and (3) the criteria used to determine whether they are granted release ("discretionary release system").

In a discretionary release system, the minimum period that prisoners must serve to become eligible for conditional release should be fixed in accordance with the law. The relevant authorities should initiate the necessary procedures to enable a decision on conditional release to be taken as soon as the prisoner has served the minimum period. Criteria for conditional release should be clear and explicit. It also should be realistic, taking into account prisoner's personality, social and economic circumstances, and availability of resettlement programs. The lack of possibilities for work on release should not constitute a ground for refusing or postponing conditional release. Efforts should be made to find other forms of employment. The absence of regular accommodation should not constitute a ground for refusing or postponing conditional release and, in such cases, temporary accommodation should be arranged.

The criteria for granting conditional release should be applied to grant conditional release to all prisoners who have met the minimum level. It should be incumbent on the authorities to show that a prisoner has not fulfilled the criteria. If the decision-making authority decides not to grant conditional release, the decision-making authority should set a date for reconsideration. In all cases, prisoners should be able to reapply given substantial circumstantial changes.¹⁹²

¹⁸⁹ Council of Europe, Recommendation (2003)22 concerning Conditional Release Section 4.a.

¹⁹⁰ Council of Europe, Recommendation (2003)22 concerning Conditional Release.

¹⁹¹ United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) "Commentary."

¹⁹² Council of Europe, Recommendation (2003)22 concerning Conditional Release Sections 16-21.



Under a mandatory release system, the period that prisoners must serve in order to become entitled to release should be fixed by law. Only in exceptional circumstances defined by law should it be possible to postpone release. The decision to postpone release should include a new date for release.¹⁹³ The minimum or fixed period should not be so long that the purpose of conditional release cannot be achieved.

Prison services should ensure that prisoners can participate in appropriate pre-release programs and should encourage prisoners to take part in educational or training courses that prepare them for life in the community. Specific modalities for the enforcement of prison sentences such as semi-liberty, open regimes or extra-mural placements, should be used as much as possible to prepare prisoner resettlement in the community. The preparation for conditional release should also include maintaining, establishing or re-establishing links between the prisoner, family and close relations. Preparation also should include forging contacts with services, organizations and voluntary associations that can assist conditionally released prisoners in adjusting to life in the community.¹⁹⁴ Additionally, various forms of prison leave should be granted to include compassionate grounds based on health and age.¹⁹⁵

In order to reduce recidivism of conditionally released prisoners, individualized conditions should be imposed. Possible conditions include compensation or reparation to victims; treatment for drug misuse, alcohol misuse, or other conditions associated with the commission of crime; occupational activity, such as work, education, or vocational training; participation in personal development programs; and restraining orders prohibiting contact with certain individuals.

The nature, duration and intensity of supervision of conditionally released individuals should be adapted to each case. Adjustments should be possible throughout the period of conditional release. Conditions or supervision measures should be imposed for a period of time that is proportionate to the part of the prison sentence that has not been served. Conditions and supervision measures of indeterminate duration should only be applied when absolutely necessary for the protection of society and when in accordance with Rule 5 of the recommendations issued by the Council of Europe.¹⁹⁶

Victims should be notified of their rights to participate in conditional release/parole proceedings.

Procedural Safeguards

Decisions on granting, postponing or revoking conditional release, and on imposing or modifying conditions and measures attached to conditional release, should be taken by authorities in accordance with the following safeguards: (a) convicted persons should have the rights to be heard in person and to be assisted according to the law; (b) the decision-making authorities should give careful consideration to any elements, including statements, presented by convicted persons; (c) convicted persons should have adequate access to their file; and (d) decisions should state the underlying reasons and should be written.

The decision on post-sentencing dispositions, except in the case of pardon, shall be subject to review by a judicial or other competent independent authority, upon application of the

¹⁹³ Council of Europe, Recommendation (2003)22 concerning Conditional Release Sections 22-24.

¹⁹⁴ Council of Europe, Recommendation (2003)22 concerning Conditional Release.

¹⁹⁵ The Ouagadougou Declaration and Plan of Action on Accelerating Prisons and Penal Reforms in Africa – “Plan of Action” 1.

¹⁹⁶ Council of Europe, Recommendation (2003)22 concerning Conditional Release.



offender.¹⁹⁷ Review should consider substantive and procedural guarantees provided by the decision. Procedures should also be available for complaints regarding the implementation of conditional release.¹⁹⁸

Imposition of Conditions

When considering whether to impose parole conditions or supervision, the competent authority should have at its disposal oral statements from personnel working in prison who are familiar with the personal circumstances of the prisoners. Professionals involved in post-release supervision or other persons knowledgeable about the prisoners' circumstances should also make information available. The decision-making authority should ensure that prisoners understand parole conditions, the requirements of control, and any possible consequences of failure to comply with the parole conditions.¹⁹⁹

The Tokyo Rules and the Council of Europe's Recommendation (92)16 on the European Rules on Community Sanctions and Measures also apply to parole. The Tokyo Rules state that "the relevant provisions of the present Rules shall be applied to all persons subject to prosecution, trial or the execution of a sentence, at all stages of the administration of justice."²⁰⁰ Further, states are encouraged to "provide a wide range of non-custodial measures, from pretrial to post-sentencing dispositions."²⁰¹ Parole is cited as one example of a post-sentencing disposition which is an alternative to incarceration.²⁰² The Council of Europe states that: "conditional release is a community measure. Its introduction into legislation and application to individual cases are covered by the European rules on community sanctions and measures contained in Recommendation No. R (92)16." Many of the same standards discussed above will apply to parole.

Implementation

Effective parole programs require, as a threshold measure, that the duties of agencies responsible for implementation and monitoring are specified in law.²⁰³

At the beginning of a period of parole, the offender should receive a verbal and written explanation of the conditions of parole, including obligations and rights.²⁰⁴ The parolee should also be informed of both the rules governing non-compliance and the consequences of non-compliance or inadequate compliance.²⁰⁵

The agency should impose obligations no more onerous than those that were authorized to impose.²⁰⁶ The duration of the obligations should not exceed the period authorized, although

¹⁹⁷ United Nations Minimum Rules of Non-Custodial Measures (The Tokyo Rules) Section 9.3.

¹⁹⁸ European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders Sections 32-34.

¹⁹⁹ European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders Sections 25-26.

²⁰⁰ Para. 2.1.

²⁰¹ Para. 2.3.

²⁰² Para. 9.2.

²⁰³ United Nations Minimum Rules of Non-Custodial Measures, para. 10.2. Council of Europe, Recommendation (92)16 on the European Rules on Community Sanctions and Measures, Rule 7.

²⁰⁴ Para. 12.3.

²⁰⁵ Council of Europe, Recommendation (92)16 on the European Rules on Community Sanctions and Measures, Rule 76.

²⁰⁶ United Nations Minimum Rules of Non-Custodial Measures, para. 3.10.

obligations may be terminated earlier if the offender has satisfied his obligations or has responded favorably.²⁰⁷

The offender should be entitled to make a request or complaint to a judicial or other competent independent authority on matters affecting the implementation of the conditions of parole, including that a restriction imposed upon him is unlawful or incompatible with the decision to grant parole.²⁰⁸ Even if an offender does not issue a formal request or complaint, the implementing agency should review the supervision and treatment program periodically reviewed and ensure that the program is adjusted as necessary.²⁰⁹

Monitoring

For each offender, a case record shall be established and maintained by the authority implementing and monitoring parole.²¹⁰ There should be clearly defined procedures for an offender's non-compliance or inadequate compliance.²¹¹ Minor transgressions that do not require revocation shall be promptly dealt with by the implementing agency through discretionary means, including advice, warnings, or administrative procedures.²¹² Any significant failure to comply with the conditions or obligations imposed on the offender should be promptly reported in writing to the competent authority.²¹³ Such reports should give an objective and detailed account of the manner in which the failure occurred, and the circumstances in which it took place.²¹⁴

Revocation

Once a competent authority has received a report of a significant failure to comply with a condition of parole, the competent authority must decide what actions to take.

The fair trial and due process considerations discussed in section 3.1 above apply to such decisions. For example, Council of Europe Recommendation (2003)22 concerning Conditional Release states that the following safeguards should apply: "a) convicted persons should have the right to be heard in person and to be assisted according to the law; b) the decision-making authority should give careful consideration to any elements, including statements, presented by convicted persons in support of their case; c) convicted persons should have adequate access to their file; d) decisions should state the underlying reasons and be notified in writing".²¹⁵ Before reaching a decision, the competent authority should make a detailed examination of the facts reported by the implementing authority.²¹⁶

²⁰⁷ United Nations Minimum Rules of Non-Custodial Measures, para. 11.1-2.

²⁰⁸ Para. 3.6. See also Council of Europe, Recommendation (92)16 on the European Rules on Community Sanctions and Measures, Rule 14.

²⁰⁹ United Nations Minimum Rules of Non-Custodial Measures, para. 10.3.

²¹⁰ United Nations Minimum Rules of Non-Custodial Measures, para. 13.6.

²¹¹ Council of Europe, Recommendation (92)16 on the European Rules on Community Sanctions and Measures, Rule 77.

²¹² *Id.*, Rule 78. Council of Europe, Recommendation (2003)22 concerning Conditional Release states, "Minor failures to observe imposed conditions should be dealt with by the implementing authority by way of advice or warning. Any significant failure should be promptly reported to the authority deciding on possible revocation." Para. 30.

²¹³ *Id.*, Rule 80.

²¹⁴ *Id.*, Rule 81.

²¹⁵ Para. 32.

²¹⁶ *Id.*, Rule 82.



Failure to comply with the obligations imposed should not automatically lead to the revocation of parole.²¹⁷ Further, failure to comply is not an offense.²¹⁸ Parole should only be revoked in the absence of other suitable alternatives.²¹⁹ The authority should, for example, consider whether further advice or warning, stricter conditions, or temporary revocation would constitute a sufficient penalty.²²⁰ The authority should consider the manner and extent to which the offender complied with the conditions imposed upon him.²²¹

Where parole is revoked, convicted persons should be able to make an appeal to a higher authority.²²² The appeals process should examine the substantive and procedural guarantees of the decision.²²³

²¹⁷ United Nations Minimum Rules of Non-Custodial Measures, para. 14.3.

²¹⁸ Council of Europe, Recommendation (92)16 on the European Rules on Community Sanctions and Measures, Rule 84.

²¹⁹ United Nations Minimum Rules of Non-Custodial Measures, para. 14.4.

²²⁰ Council of Europe, Recommendation (2003)22 concerning Conditional Release, para. 30.

²²¹ Council of Europe, Recommendation (92)16 on the European Rules on Community Sanctions and Measures, Rule 85.

²²² Council of Europe, Recommendation (2003)22 concerning Conditional Release, para. 33.

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