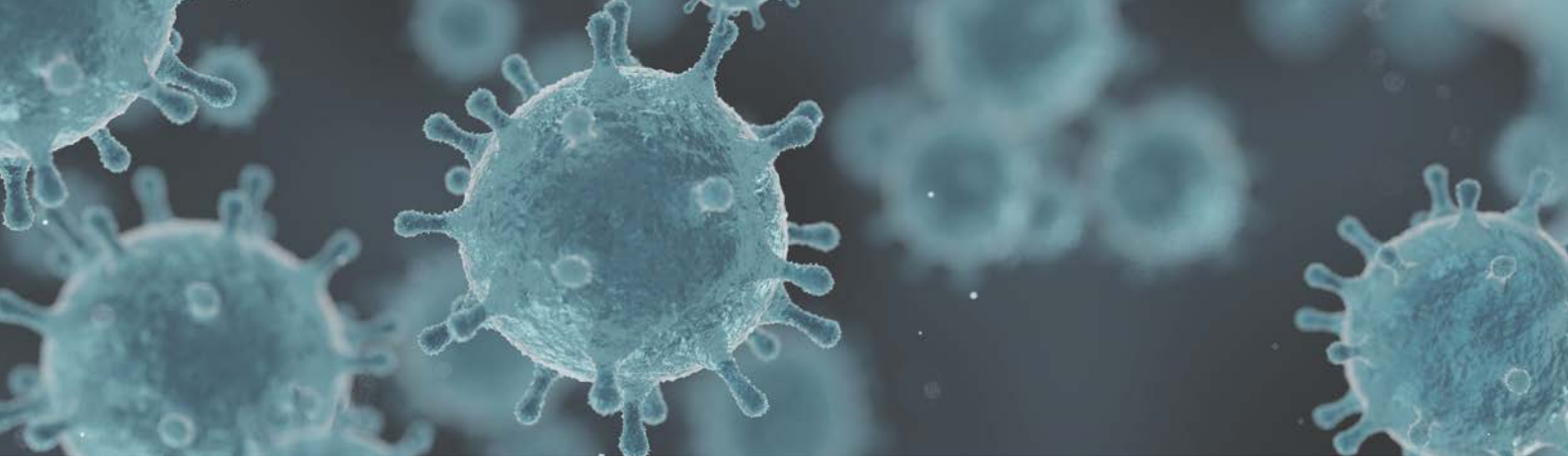

UNODC
United Nations Office on Drugs and Crime

COVID-19 GUIDANCE NOTE

Emergency release mechanisms for detainees and prisoners during COVID-19: findings and recommendations

INTRODUCTION

Since the outbreak of the coronavirus disease (COVID-19) pandemic, persons living in prisons and places of detention have become more vulnerable than ever to the adverse consequences of imprisonment. As of May 2021, it is estimated that nearly 550,000 prisoners in 122 countries have become infected with COVID-19, with close to 4,000 fatalities in prisons in 47 countries.[1] The rapid spread of the virus has threatened the health not only of prisoners and prison staff, but also of society at large and the impact of the pandemic in overcrowded prisons and among prisoners with existing health problems has been particularly severe. Prevention measures related to COVID-19 that are currently implemented in the community, such as hand hygiene and physical distancing, are often severely restricted or not possible in confined and overcrowded prison settings.

Since the publication, in March 2020, of its position paper on COVID-19 preparedness and responses in prisons, the United Nations Office on Drugs and Crime (UNODC) has collected data on the measures adopted by Member States to reduce their prison populations, including by means of emergency release mechanisms, in order to better understand the global situation and make informed policy recommendations. The present guidance note presents the findings of that data-collection exercise and contains practical and policy recommendations in line with the relevant international standards, most notably the United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules), for consideration by Member States.

[1] Justice Project Pakistan, COVID-19 and Prisoners, "**Infected prisoners and deaths across the world**". Available at **www.jpp.org.pk/covid19-prisoners** (accessed on 20 May 2021).

METHODOLOGY AND LIMITATIONS OF THE RESEARCH

The findings presented in the present guidance note are based on analysis of publicly available information, including news articles and statistics provided by national authorities. The information collected covers 119 Member States from all regions of the world. Some of the information was supplemented by data collected by the UNODC field office network, including through consultation with national stakeholders. As such, it is important to note the following caveats:

(a) *Unavailable, inconsistent or inaccurate prison statistics.* In many countries, the statistics on the release of prisoners as a result of COVID-19 were not publicly available; even fewer countries had disaggregated data (e.g., by sex or age) on the subject. Where such statistics were available, comparative analysis across countries and regions was challenging owing to a lack of consistent data collection and/or differences in data points and time periods. Furthermore, the announced number of releases did not always reflect the actual number of prisoners and detainees released. This discrepancy could be attributed to various factors, including that the announced numbers indicated how many people were eligible for a given measure instead of the number of people actually released, and difficulties in implementation (e.g., suspension of measures, prisoners having nowhere to be released to, vetoes by prison directors and inability to afford bail payments or outstanding fines);

(b) *Difficulty attributing releases to COVID-19.* In many countries, no distinction was made between releases made on account of COVID-19 and those that would have taken place in the course of normal procedures. In others, mass pardons and amnesties were announced, but without a clear link to COVID-19. In addition, a reduction in the prison population during the pandemic can also be partially attributed to a drop in crime rates and a decrease of and delays in court proceedings.

FINDINGS

1. Since March 2020, at least 700,000 persons around the globe – or roughly 6 per cent of the more than 11.5 million people behind bars around the world at the end of 2019 – have been authorized or considered eligible for release through emergency release mechanisms adopted by 119 Member States. This figure is based on numbers reported in the media and numbers announced by government agencies. The number of persons released varies widely, with some countries reported as releasing as many as 120,000 prisoners and many others reported as releasing under 1,000. Variations also existed in the way that they were released. Owing to a lack of available data in many countries, including in some of the most populous countries, the total number of persons released may be significantly higher.

2. On the basis of the information available, it appears that emergency release mechanisms in the vast majority of Member States were focused on convicted persons rather than on pretrial detainees. This is likely because instruments commonly used to release prisoners are pre-existing constitutional or executive powers (e.g., presidential or royal pardons), which typically apply only to convicted prisoners. The lack of attention paid to the pretrial detainee population is a cause for concern as it makes up a sizeable portion of the prison population in many countries, despite the international legal obligation that persons awaiting trial should not automatically be detained in custody.[2] In reality, the prison conditions faced by pretrial detainees are the same as, or even worse than, those faced by convicted prisoners, often over prolonged periods of time.

[2] International Covenant on Civil and Political Rights, art. 9, para. 3.

PROMISING PRACTICE

By taking decisive and coordinated action and by making full use of the existing non-custodial measures available in law and policy, Kenya released over 12,000 people from custody and reduced the prison population by 25 per cent between March and August 2020;[a] there was also a notable drop in the number of pretrial detainees. Prior to the pandemic, the majority of the prison population had been awaiting trial but, as a result of the prison-decongestion measures, the pretrial population decreased to 37 per cent of the prison population.

When the first COVID-19 case was confirmed in Kenya, in March 2020, the Kenyan justice agencies met under the framework of the National Council on the Administration of Justice – a high-level policymaking organ comprising representatives from all relevant justice actors – and adopted the following prison-decongestion measures:

(a) Police stations were instructed to impose police bonds for minor offences and minimize the number of people held in police custody;

(b) The prison authorities were directed to suspend all new admissions to prison facilities. Only those arrested for or convicted of serious offences for which there was no legal basis for such a suspension and those ineligible for police bond or bail could be admitted to prison;

(c) To prevent an outbreak of COVID-19 in prisons, the Kenya Prisons Service required newly admitted prisoners to spend the first 14 days in regional facilities that served as quarantine centres before joining the general prison population;[b]

(d) The High Court was advised to review the cases submitted by prison authorities of prisoners eligible for release. Out of nearly 7,500 prisoners whose cases were submitted for review, over 4,000 were released and nearly 1,000 had their sentences commuted. Many such reviews were conducted online, by means of videoconferencing software;[c]

(e) An additional 15,379 offenders were given community service orders;

(f) Magistrates reviewed the bail terms of accused persons remanded in custody. Those reviewed bail terms were then communicated to prisons, where staff assisted the detainees in contacting their lawyers or family members. Those who were able to comply with the reviewed terms were released;

(g) To cope with the surge in the number of persons released on probation, supervision was done over the telephone. Offenders without telephone service were required to physically attend the nearest probation office.

The Kenyan experience is a testament to how using alternatives to imprisonment to their fullest extent can have a positive impact on alleviating prison overcrowding and in promoting the principle of proportionality. It is also a good example of how a robust coordination mechanism between relevant criminal justice agencies can play a key role in responding effectively to crises.[d]

[a] Mercy Deche and Conrad Bosire, "**The silver lining in the COVID-19 cloud: an appraisal of accelerated prison decongestion in Kenya**", *Victims and Offenders*, vol. 15, Nos. 7 and 8 (October 2020).

[b] As a result of such measures, there were no infections among prisoners in Kenya and only 318 COVID-19 cases were detected in the country's 59 holding facilities.

[c] Aysha Salaudeen, "**Kenya has freed nearly 5000 inmates via newly adopted Skype court sessions**", CNN, 2 April 2020.

[d] UNODC, through its **Programme for Legal Empowerment and Aid Delivery in Kenya**, has supported this process through technical assistance to develop and promote various policies on alternatives to imprisonment. UNODC has also strengthened the coordinating role of the National Council on the Administration of Justice, which played a key role in the justice response to the pandemic, and supported the roll-out of the first e-learning course for the National Police Service, as well as the adoption of e-justice to limit the increase in the backlog of cases.

3. By and large, the vast majority of release initiatives were implemented by executive organs rather than by the judiciary. Some countries' release mechanisms involved parole boards (e.g., South Africa) or committees established specifically for that purpose (e.g., India and Peru).

PROMISING PRACTICE

In May 2020, the Chief Justice of Nigeria issued a letter to all chief judges of the country to draw attention to the urgent need for the speedy trial of cases and decongestion of custodial centres. Noting that 70 per cent of the Nigerian prison population consisted of those awaiting trial, the Chief Justice urged the judiciary to consider the conditional or unconditional release of pretrial detainees who had already spent six years or more in custody. The Chief Justice also called for particular attention to be paid to, inter alia, older prisoners, those with health issues, low-risk offenders and those for whom there was no sufficient legal basis for their remaining in custody. The imposition of fines for those convicted of lesser offences was also encouraged.

As a result of such initiatives, as well as the establishment of a committee dedicated to decongesting prisons, Nigeria was able to release 7,813 prisoners – 10 per cent of its prison population – by July 2020.[a]

[a] Agency Report, "**COVID 19: Nigeria releases 7,813 from correctional centres**", *Premium Times*, 7 July 2020.

4. A diverse range of criteria were used to select those suitable for release, including: *(a)* character and condition of a prisoner (health condition, gender and whether it was a first-time offence); *(b)* behaviour in prison; *(c)* length of original sentence; *(d)* remaining time to serve; and *(e)* type of offence (whether serious or violent). As a result, prisoners identified as eligible for release were mainly those convicted for non-violent offences, vulnerable persons and prisoners who had served the majority of their sentences. Some countries used existing criteria in international standards and norms to review and identify cases for release. For example, many countries assessed whether the offender posed a risk of absconding, had already served a long period of pretrial detention or posed a risk to public safety if released. Those considerations reflect existing principles relating to the deprivation of liberty under the international legal and normative framework.

5. Globally, few countries prioritized the release of prisoners on the basis of gender, as emergency release measures were more commonly applied according to sentence-based criteria. However, a minority[3] of countries did include gender-specific criteria, such as pregnancy, breastfeeding and/or being mothers of infants or young children in or outside of prison.[4] Given the high percentage of female offenders who are serving prison sentences for non-violent or minor offences, it should follow that countries prioritizing the release of such offenders would release significant numbers of female prisoners. However, the statistics were not available to confirm such a trend.

6. There was no clear pattern on the inclusion or exclusion of drug-related offences in release criteria. While persons accused or convicted of drug trafficking were explicitly excluded from release eligibility in some countries (e.g., Algeria, Cameroon, Namibia and Portugal), there was no discernible trend with regard to those accused or convicted of personal possession.

[3] The countries that explicitly included gender-specific criteria in their emergency release mechanisms included Bolivia (Plurinational State of), Brazil, the Central African Republic, Chad, Colombia, Egypt, Ethiopia, Georgia, Italy, Kyrgyzstan, Pakistan, Peru, Rwanda, Tunisia, the United Kingdom of Great Britain and Northern Ireland and Zimbabwe.

[4] For specific guidance on children deprived of their liberty and COVID-19, see Alliance for Child Protection in Humanitarian Action and United Nations Children's Fund, "**Technical note: COVID-19 and children deprived of their liberty**"; and UNODC, "**Protecting children deprived of liberty during the COVID-19 outbreak: UNODC technical assistance services**".

7. In some countries (e.g., Iran (Islamic Republic of) and Japan), emergency release mechanisms were temporary in nature and prisoners were required to return to prison after a certain period of time. Such measures reduced the prison population for a short period.

8. In general, there was a lack of attention paid to the provision of post-release services in the context of emergency releases. Whenever post-release measures were mentioned, they were part of the existing post-release supervision architecture, such as house arrests and electronic monitoring (e.g., Brazil, Italy, Netherlands, Poland and Spain). The provision of post-release services, such as housing and employment support – which typically accompany probation – was not reported. The lack of post-release services is problematic as many former offenders have a wide range of needs immediately after release, including housing, health care (including access to drug use treatment or other community health services) and employment support. Without access to and availability of such services, many former offenders face obstacles in successfully reintegrating into society, which increases the likelihood of their reoffending. Such consequences are commonly observed in countries that periodically announce large-scale pardons or amnesty measures without providing post-release services: the number of prisoners increases back to the original level over time.

9. In terms of measures to curb new admissions to prison, only a small minority of countries adopted measures such as suspended sentences, waivers of prosecution or bail. Compared with the release of prisoners, much less information was available on the scope, conditions and time frame of measures aimed at curbing new admissions. Where data were available (e.g., on the number of those granted bail), the distinction between those granted bail pre-detention and those released on bail was not made clear.

PROMISING PRACTICE

In March 2020, Austria responded to COVID-19 by, inter alia, passing a federal decree that suspended the commencement of a prison sentence for those who had been convicted of an offence punishable by less than three years of imprisonment.[a] The suspension did not apply to repeat offences, hate crimes or violent offences. The decree also provided that persons infected with COVID-19 or those who were in quarantine owing to close contact with an infected person were considered "unfit for prison" and should be placed in substitute custody, including a public hospital if necessary.

[a] Austria, Ministry of Justice, **decree of 27 March 2020 on the special precautions in scope of application of the Prison Act to prevent spread of COVID-19 (Erlass vom 27. März 2020 über die besonderen Vorkehrungen im Anwendungsbereich des Strafvollzugsgesetzes zur Verhinderung der Verbreitung von COVID-19).**

CONCLUSION

The COVID-19 pandemic and the particularly vulnerable situation faced by prisoners and prison personnel around the world have prompted many Member States to enhance their use of non-custodial measures through emergency release mechanisms that – if fully implemented – would apply to 6 per cent of the world prison population. The unprecedented level of recognition, attention and effort by Member States with regard to the use of non-custodial measures is a welcome development and it is to be hoped that it is the beginning of the much-needed shift away from the overreliance on imprisonment around the world. However, many of the emergency measures adopted by Member States were temporary and exceptional in nature, and must therefore be followed by an effective, institutionalized and sustainable use of non-custodial measures that is rooted in law and policy.

The post-COVID-19 environment presents an opportunity to improve and innovate in terms of how criminal justice systems operate and to address the chronic shortcomings of those systems. In an effort to "build back better", Member States should seize this opportunity to scrutinize their reliance on imprisonment and maximize the availability and use of non-custodial measures in appropriate cases. Ensuring that pretrial detention remains an exceptional measure and restricting the use of imprisonment to those individuals who genuinely pose a threat to society will be instrumental in enabling national criminal justice systems to meet their objectives of protecting society from crime and of fostering the rehabilitation and social reintegration of offenders through individualized and proportionate criminal justice responses.

POLICY RECOMMENDATIONS

In the short term, it is recommended that Member States:

(a) Consider including certain categories of pretrial detainees, in addition to convicted prisoners, as eligible for emergency release mechanisms, particularly those accused of minor and non-violent offences and those who have already served a long period of pretrial detention. This is in line with the guidance contained in the international legal and normative framework, which provides that pretrial detention is not to be the general rule[a] and that it should be used as a means of last resort in criminal proceedings;[b]

(b) Make full use of the non-custodial measures available in law, wherever appropriate. In addition to pardons and conditional releases, efforts such as suspending the commencement of a sentence for minor offences, reviewing bail and bond terms and maximizing community service orders can directly contribute to reducing the prison population, thereby lowering the risk of infection within prisons;

(c) Adopt a gender perspective when determining the eligibility of prisoners for emergency release mechanisms. This should include the use of specific criteria, such as pregnancy, breastfeeding and/or having infants or young children in or outside prison, as well as the taking into account of an offender's history of victimization, caretaking responsibilities and specific social reintegration needs;

(d) Couple emergency release mechanisms with a range of community-based post-release services, such as housing, health care (including access to drug treatment or other community health services, when necessary) and employment support, for those who are released. As many prisoners come from poor and marginalized backgrounds, it is important to ensure that, when released from prison, individuals can support themselves and do not reoffend;

(e) Keep detailed sex- and age-disaggregated data on emergency releases, including on how many people are released under each non-custodial measure, how many people attend their trial (in the case of pretrial detainees), how many do not comply with the terms of their non-custodial measure and how many reoffend. Such data will be instrumental in understanding the efficacy and impact of using non-custodial measures and will provide a sound evidence base to inform future policymaking.

In the long term, it is recommended that Member States:

(a) Accelerate, further expand and institutionalize the use of non-custodial measures by ensuring that a wide range of alternatives to imprisonment are available and fiscally sustainable in law, policy and practice at every stage of the criminal justice process so that they are a viable option for responding to crime in an individualized and proportionate manner;

(b) Avoid the use of temporary emergency release mechanisms, which require prisoners to return to prison after a set period of time. This is recommended in particular for Member States with overcrowded prisons. Temporary releases do not reduce the prison population in the long term, nor do they adequately support the rehabilitation and reintegration of offenders into society;

(c) Address the disproportionate increase in the female prison population. This can be done by developing and implementing gender-specific options for diversion and non-custodial measures at every stage of the criminal justice process, taking into account any prior victimization and mitigating factors such as lack of a criminal history and the nature and severity of the offence;

(d) Strengthen the capacity of criminal justice authorities (the police, prosecution services, the judiciary and agencies responsible for the implementation and supervision of non-custodial measures) to implement alternatives to imprisonment by providing adequate resources and training and capacity-building activities, in partnership with national training institutions;

(e) Establish or enhance a structured coordination mechanism involving other relevant agencies, including legal aid services (for access to a legal representative and legal information) and social welfare and health agencies (for rehabilitation and reintegration support services);

(f) Foster understanding of and support for the use of non-custodial measures by raising awareness, through evidence-based campaigns, of the benefits thereof among criminal justice actors and the wider public;

(g) Promote and support consistent and sustainable research and data collection on the use of non-custodial measures, in particular on their impact on reducing the prison population and on reducing reoffending.

[a] International Covenant on Civil and Political Rights, art. 9, para. 3.
[b] The Tokyo Rules, rule 6.1.

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