

International standards regarding non-custodial sanctions with special attention to sentencing and the practice of ex officio defence counsels

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Main
International
Standards
relevant to
Non-
Custodial
Sanctions:
United
Nations

- International Covenant on Civil and Political Rights (ICCPR)
 - Convention against Torture (CAT)
 - Standard Minimum Rules for Non-custodial Measures (Tokyo Rules)
 - Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (Bangkok Rules)
 - Plus.....
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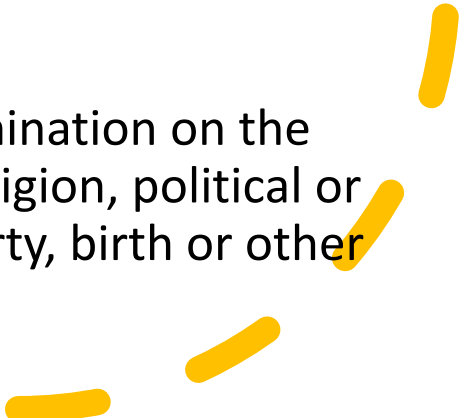
Main
International
Standards
relevant to
Non-
Custodial
Sanctions:
Council of
Europe

- European Convention on Human Rights (ECHR)
 - Rules on Community Sanctions and Measures (CSM)
 - White Paper on Prison Overcrowding (WP)
 - Probation Rules (EPR)
 - Recommendation concerning restorative justice in criminal matters (Rec2018 8)
 - Recommendation on conditional release (parole) (Rec(2003)22)
 - Recommendation on Prison Overcrowding and Prison Population Inflation (Rec R99 22)
 - Plus
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EU Council conclusions on alternative measures to detention: the use of non-custodial sanctions and measures in the field of criminal justice (2019/C 422/06)

- Member States are encouraged to raise awareness among legal practitioners of the benefits of alternative measures to detention as well as of the availability and technical features of existing tools
- As regards the use of alternative measures to detention, the Member States are encouraged to pay particular attention to the needs of vulnerable persons such as children, persons with disabilities and women during pregnancy and after giving birth.
- Member States are encouraged to share with each other and with the Commission best practices as regards all aspects of non-custodial sanctions and measures, with the aim to learn from each other.


Tokyo Rules 1990

- Principles to promote the use of non-custodial measures and sanctions and minimum safeguards for persons subject to them.
 - Alternatives to imprisonment can be effective and ‘to the best advantage of both the offenders and society.’
 - Any non-custodial measure or sanction should be selected based the nature and gravity of the offence, and personal characteristics and the background of the person who is charged with, or convicted of a criminal offence
 - Staff or personnel employed to supervise non-custodial alternatives should have professional training and be adequately remunerated
 - The Rules shall be applied without any discrimination on the grounds of race, colour, sex, age, language, religion, political or other opinion, national or social origin, property, birth or other status.
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Concluding
observations
on the sixth
periodic
report of
Hungary by
Human Rights
Committee
2018

- Regrets failure to make greater use of non-custodial alternative measures to incarceration.
- Hungary should strengthen its efforts to eliminate overcrowding in places of detention, including by increasing the use of non-custodial alternative measures to incarceration.





Committee of
Ministers
Examination of
Status of
Execution of
Varga and Others
Pilot Judgment
(2021)

- Noted with satisfaction the eradication of overcrowding in each prison facility
- Strongly encouraged further promotion of use of alternatives to detention.
- Found potential of such alternatives still appears to be underused as evidenced by the negative recent trends in all areas for which data was submitted
- Recalled that “providing additional accommodation cannot on its own offer a lasting solution. The only viable way to control overcrowding is to adopt policies designed to limit or moderate the number of persons sent to prison”

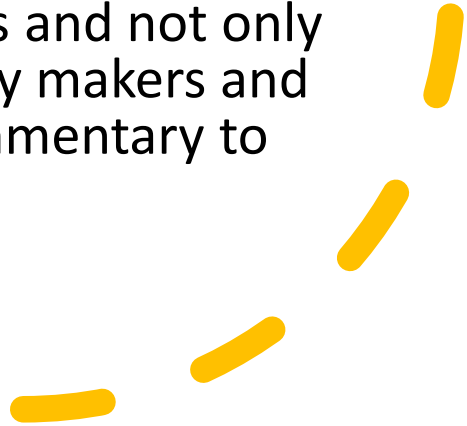
International Standards and Sentencing Practice

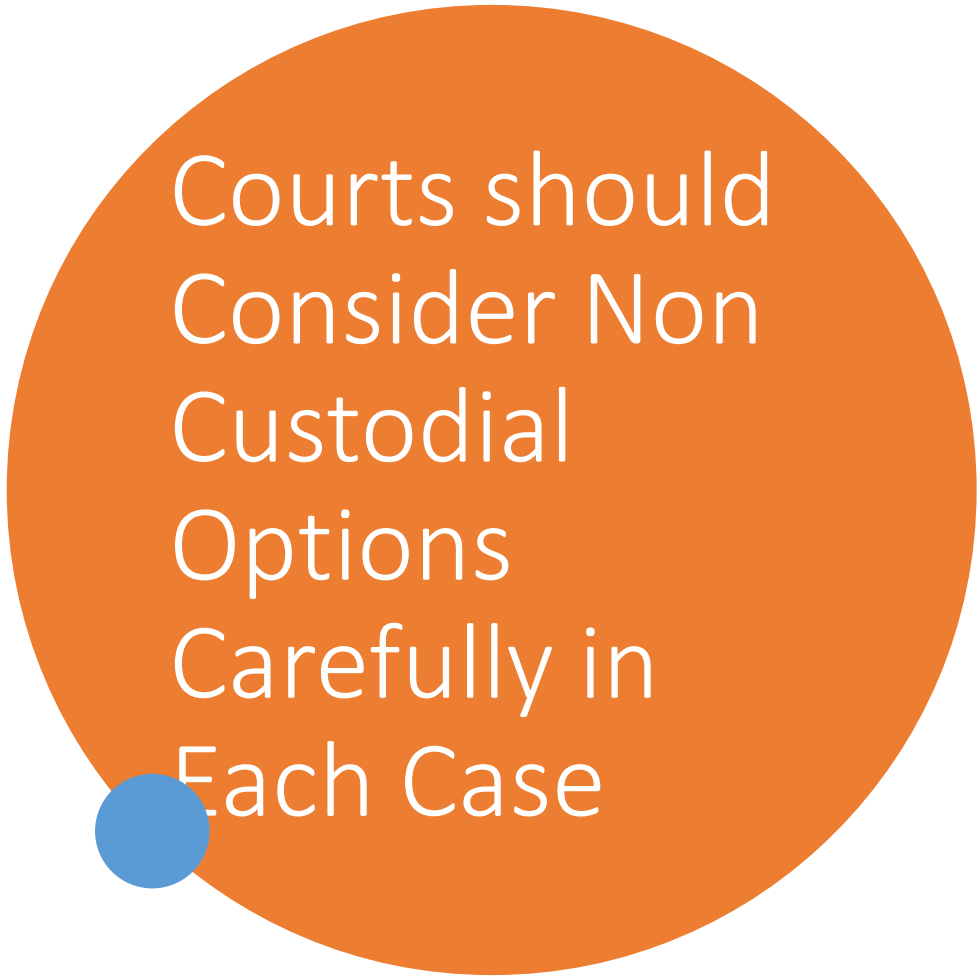
- “Hard law” more often on fair trials, pre-trial justice and detention conditions rather than sentencing
- ECHR accepts large “margin of appreciation which must be accorded to Contracting States in the matters of criminal justice and sentencing”
- Article 3 held to require reducibility of life sentences. Possibility of release on parole after 40 years’ imprisonment are incompatible with ECHR (Hungary cases)
- “Softer standards” and commentaries on them deal with sentencing to prison expressly and by implication

A Prison Sentence Should Be a Last Resort


- The Council of Europe in a number of texts adopted by the Committee of Ministers as well as its European Court of Human Rights has persistently upheld the principle that deprivation of liberty should be a sanction or measure of last resort due to the fact that the right to freedom is one of the most fundamental human rights and that deprivation of this right has harsh and serious consequences on the individuals affected by it. (WP)

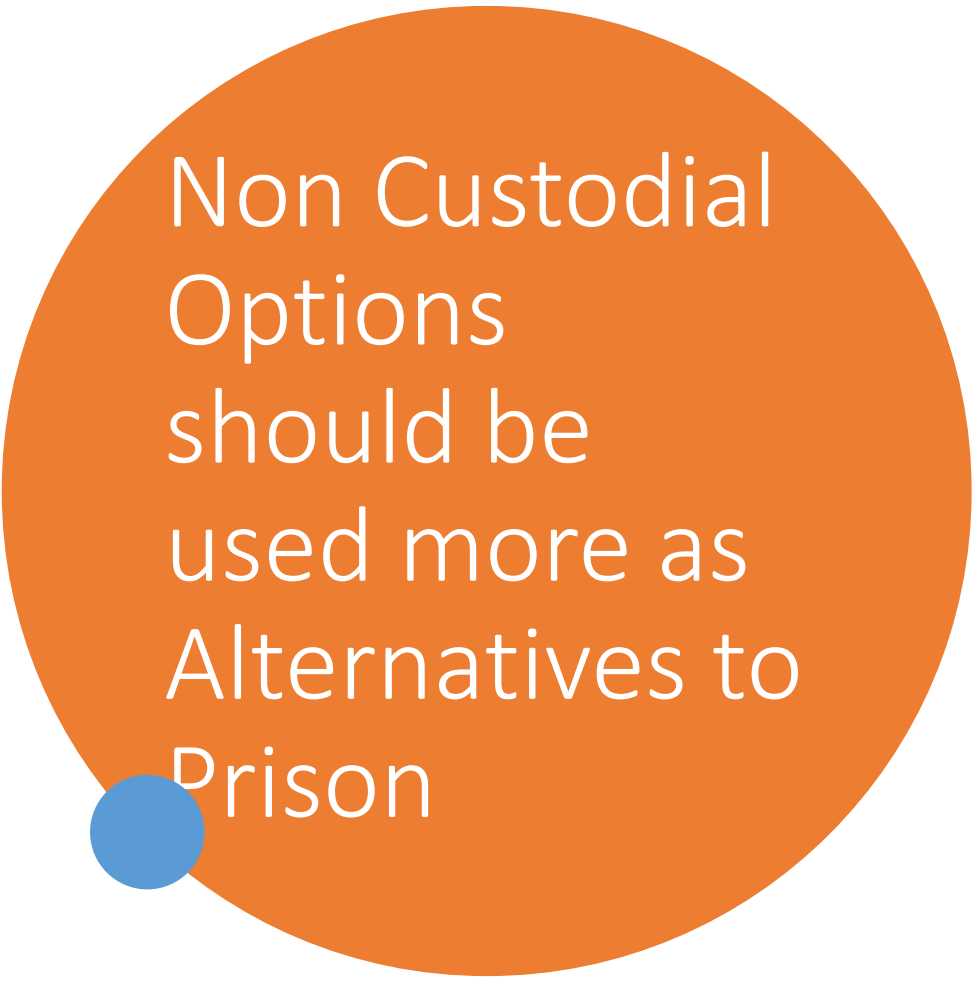
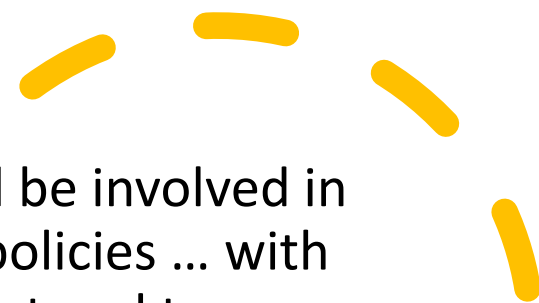
Sentencing Should Be Proportional

- Imprisonment cannot be considered an appropriate sanction for a wide range of offences and many types of offenders, in particular those who are not likely to repeat offences, those convicted of minor crimes and those needing medical, psychiatric or social help. (Tokyo Rules Commentary)
 - The nature and the duration of a community sanction or measure shall be in proportion to the seriousness of the offence and the harm done to victims and shall take into account any risks assessed as well as the individual's needs and circumstances. (CSM)
 - While community sanctions and measures can appropriately be used for serious offences and not only for first offenders, it is important for policy makers and the judiciary to avoid 'net widening' (Commentary to CSM)
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Courts should
Consider Non
Custodial
Options
Carefully in
Each Case

- Individualisation of the sentence goes hand in hand with the proportionality of the punishment and should remain within the discretionary power of the judiciary (WP)
 - Before final judgement is delivered the judge should systematically weigh the pros and cons of sentencing someone to imprisonment including the possible effect this could have on the individual and their family and also the general consequences and costs for society. (WP)
 - When applying the law prosecutors and judges should endeavour to bear in mind the resources available, in particular in terms of prison capacity (Rec R99 22)
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Non Custodial Options should be used more as Alternatives to Prison

- Prosecutors and Judges should be involved in the process of devising penal policies ... with a view to engaging their support and to avoiding counter productive sentencing practices (Rec R99 22)
- Rationales for sentencing should be set with a view to , inter alia, reducing the use of prison, expanding CSM and to using measures of diversion such as mediation or the compensation of victim (Rec R99 22)



Restorative Justice Can form part of a Sentence

- Restorative justice may be used at any stage of the criminal justice process. For example, it may be associated with diversion from arrest, charge or prosecution, used in conjunction with a police or judicial disposal, occur before or parallel to prosecution, take place in between conviction and sentencing, **constitute part of a sentence**, or happen after a sentence has been passed or completed. (Rec2018 8)

Conditional release is one of the most effective and constructive means of preventing reoffending

- Should be available to all sentenced prisoners, including life-sentence prisoners. (Rec(2003)22)
- Should be applied to all prisoners who meet the minimum level of safeguards for becoming law-abiding citizens. It should be for the authorities to show that a prisoner has not fulfilled the criteria. (Rec(2003)22)
- Any form of release from an institution to a non-custodial programme shall be considered at the earliest possible stage.(Tokyo Rules)



Arguments for Alternatives

- If imprisonment is to be a 'last resort', there must be sanctions and measures of earlier resort (CSM Commentary)
- Community sanctions and measures are often introduced to give courts a range of options to avoid imprisonment . They should be valued not only for their potential to reduce the size of the prison population but for their **positive contribution to justice and social inclusion.** (CSM Commentary)