INSTITUTE FOR INTERNATIONAL LAW & HUMAN RIGHTS

Legislative Considerations for Alternatives to the Imprisonment and Monetary Penalties Systems in Iraq

Prepared by the Institute for International Law and Human Rights

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EXECUTIVE SUMMARY

- Prison populations in Iraq have drastically increased over the past two decades, with reports of some prisons in Iraq being at a capacity of 200-300% of what they were designed for. With overcrowded prisons and an overburdened judiciary and justice system, Iraq has a clear need to establish implementable legislation empowering judges and prosecutors to choose non-custodial enforcement measures as an alternative to imprisonment.

- Experts have recognized the link between overcrowded prisons and an increase in the risk of extremist ideologies growing in prisons. With detention facilities already overcrowded with those suspected and convicted of links to Da'esh, Iraq's prisons provide a breeding ground for the next insurgency.

- Non-custodial sanctions have been used by countries around the world as an alternative to prison and monetary fines. These non-custodial sanctions have several advantages, including reducing prison populations, focusing on rehabilitation and reintegration into society, strengthening the community and reducing financial and administrative burdens on the government and justice system.

- Although Iraq has some legislative provisions that offer alternatives to prison and fines, such as suspended sentences, the legislative framework in Iraq is not equipped to provide the judiciary with the tools to choose from a broad scope of non-custodial sanctions as an alternative to prison or fines. By developing a legal framework to grant judges the authority to choose from a variety of non-custodial sanctions while also establishing an administrative framework to ensure these sanctions are effectively implemented, the load on Iraq's overburdened justice system may be lightened.

- Any legislation incorporating non-custodial measures should conform to the existing international framework set out in the *Tokyo Rules*, *Bangkok Rules* and other relevant regional and international instruments.

- Legislators must acknowledge that many forms of non-custodial measures, such as probation or electronic monitoring, need strong administrative institutions in place to ensure they are effective at meeting the aims of reducing reoffending, protecting the public and rehabilitating the offender. However, many countries also have legislation that can be used as models for how to develop a system of non-custodial measures that relies on voluntary community participation to effectively carry out its goals, reducing the need for some administrative institutions.

- Legislators should consider how best to incorporate existing traditional and community-based dispute resolution mechanisms into the justice system, provided these mechanisms align with human rights norms and best practices.

- When using non-custodial measures, decision-makers must ensure that any measure is proportionate to the offence, maintains the dignity of the offender, and contributes to the safety and betterment of the community.

- There is a need for clear sentencing policies that go beyond merely encouraging non-custodial measures on a discretionary basis. As some offences are not appropriate for non-custodial measures, sentencing policies should clearly state which cases or individuals are suited for non-custodial measures and which are not. Legislation and policies should further outline how and when non-custodial measures are to be used in a rehabilitative manner versus a punitive manner.

- Reliance on non-custodial measures alone is unlikely to be effective at reducing prison populations. Non-custodial measures should form part of a more holistic approach to addressing sanctions and shifting societal perception with objectives of reducing reoffending, encouraging reparations, and facilitating restorative justice within the community.

- Training will be necessary for judges, police, and prosecutors to understand the benefits of non-custodial measures as well as how best to assess the circumstances of each case to determine which non-custodial measures are most suited to facilitate rehabilitation while also protecting the public and reducing reoffending.

- Authorities should consider engaging with the media to ensure non-custodial measures are not characterized as "soft on crime" or less effective than prison. Similarly, authorities should engage with the public through awareness campaigns to shift public perception away from the justice system as solely punitive toward community-based approaches to justice.

- Although implementable legislation is a necessary starting point, authorities must also work to shift policy and perception within the justice system so that prison is viewed as a sentence of last resort. If the aims of reducing reoffending, rehabilitating the offender and protecting the public can be met through non-custodial enforcement measures, those measures should be chosen instead of prison.

- In addition to reconsidering alternatives to imprisonment in Iraq, there are also opportunities to modernize the monetary penalties system. This will ensure that monetary penalties remain effective over time, consistently proportionate and

dissuasive. Legislators may consider implementing a system of Day Fines or using a Penalty Units system found in many countries around the world.

The Institute for International Law and Human Rights (IILHR) stands ready to provide additional assistance and support needed to move forward to develop legislation that can facilitate use of non-custodial enforcement measures in Iraq.

Table of Contents

Explanatory Interpretive Note

Drawing on international and contemporary terminology, this paper uses the term "offender" to refer to any individual that has committed an act that subjects them to prosecution, trial or carrying out of a sentence. Further, this paper uses the term "non-custodial measures" in the same manner as the Tokyo Rules, meaning sanctions or sentences that do not involve imprisonment or deprivation of liberty in any other detention center. Some experts have instead used the term "community sanctions and measures" rather than "non-custodial measures", thereby de-emphasizing the role of prison in the justice system.[1]

Importantly, despite the use of the term "alternative" in some places in this publication, this does not imply that imprisonment should be considered a primary enforcement measure, or that non-custodial measures should be viewed as secondary or less important.[2]

[1] See, for example, Robinson G., McNeill F., and Maruna S. "Punishment in Society: The Improbable Persistence of Probation and Other Community Sanctions and Measures", (2012) *The SAGE Handbook of Punishment and Society*. Available online: http://eprints.gla.ac.uk/70216/1/70216.pdf

[2] United Nations Office at Vienna, "Commentary on the United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules)" New York (1993) at p. 3. Available online: https://www.ojp.gov/ncjrs/virtual-library/abstracts/commentary-united-nations-standard-minimum-rules-non-custodial

I. CONTEXT AND MAIN ISSUES

A. Iraqi Context for Imprisonment as a Sanction

Iraq, like every country in the world, uses imprisonment as a major penalty for crimes. However, unlike many other countries, the historical circumstances in Iraq since the early 2000s have resulted in a severe overcrowding of the prison system, with detention facilities and prisons throughout the country being filled well beyond capacity with suspects of terrorism and other crimes, as well as those already convicted of crimes. In July 2019, three major pretrial facilities in Northern Iraq (Tal Kayf, Faisaliya and Tasfirat) were reported to be collectively holding 4500 prisoners, despite a total capacity of 2500 people.[3] Of this total number, 1300 had already been tried and convicted of a crime, meaning they should have been transferred to prisons upon conviction. In some cases, prisoners in the pretrial facilities had been convicted of a crime six months earlier and were yet to be moved to a prison for convicts.[4]

As of 2023, the problem of overcrowded prisons has only grown worse. In April 2023, there were reported to be approximately 60,000 prisoners in Iraq, despite a total capacity of 25,000 in 28 federal prisons nationwide. Reports also noted that some prisons had vastly exceeded their designed capacity, in some cases reaching between 200 and 300 percent capacity.[5] In the Kurdistan Region, as in Federal Iraq, prisons remain overcrowded. Officials have reported that, despite facility capacities of around 900, some prisons in the Region may have up to 2200 inmates, with up to 30 inmates being placed in cells designed for only eight.[6]

This rise in prison populations over the past 10 years has been widely attributed to two major factors that continue to burden the justice system in Iraq: terror-related offences and drug-related offences.[7]

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[3] Human Rights Watch, "Iraq: Thousands Detained, Including Children, in Degrading Conditions" (4 July 2019). Available at: https://www.hrw.org/news/2019/07/04/iraq-thousands-detained-including-children-degrading-conditions.
[4] Human Rights Watch, "Iraq: Thousands Detained, Including Children, in Degrading Conditions" (4 July 2019). Available at: https://www.hrw.org/news/2019/07/04/iraq-thousands-detained-including-children-degrading-conditions.
[5] Karwan Faidhi Dri, "Iraqi prisons overcrowded up to 300 percent capacity: Justice ministry" (14 April 2023) Rudaw News. Available online: https://www.rudaw.net/english/middleeast/iraq/140420231
[6] Justice Trends, "How Iraqi Kurdistan prisons handle thousands of terrorism convicts: Interview with Ahmed Najmaddin Ahmed" (21 March 2022). Available online: https://justice-trends.press/how-iraqi-kurdistan-prisons-handle-thousands-of-terrorism-convicts/
[7] United States Department of State, "2022 Country Reports on Human Rights Practices: Iraq" at pp.8-9. Available online: https://www.state.gov/reports/2022-country-reports-on-human-rights-practices/iraq/

1. Terrorism and drug offences contribute to overcrowded prisons

Following the fall of Da'esh in Iraq, significant government resources have been devoted to arresting, prosecuting and detaining those suspected and convicted of having ties to Da'esh. Detention facilities and detention camps continue to be filled with individuals and families suspected of having ties to Da'esh, with many located in these facilities still waiting to be charged with a crime.[8]

The United States of America Department of State has noted that senior government officials in Iraq report over half of juveniles being held in correctional facilities have been convicted on terrorism-related offences.[9] These reports were corroborated by the Ministry of Justice's Iraqi Reform Department which stated that, in 2021, at least 41,049 people were detained in Iraqi prisons, including 22,380 individuals convicted on terror-related charges.[10]

In the Kurdistan Region of Iraq, adult males convicted of terror-related offences are placed in prison facilities in Erbil, Sulaymaniyah and Dohuk. As of 2022, over 2300 prisoners in the Kurdistan region were convicted on terrorism-related charges.[11]

High numbers of suspected, charged and convicted Da'esh members and affiliates continue to place significant burdens not only on the existing prison system, but the judiciary and broader justice system as well. These burdens are also exacerbated by the second major issue contributing to overcrowding in the Iraqi justice system: increasing use, sale and manufacturing of illicit drugs.

Since at least 2015, Iraq has also been experiencing a wave of narcotics-related arrests as a result of a drug epidemic sweeping through the country. As reported by the United States Department of State, overcrowding increased largely due to "law enforcement efforts against drugs in the country, with the thousands of dealers and drug abusers arrested during the year resulting in an increase in prison inmates".[12]

This increase in drug-related offences is a result of a confluence of several factors: a

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[8] Dr. Massaab Al-Aloosy, "Systemic Failures in Iraqi Prisons Create Breeding Grounds for Extremism" (14 July 2023) *Gulf International Forum.* Avsilable online: https://gulfif.org/systemic-failures-in-iraqi-prisons-create-breeding-grounds-for-extremism/

[9] United States Department of State, "2022 Country Reports on Human Rights Practices: Iraq" (2022). Available online: https://www.state.gov/reports/2022-country-reports-on-human-rights-practices/iraq/

[10] Sura Ali, "22,380 terror convicts imprisoned in Iraq: Ministry of Justice" Rudaw English (07 January 2021). Available online: https://www.rudaw.net/english/middleeast/iraq/070120211

[11] Justice Trends, "How Iraqi Kurdistan prisons handle thousands of terrorism convicts: Interview with Ahmed Najmaddin Ahmed" (21 March 2022). Available online: https://justice-trends.press/how-iraqi-kurdistan-prisons-handle-thousands-of-terrorism-convicts/

[12] United States Department of State, "2022 Country Reports on Human Rights Practices: Iraq" (2022). Available online: https://www.state.gov/reports/2022-country-reports-on-human-rights-practices/iraq/

dipping economy, lowered prices of illicit drugs, and the establishment of drug labs within Iraq, removing the need for riskier drug trafficking across borders.[13]

The 2020 World Drug Report from the UNODC commented on the changing nature of the drug market in Iraq and highlighted the nationwide increase in availability of methamphetamine (declared "very easy" to obtain). The report noted that, in the past, enforcement officers had suggested methamphetamine was smuggled into the country from the Islamic Republic of Iran, but new information suggested that clandestine drug labs are now manufacturing methamphetamine within Iraq.[14]

Some areas of Iraq may be more heavily affected by the drug trade than others. For example, in Basra in 2019, reporters noted over 150 inmates placed into two small cells. A senior member of the Basra Police narcotics unit stated that prison officials have requested a reduction in the number of prisoners convicted on drug charges as prisons were over capacity and "ninety percent of inmates are convicted on drug charges".[15] The problems with these cramped conditions are also exacerbated by a lack of drug treatment options available for incarcerated addicts.

Comments from many officials in Iraq also signal that the drug problem is worsening. In 2020, the Governor of Diwaniyah stated that some reports indicate the drug abuse rate among youth in the area may be as high as 40%.[16]

In addition to those already within the prison system, there remains a significant backlog of individuals with arrest warrants that have not yet been arrested due to a lack of space in detention facilities. For example, in 2019, officials in Ninevah reported that there were active arrest warrants for 70,000 individuals in Ninevah that could not be arrested due to a lack of space at detention facilities.[17]

Fortunately, Iraq has notably made significant advancements toward addressing use of torture and mistreatment in its prisons over the past several years. The United Nations Committee Against Torture has approved of the increasing use of weekly training sessions for police and military in relation to human rights, including in relation to reducing

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[13] Bel Trew, "Breaking Baghdad: How Iraq's crystal meth epidemic is ravaging the nation" *The Independent* (13 April 2021). Available online: https://www.independent.co.uk/news/world/middle-east/iraq-crystal-meth-drugs-epidemic-b1828463.html

[14] United Nations Office on Drugs and Crime, *World Drug Report 2020: Changes in Drug Markets* at p.21. Available online: https://www.unodc.org/documents/Focus/WDR20_Booklet_4_Market_change.pdf

[15] Ahmed Aboulenein, "Crystal meth and crowded jails: problems mount in Iraqi oil city" (09 April 2019). Available online: https://www.reuters.com/article/idUSKCN1RL11P/

[16] Massaab Al-Aloosy, "Iraq's Corruption and Rule of Law Deficits Nourish a Worsening Drug Problem" The Arab Gulf States Institute in Washington (17 March 2022). Available online: https://agsiw.org/iraqs-corruption-and-rule-of-law-deficits-nourish-a-worsening-drug-problem/

[17] Lawk Ghafuri, "Nineveh prison conditions a 'humanitarian catastrophe,' confirm province MPs" *Reuters News* (07 July 2019). Available online: https://www.rudaw.net/english/middleeast/iraq/070720191

torture and enforced disappearances.[18] However, the same Committee has also emphasized the need to drastically reduce the amount of overcrowding in the Iraqi prison system.[19]

2. Overcrowding leads to higher risks of extremism

As the prison population in Iraq grows and prisons become more overcrowded, Iraq runs the risk of deepening social and political divisions that can threaten the long-term stability and security of the country. Experts in the area of penal systems have noted that, in addition to human rights impacts, overcrowded prisons have other negative impacts as well. Importantly, overcrowded prisons have been acknowledged as breeding grounds for extremism, with inmates being exposed to radical extremists at higher rates than properly staffed and under-capacity prisons.[20]

The conditions of overcrowded prisons and detention facilities in Iraq and elsewhere provide ample opportunity for extremist recruiters to target individuals with a view to recruiting new members to extremist ideologies. The first major factor that can contribute to a rise in extremism relates to the heightened possibility of exposure to such ideologies. Prisons in Iraq may contain a mix of politically motivated offenders (such as ISIS-affiliates) and ordinary criminals, as well as those who are suspected of links to extremism or other crimes. Many detainees in these facilities may not have had any exposure to extremist ideologies but for their detention in these facilities, putting them in close proximity to those who are looking to recruit.[21]

The second major factor relates to prisons and detention facilities being places of emotional or social vulnerability, in which detainees may be experiencing both social isolation and personal crises. These conditions of vulnerability may lead individuals to

[18] United Nations Office of High Commissioner of Human Rights, "Experts of the Committee against Torture praise Iraq's Human Rights Training in Police and Military Colleges, ask about overcrowding in prisons and the continued use of the death penalty" (27 April 2022). Available online: https://www.ohchr.org/en/news/2022/04/experts-committee-against-torture-praise-iraqs-human-rights-training-police-and

[19] *Ibid*.

[20] The International Centre for the Study of Radicalisation and Political Violence, *Prisons and Terrorism: Radicalisation and De-Radicalisation in 15 Countries*, (2010) United Kingdom at p.30. Available online: https://www.clingendael.org/sites/default/files/pdfs/Prisons-and-terrorism-15-countries.pdf

[21] The International Centre for the Study of Radicalisation and Political Violence, *Prisons and Terrorism: Radicalisation and De-Radicalisation in 15 Countries*, (2010) United Kingdom at p.26. Available online: https://www.clingendael.org/sites/default/files/pdfs/Prisons-and-terrorism-15-countries.pdf

attempt to ameliorate their situations by affiliating with any social group (including those with extremist ideologies) that promises camaraderie, protection and support.[22]

Pre-trial detention centers and other facilities that hold thousands of detainees in Iraq are one such example of the possibility for a heightened risk of extremism due to overcrowding and high incarceration. Sources have indicated that some detention facilities in Iraq operate at 300% capacity, with approximately half of the detainees yet to be charged with a crime.[23] In these facilities, cramped conditions coupled with alleged mistreatment and torture create vulnerabilities in detainees while close proximity to charged or convicted extremists exposes detainees to dangerous ideologies.

In Iraq, high-density displacement camps that contain hundreds of thousands of individuals, many with suspected ties to Da'esh, are another example of how overcrowded prisons and facilities may lead to increased extremism. In relation to these camps, some experts have noted that, "[d]ensely packed and cut off from society, the camps are fertile ground for ISIS indoctrination. Those who are unsympathetic to ISIS risk being victimized by the group, a dynamic that over time could swell into yet another challenge to the government's legitimacy."[24]

Overcrowded prisons and camps in Iraq continue to expose many vulnerable individuals (who often have no affiliation with ISIS) to extremist ideologies, causing a continued risk of converting those who would otherwise be law-abiding citizens into extremists. As noted in the past, "the longer these people languish in legal and physical limbo, the greater the chance of an eventual ISIS revival."[25]

By expanding the use of non-custodial measures in Iraq, authorities will be able to reduce the prison population and create a gradual culture shift away from a punitive justice system toward a community-oriented approach that encourages rehabilitation. By doing so, Iraq will account for the long-term security and stability of the country, decrease government expenditure on the justice system and decrease the overall burden on the judiciary and justice system as a whole.

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[22] The International Centre for the Study of Radicalisation and Political Violence, *Prisons and Terrorism: Radicalisation and De-Radicalisation in 15 Countries*, (2010) United Kingdom at p.26. Available online: https://www.clingendael.org/sites/default/files/pdfs/Prisons-and-terrorism-15-countries.pdf

[23] Dr. Massaab Al-Aloosy, "Systemic Failures in Iraqi Prisons Create Breeding Grounds for Extremism" (14 July 2023) *Gulf International Forum.* Available online: https://gulfif.org/systemic-failures-in-iraqi-prisons-create-breeding-grounds-for-extremism/

[24] Thanassis Cambanis, "The Coming Emergency in Iraq: Neglected Prison Camps are Incubating a New Extremist Threat," Foreign Affairs, November 1, 2019. Available online: https://www.foreignaffairs.com/articles/middle-east/2019-11-01/coming-emergency-iraq

[25] Thanassis Cambanis, "The Coming Emergency in Iraq: Neglected Prison Camps are Incubating a New Extremist Threat," Foreign Affairs, November 1, 2019. Available online: https://www.foreignaffairs.com/articles/middle-east/2019-11-01/coming-emergency-iraq

B. International Instruments Relating to Imprisonment as a Sanction

As in Iraq, most of the world is experiencing a clear trend of consistent and, in many cases, increasing use of imprisonment as a penalty for both minor and major offences at both the pre-trial and post-sentencing stages.[26] Prisons and pre-prison custodial facilities are becoming overcrowded, resulting in an increased use of government resources to run the prisons, overburdens on national justice systems and severe impacts on the human rights of the detained.

Although prison by its very nature requires a deprivation of some human rights, including liberty, this deprivation must be administered in a proportionate manner to ensure that any imposition on human rights is proportionate to the gravity of the offence.

In recognition of the need to ensure that prisons are operated within certain acceptable standards to minimize the deprivation of human rights and to maintain dignity, worth and fundamental human rights of all, the United Nations General Assembly adopted on 17 December 2015 the *United Nations Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*.[27] This set of rules has become the *de facto* global guidelines applicable to the management of prisons and applies to all categories of prisoners apart from juveniles.

Although non-binding, the Nelson Mandela Rules provide clear guidelines to countries on how to operate penitentiary systems with minimal unnecessary impact on human rights. These Rules recognize and emphasize the importance of ensuring all prisoners are treated impartially and without discrimination on the grounds of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or any other status. The Rules also require that religious and moral beliefs of prisoners must be respected.[28]

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[26] Institute for Criminal Policy Research, *Prison: Evidence of its use and over-use from around the world*, (2017) at p.1. Available online: https://www.prisonstudies.org/sites/default/files/resources/downloads/global_imprisonment_web2c.pdf.
[27] United Nations General Assembly, "United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)" (17 December 2015) 70th sess, A/Res/70/175. Available online: https://undocs.org/Home/Mobile?FinalSymbol=A%2FRES%2F70%2F175
[28] United Nations General Assembly, "United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)" (17 December 2015) 70th sess., A/Res/70/175 at Rule 2(1). Available online: https://undocs.org/Home/Mobile?FinalSymbol=A%2FRES%2F70%2F175

Given the importance of non-discrimination in the treatment of prisoners, the Nelson Mandela Rules affirm that individual needs of prisoners must be taken into account, particularly the needs of the most vulnerable categories of prisoners. [29]

Similar to the Nelson Mandela Rules, there are many other international instruments that also address topics relating to imprisonment, including protection of the vulnerable and respect for human rights, the right to liberty and the right to dignity in the context of the criminal justice system. These instruments include, *inter alia*:

- The Universal Declaration of Human Rights of 1948;[30]
- The International Covenant on Economic, Social and Cultural Rights;[31]
- The International Covenant on Civil and Political Rights;[32]
- The Convention on the Prevention and Punishment of the Crime of Genocide;[33]
- The Convention on the Rights of the Child;[34]
- The International Convention on the Elimination of All Forms of Racial Discrimination;[35]
- The Convention on the Elimination of All Forms of Discrimination against Women;[36]
- The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;[37] and
- The Arab Charter on Human Rights.[38]

Each of these instruments reinforces the notion that prisons, while sometimes necessary, must be operated in a manner that respects human rights and maintains the dignity of all, with particular attention to protecting the most vulnerable in society.

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[29] United Nations General Assembly, "United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)" (17 December 2015) 70th sess., A/Res/70/175 at Rule 2(2). Available online: https://undocs.org/Home/Mobile?FinalSymbol=A%2FRES%2F70%2F175

[30] Universal Declaration of Human Rights (1948). Available online: https://www.un.org/ar/about-us/universal-declaration-of-human-rights

[31] Ratified by Iraq on 25 January 1971. Available online: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&clang=_en

[32] Ratified by Iraq on 25 January 1971. Available online: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en

[33] Acceded to by Iraq on 20 January 1959. Available online: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-1&chapter=4

[34] Acceded to by Iraq on 15 June 1994. Available online: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=_en

[35] Ratified by Iraq on 13 February 1970. Available online: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&clang=_en

[36] Acceded to by Iraq on 13 August 1986. Available online: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&clang=_en

[37] Acceded to by Iraq on 7 July 2011. Available online: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&clang=_en

[38] Ratified by Iraq on 04 April 2013. Available online: https://digitallibrary.un.org/record/551368?ln=en

C. Goals and Effects of Criminal Sanctions

A fundamental principle of criminal sanctions is that any sanction must be proportionate to the offence. This principle is widely used in jurisdictions around the world and was stated as fundamental by *United Nations Human Rights Committee in its General Comment No. 31* on the nature of legal obligations imposed under the International Covenant on Civil and Political Rights. In this General Comment, the Committee clarified that any restrictions on rights under the Covenant must be demonstrated as necessary and States must "only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights."[39]

Although there is no uniform definition, the principle of proportionality generally requires that the punishment fits the crime. The principle may be interpreted differently by different authorities or those in different cultural or social settings, but the premise remains that it must form a basis for any sentencing.

Other jurisdictions have expanded upon the fundamental principles of sentencing in recognition that proportionality alone may not be enough to determine a suitable sanction. For example, the European Union has set as a standard the notion of "effective, proportionate and dissuasive" when determining sanctions. This standard usually means:

- penalties must be capable of ensuring compliance and achieving the desired objective;
- penalties must reflect the gravity of the offence and must not go beyond what is necessary to achieve the desired outcome; and
- penalties must deter the offender from reoffending and deter others from committing the offence in the first place.[40]

As a starting point, the principle of proportionality supplemented by effectiveness and dissuasiveness provides a solid foundation for choosing sanctions in criminal law in a manner that minimizes negative effects on individuals. However, rather than clearly assessing on a case-by-case basis whether every prison sentence is proportionate to the

[39] United Nations Human Rights Committee, "General Comment No. 31[80]: The Nature of the general Legal Obligation Imposed on States Parties to the Covenant" (Adopted on 29 March 2004) CCPR/C/21/Rev.1/Add. 13 at para. 6. Available online: https://undocs.org/Home/Mobile?FinalSymbol=CCPR%2FC%2F21%2FRev.1%2FAdd.13

[40] "Effectiveness, Proportionality and Dissuasiveness" (2011-2012) Eastern and Central European Journal on Environmental Law, 15:2 at p.11. Available online: https://heinonline.org/HOL/LandingPage?handle=hein.journals/eceujevl15&div=13&id=&page=

crime, as well as dissuasive and effective, courts will often resort to prison as a presumptive punishment.[41]

Despite prison being used alongside monetary penalties as one of the most commonly legislated consequences of breaking the law, the negative effects of even short terms of imprisonment on individuals are well-documented, including harmful impacts on prisoners' mental, physical, social and economic well-being.[42] Imprisonment also has other detrimental effects, including affecting interpersonal relationships, housing and employment opportunities, self-perception and, in some places, voting rights. It can also result in social stigma which further marginalizes those who have spent time in prison.[43]

The potential for such negative effects has prompted action from international entities, civil society organizations and governments around the world to attempt to reframe how prisons and criminal justice systems are operated in order to minimize these negative individual and societal impacts.

As stated in the *Nelson Mandela Rules*, imprisonment has two main objectives that make it an attractive sanction to lawmakers: to protect society against crime and to reduce reoffending.[44] Ideally, imprisonment would also contribute to the rehabilitation of offenders.[45]

"Reoffending" is generally defined as the commission of a new criminal offence by a person who has previously committed at least one other criminal offence. By focusing on the goal of reducing reoffending, a country can contribute directly to minimizing victimization, increasing safety in the community and lowering the financial burden on the criminal justice system.[46]

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[41] United Nations, "United Nations System Common Position on Incarceration" (April 2021) at p.3. Available online: https://www.un.org/ruleoflaw/blog/document/united-nations-system-common-position-on-incarceration/

[42] Katherine Beckett and Allison Goldberg, "The Effects of Imprisonment in a Time of Mass Incarceration" (2022) *Crime and Justice*, vol.51. Available online: https://soc.washington.edu/sites/soc/files/documents/research/crime_justice_the_effects_of_imprisonment_beckett_goldberg.pdf

[43] Moore K.E., Stuewig J.B. and Tangney J.P., "The Effect of Stigma on Criminal Offenders' Functioning: A Longitudinal Mediational Model" (February 2016) *Deviant Behaviour* 37:2, pp.196-218. Available online: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4788463/

[44] United Nations General Assembly, "United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)" (17 December 2015) 70th sess., A/Res/70/175 at Rule 4(1). Available online: https://undocs.org/Home/Mobile?FinalSymbol=A%2FRES%2F70%2F175

[45] United Nations Office on Drugs and Crime, *Custodial and Non-Custodial Measures: Alternatives to Incarceration*, Vienna (2006) at p.1. Available online: https://www.unodc.org/documents/justice-and-prison-reform/cjat_eng/3_Alternatives_Incarceration.pdf

[46] United Nations Economic and Social Council, "Open-ended intergovernmental expert group meeting on model strategies on reducing reoffending: Working paper by the Secretariat", Commission on Crime Prevention and Criminal Justice, 14 March 2023 (UN Doc E/CN.15/2023/13). Available online: https://undocs.org/Home/Mobile?FinalSymbol=E%2FCN.15%2F2023%2F13

Imprisonment works to reduce reoffending by depriving offenders of various liberties within an acceptable limit established by law, and may be ordered at the pre-trial, sentencing or post-sentencing stages.

Other entities and instruments have also reaffirmed and reiterated that the overall goal of prison and the justice system should be premised around reducing reoffending. For example, the *Commission on Crime Prevention and Criminal Justice (CCPCJ)*[47] at its 32nd session in May 2023 stated that, rather than punishment, reducing reoffending should be one of the main goals of criminal justice systems.[48] The *Arab Charter on Human Rights*, to which Iraq is a Party, also emphasizes that the aim of the penitentiary system shall be to reform prisoners and effect their social rehabilitation.[49]

To provide a baseline standard for operating prisons in a rehabilitative manner rather than a punitive manner, the Nelson Mandela Rules propose that prison administrations and other relevant authorities should ensure that prisoners are provided with the means of reintegrating into society upon leaving prison. Rule 4(2) of the Nelson Mandela Rules states that authorities should:

> *…offer education, vocational training and work, as well as other forms of assistance that are appropriate and available, including those of a remedial, moral, spiritual, social and health- and sports-based nature. All such programmes, activities and services should be delivered in line with the individual treatment needs of prisoners.*[50]

However, despite the international recognition and obligation that penitentiary systems remain rehabilitative, the United Nations General Assembly has acknowledged that prison systems in most countries around the world no longer focus on reformation or rehabilitation of offenders, but rather aim to merely punish and lock away offenders. Imprisonment has become increasingly common as a sanction and is, in many cases, "an almost automatic response rather than a last resort".[51] Along with corruption, the United

[47] The Commission on Crime Prevention and Criminal Justice is a commission established under the United Nations Economic and Social Council.
[48] United Nations Economic and Social Council, "Open-ended intergovernmental expert group meeting on model strategies on reducing reoffending: Working paper by the Secretariat", Commission on Crime Prevention and Criminal Justice, 14 March 2023 (UN Doc E/CN.15/2023/13). Available online: https://undocs.org/Home/Mobile?FinalSymbol=E%2FCN.15%2F2023%2F13
[49] Arab Charter on Human Rights, (2004) art.20(3). Available online: https://digitallibrary.un.org/record/551368?ln=en
[50] United Nations General Assembly, "United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)" (17 December 2015) 70th sess., A/Res/70/175 at Rule 4(2). Available online: https://undocs.org/Home/Mobile?FinalSymbol=A%2FRES%2F70%2F175
[51] United Nations General Assembly, "Torture and other cruel, inhuman or degrading treatment or punishment: Note by the Secretary-General" (09 August 2013) 68th sess., A.68/295 at para.85. Available online: https://undocs.org/Home/Mobile?FinalSymbol=A%2F68%2F295

Nations has cited this punitive approach as one of the main reasons for non-compliance with international standards in relation to conditions of detention.[52]

As a temporary approach to justice, many authorities use prison sentences as a means of incapacitating prisoners in order to prevent them from reoffending by taking away their liberty. However, the common understanding among experts is that incapacitation only works while the offender remains in prison, and it does little to reduce the risk of reoffending once the prisoner has been released.[53]

The United Nations Office on Drugs and Crime (UNODC) has also noted that, despite an ideal goal of rehabilitation, imprisonment as a penalty rarely rehabilitates offenders and instead has a high potential of creating conditions that can worsen the offender's risk of reoffending.[54] In fact, authorities have recognized that rates of reoffending (recidivism rates) upon release from prison are as high as 70% in some countries.[55] These rates of reoffending have been attributed, in large part, to the lack of governmental supervision or social assistance following the release of prisoners.[56]

Furthermore, imprisonment has also been recognized as having particularly harmful effects on children, women, drug users and the mentally ill.[57] Without adequate justice systems that also account for the effects of imprisonment on various demographics, problems associated with ensuring a reduction in recidivism rates will only be exacerbated in these vulnerable populations.

It is clear that the rehabilitative value of prisons can best be achieved through strategies that focus on socially reintegrating prisoners following their release. Absent such systems of supervision and post-imprisonment assistance, offenders will not be provided with the

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[52] United Nations General Assembly, "Torture and other cruel, inhuman or degrading treatment or punishment: Note by the Secretary-General" (09 August 2013) 68th sess., A.68/295 at para.85. Available online: https://undocs.org/Home/Mobile?FinalSymbol=A%2F68%2F295

[53] United Nations Office on Drugs and Crime, *Handbook of Basic Principles and Promising Practices on Alternatives to Imprisonment*, (2007) at p.7. Available online: https://www.unodc.org/pdf/criminal_justice/Handbook_of_Basic_Principles_and_Promising_Practices_on_Alternatives_to_Imprisonment.pdf

[54] United Nations Office on Drugs and Crime, *Custodial and Non-Custodial Measures: Alternatives to Incarceration*, Vienna (2006) at p.1. Available online: https://www.unodc.org/documents/justice-and-prison-reform/cjat_eng/3_Alternatives_Incarceration.pdf

[55] United Nations Office of Drugs and Crime, *Introductory Handbook on the Prevention of Recidivism and the Social Reintegration of Offenders*, Vienna (2012) at p.7. Available online: https://www.unodc.org/documents/justice-and-prison-reform/crimeprevention/Introductory_Handbook_on_the_Prevention_of_Recidivism_and_the_Social_Reintegration_of_Offenders.pdf

[56] *Ibid*.

[57] United Nations Office on Drugs and Crime, *Handbook of Basic Principles and Promising Practices on Alternatives to Imprisonment*, (2007) at chapter 6. Available online: https://www.unodc.org/pdf/criminal_justice/Handbook_of_Basic_Principles_and_Promising_Practices_on_Alternatives_to_Imprisonment.pdf

proper tools to effectively reintegrate into society, increasing their likelihood of reoffending. Therefore, focusing on strategies that either assist prisoners in reintegrating into society or strategies that selectively divert offenders away from the prison systems toward alternatives to imprisonment can assist countries in reducing rates of reoffending, reducing the burden on the justice system, and ensuring the continued safety of the public.

D. Standards for Alternatives to Imprisonment

Given the recognition by experts and authorities in the field of penal reform that prison rarely meets the goal of reducing reoffending (and, in many cases, actually increases the risk of reoffending),[58] many countries are exploring alternatives to imprisonment to more effectively meet the stated goals of the criminal justice system. As prisons are often expensive to operate and have the possibility of unduly infringing on human rights, it stands to reason that alternatives should be used in situations where those alternatives can effectively protect the public, reduce the risk of reoffending, maintain the dignity of the offender and victim, and consume fewer financial resources.

As recognized by UNODC, there are four broad reasons why authorities may choose to use alternatives to imprisonment: imprisonment can disproportionately impact human rights; imprisonment is expensive; imprisonment is overused; and many alternatives to imprisonment are more effective at reducing the risk of reoffending and protecting the public.[59]

UNODC has emphasized that alternatives to imprisonment can be used to effectively reduce the risk of reoffending by enabling suspects and offenders to maintain their relationships and connection to their community. These connections are critical in the rehabilitation process as social integration interventions are more easily carried out by community actors rather than prison officials and offenders are less likely to reoffend when they have strong community connections. Further, alternatives to imprisonment can still be designed to hold the offenders accountable in a punitive manner for their actions while simultaneously focusing on reducing reoffending.[60]

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[58] Cullen, F. T., Jonson, C. L., and Nagin, D. S. (2011). "Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science." *The Prison Journal*, *91*(3 suppl) at p. 58S. Available online: https://journals.sagepub.com/doi/abs/10.1177/0032885511415224

[59] United Nations Office on Drugs and Crime, *Handbook of Basic Principles and Promising Practices on Alternatives to Imprisonment*, (2007) at pp.4-7. Available online: https://www.unodc.org/pdf/criminal_justice/Handbook_of_Basic_Principles_and_Promising_Practices_on_Alternatives_to_Imprisonment.pdf

[60] United Nations Office of Drugs and Crime, *Introductory Handbook on the Prevention of Recidivism and the Social Reintegration of Offenders*, Vienna (2012) at p.67. Available online:

The fundamental standards and principles related to alternatives to imprisonment were formalized by the United Nations in two main instruments. The first, the *United Nations Standard Minimum Rules for Non-Custodial Measures (the Tokyo Rules),* was adopted by UN General Assembly Resolution 45/110 of 14 December 1990.[61] In recognition of the diverse array of penal systems around the world, and varying political, social, economic and cultural conditions in the world, the Tokyo Rules were drafted in a manner to have the broadest applicability to all domestic legal systems.[62]

The Tokyo Rules were designed to provide a clear set of basic principles to promote the use of non-custodial measures while at the same time promoting greater community involvement in the treatment of offenders.[63] The developers of the Tokyo Rules noted that, rather being rehabilitative, imprisonment can often turn offenders into worse criminals than they were prior to imprisonment. Accordingly, the interpretive notes to Tokyo Rules emphasize that imprisonment should only be reserved for the most serious and most dangerous offenders.[64]

In relation to the administration of all sanctions, the Tokyo Rules are meant to be implemented with a view to finding a "proper balance between the rights of individual offenders, the rights of victims, and the concern of society for public safety and crime prevention".[65]

To ensure the Rules are implemented in a manner that facilitates the necessary balance of rights and public safety, section 2.3 of the Tokyo Rules also emphasizes that criminal justice systems should provide a wide range of non-custodial measures in order to correspond to the nature and gravity of any offence, while ensuring that non-custodial measures are available from pre-trial to post-sentencing dispositions. The Tokyo Rules list

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https://www.unodc.org/documents/justice-and-prison-reform/crimeprevention/Introductory_Handbook_on_the_Prevention_of_Recidivism_and_the_Social_Reintegration_of_Offenders.pdf

[61] United Nations General Assembly, "United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules)", (14 December 1990) UNGA Res. 45/110. Available online: https://digitallibrary.un.org/record/105347?ln=en

[62] United Nations Office at Vienna, "Commentary on the United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules)" New York (1993) at p.3. Available online: https://www.ojp.gov/ncjrs/virtual-library/abstracts/commentary-united-nations-standard-minimum-rules-non-custodial

[63] United Nations General Assembly, "United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules)", (14 December 1990) UNGA Res. 45/110 at Rules 1.1 and 1.2. Available online: https://digitallibrary.un.org/record/105347?ln=en

[64] United Nations Office at Vienna, "Commentary on the United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules)" New York (1993) at p.2. Available online: https://www.ojp.gov/ncjrs/virtual-library/abstracts/commentary-united-nations-standard-minimum-rules-non-custodial

[65] United Nations General Assembly, "United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules)", (14 December 1990) UNGA Res. 45/110 at Rule 1.4. Available online: https://digitallibrary.un.org/record/105347?ln=en

a broad array of non-custodial measures that may be considered by authorities when ruling on a case.

The following proposed measures in the Tokyo Rules are examined in further detail in **Section E**:

- Verbal sanctions (warnings, admonitions, reprimands);
- Conditional discharges;
- Status penalties;
- Economic sanctions and monetary penalties (day-fines and fines);[66]
- Confiscation or an expropriation order;
- Restitution or compensation to the victim or victim's family;
- Suspended or deferred sentence;
- Probation and judicial supervision;
- A community service order;
- Referral to an attendance center;
- House arrest;
- Any other mode of non-institutional treatment; or
- Some combination of the measures listed below.[67]

These rules leave discretion to the sentencing authorities to choose measures that effectively suit the offender, victim and circumstances around the offence. However, the provisions are also clear that any non-custodial measures must respect fundamental principles of human rights. Importantly, section 3.9 states that "the dignity of the offender subject to non-custodial measures shall be protected at all times".[68]

The Tokyo Rules emphasize several other precautions to ensure that offenders and those close to them are safeguarded against any harm as a result of non-custodial measures. These precautions include requirements that non-custodial measures:

- must not involve medical or psychological experimentation on the offender;[69]
- must not involve undue risk of physical or mental injury to the offender;[70]
- must not restrict the offender's rights further than was authorized by the competent authority that rendered the initial decision;[71] and

[66] See H(3) of this publication for an in-depth examination of the Day-Fines System.
[67] United Nations General Assembly, "United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules)", (14 December 1990) UNGA Res. 45/110 at Rule 8. Available online: https://digitallibrary.un.org/record/105347?ln=en
[68] Tokyo Rules at Rule 3.9.
[69] Tokyo Rules at Rule 3.8.
[70] Tokyo Rules at Rule 3.8.
[71] Tokyo Rules at Rule 3.10.

- must respect the right to privacy of the offender and the offender's family.[72]

Further, the Tokyo Rules also require that, when administering non-custodial measures, the personal records of the offender are kept strictly confidential, apart from those concerned with the disposition of the case or other authorized persons.[73]

Finally, to ensure any non-custodial measures are implemented in a safe and effective manner, the Tokyo Rules require that any staff administering non-custodial measures have specific and appropriate professional training and experience.[74] This helps to ensure the chosen measures are effective and responsive to the individual needs of the offender and that the measures adhere to the goals and objectives of the justice system.

In acknowledgement of the unique challenges women encounter in the penal system, the United Nations General Assembly also unanimously adopted the *United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (the Bangkok Rules)* on 16 March 2011.[75]

The Bangkok Rules are meant to be used as a supplement to the Tokyo Rules and not as a replacement for them. As the Tokyo Rules were designed to be uniformly applied to all offenders, the Bangkok Rules allow authorities to accommodate the special needs of women within judicial systems that are generally designed for men, since women tend to be in the vast minority of all offenders.[76]

These supplementary rules address matters unique to women in the prison system and include provisions related to:

- Ensuring women prisoners have access to sanitary towels and other hygiene products in prison;[77]
- Ensuring availability of gender-specific healthcare services in prisons, such as by allowing women to be treated by women healthcare professionals;[78]
- The need to preserve the dignity of women during personal searches, such as by ensuring such searches are only carried out by women staff;[79] and

[72] Tokyo Rules at Rule 3.11.
[73] Tokyo Rules at Rule 3.12.
[74] Tokyo Rules at Rule 13.2 and 15.2.
[75] United Nations General Assembly, "United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (The Bangkok Rules)" (21 December 2010) UNGA Res. 65/229. Available online: https://digitallibrary.un.org/record/702724?ln=en
[76] Note: Common estimates generally note that women make up less than 10% of the global prison population. See Helen Fair and Roy Walmsley, "World Prison Brief: World Female Imprisonment List, 5th Edition" (2022) Institute for Crime and Justice Policy Research. Available online: https://www.prisonstudies.org/sites/default/files/resources/downloads/world_female_imprisonment_list_5th_edition.pdf
[77] Bangkok Rules at Rule 5.
[78] Bangkok Rules at Rule 10.
[79] Bangkok Rules at Rule 19.

- Ensuring that instruments of restraint are never used on incarcerated women during labor, during birth or immediately after birth;[80]

The Bangkok Rules also include additional provisions on non-custodial measures directed at supplementing similar provisions in the Tokyo Rules. The specific provisions on non-custodial measures again recognize the unique challenges that women face in the penal system, highlighting how women often take on caretaker roles within the household. The provisions of the Bangkok Rules related to non-custodial measures state, among other things, that:

- When sentencing, courts shall have the power to consider mitigating factors, such as lack of criminal history or non-severity, in light of women's caretaking roles and typical backgrounds;[81]
- Appropriate resources shall be made available to devise suitable alternatives for women offenders to combine non-custodial measures with gender-specific interventions that address the most common problems leading to women entering into the criminal justice system. This could include courses or counselling on the topic of domestic violence or sexual abuse; treatment for those with mental disabilities; or educational and training programmes to improve employment prospects;[82] and
- Non-custodial measures shall be the preferred approach for pregnant women and women with dependent children, unless the offence is serious or violent or the woman represents a continuing danger;[83]

Although both the Tokyo Rules and Bangkok Rules recognize the value of non-custodial measures, the supplementary effect of the Bangkok Rules emphasizes the importance of using a tailored case-by-case approach with these measures by considering the personal characteristics of the offender when making sentencing decisions.

Women undoubtedly face unique difficulties in the criminal justice system necessitating special consideration when choosing suitable sentences. However, a personalized approach to non-custodial measures should apply regardless of the gender of the offender, with judges and prosecutors taking into account the circumstances of the offence, circumstances of the offender and circumstances of the victim, underscored by the overarching goals of reducing reoffending and protecting the public.

The Tokyo Rules also emphasize the importance of social inquiry reports, in which a competent authority compiles information on the background of the offender relevant to

[80] Bangkok Rules at Rule 24.
[81] Bangkok Rules at Rule 61.
[82] Bangkok Rules at Rule 60.
[83] Bangkok Rules at Rule 64.

the person's pattern of offending and current offences.[84] These reports should contain information on any circumstances related to the offender relevant to understanding why they committed the offence and should include recommendations for custodial or non-custodial interventions. If a non-custodial measure is to be recommended, the report should also contain information on whether the offender is likely to comply with the proposed conditions and how likely they are to cope in the community.[85] UNODC recommends including detailed information on, *inter alia*:

- Personal information and history of the offender;
- Family information on the offender;
- Details of the current criminal charge and criminal history of the offender;
- Offender's general attitude, motivation and attitude concerning the offence;
- Physical and mental health information;
- School or employment history;
- Impact on the victim(s);
- Potential drug or alcohol use disorders; and
- Sentencing recommendations and rationale.

Although primarily directed at those already in detention, the Nelson Mandela Rules were also accompanied by a recommendation from the UN General Assembly that Member States resort to non-custodial measures as alternatives to pre-trial detention, to reinforce alternatives to imprisonment and support rehabilitation and social reintegration programmes in accordance with existing international norms.[86]

In addition to the existing set of rules directed at promoting non-custodial measures, the Commission on Crime Prevention and Criminal Justice (CCPCJ) has outlined several core principles to guide States in developing effective systems for non-custodial measures. These core principles are built off the existing standards and norms related to non-custodial measures and reducing reoffending and appear as follows:[87]

[84] Tokyo Rules at Rule 7.
[85] United Nations Office on Drugs and Crime, *Introductory Handbook on the Prevention of Recidivism and the Social Reintegration of Offenders*, Vienna (2012) at p.71. Available online: https://www.unodc.org/documents/justice-and-prison-reform/crimeprevention/Introductory_Handbook_on_the_Prevention_of_Recidivism_and_the_Social_Reintegration_of_Offenders.pdf
[86] United Nations General Assembly, "United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)" (17 December 2015) 70th sess., A/Res/70/175 at para.12. Available online: https://undocs.org/Home/Mobile?FinalSymbol=A%2FRES%2F70%2F175
[87] United Nations Economic and Social Council, "Open-ended intergovernmental expert group meeting on model strategies on reducing reoffending: Working paper by the Secretariat", Commission on Crime Prevention and Criminal Justice, 14 March 2023 (UN Doc E/CN.15/2023/13) at Section B. Available online: https://undocs.org/Home/Mobile?FinalSymbol=E%2FCN.15%2F2023%2F13

- Core principle I: All decisions regarding the treatment of offenders should be tailored to address their individual circumstances and based on thorough and continuing assessments of their risks, needs, capacities and dispositions. This means avoiding a "one-size-fits-all" approach to addressing reoffending.

- Core principle II: Imprisonment should be avoided unless strictly necessary, as it may worsen the conditions that contributed to an individual's criminal conduct and aggravate pre-existing challenges in offenders' social integration.

- Core principle III: Rehabilitation programmes and other interventions intended to prevent reoffending must respond to the needs of individual offenders and the factors that cause them to commit crime.

- Core principle IV: The prevention of reoffending by former prisoners depends not just on suitable rehabilitation programmes, but also on ensuring safe, secure and humane custodial environments and carefully managed reintegration processes.

- Core principle V: Reducing reoffending requires the active participation of not only the justice sector but all sectors of society, and significant amounts of time and resources must be invested in partnerships, outreach, training and sustainability measures.

- Core principle VI: States should invest in research, including comparative research, into patterns of reoffending and the effectiveness of responses.

Non-custodial measures give lawmakers and judicial authorities an opportunity to account for the nuances between individual offenders, tailoring their sentencing approaches so that the chosen non-custodial measures will be most likely to reduce reoffending while simultaneously protecting the public. These measures can also be designed to recognize the unique challenges associated with women, juveniles and the mentally ill in the penal system.

Importantly, experts emphasize that, although there is high value in using non-custodial enforcement measures, these measures alone will not be able to reduce prison populations.[88] Lawmakers and responsible authorities should also consider how the broader criminal justice system can be reformed with a view to reducing the numbers of

[88] O. Firouzi Tabar, M. Miravalle, D. Ronco, and G. Torrente, *Reducing the Prison Population in Europe: Do Community Based Sentences Work?*, (May 2016) European Prison Observatory at p.9. Available online: http://www.prisonobservatory.org/upload/EPO_2_WS1_Final_report.pdf

people entering into the criminal justice system, encouraging restorative justice and rehabilitating offenders to facilitate their reintegration into the community.[89]

E. Common Forms of Non-Custodial Enforcement Measures[90]

The following section provides an overview on the various types of non-custodial measures used in jurisdictions around the world. Some of these, such as community service or probation, tend to be more common than others. However, it is important to note that, despite the common use of some specific measures, the range of available non-custodial measures should be tailored to the community that uses them, given the high involvement of community members in many forms of non-custodial measures.

What works in one country or community may not work in another country or community. For this reason, legislators are encouraged to assess the culture and practices of a community before implementing any form of non-custodial measures in order to determine which measures may be more effective. Similarly, legislators are discouraged from copying legislation from other jurisdictions as non-custodial measures should be adapted to the context of the unique circumstances found in Iraq.

UNODC also emphasizes that many non-custodial measures available in western countries may not be suitable for other countries without consciously adapting to societal circumstances, just as there are measures used in many non-western countries that would not be suitable for western countries.[91]

For example, many western countries use probation systems that rely on consistent availability of significant government financial and staffing resources. Without this infrastructure in place, many jurisdictions may struggle to see the benefits of such a probation system. However, UNODC notes that such systems can be tailored to national circumstances, such as with Zimbabwe, where a community service scheme was developed using volunteers for the supervision of non-custodial sentences.[92]

Legislators should consider the full range of non-custodial measures available to them, including how each measure could be effectively used in practice. Legislators should also

[89] United Nations Office on Drugs and Crime, *Custodial and Non-Custodial Measures: Alternatives to Incarceration (Criminal Justice Assessment Toolkit)*, New York (2006) at p.1. Available online: https://www.unodc.org/documents/justice-and-prison-reform/cjat_eng/3_Alternatives_Incarceration.pdf
[90] This section is adapted from United Nations Office on Drugs and Crime, *Handbook of Basic Principles and Promising Practices on Alternatives to Imprisonment*, (2007) at s.4.3. Available online: https://www.unodc.org/pdf/criminal_justice/Handbook_of_Basic_Principles_and_Promising_Practices_on_Alternatives_to_Imprisonment.pdf
[91] United Nations Office on Drugs and Crime, *Custodial and Non-Custodial Measures: Alternatives to Incarceration (Criminal Justice Assessment Toolkit)*, New York (2006). Available online: https://www.unodc.org/documents/justice-and-prison-reform/cjat_eng/3_Alternatives_Incarceration.pdf
[92] *Ibid*.

consider drafting laws in a manner that grants judges and prosecutors discretion to choose from a range of non-custodial measures on a case-by-case basis to best meet the goals of reducing reoffending and protecting the public, while ensuring the chosen measures maintain the dignity of the offender at all times.

The following list provides a brief explanation of all non-custodial measures that are proposed in Article 8.2 of the Tokyo Rules:

1. **Verbal sanctions (reprimand, warning)**

Verbal sanctions may be used in situations where no formal administrative infrastructure is necessary or available, but authorities still desire to make a formal record of an offence. Verbal warnings are a mild form of sanction that can be administered easily by a judge on determination of guilt and do not require any further action to be taken on the part of the judiciary or offender (apart from not reoffending). Generally, these sanctions can be issued on first offence, where the offender poses no danger to society or for very minor crimes. One example might be if an individual is caught spraying graffiti on a public wall or drinking alcohol in public, a judge may issue a written warning.[93] Such a warning does not require any further follow-up from the court or justice system.

2. **Conditional Discharge**

When a discharge is issued by a judge on determination of guilt, this means that a person is released from court without any further action taken. A *conditional* discharge is where a judge releases an offender from court without a conviction but applies certain conditions to the release, such as a requirement to abstain from certain behaviors or avoid certain places. If the offender breaches the conditions, the judge may withdraw the discharge and convict the offender of the original offence. Conditional discharges may be used where the crime is proven in court, but the court determines that the nature of the offence is relatively trivial or there are certain personal or extenuating circumstances that warrant a discharge or dismissal. One example may be possession of a very small number of illegal drugs by a doctor – by ordering prison, the community will be deprived of the doctor for commission of a relatively small offence. Some conditions that could be applied may include supervision, restrictions on movement (such as refraining from visiting a location), or certain treatment requirements (such as alcohol or drug treatment).

One difficulty with applying conditional discharges is that there needs to be sufficient and reliable infrastructure in place to monitor and ensure that all conditions are met in the manner required by the court. Any authority that is required to monitor compliance,

[93] Youth Law Australia, "Warnings" (06 February 2024). Available online: https://yla.org.au/act/topics/courts-police-and-the-law/the-youth-justice-system/warnings/

including police, must have the ability and capacity to do so in addition to their existing work duties.

3. Status Penalties

Status penalties are penalties that relate to the status of the offender and work by denying certain community rights of that offender. For example, if a lawyer acts in an unethical manner, their professional license to practice law may be suspended or revoked.

Importantly, these penalties must relate to the particulars of the offence. It would not necessarily be a correct use of a status penalty to revoke a doctor's license for the crime of driving while drunk. However, a court may revoke the medical license of a doctor who committed violence against a patient during the course of their work.

Care should be taken when issuing such penalties as the effects of status penalties may spread beyond the penalty itself. For example, if there is only one doctor in a community and the doctor's license is revoked, this may deprive the entire community of medical care, thereby causing a punitive effect on the community for the actions of the doctor.

4. Economic Penalties (fines)

Also referred to as "fines", these are monetary penalties that can be easily issued by a judge or administrative officer on determination of guilt. There are many different forms of economic penalties that are applied around the world. Fixed economic penalties generally apply a specific monetary or unit amount (or specific range) to a specific offence. There are also variable penalties that can come in the form of day fines, in which the amount of the fine is calculated based on some metric related to the income of the offender. This ensures that fines still have a deterrent effect on the wealthy. For an expanded explanation of "day fines", please see **Section H(3)** of this publication.

Fines are used for a wide range of crimes and can be applied in most situations where prison is an option. The magnitude of the maximum penalty often increases with the severity of the crime. There are also many situations in which certain crimes are of such high magnitude as to only have a prison sentence and no corresponding fine, just as there are crimes that may have a possibility of a monetary penalty but no corresponding prison sentence.

In Victoria, Australia, the *Sentencing Act 1991* sets out twelve levels of offences, each with a corresponding maximum prison term and maximum economic penalty. A Level 9 offence, such as concealing the birth of a child, carries a maximum fine of 60 penalty units or 6 months in prison while a Level 2 offence, such as armed robbery, carries a maximum prison sentence of 25 years or a maximum fine of 3000 penalty units.[94] Of note

[94] See Sentencing Advisory Council, "Maximum Penalties" (2024). Available online: https://www.sentencingcouncil.vic.gov.au/about-sentencing/maximum-penalties

is that some crimes, such as murder (a Level 1 offence),[95] only have prescribed prison sentences and do not have corresponding monetary penalties while other offences, such as giving a false name to a police officer (a Level 11 offence) have a prescribed fine of up to 5 penalty units but no corresponding prison sentence.[96]

Legislation can also be drafted to clarify where fines are to be paid and how the collected funds are to be used. For example, environmental legislation may direct that any fines for environmental offences must be paid to a governmental environment remediation fund. Similarly, a fine issued under an animal protection law may be paid to a government organization concerned with animal welfare.

One notable challenge relates to circumstances in which an offender is not able to pay an ordered fine immediately. UNODC notes that legislators should be careful when considering imprisonment as a punishment for failure to pay a fine as this means the fine is not truly an alternative to a prison sentence. Instead, UNODC recommends that, when an offender has difficulty paying a fine, authorities should consider whether payment plans, payment deferrals or community service may be instead permitted as an alternative to paying a fine outright.[97] Similarly, the Tokyo Rules also urge authorities to examine the circumstances of why an offender may be unable to pay a fine and, where possible, avoid resorting to prison as a punishment for failure to pay a fine.[98]

5. Confiscation or Expropriation Order

Confiscation refers to monetary proceeds of a crime being forfeited to the State. Expropriation refers to forfeiture of property or goods to the State. Whether used as a consequence that follows a crime (such as having to surrender money that was obtained through sale of illicit substances) or as a final disposition to an offence, the availability for confiscation and expropriation orders largely depends on the specific content of legislation.

These orders may arise when there are proceeds of a crime that are ordered to be forfeited to the State. Authorities are advised to ensure that any such order remains proportionate to the gravity of the offence and to use care in determining whether particular money or

[95] See Sentencing Advisory Council, "Maximum Penalties" (2024). Available online: https://www.sentencingcouncil.vic.gov.au/about-sentencing/maximum-penalties
[96] Government of Victoria (Australia), *Crimes Act 1958*, s.456AA(3)(a). Available online: https://www.legislation.vic.gov.au/in-force/acts/crimes-act-1958/304
[97] United Nations Office on Drugs and Crime, *Handbook of Basic Principles and Promising Practices on Alternatives to Imprisonment*, (2007) at p.44. Available online: https://www.unodc.org/pdf/criminal_justice/Handbook_of_Basic_Principles_and_Promising_Practices_on_Alternatives_to_Imprisonment.pdf
[98] United Nations General Assembly, "United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules)", (14 December 1990) UNGA Res. 45/110 at art.14.3. Available online: https://digitallibrary.un.org/record/105347?ln=en

property was a clear product of the offence rather than having been obtained through legitimate means.

6. Restitution or Compensation to the Victim

This sanction may be used where traditional cultural practices encourage compensation to the victim as part of the process of rectifying the wrong of the offender. Article 8 of the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*[99] states that fair restitution to victims, their families and dependents may include: return of property or payment for harm or loss suffered; reimbursement of expenses incurred as a result of victimization; the provision of services; and the restoration of rights.

When these measures are used alongside other sanctions, judges and prosecutors should put effort into properly assessing the level of compensation or restitution so that it accurately reflects the magnitude of the loss to the victim, the victim's family and dependents. It may be helpful to have prosecutors work directly with the victim to accurately determine the magnitude of any losses.

7. Suspended or Deferred Sentence

A suspended sentence can be given when a judge makes a determination of guilt and imposes a prison sentence (or other sanction), but defers the sentence being carried out pending fulfilment of certain conditions. If the conditions are fulfilled by the offender, the prison sentence will not be carried out. In this sense, the offender knows what the consequences will be if he or she does not meet certain conditions specified by the court.

This sanction differs from a conditional discharge in that a suspended sentence involves a determination of guilt and imposition of a penalty (such as prison), although the penalty may be dismissed if certain conditions are upheld. With a conditional discharge, although there is a determination of guilt, there is no ultimate decision on a sentence or penalty. If the offender breaches conditions related to a conditional discharge, they may be sentenced for the original offence. For the purposes of record-keeping, suspended sentences will generally result in a record noting there has been a conviction, while a conditional discharge may have a record but will not indicate a conviction on this record.

8. Probation and Judicial Supervision

Probation and judicial supervision often relate to other sentences in this section and may be viewed as a process or service by which authorities ensure certain conditions are adhered to. A probation service in a country can be established by the government and staffed with workers who monitor whether offenders complete the requirements of their

[99] United Nations General Assembly, "Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power" (29 November 1985) Res. 40/34. Available online: https://undocs.org/Home/Mobile?FinalSymbol=A%2FRES%2F40%2F34

non-custodial sentences (such as by ensuring they complete their community service programs). Probation services may also assist offenders with certain problems, such as how to change their behaviors to better re-integrate into the community.

9. Community Service

Community service orders generally require the offender to complete a certain number of hours of supervised and unpaid work in the community. These orders are generally given with a view to ensuring the offender gives back to the community that was wronged by his or her actions.

These orders require a system that is capable of effectively supervising the work that is carried out by offenders to ensure that they complete the work as requested and that they are not being exploited or mistreated by the entity for which they are performing the service. Some countries use a government-run probation services system to monitor community service while other countries (such as Zimbabwe – see **section F(5)** of this publication) may use community volunteers to ensure the community service order is carried out.

10. Referral to an Attendance Center

This sanction can be used for situations in which the offence may require the offender's actions or behavior to be treated in a way that reduces the likelihood of that behavior or action from recurring. For example, a judge may order that a frequent drug user report to a rehabilitation center for drug treatment, a drunk driver to attend at a series of alcohol treatment sessions, or a non-violent abuser to attend anger management classes.

11. House Arrest

House arrest orders generally state that an offender must remain in their house for a certain period of time. This may mean that the offender can leave the house for brief periods throughout the day, such as to maintain their employment, or it may be more restrictive. Although house arrest may be similar to a custodial measure such as imprisonment, it allows the offender to remain near their community and family throughout their sentence. This proximity to friends and family allows the offender to remain in a supportive environment and is less disruptive than a formal prison sentence.

Authorities should be conscious of challenges associated with house arrest. When sentencing, house arrest cannot be effectively used as a sentence for homeless individuals or those with non-conventional housing arrangements. Further, authorities should also have a system in place to monitor that an offender adheres to their house arrest. Some countries use a system of electronic monitoring while others may use a system of regular check-ins by authorities.

F. Non-custodial Enforcement Measures in Iraq

Iraq's government has repeatedly signaled its intention to comply with international human rights standards related to imprisonment by becoming Party to several treaties that directly or indirectly relate to the treatment of prisoners. In addition to being subject to the terms of the Nelson Mandela Rules, Tokyo Rules, and Bangkok Rules, Iraq is also Party to the Convention on the Rights of the Child; International Covenant on Civil and Political Rights; Convention on the Elimination of All Forms of Domestic Violence Against Women; and the International Covenant on Economic, Social and Cultural Rights, all of which relate to the status or treatment of every individual, including prisoners.

According to the Tokyo Rules, the success of various non-custodial measures will depend on a comprehensive system of pre-sentencing assessment (such as social inquiry reports),[100] appropriate review and careful sentencing by judges, [101] and consistent monitoring and supervision of the offender to ensure the efficacy of the ordered measures and rehabilitation of the offender.[102] Currently, Iraq has no formal system of non-custodial measures to enable preparation of comprehensive pre-sentencing reports, facilitate decision-making by judges on a range of measures, or adequately supervise large numbers of offenders that could be sentenced to non-custodial measures.

Paragraph 85 of the *Penal Code* emphasizes Iraq's reliance on traditional custodial and monetary sanctions for adults by stating that "primary penalties" in Iraq include imprisonment, penal servitude and detention, along with fines and the death penalty. Imprisonment, penal servitude and detention are all custodial sanctions that differ based on the length of time one is sentenced and activities ordered during detention. Imprisonment is defined as confinement in a penal institution for more than 5 years but less than 25 years; penal servitude is the confinement of a convicted person for not less than three months and not more than five years and requires the sentenced individual to be put to work; and detention is confinement in a penal institution for not less than 24 hours and not more than one year without an order for the sentenced individual to be put to work.[103]

Iraq's current framework, while including some piecemeal provisions throughout the legislative framework of Iraq, does not yet consider the full array of available non-custodial measures. Further, the existing provisions must be strengthened, clarified and supplemented by a robust regulatory and administrative framework to ensure

[100] Tokyo Rules at rule 7.
[101] Tokyo Rules at rule 8.
[102] Tokyo Rules at rule 10.
[103] Iraq, *Penal Code (Law No.111 of 1969),* s.85-89.

consideration of non-custodial measures becomes a routine aspect of sentencing offenders. However, several provisions in the *Penal Code (Law No.111 of 1969)* do provide a good starting point to encourage those in the justice system to more frequently consider using non-custodial measures in certain circumstances.

Under Section 8 of the *Penal Code*, judges are given authority to take into account various characteristics and circumstances of the offender in determining whether to suspend a sentence. Paragraph 144 notes that, if a prison sentence for a felony or misdemeanor does not exceed one year, the judge may consider the offender's age, past, character, and circumstances of offence in order to suspend the sentence. This suspension may have certain conditions imposed, such as the requirement for the person to undertake to be on good behavior for the duration of the suspended sentence.[104]

The suspension can remain in place for up to three years and the full sentence can be reinstated for a variety of reasons, including failure of the offender to fulfil imposed conditions, or commission by the offender of a premeditated felony or misdemeanor that results in a sentence of three months or more.[105] Paragraph 148 of the *Penal Code* also notes that, if a sentence is reinstated, the primary penalty that was suspended is to be fully served.[106]

Informal discussions with criminal trial judges in Iraq have indicated that, apart from fines, suspended sentences are one of the most commonly used methods of reducing the burdens on prisons in Iraq. Although specific numbers on the of use of suspended sentences is not readily available, Iraq judges have remarked that the judiciary is heavily reliant on suspended sentences when sentencing those accused of less serious, low-level offences in order to ensure, as much as possible, that limited prison space is reserved for more serious offences.

The *Penal Code* also allows judges to issue certain precautionary measures under Sub-section 4**.** One such precautionary measure may include an order for confiscation of goods used in an offence, whether or not the accused has been convicted. Orders for confiscation relate to goods of which the manufacture, possession, acquisition, use, sale or advertisement for sale is considered an offence.[107]

Under paragraph 118, courts may also order an undertaking to be on good behavior for a period of not less than one year and not more than five years. The same provision also requires the convicted person to pay to the court "a sum of money or something of equivalent value considered by the court to be compatible with his financial position".[108]

[104] Iraq, *Penal Code (Law No.111 of 1969),* s.144.
[105] Iraq, *Penal Code (Law No.111 of 1969),* s.146-147.
[106] Iraq, *Penal Code (Law No.111 of 1969),* s.148.
[107] Iraq, *Penal Code (Law No.111 of 1969),* s.117.
[108] Iraq, *Penal Code (Law No.111 of 1969),* s.118.

Courts are also permitted to make use of Status Penalties, in which an offender is punished by removal of their ability to practice their profession. Paragraphs 113-114 of the *Penal Code* note that, if a person commits a felony or misdemeanor that violates their profession, business or activity and receives a prison sentence of at least six months, the court may also prevent that person from carrying out their employment for up to one year on first offence and up to three years on second offence.[109]

Similarly, for a person that is convicted an offence by means of a motor vehicle, the Court has discretion to invalidate that person's driving license for a period of not less than three months and preclude that person from obtaining a new license for that period.[110]

Another non-custodial condition that can be imposed relates to alcohol consumption and can be used in cases where the offender has committed an offence under the influence of alcohol. Paragraph 106 of the *Penal Code* allows the court to order a convicted person to abstain from consuming alcohol in bars or other similar locations for up to three years. Of note is that this is not an entire ban on consumption of alcohol, but rather a more limited restriction on consumption of alcohol in certain areas. The language as written does not seem to extend to consumption of alcohol within the confines of one's own home.[111]

Courts may also place restrictions on the movement of an offender by ordering that a convicted person may not visit a particular place or places for a period up to three years.[112]

Finally, the *Penal Code* also contains some provisions that have similarities to custodial sanctions but do not involve confinement in prisons. For example, paragraph 105 of the *Penal Code* allows judges to order that a convicted person be confined in a therapy unit, sanitorium or any other similar place for care and treatment for up to six months. The court is also permitted to order the release of the convicted individual into the care of a parent or relative based on the recommendation of a medical professional. This provision is a positive inclusion in the *Penal Code*, although it still relates to a form of custody as it involves a deprivation of liberty for the offender.

Discussions with members of the judiciary in Iraq have indicated that two of the major barriers to effectively implementing a system of non-custodial measures are the lack of a clear legislative framework and the lack of existing administrative infrastructure that would facilitate implementation of the legislative framework. Until legislation clearly sets out the scope of non-custodial measures available during sentencing, judges are limited to the few measures that exist in the *Penal Code* and other laws. Further, without an effective system of administrative institutions to carry out and monitor non-custodial measures at the time of entry into force of a law, judges will be reluctant to administer

[109] Iraq, *Penal Code (Law No.111 of 1969),* s.113-114.
[110] Iraq, *Penal Code (Law No.111 of 1969),* s.115-116.
[111] Iraq, *Penal Code (Law No.111 of 1969),* s.106.
[112] Iraq, *Penal Code (Law No.111 of 1969),* s.107.

non-custodial measures as a sanction until they have confidence these measures will be effectively adhered to and monitored. To administer non-custodial measures without a solid administrative system supporting implementation would likely result in an erosion of trust in the system from both the public and judiciary.

G. Case Studies on the Use of Non-Custodial Enforcement Measures

There is some consistency between many countries that use non-custodial measures, such as a high incidence of countries using community service as an alternative to imprisonment. However, when structuring non-custodial sanction schemes, many countries take into account several factors related to the culture, customs and traditions of that country in order to blend them together with the existing sanction schemes. By aligning non-custodial sanctions with existing cultural practices in a country, widespread support and community buy-in are more likely to occur, increasing the chances of a successfully-implemented program.

Many countries have implemented flexible systems to allow for non-custodial measures to be used in a wide array of offences. Generally, these measures are used in lower-level crimes that cause minimal or no danger to the community. The offenders must also generally be non-frequent offenders (or have no criminal history).

Some countries also allow for non-custodial measures for other types of offences, such as environmental offences. In such cases, the offender is given the opportunity to revert the environment to its state prior to the offence. Such an approach aligns with the principles of rehabilitation and amelioration that are often keystones of any non-custodial measures.

The following section provides five country examples of how alternative modes of sentencing are being used in countries around the world. Although many countries use some form of non-custodial measures, the following examples were chosen to provide insight into differing methods of formal and informal practices to embrace alternatives to imprisonment.

1. United Arab Emirates

Since 2016, the United Arab Emirates (UAE) has been one of the few countries in the Middle East to embrace the practice of community service as an alternative to imprisonment for some crimes. Through *Decree No.7 of 2016*, community service was added as a possible sanction to some crimes in the penal code as an alternative to

imprisonment or fines, thereby broadening the scope of discretion for judges when sentencing.[113]

The UAE *Federal Decree Law No.(31) of 2021 Promulgating the Crimes and Penalties Law* sets out three types of crimes under Article 27: felonies, misdemeanors and infractions.[114] The category of each crime is determined by the magnitude of the penalty assigned to the crime.

A **felony** is any crime that is punishable by:

- Any of the Qisas penalties (retributive punishment);
- Death penalty;
- Life imprisonment; or
- Temporary imprisonment.[115]

A **misdemeanor** is punishable by:

- Imprisonment;
- A fine of more than AED 10,000; or
- Diya (blood money – financial compensation to the victim or victim's family for bodily harm or murder).[116]

An **infraction** is punishable by one or both of:

- Custody of not less than 24 hours and not more than 10 days; or
- A fine of not more than AED 10,000.[117]

Although the specific details of how community service are to be carried out are set out in a separate directive, Articles 121-125 of the Penalties Law set out the framework that allows community service to be ordered as a sanction for misdemeanors. Article 121 notes that community service may only be used as a sanction for misdemeanors in lieu of imprisonment that does not exceed six months or in lieu of a fine. This means that, for those misdemeanors that may carry a penalty of more than six months of imprisonment,

[113] United Arab Emirates, *Decree Law No.7 of 2016* at s.120. Available online: http://menarights.org/sites/default/files/2019-01/UAE_PenalCode_2016_AR.pdf
[114] United Arab Emirates, *Federal Decree Law No.(31) of 2021 Promulgating the Crimes and Penalties Law* at art.27. Available online: https://uaelegislation.gov.ae/en/legislations/1529/
[115] United Arab Emirates, *Federal Decree Law No.(31) of 2021 Promulgating the Crimes and Penalties Law* at art.29. Available online: https://uaelegislation.gov.ae/en/legislations/1529/
[116] United Arab Emirates, *Federal Decree Law No.(31) of 2021 Promulgating the Crimes and Penalties Law* at art.30. Available online: https://uaelegislation.gov.ae/en/legislations/1529/
[117] United Arab Emirates, *Federal Decree Law No.(31) of 2021 Promulgating the Crimes and Penalties Law* at art.31. Available online: https://uaelegislation.gov.ae/en/legislations/1529/

community service is not an option. Further, Article 121 also notes that any ordered community service may not exceed three months.[118]

In the event the offender fails to meet the requirements of the community service order, the Court is permitted to substitute the community service order for a period of incarceration of equal length to the community service order. The Public Prosecution service also has discretion under the law to postpone the performance of community service if necessary.[119]

Initially, the Penalties Law did not state what may be considered as community service. However, in 2017, the *Council of Ministers issued Ministerial Decree No.41 of 2017* which sets out the specific types of community service that may be ordered.[120] The Ministerial Decree sets out 19 categories of community service that may be ordered. These categories include:

- Memorizing or assisting others in memorizing parts of the Holy Quran;
- Working in care centers for certain individuals, such as those with special needs;
- Working in nursing homes for elderly;
- Working in juvenile detention centers;
- Working in nurseries or day-care facilities;
- Working in women society centers;
- Working in traffic directorates;
- Working in ambulance services or casualties transportation;
- Conducting civil defense tasks;
- Participating in charity drives and humanitarian campaigns;
- Working in adult literacy centers;
- Cleaning and maintaining public areas and facilities (including roads, parks, public squares, beaches or wildlife reserves);
- Cleaning and maintaining mosques;
- Providing support to events or activities;
- Conducting quality control work with foodstuffs;
- Gardening and maintenance with public parks and wildlife reserves;
- Loading and unloading cargo containers at ports; or

[118] United Arab Emirates, *Federal Decree Law No.(31) of 2021 Promulgating the Crimes and Penalties Law* at art.121. Available online: https://uaelegislation.gov.ae/en/legislations/1529/
[119] United Arab Emirates, *Federal Decree Law No.(31) of 2021 Promulgating the Crimes and Penalties Law* at art.124. Available online: https://uaelegislation.gov.ae/en/legislations/1529/
[120] United Arab Emirates Cabinet, "Mohammed Bin Rashid Issues Decree Determining Community Service Work" (23 October 2017). Available online: https://uaecabinet.ae/en/details/news/mohammed-bin-rashid-issues-decree-determining-community-service-work. See also: https://communicationdubai.com/laws/united-arab-emirates-cabinet-resolution-no-41-of-2017-5045218

- Working at petrol stations.[121]

To ensure accountability, Article 122 of the Penalties Law notes that community service is to be done under coordination by the entity in which the services are being performed and under the supervision of the Public Prosecution service. Article 123 obliges the entity in which the community service is being performed to submit a report to Public Prosecution detailing the offender's performance, discipline and behavior, as well as the extent to which the offender is committed to performing the service.[122]

Community service orders have been issued in UAE many times since their introduction into the Penalties Law. For example, for the crime of reckless driving, a court ordered three men to clean city streets for four hours per day for 30 days.[123]

Although this system of community service is one of the most progressive in the region, some scholars have noted ways in which it could still be improved. As the current provisions in the Penalties Law do not elaborate on many aspects of how the system is to be implemented, researchers have proposed amending the Penalties Law to set out what factors should be considered when making a determination on the suitability of community service. For example, the provisions could be amended to obligate judges to take into account whether the offender has a history of repeated offences and, if so, to not consider community service for non-rehabilitated offenders.[124]

Additionally, it has been recommended that UAE also incorporate an assessment of the offender's past, age, circumstances and morals in any determination on the suitability of community service. Such an assessment could also include physical capacity, social and health status and ability to carry out any ordered community service, as well as an assessment on the proportionality of the community service compared to the crime.[125]

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[121] UAE National News, "UAE Judges now have 19 options for community service sentences" (10 November 2017). Available online: https://www.thenationalnews.com/uae/courts/uae-judges-now-have-19-options-for-community-service-sentences-1.674647

[122] United Arab Emirates, *Federal Decree Law No.(31) of 2021 Promulgating the Crimes and Penalties Law* at art.122-123. Available online: https://uaelegislation.gov.ae/en/legislations/1529/

[123] UAE National News, "Dubai Ruler orders men arrested for stunt-driving to clean streets for a month" (23 February 2017). Available online: https://www.thenationalnews.com/uae/transport/dubai-ruler-orders-men-arrested-for-stunt-driving-to-clean-streets-for-a-month-1.90046

[124] Raed S.A. Faqir and Ehab M. A. Alrousan, "Community Service as an Alternative Penalty to Short-term Imprisonment in the UAE and Malaysia: A Comparative Legal Analysis" *Russian Law Journal,* vol.XI (2023) Issue 3 at p.1189. Available online: https://www.researchgate.net/publication/370584229_COMMUNITY_SERVICE_AS_AN_ALTERNATIVE_PENALTY_TO_SHORT-TERM_IMPRISONMENT_IN_THE_UAE_AND_MALAYSIA_A_COMPARATIVE_LEGAL_ANALYSIS

[125] Raed S.A. Faqir and Ehab M. A. Alrousan, "Community Service as an Alternative Penalty to Short-term Imprisonment in the UAE and Malaysia: A Comparative Legal Analysis" *Russian Law Journal,* vol.XI (2023) Issue 3 at p.1188. Available online:

2. Canada

i. Alternative Measures in Canada

Introduced in 1996 in Canada, alternative measures were enshrined in the *Criminal Code* under section 717 in recognition of the notion that not all individuals alleged to have committed an offence need to be prosecuted.[126] Depending on the circumstances of the particular allegations, prosecutors are granted latitude under the Criminal Code to selectively divert offenders away from the traditional court system using a principled and flexible approach (See Annex I for legislative language from Canada).[127] This system is generally applied to offenders who:

- Have no previous record of offences;
- Have committed a less-serious offence; and
- Are unlikely to reoffend.[128]

In considering whether to divert an alleged offender into the alternative measures process, Crown Prosecutors are obliged to consider several factors, including whether:

- the proposed measure is part of an authorized program;
- the proposed measure is appropriate considering the needs of the offender and interests of the victim and society;
- the alleged offender freely consents to the use of the proposed alternative measures; and
- the person accepts responsibility for the act or omission that formed the basis of the alleged offence.[129]

The interpretive guidebook used by Crown Prosecutors in Canada sets out a broad range of possible alternative measures that can be prescribed, depending on the particulars of the alleged offender and alleged offence. These include:

- Community service;
- Restitution or compensation in cash or services;

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https://www.researchgate.net/publication/370584229_COMMUNITY_SERVICE_AS_AN_ALTERNATIVE_PENALTY_TO_SHORT-TERM_IMPRISONMENT_IN_THE_UAE_AND_MALAYSIA_A_COMPARATIVE_LEGAL_ANALYSIS

[126] Canada, *Criminal Code* (RSC 1985, c. C-46) at s.717. Available online: https://laws-lois.justice.gc.ca/eng/acts/C-46/

[127] Public Prosecution Service of Canada, "Public Prosecution Service of Canada Deskbook: (3.8) Alternative Measures" (01 March 2014) at s.1.2. Available online: https://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/p3/ch08.html

[128] *Ibid* at s.2.1.

[129] Canada, *Criminal Code* (RSC 1985, c. C-46) at s.717. Available online: https://laws-lois.justice.gc.ca/eng/acts/C-46/

- Mediation (non-judicial and non-adversarial neutral dispute resolution);
- Referrals to specialized programs for counselling, treatment or education (such as anger management, drug or alcohol treatment, or life skills education);
- Referrals to community, youth or aboriginal justice committees;
- Victim-offender reconciliation programs (or similar programs with a goal of restorative justice);
- A letter of apology or essay; or
- Any other reasonable alternative measures that are consistent with the broader objectives of the program.[130]

Of note is that there is a wide range of circumstances that have been identified as precluding the possibility of alternative measures. Most of these circumstances relate to the gravity of the offence or impact on the victim or broader society. For example, alternative measures cannot be applied to circumstances in which:

- A weapon was used or threatened to be used in commission of the offence;
- The offence was a sexual offence;
- The offence involved the use of violence (or the threat of violence);
- The offence had a serious impact on the victim (whether psychological, financial or physical);
- A person trafficked, or possessed for the purpose of trafficking, certain drugs (e.g. cocaine, heroin, methamphetamine);
- Whether the conduct leading to the offence demonstrated significant planning (such as in the case of a criminal enterprise); or
- The conduct resulted or could have resulted in harm to human health, safety, security, the environment, a natural resource, a regulated industry or to the public confidence.[131]

If the offender fails to complete or adhere to the alternative measures as required, the Crown Prosecutor may resume the ordinary course of criminal prosecution, depending on the reasons for failure to comply. The directive notes that, in such situations, there may have been some extenuating circumstances that made compliance impossible and grants discretion to the prosecutor to continue with prosecution or not.[132]

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[130] Public Prosecution Service of Canada, "Public Prosecution Service of Canada Deskbook: (3.8) Alternative Measures" (01 March 2014) at s.1.1. Available online: https://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/p3/cho8.html

[131] Public Prosecution Service of Canada, "Public Prosecution Service of Canada Deskbook: (3.8) Alternative Measures" (01 March 2014) at s.3.3. Available online: https://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/p3/cho8.html

[132] Public Prosecution Service of Canada, "Public Prosecution Service of Canada Deskbook: (3.8) Alternative Measures" (01 March 2014) at s.5. Available online: https://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/p3/cho8.html

ii. Environmental Protection Enforcement Measures in Canada

Canada has also recognized that other areas of law, such as environmental law, are well-suited to alternative enforcement measures given that the concepts of remediation and rehabilitation as a goal of sanctions can be applied outside of the scope of criminal law. For this reason, Canada has implemented an alternative system called Environmental Protection Alternative Measures (EPAMs) for offences under its *Canadian Environmental Protection Act 1999*.[133] EPAMs are meant to provide an alternative to traditional enforcement measures as a means of returning the offender to a state of compliance in situations where a charge has been laid and the offender has accepted responsibility for the actions that formed the basis of the offence. These measures are only used where the offender has a good history of compliance with the law and there are no repeat violations of the Act.

Upon issuance of an EPAM, the offender's charges are suspended pending completion of the EPAM. Once the terms of the EPAM are complied with in full, the charges are dismissed. If the offender does not comply with the EPAM, the charges can be reinstated, and the offender fined for failure to comply. EPAMs may include requirements to:

- Clean up or remediate environmental damages;
- Implement changes to production processes;
- Install certain pollution-control or monitoring systems; or
- Develop and implement specific pollution-prevention measures to reduce the release of controlled chemicals.[134]

EPAMs in Canada cannot be used for situations in which the offender caused injury or death of a person, engaged in reckless or intentional behavior causing an environmental disaster, or engaged in reckless disregard for human life or safety leading to risk of injury or death.

Alternative measures such as EPAMs can reduce the burden on the judiciary while simultaneously addressing the goal of remediation or rehabilitation by giving offenders an opportunity to correct their behavior and make amends before imprisonment or a fine is considered as a sanction.

[133] Canada, *Canadian Environmental Protection Act, 1999*, (SC 1999, c. 33) at s.296. Available online: https://laws-lois.justice.gc.ca/eng/acts/c-15.31/FullText.html

[134] Environment and Climate Change Canada, "Canadian Environmental Protection Act and environmental protection alternative measures" (2017) Government of Canada. Available online: https://www.canada.ca/en/environment-climate-change/services/canadian-environmental-protection-act-registry/general-information/fact-sheets/alternative-measures.html

3. Kenya

i. Community Service and Probation Orders in Kenya

Among countries in eastern Africa, Kenya has been identified as one of foremost users of alternative, non-custodial measures to resolve disputes and offences.[135] Most non-custodial measures in Kenya are issued through either Community Service Orders or Probation Orders, both administered by the Probation and Aftercare Service (PACS) within the Ministry of Interior and National Administration.[136] PACS is also responsible for the Aftercare and Reintegration Program which is aimed at ensuring offenders are reintegrated into society following their involvement in the justice, probation and community service systems.[137]

The current system of community service is premised in the *Community Service Orders Act No. 10 of 1998* which establishes the National Community Service Orders Committee to advise the Minister and Chief Justice on proper implementation of the Act; coordinate, direct and supervise the work of community service officers; and collect and collate data on the operation of the Act for the purpose of improving national policy on community service orders.[138]

The Act sets out clear limits for who is and who is not eligible for a Community Service Order. Article 3 of the Act states that Community Service Orders may only be given to an offender who:

- Was convicted of an offence punishable by imprisonment of not more than three years; or
- Was convicted of an offence for which a term of imprisonment of more than three years is possible but the court has determined that a term of three years or less is appropriate.

Community Service Orders are required to comprise unpaid public work for the benefit of the community and may not exceed the term of imprisonment for which the offender would have been sentenced. The Act explicitly lists several forms of public work that may be included in a Community Service Order, such as:

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[135] Penal Reform International, *Alternatives to Imprisonment in East Africa: Trends and Challenges* (2012). Available online: https://cdn.penalreform.org/wp-content/uploads/2012/05/alternatives-east-africa-2013-v2-2.pdf

[136] Ministry of Interior and National Administration, "Probation and Aftercare Service" (2023) Government of Kenya. Available online: https://www.correctional.go.ke/probation-aftercare-service

[137] Government of Kenya, "Probation and Aftercare Services: Aftercare Programme Pamphlet" (undated). Available online: https://www.probation.go.ke/sites/default/files/downloads/Aftercare%20Programme%20Pamphlet.pdf

[138] Kenya, *Community Service Orders Act,* (No. 10 of 1998) (Rev.2012) at art. 8. Available online: http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/CommunityServiceOrdersAct_No10of1998.pdf

- Construction or maintenance of public roads or roads of access;
- Afforestation works (i.e. planting trees);
- Environmental conservation or enhancement works;
- Projects for water conservation, management or distribution and supply;
- Maintenance work in public schools, hospitals or other public social service amenities;
- Work of any nature in a foster home or orphanage; or
- Rendering specialist or professional services in the community and for the benefit of the community.[139]

As with other countries, Kenya uses its Community Service Program to decongest prisons, reduce government expenditure, involve offenders in the community, encourage reparations from the offender to the community, and ensure family and community harmony.[140]

All Community Service Orders are supervised by supervising officers (similar to parole officers) who ensure the work is done according to the terms of the Order. Supervisors are also required to ensure that, as far as is practicable, instructions given under the Order do not conflict with the offender's religious beliefs.[141]

Courts in Kenya have discretion to determine the consequences of an offender's failure to comply with a Community Service Order. Under section 5 of the Act, a court is permitted to assess the reasons for breach of the Order and decide to:

- Give a warning to the offender;
- Amend the Order in accordance with the circumstances of the case; or
- Revoke the Order and impose any other sentence deemed appropriate.

Kenya also utilizes a probation system in accordance with the *Probation of Offenders Act, Cap. 64* which empowers courts to conditionally release some offenders on probation based on factors related to youth, character, antecedents, home surroundings, health or mental condition of the offender, nature of the offence or extenuating circumstances in which the offence was committed.[142]

Probation Orders may have effect for between six months and three years, will have certain conditions and require the offender to remain under the supervision of an

[139] Kenya, *Community Service Orders Act,* (No. 10 of 1998) (Rev.2012) at art. 3(2)(b). Available online: http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/CommunityServiceOrdersAct_No10of1998.pdf
[140] Probation and Aftercare Services, "Community Service Orders Programme Pamphlet" (undated) Government of Kenya. Available online: https://www.probation.go.ke/faqs
[141] Kenya, *Community Service Orders Act,* (No. 10 of 1998) (Rev.2012) at art. 4. Available online: http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/CommunityServiceOrdersAct_No10of1998.pdf
[142] Kenya, *Probation of Offenders Act, Cap. 64 of 1981* (rev. 2012), art. 4(1). Available online: http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/ProbationofOffendersAct_Cap_64.pdf

assigned probation officer for the duration of probation. The probation officer ensures the offender adheres to the conditions of the Probation Order and may assist the offender in rehabilitating or meeting the conditions of the Order.[143]

Both Community Service Orders and Probation Orders work by allowing the offender to maintain ties with their community and place them in a situation in which they can continue to give back to the community that was wronged by their offence. Although each type of Order requires some measure of administrative infrastructure, the total administrative burden and government expenditure for each of these Orders amounts to less than the overall burden of placing the offenders in prison.

ii. Alternative Justice Systems in Kenya

In addition to non-custodial Community Service Orders and Probation Orders, Kenya also embraces a system of alternative justice in recognition of existing cultural and social methods of resolving disputes without the use of courts. Its innovative *Alternative Justice Systems (AJS) Policy of 2020*[144] was developed following several reports on justice resolution in Kenya, including the *2017 Justice Needs in Kenya* survey which found that only 10% of Kenyans used the formal Court system to resolve their disputes.[145]

Further signaling the need for an alternative system, in September 2018, Kenya's prisons had a population of 51,130 while the official capacity was only 26,837 (translating to an occupancy level of approximately 190%).[146] Courts were also similarly overburdened, with a backlog of over 300,000 cases in the courts at the beginning of 2019. The AJS Policy noted that it would have taken four years to rule on the matters that were already in the court system, assuming no new cases were filed at the same time. However, approximately 400,000 new cases were filed in 2018 alone.[147]

The Alternative Justice Systems approach implements article 159(2)(c) of the *Constitution of Kenya*[148] which states that courts and tribunals should be guided by, among other factors, "alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms". However, the Constitution

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[143] Kenya, *Probation of Offenders Act, Cap. 64 of 1981* (rev. 2012), art. 5. Available online: http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/ProbationofOffendersAct_Cap_64.pdf
[144] Judiciary of Kenya, *Alternative Justice Systems Baseline Policy*, (2020). Available online: https://judiciary.go.ke/download/alternative-justice-systems-baseline-policy-and-policy-framework/
[145] The Hague Institute for Innovation of Law (HiiL), *Justice Needs and Satisfaction in Kenya 2017: Legal Problems in Daily Life*, (14 March 2018) at p.69. Available online: https://www.hiil.org/wp-content/uploads/2018/07/hiil-report_Kenya-JNS-web.pdf
[146] Judiciary of Kenya, *Alternative Justice Systems Baseline Policy*, (2020) at p. 38. Available online: https://judiciary.go.ke/download/alternative-justice-systems-baseline-policy-and-policy-framework/
[147] Judiciary of Kenya, *Alternative Justice Systems Baseline Policy*, (2020) at p. 37. Available online: https://judiciary.go.ke/download/alternative-justice-systems-baseline-policy-and-policy-framework/
[148] Kenya, *Constitution of 2010,* art. 159(2)(c). Available online: http://kenyalaw.org/lex/actview.xql?actid=Const2010

also constrains use of these dispute resolution mechanisms within certain limits. According to article 159(3) of the *Constitution of Kenya*, these alternative mechanisms shall not be used in a way that:

- Contravenes the Bill of Rights;
- Is contrary to justice and morality or results in outcomes that are contrary to justice or morality; or
- Is inconsistent with the Constitution or any written law.

The AJS approach works by giving those involved in a dispute the freedom to choose at the outset of a dispute the alternative method by which their dispute is resolved. After the dispute is resolved through an alternative method, it can then be formally recognized or validated by a Court. Further, the parties in AJS dispute resolution are free at any time to seek more formal redress in Courts. The AJS Policy endorses three models for alternative dispute resolution:

- **Autonomous AJS Institutions:** These are processes run entirely by the community with no State intervention. The community identifies a third party from within the community to resolve the dispute in accordance with laws, customs and traditions of that community. An example of this may include village elders who hear the dispute and work toward a decision based on facts presented by the victims, family, clan and community. This system relies on existing dispute-resolution structures in a community and allows for deference to existing decision-makers such as community leaders.
- **Third-Party Institution-Annexed AJS Institutions:** This method involves a third-party decision-maker that is not necessarily a member of the community, such as State-sanctioned officials, tribal chiefs, police, child welfare officers, probation officers, or imams and other religious leaders. Although this method may involve officials that work for the State, such as police or probation officers, none of these officials are a part of any official judicial mechanism.
- **Court-Annexed AJS Institutions:** This method refers to AJS processes that are completed outside of the Court (such as with the previous two methods) but are resolved under the guidance or direction of the Court on some matters, such as the requirement of particular laws in certain cases.[149]

After an outcome is reached through an AJS method, the parties involved must report back to the Courts to indicate what the outcome was. The Court reviews the process to ensure that it adhered to certain standards, including the protection, respect and

[149] Judiciary of Kenya, *Alternative Justice Systems Baseline Policy*, (2020) at p. 51-54. Available online: https://judiciary.go.ke/download/alternative-justice-systems-baseline-policy-and-policy-framework/

fulfilment of fundamental rights and certain constitutional values.[150] Following this, the Court can declare the dispute settled and withdraw the matter from the Court process if it was previously registered in Court.[151]

When reviewing the AJS overall outcome, the Court will generally exercise deference by only reviewing the outcome for proportionality and procedural fairness. The Court may intervene if either of the parties chooses to pursue the matter in a Court, such as if a party to an AJS proceeding is dissatisfied with their AJS outcome. In such a case, the AJS policy emphasizes that, although there may be some rare instances in which the Court will engage in a full finding of fact and law in relation to the matter, the preference is for the Court to exercise deference in its approach to an AJS finding. However, if both parties agree to resolve the matter using an AJS approach, Courts will defer to this decision. Courts may intervene to recognize and enforce the ultimate award, provided the award is deemed by the Court to be valid and enforceable. Once a resolution is reached, Courts may interact with the AJS process by using the outcome of an AJS dispute as evidence in any ongoing court proceedings.[152]

By using the AJS system, non-judicial bodies are able to make decisions without engaging the criminal justice system. This means that offenders will have no criminal conviction, no criminal record and the courts will be less burdened. The AJS system also places a focus on restorative justice and restitution in the community rather than punitive justice. By allowing the offender a chance to engage in acts of restitution, they are able to make amends in the community and maintain, rebuild or strengthen interpersonal relationships.[153]

AJS is a valuable alternative to more formal justice processes as it establishes a non-adversarial and cost-effective forum for dispute resolution, reducing formalities and time spent on seeking justice. This system reduces the burden on the judiciary and lowers the prison population by offering an avenue to resolve disputes before engaging with the criminal justice system, all while remaining aware of the traditional manner in which disputes are resolved at the community level. Further, ensuring Courts are able to review the processes and outcomes of AJS disputes allows for accountability and permits the parties to pursue the matter in Court if they are dissatisfied with the outcome.

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[150] Judiciary of Kenya, *Alternative Justice Systems Baseline Policy*, (2020) at p. 56. Available online: https://judiciary.go.ke/download/alternative-justice-systems-baseline-policy-and-policy-framework/
[151] Judiciary of Kenya, *Alternative Justice Systems Baseline Policy*, (2020) at p. 38. Available online: https://judiciary.go.ke/download/alternative-justice-systems-baseline-policy-and-policy-framework/
[152] Judiciary of Kenya, *Alternative Justice Systems Baseline Policy*, (2020) at p. 57-58. Available online: https://judiciary.go.ke/download/alternative-justice-systems-baseline-policy-and-policy-framework/
[153] Judiciary of Kenya, *Alternative Justice Systems Baseline Policy*, (2020) at p. 38. Available online: https://judiciary.go.ke/download/alternative-justice-systems-baseline-policy-and-policy-framework/

4. United Kingdom

i. Non-Custodial Community Orders in the United Kingdom

In addition to the system of fines and imprisonment, courts in the United Kingdom frequently use non-custodial Community Orders to ensure the offender can be punished while also protecting the community and allowing the offender to engage in rehabilitative activities.[154] The current Community Orders system became operational in 2005, although it was adjusted in 2013 to require that all Community Orders must contain an element of punishment instead of being purely remedial.[155]

Community Orders are generally issued when an offence is not serious enough to warrant a prison sentence but is too serious for only a monetary fine. There is a threshold for using Community Orders: these orders can only be used where the offender is aged 18 or over and the offence is punishable by imprisonment.[156] However, if the law prescribes a mandatory sentence for something, that mandatory sentence must be carried out.[157]

The *Sentencing Council's General Sentencing Guideline* also emphasizes that the court should consider all available disposals at the time of the sentence, meaning there may be situations in which the threshold for a Community Order is met but a fine or discharge may be more appropriate.[158]

According to Section 201 of the *Sentencing Act 2020*, a Community Order must consist of one or more of 15 enumerated requirements. These requirements can be chosen by the court on a case-by-case basis to best address the circumstances of the offence and the capabilities and needs of the offender. The *Sentencing Act 2020* requires that at least one of the requirements is imposed specifically for the purpose of punishment (unless a fine is also imposed in addition to the Community Order).[159] Community Orders must include at least one of the 15 following requirements:

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[154] United Kingdom, *Sentencing Act 2020,* chapter 2, ss.200-220. Available online: https://www.legislation.gov.uk/ukpga/2020/17/contents

[155] Dr. Eoin Guilfoyle, "Community Orders: A review of the sanction, its use and operation and research evidence" (March 2021) Sentencing Academy. Available online: https://www.sentencingacademy.org.uk/community-orders-march-2021/

[156] United Kingdom, *Sentencing Act 2020,* s.202. Available online: https://www.legislation.gov.uk/ukpga/2020/17/contents

[157] United Kingdom, *Sentencing Act 2020,* s.202(3). Available online: https://www.legislation.gov.uk/ukpga/2020/17/contents

[158] United Kingdom Sentencing Council, "General Sentencing Guidelines: Overarching principles" (01 October 2019). Available online: https://www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/general-guideline-overarching-principles/

[159] United Kingdom, *Sentencing Act 2020,* s.201. Available online: https://www.legislation.gov.uk/ukpga/2020/17/contents

- A requirement to carry out unpaid work for between 40 and 300 hours, to be completed within 12 months of the Order;
- A rehabilitation activity requirement, in which the offender is required to attend appointments or participate in activities that will reduce the risk of reoffending. Under this requirement, the Court does not specify a type of activity but instead specifies the number of hours or days of the activity;
- A program requirement, in which the offender is required to attend a program that addresses the offending behavior (such as anger management programmes);
- A prohibited activity requirement, in which the offender must not do certain specified activities for up to 3 years;
- A curfew requirement (lasting between 2 and 16 hours per day for the duration of the Order);
- An exclusion requirement, in which the offender is required to avoid a place for the specified period;
- A residence requirement, in which the offender is required to reside at a specific place;
- A foreign travel prohibition for the duration of the Order (up to 2 years);
- A mental health treatment requirement under the direction of a registered medical profession or certified psychologist;
- A drug rehabilitation requirement, including a requirement to submit to drug testing as directed by the authority;
- An alcohol treatment requirement;
- An alcohol abstinence and monitoring requirement (for up to 120 days);
- For offenders under age 25, a requirement to attend at an attendance center for a specified period of time between 12 and 26 hours total for no more than 3 hours per day, during which the offender is given a program of activities to carry out;
- A requirement to be subject to electronic compliance monitoring equipment, such as electronic whereabouts monitoring to ensure the offender stays away from a particular location; or
- A requirement to be subject to electronic whereabouts monitoring so that the offender's location is known and recorded at all times.

The *Guidelines for Community Orders* emphasize that the requirements of any Order must not conflict with each other, must not conflict with any religious beliefs of the offender, and must not be excessive.[160]

A 2021 report into the use of Community Orders noted that, between 2009 and 2019, use of Community Orders nearly halved, despite clear evidence that rates of reoffending are

[160] United Kingdom Sentencing Council, "General Sentencing Guidelines: Overarching principles" (01 October 2019). Available online: https://www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/general-guideline-overarching-principles/

lower for those sentenced using a Community Order compared to those sentenced to prison.[161] The report noted that one possible reason for this decline in use is a lack of magisterial confidence in the effectiveness of Community Orders. The report noted that around 65% of magistrates were not confident that community sentences reduce crime while 45% were not confident that community sentences effectively rehabilitate offenders.[162]

An investigation by the National Audit Office into the decline in Community Orders speculated that the decline and reduction in confidence on the part of magistrates could also be due, in part, to the quality of information provided to the magistrates in pre-sentence reports. As the pre-sentence reports form the basis of any final determination on suitability of Community Orders, the information included in the reports must be accurate and of high quality. To remedy this, the Ministry of Justice announced in 2021 that it had launched a pilot project in 15 magistrates' courts to improve the quality of information presented in the pre-sentence reports with a view to addressing the lack of confidence in this information by the magistrates.[163]

5. Zimbabwe

i. Community Service in Zimbabwe

In 1992, a pilot program began in Zimbabwe to determine the efficacy of community service in diverting low-level offenders away from the prison system as a means of lowering the prison population and lowering the risk of reoffending by increasing community integration.[164] The Community Service scheme was developed as a response to an overcrowded prison system which, at the time, held approximately 26,000 inmates in a system designed for no more than 17,000 people.[165]

The pilot program was informed by traditional customs and cultural practices related to conflict resolution, reparation and rehabilitation found in Zimbabwe. Although there was

[161] Dr. Eoin Guilfoyle, "Community Orders: A review of the sanction, its use and operation and research evidence" (March 2021) Sentencing Academy at pp.12-13. Available online: https://www.sentencingacademy.org.uk/community-orders-march-2021/
[162] Dr. Eoin Guilfoyle, "Community Orders: A review of the sanction, its use and operation and research evidence" (March 2021) Sentencing Academy at pp.13. Available online: https://www.sentencingacademy.org.uk/community-orders-march-2021/
[163] National Audit Office, "Written Evidence – JCS0039" (June 2023) at s.1b. Available online: https://committees.parliament.uk/writtenevidence/122239/html/
[164] Penal Reform International and the Zimbabwe National Committee on Community Service, "Community Service in Practice", (1997) All Africa Conference on Community Service. Available online: https://www.penalreform.org/resource/community-service-practice/
[165] Ram Subramanian, "Zimbabwe: The promise of the community service order is forestalled by court congestion and political crisis" (20 June 2012) Vera Institute of Justice. Available online: https://www.vera.org/news/zimbabwe-the-promise-of-the-community-service-order-is-forestalled-by-court-congestion-and-political-crisis

initial reluctance on the part of the public, a national awareness campaign was put into effect to promote the value of community service as an alternative to imprisonment.[166]

Further work to encourage adoption of the program included ensuring support at the community level through establishing local committees to organize and coordinate the program in each community. The local committees were volunteer-operated and composed of key members of the community, non-governmental organizations, and representatives of the justice system, including representatives from the police, prisons, courts, social services and local government.[167]

Proponents of the community service program emphasize that community service is not appropriate for every offender. For example, if an offense is very serious or the offender presents a danger to himself/herself or the community, imprisonment may be the best option. On the other hand, if the offense is very minor, it may be addressed through use of a simple fine rather than a Community Service Order to maximize the limited enforcement resources.[168] In this sense, Community Service Orders can be used when an offense requires a sanction that is more than a fine but less than prison.

To standardize the use of Community Service Orders, court officials were given guidelines that outline which offences may be considered suitable for Community Service Orders and which offences may be suited more for imprisonment or fines. If an offender qualifies for a Community Service Order, the judge then questions the offender about his or her personal circumstances to determine whether the offender is willing and able to complete the terms of the Order. If the judge determines that a Community Service Order is unsuitable for that offender, the judge is permitted to use prison as a sentence. Judges are also encouraged to only consider imprisonment as a last resort when sentencing.[169]

Once a Community Service Order is issued, staff appointed under the program work with the offender to develop a program of work setting out the number of hours of work and duties the offender is required to carry out. All work under the program is supervised, with regular reporting on each offender submitted by the supervisor to the authority in charge. The duties involve voluntary work that is generally carried out in a public institution, such as a school, hospital, clinic or other public place. In this way, the offender can compensate the community for any wrongs caused by the offence.[170]

After the two-year trial program was completed and the Community Service Program was determined to provide a viable basis for alternatives to imprisonment, the program was

[166] Penal Reform International and the Zimbabwe National Committee on Community Service, "Community Service in Practice", (1997) All Africa Conference on Community Service at p.10. Available online: https://www.penalreform.org/resource/community-service-practice/
[167] *Ibid* at p.10.
[168] *Ibid* at p.7.
[169] *Ibid* at p.8.
[170] *Ibid* at p.9.

formalized in legislation by amending the *Criminal Procedure and Evidence Act (Chapter 9:07)*, the *High Court Act (Chapter 7:06)*, and the *Prisons Act (Chapter 7: 11)* and passing the *Community Service (General) Regulations – Statutory Instrument of 1997* pursuant to the *Criminal Procedure and Evidence Act*.[171]

Since its formal launch in 1994, the Community Service program in Zimbabwe has been highly successful at diverting offenders from prison into community-oriented rehabilitation programs. From its inception in 1992 until July 1997, over 16,600 offenders took part in the program, resulting in overall prison populations dropping over this period.[172] Although current numbers are not readily available, sources have reported that, from inception to 2009, over 123,000 individuals were diverted from the prison system into the Community Service system.[173]

As another indicator of success, Court officials noted that up to 90% of all Community Service Orders were completed, with recidivism rates of those in the program remaining low in the year following the Order. Officials further noted a positive effect on the families of the offenders as the offender remained in the community and could continue to provide for their families and receive support from their communities.[174]

The use of Community Service Orders also had a positive effect on expenditure of government resources as these Orders were significantly less expensive to carry out. During the early days of the program, the cost of keeping an offender in prison amounted to approximately USD 120 per month while the cost of placing an offender in the Community Service Program was approximately USD 20 per month.[175]

To this day, prisons remain crowded in Zimbabwe due to several factors, including high population growth and an economic decline turning more people to crime in Zimbabwe.[176] Reportedly contributing further to overcrowded prisons were the delays

[171] Penal Reform International and the Zimbabwe National Committee on Community Service, "Community Service in Practice", (1997) All Africa Conference on Community Service at pp. 78-94. Available online: https://www.penalreform.org/resource/community-service-practice/
[172] Penal Reform International and the Zimbabwe National Committee on Community Service, "Community Service in Practice", (1997) All Africa Conference on Community Service at p.11. Available online: https://www.penalreform.org/resource/community-service-practice/
[173] AllAfrica News, "Zimbabwe: 123,000 sentenced to Community Service" (28 August 2009). Available online: https://allafrica.com/stories/200908280015.html.
[174] Penal Reform International and the Zimbabwe National Committee on Community Service, "Community Service in Practice", (1997) All Africa Conference on Community Service at p.11 Available online: https://www.penalreform.org/resource/community-service-practice/
[175] Penal Reform International and the Zimbabwe National Committee on Community Service, "Community Service in Practice", (1997) All Africa Conference on Community Service at p.11. Available online: https://www.penalreform.org/resource/community-service-practice/
[176] Chris Muronzi, Al Jazeera News, "'Fit for pigs': Conditions in Overcrowded Zimbabwe prisons choke inmates" (4 August 2023). Available online: https://www.aljazeera.com/features/2023/8/4/fit-for-pigs-conditions-in-overcrowded-zimbabwe-prisons-choke-inmates.

associated with overburdened judiciary, delays in court processing time and a past nationwide strike of magistrates related to poor remuneration.[177] However, it is clear that the Community Service program has significantly lessened the burden on an overburdened system.

Following the early success of the program in Zimbabwe, the participants of the International Conference on Community Service Orders in Africa held from 24 to 28 November 1997 agreed to the *Kadoma Declaration on Community Service*.[178] The Kadoma Declaration was further validated when it was adopted by the *United Nations Economic and Social Council in resolution 1998/23*.[179]

In its preamble, the *Kadoma Declaration* recognized the success of the Zimbabwe community service scheme, leading to its adoption by the Government of Zimbabwe after a three-year trial period. The preamble further underscored the inhuman conditions in prisons in Africa and the promising outcomes of community-based non-custodial measures.

The operative paragraphs of the Kadoma Declaration emphasize that the use of prison should be strictly limited to being a measure of last resort and that the majority of prisoners pose no actual threat to society. The Declaration encourages countries to embrace systems of community service and sets out a Plan of Action in the appendix to provide the basis for systems of community service akin to the Zimbabwe model.

To assist other countries in replicating the success of the Zimbabwe Community Service Program, the Zimbabwe National Committee on Community Service produced a list of essential conditions that contributed to the success of the program. These factors are included in Annex II of this publication.

ii. Rehabilitative Prisons in Zimbabwe

In accompaniment to the Community Service Program and other non-custodial options used in Zimbabwe, the Zimbabwe Prisons and Correctional Service also embraced a system of rehabilitative prisons to assist in reducing reoffending.

Zimbabwe currently operates at least two "open prisons" – one for men and one for women. Open prisons, referenced under Rule 45 of the Bangkok Rules, differ from more

[177] Ram Subramanian, "Zimbabwe: The promise of community service order is forestalled by court congestion and political crisis" (20 June 2012). Available online: https://www.vera.org/news/zimbabwe-the-promise-of-the-community-service-order-is-forestalled-by-court-congestion-and-political-crisis
[178] United Nations Economic and Social Council, "International cooperation aimed at the reduction of prison overcrowding and the promotion of alternative sentencing" (28 July 1998) Res. 1998/23 at Annex I. Available online: https://ecosoc.un.org/sites/default/files/documents/2023/resolution-1998-23.pdf
[179] United Nations Economic and Social Council, "Res. 1993/23: International cooperation aimed at the reduction of prison overcrowding and the promotion of alternative sentencing" (E/RES/1993/23) (28 July 1998). Available online: https://digitallibrary.un.org/record/428953?ln=en

traditional closed prison systems in that they are lower security, are less restrictive for prisoners, and may grant day release for employment or family visits. These prisons may also not be fully locked, allowing prisoners the opportunity to wander the grounds as they see fit and have some limited and controlled contact with the outside world.[180] Open prisons take a different approach to offender reform by moving the focus of the prison system away from punishment toward rehabilitation, re-integration and counseling.[181] By allowing some measure of contact with the outside world, open prisons can allow the prisoner to transition back into the community in a gradual manner leading up to their release.

In Zimbabwe, a prisoner that has served at least one-third of their sentence with a record of good behavior is eligible to be transferred to an open prison.[182] Open prisons in Zimbabwe allow prisoners to live in private single rooms with access to television and internet, while the prison grounds have gardens and other amenities. Prisoners have free movement on the prison grounds during the day with a late lock-up time. They are also permitted temporary home leave to visit their families for up to five days per month, time to cook their own meals and freedom to wear clothes of their own choosing.[183]

During their time at the open prison, prisoners are also given opportunities to pursue educational courses on topics such as tailoring, painting, metal work, carpentry, or bricklaying, as well as professional courses and academic education from Grades 1 to 7.[184] Open prisons also accommodate the needs of women prisoners with children by allowing them to continue to breastfeed during the day.[185]

Within the closed prison system, the Zimbabwe Prisons and Correctional Service (ZPCS) also facilitates several types of education and counseling to assist prisoners in rehabilitating and reintegrating into society following their release. When prisoners are first admitted to a prison, they are given interviews by Education Officers to determine

[180] Dr. Ian D. Marder, Magali Lapouge, Dr. Joe Garrihy and Dr. Avril M. Brandon, "Empirical research on the impact and experience of open prisons: State of the field and future directions" (September 2021) *Prison Service Journal* vol. 256. Available online: https://www.crimeandjustice.org.uk/sites/crimeandjustice.org.uk/files/PSJ%20256%2C%20Empirical%20research.pdf
[181] Zimbabwe Prisons and Correctional Service, "Open Prison" (2019). Available online: http://www.zpcs.gov.zw/open-prison/
[182] Penal Reform International, "Zimbabwe: Open prison for women promotes reintegration" (2021). Available online: https://www.penalreform.org/issues/women/bangkok-rules/bangkok-rules-map/zimbabwe/
[183] Zimbabwe Prisons and Correctional Service, "ZPCS establishes Open Prison for Females" (16 July 2021). Available online: http://www.zpcs.gov.zw/zpcs-establishes-open-prison-for-females/
[184] Zimbabwe Prisons and Correctional Service, "Skills Training and Academic Education" (2019). Available online: http://www.zpcs.gov.zw/skills-training/
[185] Penal Reform International, "Zimbabwe: Open prison for women promotes reintegration" (2021). Available online: https://www.penalreform.org/issues/women/bangkok-rules/bangkok-rules-map/zimbabwe/

their highest level of education. They are then categorized based on this level into either primary, secondary or tertiary educational classes. Classes are given in prison corresponding to each of these levels:

- Primary: These classes teach basic literacy and math to better prepare inmates for grade seven examinations;
- Secondary: Inmates are prepared for the official State examinations;
- Tertiary: Inmates are given courses to prepare them for real-world professions, such as through examination preparation and practical skills courses.[186]

The ZPCS also offers other means of rehabilitating offenders while in prison, including spiritual counselling,[187] psychological counselling,[188] and a variety of sports and recreation activities.[189]

By giving educational classes to prisoners and other remedial services to prisoners, Zimbabwe is able to better prepare prisoners in readjusting to life outside of prison while simultaneously giving them the tools to break the cycle of crime, thereby reducing recidivism.

H. Alternatives to the Current Monetary Penalties System in Iraq

Iraq already utilizes some forms of alternative enforcement measures. Like many countries around the world, Iraq has incorporated a system of monetary penalties in its Penal Code and other penal legislation as a means of deterring certain undesirable behaviors.

The monetary penalties system in Iraq, like in other countries, generally applies a range of fines to individuals or organizations that break the law. These fines can appear as a singular sanction for an offence or can be included in a law as a choice between a fine or imprisonment. For offences that are applied to non-human entities, monetary penalties may be the only option for a sanction.

For example, the *Anti-Money Laundering and Counter-Terrorism Financing Law (Law No 39 of 2015)*[190] prescribes a fine of no less than twenty-five million IQD (IQD 25,000,000) and up to two hundred fifty million IQD (IQD 250,000,000) to a financial institution that

[186] Zimbabwe Prisons and Correctional Service, "Academic Education" (2019). Available online: http://www.zpcs.gov.zw/academic-education/
[187] Zimbabwe Prisons and Correctional Service, "Spiritual Counselling" (2019). Available online: http://www.zpcs.gov.zw/spiritual-counselling/
[188] Zimbabwe Prisons and Correctional Service, "Psychological Counselling" (2019). Available online: http://www.zpcs.gov.zw/psychological-rehabilitation/
[189] Zimbabwe Prisons and Correctional Service, "Sports and Recreation" (2019). Available online: http://www.zpcs.gov.zw/sports-and-recreation/
[190] Iraq, *Anti-Money Laundering and Counter-Terrorism Financing Law (Law No 39 of 2015)* at art. 39(first)(b). Available online: https://moj.gov.iq/upload/pdf/anti.pdf

opens an account, accepts a deposit or accepts funds from an unknown source or fictitious name (Article 39 (first)(b)). Under this provision, there is no option for imprisonment as the fine is prescribed for a non-human entity.

This contrasts with another provision in the same law that prescribes either prison or monetary penalties (or both) for individuals. For example, Article 39 (second)(a) prescribes a penalty of imprisonment for up to three years, a fine of no less than fifteen million IQD (IQD 15,000,000) and up to fifty million IQD (IQD 50,000,000), or both, for any individual who intentionally submits false information under the Law.

This approach is common around the world and provides judges with a clear range of monetary penalties to ensure they have some discretion in sentencing, while also constraining the penalties to ensure they remain proportionate. Monetary penalties can easily be included in a law with a view to deterrence, proportionality and effectiveness to ensure the purpose of the law is met. However, one notable shortfall of this approach arises when penalties become outdated, such as when they are included in a law that has not been amended in a very long time.

When monetary penalties are set in legislation, they are generally representative of an amount that had a deterrent effect at the time the law was developed. However, if the law remains static or unchanged over years, the penalty will have less of a deterrent effect over time. This may come as a result of inflation, changing currency rates or currency stability, or increasing wealth disparities between classes in a society.

For example, the *Iraq Personal Status Law (No. 188 of 1959),*[191] which regulates family relations in marriage, divorce, inheritance, child custody and other issues, includes penalties that may have been significant at the time of enactment but have become less effective over time. Article 3(6) prescribes a penalty of one year imprisonment or up to 100 dinars for any person who concludes a marriage contract with more than one wife. Although a penalty of 100 dinars (approximately $0.08 USD at time of writing)[192] may have had a sufficient deterrent effect at the time of enactment of the law, it is unlikely that such a penalty will have the same deterrent effect in the present day as the monetary penalty is no longer commensurate with the amount of prison prescribed for the same sentence. For comparison, Article 34(first) of the Traffic Law of the State of Iraq (No.8 of 2019)[193] also prescribes a penalty of up to one year in prison for driving while intoxicated, but the corresponding monetary fine for this crime is up to 500,000 IQD (approximately USD 400 at time of writing).[194]

[191] Iraq, *Personal Status Law (No. 188 of 1959)*. Unofficial English translation available online: http://jafbase.fr/docAsie/Irak/iraq_personal_status_law_1959_english_translation.pdf
[192] Based on exchange rate on April 2024.
[193] Iraq, *Traffic Law of the State of Iraq (No.8 of 2019)*. Available online: https://aujfps.uoanbar.edu.iq/article_171529_11ed3cd814eaedf14bfe31a25cd1379d.pdf
[194] Based on exchange rate on April 2024.

Provisions such as Article 3(6) of the Personal Status Law show how monetary penalties, when left unadjusted over decades, can gradually have less of a deterrent effect over time. This can either render penalty provisions virtually obsolete or may force a judge to choose imprisonment instead of the monetary penalty to ensure the sanction has a sufficient deterrent effect.

One remedy to this static approach to penalties is to amend legislation every few years to adjust the penalties in accordance with inflation and changing currency rates. This method may prove tedious as the Parliament in Iraq is already overburdened and may not be able to reliably amend laws on a set timeline.

To account for changes in inflation over time, some countries have implemented systems to ensure their legislated penalties are dynamic enough to account for any changes in the economy as well as the differing economic circumstances of the offenders.

1. Penalty Units

As inflation or changing currency values can quickly render fixed penalties less effective, some countries have implemented a more dynamic system whereby the penalties can easily be adjusted over time. One such system, called the "Penalty Unit" system, is used by some countries, including Australia,[195] Ghana,[196] and Zambia.[197]

The Penalty Unit system generally works by having a single piece of legislation define how much a "Penalty Unit" is equivalent to. A central authority regularly reviews and adjusts the amount of the Penalty Unit to ensure it accounts for inflation, such as by adjusting it according to the Consumer Price Index. Once the amount of a Penalty Unit is set, many different pieces of legislation with enforcement provisions can then refer to this central definition of a Penalty Unit when prescribing penalties by stating how many Penalty Units are assigned to each offence.

For example, from 1 July 2023 to 30 June 2024, the value of one Penalty Unit in Victoria, Australia, is defined as AUD $192.31.[198] If a law states that a certain offence may attract a penalty of five Penalty Units, the penalty would be (5 x 192.31) = AUD $961.55. The value

[195] Parliament of Australia, *Crimes Amendment (Penalty Unit) Bill 2017,* Bill Digest no. 82, 2016-2017. Available online: https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd1617a/17bd082
[196] Ghana, *Fines (Penalty Units) Act, 2000*, Act 572. Available online: https://lawsghana.com/post-1992-legislation/table-of-content/Acts%200f%20Parliament/FINES%20(PENALTY%20UNITS)%20ACT,%202000%20(ACT%20572)/50
[197] Zambia, *Fees and Fines Act*, *1994,* Chapter 45. Available online: https://zambialii.org/akn/zm/act/1994/13/eng@1996-12-31
[198] Victoria Government Gazette, No. S 256 (23 May 2023). Available online: http://www.gazette.vic.gov.au/gazette/Gazettes2023/GG2023S256.pdf

of the Penalty Unit in Victoria will then be reviewed in 2024 to ensure it aligns with the current economic state of affairs.

By using the Penalty Unit system, governments do not have to continually and regularly expend significant legislative resources to ensure penalties are updated and reflective of the current economic situation in a country. Instead, they can quickly amend the amount of the Penalty Unit whenever penalties are no longer sufficiently deterrent due to their magnitude.

Further, some countries, such as Zambia, converted their previous fixed penalty systems to a Penalty Unit system through a single piece of legislation. In Zambia's *Fees and Fines Act,* section 7 states that, where any provision in an Act prescribes a monetary penalty in the national currency (Kwacha), that penalty shall be converted to a Penalty Unit value according to section 8.[199] Section 8 states that, where a penalty is expressed in Kwacha, the Penalty Unit amount for that offense shall be determined by multiplying the amount of Kwacha stated in the Act by a multiplier number set out in Schedule 1, then divided by 100 and rounded to the next highest whole number:

Year in which fine or rate of fine was prescribed or last varied	**Multiplier number**
1970 or earlier	1500
1971-1975	1000
1976-1980	500
1981-1985	250
1986	125
1987	75
1988	50
1989	25
1990	15
1991	8
1992	4
1993	2
1994	1

For example, if an Act in Zambia was last amended in 1988 and contained a penalty of 10 Kwacha for an offense, the multiplier is 50 so the amount of Penalty Units would become (10 x 50) / 100 = 5 penalty units. Section 6 of the same Act sets the current rate of the Penalty Unit at 180 Kwacha, meaning the offender would pay (5 x 180) = 900 Kwacha.

[199] Zambia, *Fees and Fines Act,* (chapter 45 of 1994, rev. 2013). Available online: https://zambialii.org/akn/zm/act/1994/13/eng@1996-12-31

2. Standard Scale System

The Penalty Unit approach is also similar to the "Standard Scale" system used in the United Kingdom and some other Commonwealth countries. In the "Standard Scale" system, monetary penalties are set against levels in an established scale. For example, a Scale 1 penalty for summary offences using the standard scale in the United Kingdom is listed as a maximum fine of GBP200 while a Scale 4 penalty is a maximum fine of GBP2500 for offences committed on or after 12 March 2015.[200] The current scale under the Sentencing Act 2020 has the following maximum penalties:

Level on Scale	Offence committed on or after 11 April 1983 and before 1 May 1984	Offence committed on or after 1 May 1984 and before 1 October 1992	Offence committed on or after 1 October 1992 and before 12 March 2015	Offence committed on or after 12 March 2015
1	£25	£50	£200	£200
2	£50	£100	£500	£500
3	£200	£400	£1000	£1000
4	£500	£1000	£2500	£2500
5	£1000	£2000	£5000	Unlimited

The Standard Scale is used in a variety of offences in the United Kingdom, including environmental offences,[201] workplace health and safety offences,[202] and traffic offences.[203]

As with the Penalty Units system, the amounts in the Standard Scale system can be adjusted with a minor legislative amendment according to inflation, eliminating the need to instead amend all laws that contain monetary penalties.

[200] United Kingdom, *Sentencing Act 2020*, 2020 c.17 at s. 122 as amended by *Legal Aid, Sentencing and Punishment of Offenders Act 2012*, 2012 c.10 at s. 85. Available online: https://www.legislation.gov.uk/ukpga/2020/17/section/122
[201] See United Kingdom, *Clean Air Act 1993, 1993* c.11 at s.19B(7). Available online: https://www.legislation.gov.uk/ukpga/1993/11/contents
[202] See United Kingdom, *Health and Safety at Work etc. Act 1974*, 1974 c.37 at Schedule 3A. Available online: https://www.legislation.gov.uk/ukpga/1974/37/contents
[203] See United Kingdom, *Road Traffic Offenders Act 1988*, 1988 c.53 at Schedule 2. https://www.legislation.gov.uk/ukpga/1988/53/contents

3. Day Fines

Monetary penalties, when applied uniformly to a diverse population, can have varying levels of deterrent effects unless properly adjusted to fit the recipient's circumstances. This is particularly true in countries with large wealth discrepancies in the population.

For example, a speeding ticket of USD 50 may have a significant deterrent effect on an individual earning USD 500 per month but may have virtually no deterrent effect on a wealthier individual making USD 5000 per month. To address this discrepancy, some countries have embraced a system whereby some violations are administered in relation to the salary of the offender to ensure the fines remain proportionate. This system, known as the Day Fines system, is used in Finland,[204] Germany,[205] Sweden[206] and Switzerland,[207] among many other countries.[208]

In jurisdictions that use Day Fines, monetary penalties are generally calculated based on the income, wealth or financial situation of the offender. Legislation or courts will set out the number of units of a day fine that will apply to a particular offence. The amount of the Day Fine will be variable, often based off a percentage of the offender's daily income. The total fine will then be the fixed number of units of the Day Fine multiplied by the specific amount of the Day Fine for that particular person.

In Finland, the legislated amount of a Day Fine is 1/60 (one sixtieth) of an individual's monthly salary, after tax and deductions, which works out to approximately half a day of salary. The specific amount of someone's salary and the value of a Day Fine are calculated using the offender's tax information but may also be assessed using other information if tax information is not readily available.[209]

For example, an individual may make EUR 600 per month after tax and deductions. Under Finland's law, the amount of their individual Day Fine would be (EUR 600 / 60 = EUR 10). If the legislated fine for speeding while driving is 20 Day Fine units, this

[204] Finland, *Criminal Code*, Chapter 2(a), s. 1-3. Available online: https://www.finlex.fi/en/laki/kaannokset/1889/en18890039.pdf
[205] Germany, *Criminal Code*, arts. 40-43. Available online: https://www.gesetze-im-internet.de/englisch_stgb/
[206] Sweden, *Criminal Code*, Chapter 25, s.1. Available online: https://www.government.se/government-policy/judicial-system/the-swedish-criminal-code/
[207] Switzerland, *Criminal Code*, arts. 34-36. Available online: https://www.fedlex.admin.ch/eli/cc/54/757_781_799/en
[208] For a resource cataloguing European countries that use Day Fines, please see Elena Kantorowicz-Reznichekno, "Day Fines: Reviving the Idea and Reversing the (Costly) Punitive Trend", 55 American Criminal Law Review 333 (2018) at p.340. Available online: https://www.law.georgetown.edu/american-criminal-law-review/wp-content/uploads/sites/15/2018/04/55-2-Day-Fines-Reviving-the-Idea-and-Reversing-the-Costly-Punitive-Trend.pdf
[209] Finland, *Criminal Code*, Chapter 2(a), s. 2. Available online: https://www.finlex.fi/en/laki/kaannokset/1889/en18890039.pdf

individual would have to pay (EUR 10 x 20 = EUR 200). Comparatively, an individual who makes twice as much (EUR 1200 per month) would have to pay EUR 400 for the same offence. This method of calculating fines ensures that monetary penalties will continue to have a deterrent effect regardless of income of the offender and also ensures that wealthier individuals will not as easily be able to consider low monetary penalties as a "cost of doing business".

One notable difficulty when implementing the Day Fine system relates to the methods used to accurately determine the monthly or daily income of students, small business owners, non-working individuals, and individuals who work but may not receive income (such as housewives and stay-at-home mothers). This can be somewhat remedied by prescribing minimum amounts for a Day Unit. For example, the Swiss *Criminal Code* states that a Day Unit is normally between a minimum of 30 and a maximum of 3000 CHF. However, the *Criminal Code* also grants discretion to judges to lower the Day Unit amount to as low as CHF 10 if the offender's personal or financial circumstances so require.[210]

It is not common for jurisdictions to provide specific provisions related to addressing Day Fines among indigent groups (such as homeless people or asylum seekers). Instead, many jurisdictions will instead account for the inability of certain individuals to pay ordered fines by setting up payment plans or substituting the fines with community service. Authorities may also decide to postpone, suspend or extend payment plans based on the inability of the offender to pay the ordered fine.[211]

Other countries, such as Germany, expressly provide for the ability to imprison an individual for non-payment of a Day Fine. The *German Criminal Code* notes that a Day Fine that cannot be recovered is to be substituted for imprisonment at a rate of one day of imprisonment per unit of Day Fine ordered, with a minimum default imprisonment of one day.[212]

Further, without an effective system of income-reporting in a country, it may be difficult to reliably ascertain the daily or monthly earnings of an individual. Countries must have (or be able to obtain) reliable data on the incomes of all individuals, as well as ways of verifying whether information provided by offenders is accurate. This can require complicated infrastructure with extensive record-keeping capabilities. However, if these hurdles can be overcome, Day Fines are an effective way that some governments use to ensure their penal system remains consistent with inflation, fluctuating currency values and changing wealth demographics in a country.

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[210] Switzerland, *Criminal Code*, art. 34(2). Available online: https://www.fedlex.admin.ch/eli/cc/54/757_781_799/en

[211] Fair Trials, "Day Fines Systems: Lessons from Global Practice" (June 2020). Available online: https://www.fairtrials.org/articles/publications/day-fines-systems-lessons-from-global-practice/

[212] Germany, *Criminal Code*, art.43. Available online: https://www.gesetze-im-internet.de/englisch_stgb/

I. Challenges to Administering Non-custodial Measures

Although the benefits of non-custodial measures are clear, there may be some societal or administrative challenges to establishing a system that effectively utilizes these measures in Iraq. Common challenges to effectively implementing a system of non-custodial measures may include the following:

Public perception: One prominent challenge associated with implementing a system of non-custodial measures relates to whether the public will have confidence in the effectiveness of those measures. The public may believe that non-custodial measures are too lenient on the offender, that such measures are "soft on crime" or may feel that the public is not adequately protected if they perceive offenders to be just "walking free" from prison. The public may also arrive at incorrect conclusions in relation to the nature of non-custodial sentences, such as by believing they will be used for all offenders, including those who have committed serious or dangerous crimes.

The media is often complicit in shaping public support for non-custodial sentences by portraying non-custodial sentences as lenient on offenders. Media is commonly recognized as being a vital aspect of whether the public accepts non-custodial measures as effective.[213] Reporting on sentences may be sensationalized or inaccurate and the public may rely on these reports to arrive at their own conclusions of the effectiveness of non-custodial measures.

Legislators and policymakers may consider a public awareness campaign with media outlets to ensure that the public understands the purpose of non-custodial measures, how these measures are assigned, what crimes would be eligible and who may be ordered to complete such measures. Policy makers may also consider conducting regular surveys to gauge public support for non-custodial measures and could regularly share sentencing principles, guidelines and data on sentencing trends with the public and media to ensure there is a widespread clear understanding of the rationale for using non-custodial measures.

Sensitizing those in the justice system: In addition to reluctance from the public about the effectiveness of non-custodial measures, many judges, prosecutors or police may be equally reluctant to advocate for these measures. Justice system officials may be wary about being viewed as "soft on crime" or may

[213] United Kingdom Parliament, *Public Opinion and Understanding of Sentencing: Tenth Report of Session 2022-23,* (25 October 2023) at pp.48-52. Available online: https://publications.parliament.uk/pa/cm5803/cmselect/cmjust/305/report.html

not even be aware of the range of sentencing options that could be available to them under a new law.

Further, the effective use of non-custodial measures also requires understanding which measures may be suitable for a particular offender and which may not be suitable. When justice system officials are determining which non-custodial measures are suitable, they should consider the ability of the offender to complete the sentence, the risk that the offender will reoffend if placed back in the community, and the relative trust of the public that the measures will be effective.

Many countries that effectively use non-custodial measures gave trainings to the judiciary, prosecution and police to ensure community sentences are properly administered. In Zimbabwe, upon development of the community service scheme, a National Committee held a series of regional training events around the country to raise awareness and train judges and others in the justice system on the topic of community service. These trainings were accompanied by guidelines on sentencing and forms that were designed for courts to monitor the performance of offenders in the community service scheme.[214]

In addition to trainings, developing clear guidelines that state which offences are eligible for non-custodial measures and which are not may also assist justice system officials in carefully considering the suitability of different measures in different cases.

Effort should also be made to move the decision-makers in the justice system away from presumptively using prison as an immediate response to crime. To ensure widespread use of non-custodial measures, prison must be viewed as an option of last resort reserved for the worst offenders.

Necessary infrastructure: Although some non-custodial measures, such as suspended sentences, may not require any administrative infrastructure to implement, other measures may require extensive infrastructure. For example, if the intention is to use a probation program in place of imprisonment, authorities should ensure that an administrative system to implement and monitor the program is set up and functional before probation orders are issued. This may require hiring and training probation officers and social support staff to ensure the terms of any probation are adhered to.

[214] Penal Reform International and the Zimbabwe National Committee on Community Service, "Community Service in Practice", (1997) All Africa Conference on Community Service at p.10. Available online: https://www.penalreform.org/resource/community-service-practice/

If non-custodial measures are ordered before there is a sufficient system in place to ensure their success, the measures may not be successful in rehabilitating the offender or protecting the public. This can ultimately undermine the confidence of the public and justice system in the effectiveness of non-custodial measures.

Legislators should carefully consider the feasibility of all proposed forms of non-custodial measures, including by assessing whether administrative infrastructure will be necessary and whether there are sufficient resources allocated to ensure long-term sustainability of that administrative infrastructure. If certain measures are included in legislation, there should be corresponding provisions, subsidiary legislation or policy setting out exactly how those measures could be administered.

Ultimately, implementing an effective system of non-custodial measures requires a whole-of-society approach to how these measures are used and perceived. An effective system cannot end with the development of legislation permitting non-custodial measures. As many of these measures require the support of the community to ensure the offender is properly reintegrated through non-custodial measures, there should be consistent and clear engagement with the public, media and actors in the justice system to ensure these measures are effective.

II. CONCLUSION

When legislating on the topic of non-custodial measures, there is an abundance of information on types of measures available, factors that can contribute to success and possible barriers to implementation of any program. Legislators and decision-makers in Iraq should consider the wealth of information globally available as a starting point when legislating on the topic.

Legislators and authorities must also recognize that any reduction in prison population from using non-custodial measures may only occur after several years, depending on the prison terms of those already incarcerated and the degree to which non-custodial measures are used at the outset of any program. A lack of immediate reduction in prison numbers should not be used as evidence that non-custodial measures are ineffective. When assessing the success of a program of non-custodial measures, authorities should take a holistic approach, assessing rates of recidivism, community integration, human rights conditions and any other factors that are relevant.

Importantly, legislators must take into consideration the cultural and social aspects of Iraqi society in determining which non-custodial measures may be right for Iraq, realizing that a successful system of non-custodial measures must reflect community norms and practices. Just as the United Kingdom takes a different approach than Zimbabwe, so too should Iraqi legislators consider what approach would best serve their own country while

ensuring alignment with human rights norms, protecting the public and reducing reoffending.

III. About the Institute for International Law and Human Rights

The Institute for International Law and Human Rights (known as IILHR) is a non-profit charity registered in Washington, D.C., Belgium, and Iraq. IILHR helps states in the early stages of democracy develop the capacity to strengthen the rule of law and build respect for human rights. With a staff of diplomats, parliamentarians, human rights activists, jurists, and attorneys, IILHR has a strong track record of implementing successful programs that help local partners strengthen support for human rights and the rule of law.

IILHR has been a strong, supportive presence in Iraq since July 2005. It collaboratively engages with leaders of both the Iraqi government and civil society to strengthen approaches to human rights issues by a) developing draft legislation; b) working to enact that legislation; c) helping local partners in and out of government to develop the capacity to advocate about specific issues as well as to assess, develop and draft legislation; and d) building consensus on priorities, tactics and strategies for achieving stronger systems of law and human rights protection. IILHR partners with leading civil society leaders, jurists, academics, legislators and policy makers to ensure that its work is built on a foundation of Iraqi jurisprudence and practice.

Examples of IILHR's work include extensive participation in drafting more than 100 different analyses of legislative and constitutional issues. IILHR has also provided commentary on approaches to a broad spectrum of issues, including Constitutional Review, Gender Law, Iraq's Human Rights Commission, Social Safety Net development, Freedom of Expression and Information, Accountability, Transitional Justice, and Minority Rights. IILHR also works closely with Iraq's judiciary and executive branch.

For more information, please contact:

- *Benjamin Ojoleck, Legal Advisor: bojoleck@lawandhumanrights.org , +964 785 4270 517*
- *Najim Al Khaphaji, Senior Advisor: nalkhaphaji@lawandhumanights.org, +964 790 128 010*

Annex I
Canada Criminal Code[215]

Provisions related to Alternative Enforcement Measures

When alternative measures may be used

- **717 (1)** Alternative measures may be used to deal with a person alleged to have committed an offence only if it is not inconsistent with the protection of society and the following conditions are met:
    - **(a)** the measures are part of a program of alternative measures authorized by the Attorney General or the Attorney General's delegate or authorized by a person, or a person within a class of persons, designated by the lieutenant governor in council of a province;
    - **(b)** the person who is considering whether to use the measures is satisfied that they would be appropriate, having regard to the needs of the person alleged to have committed the offence and the interests of society and of the victim;
    - **(c)** the person, having been informed of the alternative measures, fully and freely consents to participate therein;
    - **(d)** the person has, before consenting to participate in the alternative measures, been advised of the right to be represented by counsel;
    - **(e)** the person accepts responsibility for the act or omission that forms the basis of the offence that the person is alleged to have committed;
    - **(f)** there is, in the opinion of the Attorney General or the Attorney General's agent, sufficient evidence to proceed with the prosecution of the offence; and
    - **(g)** the prosecution of the offence is not in any way barred at law.
- **Restriction on use**

  (2) Alternative measures shall not be used to deal with a person alleged to have committed an offence if the person
    - **(a)** denies participation or involvement in the commission of the offence; or

[215] Canada, *Criminal Code* (RSC 1985, c. C-46) at s.717. Available online: https://laws-lois.justice.gc.ca/eng/acts/C-46/

- **(b)** expresses the wish to have any charge against the person dealt with by the court.

- **Admissions not admissible in evidence**

  (3) No admission, confession or statement accepting responsibility for a given act or omission made by a person alleged to have committed an offence as a condition of the person being dealt with by alternative measures is admissible in evidence against that person in any civil or criminal proceedings.

- **No bar to proceedings**

  (4) The use of alternative measures in respect of a person alleged to have committed an offence is not a bar to proceedings against the person under this Act, but, if a charge is laid against that person in respect of that offence,

  - **(a)** where the court is satisfied on a balance of probabilities that the person has totally complied with the terms and conditions of the alternative measures, the court shall dismiss the charge; and

  - **(b)** where the court is satisfied on a balance of probabilities that the person has partially complied with the terms and conditions of the alternative measures, the court may dismiss the charge if, in the opinion of the court, the prosecution of the charge would be unfair, having regard to the circumstances and that person's performance with respect to the alternative measures.

- **Laying of information, etc.**

  (5) Subject to subsection (4), nothing in this section shall be construed as preventing any person from laying an information, obtaining the issue or confirmation of any process, or proceeding with the prosecution of any offence, in accordance with law.

Annex II
Zimbabwe: Critical factors for success[216]

The Zimbabwe National Committee on Community Service has established a list of twelve essential conditions for the success of a Community Service scheme:

1. Political willingness to have and actively support a Community Service scheme.

2. Involvement and co-operation of all relevant ministries at a high level, particularly the ministries concerned with Social Welfare, Local Government, Home Affairs and Justice.

3. Complete autonomy of the Committees, free from Government constraints and controls. In Zimbabwe, this was achievable because the ZNCCS (Zimbabwe National Committee on Community Service) was judicially driven and fully trusted by the government.

4. Control by the National Committee on Community Service of finance, assets, staff and implementation of the scheme and the prerogative to issue guidelines and set up administrative controls.

5. A reasonably efficient and responsive court structure countrywide and the commitment of provincial and resident magistrates countrywide to actively promote the system (despite their already heavy workload).

6. Ability to form district committees nation-wide amalgamating governmental and nongovernmental organizations all on a voluntary basis with a willingness and ability to implement the central policies.

7. Involvement of Supreme Court and High Court in encouraging the system i.e. agreement of Supreme Court and High Court as to the grid and guidelines plus constant issue of review judgements by High Court for guidance of magistrates.

8. Willingness of heads of institutions to participate in the scheme and properly supervise offenders placed at their institutions.

9. Commitment of the Executive Committee to ensure that all funds are honestly expended on the programme.

10. Co-operation between government and non-governmental organizations.

[216] Penal Reform International and the Zimbabwe National Committee on Community Service, "Community Service in Practice", (1997) All Africa Conference on Community Service at p.13. Available online: https://www.penalreform.org/resource/community-service-practice/

11. Effective control of employment contracts of staff engaged in the scheme by National Committee on Community Service thereby avoiding government bureaucracy.

12. Effective use of the media in providing positive publicity at appropriate and opportune times.

Annex III
Other Useful Sources on Non-Custodial Measures

Source	Location
Penal Reform International, *Global Prison Trends 2020 – Alternatives to Imprisonment*, 2020.	English: https://www.penalreform.org/resource/global-prison-trends-2020/
United Nations Office on Drugs and Crime, *Technical Assistance Handbook on Appropriate Uses of Non-Custodial Measures for Terrorism-Related Offences*, 2021	Arabic: https://www.unodc.org/pdf/terrorism/UNODC_Technical_Assistance_Handbook_-_Electronic_AR.pdf English: https://www.unodc.org/pdf/terrorism/UNODC_Technical_Assistance_Handbook_-_Electronic_ENG.pdf
United Nations Office on Drugs and Crime, *Handbook of Basic Principles and Promising Practices on Alternatives to Imprisonment*, 2007	English: https://www.unodc.org/documents/justice-and-prison-reform/crimeprevention/Handbook_of_basic_principles_and_promising_practices_on_Alternatives_to_Imprisonment.pdf
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