
.....Chapter 9

THE USE OF

NON-CUSTODIAL

MEASURES IN THE

ADMINISTRATION

OF JUSTICE

Learning Objectives

- *To familiarize participants with the existing international standards that promote the use of non-custodial measures;*
- *To explain the aim of non-custodial measures and their use at the various stages of the administration of justice;*
- *To help participants identify what kinds of non-custodial measures may be useful within the context of their professional responsibilities;*
- *To acquaint participants with the legal protection linked to the use of non-custodial measures;*
- *To familiarize participants with the consequences of non-compliance with the dispositions of non-custodial measures.*

Questions

- *What alternatives to imprisonment exist in the country where you work, and in regard to what kinds of criminal offences?*
- *Have you, in your role as a judge, prosecutor or lawyer, advised or resorted to the use of non-custodial measures?*
- *In what situations do you think that it would be particularly useful to do so?*
- *Are there special groups of people that are more likely to benefit from the use of non-custodial measures than others?*

Questions (cont.d)

- If so, identify these groups and explain why they are more likely to benefit from alternatives to imprisonment.
- What legal safeguards exist in the country where you work with regard to the use of non-custodial measures?
- What are the sanctions for violations of the conditions attached to non-custodial measures in the country where you work?

Relevant Legal Instruments

- United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules), 1990
- United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), 1985
- Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985

1. Introduction

The question of punishment for overstepping legal boundaries is a subject of continuing interest. Although not the most frequently used penal sanction, imprisonment of offenders remains a common punishment for crime, which is authorized by international human rights law to the extent that it is imposed following a trial respecting due process of law and does not amount to treatment prohibited by human rights standards as being, in particular, clearly disproportionate to the criminal offence committed.

While imprisonment is necessary in many cases involving violent offenders, it does not constitute a panacea with regard either to crime prevention or to the social reintegration of offenders. Moreover, in many countries the prison system faces major challenges because of overcrowded and outdated facilities, with the result that prisoners often find themselves in deplorable conditions of detention that can have adverse effects on their physical and mental health and impede their educational and vocational training, thereby also affecting their chances of future adjustment to an ordinary life in the community. The impact of long-term imprisonment on a person's family and work life is also considerable.

The most commonly applied penal sanctions are of *a non-custodial nature*, and it is the use of these sanctions that will be dealt with in this chapter. As scepticism has grown with regard to the effectiveness of imprisonment, experts have tried to develop other useful measures to help offenders while keeping them in the community, and one goal of the United Nations Standard Minimum Rules for Non-custodial Measures (hereinafter referred to as the Tokyo Rules) is to emphasize the importance of such measures.¹ The present chapter will primarily be based on the Tokyo Rules and the *Commentary thereto*, although reference will also occasionally be made to the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) and the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. The Beijing Rules will however be considered in greater depth in Chapter 10, on "The Rights of the Child in the Administration of Justice".

1.1 The purpose of non-custodial measures and the Tokyo Rules

As intimated above, *the purpose of non-custodial measures in general, and the Tokyo Rules in particular, is to find effective alternatives to imprisonment for offenders and to enable the authorities to adjust penal sanctions to the needs of the individual offender in a manner proportionate to the offence committed*. The advantages of individualizing sentencing in this way are evident, given that it permits the offender to remain at liberty, thereby also enabling him or her to continue work, studies and family life.²

¹See UN doc. ST/CSDHA/22, *Commentary on the United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules)* (hereinafter referred to as *Commentary*), p. 2.

²Ibid., loc. cit.

As will be seen below, non-custodial measures can, however, be subjected to conditions and restrictions, the violation of which may in serious cases lead to imprisonment. Yet in order to safeguard human rights and human dignity, standards must be set for the imposition and implementation of any restrictions and conditions, and one of the major purposes of the Tokyo Rules is precisely to try to define these standards, which must be considered to be the *minimum standards* aimed at promoting “efforts to overcome practical difficulties in the application of such measures”. Consequently, the Rules are not intended to be read as a detailed model for a system of non-custodial measures, but simply as setting out “what are generally accepted as good principles and current good practice” in this area.³

Following an explanation of some of the basic terms used, this chapter will consider the general principles of the Tokyo Rules, the legal safeguards, the options for non-custodial measures at the various stages of the administration of justice, and the implementation of these measures. Lastly, brief reference will be made to the role of the legal professions in choosing alternatives to imprisonment.

2. Terminology

2.1 The term “non-custodial measures”

For the purposes of this chapter, the concept of “non-custodial measures” means any decision made by a competent authority to submit a person suspected of, accused of or sentenced for an offence to certain conditions and obligations that do not include imprisonment; such decision can be made at any stage of the administration of criminal justice (Rule 2.1).⁴

2.2 The term “offender”

According to Rule 2.1, the Tokyo Rules “shall be applied to all persons subject to prosecution, trial or the execution of a sentence, at all stages of the administration of criminal justice”, and “these persons are referred to as ‘offenders’, irrespective of whether they are suspected, accused or sentenced”. Consequently, the term “offender” is used in a generic sense, without detracting from the presumption of innocence.

³Ibid., p. 3.

⁴Ibid., loc. cit.

2.3 The term “competent authority”

The term “competent authority” means a member of the judiciary, a prosecutor or a body that is empowered by law to make decisions about the imposition or implementation of a non-custodial measure.⁵

3. General Principles Relating to Non-custodial Measures

Rules 1 to 4 of the Tokyo Rules lay down in some detail the general principles guiding recourse to non-custodial measures as alternatives to imprisonment, and, apart from the saving clause in Rule 4, these principles describe the fundamental aims, the scope, and the legal safeguards of non-custodial measures. This section will highlight the most salient aspects of these general principles.

3.1 The fundamental aims of non-custodial measures

According to Rule 1.1, the two fundamental purposes of the Tokyo Rules are to provide:

- ❖ “a set of basic principles to promote the use of non-custodial measures”; and
- ❖ “minimum safeguards for persons subject to alternatives to imprisonment”.

The Tokyo Rules thus begin by establishing an important balance between their two fundamental purposes in that they simultaneously encourage recourse to non-custodial measures and aim at guaranteeing a just application thereof based on respect for the human rights of the offenders; such guarantees are required in order to prevent disproportionate recourse to control measures.⁶

According to the *Commentary* to the Tokyo Rules, non-custodial measures are of “considerable potential value for offenders, as well as for the community”, and can be an appropriate sanction for a whole range of offences and many types of offenders, and in particular for those who are not likely to repeat offences, those convicted of minor crimes and those needing medical, psychiatric or social help.⁷ In these cases, imprisonment cannot be considered an appropriate sanction, since it severs community ties and hinders reintegration into society and thereby also reduces offenders’ sense of responsibility and their ability to make their own decisions.⁸ On the other hand, non-custodial measures have the unique characteristic of making it possible to exercise control over an offender’s behaviour while allowing it to evolve under natural circumstances.⁹

⁵Ibid.

⁶Ibid., p. 5.

⁷Ibid., loc. cit.

⁸Ibid., p. 6.

⁹Ibid., loc. cit.

Consequently, the use of non-custodial measures also diminishes social costs, given that the administration of criminal justice imposes a very heavy financial burden on States. Since not only the individual offender, but also society as a whole, benefit from the use of non-custodial measures, this positive potential should encourage community involvement in their implementation.¹⁰

Next, Rule 1.2 describes the further aim of promoting both “greater community involvement in the management of criminal justice, specifically in the treatment of offenders, as well as ... a sense of responsibility towards society” among offenders. Involvement of the community is essential in reintegrating the offender into society and may reduce the risk of stigmatization.¹¹

According to Rule 1.3, the Tokyo Rules “shall be implemented taking into account the political, economic, social and cultural conditions of each country and the aims and objectives of its criminal justice system”. Consequently, the Rules are not intended to describe a model system of non-custodial measures, and such a task would in any event be precluded by the variety of criminal justice systems throughout the world; the intention is rather that this diversity should allow for a fruitful exchange of ideas about methods and developments.¹²

Mindful of the objectives of a criminal justice system and the balance that has to be struck between the different individual interests, Rule 1.4 provides that “when implementing the Rules, Member States shall endeavour to ensure a proper balance between the rights of individual offenders, the rights of victims, and the concern of society for public safety and crime prevention”. *While emphasizing the promotion of non-custodial measures and the application of individualized penal sanctions, the Tokyo Rules consequently also fully support the general aim of the criminal justice system, which is to reduce crime and the need to recognize the important role of the victims of crime.*¹³

Lastly, according to Rule 1.5,

“Member States shall develop non-custodial measures within their legal systems to provide other options, thus reducing the use of imprisonment, and to rationalize criminal justice policies, taking into account the observance of human rights, the requirements of social justice and the rehabilitation needs of the offender.”

According to the *Commentary*, the reference to “the observance of human rights, the requirements of social justice and the rehabilitation needs of the offender” means, *inter alia*, that, while the Tokyo Rules aim at guaranteeing more frequent use of non-custodial measures, such use should not lead to an increase in the number of people subject to penal measures or to an increase in the intensity of such measures; by emphasizing the observance of human rights, the Tokyo Rules seek to avoid the abuse of discretion in the implementation of non-custodial measures.¹⁴

¹⁰Ibid.

¹¹Ibid.

¹²Ibid.

¹³Ibid.

¹⁴Ibid., p. 7.

The primary purpose of non-custodial alternatives to imprisonment is to enable penal sanctions to be individualized to the needs of the offender, thereby making the sanctions more effective. Non-custodial measures are also less expensive for society in general than deprivation of liberty.

Individualized penal sanctions involving non-custodial measures must be considered in the light of the general aim of the criminal justice system, which is to reduce crime, and the need to recognize the needs and interests of the victims of crime.

The use of non-custodial measures must respect internationally recognized human rights.

3.2 The scope of non-custodial measures

3.2.1 The general scope of non-custodial measures

As noted in subsection 2.2 above, the Tokyo Rules are applicable to “all persons subject to prosecution, trial or the execution of a sentence” (Rule 2.1). They can thus apply either to measures imposed on a convicted person as a penalty for an offence, or to suspects and defendants before their trial. Lastly, they cover measures which allow some part of a prison sentence to be served in the community and measures that reduce the length of imprisonment and substitute for it some form of supervision.¹⁵ The use of non-custodial measures instead of pre-trial detention is particularly to be encouraged, since pre-trial custody should be an exceptional measure in view of the suspect’s right to be presumed innocent.¹⁶

3.2.2 The prohibition of discrimination

According to Rule 2.2, the Tokyo Rules “shall be applied without any discrimination on the grounds of race, colour, sex, age, language, religion, political or other opinion, national or social origin, property, birth or other status”. As shown in this Manual, the prohibition on discrimination conditions the application of all aspects of international human rights law. It is therefore fully logical that non-custodial measures too must be resorted to in a non-discriminatory manner.

However, not all differences in treatment can be considered to be discriminatory, and, as held by the Human Rights Committee under article 26 of the International Covenant on Civil and Political Rights, “differentiation based on reasonable and objective criteria does not amount to prohibited discrimination” within the meaning of that article.¹⁷

¹⁵Ibid., p. 8.

¹⁶Ibid., loc. cit. and cf. Chapter 5 on “Human Rights and Arrest, Pre-trial and Administrative Detention”.

¹⁷See e.g. Communication No. 172/1984, *S. W. M. Broeks v. the Netherlands* (Views adopted on 9 April 1987), GAOR, A/42/40, p. 150, para. 13.

Having regard to the fact that one of the great advantages of non-custodial measures is the possibility to adjust them to the needs of the individual offender, the element of discretion involved in the decision-making may increase the risk of discrimination against a person or group. Implementation of the measures may of course also reflect any discrimination currently being practised in that community.¹⁸ For example, it could prove more difficult to find training opportunities or work placements for members of ethnic minorities or even for women undergoing non-custodial measures.¹⁹ In spite of these problems, equality of treatment in the application of non-custodial measures **must** be ensured.

On the other hand, and as pointed out above, the prohibition on discrimination does not mean that all differences in treatment are prohibited, **but only those that have no reasonable and objective justification**. It may in fact be quite reasonable and justified objectively to treat persons differently in view of their particular background and personal needs and problems.²⁰

It may also be necessary to consider the religious beliefs and moral precepts of the groups to which the offender belongs.²¹ Furthermore, there are certain groups of people, such as children, women, elderly people and people with mental health problems, on whom imprisonment may have a particularly damaging effect, and it may therefore be not only desirable but even necessary to make certain distinctions between offenders in order to meet their special needs.²²

3.2.3 Flexibility in application

While emphasizing the importance of “consistent sentencing”, Rule 2.3 promotes considerable flexibility in the development and use of non-custodial measures based on the following four criteria:

- ❖ “the nature and gravity of the offence”;
- ❖ “the personality and background of the offender”;
- ❖ “the protection of society”; and
- ❖ the avoidance of “unnecessary use of imprisonment”.

The non-custodial measures can be much more flexible than pre-trial detention, for instance, and this is the potential recognized by Rule 2.3.²³ However, consistency is clearly in the interests of fairness and justice and sentencing guidelines that establish the equivalencies among the various types of non-custodial measures would assist those imposing such measures.²⁴

¹⁸Commentary, pp. 8-9.

¹⁹Ibid., p. 9.

²⁰Ibid., loc. cit.

²¹Ibid.

²²Ibid.

²³Ibid.

²⁴Ibid.

In line with this flexible approach, Rule 2.4 provides that “the development of new non-custodial measures should be encouraged and closely monitored and their use systematically evaluated”. The need for regular monitoring and systematic evaluation is particularly important given the flexibility inherent in non-custodial measures and in order to ascertain whether the objectives laid down in Rule 2.3 are met.²⁵ From the viewpoint of a rational criminal justice policy, new non-custodial measures should be added only if accompanied by systematic evaluation enabling the authorities to measure their operational effectiveness.²⁶

According to Rule 2.5, furthermore, “consideration shall be given to dealing with offenders in the community avoiding as far as possible resort to formal proceedings or trial by a court, in accordance with legal safeguards and the rule of law.” This rule is consistent with Rule 2.6 of the Tokyo Rules which provides that “non-custodial measures should be used in accordance with the principle of minimum intervention”.²⁷ Whenever feasible, a trial should be avoided, both because it spares the suspect and his or her family from the negative consequences of formal sanctioning and because it eases the economic burden on society.²⁸

The flexibility inherent in non-custodial measures implies that they can be used at any stage of the proceedings.

Non-custodial measures must be applied fairly and objectively; they must not involve discrimination. Differences in treatment are lawful only if they have a reasonable and objective justification.

Authorities must ensure consistent sentencing when resorting to non-custodial measures.

Non-custodial measures should be used in accordance with the principle of minimum intervention; all excessive measures must be avoided.

When resorting to non-custodial measures, the competent authorities must consider:

- *the nature and gravity of the offence;*
- *the personality and background of the offender;*
- *the protection of society (the prevention of crime); and*
- *the avoidance of unnecessary use of imprisonment.*

²⁵Ibid.

²⁶Ibid., pp. 9-10.

²⁷Ibid., p. 10.

²⁸Ibid., loc. cit.

3.3 Legal safeguards

3.3.1 The principle of legality

The importance of respecting the human rights of persons to whom non-custodial measures may be applied is a recurring theme in the Tokyo Rules, and the reason why legal safeguards are considered to be essential. Rule 3.1 thus provides that “the introduction, definition and application of non-custodial measures shall be prescribed by law”. The requirement that non-custodial measures must be defined and applied only as “prescribed by law” is consistent with the requirement in international human rights law that “restrictions on the exercise of human rights must be laid down in pre-established legal standards of general application”;²⁹ in other words, the principle of legality must be respected whenever the State authorities take measures interfering with the enjoyment of the rights and freedoms of an individual, whether within or outside the framework of criminal proceedings.

However, with regard to the application of non-custodial measures, it is not sufficient that the law defines the measures to be applied and the conditions for their application; it must also specify which authorities are responsible for their implementation and, where authority has been delegated to third parties, such delegation should be founded in law.³⁰

3.3.2 The criteria for resorting to non-custodial measures and the need for discretion

A second important legal safeguard in the application of non-custodial measures is that, as stipulated in Rule 3.2, the selection of a non-custodial measure shall be based on an assessment of established criteria in respect of:

- ❖ the nature and gravity of the offence;
- ❖ the personality and background of the offender;
- ❖ the purposes of sentencing; and
- ❖ the rights of victims.

The Tokyo Rules thus provide a clear framework for the selection of non-custodial measures, which considers the interests of the offender, as well as those both of society in general and of the victim or victims. These criteria constitute another recurring theme in the Tokyo Rules and are also reflected in Rules 1.4 and 2.3.

In spite of these basic criteria, the nature of the imposition of non-custodial measures requires that the competent judicial or other independent authorities enjoy a considerable degree of discretion, which, however, according to Rule 3.3, “shall be exercised at all stages of the proceedings by ensuring full accountability and only in accordance with the rule of law”.

²⁹ Anna-Lena Svensson-McCarthy, *The International Law of Human Rights and States of Exception - With Special Reference to the Travaux Préparatoires and Case-Law of the International Monitoring Organs* (The Hague/Boston/London, Martinus Nijhoff Publishers), 1998, p. 721.

³⁰ *Commentary*, p. 11.

This rule applies to all decisions relating to non-custodial measures, from the original decision imposing the measure to any subsequent decision about implementation.³¹ ***The principle of legality is to be respected throughout the proceedings relating to the non-custodial measures.***

3.3.3 The requirement of consent

The requirement of consent of the offender to the imposition of non-custodial measures is an important precondition for its success, and, according to Rule 3.4, such consent is obligatory with regard to non-custodial measures “applied before or instead of formal proceedings or trial”. Consequently, the requirement of consent is a particular safeguard relating to persons accused but not yet tried or convicted.³² The *Commentary* explains that it is essential that the suspect or accused person consents to the non-custodial measure because, where it is imposed instead of formal proceedings, consent to it can lead to the renunciation of the legal safeguards that would exist if the case were proceeded with.³³

Furthermore, the accused should be informed about the potential consequences of refusing to consent to non-custodial measures, and any indirect pressure on the accused to consent to the measures should be avoided.³⁴ Lastly, a refusal to consent to the imposition of a non-custodial measure should not adversely affect the accused’s position in any way.³⁵

The requirement of consent to diversionary measures is also contained in Rule 11.3 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules). In that context, it is either “the juvenile, or her or his parents or guardian” who must give consent to the recommended diversionary measure (see further Chapter 10, subsection 10.3).

3.3.4 The right to review

Rule 3.5 stipulates that “decisions on the imposition of non-custodial measures shall be subject to review by a judicial or other competent independent authority, upon application by the offender”. This right of appeal is an additional safeguard against arbitrary decisions. In order for this safeguard to be truly effective, the offender must be informed of this right. In this respect, the *Commentary* advises that, at the time of the imposition of the measure, the offender and, where appropriate, his or her legal representative be given a document explaining the details of the review procedure, including information on the competent body and how to contact it.³⁶ The offender should have the right to appear in person or to have access to some other way of being heard by the review body. The review itself should be speedy.³⁷

³¹Ibid., p. 12.

³²Ibid., loc. cit.

³³Ibid.

³⁴Ibid.

³⁵Ibid.

³⁶Ibid.

³⁷Ibid.

The right to appeal does not only concern the initial non-custodial measure: Rule 3.6 also guarantees the offender the right “to make a request or complaint to a judicial or other competent independent authority on matters affecting his or her individual rights *in the implementation of non-custodial measures*” (emphasis added). Even after the offender has accepted the imposition of a non-custodial measure, he or she may need to seek recourse to complain about unfair or arbitrary implementation that violates his or her human rights and fundamental freedoms.³⁸

The body hearing the complaints should be *independent* of the authority implementing the measure, and should be a court, a review board or an ombudsman empowered to investigate. Here too, it is essential that the offender and his or her legal representative be informed in clear and simple terms of the existence of this entitlement and how it can be exercised.³⁹ Investigation should be speedy and the results communicated to the offender in terms that he or she can understand.⁴⁰

Lastly, Rule 3.7 provides that

“Appropriate machinery shall be provided for the recourse and, if possible, redress of any grievance related to non-compliance with internationally recognized human rights.”

This rule obliges States to set up an adequate complaints procedure to ensure that Rules 3.5 and 3.6 are duly implemented and that the legal machinery provides for the possibility of redress for any violation of international human rights obligations that may have been caused by the imposition and/or implementation of non-custodial measures. This provision is simply an expression of States’ duty under general international human rights law to remedy any violation of individual rights and freedoms for which they have been found responsible.

The right of appeal against diversionary measures is also guaranteed by Rule 11.3 of the Beijing Rules with regard to juvenile offenders (see Chapter 10, subsection 10.3).

3.3.5 Restrictions on the imposition of non-custodial measures

First, Rule 3.8 prohibits non-custodial measures involving “medical or psychological experimentation on, or undue risk of physical or mental injury to, the offender”. In any event, non-custodial measures may not, of course, violate the legally binding rules existing in international human rights law, such as the right to freedom from inhuman or degrading treatment or punishment (cf. *inter alia* art. 7 of the International Covenant on Civil and Political Rights and the saving clause contained in Rule 4.1 of the Tokyo Rules).

It is important to stress that the search for new non-custodial measures, which is encouraged in Rule 2.4 of the Tokyo Rules, must be seen in the light of Rule 3.8, since it is essential that offenders not be used as guinea-pigs.⁴¹ The implementation and

³⁸Ibid.

³⁹Ibid.

⁴⁰Ibid., pp. 12-13.

⁴¹Ibid., p. 13.

development of non-custodial measures must, in other words, always respect the rights and freedoms of the offenders, a requirement underlined by Rule 3.9, according to which “the dignity of the offender subject to non-custodial measures shall be protected at all times.”

Second, “in the implementation of non-custodial measures, the offender’s rights shall not be restricted further than was authorized by the competent authority that rendered the original decision” (Rule 3.10). This is a rule based on the principle of legality: any interference with a person’s rights must be based on law, and no further restrictions can be imposed without a decision taken by a duly authorized authority acting in accordance with the law.

Third, “in the application of non-custodial measures, the offender’s right to privacy shall be respected, as shall be the right to privacy of the offender’s family” (Rule 3.11). In this respect the *Commentary* advises against the use of methods of surveillance that treat offenders solely as objects of control; further, surveillance techniques should not be used without the offenders’ knowledge, and persons other than properly accredited volunteers should not be employed for the surveillance of offenders.⁴² Such measures could of course jeopardize the dignity of the offender, which must be guaranteed at all times.

Lastly, the right to dignity and the right to respect for the offender’s privacy are also protected by Rule 3.12, according to which “the offender’s personal records shall be kept strictly confidential and closed to third parties. Access to such records shall be limited to persons directly concerned with the disposition of the offender’s case or to other duly authorized persons.” Offenders and their families are entitled to know that personal information about them will not be made public and will not be used to hinder their chances of social reintegration. It is therefore also important to keep the records in a safe place, and consideration should be given to the desirability of destroying them after a reasonable period.⁴³

The principle of legality must be fully respected in employing non-custodial measures, i.e., recourse to and implementation of such measures must be in accordance with the law.

Non-custodial measures must be based on the following criteria:

- *the nature and gravity of the offence;*
- *the personality and background of the offender;*
- *the purposes of sentencing; and*
- *the right of victims.*

The use of non-custodial measures requires the consent of the offender when applied before or instead of formal proceedings or trial.

The offender has a right to request a review by a judicial or other competent and independent authority of the non-custodial measures imposed.

⁴²Ibid., loc. cit.

⁴³Ibid., p. 14.

The dignity of an offender subjected to non-custodial measures must be respected at all times, as must his or her other rights and freedoms.

The non-custodial measure must not restrict the offender's rights further than was authorized by the original decision.

The right to privacy of the offender and his or her family must be guaranteed throughout the implementation of the non-custodial measures.

4. Non-custodial Options at the Different Stages of the Judicial Process

As explained above, non-custodial measures can be resorted to at any stage of the judicial proceedings, whether at the pre-trial, trial and sentencing or post-sentencing stages. They therefore constitute important and flexible tools in choosing the sanctions most likely to have a beneficial impact on the offender in the form of his or her reintegration into the community as a law-abiding citizen.

4.1 Non-custodial measures at the pre-trial stage

The possibility of resorting to non-custodial measures at the pre-trial stage is regulated in the following terms by Rule 5.1 of the Tokyo Rules:

“Where appropriate and compatible with the legal system, the police, the prosecution service or other agencies dealing with criminal cases should be empowered to discharge the offender if they consider that it is not necessary to proceed with the case for the protection of society, crime prevention or the promotion of respect for the law and the rights of victims. For the purpose of deciding upon the appropriateness of discharge or determination of proceedings, a set of established criteria shall be developed within each legal system. For minor cases the prosecutor may impose suitable non-custodial measures, as appropriate.”

Discharging the offender even before formal action has been taken is the earliest possible non-custodial measure in the pre-trial stage, but, as is seen in Rule 5.1, it is conditioned by

- ❖ the protection of society;
- ❖ crime prevention;
- ❖ the promotion of respect for the law; and
- ❖ the rights of victims.

Consequently, the individual interest the offender may have in agreeing to the conditions to be imposed must in all cases be weighed against these four other interests which are of a general nature, going to the heart of society's values as reflected in the criminal law of the State concerned. Whenever the four general interests outweigh the offender's personal interest in having the proceedings dismissed, he or she will have to face the relevant proceedings.

Whether or not formally recognized, discharge is frequently used in many legal systems as an effective means of dealing with certain categories of offence and types of offender in accordance with the *principle of minimum intervention* (cf. Rule 2.6).⁴⁴ It is considered a particularly appropriate method of dealing with juveniles, since keeping them out of the formal criminal justice process is believed to reduce the chances of them becoming more deeply involved in crime.⁴⁵

However, the discretionary power of the authorities to dismiss proceedings should be restricted by the aforementioned specific criteria. Such criteria are necessary in order to guide the authorities in their decision-making and enable them to take consistent decisions according to Rule 2.3, thereby also promoting legal security in the State concerned.

The use of non-custodial measures at the pre-trial stage should also be seen in the light of the basic rule reflected in Rule 6.1, according to which “pre-trial detention shall be used as a means of last resort in criminal proceedings, with due regard for the investigation of the alleged offence and for the protection of society and the victim”. Rule 6.2 promotes the earliest possible use of alternatives to pre-trial detention.

As far as the various safeguards relating to pre-trial detention are concerned, general international human rights law provides a more detailed regulation than Rules 6.2 and 6.3 of the Tokyo Rules, and it is therefore sufficient in this respect to refer to Chapter 5 of this Manual, which deals in some depth with “Human Rights and Arrest, Pre-trial and Administrative Detention”.

4.2 Non-custodial measures at the trial and sentencing stage

As to the sentencing stage, the Tokyo Rules provide for a range of non-custodial measures which the judicial authorities “may” use, although in doing so, they “should take into consideration ... the rehabilitative needs of the offender, the protection of society and the interests of the victim, who should be consulted whenever appropriate” (Rules 8.1 and 8.2). According to Rule 8.2 (a) to (m), the sentencing authorities may dispose of cases in the following ways:

- ❖ verbal sanctions, such as admonition, reprimand and warning;
- ❖ conditional discharge;
- ❖ status penalties;
- ❖ economic sanctions and monetary penalties, such as fines and day-fines;

⁴⁴Ibid., p. 15.

⁴⁵Ibid., loc. cit.

- ❖ confiscation or an expropriation order;
- ❖ restitution to the victim or a compensation order;
- ❖ suspended or deferred sentence;
- ❖ probation and judicial supervision;
- ❖ a community service order;
- ❖ referral to an attendance centre;
- ❖ house arrest;
- ❖ any other mode of non-institutional treatment; or,
- ❖ some combination of these measures.

Just as the offender's personal needs and interests have to be weighed against society's interests at the pre-trial stage, so the offender's "rehabilitative needs" at the sentencing stage must be balanced against the need to protect society and "the interests of the victim". The participation of the **victim** in the proceedings is also encouraged by Principle 6(b) of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, which was adopted by the United Nations General Assembly in 1985. According to this principle, "the responsiveness of judicial and administrative processes to the needs of victims should be facilitated by ... allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system." Indeed, the participation of the victim may raise the possibility of his or her obtaining restitution or compensation, a measure that may constitute a penalty in its own right and could make the imposition of further sanctions unnecessary.⁴⁶

As indicated above, the list of non-custodial measures in Rule 8.2, while not exhaustive, contains a wide range of non-custodial measures to suit different circumstances and achieve different objectives.⁴⁷ For example, verbal sanctions such as admonition or reprimand may be appropriate for young offenders, enabling them to realize that they have done wrong without being stigmatized as criminals.⁴⁸

Economic penalties such as fines and day-fines are widely used, but offenders with little money may have difficulty in paying them. Day-fines can solve this problem by linking the amount to be paid to the offender's level of disposable income.⁴⁹

Community service is a form of restitution that benefits the community rather than the individual victim, and has the advantage of making demands on the offender and, at the same time, producing a useful outcome in the form of the work done for the community.⁵⁰

⁴⁶Ibid., p. 18.

⁴⁷Ibid., loc. cit.

⁴⁸Ibid.

⁴⁹Ibid.

⁵⁰Ibid.

Various supervision measures can also be imposed on the offender, and can of course be adapted to the needs of individual offenders, helping them to reintegrate into society.⁵¹

An example of other non-custodial measures that might be of interest is the requirement for offenders sentenced for drunken driving to undergo traffic education. Other possibilities may involve upgrading sanctions that were originally ancillary to a principal sentence, such as revocation of a driving licence, or confiscation of unlawful gains. Lastly, combinations of custodial and non-custodial measures may also be considered.⁵²

4.3 Non-custodial measures at the post-sentencing stage

The use of non-custodial measures is also encouraged at the post-sentencing stage, and in this respect Rule 9.1 of the Tokyo Rules provides that “the competent authority shall have at its disposal a wide range of post-sentencing alternatives in order to avoid institutionalization and to assist offenders in their early reintegration into society.” This rule is based on the principle that reducing the length of imprisonment can reduce the risk of offenders becoming institutionalized and thus unable to cope with society once they have been released. Consequently, it can be of advantage to grant offenders early release, while subjecting them, if necessary, to supervision.⁵³ Rule 9.4 also promotes the idea of releasing offenders from an institution to a non-custodial programme at the earliest possible stage.

Rule 9.2 enumerates the following post-sentencing dispositions:

- ❖ furlough and half-way houses;
- ❖ work or education release;
- ❖ various forms of parole;
- ❖ remission;
- ❖ pardon.

Some of these measures are substitutes for imprisonment. The offender is still under the authority of the prison administration but spends his or her days outside the prison working or undergoing training. The advantage of such an arrangement is that he or she can earn money that can be used to help meet family commitments, or saved to assist with reintegration upon release.⁵⁴ In a half-way house, the offender is still technically under the supervision of the prison authorities but lives in “semi-freedom”, readjusting to life in the community.⁵⁵

⁵¹Ibid., p. 19.

⁵²Ibid., loc. cit.

⁵³Ibid., p. 20.

⁵⁴Ibid., loc. cit.

⁵⁵Ibid.

The right to request review of decisions on post-sentencing disposition is guaranteed by Rule 9.3 of the Tokyo Rules except in the case of pardon; decisions on other non-custodial measures shall however “be subject to review by a judicial or other competent independent authority, upon application of the offender”. This rule is in full harmony with the general principles on judicial review both of decisions concerning non-custodial measures and of their implementation as laid down in Rules 3.5 and 3.6, which were dealt with above in subsection 3.3.4. It is recalled in this respect that in order to enable the offender to exercise the right to review effectively, he or she must be given clear information on the possibilities for review and on how to apply for it.⁵⁶

The *Commentary* stresses that, as a decision on early release or the granting of parole requires an implicit review of the previous sentencing decision, a formal decision-making procedure to be followed by the competent body should be developed. Well-defined criteria for the granting of early release or parole should be drawn up, and clearly explained to the prisoners. Such criteria also reduce abuses of the discretionary power of the competent authorities to a minimum, as well as enabling prisoners to work towards release knowing what criteria they will need to satisfy.⁵⁷

Non-custodial measures are flexible tools that can be used at the pre-trial stage, at the trial and sentencing stage or at the post-sentencing stage. They should always be considered in the light of the principle of minimum intervention.

At the pre-trial stage, the interest of the offender in seeing the proceedings dismissed has to be weighed against:

- *the protection of society;*
- *crime prevention/ the promotion of respect for the law; and*
- *the rights of victims.*

Dismissal of proceedings is a common non-custodial measure at this stage.

At the trial and sentencing stages, recourse to non-custodial measures should consider:

- *the rehabilitative needs of the offender;*
- *the protection of society; and*
- *the interests of the victims.*

The victims should be consulted whenever appropriate.

At the post-sentencing stage, the authorities should have a wide range of non-custodial measures at their disposal in order to ensure the prisoner’s earliest possible release to assist his or her reintegration into society.

⁵⁶Ibid., p. 21.

⁵⁷Ibid., loc. cit.

5. Implementation of Non-custodial Measures

The remaining Tokyo Rules concern implementation of non-custodial measures, staff, volunteers and other community resources as well as research, planning, policy formulation and evaluation. However, since some of these provisions may be considered to be chiefly aimed at those involved in the implementation of the non-custodial measures rather than at the legal professions as such, only a few of the rules regarding *implementation* will be considered here. A more detailed knowledge can be acquired by reading the Tokyo Rules in their entirety in conjunction with the *Commentary*. The present section will therefore confine itself to dealing with the rules relating to the following issues, which are intrinsically linked to the implementation of non-custodial measures, namely: supervision, duration, conditions, the treatment process, and discipline and breach of conditions.

5.1 The supervision of non-custodial measures

As emphasized in Rule 10.1, “the purpose of supervision is to reduce reoffending and to assist the offender’s integration into society in a way which minimizes the likelihood of a return to crime.” In a sense, this is simply a restatement of the basic principle on which the concept of non-custodial measures in general is based, and which the authorities responsible for implementation should always bear in mind, namely, that their purpose is to help offenders to avoid a relapse into crime by strengthening their sense of responsibility, thereby also assisting their reintegration into society.

Non-custodial measures such as verbal sanctions and fines need no supervision at all, but others, such as transfer to attendance centres, probation, parole and community service, require supervision, since they are designed to provide the offenders with guidance and assistance towards their social rehabilitation.⁵⁸ Non-custodial measures of this kind are based on supervision, the principal element of which is the personal relationship between supervisor and offender. It is obvious that such measures cannot be implemented without the consent of the offender and that they depend for their success on his or her cooperation and participation.⁵⁹ The supervision can be described as having a twofold objective in that, on the one hand, it focuses on the responsibilities of offenders to the community, while, on the other hand, helping them to overcome the difficulties they may face in adjusting to life in the community.⁶⁰

It follows that supervision is a highly skilled task, as is reflected in Rule 10.2, which provides that “if a non-custodial measure entails supervision, the latter shall be carried out by a competent authority under the specific conditions prescribed by law”. According to the *Commentary*, some of the responsibilities involved in supervision can

⁵⁸Ibid., p. 22.

⁵⁹Ibid., loc. cit.

⁶⁰Ibid.

be delegated to community groups or volunteers, although when this is done it must be made clear that all statutory power rests with the competent authorities.⁶¹ On the other hand, when supervisory functions are delegated to agencies working for commercial profit, many questions arise which need careful consideration in the light of Rule 10.2.⁶²

Rule 10.3 provides that

“Within the framework of a given non-custodial measure, the most suitable type of supervision and treatment should be determined for each individual case aimed at assisting the offender to work on his or her offending. Supervision and treatment should be periodically reviewed and adjusted as necessary.”

This rule must, however, be interpreted in the light of Rule 2.6, according to which “non-custodial measures should be used in accordance with the principle of minimum intervention”. Consequently, the measure agreed on must not be stricter than is necessary in order to help the offender reintegrate into the community as a law-abiding citizen. Excessive intervention may undermine the offender’s self-confidence and result in him or her becoming overly dependent on the supervising officers.⁶³

It is important that the authorities show that they are convinced of the rightness of the decisions that they are taking on non-custodial measures, and they must also ensure that offenders are treated equally, so as to avoid unfair distinctions being made (cf. Rule 2.2 and subsection 3.2.2).

The offender must be involved to the greatest possible extent in the formulation of the treatment plan, the assessment of the intensity of the supervision and treatment, and its possible adjustment in the light of the progress made by the offender.⁶⁴ This does not mean that the supervision can be designed entirely in accordance with the offender’s own wishes: the decision-making authorities have also to take into account the nature and gravity of the original offence, the personality and background of the offender, the purpose of the sentencing and the rights of victims (cf. Rule 3.2).

As to the help which offenders may need in order to successfully reintegrate into society, Rule 10.4 mentions “psychological, social and material assistance and ... opportunities to strengthen links with the community”. Offenders may have a wide range of needs and problems. Some may need long-term psychological counselling while others may only need help in finding a place to live or a job. Again, on the basis of Rule 10.4 the assistance given must respect the principle of minimum intervention and should only comprise what is absolutely necessary to help the offender.⁶⁵

⁶¹Ibid., pp. 22-23.

⁶²Ibid., loc. cit.

⁶³Ibid.

⁶⁴Ibid.

⁶⁵Ibid.

5.2 The duration of non-custodial measures

As to the duration of the non-custodial measure, it “shall not exceed the period established by the competent authority in accordance with the law” (Rule 11.1), but “provision may be made for early termination of the measure if the offender has responded favourably to it” (Rule 11.2).

Rule 11.1 thus reinforces the principle of strict legality in the determination of the non-custodial measures, which must be fixed by a “competent authority” taking a decision “in accordance with the law”. It follows that the implementing authorities have no power to extend the duration of the measure.⁶⁶ However, an ongoing measure may be *extended* by the competent authority if doing so can be shown to be beneficial to the offender, for instance, to enable him or her to continue a course of treatment; any such extension must, however, be entirely voluntary, a point that must be made completely clear to the offender.⁶⁷

As provided by Rule 11.2, a measure can also be *terminated before the expiry of the duration originally foreseen*, and this again reflects the principle that non-custodial measures should be limited to the shortest possible time.⁶⁸ This should encourage offenders in their efforts to reintegrate into society, and the relevant procedures should be clear and well understood by them.⁶⁹

5.3 The conditions attached to non-custodial measures

According to Rule 12.1, whenever the competent authority has to determine the conditions to be observed by the offender, “it should take into account both the needs of society and the needs and rights of the offender and the victim”. Here again, it is a question of striking a fair balance between various legitimate interests: if the offender’s interests were given undue weight, the needs of society and the victim or victims might not be satisfied, and vice versa. It is thus for the individual judge or other competent decision-making authority to balance these interests in an equitable and objective manner. It follows from the principle of legality that the implementing authority should never impose conditions going beyond the requirements already fixed by the judicial authority.⁷⁰

The conditions to be observed by the offender shall, in the words of Rule 12.2, “be practical, precise and as few as possible”, the latter stipulation being yet another expression of the principle of minimum intervention as laid down in Rule 2.6. Furthermore, the conditions “shall be aimed at reducing the likelihood of an offender relapsing into criminal behaviour and at increasing the offender’s chances of social integration, taking into account the needs of the victim”. In other words, it is of

⁶⁶Ibid.

⁶⁷Ibid., p. 24.

⁶⁸Ibid., loc. cit.

⁶⁹Ibid.

⁷⁰Ibid.

fundamental importance that the conditions are both *realistic* and *precise*.⁷¹ Unless it is clear from the outset that the conditions are achievable by the offender, they may impede, rather than facilitating, his or her progress towards social integration. As to the requirement of precision, it is important both in order to help the offender to understand the conditions clearly, and also to avoid causing difficulties in the relationship between the offender and the supervisor.⁷²

The conditions envisaged in the Tokyo Rules may include those reinforcing the offender's responsibility to society and his or her family, keeping a job, pursuing an education, living at a specific address, refraining from involvement in criminal activities, and avoiding specific places.⁷³ If, for instance, the condition is the performance of community service, the work assigned to the offender should be socially useful, thereby enhancing his or her chances of social reintegration.⁷⁴

As provided by Rule 12.3, "at the beginning of the application of a non-custodial measure, the offender shall receive an explanation, orally and in writing, of the conditions governing the application of the measure, including the offender's obligations and rights." In order for the measure to be successful, it is of course essential that the offender is aware of what is expected from him or her. To have the conditions clearly defined is also important for the implementing authority, in that it establishes the criteria for assessing whether or not the obligations and conditions have been complied with.⁷⁵

Lastly, Rule 12.4 allows for the modification of the conditions "by the competent authority ... in accordance with the progress made by the offender". If the offender has made progress towards social integration, the conditions may be made less stringent, while the opposite is possible if the offender does not respond favourably. This flexibility enables the authorities to avoid revoking the non-custodial measure in case of difficulties, a measure that might result in the offender's imprisonment.⁷⁶

5.4 The treatment process

Rule 13.1 of the Tokyo Rules provides the following examples of various schemes which, "in appropriate cases ... should be developed to meet the needs of offenders more effectively":

- ❖ case-work;
- ❖ group therapy;
- ❖ residential programmes; and
- ❖ the specialized treatment of various categories of offenders.

⁷¹Ibid.

⁷²Ibid.

⁷³Ibid., p. 25.

⁷⁴Ibid., loc. cit.

⁷⁵Ibid.

⁷⁶Ibid.

The purpose of this provision is to find the most effective help for offenders with particular problems, and to call for the development of new programmes to try to deal with particularly difficult categories of offenders, such as drug-dependent persons and sex offenders.⁷⁷

A rather obvious principle is contained in Rule 13.2, according to which “treatment should be conducted by professionals who have suitable training and practical experience.” Yet, according to the *Commentary*, this rule should not be understood as a prohibition of the use of non-professionals in programmes of assistance, where the essential strength of such programmes lies in persons with practical experience rather than professional qualifications.⁷⁸

“When it is decided that treatment is necessary, efforts should be made to understand the offender’s background, personality, aptitude, intelligence, values and, especially, the circumstances leading to the commission of the offence” (Rule 13.3). Clearly, unless such an assessment of the offender and the offence is made, it will be difficult to choose an individualized and suitable treatment programme.

In line with the aim of promoting greater community involvement in the management of criminal justice, specifically in the treatment of offenders (Rule 1.2), the Tokyo Rules also authorize the competent authority to “involve the community and social support systems in the application of non-custodial measures” (Rule 13.4). This is a recognition that the community, in the form of the family, neighbourhoods, schools, the workplace and social or religious organizations, for instance, can contribute greatly to the successful social reintegration of offenders.⁷⁹

5.5 Discipline and breach of conditions

Even though the imposition of some non-custodial measures is dependent on the consent of the offender, most such measures are still sanctions that imply some restriction of liberty, and offenders may therefore fail to observe the conditions imposed on them.⁸⁰ Such “a breach of the conditions to be observed by the offender may result in a modification or revocation of the non-custodial measure” (Rule 14.1). However, according to the *Commentary*, not all breaches need lead to modification or revocation, and the supervisor or competent authority can deal with minor transgressions by less formal means.⁸¹

Considering that modification or revocation of a non-custodial measure can have serious consequences for the offender, it is for the competent authority to take a decision in the matter, but it shall do so only “after a careful examination of the facts adduced by both the supervising officer and the offender” (Rule 14.2). This means that the offender should have the right to see the documents on which the request for modification or revocation is based, to make representations and to be heard.⁸² In

⁷⁷Ibid., p. 26.

⁷⁸Ibid., loc. cit.

⁷⁹Ibid.

⁸⁰Ibid., p. 27.

⁸¹Ibid., loc. cit.

⁸²Ibid., p. 28.

examining the request, the competent authority should also consider the extent to which the offender has already complied with the non-custodial measures, such as, for instance, the fact that he or she may have already satisfactorily carried out a substantial proportion of the number of hours of community work imposed.⁸³

The principle that imprisonment should also be a penalty of last resort in cases of violation of the conditions imposed in connection with a non-custodial measure is clear from the terms of Rule 14.3, according to which “the failure of a non-custodial measure should not automatically lead to the imposition of a custodial measure”. Furthermore, “in the event of a modification or revocation of the non-custodial measure, the competent authority shall attempt to establish a suitable alternative non-custodial measure”, and it is only if such other suitable alternative has not been found that a sentence of imprisonment may be imposed (Rule 14.4). Indeed, to impose imprisonment for a breach of the non-custodial measure may even be disproportionate to the original offence,⁸⁴ and the competent authorities will therefore need to proceed with considerable care in deciding on the consequences in the event of failure to comply with the relevant conditions.

Care must also be taken not to let the offender take the consequences of breaches of conditions for which he or she cannot be blamed; there could for instance be many reasons why an offender is unable to pay a fine, some of which may be beyond his or her control, and this aspect must be given due consideration when the competent authority examines the question of modification or revocation of non-custodial measures.⁸⁵

Rule 14.5 provides that “the power to arrest and detain the offender under supervision in cases where there is a breach of the conditions shall be prescribed by law”. Strict respect for the principle of legality is here again to be ensured, including all basic judicial guarantees which the offender has a right to enjoy when deprived of his or her liberty.⁸⁶ The *Commentary* points out the importance of laying down a maximum time for detention prior to investigation and decision by the competent authority; the period should be short and the decision made as soon as possible.⁸⁷

Lastly, consistent with the general legal safeguard in Rule 3.6, Rule 14.6 secures the offender “the right to appeal to a judicial or other competent independent authority” upon modification or revocation of the non-custodial measure.

Supervision of non-custodial measures is aimed at reducing reoffending and helping the offender's social reintegration. The need for supervision depends on the nature of the non-custodial measure concerned.

The supervision shall be carried out by a competent authority in accordance with conditions prescribed by law.

⁸³Ibid., loc. cit.

⁸⁴Ibid.

⁸⁵Ibid.

⁸⁶Ibid.

⁸⁷Ibid.

The supervision must be adapted to the needs of the offender and depends for its success on his or her consent, participation and cooperation. It has to be reviewed periodically.

The duration of the non-custodial measures shall be established by the competent authority in accordance with law; the measure can be terminated early and may also be prolonged if necessary in the interest of the offender.

The conditions attached to non-custodial measures shall take into account the needs of society and the needs and rights of the offender and victim.

The conditions shall be realistic and precise and shall be explained to the offender both orally and in writing.

It may be necessary to develop special treatment schemes to deal with the needs and problems of particularly difficult categories of offenders.

In case of breach of the conditions attached to non-custodial measures, the measures may be modified or revoked. However, such a breach should not automatically lead to deprivation of liberty.

6. The Role of Judges, Prosecutors and Lawyers in Choosing Alternatives to Imprisonment

Judges, prosecutors and lawyers have a fundamental role in deciding whether to subject offenders to non-custodial measures rather than to imprisonment. The powers granted to the legal professions by domestic law on this subject undoubtedly vary a great deal, but, given the adverse effect that imprisonment often has on juvenile offenders in particular, as well as the heavy social costs of imprisonment, every opportunity should be explored to provide offenders with a chance of rehabilitation by means of less drastic but possibly more efficient sanctions than imprisonment.

However, generalized use of non-custodial measures requires the development of a considerable network of skilled people, not only within the judicial and prosecuting bodies but also within the social and administrative authorities. Careful and concerted efforts are thus required by authorities at all levels in order to elaborate a range of non-custodial measures that can be applied flexibly and adjusted to the specific needs of individual offenders.

Judges, prosecutors and lawyers, with their particularly close links to and experience of suspected and accused offenders, have a particularly important role to play in defining the problems and the appropriate solutions, and in stimulating an open debate in society regarding crime and ways of sanctioning offenders.

7. Concluding Remarks

The present chapter has focused on explaining some of the major features of the United Nations Standard Minimum Rules for Non-custodial Measures, which is an instrument that strongly promotes the use of non-custodial measures whenever such measures are likely to promote the social reintegration of an offender, having regard to such community interests as the prevention of crime, respect for the law, and the interests of the victims. Non-custodial measures are a legal field that is far from having been fully explored, but which has important potential from which both the community and offenders could benefit. Sanctions for the commission of criminal offences are in general a subject of continuing debate and scrutiny, in particular, but not exclusively, as it relates to juvenile offenders. As our societies evolve and change, so to some extent do the crimes committed, and the question of sanctions *largo sensu* will thus continue to be a subject of great concern and interest to the community.