

Covid-19 Emergency Prison Release Policy: A Public Health Imperative and a Rule of Law Challenge

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Abstract

Many countries are implementing emergency releases of people from prison to mitigate the spread of Covid-19. Such measures, while critical to public health, can enable the unjust release from prison of politically connected and wealthy individuals convicted of corruption offences, thereby undermining the rule of law and democratic values by weakening public trust in the justice system. To reduce overcrowding of prisons while ensuring that white-collar criminals are appropriately sanctioned, one strategy is to impose alternatives to custodial sentences that ensure appropriate sanctioning of convicted criminals while de-densifying prisons – an approach that could be considered for non-emergency times as well.

Main points:

- *Emergency prison release mechanisms to prevent the spread of Covid-19 can pose corruption risks owing to weak design, uneven implementation and inadequate oversight.*
- *Such releases take three main forms: prisoner amnesties declared by governments; emergency release procedures drafted by governments and implemented by prison directors; and court decisions to release individual prisoners or set out frameworks to determine who is eligible for release.*
- *These emergency procedures can enable the unjust release of politically connected prisoners convicted of corruption offences and undermine public trust in the rule of law and the justice system.*
- *To help maintain rule of law during the emergency, alternatives to custodial sentences in line with international standards can be imposed on newly released persons who have been convicted of corruption crimes.*
- *Conditions attached to releases can include, among others, status penalties, economic sanctions and monetary penalties, confiscation or expropriation of assets, and restitution or compensation to victims.*
- *In non-emergency times, as well, alternatives to custodial sentences can be used to sanction those convicted of corruption crimes as a means to mitigate*

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financial and social damage caused by corruption and reduce prison overcrowding.

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For obvious reasons the plague seemed to fasten particularly on all those who had become accustomed to living in groups: soldiers, members of religious orders or prisoners. [...] In our municipal prison the wardens were as likely as the prisoners to succumb to the disease. From the higher point of view adopted by the plague, everyone, from the prison governor to the least of the inmates, was condemned, and perhaps for the first time absolute justice reigned inside the jail.

– Albert Camus, *The Plague* (1947)

A Reducing Prison Populations: A Public Health Imperative

During the ongoing Covid-19 public health emergency, policymakers across the globe are seeking to prevent the further spread of the disease in prisons and detention centres by reducing incarcerated populations, as well as by introducing infection prevention and control measures in these facilities. Many countries are also stopping or reducing pre-trial committal as well as the committal of detainees to holding cells, detention centres and prisons by the police, prosecutors and courts.

There have long been solid public health reasons for de-densifying prisons and detention centres to prevent the spread of infection among imprisoned people, as well as among prison staff and their families in the wider community. Indeed, the current emergency releases have – perhaps unintentionally, but nonetheless positively – lent renewed momentum to efforts to tackle the notorious issue of prison overcrowding, which continues to affect a majority of countries. An effective use of non-custodial sanctions was urgently needed even before the pandemic hit. Such measures should support the treatment of offenders in compliance with relevant international standards, in particular the United Nations Standard Minimum Rules for the Treatment of Prisoners (the

Nelson Mandela Rules) and the United Nations Standard Minimum Rules for Non-Custodial Measures (the Tokyo Rules).¹

From an anti-corruption reformer's perspective, additional considerations come into play when assessing emergency prisoner release processes. These processes should meet good governance and ethical standards for the design of justice sector institutions and their decision-making procedures. Many of these are set out in the United Nations Office on Drugs and Crime (UNODC) Handbook on anti-corruption measures in prisons.² The good governance requirements of transparency, accountability, integrity, fairness, proportionality, responsiveness and inclusion must be taken into account in designing and implementing emergency responses during the Covid-19 pandemic – in particular, decisions to release detainees and prisoners or to not commit people to jails, detention centres and prisons. ('Detainees' commonly refers to pre-trial detainees, and 'prisoners' includes both pre-trial detainees and sentenced inmates.)

B Types of Emergency Release Procedures

Three routes for the emergency release of imprisoned people have emerged in the first half of 2020 in response to the spread of Covid-19 among prison populations.

First, ad hoc initiatives, amnesties and parole schemes have been decided at the highest levels of governments. Such schemes have been implemented in, among other countries, India, Indonesia, Iran, Myanmar, Thailand and Turkey (see UNODC position paper³). In Turkey, for example, the risks to prisons posed by Covid-19 prompted the government to accelerate a decision to release 90,000 people.⁴ The policy was in preparation even before the pandemic, as the government sought to replace custodial sentences with early parole and house arrest in order to reduce the severe overcrowding in Turkish prisons. However,

- 1 The suite of UN legal instruments applicable to people in prison, including the Nelson Mandela Rules and the Tokyo Rules, as well as regional instruments from Africa, the Americas, Asia and Europe, are found on the UNODC website: <https://www.unodc.org> and are included in the UNODC Compendium of United Nations standards and norms in crime prevention and criminal justice (2016) found at https://www.unodc.org/documents/justice-and-prison-reform/compendium/English_book.pdf. They are also available on the website of the International Penal and Penitentiary Foundation: [https://www.ru.nl/ippf/legal-instruments/united-nations-\(un\)/#Treatmentofprisoners](https://www.ru.nl/ippf/legal-instruments/united-nations-(un)/#Treatmentofprisoners).
- 2 UNODC. 2017. Handbook on anti-corruption measures in prisons, found at https://www.unodc.org/documents/justice-and-prison-reform/17-06140_HB_anti-corr_prisons_eBook.pdf.
- 3 UNODC (United Nations Office on Drugs and Crime). 2020. Covid-19 preparedness and responses in prisons. Position paper, 31 March, found at https://www.unodc.org/documents/justice-and-prison-reform/UNODC_Position_paper_COVID-19_in_prisons.pdf.
- 4 Hurriyet Daily News. Parliament ratifies bill for release of almost 90,000 prisoners. 14 April, found at <https://www.hurriyetsdailynews.com/turkish-parliament-passes-penal-reform-law-153838>.

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the law to release prisoners excluded many political opponents imprisoned under broadly defined terrorism legislation.⁵

In March, the Indonesian Ministry of Justice and Human Rights issued a decree to release approximately 50,000 of an estimated 270,000 inmates to avoid the spread of Covid-19⁶ in Indonesia's overcrowded prisons. According to the decree, adults are eligible for early release if they have completed two-thirds of their sentence (by 1 December 2020) and juvenile offenders if they have completed half their sentence; inmates must have shown good behaviour during the last couple of months. The Indonesian Corruption Eradication Commission (KPK) and the Indonesian Legal Aid Foundation criticized the move⁷, stating that the release of white-collar offenders should not be a priority because of their relatively small number and their incarceration in better facilities, where many have their own cells. More broadly, there is a high risk of possible abuse in the implementation of this decree in a prison system that is notorious for corruption. Indeed, there are already reports of prison officials extorting prisoners who are eligible for early release (or their family members).⁸

Second, prison release guidelines have been issued by ministries of justice and/or prison authorities. These set out the categories of prisoners eligible for release, the process of applying for release, the conditions of release, post-release care and supervisory duties, and the parameters of decision making on release. The guidelines often allow space for prison directors to exercise discretion in deciding on the release of particular individuals. See, for example, the UK Ministry of Justice memorandum on temporary release (24 April 2020)⁹ and the US Attorney General's memorandum for the Bureau of Prisons on home confinement (26 March 2020)¹⁰.

In addition to the emergency release schemes, many countries are using pre-existing 'compassionate release' schemes to free incarcerated people who are at high risk of developing complications if they contract Covid-19. They include older inmates, those with pre-existing health conditions and other categories of prisoners such as pregnant women. In many countries, offenders convicted of

5 Kucukgocmen, A. 2020. Turkey plans prisoner release, excluding those jailed on post-coup terrorism charges. Reuters, 7 April, found at <https://www.reuters.com/article/us-health-coronavirus-turkey-prisoners/turkey-plans-prisoner-release-excluding-those-jailed-on-post-coup-terrorism-charges-idUSKBN21P1WW>.

6 Gorbiano, M. I., Erviani, N. I., and Gunawan, A. 2020. Overcrowded and understaffed, prisons scramble to protect inmates from infection. Jakarta Post, 24 March, found at <https://www.thejakartapost.com/news/2020/03/24/overcrowded-and-understaffed-prisons-scramble-to-protect-inmates-from-infection.html>.

7 Firdaus, F. 2020. Fear and illness stalk Indonesia's packed jails as riots break out. Guardian, 29 April, found at <https://www.theguardian.com/global-development/2020/apr/29/fear-and-illness-stalk-indonesias-packed-jails-as-prisoners-hope-for-early-release-coronavirus>.

8 Ibid.

9 UK Ministry of Justice, HM Prison & Probation Service. 2020. End of custody temporary release. 24 April, found at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/881061/end-custody-temporary-release.pdf.

10 US Attorney General. 2020. Memorandum for Director of Bureau prisons. Privatization of home confinement as appropriate in response to COVID-19 pandemic. 26 March, found at https://www.bop.gov/coronavirus/docs/bop_memo_home_confinement.pdf.

violent crimes, such as sexual crimes or domestic violence, are expressly excluded from emergency release measures.

Third, in some countries, courts have taken the lead in hearing applications for release by individual prisoners. They also hear opposition to release by individual victims, victims' groups and others on grounds of risks to public safety. One concern with this approach is whether there is equal access to justice for all imprisoned people or whether only the wealthy and well connected can afford to engage legal teams to apply to courts for their release. In Argentina, where courts are assessing and deciding on prisoner releases, the highest criminal court, the Federal Court of Cassation, has issued guidelines on this matter.¹¹

C Concerns About Prisoner Releases

All three methods of releasing people from prison raise concerns for anti-corruption policymakers and advocates, who want to ensure that releases are not marred by corrupt processes and do not increase corruption risks.

First, are prison population profiles developed to assess potentially eligible prisoners? What is the process for assessment and audit? Are records maintained of individuals released, and are those lists transparent and publicly accessible?

In the United Kingdom, an offender management hub has been established to “consider the list of potentially eligible adult prisoners, and work with local establishments, probation services and the police to assess individuals”. The UK has already acknowledged that the first wave of emergency releases was subject to errors that resulted in the freeing of certain persons who should not have been eligible. This experience highlights the need to track and verify who is being released and on what grounds. Governments and prison authorities have a duty to do this, but civil society organizations and the media can also monitor the records (see UK Ministry of Justice, End of custody temporary release, 24 April 2020 at footnote 9).

Prison release schemes can be strengthened by continuous oversight, both internally within prisons and by independent external oversight bodies. It is also vital that those released receive post-release care and supervision that take into account their housing and healthcare. Electronic monitoring can provide tracking of the released person's location.

Second, which categories of people in prisons benefit from release, and what is the justification for their selection?

Release schemes generally favour inmates who are deemed to pose a low risk to public safety and/or those who are approaching the end of their sentence. As will be discussed further on, people convicted of corruption offences are seldom

11 Bertoia, L. 2020. Prisoners jailed for minor offences begin to be released amid pandemic. Buenos Aires Times, 18 April, found at <https://www.batimes.com.ar/news/argentina/prisoners-jailed-for-minor-offences-begin-to-be-released-amid-pandemic.phtml>.

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considered to threaten public safety, despite the seriousness of their crimes. As a result, they may be eligible for release in some jurisdictions.

Many release schemes have excluded from eligibility any individuals convicted of sexual and/or violent offences and who do pose a risk to public safety. Guidelines in the UK exclude persons currently on remand, that is, detainees who are not yet serving a custodial sentence but are awaiting trial or sentencing or another court decision. By contrast, Human Rights Watch¹² has recommended that in Argentina, persons in pre-trial detention, particularly those accused of non-violent and low-level crimes, should be eligible for release via house arrest. Pre-trial detainees make up half the prison population in Argentina and are a major cause of prison overcrowding, a situation that requires urgent attention.

Third, are questionable release decisions being taken that benefit political allies or high-profile white-collar criminals?

In Turkey, the law to release prisoners has been criticized as an effort to free political cronies and businesspersons close to the ruling party. Those who stand to benefit from the law include persons convicted for their roles in the Soma mine disaster and the Çorlu train accident, as well as police officers convicted of murdering teenagers during the Gezi protests.¹³ A notorious mafia boss has already been released.¹⁴ Further underscoring the discriminatory application of the release legislation, prisoners detained for terrorist offences are excluded from the release scheme. This provision has been criticized by human rights groups, given that Turkey has misused anti-terrorism laws to target journalists and political dissidents.¹⁵

Finally, what conditions could be attached to release on licence, what supervision exists and what provisions are in place to ensure the health and housing of released persons?

Under release schemes, prisoners may be issued 'temporary release licences' with conditions. These licences may be revoked and the individual re-imprisoned if the conditions are breached. Conditions may include house arrest, observing curfews, not committing new offences, complying with all Covid-19 precautions, not leaving the country, refraining from consuming alcohol or drugs or wearing an electronic monitoring device.

12 Vivanco, J. M. 2020. Debate about prisoners' release in Argentina. Human Rights Watch, 1 May, found at <https://www.hrw.org/news/2020/05/01/debate-about-prisoners-release-argentina>.

13 Evin, M. 2020. Turkey's parole law and COVID-19 opportunism. Duvar English, 16 April, found at <https://www.duvarenglish.com/columns/2020/04/16/turkeys-parole-law-and-covid-19-opportunism>.

14 İdil, N. 2020. Turkey releases notorious mafia leader Alaattin Çakıcı with ties to nationalist party from prison. Duvar English, 16 April, found at İdil, N. 2020. Turkey releases notorious mafia leader Alaattin Çakıcı with ties to nationalist party from prison. Duvar English, 16 April.

15 Kucukgocmen, A. 2020. Turkey plans prisoner release, excluding those jailed on post-coup terrorism charges. Reuters, 7 April, found at <https://www.reuters.com/article/us-health-coronavirus-turkey-prisoners/turkey-plans-prisoner-release-excluding-those-jailed-on-post-coup-terrorism-charges-idUSKBN21P1WW>.

D The Handling of Prisoners Convicted of Corruption-Related Crimes

Decisions to release should be taken on an individual, case-by-case basis. Considerations that factor into such decisions include whether a prisoner poses a high risk to public safety and the risk of recidivism. The level of risk to public safety should not be confused with the seriousness of crimes. Although white-collar criminals may have committed grave offences, many may nonetheless be eligible for emergency release schemes on grounds that they pose no threat to public safety and are unlikely to reoffend. Occasionally, prisoners convicted of offences under ‘official secrets’ acts, or those who are deemed a threat to national security, will be classified as posing a high risk. Corruption offenders in this category are not likely to be eligible for emergency release schemes. (See, for example, information from the Prison Reform Trust on how the UK classifies people in prison based on level of risk.¹⁶)

However, it can be argued that the categorization of most white-collar criminals as a low risk to the public – and who are therefore eligible for emergency release – underestimates the social damage inflicted by corruption offences. Financial losses, loss of public trust and degradation of public and private institutions caused by corruption can result in serious societal damage. Economic, social, civil and human rights violations occur when the theft of resources from state and private entities undermines public sector services such as health, water and education, as well as political structures.¹⁷

In addition to qualifying for emergency release owing to their putative low-risk status, white-collar criminals may also have unjust, privileged access to release schemes on account of their political influence and financial means. In Argentina, the Federal Criminal Cassation Court, which has developed guidelines on categories of prisoners eligible for Covid-19 emergency release, did not include corruption offences in the category of serious crimes that make people ineligible.¹⁸ Under the Argentinian court’s guidelines, former vice president Amado Boudou, who was convicted of serious corruption charges, was released from prison to serve out his term under house arrest.¹⁹ There are also reports that the minister of human rights has requested the release of individuals imprisoned on corruption charges who have ties to government officials and allies.²⁰

16 Prison Reform Trust. 2020. *Categorisation: Men’s prisons*. London, found at <http://www.prisonreformtrust.org.uk/ForPrisonersFamilies/PrisonerInformationPages/Categorisation/Categorisationmensprisons>.

17 Lewis, J. 2017. Social impacts of corruption upon community resilience and poverty. *Jamba: Journal of Disaster Risk Studies* (Potchefstroom, South Africa) 9(1): 391, found at <https://jamba.org.za/index.php/jamba/article/view/391>.

18 Op. cit. fn 11.

19 Buenos Aires Times. 2020. *Ex-VP Boudou, jailed for corruption offences, granted house arrest*. 7 Apr, found at <https://www.batimes.com.ar/news/argentina/ex-vp-boudou-jailed-for-corruption-offences-granted-house-arrest.phtml>.

20 Op. Cit, fn 12.

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In the United States, Paul Manafort, the former Trump campaign chairman who was convicted of tax and money laundering charges, was released to home confinement despite not meeting the release guidelines issued by the Federal Bureau of Prisons.²¹

In Indonesia, the government's initial release included persons convicted of corruption. Notably, public officials Setya Novanto and Suryadharma Ali, who were convicted of stealing public funds, walked free. Overcrowding in Indonesia's prisons is largely attributable to persons convicted of drug-related crimes, including minor drug offences. White-collar prisoners make up a small fraction of the total, and – in Indonesia as elsewhere – often enjoy their own private cells. For this reason, the focus on releasing corruption-related offenders as a purported response to overcrowding was met with scepticism and criticized by NGOs.²²

E Alternatives to Custodial Sentences for Corruption-Related Crimes

In analysing decisions to release white-collar criminals, the implications of release must be considered from the perspective of anti-corruption efforts. This raises the question of what conditions could be attached to release licences to ensure that released individuals receive appropriate punishment for the crimes of which they were convicted. As noted earlier, there is evidence that some white-collar criminals with political connections are benefiting from emergency release decisions (e.g. former vice president Amado Boudou in Argentina, as well as prominent figures in Indonesia, Turkey and the United States). Conditional releases are a means to ensure that politically connected, wealthy and/or influential white-collar criminals are not unjustly absolved of criminal responsibility when their custodial sentences are commuted under cover of Covid-19 emergency measures.

To grant conditional release from prison, alternatives to custodial sentences can be attached to release licences. The United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules)²³ “promote the use of non-custodial measures, as well as minimum safeguards for persons subject to alternatives to imprisonment”. Section 8.2 of the rules sets out a list of ways in which sentencing authorities may dispose of cases:

- a Verbal sanctions, such as admonition, reprimand and warning
- b Conditional discharge
- c Status penalties
- d Economic sanctions and monetary penalties, such as fines and day fines
- e Confiscation or an expropriation order

21 Gerstein, J. 2020. Paul Manafort released from prison because of virus concerns. Politico, 13 May, found at <https://www.politico.com/news/2020/05/13/paul-manafort-released-from-prison-due-to-virus-concerns-254532>

22 Op cit. fn 7.

23 Op. cit. fn 1 and found at <https://www.ohchr.org/Documents/ProfessionalInterest/tokyorules.pdf>.

- f Restitution to the victim or a compensation order
- g Suspended or deferred sentence
- h Probation and judicial supervision
- i A community service order
- j Referral to an attendance centre
- k House arrest
- l Any other mode of non-institutional treatment
- m Some combination of the foregoing measures

Of particular relevance to prisoners convicted of corruption-related offences are items (c) through (f), namely status penalties; economic sanctions and monetary penalties, such as fines and day fines; confiscation or an expropriation order; and restitution to the victim or a compensation order.

Application of non-custodial measures should be based on an individualized assessment and should suit the facts of the case. Certain prisoners, for example, might be required to pay compensation or make reparations, with their own assets subject to confiscation, while others might have status penalties imposed on them to prevent them from holding fiduciary positions in companies or public office for a period of time. Such non-custodial measures, when applied in appropriate cases and in line with international standards, are likely to better protect society from corruption crimes than imposing custodial sentences and can repair some of the damage caused by such crimes.

With respect to non-custodial measures such as economic sanctions, confiscation and expropriation orders, it is important to give them ‘teeth’ and make them effective. Towards this end, there exist international networks and mechanisms to help countries implement the measures. For example, the Stolen Asset Recovery Initiative (StAR)²⁴, established by the World Bank and UNODC, works with developing countries to facilitate the recovery and return of corruption proceeds.

Applying non-custodial measures to persons convicted of corruption crimes and granted early release under emergency Covid-19 legislation ensures that they will continue to be appropriately sanctioned for their offences. At the same time, innovative and financially consequential non-custodial measures may mean that institutions and communities in society that suffered from the corrupt acts receive appropriate compensation or reparations.

In sum, society is protected, social damage is mitigated, and the rule of law is meaningfully upheld as the public retains trust in the fair and just operation of the justice system. These potential advantages raise the question of whether alternatives to custodial sentences might be more effective than prison sentences as a means to punish those convicted of corruption-related crimes in non-emergency times as well.

24 The Stolen Asset Recovery Initiative (StAR) website is found at <https://star.worldbank.org>.