

## **The use of electronic monitoring bracelets as an alternative measure to imprisonment in Panama**

Technical Advisory Opinion No. 002/2013, addressed to the Public Ministry and the Ministry of Government of Panama

**United Nations Office on Drugs and Crime**  
**Regional Office for Central America and the Caribbean**

**UNODC ROPAN**

**Criminal Justice and Prison Reform Team**

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### **RECALLING,**

the Preambulatory Clause 6 of the United Nations General Assembly Resolution 45/110<sup>1</sup>, urging all of the United Nations specialized agencies to assist Member States in the implementation of the United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules) and the content of Rule 23 of this international instrument;

the Preambulatory Clause 10 of the United Nations General Assembly Resolution 65/229<sup>2</sup>, in which the technical assistance and advisory service of UNODC to Member States has been requested, with special attention to policies and practices on alternatives to imprisonment for women offenders;

the mandate of UNODC regarding Criminal Justice and Prison Reform grounded in Resolution 52/12<sup>3</sup> of the United Nations Commission on Narcotic Drugs and the content of the UNODC ROPAN Thematic Programme on Crime Prevention and Criminal Justice 2012-2015<sup>4</sup>;

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<sup>1</sup> UN General Assembly, *United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules)* : resolution / adopted by the General Assembly., 14 December 1990, A/RES/45/110, available at: <http://www.unhcr.org/refworld/docid/3b00f22117.html> [accessed 7 March 2013].

<sup>2</sup> UN General Assembly, *United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (the Bangkok Rules)* : note / by the Secretariat, 6 October 2010, A/C.3/65/L.5, available at: <http://www.unhcr.org/refworld/docid/4dcbb0ae2.html> [accessed 7 March 2013].

<sup>3</sup> UNODC. Resolution 51/12. Available in: < <http://www.unodc.org/documents/commissions/CND-Res-2000-until-present/CND-2008-Session51/CND-51-Res-2008-12e.pdf>>.

<sup>4</sup> UNODC. Thematic Programme on Crime Prevention and Criminal Justice 2012-2015. Available in: <[http://www.unodc.org/documents/justice-and-prison-reform/20120702\\_-\\_Thematic\\_Programme\\_Crime\\_Prev\\_and\\_Criminal\\_Justice\\_2012-2015\\_FINAL.pdf](http://www.unodc.org/documents/justice-and-prison-reform/20120702_-_Thematic_Programme_Crime_Prev_and_Criminal_Justice_2012-2015_FINAL.pdf)>.

and the official request from the Government of Panama, through its Public Ministry and Minister of Government, to assist in the extension of the use of electronic bracelets in the country.

UNODC ROPAN presents this Technical Advisory Opinion No. 002/2013, with a view to further develop its institutional position concerning the use of electronic surveillance as an alternative to imprisonment, analyzing the implementation of this technology *vis-à-vis* human rights matters and the possibilities and limitations faced by developing countries, such as Panama. A direct answer to these issues implies an analysis of the scope and content of the respective rules included in the international law and the interpretation of the existing national legislation of Member States in this domain.

Furthermore, UNODC ROPAN is aware of the traditional *juris dictio* nature of a Technical Advisory Opinion in its essence<sup>5</sup>, considering that such documents are typically issued by International Courts rather than by operational United Nations agencies, especially from the ones working in the field. Then again, UNODC ROPAN believes that a Technical Advisory Opinion might be the most effective channel to address, in general lines, questions of vital importance to governmental authorities that remain uncertain. In this context, UNODC ROPAN is proud to inaugurate this new practice among operational agencies, hoping that it might serve as an example for other international organizations.

## 1. MATTER FOR PREVIOUS CONSIDERATION

### 1.1 The electronic monitoring bracelet: history and used technologies

The use of new technologies in the public service is an undeniable trend. As technologies have been rapidly improving, governments have been shaping innovative policies in order to include new equipment and new software, motivated by different causes: positive public opinion, cost/benefit analysis, etc. Prison systems as any other public service are no exception to this trend. The 1992 Mark Allen movie “*Fortress*” demonstrates that the idea of controlling “criminals” with a high technology-approach is a latent demand of society’s collective consciousness by illustrating a futuristic prison.

In this pursuit of modernization of the criminal justice system, numerous governments around the world have been adopting the use of electronic monitoring bracelets as an alternative measure to imprisonment. According to Cesar Barros Leal<sup>6</sup> it is possible to identify three phases in the development of this technology. The first phase began in 1960, through the use of a two-piece portable disposal called *Behavior Trasmiter-Reinforcer (BRT-R)* where the objective was to monitor the localization and the behavior of a person by sending a discriminative signal if an unwished behavior was ever detected. The second phase was characterized by a profound apathy towards the use of electronic monitoring technologies: it lasted from 1970 until 1984<sup>7</sup>. Meanwhile, the third phase was a result of the work of the North-American judge Jack Love and the engineer Michael Goss who jointly designed a bracelet connected to a radar indicating the user’s position.

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<sup>5</sup> According to Article 65(1) of the International Court of Justice Statute, the ICJ encompasses the traditional competence in the United Nations System to issue Advisory Opinions. The ICJ has determined that “[t]he purpose of the Court’s advisory opinion is not to settle - at least directly - disputes between States, but to offer legal advice to the organs and institutions requesting the opinion”. UNODC will use this same methodology adapting this function to answer legal and administrative requests by government authorities inside its mandate, with a view to creating an institutional position on uncertain subjects such as the use of mandatory clothing for inmates (Technical Advisory Opinion No. 001/2013 of UNODC to the General Prison System of Panama) and the use of electronic monitoring bracelets as an alternative measure to imprisonment (current Technical Advisory Opinion No. 002/2013). [ICJ, Advisory Opinion on the Threat or Use of Nuclear Weapons, 1996, para. 15; ICJ, Advisory Opinion on the Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, 1950, p. 71].

<sup>6</sup> LEAL, Cesar Barros. *La vigilancia electrónica a distancia: instrumento de control y alternativa a la prisión en América Latina en el marco de los derechos humanos*. Editorial Porrúa: México, 2010. p.33/39.

<sup>7</sup> *Ibidem*, p. 34.

At the present time there are countless experiences that imply the use of this technology. Argentina, Brazil, Chile, Colombia, Mexico and Uruguay represent the most important initiatives in Latin America. Countries such as Portugal, Sweden and the United States of America have experienced a good and sustainable use of the electronic bracelets. However some other countries' experiences have not been very successful.

With regards to the technologies applied in the electronic bracelets, there are two main technical options: 1 - Radio Frequency (RF); and 2 - Global Positioning System (GPS). Both of them are used in different contexts and for various purposes since, according to the Guidelines on the Use of Electronic Monitoring Bracelets of COMJIB<sup>8</sup> - based on the Portuguese experience - each technology aims to respond to a specific purpose.

The Radio Frequency control is useful to determine if someone is obeying an order to remain at a specific address<sup>9</sup>. It is normally used to reinforce house arrest and it is relatively less intrusive and more economic than other technologies. On the other hand, bracelets equipped with a GPS system are the most appropriate alternative for monitoring the real time position of a user allowed to circulate in a predetermined area of a city or a neighborhood<sup>10</sup>. It is also used for assuring the compliance of work and study permits. GPS bracelets may also be part of a dual technology for the protection of victims and witnesses. In such cases, another disposal similar to a cell phone is given to the victim or witness who receives continuous information on the bracelet user's position.

When RF bracelets are employed, it is possible to allow the user to circulate in a predetermined area of a territory. However the effective control over his/her route must be made by cell phone. Meanwhile, GPS bracelets are not totally precise and "[...] the accuracy of a position determined with GPS depends on the type of GPS receiver. Most handheld GPS units are accurate within 15 meters on average from the location of a user"<sup>11</sup>. This is why it is not advisable to use this technology to reinforce house arrest as the user will have a larger area to circulate, which will not be detected by the monitoring center.

For the use of both RF and GPS bracelets, it is first imperative to ensure the quality of the phone network (fixed and mobile/GSM) of the region where it will be implemented. Also, as it will be further explained in sub item 2.3 of this Opinion, the first step before implementing any electronic surveillance system is to know the challenge that the given technology is intended to respond. The answer to this question will guide the choice of the appropriate technology. The Colombian experience, for instance, demonstrates that the most effective way appears to be the simultaneous use of RF and GPS technology, where the first technology assures the compliance of the house arrest with high precision and the second allows for the bracelet user to work or study, circulating in a fixed area.

Given the above mentioned information on the electronic bracelet history and technologies, it is now possible to analyze the possibilities and limitations of its use, in order to identify whether this type of electronic surveillance is also advisable for developing countries, such as Panama.

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<sup>8</sup> COMJIB. *Guía de implementación y gestión de sistemas de vigilancia electrónica en América Latina: transferencia de buenas prácticas*. Available at: [http://www.comjib.org/sites/default/files/Propuesta\\_portuguesa\\_implementacao\\_ES.pdf](http://www.comjib.org/sites/default/files/Propuesta_portuguesa_implementacao_ES.pdf).

<sup>9</sup> *Ibidem*, p. 10.

<sup>10</sup> *Ibidem*, p. 11.

<sup>11</sup> STEPHEN, V. G. RANDY G. , *et al. Monitoring High-Risk Sex Offenders With GPS Technology: An Evaluation of the California Supervision Program Final Report*. Available at: <https://www.ncjrs.gov/pdffiles1/nij/grants/238481.pdf> p. 24.

## 2. POSSIBILITIES AND LIMITATIONS IN THE USE OF ELECTRONIC SURVEILLANCE

UNODC has already concluded that imprisonment must not be granted as the natural form of punishment and that most of the objectives it implies can be met by using alternative measures, which are normally more effective and less expensive<sup>12</sup>. The international legal basis for the promotion and implementation of alternative measures to imprisonment rely, among other international instruments, in the International Covenant on Civil and Political Rights<sup>13</sup>, the American Convention on Human Rights and the Resolution 45/110 of the United Nations General Assembly that approved the “United Nations Standard Minimum Rules for Non-custodial Measures”, also known as the Tokyo Rules<sup>14</sup>. It is clear that States have been committed to develop new modalities of non-custodial measure, so electronic monitoring bracelets are – in part – a consequence of this commitment. In a previous publication, UNODC has classified the electronic monitoring as an alternative to detention that serves as “[...] an additional means of surveillance that can monitor compliance with other measures”<sup>15</sup>.

The present Technical Advisory Opinion will initially present different arguments used by critics and supporters of electronic bracelets. After a brief analysis of UNODC ROPAN’s current view on the subject it will be issued a coherent revised institutional opinion trying to specifically answer important criticisms.

### 2.1 Arguments in favor and against the use of electronic monitoring bracelets

Based in the criminal law doctrine<sup>16</sup>, it is possible to identify two distinct streams supporting and criticizing the use of electronic bracelets as an alternative measure to imprisonment. Critics base their arguments on the following issues:

- The measure might be considered as unconstitutional in the majority of States;
- It promotes public humiliation and stigmatization for the users;
- Bracelets only replicate other alternative measures such as house arrest;
- It is normally difficult to operate and users are not familiar to the use of technological devices, considering that the majority of persons in conflict with the law do not have enough resources, especially in developing countries;
- The possibility of failures, faults and transgressions;
- It promotes the expansion of the control by the State;
- The high costs for its implementation;
- It might be seen as a discriminatory measure because of the established criteria used to select users (such as the need of having a fixed telephone which could exclude offenders with low resources);
- The inability to reduce prison overcrowding.

On the other side, the common arguments used to support the implementation of this technology are:

<sup>12</sup> UNODC. *Handbook of basic principles and promising practices on alternatives to imprisonment*. Available at: [http://www.unodc.org/pdf/criminal\\_justice/Handbook\\_of\\_Basic\\_Principles\\_and\\_Promising\\_Practices\\_on\\_Alternatives\\_to\\_Imprisonment.pdf](http://www.unodc.org/pdf/criminal_justice/Handbook_of_Basic_Principles_and_Promising_Practices_on_Alternatives_to_Imprisonment.pdf). p. 6.

<sup>13</sup> UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <http://www.unhcr.org/refworld/docid/3ae6b3aa0.html> [accessed 7 March 2013].

<sup>14</sup> UN General Assembly, United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules) : resolution / adopted by the General Assembly., 14 December 1990, A/RES/45/110.

<sup>15</sup> UNODC. *Handbook of basic principles and promising practices on alternatives to imprisonment*.p. 22.

<sup>16</sup> LEAL, Cesar Barros. La vigilancia electrónica a distancia: instrumento de control y alternativa a la prisión en América Latina en el marco de los derechos humanos. p. 41/78.

- It is not a coercive measure: The user always gives his/her consent before wearing the bracelet and the measure is never imposed by a Judge or a Prosecutor;
- The continuous evaluation of the technology which guarantees the progress in the field of criminal justice;
- Its efficiency and reliability are proven in developed nations with a tradition of respect for human rights and individual liberties, such as Sweden<sup>17</sup>;
- It guarantees the rehabilitation process of the user as it allows a person to continue living in his/hers regular familiar environment;
- The continuous advance of the technologies;
- Reduced costs if compared to imprisonment;
- The protection of the user's intimacy (if compared with prison);
- The measure allows the user to work in order to pay compensation for the victim.

## 2.2 Electronic surveillance and the International Law

Criminal law doctrine must be complemented by the international rules which regulate the application of non-custodial measures. In this context, article 2.4 of the Tokyo Rules specifies that “The development of new non-custodial measures should be encouraged and closely monitored and their use systematically evaluated”. This rule sets the legal foundation for the introduction of new technologies as alternative measures to imprisonment, such as the electronic monitoring bracelet. It also stipulates the need of a *systematical evaluation* in order to ensure the effectiveness of any new non-custodial measure.

With regards to the question of the supposed stigmatization of the offender, and responding to the critics concerning the possible humiliation suffered by users of the electronic monitoring bracelets, it is important to bear in mind the broad scope of article 10.1 of the International Covenant on Civil and Political Rights:

Article 10.1 - All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

In interpreting the scope of this article as including the protection of human treatment also for people whose liberty has been partially limited – as it is the case of the majority of the non-custodial measure – the reader would easily understand that this basic human right should be read in harmony with rules 3.8, 3.9 and 3.11 of the Tokyo Rules, *in verbis*:

3.8 - Non-custodial measures shall not involve medical or psychological experimentation on, or undue risk of physical or mental injury to, the offender.

3.9 - The dignity of the offender subject to non-custodial measures shall be protected at all times.

3.11- 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.

Also, the official Commentary on the United Nations Minimum Standard Rules on Non-custodial Measures<sup>18</sup> emphasizes that:

The right to privacy of the offender and his or her family, mentioned in rule 3.11, is of special importance. Current developments and new intensified forms of supervision and control, such as

<sup>17</sup> UNODC. *Handbook of basic principles and promising practices on alternatives to imprisonment*. p. 40.

<sup>18</sup> United Nations. *Commentary on the United Nations Standard Minimum Rules for Non-Custodial Measures (the Tokyo Rules)*. Available at: <https://www.ncjrs.gov/pdffiles1/Digitization/147416NCJRS.pdf>. p. 14.

electronic monitoring and house arrest, give this rule particular significance; the utmost vigilance is required to ensure that undue intrusion does not take place.

In its previous publication on the subject<sup>19</sup> UNODC has expressed that:

Most fundamentally, the objection may be made that the fitting of an electronic bracelet to an offender is an infringement of privacy, if not of human dignity, that is itself a punishment and not merely a technique for ensuring compliance with other restrictions. Improvements in technology, such as the increased use of mobile telephones as a means of monitoring, may allow some of these considerations to weigh less heavily in the future.

As technology has been rapidly evolving, electronic bracelets do not represent any harm for physical and especially mental integrity for its users. This improvement of technology has contributed to transform the electronic bracelet (for both of current technologies) as a modern instrument, similar to a watch. In this sense, the dignity of users is not disrespected at any time. UNODC ROPAN reaffirms that more technological improvement may cause a positive impact in the user's lives, minimizing the visual effects of the bracelet and therefore avoiding any type of stigmatization towards its users.

Likewise, article 2.6 of the Tokyo Rules highlights that "Non-custodial measures should be used in accordance with the principle of minimum intervention". This rule must be read in harmony with the principle of presumption of innocence (*in dubio pro reo*). In this context, the use of electronic bracelets should be prioritized as an alternative measure to pre-trial detention, following the letter of article 9.3 of the International Covenant on Civil and Political Rights:

Article 9.3 - Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. **It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment. (UNODC ROPAN's bold highlighting).**

It is also noteworthy to mention the Principle III (*Personal liberty*) of the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas<sup>20</sup>:

## 2. Exceptional use of preventive deprivation of liberty

The law shall ensure that personal liberty is the general rule in judicial and administrative procedures, and that preventive deprivation of liberty is applied as an exception, in accordance with international human rights instruments.

[...]

Preventive deprivation of liberty is a precautionary measure, not a punitive one, which shall additionally comply with the principles of legality, the presumption of innocence, need, and proportionality, to the extent strictly necessary in a democratic society. It shall only be applied within the strictly necessary limits to ensure that the person will not impede the efficient development of the investigations nor will evade justice, provided that the competent authority examines the facts and demonstrates that the aforesaid requirements have been met in the concrete case.

<sup>19</sup> UNODC. *Handbook of basic principles and promising practices on alternatives to imprisonment*. p. 41.

<sup>20</sup> OAS. Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas. Available at: <http://www.cidh.org/basicos/english/Basic21.a.Principles%20and%20Best%20Practices%20PDL.htm>.

Articles 6.1 and 6.2 of the Tokyo Rules should also be taken in consideration at this point:

6.1 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.

6.2 Alternatives to pre-trial detention shall be employed at as early a stage as possible. Pre-trial detention shall last no longer than necessary to achieve the objectives stated under rule 5.1 and shall be administered humanely and with respect for the inherent dignity of human beings.

It should also be noted that article 2.1 of the Tokyo Rules specifies that “The relevant provisions of the present 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. [...]”, UNODC ROPAN calls the attention of Member States and especially of the Government of Panama, for the need of prioritizing pre-trial detainees in the implementation of an electronic surveillance programme. This is a special need for Panama where 65.1% of persons deprived of liberty are still awaiting trial<sup>21</sup>.

Another important basic principle given by the Tokyo Rules comes from its article 1.2:

Article 1.2 The Rules are intended to promote greater community involvement in the management of criminal justice, specifically in the treatment of offenders, as well as to promote among offenders a sense of responsibility towards society.

UNODC ROPAN emphasizes that electronic monitoring bracelets is a technology employed to serve as an alternative measure to imprisonment *and not as another form of imprisonment*. The goal of the use of this technology must never be the creation of a *virtual prison*<sup>22</sup>, otherwise, States would be disrespecting the above mentioned article 1.2 of the Tokyo Rules. It is important for governments willing to implement the electronic monitoring system to keep in mind the need of the required infrastructure and planning<sup>23</sup> which will guarantee the involvement of the community in the treatment of the bracelet user. This reflects in the need for the formulation of a “Reintegration Plan”<sup>24</sup> where the use of electronic bracelets should be considered as part of the reinsertion process of offenders, prioritizing the design of work and study programmes of electronic bracelets.

The discussion on the need for a “Reintegration Plan” for persons who are granted with a non-custodial measure must be understood in a broad context considering the United Nations prison model based in the establishment of rights for persons deprived of liberty and obligations for both prisoners and States. This model transcends the need for a philosophical and academic debate on the justification and objectives of the deprivation of liberty and is focused on the establishment of international consensus over the basic principles and minimum rules regarding Member States prisons’ policies<sup>25</sup>. This model is, therefore, grounded in a series of Basic Principles, such as the Inter-American Commission Basic Principles for the Treatment of Persons Deprived of Liberty and the series of United Nations Minimum Rules for the Treatment of Prisoners approved by the General Assembly. All of these instruments are consider as “non-binding rules” (or international soft law),

<sup>21</sup> According to official data provided by the Prison System of Panama on February, 2013.

<sup>22</sup> COMJIB. *Guía de implementación y gestión de sistemas de vigilancia electrónica en América Latina: transferencia de buenas prácticas*. p. 1.

<sup>23</sup> UNODC. *Handbook of basic principles and promising practices on alternatives to imprisonment*. p. 22.

<sup>24</sup> The elaboration of such plan should be guided by rules 13.1 and 10.1, which stresses the constructive purposes of supervision and the positive aims it seeks to achieve. The United Nations Commentary on the Tokyo Rules specifies that Rule 13.1 “[...] calls for programmes to be developed so that the needs of offenders can be met more effectively meet. Much more needs to be known about appropriate treatments and rule 13.1 encourages implementing authorities to be innovative. Groups such as sex offenders and drug-dependent persons pose particular challenges and the development of innovative treatment programmes is encouraged by this rule. Specialized treatment of the kind advocated in rules 13.1-13.6 needs time and resources. If supervisors have a heavy case-load, they may not be able to effectively implement the treatment programmes that are needed. Therefore, rule 13.5 stresses the need to limit the case-load and to maintain practicable and manageable case-load assignments.” [United Nations. Commentary on the United Nations Standard Minimum Rules for Non-Custodial Measures (the Tokyo Rules) p.26]

<sup>25</sup> CARRANZA, E. *Carcel y justicia penal en América Latina y el Caribe*. México: siglo XXI, 2009.

however, they have been increasingly used as guidelines which give scope and content to the international human rights law<sup>26</sup>.

The origin of this “United Nations Penitentiary Model” is an answer to the failure in the achievement of the “re” ideologies that have been widely used as a guideline for prison systems around the globe and have led to the idealistic perspective that prison facilities’ main objective would be to provide a “treatment” for offenders. The legal basis for such ideologies can be found in articles 10.3 of the International Covenant on Civil and Political Rights and in article 5.6 of the American Convention on Human Rights.

Considering the failure in the application of the “re” ideologies, there is a clear need for reinterpreting the aforementioned articles aligning the objectives of imprisonment to a more pragmatic perspective. This perspective is proposed by Zafaroni as the double function of imprisonment: (1) an alternative to the exercise of fundamental rights, which have been systematically denied for offenders in the phase immediate before the imprisonment; and (2) the mitigation of damage and the minimization of the negative effects of imprisonment<sup>27</sup>.

Also rule 21.1 states that “Programmes for non-custodial measures should be systematically planned and implemented as an integral part of the criminal justice system within the national development process”. In this context, the UN Commentary on the Tokyo Rules<sup>28</sup> emphasizes the importance that States develop:

“[...] additional innovative measures in response to changing conditions in the criminal justice system. The planning and implementation of non-custodial measures should not be solely viewed as a criminal justice issue or even more narrowly as a response to an immediate crime problem. Instead, according to rule 21.1, **the measures imposed on offenders should be developed and implemented within the framework of comprehensive national development plans, including the development of employment, education, social welfare and health. In this way treatment programme priorities and objectives can be coordinated with overall development goals. (UNODC ROPAN’s bold highlighting).**”

Given the previous analysis, UNODC ROPAN concludes that the use of electronic bracelets as an alternative measure to imprisonment is in harmony with the established international rules and principles of law as it encompasses the United Nations Prison Model of Rights and Obligations. However, the following matters remain uncertain: a) the definition of the objectives to the use of electronic monitoring bracelets previous to its implementation; b) the imperative need for the definition of the criteria used to select possible users and the necessary inter-institutional coordination in the implementation of the programme; and c) finally, the possible management approaches to an electronic surveillance programme, considering the experiences of developed and developing countries.

### 2.3 Objectives of the Electronic Surveillance Programme

The basic starting point would be the definition of the objectives a country aims to fulfill by the use of electronic monitoring bracelets. As we have previously referred under sub item 1.1, experts must first provide an answer to the question “Why to implement an electronic monitoring system?”, so that one can define the technology and the criteria which will be used to select possible users.

<sup>26</sup> Inter-American Court on Human Rights. *Vélez Loo vs. Panama Case*. Available at: [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_218\\_esp.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_218_esp.pdf) par 215.

<sup>27</sup> ZAFFARONI, E., ALAGIA, A., *et al. Derecho Penal. Parte General*. Ediar: Buenos Aires.

<sup>28</sup> United Nations. *Commentary on the United Nations Standard Minimum Rules for Non-Custodial Measures (the Tokyo Rules)* p. 37.



UNODC ROPAN recalls that electronic surveillance may be employed: (1) for humanitarian reasons; (2) to reinforce house arrest; (3) to diminish prison overcrowding; (4) to provide a special treatment for prisoners with special needs (e.g. prisoners living with HIV/AIDS or in need of special health care); (5) to monitor the compliance of work and study permits; and (6) to protect victims or witnesses. Depending on this answer, a Government will be able to launch its institutional policy framework on the subject, defining competences, criteria and the technologies that will be put in place.

**UNODC ROPAN IS OF THE OPINION** that in order for electronic bracelets to be considered as an effective alternative measure to imprisonment and in harmony with international rules, Governments must first select the problems/issues that it aims to solve. Also, this measure should not be, in any case, used as an isolated alternative. This means that the use of electronic monitoring bracelets should always be part of a complete “Reintegration Plan” for its users, avoiding the establishment of a virtual prison.

### 3. TARGET POPULATION

In analyzing the issue brought to UNODC ROPAN’s appreciation, an important question emerges concerning the selection criteria of the target population for the use of the electronic monitoring bracelets. In this regard, it is important to highlight the content of article 3 of the Tokyo Rules, with special attention to items 1 and 2:

#### 3. Legal safeguards

3.1 The introduction, definition and application of non-custodial measures shall be prescribed by law.

**3.2 The selection of a non-custodial measure shall be based on an assessment of established criteria in respect of both the nature and gravity of the offence and the personality, background of the offender, the purposes of sentencing and the rights of victims.**

[...](UNODC ROPAN’s bold highlighting).

The broad scope of the lecture of article 3.2 of the Tokyo Rules permits the conclusion that Member States willing to develop any form of non-custodial measure should do so through the clear legal establishment of subjective and objective criteria in the selection of possible beneficiaries. In the specific case of electronic monitoring bracelets, UNODC ROPAN insists that such criteria must be aligned with the objectives that the use of this alternative measure to imprisonment aims to respond in the country’s criminal justice system. In the case where bracelets are selected as a policy to respond to a victim and witness protection programme, for instance, Governments should develop specific protocols in order to prioritize the most vulnerable victims (such as in domestic violence cases).

Furthermore, article 2.3 of the Tokyo Rules calls the attention on the importance that Member States foresee a different set of alternative measures to imprisonment “[...]In order to provide greater flexibility consistent with the nature and gravity of the offence, with the personality and background of the offender and with the protection of society[...]”. In conclusion, the use of electronic monitoring bracelets must be addressed as just one of a wide range of other alternative measures to imprisonment. As different alternative measures are foreseen, competent authorities will be able to select the most suitable type in each case, according to subjective criteria of offender (or presume offender). Article 8 and 10.3 of the Tokyo Rules establish:

Article 8. Sentencing dispositions 8.1 The judicial authority, having at its disposal a range of noncustodial measures, should take into consideration in making its decision the rehabilitative needs of the offender, the protection of society and the interests of the victim, who should be consulted whenever appropriate.

Article 10.3 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.”

As it was mentioned before, the Republic of Colombia has a leading experience in Latin America in the use of this technology, applying it for sentenced and pre-trial detainees. Articles 1 and 2 of the Decree n. 177 of 2008<sup>29</sup>, establishes the legal criteria for the selection of users of electronic bracelets, as it follows:

Article 1. Electronic Monitoring System. The Execution and Security Measure Judge may request the utilization of electronic monitoring systems during the execution of the sentence, as an alternative measure to imprisonment, provided that the sentenced meet the following requirements:

1. That the punishment imposed in the sentence does not exceed eight (8) years of imprisonment, and the offender has not been declared guilty of crimes of genocide, crimes against international humanitarian law, forced disappearance, kidnapping, torture, forced displacement, smuggling of migrant, trafficking in persons, crimes against freedom, integrity and sexual, extortion, aggravated conspiracy, money laundering, terrorism, terrorist financing and resource management related to terrorist activities and crimes related to drug trafficking.
2. That the sentenced has not been declared guilty for an intentional or *almost intentional*<sup>30</sup> crime within the last 5 years;
3. That personal, professional, family or social behavior would allow the court to consider that the sentenced does not represent any danger to the community and shall not try to evade the execution of the sentence.
4. The sentenced has fulfilled the total payment of the fine.
5. That the damage caused by the offense has been repaired by the offender within the period established by the Judge.

[...]

Article 2. Application as an alternative measure to pre-trial detention. The Correction Judge may order the use of electronic surveillance systems who would be replaced in the pre-trial detention facility by the place of residence, subject to compliance with the requirement referred to in Article 314 of Law 906 of 2004.

The Panamanian legal context is quite different than its neighboring countries. As the Accusatorial Penal System has not yet been implemented in all of the provinces of the country, including the Province of Panama where the highest levels of criminality and prisoners are concentrated, the Public Ministry still remains the only State authority responding for the imprisonment of pre-trial detainees. This inquisitorial system explains, in great extent, why the country suffers one of the highest proportional pre-trial prison population rates in Latin America. It also explains why the Public Ministry of Panama was the primary authority in the implementation of the electronic surveillance in the country: a measure that expresses its special will of reducing the number of prisoners waiting for trial.

<sup>29</sup> Republic of Colombia. *Decree n. 177 of 2008*. Available at: <http://www.alcaldiabogota.gov.co/sisjur/normas/Normal1.jsp?i=28508>.

<sup>30</sup> In the original: “*preterdolo*”.

As a consequence, the practical legal basis for the use of electronic monitoring bracelets in the country is found in Resolutions from the Public Ministry and not in Executive Decrees. Also, this institution is responsible for providing the service of electronic surveillance in the country since 2005. Article 3 of the Resolution 46 of 2009<sup>31</sup> of the Panamanian Public Ministry establishes the selection criteria for possible beneficiaries:

Article 3. To select the following persons in order to assure the efficiency of the use of the electronic monitoring bracelet as an alternative measure to imprisonment:

1. The primary syndicated wanting to voluntarily participate in the program who is aware of the obligations that entails.
2. The patient whose condition cannot be treated according to indications of the prison medical center.
3. Pregnant women and mothers with children within the first 6 months age, except the ones that represent danger against the child or infant.
4. The person deprived of liberty who is ordered house arrest and is not potentially dangerous.
5. The syndicated bailable offense of release, notifying the victim of this decision.
6. The syndicated with work permit.
7. The syndicated with study permit.

Other countries have shifted their perspective towards the use of electronic monitoring bracelets. It is the case of the State of Sao Paulo in Brazil where this measure is primarily applied to people who were sentenced for committing serious crimes, such as torture, drug trafficking and others. The objective is to reinforce measures such as house arrest, parole order and work or study permits<sup>32</sup>.

As the implementation of an electronic surveillance programme is also limited by the amount of available resources, especially in developing countries, it is important to use the establishment of subjective and objective criteria to prioritize prison populations with special needs. Such prioritization should not be considered as a discriminatory policy. UNODC ROPAN has already affirmed in its Technical Advisory Opinion No. 001, on the use of mandatory clothing for persons deprived of liberty in Panama, that not all differences in treatment of persons deprived of liberty can be considered to be discriminatory (sub item 4.2). In this context, the Human Rights Committee has interpreted the content of article 26 of the International Covenant on Civil and Political Rights and concluded that: “[...] *differentiation based on reasonable and objective criteria does not amount to prohibited discrimination*”<sup>33</sup>. Such positioning should be jointly read with Principle II of the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas:

Measures designed exclusively to protect the rights of women, particularly the rights of pregnant women and nursing mothers; of children; of the elderly; of those who are sick or suffering from infections such as HIV-AIDS; of persons with a physical, mental, or sensory disability; as well as of indigenous peoples, afro-descendants, and minorities shall not be considered discriminatory. These measures shall be applied in accordance with the law and international human rights law, and shall always be subject to review by a judge or other competent, independent, and impartial authority.

Considering this scenario, **UNODC ROPAN IS OF THE OPINION** that Member States willing to adopt the electronic monitoring bracelet must adapt their legal framework, by regulating the use of

<sup>31</sup> Public Ministry of Panama. *Resolution 46 of 2009* Available at: [http://ministeriopublico.gob.pa/minpub/Portals/0/Pdfs/resoluciones/Res\\_46\\_09.pdf](http://ministeriopublico.gob.pa/minpub/Portals/0/Pdfs/resoluciones/Res_46_09.pdf)

<sup>32</sup> State of Sao Paulo, Brazil. *Article 2, par 2 of Law n 12.90672008*. [LEAL, Cesar Barros. La vigilancia electrónica a distancia: instrumento de control y alternativa a la prisión en América Latina en el marco de los derechos humanos. p. 191/197].

<sup>33</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), Implementation of the International Covenant on Economic, Social and Cultural Rights : consideration of reports submitted by States parties in accordance with article 16 of the International Covenant on Economic, Social and Cultural Rights : replies by the Government of Poland to the list of issues (E/C.12/POL/Q/5) to be taken up in connection with the consideration of the fifth periodic report of Poland (E/C.12/POL/5), 7 August 2009, E/C.12/POL/Q/5/Add.1, available at: <http://www.unhcr.org/refworld/docid/4ad5d5290.html> [accessed 7 March 2013] p. 28.

this measure so as to establish the exact subjective and objective criteria in the definition of possible users in order to avoid corruption and misinterpretations.

Member States should prioritize the use of electronic monitoring bracelets to the following populations:

1. Obeying a *humanitarian purpose*, electronic monitoring bracelets should be employed for detainees (pre-trial and sentenced), suffering from serious illness which cannot be adequately treated in prison facilities, such as cancer, late stages of AIDS, amongst others; elders (according to national legislations); persons suffering from serious incapacities in cases where their health conditions are totally incompatible with life in prison; and pregnant women or mothers of infants under the age of one<sup>34</sup>.
2. Based in the *principle of minimum intervention and presumption of innocence*, States should prioritize the use of electronic bracelets as an alternative measure for pre-trial detention, according to the gravity of the offence.
3. For sentenced inmates, priorities should be given to the ones who have committed *small offences* (according to national legislation). In these cases, electronic bracelets should be used to reinforce house arrest punishment (through RF technology), for work and study permits (GPS technology) or even for the pre liberty period<sup>35</sup>.

#### 4. IMPLEMENTATION ISSUES

States willing to adopt this new technology normally start with the implementation of a “pilot plan”. In the case of Panama this “pilot plan” has been implemented since 2005, and until now the country has employed around 222 bracelets mainly to pre-trial detainees<sup>36</sup>. The implementation of a pilot plan may raise three important issues: (1) the necessary inter-institutional coordination amongst States authorities aligned with the legal procedure for the concession and supervision of electronic bracelets; (2) the appropriate management approach to provide this public service, especially in the context of developing and middle-income countries, such as Panama; and (3) the need for public participation and community cooperation.

##### 4.1 Inter-institutional coordination

The main issue consists of defining which States authorities will be involved in the procedure of concession, supervision and assistance to bracelet users. That is why, previous to the analysis of the inter-institutional context of Panama, UNODC ROPAN will present important considerations detached from the Tokyo Rules.

###### 4.1.1 Application procedure of the electronic monitoring bracelets

Complementing the need for the establishment of legal objectives and subjective criteria further developed in item 3 of this Technical Advisory Opinion, it is important to note that the positive description of the procedure by which an offender (or presumed offender) may request and be granted with the use of the electronic monitoring bracelet is imperative to the legality of this non-custodial measure. At this stage it is essential to bear in mind articles 3.3, 3.5 and 3.6 of the Tokyo Rules:

<sup>34</sup> Rodriguez, M. N. Women in prison: an approach from the gender perspective. *In*. Crime, criminal justice and prison in Latin America and the Caribbean Mexico: Siglo XXI, 2010. p. 215.

<sup>35</sup> At this point it is important to recall rule 9.4 of Tokyo Rules: “Any form of release from an institution to a non-custodial programme shall be considered at the earliest possible stage”.

<sup>36</sup> According to official information from the Panamanian Public Ministry provided in March 2013.

3.3 **Discretion by the judicial or other competent independent authority** shall be exercised at all stages of the proceedings by ensuring full accountability and only in accordance with the rule of law.

[...]

3.5 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.

3.6 The offender shall be entitled **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. (UNODC ROPAN's bold highlighting).

The guarantee of discretion<sup>37</sup> by the competent authority<sup>38</sup> is a key element to the application of any non-custodial measure. This rule must be read jointly with the rule described in article 2.3 of the Tokyo Rules (as explained in item 3 of this Opinion). The discretion of the competent authority must be exercised not only at the moment of deciding if one has the right to be granted an alternative measure such as the electronic bracelet, but also at the moment of evaluating if his/her behavior is suitable *vis-à-vis* the granted alternative measure. In this sense, it is very important that the rules and conditions are clear for the beneficiary of the electronic bracelet, from the beginning<sup>39</sup>, and that the person has formally accepted to respect such conditions. Article 12.3 of the Tokyo Rules specifies:

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.

As for the supervision of the compliance of users of electronic bracelets, it is noteworthy to mention the disposition of article 10.2: "If a non-custodial measure entails supervision, the latter shall be carried out by a competent authority under the specific conditions prescribed by law". At the same time, article 14.1 of the Tokyo Rules calls the attention to the fact that a "[...] breach of the conditions to be observed by the offender may result in a modification or revocation of the non-custodial measure". According to the understanding of the United Nations Commentary on the Tokyo Rules<sup>40</sup>, such conditions should be limited as follows:

Conditions should be as few as possible, taking into account rule 2.6, on minimum intervention. If the offender is to benefit from them and to achieve some progress towards social reintegration, then the **conditions should be achievable and realistic. They should also be precise. Vague conditions will only confuse the offender and cause difficulties in the relationship between the offender and the supervisor. It is important for the offender to understand the conditions.** (UNODC ROPAN's bold highlighting).

However, article 14.3 of the same International instrument highlights that the failure of any alternative measure to imprisonment should not automatically lead to the imposition of a custodial measure<sup>41</sup>. The following article, 14.4, also establishes that in such cases "[...] A sentence of

<sup>37</sup> Concerning the meaning of discretion, it is important to note the UN Commentary on the Tokyo Rules: "The element of discretion involved in the decision-making may increase the risk of discrimination against a person or group.[...] 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 to treat persons differently in view of their particular background and personal needs and problems." [United Nations. Commentary on the United Nations Standard Minimum Rules for Non-Custodial Measures (the Tokyo Rules) p. 378]

<sup>38</sup> As established by the Commentary on the Tokyo Rules: "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." [*Ibidem*, p. 3].

<sup>39</sup> *Ibidem*, p. 12.

<sup>40</sup> *Ibidem*, p. 24.

<sup>41</sup> If violations of conditions were to be considered as offences in themselves, it might result in an accumulation of penalties quite disproportionate to the original offence. [*Ibidem*, p. 28].

imprisonment may be imposed only in the absence of other suitable alternatives”. Article 14.6, on the other hand, grants beneficiaries from non-custodial measures the right of appealing to a judicial or other competent authority in the case of revocation.

Furthermore, the concession and supervision of any non-custodial measure might include the elaboration of a social inquiry. In the case of electronic monitoring bracelet, each beneficiary should be first accurately evaluated by a team of specialized professionals, in order to identify if his or her social environment and psychological conditions is compatible with this alternative measure. The social inquiry in this case may also include the assessment of whether the potential user possesses all the necessary technical infrastructure to receive this alternative measure (e.g. telephone line, electricity, etc.)<sup>42</sup>.

**UNODC ROPAN IS OF THE OPINION** that the procedure that regulates the concession, supervision and assistance to the user of electronic bracelet must be fully described by law and the competence of each State authority must be clearly stated from the beginning of the pilot plan.

#### 4.1.2 The institutional context: competent authority v. implementing authority

The lack of legal provision that regulates the division of competences among State authorities may lead to misinterpretations and inefficiency in the implementation of electronic surveillance. Deciding which will be the “competent authority” is an important and basic step to the development of the programme. Likewise, some States choose to separate the work of the “competent authority” that decides if an offender (or presumed offender) fits the legal subjective and objective criteria to use the electronic monitoring bracelet from the work of the “implementing authority” that is responsible to manage the monitoring centre and is assigned to supervise the compliance of the conditions by the beneficiary.

In this sense, it is noteworthy to mention the United Nations Commentary on the Tokyo Rules:

Whichever authority decides on the conditions to be observed by the offender, it should base its decisions on achieving a balance between satisfying the needs of society, the needs and rights of the offender, and the needs of the victim. The implementing authority should never impose conditions that subject the offender to requirements going beyond those resulting from the decision of the judicial authority.<sup>43</sup>

In the particular case of Panama, the institutional coordination of its electronic surveillance programme is influenced by the transition process from the Inquisitorial Penal System towards the Accusatorial Penal System (APS). The reform of the Criminal Procedure Code of 2008 included the use of electronic monitoring bracelets in the country as a “*Medida Cautelar Personal*” (preventive personal measure) through article 224.9. Also, article 333 of the Criminal Procedure Code of Panama foresees the use of electronic bracelets for the protection of victims in the case of domestic violence.

There are not any laws or executive decrees that regulate the competence for implementing the management of the electronic surveillance programme in the country. As the Public Ministry is responsible for the concession and supervision of preventive personal measures in the Inquisitorial Penal System, this institution decided to implement the use of electronic monitoring bracelet in

<sup>42</sup> The United Nations Commentary on the Tokyo Rules explains that: “A social inquiry report requires an official or competent person to collect information about an offender. This must be done with proper regard to rule 3.11, which calls for the offender's right to privacy to be respected. Furthermore, since the Tokyo Rules call for an offender's dignity to be respected (rule 3.9) and his or her sense of responsibility to be developed (rule 1.2), it would be appropriate for the information provided in the social inquiry report to be made available to the offender, unless there are special grounds for not releasing specific pieces of information.” [*Ibidem*, p. 17].

<sup>43</sup> *Ibidem*, p. 24.

2005, based on their own internal resolutions (which were all compatible with the Inquisitorial Penal System). As it was mentioned before, these documents have established the procedure for concession and supervision and also the subjective and objective criteria for the authorization of the use of electronic bracelets in the country. The Public Ministry has then cumulated both functions: that of “competent authority” and also “implementing authority” – as the monitoring centre was created inside the structure of this institution.

Considering this complex inter-institutional context and the fact that the Public Ministry will not be able to continue as the competent authority to grant any preventive personal measure when the Accusatorial Penal System is fully implemented in the country, this institution decided to coordinate with other State authorities to transfer this competence. As the Judge of Guarantees is the competent authority to grant preventive personal measures, including the electronic monitoring bracelet, the Judicial Organ of Panama was identified as the “competent authority”. On the other hand, the institutional and political context of Panama led to the inclusion of the Ministry of Government as the implementing authority since the penitentiary system is under its competence. The three institutions signed a Memorandum of Understanding (*Acta de compromiso inter-institucional*) establishing the competences of each institution in light of the imminent Accusatorial Penal System. It was also decided that a “pilot plan” of the electronic surveillance lead by the Ministry of Government of Panama would be implemented in the Province of Panama where the APS will only be implementing after 2017<sup>44</sup>. Taking into account this delay of four years in the implementation of the APS in the Province of Panama, the Public Ministry would still continue to be the “competent authority” to grant this alternative measure during this transitional period basing its decision in the aforementioned Resolutions.

Meanwhile, the Panamanian Public Ministry requested the assistance of UNODC ROPAN to the process of extension of the use of electronic bracelets in the country, providing the resources to the procurement of new bracelets (of both technologies). The assistance request included a special demand for supporting this institution in including the protection of victims (especially of domestic violence) as possible beneficiaries of the electronic monitoring bracelet. It is worth mentioning that the protection of victims will continue to be the Public Ministry’s responsibility and competence including once the adversarial system is fully implemented in the country.

UNODC ROPAN is aware of the need for the national competent authorities to keep an objective and impartial view when deciding as to whether the use of the electronic monitoring system is suitable or not. In this context, it is advisable that attributions regarding the granting (as competent authority) and implementation (as implementing authority) of the electronic monitoring bracelets are segregated and therefore exercised by different State institutions. In the case of Panama, the Memorandum of Understanding signed on 10 December 2012 by all of the institutions involved stipulates that the Ministry of Government shall act as the implementing authority whereas the Public Ministry shall act as the competent authority. This status quo shall be respected until the complete phasing out of the Inquisitorial Penal System and the entering into force of the Accusatorial Penal System in the province of Panama – when the Judicial Organ shall begin to act as the only competent authority to grant personal preventive measures, such as the electronic monitoring system. In order to comply with its obligations as the implementing authority, the Ministry of Government will have to proceed with all relevant institutional adjustments (including appropriate budgetary planning and operational allocations) so as to ensure the sustainability of the programme.

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<sup>44</sup> Law 8 of 06 March 2013 of the Republic of Panama has postponed the arrival of the Accusatorial Penal System in the Province of Panama to 2017 which was originally foreseen to 2014.

Considering the above national institutional context, **UNODC ROPAN IS OF THE OPINION** that the electronic surveillance pilot plan in the province of Panama should be led by the Public Ministry until the APS is fully implemented in the country. The Public Ministry shall therefore function as the competent authority (based on their own resolutions) during the transition to a fully-fledged APS. Meanwhile, the Ministry of Government could function as the implementing authority, assigning the necessary institutional and budgetary resources to fulfill the functions that have been assigned to this institution.

Even with the arrival of the APS, UNODC ROPAN calls the attention for the competence of the Public Ministry, being the only competent authority in the case of victim protection, so we strongly recommend for this institution to further develop the necessary protocols and resolutions for the specific protection of victims of domestic violence through the use of electronic monitoring bracelets.

## 4.2 Management issues

The main management issue consists in assuring the necessary technical coordination to proceed with the supervision of the user of the electronic bracelet. In this regard it is essential to bear in mind the content of rule 10.2 of the Tokyo Rules, *in verbis*:

10.2 If a non-custodial measure entails supervision, the latter shall be carried out by a competent authority under the specific conditions prescribed by law.

About this specific question, UNODC has affirmed, in a previous publication<sup>45</sup>, that as for the use of electronic monitoring bracelets:

The technology may be expensive. In less developed societies, it may not be possible to use electronic monitoring, as there is not the technical infrastructure to implement it[...] In any event, it may be more desirable to have supervision conducted by human beings rather than by machines. In many developing societies where labour costs are low, it may even be more economical to employ such supervisors rather than set up and maintain the complex technology needed for electronic monitoring.

As Governments in developing countries do not possess the precise technological skills to fulfill the job of supervision of the electronic bracelets, they have been using public-private partnership or outsourcing contracts as a common practice. Concerning this matter, the UN Commentary on the Tokyo Rules specifies:

Supervision is therefore a highly skilled task. Rule 10.2 requires that supervision of offenders must be carried out within a legal framework by a properly constituted authority. Parts of the supervisory task may be delegated or contracted out to community groups or volunteers. When this is done it must be made clear that all the statutory power rests with the competent authorities. When supervisory functions are delegated to agencies working for commercial profit, many questions arise that need careful consideration in the light of rule 10.2.

UNODC ROPAN is aware that Member States have the power and discretion to undertake negotiations with private companies to provide any public service, including the ones relating to the criminal justice system. In such cases, it is important that contracts be conducted in harmony with the procurement laws of each country, and therefore governments shall take special care for the risks

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<sup>45</sup> UNODC. *Handbook of basic principles and promising practices on alternatives to imprisonment*. p. 41.



of corruption. In the specific case of electronic monitoring bracelets, a common practice amongst Member States is that State authorities manage the monitoring centre jointly with the specialized private company, assuring the necessary control and safety of public sensitive data. In this sense, it is important to highlight the content of rule 2.2 of the Tokyo Rules:

2.2 The Rules shall be applied without any discrimination on the grounds of race, colour, sex, age, language, religion, political or other opinion, national or social origin, property, birth or other status.

In this scenario, UNODC ROPAN calls the Member States attention to the fact that charging directly bracelet's users for the use of this alternative measure might constitute a violation of the aforementioned rule 2.2 of the Tokyo Rules.

**UNODC ROPAN IS OF THE OPINION** that Member States willing to initiate a pilot programme on electronic surveillance should first analyze the costs *versus* benefits relation, comparing the expenses of the life of a person in prison and the cost of the use of electronic bracelets per person. The mere fact that life in prison is less expensive than the implementation of this technology should not be used as the solely impeditive factor for the implementation of electronic surveillance.

Furthermore, UNODC ROPAN highlights the need for technical supervision for the procurement of technologies at the beginning of the process which could be achieved through the request of specialized technical assistance.

Finally, if Governments are willing to provide this public service in partnership with a private company, it is important to guarantee that the use of electronic bracelets will not represent any costs for the possible beneficiaries, taking into account that the vast majority of prisoners are subject to the systematical denial of social rights, such as education, which have certainly contributed to their conflictive situation with the law and their vulnerable economic condition.

When the implementation of a public-private partnership of the bracelet for the provision of electronic bracelets foresees the direct charge of costs to the user, it is imperative for Member States to plan a distributive system in order to respect the content of rule 2.2 of Tokyo Rules (e.g. creation of a voucher programme, establishment of a loan fund for persons with few resources, etc).

#### **4.3 Public Participation and Community Cooperation**

Another essential need for the success of an electronic surveillance programme is the public participation and the community's cooperation so as to ensure the reintegration of the beneficiaries. Rule 13.4 of the Tokyo Rules establishes that:

13.4 The competent authority may involve the community and social support systems in the application of non-custodial measures. Alternative or substitute measures for deprivation of liberty.

In this same sense, Principe III.4 of the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas states that:

When applying alternative or substitute measures for deprivation of liberty, Member States shall promote the participation of society and the family in such a way as to complement the intervention by the State, and shall also provide the necessary and appropriate resources to ensure their availability and effectiveness

Finally, Rules 17 and 18 of the Tokyo Rules should be used by Governments as guidelines to the establishment of a public participation plan and to raise awareness on the need for community cooperation with the integration process of bracelet's users:

#### 17. Public participation

17.1 Public participation should be encouraged as it is a major resource and one of the most important factors in improving ties between offenders undergoing non-custodial measures and the family and community. It should complement the efforts of the criminal justice administration.

17.2 Public participation should be regarded as an opportunity for members of the community to contribute to the protection of their society.

#### 18. Public understanding and cooperation

18.1 Government agencies, the private sector and the general public should be encouraged to support voluntary organizations that promote noncustodial measures.

18.2 Conferences, seminars, symposia and other activities should be regularly organized to stimulate awareness of the need for public participation in the application of non-custodial measures.

18.3 All forms of the mass media should be utilized to help to create a constructive public attitude, leading to activities conducive to a broader application of non-custodial treatment and the social integration of offenders.

18.4 Every effort should be made to inform the public of the importance of its role in the implementation of non-custodial measures.

Considering this scenario, **UNODC ROPAN IS OF THE OPINION** that Governments should ensure the society's participation in the reintegration process of the beneficiaries from the electronic monitoring bracelet with the design of efficient policies within the framework of the "Reintegration Plan" proposed in sub item 2 of this Technical Advisory Opinion.

Done in Panama in 18 March 2013, at the Regional Office for Central America and the Caribbean of the United Nations Regional Office on Drugs and Crime.

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