Human Rights Law Clinic Papers 2017

HUMAN RIGHTS ASSESSMENT OF ELECTRONIC MONITORING AS AN ALTERNATIVE TO PRE-TRIAL DETENTION

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Sussex Law School Human Rights Law Clinic

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Introduction

Without so much as a conviction, millions of people across the globe are being detained while awaiting the resolution of charges against them. Pre-trial detention is supposed to be an exceptional measure[1] and, yet, it is continuously used as more than that. In a number of situations, being in prison subjects these detainees to horrific physical and mental conditions, to make matters worse, many countries allow for inadequately long periods of pre-trial detention.

Despite the many dangers associated with incarceration, courts often seem dismissive of the alternatives that have been made available to them. This reluctance towards implementation has significantly contributed to prison overcrowding, further aggravating the conditions for pre-trial detainees, chipping away from the fairness of the procedure. This dramatic overuse of pre-trial detention and the consequences thereof have led to a suggestion that this is now "the most overlooked human rights crisis of our time".[2]

The aim of this memorandum is to shine a light towards a better understanding of alternatives to the custodial remand of persons awaiting trial. It is argued that while alternatives may at times be seen as yet another form of deprivation of liberty, they should in many instances be viewed as a better option than detention. In order to do so, consideration is given as to whether the alternatives are truly something deserving of the name or if they are just another way to deprive of liberty, in particular within the meaning of Article 9 of the International Covenant on Civil and Political Rights (ICCPR) and Article 5 of the European Convention on Human Rights (ECHR). The memorandum then examines how these alternatives impact on other human rights and, if they do, when and how these alternatives might become dangerous. Finally, in an attempt to demonstrate the potential of electronic monitoring, the effectiveness of this alternative will be contemplated.

Background

Article 9(3) ICCPR and Article 5(3) ECHR stress the importance of not allowing pre-trial detention to become the norm, stating that: "it shall not become the general rule that persons awaiting trial shall be detained in custody". Jurisprudence has continuously treated pre-trial detention with caution by stating that it is important to ensure that it remains "the exception and as short as possible".[3] What's more, the Human Rights Committee has repeatedly emphasised that this exceptional measure should only be used when it is deemed to be the only means available to "prevent flight, interference with evidence or the recurrence of crime".[4] This makes it clear that detention only ought to be ordered when other means of accomplishing these goals have proved to be insufficient. It therefore seems to be imperative that the necessity of detention be assessed on a case by case basis, taking into account all the individual circumstances.[5] The Court further elaborated on what circumstances are to be considered relevant in *W v Switzerland,* where it was held that only very specific information about "applicant's personality and the numerous examples of forgery and interference with witnesses already shown to have been done by him in specific cases"[6] would be seen as sufficient basis to justify pre-trial detention. Consequently, the lack of consideration for

[1] *Eligio Cedeño v Bolivarian Republic of Venezuela*, Communication 1940/2010, UN Doc CCPR/C/106/D/1940/2010 (2012).
[2] Martin Schoenteich 'Why the Overuse of Pretrial Detention Is an Overlooked Human Rights Crisis' (*Open Society Foundations*, 12 September 2014), available at: <https://www.opensocietyfoundations.org/voices/why-overuse-pretrial-detention-overlooked-human-rights-crisis> (accessed 3 May 2017).
[3] *Eligio Cedeño* (n 1) para 7.10.
[4] *Mikhail Marinich v Belarus*, Communication 1502/2006, UN Doc CCPR/C/99/D/1502/2006 (2010), para 10.4.
[5] UN Human Rights Committee, 'General Comment No. 35: Article 9 (Liberty and Security of Person)', UN Doc CCPR/C/GC/35 (2014), para 38.
[6] *W v Switzerland*, App No 14379/88 (ECHR, 26 January 1993), para 22.

applicant's personal situation by use of general and stereotyped wording in *Mamedova v Russia* was held to be a violation of Article 5 (3) ECHR.[7]

There is also an obligation to examine the alternatives available,[8] which was made clear in *Smantser v Belarus*, where it was found that the failure to consider custodial alternatives amounted to a violation of Article 9(3) ICCPR, due to the fact that the "assumption by the State party that the author would interfere or abscond if released on bail does not justify an exception".[9] It has been made clear that specific evidence as to why detention remains the only option must be provided in order to protect the applicants from arbitrariness and ensure the compliance of the rule of law.[10] This ought to prevent the singling out of certain groups and automatically applying detention to them. The importance of this element of non-discrimination was also particularly visible in *Hill v Spain*, where it was made clear that "the mere fact that the accused is a foreigner does not of itself imply that he may be held in detention pending trial".[11]

In practice, however, pre-trial detention continues to be applied far more generally. There seems to be an overwhelming reluctance on the part of the judiciary to implement alternatives. This unwillingness could be caused by a variety of factors, it has been argued that judges are more reluctant to apply alternatives because they would be held personally responsible if they erroneously released an individual who then failed to comply with the conditions of release.[12] It has long been acknowledged that detention conditions encourage a confession,[13] which is why some have gone as far as to argue that the guilty plea is the ultimate goal of ordering a detention on remand because a "release without tangible result will leave the impression that the suspect was unnecessarily locked up".[14] It is undeniably a possibility that the reasons for ordering a detention might be darker than most would care to admit. However, it seems more reasonable to conclude that the insufficient consideration of alternatives, at least in most cases, is simply linked to the lack of knowledge regarding the available substitutes to detention, their reluctance to implement them arising due to concerns that this would cause unnecessary delays in proceedings and risk failure to appear at trial.[15] Understandably, this absence of faith in the efficiency of alternatives, combined with lack of experience, translates into the continuous overuse of pre-trial detention. Incarceration leads to a variety of negative consequences that must not be downplayed and many of these negative effects are closely linked to prison overcrowding.

Overcrowding

Overcrowding has now become the defining word of the prison system, creating numerous issues which negatively impact on physical and mental well-being of detainees.

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[7] *Mamedova v Russia*, App No 7064/05 (ECHR, 1 June 2006), para 80; see also *Bykov v Russia*, App No 4378/02 (ECHR (GC), 10 March 2009), para 65.

[8] General Comment No. 35 (n 5) para 37.

[9] *Aleksander Smantser v Belarus*, Human Rights Committee Communication 1178/2003, UN Doc CCPR/C/94/D/1178/2003 (2008), para 10.3; see also *Letellier v France*, App No 12369/86 (ECHR, 26 June 1991), para 46; *Mamedova v Russia* (n 7) para 78.

[10] *Jėčius v Lithuania,* App No 34578/05 (ECHR, 11 July 2000), para 62.

[11] *Michael and Brian Hill v Spain*, Human Rights Committee Communication 526/1993, UN Doc CCPR/C/59/D/526/1993 (1997), para 12.3; see also *Caballero v the United Kingdom*, App No 32819/96 (ECHR (GC), 8 February 2000), paras 18-21.

[12] Laura I. Appleman, 'Justice in the Shadowlands: Pretrial Detention, Punishment, & the Sixt Amendment' (2012) 69 *Wash & Lee L.Rev.* 1297, 1359.

[13] Gail Kellough, Scot Wortley 'Remand for Plea: Bail Decisions and Plea Bargaining as Commensurate Decisions' (2002) 42 *The British Journal of Criminology* 186.

[14] Stefan Trechsel, *Human Rights in Criminal Proceedings* (Oxford University Press 2005), 504.

[15] Fair Trials International, 'Stockholm's Sunset: New Horizons for Justice in Europe' (*Legal Experts Advisory Panel*, 2014), available at: <https://www.fairtrials.org/wp-content/uploads/Stockholms-Sunset.pdf> (accessed 13 March 2017), 94; 'A Measure of Last Resort? The Practice of Pre-trial Detention Decision Making in the EU' (2013) available at: <https://www.fairtrials.org/wpcontent/uploads/A-Measure-of-Last-Resort-Full-Version.pdf> (accessed 7 March 2017), para 81.

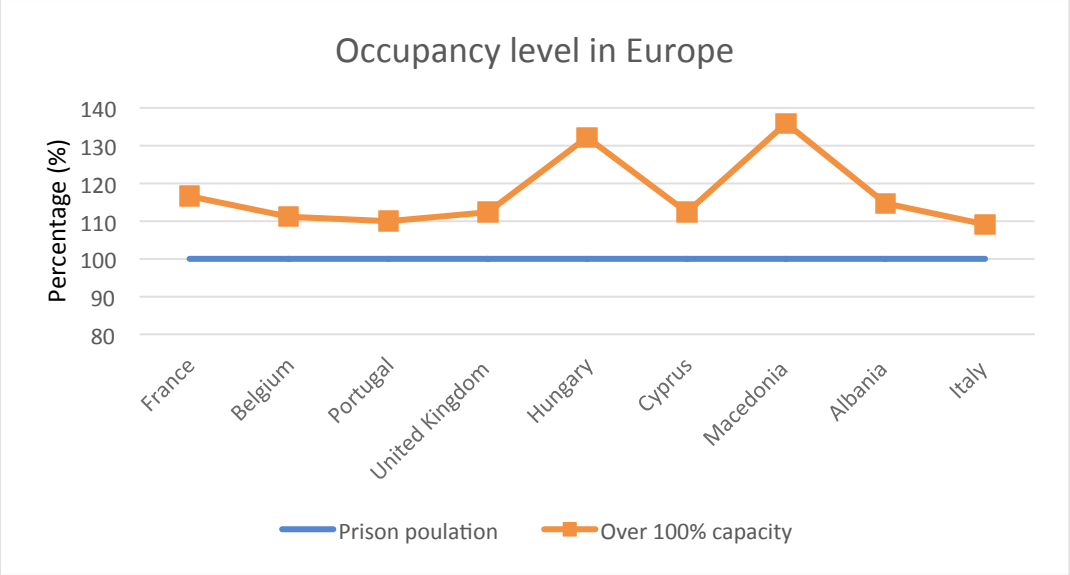

Figure 1 – represents the highest percentages of prison overcrowding within Europe[16]

To begin with, overcrowding reduces the accessibility to essential services of the prison facility, varying from medical treatment to rehabilitative programmes. The necessity to ensure that adequate medical care is available was particularly prominent in *Dzieciak v Poland* where it was found that the "quality and promptness of the medical care provided to the applicant during his four-year pre-trial detention put his health and life in danger"[17] therefore amounting to violation of Article 2 ECHR.[18]

Another potential negative impact is on the right to family life, as guaranteed under Article 8 ECHR and Article 17 ICCPR. As a side-effect of overcrowding, many detainees may be transferred to less cramped, but more distant prisons,[19] thus adding yet another hurdle to the already complicated family relationship. It has been argued that this lack of family support is also used as a coercive measure, namely that "in the isolation of a prison cell, a person will be more inclined to admit involvement than if he or she is free and has the support of family and friends".[20]

Most importantly, overcrowding significantly limits living space of detainees and creates additional privacy issues, which in turn negatively impacts on the human dignity. The conditions to which the detainees are often subjected to appear to be in direct contradiction to the requirements of Article 10(1) ICCPR, namely to be "treated with humanity and with respect for the inherent dignity of the human person"[21] and might arguably also amount to cruel, inhuman or degrading treatment, therefore falling below the standards of Article 7 ICCPR and Article 3 ECHR. Therefore, in *I I v Bulgaria,* the Court considered the fact that the detainee was held in a "cell of six square metres apparently occupied by three to four detainees"[22] and the humiliation which he must have suffered while being forced to "relive

[16] World Prison Brief, 'Highest to Lowest- Occupancy Level', available at: <http://www.prisonstudies.org/highest-to-lowest/occupancy-level?field_region_taxonomy_tid=14> (accessed 5 March 2017).
[17] *Dzieciak v Poland*, App No 77766/01 (ECHR, 9 December 2008), para 101.
[18] See also Article 6 ICCPR.
[19] 'A Measure of Last Resort' (n 15), p.33; Hans-Joerg Albrecht, 'Prison Overcrowding- Finding Effective Solutions. Strategies and Best Practices Against Overcrowding in Correctional Facilities' (2012) *Max Planck Institute for Foreign and International Criminal Law*, available at: <http://www.defensesociale.org/xvicongreso/usb%20congreso/1ª%20Jornada/02.%20Panel%201/P1_albrecht%20-%20prisonvercrowding_2012.pdf> (accessed 13 March 2017).
[20] Trechsel (n 14), 503.
[21] see also Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty in All Circumstances (European Convention on Human Rights).
[22] *I I v Bulgaria*, App No 44082/98 (ECHR, 9 June 2005), para 72.

himself in a bucket in the presence of his cellmates"[23] and rightfully concluded that this type of treatment amounted to a violation of Article 3 ECHR.[24]

It has been suggested that in order to address these issues, greater financial investment needs to be made towards the creation of additional confinement institutions.[25] However, it has been argued that the expansion in prison capacity would only set the scene for possible mass incarceration,[26] many have warned against this, saying that while it might indeed be a much easier option to continue "to produce overcrowded prisons than developing and implementing effective ways to reduce prison populations",[27] it is important to note that this would fail as a long-term solution. It would instead merely "reinforce a policy of reliance on imprisonment and the deprivation of liberty, which does not comply with the principle of last resort and proportionality as well as basic procedural standards".[28] It appears reasonable to conclude that the creation of additional correctional institutions would further increase the existing problems and simply add another layer of the unfairness of the justice system. It has therefore been suggested that a better long-lasting solution might be to reform the rules governing the pre-trial stage,[29] especially considering the link between prison overcrowding and pre-trial detention.

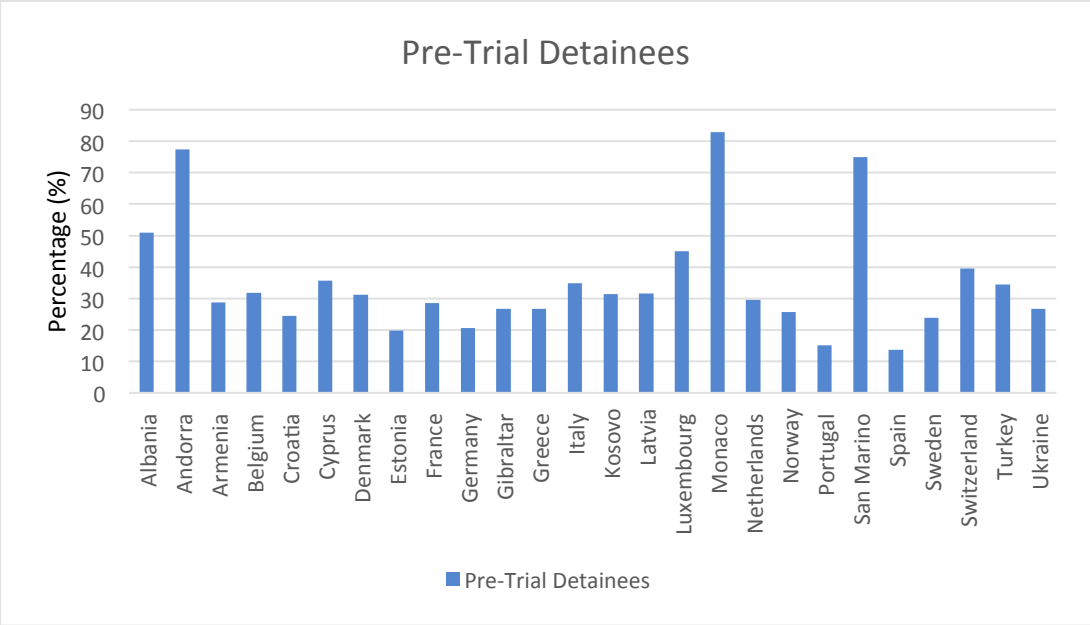

Figure 2 – represents the number of pre-trial detainees currently imprisoned across Europe[30]

It has long been argued that the correlation between pre-trial detention and the level of overcrowding is undeniable.[31] Figure 2 makes it obvious that the number of remand prisoners has significantly contributed to Europe's bloated prisons. The large percentage of pre-trial detainees appears to be a direct consequence of the overuse of custodial sentencing. It is important to remember that there is no differentiation between the treatment

[23] Ibid, para 75.
[24] Ibid, para 79.
[25] Mike Hough, Rob Allen, Enver Solomon, 'Tackling Prison Overcrowding: Build More Prisons? Sentence Fewer Offenders?' (Bristol: Policy Press, 2008), 138.
[26] Joshua Guetzkow, Eric Schoon, 'If you Build It, They Will Fill It: The Consequences of Prison Overcrowding Litigation' (2015) 49(2) *Law & Society Review* 401.
[27] Albrecht (n 19), 1.
[28] Ibid, 44.
[29] Shima Baradaran "The Right Way to Shrink Prisons" (May 30, 2011, The New York Times) available at: <http://www.nytimes.com/2011/05/31/opinion/31baradaran.html> (accessed 10 February 2017).
[30] World Prison Brief, 'Highest to Lowest- Pre-trial Detainees/ Remand Prisoners', available at <http://www.prisonstudies.org/highest-to-lowest/pre-trial-detainees?field_region_taxonomy_tid=14> (accessed 5 March 2017).
[31] Albrecht (n 19).

of remand prisoners and those who have already been found guilty.[32] To make matters worse, many countries allow for inadequately long periods of pre-trial detention, for example, Spanish law allows for pre-trial detention for up to four years, while Belgium law imposes no limits at all.[33] What is particularly significant is that due to the lack of adequate rules governing the length of pre-trial detention, many defendants may be forced to spend more time in jail than the potential maximum sentence upon conviction. This excessive period quite understandably pushes detainees to a point where they are willing to plead guilty, irrespective of its truth, simply to avoid the prolonged state of uncertainty and continuation of detention.[34]

Irrespective of the resolution of charges, pre-trial detention also considerably complicates the financial situation of the remand prisoners and their family members, who are forced to find a way to survive without detainee's financial support.[35] Additionally, it is important to note that many of these pre-trial detainees are "non-violent, non-felony offenders, charged with crimes ranging from petty theft to public drug use".[36] With the incarceration of these non-violent pre-trial detainees, the risk of them becoming violent if exposed to brutality in prison is only increased, which is why the decision to opt for a custodial sentence for reasons of public safety is highly questionable and very short-sighted.[37]

Taking into account the aforementioned facts, reforming the rules guiding pre-trial detention could turn out to be the long-lasting solution that has been persistently sought for.

Electronic monitoring – historical use and benefits

Electronic monitoring has been used in Europe since the 1980s.[38] Originally, electronic monitoring was introduced as a way to reduce correctional costs.[39] It should be noted that ever since its introduction, this particular type of surveillance has been more widely used in sentencing.[40] This appears to be counterintuitive, considering that electronic surveillance seems to be more useful for locating detainees instead of controlling their behaviour,[41] which is precisely why it can be argued that this form of surveillance is better suited for pre-trial use.

The use of electronic monitoring as an alternative to pre-trial detention should be seen as an advantageous option which allows a suspect to avoid the many negative effects associated with incarceration. Many point towards the promise of greater freedom of electronic monitoring. Wiseman proposes that "increasingly advanced technologies are able to closely monitor pre-trial defendant's locations while granting them far greater freedom".[42] This freedom in turn could also improve other aspects of detainees' lives- it could improve the psychological state of pre-trial detainees by ensuring that suspects are able to remain in the comfort of their own homes. By leaving suspects in a familiar environment, the potential

[32] *Peers v Greece*, App No 28524/95 (ECHR, 19 April 2001), para 78.
[33] Fair Trials International, 'Commission Says EU Countries Must Stop Excessive Pre-Trial Detention' (2011) available at: <https://www.fairtrials.org/commission-says-eu-countries-must-stop-excessive-pre-trial-detention/> (accessed 20 February 2017).
[34] Samuel R. Wiseman, 'Pretrial Detention and the Rights to be Monitored' (2013) 123 *Yale Law Journal* 1344.
[35] Ibid.
[36] United States Department of Justice, 'Attorney General Eric Holder Speaks at the National Symposium on Pretrial Justice' (Washington, DC, United States, 1 June 2011), available at: <https://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-national-symposium-pretrial-justice> (accessed 22 February 2017).
[37] Appleman (n 12).
[38] Joseph Hughes, 'You're Tagged: The Scottish Experience of Tagging as an Option for Sentencing Over the Past Five Years and How It Might Develop' (November 1, 2003, the Journal of the Law Society of Scotland), available at: <http://www.journalonline.co.uk/Magazine/48-11/1000631.aspx> (accessed 12 March 2017).
[39] Ralph Kirkland Gable, 'Application of Personal Telemonitoring to Current Problems in Corrections' (1986) 14(2) *Journal of Criminal Justice* 167.
[40] Hughes (n 38).
[41] Wiseman (n 34).
[42] Ibid.

negative peer influence that they would otherwise face in jail is avoided. It could be seen as a weapon to avoid side-effects of overcrowding by reducing the number of prison inmates, keep suspects within society, reduce the possible future crimes and more. Electronic monitoring also makes it possible for those subjected to electronic monitoring to continue working and thus avoid the negative financial implications affiliated with detention.

The freedom associated with electronic monitoring would ensure that there is a potential to maintain a better relationship with family. It is clear that the prison environment puts a strain on family relationships and could permanently damage them. It has been concluded that "EM gave offenders the chance to rebuild relationships that might be permanently broken if they were in prison".[43] The importance of family was stressed by many of those who were subjected to electronic monitoring and appears to be best captured by one of the respondents as follows: "this [bracelet] does not interest me. I am surrounded by my family and that is my happiness…". It is thus clear that as well as maintaining the family bond and bringing the family closer together, this particular method of surveillance could also have a better impact on the mental wellbeing of the person.

Functioning of electronic monitoring

Different types of electronic monitoring

Current electronic surveillance technologies take several forms. As a substitution to pre-trial detention, curfew systems and constant monitoring appear to be best suited to tackle the fear that is often cited as a justification for incarceration, i.e. these methods aim to ensure that the defendant shows up for trial without the ability to influence witnesses or interfere with evidence.[44]

The curfew system uses satellite tracking and consists of an ankle bracelet and a transceiver box which is installed at the person's home.[45] The transceiver then confirms the person's presence at the assigned residence.[46] The curfew makes room for the option to continue working and maintain a connection with the outside world, provided that the person in question returns to the residence at specified times. The strictest form of this method is house arrest, which, while still viewed by many as a kinder alternative to prison, is clearly a much more intrusive form of electronic monitoring, especially considering the limitations that it imposes on a person. It essentially turns ones' home into a place of detention, essentially merging together punishment with personal comfort,[47] thus arguably adding another layer of confusion to the complicated situation of detainees.

The other form to consider here is constant monitoring, which uses GPS technology and makes it possible to monitor a person's movement anywhere in the world, whether it is outdoors or indoors. It can track a person's location in "real-time", therefore constantly disclosing their whereabouts.[48] Perhaps a slightly less intrusive form of GPS monitoring is to simply ensure that an alert goes off once the person steps outside the perimeter of the accepted area.[49]

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[43] Delphine Vanhaelemeesch, Tom Vander Beken, 'Punishment at Home: Offenders' Experiences with Electronic Monitoring' (2014) 11(3) *European Journal of Criminology* 273, 278.
[44] *Mikhail Marinich v Belarus* (n 4).
[45] 'Scope and Definitions: Electronic Monitoring' (*Council of Europe*, 16 October 2012), available at: <http://www.coe.int/T/dghl/standardsetting/cdpc/CDPC%20documents/PC-CP%20(2012)%207rev2%20Scope%20and%20Definitions%2025%20Electronic%20Monitoring%2016%2010%2012.pdf> (accessed 11 May 2017).
[46] Ibid.
[47] William G. Staples, Stephanie K. Decker, 'Between the 'Home' and Institutional' Worlds: Tensions and Contradictions in the Practice of House Arrest' (2010) 18(1) *Critical Criminology* 1.
[48] 'Scope and Definitions: Electronic Monitoring' (n 45).
[49] Eric Maes, Benjamin Mine, 'Some Reflections on the possible introduction of electronic monitoring as an alternative to pre-trial detention in Belgium' (2013) 52 *The Howard Journal of Criminal Justice* 7.

Clearly, the severity of the impact that these alternatives will have on other human rights will greatly depend on the type of electronic monitoring employed and the conditions that accompany them, such as the area and hours within which a person is controlled.

Decision on the implementation of alternatives

The determination on the implementation of the alternatives will have to take into account all individualised circumstances. As stated by the Human Rights Committee: "what is reasonable has to be assessed in the circumstances of each case, taking into account mainly the complexity of the case, the conduct of the accused".[50] When making the assessment, it will be particularly important for the courts to separate flight risk from dangerousness, especially since it has been argued that the lack of separation of these risks causes the courts to overestimate both.[51] A clearer distinction between the two could significantly reduce the subjectiveness of risk assessments carried out by the judges to ensure that "evaluations of flight risk are not tainted by fears of dangerousness and that estimates of dangerousness are no inflated by concerns about flight"[52] and make room for the implementation of alternatives.

It appears that also in their choice of alternatives, judges tend to be rather biased, often having a "tendency to generalise from experiences with past offenders on bases that have few, if any, relationships to future violence".[53] It has been claimed that this inclination to find dangerousness has a long historical use. Many argue that judges used to set bail too high in order to ensure that the individual is detained until trial.[54] This is rather understandable considering the fact that pre-trial release could potentially be particularly damaging for the reputation of the judge if the released defendant later commits any wrongdoing, whereas when deciding to detain an individual "that error is invisible- and, indeed, unknowable".[55] Therefore, this inclination to detain might again be linked to the lack of faith that judges have in the effectiveness of alternatives.

While it might be difficult, if not impossible for the judges to make this type of assessment, it is imperative that their decision complies with the necessity and proportionality requirements of imitations upon the enjoyment of rights, especially considering the weight that these decisions will carry on fundamental rights.

Impact on other human rights

While the impact of electronic monitoring will significantly depend on the technology in question, it is rather evident that even the most limited intrusion may have a considerable impact.

Privacy

The level of privacy under electronic monitoring is quite reasonably a cause for concern. In *Bell v Wolfish*, a case involving pre-trial detainees, it was stressed that any expectation of privacy of a prisoner necessarily would be of a diminished scope.[56]

Quite understandably, with the implementation of electronic monitoring, defendants suddenly find themselves in a very challenging situation. It might be difficult, if not impossible, to get

[50] UN Human Rights Committee 'General Comment No. 32: Article 14 (Right to Equality Before Courts and Tribunals and to Fair Trial', UN Doc CCPR/C/GC/32 (2007), para 35.
[51] Lauryn P. Gouldin, 'Disentangling Flight Risk from Dangerousness' (2016) *Brigham Young University Law Review* 837.
[52] Ibid, 888.
[53] Appleman (n 12) 1359.
[54] Gouldin (n 51); Wiseman (n 34).
[55] David Cole 'Out of the Shadows: Preventive Detention, Suspected Terrorists, and War' (2009) 97(3) *California Law Review* 693, 696.
[56] *Bell v Wolfish* 411 U.S. 520 (1979).

over the feeling of constantly being watched. This type of anxiety can understandably lead to an emotional trauma – it has been asserted that "emotionally, EM can be harder than anticipated".[57] Additional stress may also be caused by the need to get accustomed to a very strict timetable. Those interviewed about their experience with EM stressed that they "felt hurried and had to rush to get everything done".[58]

Likewise, the promise of more freedom is often misleading since "offenders expect more freedom from EM than they actually get".[59] In a study of those who had been subjected to monitoring a few of the biggest problems reported "not being able to go for a walk or run when you want"[60] and the embarrassment of "having to wear a visible monitor".[61] The experiences that appeared to be particularly problematic for the respondents included: the shameful aspects of the sanctions, such as "having to wear a visible monitor";[62] the "embarrassment of having to tell your friends about the sanctions";[63] and aspects that imposed limitations on respondent's interactions, for example "not having the weekends free"[64] and "having to limit the length of conversations on the phone".[65]

As already mentioned, the fact that being electronically monitored allows more family contact is often cited as a very big advantage of EM. However, some negative impacts have also been reported, namely the increase of family disputes, precisely because the defendant is always at home and suddenly finds her or himself far more dependent on other family members.[66]

Rights to dignity

The wearing of the ankle bracelet is often associated with the feeling of shame as it appears that this device around the ankle is closely linked to the idea of guilt. Bulman states that "most of the offenders said they felt a sense of shame about being under electronic monitoring and that they were unfairly stigmatized".[67] It is therefore understandable that defendants may wish to keep the device concealed. It has been found that females might be more prone to the feeling of embarrassment precisely because it might be harder for them to conceal the device.[68] The visibility of ankle bracelet has been compared to modern day "scarlet-letter probation conditions".[69] Despite the obvious danger of stigmatization, the insistence of a visible monitor pertains in order to serve as a reminder for the detainees and ensure greater compliance.[70]

Risk of misuse of information

With the increased use of GPS monitoring, there is an additional risk that the information gathered may be used beyond what is strictly necessary to ensure compliance with imposed conditions. Without clear and strict regulations in place, and also taking into account the

[57] Vanhaelemeesch, Beken (n 43), 282.
[58] Ibid.
[59] Ibid., 281.
[60] Brian K. Payne, Randy R. Gainey, 'The Electronic Monitoring of Offenders Released from Jail or Prison: Safety, Control, and Comparisons to the Incarceration Experience' (2004) 84 *The Prison Journal* 413, 421.
[61] Ibid.
[62] Ibid.
[63] Ibid.
[64] Ibid.
[65] Ibid.
[66] Ibid.
[67] Philip Bulman, 'Electronic Monitoring Reduces Recidivism' (2010) 72(6) *Corrections Today* 72.
[68] Marietta Martinovic, 'The Punitiveness of Electronically Monitored Community Based Programs' (2002) *Artículo presentado en la Conferencia de la "Probation and Community Corrections Officers Association Inc.", Perth, Australia*, p.7, available at <http://www.antoniocasella.eu/nume/martinovic_2002.pdf> (accessed 12 March 2017).
[69] Phaedra Athena O'Hara Kelly 'The Ideology of Shame: An Analysis of First Amendment and Eighth Amendment Challenges to Scarlet-Letter Probation Conditions' (1999) 77 *North Carolina Law Review* 783, 786.
[70] Mike Nellis 'Surveillance and Confinement: Explaining and Understanding the Experience of Electronically Monitored Curfews' (2009) 1(1*) European Journal of Probation* 41.

current environment of mass surveillance and data interception, there is a chance that this system of pre-trial monitoring could end up being used as a "special criminal investigation method"[71] or for other purposes beyond those that are necessary. This is why it has been argued that imposition of strict regulations and sanctions is necessary in order to prevent such dangerous misuse from taking place.[72]

Right to a timely trial

While some of the dangers associated with electronic monitoring pose certain risks, it is arguably the right to a timely trial that presents the biggest danger. Both Article 9(3) ICCPR and Article 5(3) ECHR require that any person arrested or detained on a criminal charge be "entitled to trial within a reasonable time or to release". The term 'reasonable time' is not further elaborated on and therefore creates an unnecessary level of uncertainty. The Court in *Koster v Netherlands* was reluctant to impose a strict time limit, instead simply stating that "promptness is to be assessed in each case according to its special features".[73] This was further elaborated on in *Labita v Italy* where the Court decided that the period of two years and seven months spent in pre-trial detention was unreasonable, considering that the evidence against the applicant had only grown weaker throughout the proceedings.[74] In *Adamiak v Poland* the Court admitted that while the infraction in question and the complexity of the case were indeed significant, only the most compelling reasons could justify an excessively prolonged pre-trial detention and therefore it was held that the 5 years spent in detention amounted to a violation of Article 5(3) ECHR.[75] Consequently, while the Court has made it abundantly clear that the reasonableness of the length of detention pending trial will be assessed based on the merits of each particular case, it has been established that neither delays caused by lack of resources,[76] nor delays caused by a backlog of cases[77] can be considered reasonable.

This right enshrined in Article 9(3) ICCPR and Article 5(3) ECHR is particularly important in the context of this memorandum, especially considering that in *Aksoy v Turkey* it was held that an excessively prolonged period of detention not only leaves the detainee vulnerable to interference with his right to liberty, but also increases the likelihood of torture.[78] Additionally, these provisions clearly prevent persons from being placed in a situation of uncertainty regarding their future and ensures that this deprivation of liberty pending trial does not last longer than absolutely necessary.[79]

The current situation in France appears to be in direct contradiction to this. It has been stated that judges in France are generally willing to comply and implement one of the 17 alternatives that have been made available to them.[80] The result of this implementation, however, appears to be rather troubling. It seems that an inadequately large number of suspects are placed under supervision, which often appears to be ordered too eagerly.[81] This begs to question if the reason behind this overuse is that the judges may not have sufficient information available about the adverse impacts of electronic monitoring. Whatever the reason, this overly eager implementation means that many suspects are forced to remain under this supervision "for many years as investigations are not conducted with the "special diligence" required in detention cases".[82] This is particularly problematic and even

[71] Maes, Mine (n 49).
[72] 'Scope and Definitions: Electronic Monitoring' (n 45).
[73] *Koster v the Netherlands*, App No 12843/87 (ECHR, 28 November 1991), para 24.
[74] Labita v Italy, App No 26772/95 (ECHR (GC), 6 April 2000), paras 163-165.
[75] *Adamiak v Poland*, App No 200758/03 (ECHR, 19 December 2006), para 34.
[76] *Lubuto v Zambia*, Communication No 390/1990, UN Doc CCPR/C/55/D/390/1990/Rev1 (1995), para 5.2.
[77] *Nogolica v Croatia (No. 3)*, App No 9204/04 (ECHR, 7 December 2006), para 27.
[78] Aksoy v Turkey, App No 21987/93 (ECHR, 18 December 1996).
[79] 'General Comment No. 32' (n 50) para 35.
[80] 'Stockholm's Sunset: New Horizons for Justice in Europe' (n 15).
[81] Ibid.
[82] Ibid.

counterproductive[83] because it means that once a person is no longer in detention, her or his case immediately loses priority and is treated without urgency, resulting in a dual infringement of rights: the person remains under significantly restrictive conditions of freedom for inadequately long period of time; and she or he is denied trial within a reasonable time. While it is somewhat understandable how these types of cases arise, the dangers posed must never be downplayed.

It is clear that these types of delays could lead to severely damaging and irreversible impacts, which is why it is imperative that the application of electronic monitoring be periodically reviewed in order to reduce unnecessarily prolonged pre-trial stage as much as possible. With a maximum term in place, problems associated with the lack of urgency could be avoided.

Presumption of innocence

Closely linked to this preceding right to a timely trial is the idea of presumption of innocence. According to Article 14(2) ICCPR and Article 6(2) ECHR "everyone charged with a criminal offence shall be presumed innocent until proven guilty according to law".[84] This, rather obviously, is one of the core principles of the right to a fair trial. In *Wemhoff v Germany* the Court made the importance of this requirement to protect the right to be presumed innocent abundantly clear by claiming that: "in the determination of the relation between the penalty and the length of detention in remand, it is necessary to take into account the presumption of innocence".[85] It can therefore be concluded that presumption of innocence is precisely the key reason why detention without a conviction ought to be imposed only as a last resort, in particularly exceptional cases.[86] In detention, irrespective of the promise enshrined in Article 14(2) ICCPR and Article 6(2) ECHR, the pre-trail detainees are still subjected to punishment by being treated like those who have already been convicted.[87] This is precisely the reason why the overuse of pre-trial detention ought to be regarded as a violation of the presumption of innocence.

It has been argued that pre-trial detention is the most intrusive and therefore also the most critical issue regarding the presumption of innocence.[88] It seems that the justification to detain is based mostly on fear, "but a fear built on a mere possibility is a terribly weak basis for detaining a person for weeks or months".[89] This appears to be precisely the reason why the right to the presumption of innocence was held to be violated in the case of *Cagas v Philippines* where the Committee held that "the excessive period of preventive detention… does affect the right to be presumed innocent and therefore reveals a violation of article 14(2)".[90]

With the application of electronic monitoring the right to be presumed innocent is also violated, although in somewhat less damaging manner. While the adverse effects of electronic monitoring remain less visible to the outside world, it is practically undeniable that limitations on freedom that it imposes could potentially in violation of Article 14(2) ICCPR

[83] 'Examining Electronic Monitoring Technologies: 5 Experts Explore Advantages, Disadvantages, and Future Research Priorities' (*The Pew Charitable Trusts*, 19 November 2015), available at: <http://www.pewtrusts.org/en/research-and-analysis/q-and-a/2015/11/examining-electronic-monitoring-technologies> (accessed 11 May 2017).
[84] Article 6(2) ECHR.
[85] *Wemhoff v Germany*, App No 2122/64 (ECHR, 27 June 1968), para 2.
[86] Fair Trials International 'Defending the Human Right to a Fair Trial: The Presumption of Innocence' available at: <https://www.fairtrials.org/about-us/the-right-to-a-fair-trial/the-presumption-of-innocence/> (accessed 4 March 2017).
[87] LeRoy Pernell, 'The Reign of the Queen of Hearts: The Declining Significance of the Presumption of Innocence- A Brief Commentary' (1989) 37(3) *Cleveland State Law Review* 393.
[88] Thomas Weigend, 'Assuming That the Defendant Is Not Guilty: The Presumption of Innocence in the German System of Criminal Justice' (2014) 8(2) *Criminal Law and Philosophy* 285.
[89] Ibid, 298.
[90] *Cagas v Philippines*, Human Rights Committee Communication 788/1997, UN Doc CCPR/C/73/D/788/1997 (1996), para 7.3.

and Article 6(2) ECHR. Equally, the aforementioned stigmatisation associated with wearing a visible ankle monitor further undermines the concept of presumption of innocence.[91]

Irrespective of these aforementioned deprivations and the heavy impact on other human rights, it should be noted, somewhat unsurprisingly, that "most electronically monitored offenders prefer house arrest to jail".[92]

Effectiveness of electronic monitoring

Cost benefits of electronic monitoring

The practical benefits of electronic monitoring have long been discussed, it appears that replacing pre-trial detention with monitoring programs can generate considerable savings. Maes and Mine state that "electronic monitoring is much more cost effective than traditional incarceration".[93] Equally, in Iowa's Southern District, use of alternatives to pre-trial detention generated savings of USD $1.7 million in 2009.[94] Mimicking these positive results in Europe, in Portugal for example, "daily electronic monitoring costs are estimated at €13.77, as opposed to €37.05 costs of daily imprisonment",[95] thus confirming that if implemented correctly, electronic monitoring could be a far less expensive option.

In general, it appears that this type of electronic supervision would therefore reduce the high financial costs as well as the damaging social consequences associated with mass incarceration.[96]

Successful use of electronic monitoring

Due to the continuously increasing use of electronic monitoring, concerns relating the effectiveness of this alternative are also being more intently discussed. As is usually the case, once technology is involved, it can easily be argued that no type of monitoring can ever be as effective at guaranteeing a defendant's presence in trial as detention.[97] As observed by Blackstone: "in... offences of a capital nature, no bail can be a security equivalent to the actual custody of the person".[98] It then becomes clear that no technology could ever completely eliminate flight risk. It could, however, reduce the number of pre-trial defendants that are deemed too great a risk for a release. Indeed, some remain highly pessimistic about the potential success of electronic monitoring, claiming that "electronic supervision program has the potential to result in various unanticipated negative consequences that will set up many agencies for failure".[99]

However, others remain more optimistic and view monitoring as a "true alternative" to detention.[100] Indeed, research findings continuously demonstrate that "either form of EM significantly reduces the risk to public safety from offenders living in the community".[101] There is strong evidence in Europe and the United States that suggests the potential

[91] Kelly (n 69)
[92] Payne, Gainey (n 43).
[93] Maes, Mine (n 49).
[94] Ibid.
[95] Wiseman (n 34) 1373.
[96] Matthew De Michele, 'Electronic Monitoring: It Is a Tool, Not a Silver Bullet', (2014) 13(3) *Criminology & Public Policy* 393.
[97] Wiseman (n 34).
[98] William Blackstone, 'Commentaries on the Laws of England' (1769), cited in Samuel R. Wiseman, (n 34) p.1371.
[99] De Michele (n 95), 397.
[100] Jennifer Airs, Robin Elliot and, Esther Conrad, 'Electronically Monitored Curfew as a Condition of Bail- Report of the Pilot" (2000, London: Home Office), available at: <http://library.college.police.uk/docs/homisc/occ-bail.pdf> (accessed 10 March 2017); Kathy G. Padgett, William D. Bales, Thomas G. Blomberg 'Under Surveillance: An Empirical Test of the Effectiveness and Consequences of Electronic Monitoring' (2006) 5(1) *Criminology & Public Policy* 61.
[101] Padgett, Bales, Blomberg (n 99) 81.

success of electronic monitoring in sentencing.[102] Evidence has been brought forward to suggest that electronic monitoring can be considered to be a success in crime reduction of high-risk sex offenders in California.[103] A study in Europe suggests that electronic monitoring, combined with the threat of incarceration, could produce positive results: "EM can achieve significant crime reduction when the threat of incarceration is sufficiently credible".[104] However, it appears that additional research, which assesses the efficiency of electronic monitoring in the pre-trial stage, is essential.

There nevertheless appears to be sufficient evidence to conclude that, if properly implemented, electronic monitoring would have the potential to truly improve the justice system. Not only could it be an be used successfully to ensure defendants presence in trial, it could also generate significant savings of correctional programs.

Conclusion

There are clearly many grave dangers associated with incarceration. For those facing a pre-trial charge, electronic monitoring could prove to provide some sort of solace in this difficult situation. Monitoring would permit the accused to preserve the sense of normalcy in the accused's chaotic life pending trial.

Despite the many advantages that are provided by electronic monitoring, it is clear that these benefits come at a cost. Electronic monitoring could significantly limit defendants' freedom, create numerous privacy issues, affect family and work relationships and there is a particularly harmful risk that the case might lose its urgency, once the defendant is placed under monitoring.

However, while electronic monitoring is certainly an imperfect mechanism, it certainly appears to generate fewer negative effects than incarceration. It can be argued that the choice is between two evils and, at best, monitoring can be concluded to be the lesser evil. On the other hand, Wiseman reminds that "perfect must not be the enemy of the good".[105] While it might perhaps seem easier to point out the many flaws of this particular alternative, the adverse effects of incarceration must never be forgotten.

With careful application and strict limits in place, electronic monitoring might be the cure long sought for to once again increase the credibility of the justice system. It is clear that any noteworthy improvement will depend on the willingness of fair minded people across the globe to engage in a dialogue and to improve the understanding of the use of alternatives in pre-trial detention.

[102] Wiseman (n 34).
[103] Steven V. Gies et al, 'Monitoring High-Risk Sex Offenders with GPS Technology: An Evaluation of the California Supervision Program- Final Report' (April 2012), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/238481.pdf> (accessed 10 March 2017).
[104] Anaïa Henneguelle et al, 'Better at Home than in Prison? The Effects of Electronic Monitoring on Recidivism in France' (2016) 59 *Journal of Law & Economics* 629.
[105] Wiseman (n 34).