

# **Introducing the use of electronic monitoring as an additional measure of supervision within the Probation Department (Ministry of Justice) in the Kyrgyz Republic**

## **Position Paper**

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<sup>1</sup> The author declares no known conflicts of interest or apprehension of bias, and the author acted solely as an independent scholar with no affiliations other than to act as a consultant for the UNODC Regional Office for Central Asia / Program Office in the Kyrgyz Republic (Contract No: 2500311444).

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## INTRODUCTION

The United Nations Office on Drugs and Crime (UNODC) provides advisory and technical support to the authorities of the Kyrgyz Republic, in particular the Ministry of Justice and the Probation Department, with a view to introduce the use of electronic monitoring (EM) as an additional measure of supervision in line with international and European standards and practice.

The advisory and technical support provided to the Kyrgyz Republic supports two (2) high-level initiatives that are currently engaged by the UNODC in Central Asia:

'Support to Justice Sector Reform in the Kyrgyz Republic: Advancing Probation and Integrated Justice Information Management' (JUSTICE4ALL)<sup>3</sup>. The overall objective of the JUSTICE4ALL project, with support from the European Union, is to improve access to justice and rule of law in the Kyrgyz Republic through improved probation and criminal justice reform in line with international standards and norms.

'Post-release Monitoring and Probation of Returning Foreign Terrorist Fighters and Violent Extremist Prisoners'. The overall objective of this project, with support from the Government of the United States, is to advance and develop the effectiveness and sustainability of the Probation Department and relevant agencies/Ministries in the Kyrgyz Republic to prevent post-release radicalization to violence and recidivism of violent extremist prisoners through proper monitoring and supervision and by preparing the receiving community and offenders.

The writer was engaged by the UNODC to assist in designing and conducting a feasibility study to provide evidence in whether piloting the use of EM, specifically for use in community supervision, is a reasonable and responsible approach in view of the current environment of the Kyrgyz Republic's efforts to modernize probation and the overall criminal justice system. The general themes introduced for analysis in the draft feasibility study outline, identified by the consultation's terms of reference and with the writer's input, included:

- i. An analysis of the existing legal framework in the Kyrgyz Republic as it relates to the use of EM as a tool for use by the Probation Department,
- ii. A needs and resource assessment of the current Probation Department,
- iii. A study of the current geographical & socioeconomic context as it relates to community corrections and the use of EM,
- iv. Conducting a cost & benefit analysis to the possible use of EM in probation,
- v. Separate consideration to the use of EM for extremists and returning foreign fighters within the context of community supervision by probation, and
- vi. Confirmation of alignment of practice in the use of EM, as it relates to the mandates of the United Nations and current international best practice.

Starting in July 2022, the writer undertook a paper review of the current context of criminal justice reform in the Kyrgyz Republic, conducted a scan of previous work undertaken by the

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<sup>3</sup> <https://www.unodc.org/centralasia/en/european-union--united-nations-office-on-drugs-and-crime-unodc-and-the-kyrgyz-government-launch-8-mln-eur-programme-to-support-justice-sector-reform-in-the-kyrgyz-republic.html>

UNODC with respect to prison and penal reform, and researched the applicable best practices for use of EM in the context of community supervision with respect to the themes of analysis identified as useful for a potential feasibility study.

**After preliminary review, the writer formed the position that, *at present and for the immediate foreseeable future*, there exist too great a risk and too many unknown factors or assumptions that prevents the writer to (1) conduct a feasibility study with credible value and foresight, and (2) form a reasonable belief that a safe and judicious likelihood of success to implementation of any EM program, in alignment with the core vision<sup>4</sup> of the UNODC Program for Central Asia, is possible for the Kyrgyz Republic.**

The balance of this position paper will provide the reader with a background synopsis of the current context and environment that has touch points with the EM project proposal, followed by descriptions of the dominate considerations that led to the writer's position, and lastly conclude with a commentary on the perceived risk to proceed with this project and possible ways to mitigate these risks moving forward.

## BACKGROUND

### Current state of criminal justice reform in the Kyrgyz Republic

The mission by the UNODC Central Asia intends to support, but not limited to, two crucial areas in criminal justice reform in the Kyrgyz Republic: establishment of a credible probation organization and adopting modernized criminal justice information management practises, as described:

*“Thus, the project will create a fully functional probation service that can rehabilitate its clients and strengthen gender-responsive and human rights-based approaches to the administration of justice in the context of increased automation and digitalisation in the justice sector”.*<sup>5</sup>

Human Rights Watch and similar human rights observation bodies cite sustained concern in Kyrgyzstan of police corruption, government influence in judicial matters, use of torture and other violations in the penal system, and a slow response to the matter of domestic violence and violence against women and girls. The relatively new government in the Kyrgyz Republic has recently made swift and sweeping reform in the legal and judicial system, which has certain observation groups proposing that not enough research and consultation was made to properly inform these reforms<sup>6</sup>.

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<sup>4</sup> UNODC (2022). UNODC Programme for Central Asia 2022-2025. As stated: “To strengthen the rule of law in Central Asian countries through prevention of crime and promotion of effective, fair, humane and accountable criminal justice systems aligned with UN standards and norms” (p.4).

<sup>5</sup> European Union, UNODC and the Kyrgyz Government Launch 8 mln EUR Programme to Support Justice Sector Reform in the Kyrgyz Republic (2022). Accessed from: <https://www.unodc.org/centralasia/en/european-union--united-nations-office-on-drugs-and-crime-unodc-and-the-kyrgyz-government-launch-8-mln-eur-programme-to-support-justice-sector-reform-in-the-kyrgyz-republic.html> .

<sup>6</sup> Human Rights Watch. (2022). World Report 2022, Kyrgyzstan Events of 2022. See: <https://www.hrw.org/world-report/2022/country-chapters/kyrgyzstan>

The United Nations, the European Union, and the Organization for Security and Co-operation in Europe (OSCE) have remained active collaborators in the Kyrgyz Republic, with the lens to address a number of proposed reforms including the transparent pursuit for human rights and protections in the legal system, stabilization of on-going boarder conflicts, provisions for the sufficient protection of women and girls from violence, lessening the discord between the State and non-governmental and civil society organizations, proper reconciliation of torture and other human rights violations in the justice system, responding to terrorism and radicalization, and securing a commitment from the sitting government to a fulsome and transparent investigation into the arrest, incarceration and death of journalist Mr. Azimjon Askarov in 2020.

The United Nations and the European Union have been actively engaged in prison reform in Kyrgyzstan for over a decade. The ongoing efforts of collaboration and reform have culminated into the 'JUSTICE4ALL' project, and in evidence to the recent steering committee meeting held in September 2022<sup>7</sup> as the 'JUSTICE4ALL' project proceeds into the third phase of implementation. Introduced at that meeting was the proposed overarching objective of the 2022 Activity Plan<sup>8</sup> for the Probation Department reformation in the Kyrgyz Republic, tantamount to this paper:

*“Advancing the criminal, criminal procedural and penal legislation in the area of probation, optimization of alternative forms of punishment, regulatory and legal support of probation in accordance with international norms and standards”.*

Equally important to capture are comments made at the steering committee meeting by Mr. Hans Farnhammer, Head of EU Delegation Cooperation Unit in the Kyrgyz Republic. He highlighted the value in continued collaborative work with respect to the rule of law and the justice system, including the explicit ambition to design and implement a “fully functional probation service that can rehabilitate its clients”.<sup>9</sup>

### The use of electronic monitoring for offender supervision

For the context of this paper, specifically the use of technology to monitor people under the supervision of the criminal justice system, the definition of electronic monitoring (EM) held by the Council of Europe as captured in their proposed EM guidelines proves useful:

*“Electronic monitoring” is a general term referring to forms of surveillance with which to monitor the location, movement and specific behaviour of persons in the framework of the criminal justice process. The current forms of electronic monitoring are based on radio wave, biometric or satellite tracking technology. They usually comprise a device attached to a person and are monitored remotely.”<sup>10</sup>*

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<sup>7</sup> <https://www.unodc.org/centralasia/en/news/eu--unodc-and-government-partners-held-first-steering-committee-meeting-of-the-support-to-justice-sector-reform-in-the-kyrgyz-republic-joint-project.html>

<sup>8</sup> Translated draft report provided to the writer by UNODC on October 12<sup>th</sup>, 2022.

<sup>9</sup> <https://www.unodc.org/centralasia/en/news/eu--unodc-and-government-partners-held-first-steering-committee-meeting-of-the-support-to-justice-sector-reform-in-the-kyrgyz-republic-joint-project.html>

<sup>10</sup> Council of Europe (2014). Recommendation CM/Rec(2014)4 of the Committee of Ministers to member States on electronic monitoring. Adopted on February 19, 2014.

Using a form of technology in the pursuit of offender management or rehabilitation is not a new concept. As early as 1958, an academic study by Harvard University looked into the potential positive rehabilitative function of the use of tape recorders by young offenders<sup>11</sup>. That same study later introduced the idea of behavior reinforcement or modification by a simple device that emitted a tone signal from participant to a monitoring station. What was truly inspired was the hypothesized value of monitoring technology on three aspects of offender management: research, preventive parole, and immediate reinforcement.

Dramatic growth in the interest and use of monitoring technology in offender management was seen firstly within the United States from the 1970s, primarily a response to the ballooning prison population and the costs associated. In 2017, Norway, a country with a well-established EM program, had approximately 300 offenders each day on some form of EM supervision<sup>12</sup>. Berg Insight (2021)<sup>13</sup> purports that in 2020, 46,000 people in Europe, 282,000<sup>14</sup> people in North America, and 71,000 people in Latin America were on some form of offender electronic monitoring schema.

This report will not go into depth into the types of technologies applied to EM. The most common methods of monitoring are the use of radio frequency (RF) and Global Positioning Systems (GPS). Each technology has its benefits and drawbacks, and the application of the technology is only as good as how the technology is leveraged to compliment an intended effort or outcome. For example, RF is a suitable tool when house arrest is the primary objective – the technology will alert if an offender leaves a prescribed location such as a house. GPS provides a real-time tracking of the offenders location, and added value can be realized when the GPS is layered with monitoring rules such as no-go zones like a victims home, geo-fenced areas such as a playground or park, and can also be used in bi-lateral application when contact between people who are wearing monitoring bracelets are discouraged from contact through virtual shields – such as reinforcing no-contact orders between domestic violence parties or deterring contact amongst peers in a criminal or terror enterprise.

Two features of an EM program that are often erroneously overlooked and undervalued during program development is (1) whether the physical monitoring of actively deployed EM devices is conducted by the host organization or a third-party which may or may not be the technology vendor, and (2) the intended means of collection, storage, use, distribution and virtual travel of the data that is created when using electronic monitoring. Both of these features are significant considerations when designing a business plan for the use of EM.

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<sup>11</sup> See Schwitzgebel, R.R. (1963). Delinquents with tape recorders. *New Society*, 18, p.11-13.

<sup>12</sup> Oster, M.K. & Tore, R. (2018). The Norwegian Approach to Electronic Monitoring: Changing the System and Making a Difference, *Federal Sentence Reporter*, Vol. 31, No. 1, P. 75-84. (p. 75).

<sup>13</sup> Berg Insight. (2021). The electronic offender monitoring market in Europe and the Americas to reach US\$ 1.6 billion in 2025. <https://www.berginsight.com/the-electronic-offender-monitoring-market-in-europe-and-the-americas-to-reach-us-16-billion-in-2025>

<sup>14</sup> For context, the Bureau of Justice Statistics in the USA cited “an estimated 3,890,400 adults were under community supervision (probation or parole)” in 2020. See <https://bjs.ojp.gov/library/publications/probation-and-parole-united-states-2020#:~:text=At%20yearend%202020%2C%20an%20estimated,at%20the%20end%20of%202020>.

The judicial or penal context in how the technology is applied can vary from monitoring a client on bail release prior to trial, under versions of probation or parole, use in work programs, transportation of high-flight offenders between destinations, house arrest, and even victim security planning when a no-contact order is in place. Some jurisdictions may invoke cost recovery policy whereby the offender is responsible to pay some or all of the costs associated with the monitoring device and related service. The decision and authority to direct EM for an offender's community supervision may be struck in a courtroom, within the lawful prevue of police or corrections, or in some cases at the request of the client or offender.

The estimated cost of administering an EM program is connected to a number of factors including but not limited to: the type of monitoring equipment used; whether the technology is leased or purchased outright; required training and on-going technical support needs; if the technology will be monitored by the agency, the vendor or another third-party; what data is collected, where that data is stored, and how that data is accessed; need for report generation or other analytical tools; necessity for the vendor or other third-parties to attend court or provide expert testimony; and integration of the EM technology with any existing information technology (IT) systems the agency may have. This position paper will not attempt to capture and describe what a possible EM program might actually cost in the Kyrgyz Republic, due to the large number of factors required to make such an estimate.

Despite the billion dollar industry of offender electronic monitoring, the technology remains a rather boutique use in the overall correction system schema. A study by Mair and Nellis (2013, p. 78-79)<sup>15</sup> remains relevant in their description of how the technology has had little impact on overall penal reform or practice in the British experience. There is limited evidence that the use of EM is evolving corrections into a new modern state<sup>16</sup>, and the overall cost-benefit analysis remains in the eye (and opinion) of the respective beholder. Simply stated, EM technology cannot guarantee that a future offence will not occur<sup>17</sup>, and the true value of EM is less based on the cost of the technology (and the possible savings incurred as a result of less incarceration) and more about how that technology aligns and supports the client's rehabilitation plan or the overarching management schema adopted by an organization.

The writer cautions the reader to any aspiration that EM is a manner of harm reduction and a more healthy or humane practice of community supervision. EM is and will remain an extension or version of control by the State, and the humane benefits of EM fall within how the technology is used to compliment a corrective or reintegration plan that intends on positively modifying behavior and supporting change while maintaining community safety and trust.

### Alignment with international law and human rights

The use of EM in the management of offenders has become a common practice in many correctional systems around the globe. Legislation, systems and organizations are now in place

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<sup>15</sup> Mair, G. & Nellis, N. (2013). Parallel tracks: Probation and electronic monitoring in England, Wales and Scotland. In M.Nellis, K.Beyens, & D. Kaminski (Eds.), *Electronically monitored punishment: International and critical perspectives* (p.63-81). London: Routledge.

<sup>16</sup> Daems, T. (2020). *Electronic Monitoring: Tagging offenders in a culture of surveillance* (p.77). Switzerland: Palgrave.

<sup>17</sup> Daems, T. (2020). *Electronic Monitoring: Tagging offenders in a culture of surveillance* (p.54). Switzerland: Palgrave.

that guide the lawful and humane practice of EM within offender management schemas; such examples of this prevalence include as the recommendations of best practice adopted by the Council of Europe (2014) or the establishment of dedicated EM working groups and conferences held by the Confederation of European Probation (CEP).

The writer directs the reader to an excellence source of analysis relevant to this topic – the technical advisory opinion paper produced by the UNODC ROPAN in 2013 entitled: *The use of electronic monitoring bracelets as an alternative measure to imprisonment in Panama*<sup>18</sup>. That paper provides a solid foundation for future work by the UNODC in the realm of EM, and the section of that paper entitled ‘Electronic surveillance and the International Law’ (Section 2.2) delivers a solid analysis held against a number of articles relative to the United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules)<sup>19</sup>. The UNODC ROPAN technical opinion paper concludes “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”<sup>20</sup>.

The following are important highlights from the Panama UNODC ROPAN technical opinion paper relative to this position paper:

- Although the use of EM is a deprivation of privacy and impacts a certain level of dignity, those deprivations are tolerable and will only improve with advancement in new technology (p.6).
- EM must be an alternative form of supervision and not an alternative for imprisonment or punishment (p. 7).
- It is imperative that the use of EM is a part of an individualized reintegration plan (p. 9).
- At the onset and before implementation of an EM program “we” must (1) define the objective or purpose for the use of EM, (2) strike a clear and defined criteria for the type of circumstance and offender that would be eligible for EM, (3) apply careful consideration to the interoperability and potential interplay between organizational units within Government, and (4) develop thoughtful EM management plans that consider the “experiences of developed and developing countries” (p.8).

The Panama UNODC ROPAN technical opinion paper was not afforded an opportunity for analysis against the United Nations Standard Minimum Rules for Treatment of Prisoners<sup>21</sup> (Nelson Mandela Rules), a piece of literature that has merit for consideration as it relates to this topic. Although the Mandela Rules are generally targeted to address incarceration, the scope of application to these rules could, in certain cases, extend to the offender that has been moved

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<sup>18</sup> UNODC (2013). The use of electronic monitoring bracelets as an alternative measure to imprisonment in Panama. Technical Advisory Opinion No. 002/2013.

<sup>19</sup> United Nations. (1990). United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules).

<sup>20</sup> UNODC (2013). The use of electronic monitoring bracelets as an alternative measure to imprisonment in Panama. Technical Advisory Opinion No. 002/2013.

<sup>21</sup> United Nations. (2015). United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) No 70/175.

from a prison setting to one of supervision in the community. The following descriptions, although not exhaustive, provide certain points to consider in this study.

The Nelson Mandela Rules highlight an important aspiration directed at Member States regarding prison populations and the potential use of non-custodial measures:

*“Member States continue to endeavour to reduce prison overcrowding and, where appropriate, resort to non-custodial measures as alternatives to pretrial detention, to promote increased access to justice and legal defence mechanisms, to reinforce alternatives to imprisonment and to support rehabilitation and social reintegration programmes, in accordance with the United Nations Standard Minimum Rules for Non-custodial Measures.” (p.6)*

This direction to Member States to explore non-custodial measures provides an opportunity to explore and use EM for offender management, but must align with the first rule (Rule 1) in the Nelson Mandela Rules that any treatment to prisoners must be dignified, humane, and free from “torture and other cruel, inhuman or degrading treatment or punishment” (p.8). Rule 4 defines the purpose of imprisonment, “or similar measures of deprivation of a person’s liberty” (p. 8), as the lawful and humane effort to protect society and reduce reoffending. This provides certain scope on the broad rationale for considering the use of EM.

Rule 6, and certain sections thereafter, speak to the necessity for a standardized prisoner file management system (p. 9). Of importance to any EM program is the preservation, protection and safeguard the data and potential use of the data that is collected from monitoring technology. This rule speaks to the importance of a “secure audit trail” (p.9) and procedure or regulations that prevent unauthorized access.

The Nelson Mandela Rules specifically highlight *Restrictions, Discipline and Sanctions* as a sub-section title, which contain rules 36 to 46 respectively. Although a number of the rules contained within this section clearly relate to those circumstances of incarceration, the section opens with a disclaimer that “discipline and order shall be maintained with no more restriction than is necessary to ensure safe custody, the secure operation of the prison and a **well ordered community life**. (p.14 – emphasis added).

The value of prison and penal service oversight is introduced in Rule 83 (p. 26), which highlight the importance of both internal and external audits to ensure that the administration of correction services is in alignment “with existing laws, regulations, policies and procedures, with a view to bringing about the objectives of penal and corrections services, and that the rights of prisoners are protected” (p.26).

Rule 87 through 89 reaffirm the qualities of a modern penal system, whereby thoughtful effort must be applied by the system to ensure a gradual return to the community (Rule 87), that proper penal reform must engage the community (Rule 88), and that the efforts of support and reintegration is guided by individually-tailored plans respective of the unique needs of the prisoner (Rule 89). Of unique note, Rule 87 speaks directly to the necessity of not entrusting the release planning or supervision of an offender to the police, but does suggest the perceived



value of collaboration by the prison or penal authority with other social aid societies to properly support reintegration efforts.

A final piece of international guidance in this matter can be found in the UNODC Kyoto Declaration (2021)<sup>22</sup>. Contained within the Kyoto Declaration are a number of directed 'actions' that Member States agree to align with, and a number of those actions have claim to probation reform including the allowable use of EM technology in community supervision. Actions 35 and 36 (p.7) reinforce the importance of intentional efforts by Member States to improve the condition of prisons (as captured in the Nelson Mandela Rules) and exploring alternative to pretrial detention and custodial sentences (as captured in the Tokyo Rules). The Kyoto Declaration highlights action to reduce reoffending (p. 7-8) by creating environments where rehabilitation and reintegration efforts are paramount, also further highlighting the necessity of collaboration amongst stakeholders (Action 39) and the value placed in community engagement (Action 40).

The writer proposes there is sufficient direction garnered in application of both the Tokyo Rules and the Nelson Mandela Rules, further reinforced by the Kyoto Declaration, to form the opinion that the use of EM as a measure of offender supervision in the community, if employed responsibly, does align with international expectations of a humane and credible penal practice.

## CONSIDERATIONS

### Lack of clear EM legal framework in the Kyrgyz Republic

Without doubt, the use of EM as a measure of offender supervision has been captured within the recent justice reform efforts in the Kyrgyz Republic. Article 3 (sub-section 12<sup>23</sup>) of the Law on Probation (2017) speaks clearly to the authority granted to the Probation Department to use "electronic technical devices" to supervise probation clients.

Article 2 (sub-section 15) of the Criminal Executive Code (2017) speaks to the concept of electronic supervision of probation clients through the use of electronic devices, as part of the duties held by the Probation Department. Section 166 (sub-section 2) of the Criminal Code speaks to how probation conditions, presumed to also include the wearing of an EM bracelet or similar technology, are applied at the Court level. Section 166 (subsection 5) expresses the obligation of the probation client to follow the "legal requirements of the probation officer"<sup>24</sup> which may also suggest where the authority of EM may reside. Section 168 of the Criminal Code then describes the respective responsibilities should there be an alleged violation of an imposed probation condition(s) by the probation client.

What is missing, in the writer's opinion, is a clear framework in which a manner of governance, assignment of responsibility, and ultimately a measure of clear oversight authority can be applied should an EM program be initiated. The first principle of the Council of Europe's

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<sup>22</sup> UNODC. (2021). "On Advancing Crime Prevention, Criminal Justice and the Rule of Law: Towards the Achievement of the 2030 Agenda for Sustainable Development". (Kyoto Declaration)

<sup>23</sup> Amendment added October 28, 2021. No 126.

<sup>24</sup> Note: The writer was able to review a translated copy of the Criminal Code, and respectfully submits that no translation is perfect and the terminology used in reference may be different the actual intended description.

recommendations for EM in verbatim is “the use, **as well as the types, durations and modalities of execution** of electronic monitoring in the framework of the criminal justice shall be regulated by law” (Emphasis added). In the present state, neither the Criminal Code nor the Probation Code of the Kyrgyz Republic provides sufficient scope, boundaries or guidance in the intended use of EM. This broad authority, although an effort to advance supervision practice in the Probation Department, will equally afford project creep and inadvertent or intended misuse counter to the reform intention.

Along a similar argument, the Panama UNODC ROPCAN technical opinion paper provides clear direction that “Member States willing to adopt the electronic monitoring bracelet must adapt their legal framework, by **regulating the use of this measure** so as to establish the exact **subjective and objective criteria in the definition of possible users to avoid corruption and misinterpretations**” (p.11-12, emphasis added). Equally relevant is the technical opinion paper’s position 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**” (p. 14, emphasis added).

A concern the writer has, one shared in concept by the Council of Europe and similar authorities, is the risk of ‘net-widening’ or inadvertently increasing the number of people subject to probation because of the use and availability of EM technology. Without a clear and defined framework within the legal and regulatory bodies, the risk is that EM becomes an “added” form of work rather than an “alternative” form<sup>25</sup>.

The writer experienced the potential of unforeseen ‘net-widening’ in 2010-2012 when the use of EM in the Province of Alberta (Canada) was on the uptake. Police agencies in that jurisdiction had successfully introduced EM as an additional tool of supervision as part of police efforts to proactively monitor offenders deemed high-risk to reoffend violently or sexually but no longer subject to any correctional supervision. As an example, an offender who served their full sentence in a provincial or federal prison and had no court assigned community supervision to follow upon release from prison, police could conduct a risk assessment and determine if there was a probable risk of that offender to reoffend, and subsequently apply to the court for a recognizance or Peace Bond<sup>26</sup> to ‘secure the good conduct’ of this offender while he or she resided in the community. As part of that judicial application to the court by police, there may be a recommended condition of supervision that includes the use of EM as part of the recognizance.

In these circumstances, the respective police organization was fully responsible for all aspects of the EM program, including the monitoring and response aspects as well as any costs incurred in the use of a monitoring device. As different actors within the criminal justice system in Alberta began to appreciate the use of EM as a tool of supervision, certain defense lawyers began to ask judges to consider EM supervision for their clients at the point of bail hearings and before court appearance, and certain lawyers and clients even proposed that they would pay for the EM service. It was suggested by some lawyers that, rather than have their client remain in

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<sup>25</sup> Daems, T. (2020). *Electronic Monitoring: Tagging offenders in a culture of surveillance* (p.66). Switzerland: Palgrave.

<sup>26</sup> Section 810 of the Criminal Code of Canada.

custody before trial, the use of EM would reasonably mitigate any perceived risk by the State to their client's flight risk, non-attendance in court, or possible continuance of the offence (such as in the case of domestic violence or criminal harassment).

At that time and in that province, police organizations were the only governmental entity with an active GPS EM program for community supervision, so should the court choose to agree with developing requests for EM supervision that onus would fall onto the police organization and their respective resources. As a result of not having a clear and defined framework for use prior to implementation, in this case the implementation of an EM program only available for those cases that the police were responsible for, the scope of use of EM could have quickly expand without any foresight or preparedness to the implications such as costs, liability and responsibility thrust onto the police.

### Probation Service in the Kyrgyz Republic is at initial stage of reform

The pursuit of modernizing the criminal justice system, including community corrections, requires a progression and adoption of intentions, then concepts, then design followed by implementation and evaluation. The evolution of the Probation Department in the Kyrgyz Republic is starting from a post-Soviet footing, which the writer will propose is a significant departure to where the authorities wish to be.

It may be attractive to stakeholders, both internally and externally, to see the use of EM as a legitimate piece of reformation in probation supervision. As Daems (2020) eloquently states "(EM) seems particularly attractive for governments that are eager to propagate the image of being part of the current digital age".<sup>27</sup> EM has also become a hopeful panacea, in the writer's experience, to swiftly addressing overcrowding of prisons. Having an EM program does not provide organizational legitimacy, nor does it assure the intention to significantly deflate the prison population as a singular response to the systemic issue of over-criminalization.

Without establishing a clear appreciation of how and why the Probation Department wishes to use the EM technology, and accurately define the intended outcome (with an ability to evaluate that intended result), the writer projects that there will be a high likelihood of risk to program inflation and probable collapse. The experience to the use of EM in Kazakhstan<sup>28</sup> may foreshadow why a program in the Kyrgyz Republic may be unsustainable at present. In the Kazakhstan endeavor, it appears that the Ministry of Justice (2010) declared the intention to use EM as a tool in the supervision of a wide breadth of offenders who were subject to deprivation of liberties (sentenced) and those conditionally convicted offenders. This broad scope of use, in addition to a concerted effort to design and produce their own technology, inflated the cost of the program to \$373.5 million dollars. As reported in the media, and not independently validated by the writer, the project was abandoned in 2018 after approximately \$13 million dollars had been reportedly spent in project start-up and probable beta testing. The writer proposes that without clear scope and intention to the use of EM prior to any project piloting, the project will likely become overwhelmed and exceed assigned budgets and offer little return on investment.

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<sup>27</sup> Daems, T. (2020). *Electronic Monitoring: Tagging offenders in a culture of surveillance* (p.76). Switzerland: Palgrave.

<sup>28</sup> See <https://acca.media/en/4888/kazakhstan-decided-to-abandon-electronic-bracelets/>

A key assignment in any consultation, such as this project, is the execution of a cost & benefit analysis to determine if a project or product makes reasonable sense to engage or produce. The Panama UNODC ROPCAN technical opinion paper speak directly to this point, stating “Member States willing to initiate a pilot programme on electronic surveillance **should first analyze the cost versus benefit relation, comparing the expense of the life of a person in prison and the cost of the use of electronic bracelets per person**” (p. 17 – emphasis added). The question the writer continues to pose is whether there is sufficient corporate history in the newly forming Kyrgyz Republic correctional system to make an accurate or helpful cost & benefit assessment. There does not appear to have been sufficient time and documentation of the new or developing practices of the Probation Department, so an attempt at a cost-benefit analysis may need to be based on the historic form of practice that which will provide false value. Equally important is the necessity of a clear expectation of use of EM by the Probation Department, so responsible cost estimates of the EM technology and subsidiary expenses can be properly calculated for consideration against possible benefit. For example, if the Kyrgyz Republic is considering the design and implementation of an operations center within the justice system, there may be real and in-kind cost accommodations that could be realized if the operational center is leveraged to monitor clients who are actively supervised by way of EM technology.

A vital requirement in the execution of a successful EM program, again deemed successful only through a manner of evaluation against the intended purpose of that program, is a sound and measured use of risk assessment. Risk assessment not only assists the practitioner to assess whether a probation client should be considered for an EM assignment, but equally important affords the ability to tailor and document the level of intrusiveness and deprivation of liberties necessary to maintain the good conduct of the offender while in the community. Rule 16 of the Council of Europe recommendations cites “the modalities of execution and level of intrusiveness of electronic monitoring at the pre-trial stage shall be proportionate to the alleged offence and shall be based on the **properly assessed risk of the person absconding, interfering with the course of justice, posing a serious threat to public order or committing a new crime**”. (Emphasis added)

Without a clear set of proven assessment tools, a probation practitioner will be forced to use subjective assessment or rely on a standardized list, and the ability of the organization to measure the effectiveness of the program will be moot. Again looking to the well established EM program in Norway<sup>29</sup>, the root of decision making for offender supervision planning is based on risk and needs assessment made by those authorities, at a local level, who have the best knowledge and appreciation of the client’s needs based on the regional experience. It appears to the writer that the Kyrgyz Republic correctional system sees the value in proper risk assessment, and it was positively noted in the Action Plan for Probation (2023-2027) the inclusion of items to (1) develop a risk assessment and classification guide for probation clients, and (2) development and implementation of an electronic system of risk assessment and classification. However in the present state of probation reform in the Kyrgyz Republic, there does not appear to exist a robust and established manner of risk assessment that would

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<sup>29</sup> Oster, M.K. & Tore, R. (2018). The Norwegian Approach to Electronic Monitoring: Changing the System and Making a Difference, *Federal Sentence Reporter*, Vol. 31, No. 1, P. 75-84. (p. 78).

compliment an effective EM program or reduce the likelihood of abuse or corruption through the use of EM technology.

A final comment on the new growth of the Probation Department is the importance of societal opinion and public confidence. The reformation of the criminal justice system, including probation, also incorporates the hopeful (re)formation of public trust held to that respective institution. Trust in any institution takes time and if trust is not genuinely established prior to quick and substantial change, such as the introduction of electronic monitoring of people, the community may construe the change as adaptations of conducting business the historical way. As captured in the Panama UNODC ROPCAN technical opinion paper (p.18) and reinforced by way of the Kyoto Declaration (p.8), securing the communities participation, not just with EM but in the holistic approach to offender reintegration, is essential to program success and safeguard against abuse. The sweeping reforms in the Kyrgyz Republic do not suggest or can assume that the citizenry have adopted or accepted change<sup>30</sup>. Unfortunately the proposed Action Plan for Probation (2023-2027) is limited in specific detail on how the project intends on educating, engaging and measuring the level of support by the citizens in Kyrgyzstan.

### Inter-institutional factors

The modernization of the Probation Department within the Kyrgyz Republic, including the integration of a justice management information system, will not occur in an institutional vacuum. The criminal justice system is just that – a system of touch points that have different but related expectations and mandates to achieve. An offender is not introduced straight into probation, but rather has followed a path through police arrest, prosecution, in some cases incarceration, and finally probation or parole. Intentional reform at one justice touch point will have inevitable implications for other touch points in the justice system.

Liam O’Shea recently published a journal article<sup>31</sup> exploring promising police reform in Georgia, and speaks to the concept of a ‘rational-legal framework’. He defines as:

*“This framework refers to a security sector that is effective, accountable to the law and democratic institutions, upholds human rights and gives operational priority to servicing the needs of individuals and private groups rather than the state, is under local leadership, and can be sustained” (p. 389).*

Although not seemingly applicable, the experience of police reform in Georgia may be similar to the pursuits of similar reforms in the penal system in the Kyrgyz Republic. There exists a history of corruption and abuse within the correctional system, and simply separating the Probation Department from the rest of corrections will not provide the autonomy and credibility to exist in a new modern state. Said otherwise, if similar reform does not occur in the other touch points in the criminal justice system, focusing on effective, accountable, humane and socially-focused mandates rather than driven by government privilege, a risk of cross contamination and abuse will most likely result. Implementation of new tools and new information, such as introducing

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<sup>30</sup> Iriskulbekov, E. & Sadykov, I. (2022). Snapshots from Kyrgyzstan: Promising early partnerships in community safety and wellbeing. *Journal of Community Safety and Well-being*, 7(Suppl 1), July 2022, P.34-35. P. 34.

<sup>31</sup> O’Shea, L. (2022). Democratic police reform, security sector reform, anti-corruption and spoilers: lessons from Georgia. *Conflict, Security & Development*, Vol. 22, No. 4, p. 389.

EM technology and the data created, will need to be considered not exclusively to the Probation Department but to the potential relations, contamination and/or exploitation by other system actors.

A poignant example of potential contamination will be found in the institution efforts and obligations to safeguarded EM data. An offender who has been directed to wear EM technology will create legacy data, to wit information, through their use. That data will have details relating to that person, their life, and potentially the lives of people and communities. There are certain deprivations of liberties, such as where they might be able to travel and when they might be expected to be at a location, but they are also forfeiting their privacy both in real-time and in passive collection of data. There are legal and ethical risks that will occur relating to the use and integrity of this data, such as how that data is store, where that data travels, if that data is stored internally or externally from the State, what government entities have access to that data, when that data can be shared and for what purpose, and the mechanisms in place to provide oversight and conduct audits to ensure data integrity. In this matter, the Council of Europe recommendations to EM cite four rules that need to be considered:

- Data collection in the course of use of electronic monitoring shall be subject to specific regulations based on the relevant international standards regarding storage, use and sharing of data.
- Particular attention shall be paid to regulating strictly the use and sharing of such data in the framework of criminal investigations and proceedings.
- A system of effective sanctions shall be put in place in case of careless or intentional misuse or handling of such data.
- Private agencies providing electronic monitoring equipment or responsible for supervising persons under electronic monitoring shall be subject to the same rules and regulations regarding the handling of the data in their possession.

Although the importance of safeguarding EM data could be spoken of in other sections of this position paper, such as when discussing the importance of a clearly defined legal and regulatory framework, the point the writer is trying to impress is the risk that exists with the interplay between the Probation Department and other judicial and government entities. Access and use of EM data (real time or historical) by police, security services or the government will create significant ethical, moral and quite possibly dangerous implications that void any meaningful efforts of reform the project stakeholders are attempting to achieve.

### Alignment with International Practice

In its current state of probation reform, the writer holds concerns that no version of an EM program in the Kyrgyz Republic will sufficiently maintain alignment or achieve resolution with a number of the expectations of international practice as discussed in in this paper.

With consideration to the United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules), the state of probation reform has yet reached a place that meets expectations to safely pilot EM. Similar to the Panama experience in 2013, there exist a number of uncertainties that preclude the writer from making a positive assumption about EM implementation. At present, the Probation Department (1) does not have a clear understanding

of how they wish to use the technology to compliment existing work, (2) the Probation Department has limited experience or corporate history in the development of offender reintegration plans or leveraging risk assessment in their work products to inform rehabilitation or reintegration efforts, and (3) there is insufficient clarity in the legal and regulatory framework surrounding the intended use of EM in the Kyrgyz Republic to effectively manage ethical and legal challenges, including the absence of a clear and credible oversight mechanism to manage institutional creep and detect/deter potential misuse or abuse of the technology and the data generated.

With consideration to the United Nations Standard Minimum Rules for Treatment of Prisoners (the Nelson Mandela Rules), the current state of reform in the Kyrgyz Republic appears to be on positive track, but has yet achieved a number of named rules including the establishment of a standardized prisoner file management system (Rule 6) that includes sufficient authority to conduct audits to manage unauthorized access and potential misuse or corruption. As spoken to previously, the safeguarding of EM data will be a paramount responsibility. Not having a sufficient data management system in place prior to EM places the program viability in question.

In similar continuity, the rules also require effective and credible prison and penal service oversight (Rule 83) to ensure that the administration of correction services is in alignment “with existing laws, regulations, policies and procedures, with a view to bringing about the objectives of penal and corrections services, and that the rights of prisoners are protected” (p.26). At present, the writer is not confident that the Probation Department has sufficiently met these milestones of reform and would make implementing EM a risky endeavor.

And as spoken previously, the necessity to engage, consult and onboard the community remains an important pursuit in reform, and it is unlikely that positive engagement and trust in one part of the system, such as the Probation Department, will occur in isolation if positive engagement and trust is not secured in the remaining touch points.

### Use of EM technology for terror subjects or returning foreign fighters

A tertiary aspect of this consultation included exploring the potential use of EM in those cases for clients under supervision for terror-related offences and/or those people who have returned from fighting in unauthorized conflicts or terror-related activities.

There are examples from developed and undeveloped countries where the use of EM has been applied to monitoring this unique type of application. The writer will suggest that using EM in these cases requires a mature and experienced probation or parole service with sufficient corporate experience in risk and threat assessment. Not only does a significant amount of liability rest with the authority in these types of cases – forecasting the implications of an EM monitored terror subject who successfully executes a suicide bomb attack while under supervision - there are delicate considerations that need to be made when designing a management plan for this type of case. Special attention needs to be made by the probation authority, with continually consideration to rights and dignities afforded to the client, to factors such as risky associations the client may have with other people or parties, consideration to the access of places the client may want such as churches or mosques that may or may not elevate a risk to further radicalization, risk from public scrutiny and possible recourse should the identity

and background of the type of 'offending' be disclosed or made know, and lastly a possible criminalization of a client who may be unable to comply with the conditions of supervision that are applied.

A recent example of the use of EM technology in this type of circumstance recently occurred in Canada<sup>32</sup>, when a woman incarcerated in Syria for her association (by marriage) to an ISIS member was repatriated to Canada. Upon arrival to Canada, an application to the court was made for a supervision order that included the use of an electronic monitoring bracelet.

The writer proposes that the use of EM for cases related to terror-related offences and/or for those people who are repatriated foreign fighters is too complex and demanding for a newly developing probation service to administer.

## CONCLUDING COMMENTARY

After considering the expectations set forth by international standards, including the rules and recommendations delivered by the United Nations to Member States, there is work still required before the Probation Department should undertake the implementation of an EM program for community supervision.

The writer holds little doubt that use of EM may assist the Kyrgyz Republic in improving the level of supervision and management of risk posed by offender's that are serving their sentence in the community. As example, the Kyrgyz Republic has been admonished by the international community for failing to properly address violence against women and girls - specifically waning to adopt and deploy measures to deter domestic violence<sup>33</sup>. The use of EM technology in a bi-lateral fashion, meaning that both the offender and the victim could be electronically monitored and rules and conditions could be leveraged to deter future contact between the parties, could assist the response to the issue of domestic violence. As cautioned in this position paper however, the use of EM technology cannot be a sole strategy and the supervision plan needs to focus on reintegration and rehabilitative elements that makes the ambition of eliminating future victimization a sustainable outcome.

Despite the insightful intentions to include EM supervision clauses within the recent criminal and regulatory reforms, there exists greater risk in having these clauses without a fulsome framework to guide the use. It is clearly captured within international and United Nation rule and recommendations that the framework for the use of EM needs to be established prior to any efforts to deploy the technology. With respect, **the writer believes the current framework in the Kyrgyz Republic is grossly lacking sufficient direction and protections to safely and ethically deploy this EM technology, and the writer recommends that the Kyrgyz Republic consider removing or suspending any mention of the use of electronic monitoring in the justice system until a sufficient framework has been designed.**

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<sup>32</sup> See <https://www.cbc.ca/news/canada/british-columbia/polman-bail-terrorism-bond-1.6631923>

<sup>33</sup> See <https://www.ohchr.org/en/press-releases/2021/11/dialogue-kyrgyzstan-experts-committee-against-torture-commend-legislative>



After review of the draft Action Plan for Probation (2023-2027) and the overall objectives of the JUSTICE4ALL project, the writer is confident that reformation of the Probation Department is heading in the right direction, and the basic tenants of rehabilitative supervision will inform the work. There may be aspirations the Probation Department of certain workload and resource improvements that could be swiftly realized at present by the use of EM technology, but there is no ability to confirm the viability or feasibility of that aspiration until a proper and established practice of work has been implemented and conducted by the Probation Department.

The Probation Department must demonstrated a system of practice that ensure an effective manner of gradual return to the community, it must conduct sufficient community engagement and relationship building with non-governmental and civil societies engaged with offender reintegration or achieving basic health determinants to support their mission, and the efforts of reintegration by the Probation Department need to be guided by individually-tailored plans respective of the unique needs of the prisoner. These proposed actions to be undertaken by the Probation Department would provide improved alignment with the expectations of international standards and practices. **The writer recommends that the Probation Department design, implement, exercise and evaluate good probation practice prior to introducing EM technology.** It will take time for the institution to engage and properly leverage individualized treatment and support plans for a respective client, and the use of proven risk assessment and professional judgment tools will be essential to properly direct the practitioners to make good and defensible decisions while managing the public safety.

As directed by the United Nations efforts in the area of prison reform, alternatives to incarceration, and the safeguarding the rights to offenders, **the writer recommends that the Probation Department, prior to introducing EM technology, continue to leverage the experience and corporate history of mature probation services, and form profitable alignments with organizations such as the Confederation of European Probation (CEP).** As example, it would be advisable for the Kyrgyz Republic to explore the efforts conducted in Latvia and the Latvian State Probation Service. This country undertook a framework analysis and restructure initiative entitled “*Increasing the Application of Alternatives to Imprisonment*”<sup>34</sup>, a project that also incorporated an investigation into the potential use of electronic supervision. The Latvian experience brought together the Latvian Prison and Court administration; Norway’s Mediation Service, Ila Detention and Security Prison, and Oslo Probation Service; Estonia’s Ministry of Justice; and the support and coordination by the Confederation of European Probation.

The most important deterrence tool for misuse or corruption of the project’s intentions will be the existence of a credible, independent and empowered source of institutional oversight that, at present, does not appear to exist for the Probation Department. **The writer recommends to the Kyrgyz Republic to establish functional oversight of the Probation Department, and introduce specific regulations and effective sanctions relating to both access and use of EM data prior to implementation of EM technology.** Ultimately the best mitigation tool for misuse or corruption is achieving full system reform, thereby all touch points in the system adopt

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<sup>34</sup> See: <http://www.cep-probation.org/electronic-surveillance-launched-in-latvia/>

similar approaches to human rights and dignities as it relates to those people subject to the power of the justice system, however effective oversight is an essential requirement in functional and sustained reformation.

And finally, the successful introduction of EM technology for offender management in the community will require sufficient community engagement and acceptance to the reformed mission of the Probation Department and ultimately the entire justice system. **The writer recommends that the Probation Department explore and invest resources to garner trust and support from the community prior to the deployment of EM technology**, likely through educational initiatives, corporate messaging, and the installation of mechanisms that allow the community to voice concerns and complaints while holding a legitimate expectations of governmental action while maintaining a right to personal safety.

Drawing on the philosophy of functionalism held by 20<sup>th</sup> century industrial design - *form follows function*. Therefore the *function* of the Probation Department, specifically the mission and values of the Department, will dictate what *form* of structure or practice the agency needs to successfully conduct the work. Therefore the introduction of EM technology for the supervision of offenders in the community should be suspended until the form and function of the Probation Department, in concert with the overarching justice system in the Kyrgyz Republic, is properly defined, exercised and tested.

## BIOGRAPHICAL STATEMENT

Mr. James Clover has been working and educating in the criminal justice field for over 25 years. As a retired Staff Sergeant from the Edmonton Police Service (Canada), he has managed a number of roles and responsibilities including Behavioural Assessment and High-Risk Offenders, Organizational Security, Training and Professional Development, Human Trafficking and Hate Crimes, and within the Office of the Chief of Police. Starting in the early 2000s, James began his professional journey exploring the interplay between law enforcement and community corrections, which afforded him the opportunity to collaborate with government and non-government groups in the pursuit of community safety, offender guardianship and reintegration efforts. This included introducing the application of EM technology in the Province of Alberta (Canada) in 2009, learning and providing support to the use of EM including testimony before the House of Commons Standing Committee on Public Safety and National Security in 2012, and sharing this experience with other countries.

James has conducted work and research in a number of countries including the United States, United Kingdom and Australia. The Canadian Association of Chiefs of Police awarded him the International Police Officer award in 2018 for his contributions to policing around the globe, and in 2020 he was named a Police Fellow to the Global Law Enforcement and Public Health Association. He achieved his Master's degree in Public Policy in 2019 from the University of Victoria (British Columbia), and has been an instructor in the Corrections Program at MacEwan University (Alberta). James is a published author, including his role as editor and author for the book *Law Enforcement and Public Health: Partners for Community Safety and Wellbeing* (2022).