NEW ENGLAND SCHOOL OF LAW

RWANDA GENOCIDE PROSECUTION PROJECT

ELECTRONIC MONITORING OF PRETRIAL DETAINEES OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

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Discussion

I. Introduction and Summary of Conclusion

A. Question Presented

Is the use of electronic-monitoring technology on pretrial detainees of the ICTR who are subsequently released a legal and feasible alternative to traditional provisional release? Specifically, is the electronic monitoring of released detainees within the scope of Rule 65, regarding provisional release, and Rule 83, regarding instruments of restraint and if so, could the International Criminal Tribunal for Rwanda successfully implement the technology?[1]

B. Brief Answer

Electronic Monitoring [hereinafter EM or tagging] as a condition of pretrial release is a new alternative to traditional bail that is gaining momentum as a cost effective, safe option for legal systems to use when releasing pretrial detainees.[2] In an earlier memorandum for the Prosecutor, Edward Hart analyzed the legal systems of multiple nations and compared them with the laws of the Tribunal to determine when bail should be granted to serious criminals.[3] In many instances, the legal standards regarding bail in the surveyed countries were quite similar to the requirements the Tribunal sets in determining whether to grant provisional release to a pretrial

[1] Issue number 14: Bail and Electronic Monitoring - Pursuant to rules 65 and 83 of the ICTR Rules of Procedure and Evidence, what is the scope for bail and electronic monitoring of an accused? Can innovative approaches to bail and electronic monitoring by ankle radio monitors apply to the ICTR/ICTY context and if so in what circumstances? What is needed technologically and financially to implement such a proposal?

[2] *See infra* Part IV.

[3] *See generally* Edward Hart, *International and Comparative Study of Bail for Serious Crimes,* New England School of Law Rwanda Prosecution Brief (9 December 1997). [Reproduced in the accompanying notebook at Tab 33]. Mr. Hart's brief analyzed the laws of U.S.A., Canada, U.K., and France rather in-depth, and examined briefly the laws of Germany, New Zealand and a few African nations.

detainee.[4] Many of these countries use or have at least tested EM in their respective justice systems. Judging from the similarities between the ICTR statute and the statutes of the surveyed countries, it seems reasonable to conclude that if EM use is permissible in those countries, EM use by the Tribunal is within the scope of the Tribunal's Rules as well. By an in-depth analysis of the pertinent statutes and the corresponding information regarding electronic monitoring technology, it becomes apparent that the legality of electronic monitoring pretrial detainees released on bail is reasonably assured while the feasibility of the program would need to be judged in terms of what systems are desired and what costs are permissible.

II. Factual Background

The International Criminal Tribunal for Rwanda is responsible for the investigation and prosecution of crimes against humanity connected with the genocide in Rwanda committed between 1 January and 31 December 1994.[5] The Tribunal seeks to prosecute individuals who participated in the ethnically driven slaughter of hundreds of thousands of ethnic Tutsis in Rwanda and the surrounding territories in 1994.[6]

Almost eight years after the Tribunal was established, individuals accused of participation in the Rwandan genocide are held in custody awaiting their trials and opportunities

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[4] *See infra* Part IV. The overriding rationales of many of the statutes that determine whether bail is granted are: 1. will the defendant's presence at trial be reasonably assured, and 2. will release of the accused endanger the community.

[5] *See* General Information, *ICTR* (visited Mar. 5, 2002) <http: www.ictr.org/ENGLISH/geninfo/ictrlaw.htm.>. [Reproduced in the accompanying notebook at Tab 31].

[6] *See id*.

for their pretrial release seem rare to nonexistent.[7] Thus far, 60 out of the roughly 75 individuals indicted by the Tribunal have been apprehended and indicted by the Prosecutor for "genocide, crimes against humanity and war crimes."[8] The current cost of housing a defendant in the Tribunal's detention center in Arusha is estimated at $20 dollars a day per detainee or $7,300 a year for each detainee.[9] Driven by the desire to conserve funds,[10] the Tribunal seeks to find economical, and innovative alternatives to pretrial detainment. One such approach is the electronic monitoring of individuals released from custody prior to their trials. Many countries and legal jurisdictions around the world have adopted EM technology for use in a variety of capacities in their legal and correctional systems.[11] Although in most instances in other countries electronic monitoring has proven to be cheaper than pretrial detainment, issues still exist regarding its use by the International Criminal Tribunal for Rwanda such as: is EM within the scope of the rules of provisional release; would EM comply with the rules governing instruments of restraint, and; what is needed technologically and financially to implement EM.

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[7] *See* Status of ICTR Detainees, *ICTR Detainees* (visited 16 April 2002) <http:www.ictr.org/wwwroot/ENGLISH/factsheets/detainee.htm>. [Reproduced in the accompanying notebook at Tab 39]. Of the 60 individuals detained by the Tribunal in either Arusha or Mali, 59 are still classified as detainees. One individual has been acquitted and granted conditional release while an appeal is pending, but provisional release has not been granted.

[8] Press Briefing By ICTR Spokesman, *Progress of the Tribunal,* ICTR/INFO-9-13-021.E. Arusha, (25 March 2002). Also available at <http://www.ictr.org.>. [Reproduced in the accompanying notebook at Tab 36].

[9] *See* Mary Kimani, *Expensive Justice: Cost of Running the Rwanda Tribunal,* Internews Reports-April 2002 (visited May 3, 2002) <http://www.internews.org/activities/ICTR_reports/ICTRnewsApr02.html#0409a>. [Reproduced in the accompanying notebook at Tab 34].

[10] *See* ICTR General Information, *supra* note 5. "For 2000 the General Assembly of the United Nations decided to appropriate to the ICTR a total budget of US$ 79,753,900." *See id*. [Reproduced in the accompanying notebook at Tab 31].

[11] Most jurisdictions incorporate EM as either a tool of the court system, in conjunction with bail; or as a home incarceration detection device which helps corrections officials monitor individuals sentenced to house arrest. *See infra* Part IV.

III. Electronic Monitoring would not violate Rules 65 and 83 of the ICTR Rules of Procedure and Evidence

Rules 65 and 83 of the Rules of Procedure and Evidence, established pursuant to Article 14 of the Statute for the International Criminal Tribunal for Rwanda,[12] represent two possible obstacles to the use of EM technology by the Tribunal. Rule 65, governing Provisional Release, states:

> (A) Once detained, an accused may not be provisionally released except upon an order of a Trial Chamber.
>
> (B) Provisional release may be ordered by a Trial Chamber only in exceptional circumstances after hearing the host country and only if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person.
>
> (C) The Trial Chamber may impose such conditions upon the provisional release of the accused as it may determine appropriate, including the execution of a bail bond and the observance of such conditions as are necessary to ensure the presence of the accused at trial and the protection of others.
>
> (D) Any decision rendered under this Rule shall be subject to appeal in cases where leave is granted by a bench of three Judges of the Appeals Chamber, upon good cause being shown. Application for leave to appeal shall be filed within seven days of the impugned decision.
>
> (E) If necessary, the Trial Chamber may issue a warrant of arrest to secure the presence of an accused who has been provisionally released or is for any other reason at large. The provisions of Section 2 of Part Five shall apply *mutais mutandis*.[13]

[12] *See* ICTR General Information, *supra* note 5. [Reproduced in the accompanying notebook at Tab 31] *See also* VIRGINIA MORRIS & MICHAEL SCHARF, *AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA* vol. 1, 413 (Transitional Publishers 1998) [Reproduced in the accompanying notebook at Tab 22].

[13] Rules of Procedure and Evidence, U.N. Doc. ITR/3/Rev.2, 31 May 2001, Rule 65. [Reproduced in the accompanying notebook at Tab 3].

A quick analysis of Rule 65 shows that essentially four conditions are necessary for the provisional release of an accused.[14] First, the defense must demonstrate that provisional release is justified by "exceptional circumstances."[15] Second, the Chamber must be satisfied that the accused will appear for trial.[16] Third, it must be established that "if released [the accused] will not pose a danger to any victim, witness or other person."[17] Lastly, provisional release may be ordered only "after hearing the host country."[18]

While Rule 65(B) holds that provisional release is available to a detained individual only in "exceptional circumstances,"[19] subsection (C) permits the Trial Chamber to "impose . . . conditions upon the provisional release of the accused as it may determine appropriate . . . [or] necessary to ensure the presence of the accused at trial and the protection of others."[20] In sum, only if the four conditions of Rule 65 are satisfied and there is a finding of *exceptional circumstances,* can the Trial Chamber then order provisional release of the accused. Once a defendant is deemed eligible for provisional release, the Trial Chamber can then impose further conditions "as it may determine appropriate" to meet the goals of Rule 65(C).[21]

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[14] *See Prosecutor v. Kanyabashi*, Case No.: ICTR 96-15-T, Decision on the Defense Motion for the Provisional Release of the Accused, 21 February 2001. [Reproduced in the accompanying notebook at Tab 12]. *See also* MORRIS & SCHARF, *supra* note 12 at 532. [Reproduced in the accompanying notebook at Tab 22].

[15] Rules of Procedure and Evidence, U.N. Doc. ITR/3/Rev.2, 31 May 2001, Rule 65. [Reproduced in the accompanying notebook at Tab 3].

[16] *See id*.

[17] *Id*.

[18] *Id*.

[19] *Id*. at subsection (B).

[20] Rules of Procedure and Evidence, U.N. Doc. ITR/3/Rev.2, 31 May 2001, Rule 65(C).

[21] *Id*.

Recent hearings by the Trial Chamber and the Appeals Chamber have shown that while provisional release is available in "exceptional circumstances," it is extremely difficult for a defendant to make this showing.[22] Two detainees of the Tribunal, Jerome Clement Bicamumpaka and Joseph Kanyabashi, have failed in their efforts to demonstrate the requisite *exceptional circumstances* in their petitions for provisional release. Despite the fact that Kanyabashi had been detained for 5 years pending trial and Bicamumpaka had been detained for over two, the Trial Chambers held that the requisite *exceptional circumstances* were not present in both cases and denied their motions for provisional release.[23] In these instances, because there was no showing of "exceptional circumstances,"[24]no imposition of "conditions upon the provisional release"[25] was even entertained by the Trial Chambers. Judging by the cases in which provisional release has been denied, and taking into account the general assumption that provisional release is much more highly desired than pretrial detention, it is very likely that

[22] *See Prosecutor v. Bicamumpaka*, Case No.: ICTR-99-50-T, Decision on the Defense's Motion for Provisional Release Pursuant to Rule 65 of The Rules, 25 July 2001. [Reproduced in the accompanying notebook at Tab 11] Jerome-Clement Bicamumpaka, a pretrial detainee of the Tribunal, motioned the Trial Chambers praying for provisional release so he could travel with his family to Canada pending his trial. The Trial Chambers denied his motion for provisional release stating there was no showing of "exceptional circumstances" as required by Rule 65(B) even though the accused was arrested 6 April 1999, had been detained pending trial for over 2 years, and his actual trial was not expected to begin before 2002. *See also Prosecutor v. Kanyabashi*, Case No.: ICTR 96-15-T, Decision on the Defence Motion for the Provisional Release of the Accused, 21 February 2001. [Reproduced in the accompanying notebook at Tab 12]. In Kanyabashi, the Trial Chamber dismissed Joseph Kanyabashi's motion for provisional release finding no "exceptional circumstances" even though the accused had been detained pending trial for over five years and had agreed to comply with strict supervisory conditions if provisionally released.

[23] *See id.*

[24] Rules of Procedure and Evidence, U.N. Doc. ITR/3/Rev.2, 31 May 2001, Rule 65. [Reproduced in the accompanying notebook at Tab 3].

[25] *Id*. at subsection (C).

defendants of the Tribunal would welcome provisional release conditioned upon participation in an EM supervision program.[26]

Although Rule 65(C) does not explicitly state EM as a condition of pretrial release, as it does with a bail bond, it seems reasonable to conclude that EM could qualify as a "condition" the Trial Chamber "determine[s] appropriate . . . as . . . necessary to ensure the presence of the accused at trial and the protection of others."[27] The absence of any other conditions other than bail bond, and the presence of the word *including* in Rule 65(C), support further the proposition that the scope of Rule 65(C) is not limited to bail bonds, but instead includes any "such conditions" that the Trial Chambers may "determine appropriate."[28] The ICTY's provisional release statute also contains the "including execution of a bail bond"[29] language but conditions imposed upon bail in that jurisdiction are not limited to execution of a bond and include conditions similar to house arrest.[30] This lends support to the position that more innovative approaches to bail are permissible under the ICTR statute. If it's determined that the appropriate "exceptional circumstances" are present and an imposition of EM as a condition of

[26] In the Kanyabashi case, the defense's motion for provisional release stated that if released the accused agreed: "(i) To remain at all times with his wife . . . within the confines of the municipality of Wevelgem, Belgium; (ii) To surrender his passport to the Police of said municipality; (iii) To report each day to the Police of said municipality; (iv) Not to harass or in any way interfere with any witness . . . call[ed] to testify against him at trial [.]" Even with all these conditions Kanyabashi's motion was still denied for lack of showing of "exceptional circumstances. *See Prosecutor v. Kanyabashi*, Case No.: ICTR 96-15-T, Decision on the Defence Motion for the Provisional Release of the Accused, 21 February 2001. [Reproduced in the accompanying notebook at Tab 12].

[27] Rules of Procedure and Evidence, U.N. Doc. ITR/3/Rev.2, 31 May 2001, Rule 65(C). [Reproduced in the accompanying notebook at Tab 3]

[28] *Id*. *See also* MORRIS & SCHARF, *supra* note 12 at 413. This source states: "[t]he Trial Chamber may grant the request for release subject to appropriate conditions . . . including posting a bond; . . . including supervised release; or . . . release into . . . third party custody [.]" *Id*. [Reproduced in the accompanying notebook at Tab 22].

[29] Rules of Procedure and Evidence, U.N. Doc. IT/32/REV.22, 13 December 2001, Rule 65. [Reproduced in the accompanying notebook at Tab 4].

[30] *See Prosecutor v. Simic,* Decision on Milan Simic's Application for Provisional Release, Case No. IT-95-9-AR65, 29 May 2000. [Reproduced in the accompanying notebook at Tab14].

bail is made by the Trial Chambers, it's reasonable to conclude that EM would be held as falling within the scope of Rule 65(C) and a pretrial detainee could be released subject to electronic monitoring.

In the ICTY, where *exceptional circumstances* are no longer required[31], provisional release of an accused is much more readily attainable. Released detainees of the ICTY regularly have conditions imposed upon their provisional release that closely emulate house arrest, and defendants are oft times required to remain within the confines of certain designated geographic areas and are subjected to periodic check-in requirements.[32] In other jurisdictions, compliance with such restrictive bail conditions is commonly insured through the implementation of an EM program.[33] Again, this leads to a general presumption that what is legal in one jurisdiction should reasonably be legal in another jurisdiction with similar rules. In respect to the ICTY, many defendants may view the use of EM technology as more desirable as it seems to be less consuming than what is now regularly imposed as a bail condition.

Rule 83 of the Rules of Evidence and Procedure is another provision of the Tribunal's rules that may be an obstacle to the employment of EM technology to individuals released from pretrial detention. Rule 83 governing the use of Instruments of Restraint states: "Instruments of restrain, such as handcuffs, shall not be used except as a precaution against escape during

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[31] *See* Rules of Procedure and Evidence, U.N. Doc. IT/32/REV.17, 17 November 1999, Rule 65. [Reproduced in the accompanying notebook at Tab 4].

[32] *See Prosecutor v. Simic,* Decision on Milan Simic's Application for Provisional Release, Case No. IT-95-9-AR65, 29 May 2000. [Reproduced in the accompanying notebook at Tab 14]. As a condition upon his provisional release, Milan Simic was compelled to: surrender his passport to authorities, remain within the confines of a designated municipality, meet once a day with local police, consent to unannounced visits by local authorities to insure his continued presence, and to agree to have no contact whatsoever nor in any way interfere with any person related with the trial. These conditions are similar to conditions commonly imposed upon bail in other jurisdictions. In many instances compliance with these conditions is monitored through the use of EM.

[33] *See generally infra* Part IV.

transfer or for security reasons, and shall be removed when the accused appears before a Chamber."[34] Rule 83 focuses on preserving the dignity of the accused while recognizing that instruments of restraint are necessary in limited instances. Concerns of prejudicing an accused by compelling their appearance before Chambers, either handcuffed or shackled, seem to be the driving factors in the adoption of Rule 83. Also, Rule 83 seeks to conform to "internationally recognized standards concerning the treatment of prisoners."[35] In many of the world's legal systems "it is considered humiliating and degrading to require the accused to wear instruments of restraint during public trial proceedings."[36]

With today's EM technology, it is questionable whether the systems an accused would need to wear would even qualify as *instruments of restraint* per Rule 83. In the Rules Covering the Detention of Persons Awaiting Trial or Appeal Before the Tribunal or Otherwise Detained on the Authority of the Tribunal it is stated that instruments of restraint should be used only: a. as a precaution against escape; b. on medical grounds; or c. to prevent a detainee from self-injury, injury to others or to prevent property damage.[37] The parameters of this rule seem to envision articles that physically restrain an individual's bodily motion such as handcuffs, shackles, balls and chains or straitjackets, not a small monitoring devices that merely transmit information about the wearer's location or movements. Prevention of self-injury or property damage could only be insured by the use of these bodily restricting articles and that is what is appears to be meant by

[34] Rules of Procedure and Evidence, U.N. Doc. ITR/3/Rev.2, 31 May 2001, Rule 83. [Reproduced in the accompanying notebook at Tab 5].

[35] MORRIS & SCHARF, *supra* note 12 at 533. [Reproduced in the accompanying notebook at Tab 22].

[36] *Id*.

[37] Provisional Rules Covering The Detention of Persons Awaiting Trial or Appeal Before the Tribunal or Otherwise Detained on the Authority of the Tribunal, U.N. Doc. ICTR/2/L.3, 9 January 1996, Rule 48. [Reproduced in the accompanying notebook at Tab 6].

the term *instruments of restraint.* Also, the rule regarding instruments of restraint contained in the United Nations' Standard Minimum Rules for the Treatment of Prisoners states: "[i]nstruments of restraint, such as handcuffs, chains, irons, and straitjackets, shall never be applied as a punishment . . . [and] chains or irons shall not be used as restraints."[38] The ICTR/ICTY's rules of detention are extremely similar to the Standard Minimum Rules for the Treatment of Prisoners and contain many of the same provisions. All of these rules further support the position that the rules limiting the use of instruments of restraint are meant to curb only the use of physically restraining correctional articles rather than the use of small EM devices.

The principles that seem to be addressed by these rules appear to be the preservation of humanity and dignity and a desire for detention facilities to distance themselves from the harsh and inhuman methods of the past. Although these rules aim to prohibit the wrongful use of instruments of restraint, the preliminary observations of the rules acknowledge that the detention field is "constantly developing . . . [and that the rules] are not intended to preclude experiment and practices, provided [they] are in harmony with the principles and seek to further the purposes"[39] of the rules. This admission that the field is constantly developing and new experimental approaches should not be precluded also seems to favor the possible implementation of the new EM technology.

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[38] *United Nations: Standard Minimum Rules for the Treatment of Prisoners,* Article 33, *reproduced in A Compilation of International Instruments,* vol. 1, 243, at 249. [Reproduced in the accompanying notebook at Tab 41]. The fact that all the instruments contained in this provision were physical restriction tools lends further support to the position that that is what is meant by the term instruments of restraint. An EM device would restrain a detainee in a method more similar to a requirement that all detainees wear a distinctive prison outfit, which clearly denotes that they are detainees. Both devices, distinctive prison uniform and an EM device, would both help prevent the detainee's escape but neither device seems to fall under the prohibitions of any of the rules.

[39] *See id*.

The goals of Rule 83 are the limitation of degradation and pre-judgment of an accused by allowing him free motion of his limbs and the freedom from appearance before Chambers handcuffed or shackled. Current EM technology in no way limits bodily motion and the systems most often utilized are commonly the size of telephone pagers that are worn around the ankle.[40] Although it could be argued that ankle bracelets are instrument which in fact restrain the freedom of an accused to travel freely, the goal of Rule 83 was not to aid detainees in escape but to insure that for other than reasons of preventing escape, instruments of restraint were not to be used. It would be possible for an EM participant to appear before Chambers wearing an ankle bracelet without any concerns of prejudice because the unit could be almost totally concealed. Thus, it appears unlikely that the rights of an accused protected by Rule 83 would be violated by requiring an accused to comply with EM supervision as a condition of their provisional release.

Because EM seems to comport with the requirements of the rules regarding instruments of restraint and provisional release, it seems reasonable to conclude that the Tribunal could adopt EM use legally just as has been done in other countries.[41]

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[40] *See infra* Section V, Discussion of EM Characteristics and Components. In some instances the technology consists of nothing more than a digital wristwatch type unit with a tamper resistant strap. A unit such as this is virtually indistinguishable from a common digital wristwatch. *See* EMS, *Products: Watch Patrol* (visited April 5, 2002) <http://www.emswp.com/products.html>. [Reproduced in the accompanying notebook at Tab 30].

[41] Although it appears that EM could be legally implemented by the ICTR for use in provisional release, the very high standard of *exceptional circumstances* required by Rule 65(B) makes opportunities for the use of the technology rather rare. In contrast, the ICTY eliminated the *exceptional circumstances* requirement as a *sine qua non* condition for provisional release allowing pretrial detainees of the ICTY to be provisionally released without requiring a difficult showing of exceptional circumstances. *See* Rules of Procedure and Evidence, U.N. Doc. IT/32/REV.17, 17 November 1999, Rule 65. [Reproduced in the accompanying notebook at Tab 4]. *See also Prosecutor v. Kanyabashi*, Case No.: ICTR 96-15-T, Decision on the Defence Motion for the Provisional Release of the Accused, 21 February 2001. [Reproduced in the accompanying notebook at Tab 12]. *See also Prosecutor v. Blagoje Simic and others,* "Decision on Milan Simic's Application for Provisional Release", Case No. IT-95-9-AR65, 29 May 2000. [Reproduced in the accompanying notebook at Tab 14]. While this distinction in no way demonstrates that the legality of EM technology is more readily assured by one Tribunal over another, it does seem to indicate if EM technology is adopted by both Tribunals, its use will most likely be more prevalent in the ICTY where defendants will not be required to show such exceptional circumstances in order to secure their provisional release.

IV. National Jurisdictions with similar rules allow Electronic Monitoring

Other legal systems, with rules similar to the Tribunal, have concluded that EM is an effective and legal method of monitoring individuals awaiting trial. The evolution of EM's usage in these countries emerged from conditions similar to the Tribunal and has led to the technology's adoption in numerous roles. By examining EM's function in the other countries it is possible that the Tribunal may determine what avenue of legality would be appropriate in adopting the technology and be more able to ascertain what role the technology should assume.

A. The Laws of the United States

In the United States individuals held in custody pending their trial are eligible for pretrial release.[42] The Bail Reform Act of 1984 permits judicial officers to order that pretrial detainees be:

1. released on personal recognizance or upon execution of an unsecured appearance bond under subsection (b) of this section;

2. released on a condition or combination of conditions under subsection (c) of this section;

3. temporarily detained to permit revocation of conditional release, deportation, or exclusion under subsection (d) of this section; or

4. detained under subsection (e) of this section.[43]

The central objective of the statute is to assure the presence of the defendant at trial.[44] Under the statute, judicial officers are permitted to consider a wide range of factors in their determination

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[42] *See* Hart *supra* note 3, § III. B.1.at 14. [Reproduced in the accompanying notebook at Tab 33] *See also* U.S. CONST. amend. VIII. [Reproduced in the accompanying notebook at Tab 1]. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." *Id*.

[43] Bail Reform Act, 18 U.S.C. § 3142(a) (1984). [Reproduced in the accompanying notebook at Tab 7].

of whether to release the detainee, release the detainee subject to conditions or to keep the detainee in custody until the date of trial.[45]

In the context of home confinement and EM, the most pertinent portion of the statute is subsection (c) concerning release on conditions. Subsection (c) states:

> (1) If the judicial officer determines that the release described in subsection (b) [release on personal recognizance] will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community, such judicial officer shall order the pretrial release of the person—
>
> (A) subject to the condition that the person not commit a Federal, State, or local crime during the period of release; and
>
> (B) subject to the least restrictive further condition, or combination of conditions, that such judicial officer determines will reasonably assure the appearance of the person as required and the safety of any other person and the community.[46]

In sum, the judicial officer should release the accused on personal recognizance unless this would not reasonably assure his presence at trial or would endanger the community.[47] If conditions are necessary to assure the defendant's presence, the judicial officer should release the accused subject to the least restrictive condition or combination of conditions. If no condition or

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[44] *See generally U.S. v. Gotay*, 609 F.Supp. 156 (S.D.N.Y 1985). [Reproduced in the accompanying notebook at Tab 16].

[45]*See* 18 U.S.C. § 3142(g) (1984). [Reproduced in the accompanying notebook at Tab 7]. The court may consider the nature and circumstances of offenses charged; the weight of evidence against defendant; the history and characteristics of defendant; and the nature and seriousness of danger that would be posed by defendant's release. Id. *See generally U.S. v. Minns*, 863 F.Supp. 360 (N.D.Tex. 1994). [Reproduced in the accompanying notebook at Tab 17].

[46] 18 U.S.C. § 3142(c) (1984). [Reproduced in the accompanying notebook at Tab 7]. This section of the statute lists 13 conditions under which a pretrial detainee can be released. Conditions: "(iv) abide by specified restrictions on personal associations, place of abode, or travel: (v) avoid all contact with an alleged victim of the crime and with a potential witness who may testify concerning the offense; (vi) report on a regular basis to a designated law enforcement agency, pretrial services agency, or other agency; and (vii)comply with a specified curfew;" are all relevant to the use of EM technology as a condition of release. *Id*.

[47]*See id*.

combination of conditions would reasonably secure the defendant's presence at trial or the safety of the community, the accused should remain in custody until the trial.[48]

Two of the conditions of 18 U.S.C. § 3142(c)(1) permit restrictions on places of abode, travel[49], and curfew conditions[50] and support the use of house arrest as a statutorily permissible condition of pretrial release.[51] EM is an extension of home detention in that it is often used to insure that the pretrial detainee is complying with the condition of house arrest. The use of EM technology falls within the purview of 18 U.S.C. § 3142(c)(1)(B)(iv) and is used widely as a permissible condition of pretrial release in the U.S. Federal justice system.[52]

In the early 1980's, neither the United States nor any foreign country incorporated EM in their respective justice systems.[53] Throughout the late 1980's and early 1990's, use of EM technology exploded and use is expected to increase as the technology improves.[54] As the technology improves places that formerly could not use the EM because they lacked sufficient infrastructure may find that use of the EM technology is now feasible and advancements in the technology have made the required infrastructure support minimal.

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[48] *See id*.

[49] *See* 18 U.S.C. § 3142(c)(1)(B)(iv). [Reproduced in the accompanying notebook at Tab 7].

[50] *See* 18 U.S.C. § 3142(c)(1)(B)(vii). [Reproduced in the accompanying notebook at Tab 7].

[51] *See* Darren Gowen, *Overview of the Federal Home Confinement Program 1988-1996*, 64 FED. PROBATION 11, 12 (2000) [Reproduced in the accompanying notebook at Tab 25].

[52] *See U.S. v. Traitz*, 807 F.2d 322 (3d Cir. 1986). [Reproduced in the accompanying notebook at Tab 18] In an early form of EM use, the defendant was confined to house arrest, had his phones monitored, was required to wear a beeper device and phone the authorities of his whereabouts if paged. *Id*. *See also* U.S. Probation & Pretrial Services, *Court and Community* (visited Mar. 1, 2002) <www.uscourts.gov/misc/cchome/pdf.>. [Reproduced in the accompanying notebook at Tab 42]. By 1999 there were approximately 16,000 defendants and offenders on home confinement with most cases using some form of electronic monitoring. *See id*.

[53] *See* Richard A. Ball & J. Robert Lilly, *Selling Justice: Will Electronic Monitoring Last?, 20* N.KY.L.REV. 505, 505 (1993). [Reproduced in the accompanying notebook at Tab 23].

[54] *See generally id*.

In the United States, in contrast to the International Criminal Tribunal For Rwanda, "there is a presumption in favor of pretrial release."[55] Although stringent restrictive conditions can be imposed upon the release, judicial officers should favor release unless no condition or combination of conditions would be adequate to meet the dual goals of community safety and appearance of the accused at trial. At the Tribunal however, provisional release of an accused may only be ordered in "exceptional circumstances" pursuant to Rule 65(B). This comparison tends to demonstrate that pretrial release is generally more difficult to attain for defendants at the Tribunal. While pretrial release may be more elusive to Tribunal detainees, the rules from both jurisdictions pertaining to the conditions that may be imposed upon released pretrial detainees are very similar in their scope. Both Rule 65 and 18 U.S.C. § 3142 allow for the imposition of restrictive conditions upon the release of pretrial detainees. In this regard, it is reasonable to conclude that because the two rules of the United States and the Tribunal are so similar, EM usage permitted in one jurisdiction, would likewise be permitted in the other.

B. The Laws of Canada

Under the laws of Canada, individuals in custody accused of a crime are eligible for bail or judicial interim release.[56] In Canada, judicial interim release can be granted, denied, or granted subject to conditions depending on the facts and circumstances of each individual case. Section 515 of the Criminal Code states:

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[55] Michael Ryan & Benjamin Olson, *Bail,* 88 GEO. L.J 1157, 1161 (May 2000). [Reproduced in the accompanying notebook at Tab 27].

[56] *See* Hart, *supra* note 3 § III.B.3 at 14. [Reproduced in the accompanying notebook at Tab 33] *See also* Canadian Charter of Rights and Freedoms, § 11 (1982) (Reproduced in 1995 Tremeear's Criminal Code). "Any person charged with an offense has the right not to be denied reasonable bail without just cause." *Id*. [Reproduced in the accompanying notebook at Tab 2].

(1) Subject to this section, where an accused who is charged with an offence . . . is taken before a justice the justice shall, unless a plea of guilty by the accused is accepted, order, in respect of that offence, the accused be released on his giving an undertaking without conditions, unless the prosecutor . . . shows cause . . . why the detention of the accused in custody is justified . . .

(2) Where the justice does not make an order under subsection (1), he shall, unless the prosecutor shows cause why the detention of the accused is justified, order that the accused be released
    (a) on his giving an undertaking with such conditions as the justice directs;[57]

Basically, sub-section (1) of section 515 of Canada's Criminal Code requires that a justice order the pretrial release of an accused unless the prosecutor is able to show good cause why detention of the accused pending trial is appropriate. Sub-section (2) allows the justice to impose conditions upon the judicial interim release of an accused but only in instance where the prosecution can establish that release under sub-section (1) is inappropriate.[58]

In order to show cause why an accused should be denied release or why an accused's release should be contingent upon limiting conditions, prosecutors must offer compelling reasons to the justice showing why the continued detention or release on conditions is appropriate. Sub-section (10) of section 515 maintains that the "detention of an accused in custody is justified only on either of the following grounds:

(a) on the primary ground that his detention is necessary to ensure his attendance in court in order to be dealt with according to law; and

(b) on the secondary ground . . . that his detention is necessary in the public interest or for the protection or safety of the public, having regard to all the circumstance including any substantial likelihood that the accused will, if he

[57] Criminal Code ss. 515(1); 515(2) (1985) (Reproduced in 1995 Tremeear's Criminal Code). [Reproduced in the accompanying notebook at Tab 8].

[58] *See* Criminal Code s. 515(3) (1985). "The justice shall not make an order [requiring conditions upon the release] unless the prosecution shows cause why an order under [sub-section (1)] should not be made." *Id*.

is released from custody, commit a criminal offence or an interference with the administration of justice. [59]

The grounds for *showing cause* why an accused should be kept in custody apply as considerations when a determination is made of whether a detainee should be released upon conditions. The statute contains prescribed conditions that can be imposed upon a released detainee when a justice determines that release with conditions is appropriate. In accordance with the sub-section (2), which allows the imposition of conditions, the justice can require that the accused:

(a) report at times to be stated in the order to a peace officer or other person designated in the order;

(b) remain within a territorial jurisdiction specified in the order;

(c) notify the peace officer or other person designated under paragraph (a) of any change in his address or his employment or occupation;

(d) abstain from communicating with any witness or other person expressly named in the order, or refrain from going to any place expressly named in the order, except in accordance with the conditions specified in the order that the justice considers necessary;

(e) where the accused is the holder of a passport, deposit his passport as specified in the order; and

(f) comply with such other reasonable conditions specified in the order as the justice considers desirable.[60]

These conditions are similar to the conditions other jurisdictions apply to instances of pretrial release. Just as electronic monitoring of pretrial detainees evolved from similar provisions in the

[59] *See* Criminal Code s. 515(10) (1985). These two provisions generally comply with pretrial release goals of the other jurisdictions which seek to ensure the defendants presence at trial and protection of the public. *See id*.

[60] Criminal Code s. 515(4) (1985).

laws of the United States, Canada has also implemented electronic monitoring technology as within the scope of their release statute.

Although the first EM programs were started in the United States in the 1980's, the practice diffused relatively quickly and by the early 1990's pilot EM trials began in multiple provinces within Canada.[61] The majority of EM programs operating in Canada are administered by the corrections system as a tool to monitor sentences of house arrest, early furlough and work release from prison, but the technology is also used by the court system in one province in conjunction with judicial interim release and probation.[62] This is the same type of EM use that is presently being investigated by the International Criminal Tribunal as an innovative alternative to bail. In the province of Saskatchewan, a defendant seeking judicial interim release under section 515 of the Criminal Code can be released subject to the restrictive condition of electronic monitoring per sections 515(2) and 515(4). Even in instances where a serious crime is committed, Saskatchewan courts have considered participation in an electronic monitoring program a legitimate factor when a judicial interim release determination is made.[63] This is especially relevant to the International Criminal Tribunal where most of the defendants are

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[61] *See* JAMES BONTA ET AL., ELECTRONIC MONITORING IN CANADA, 4 (Ottawa Solicitor General May 1999). [Reproduced in the accompanying notebook at Tab 20]. EM was reportedly first used upon an offender in 1984 by a judge in New Mexico. Canada's actual first use of the technology was in 1987 and began with a British Columbia pilot program, which led to its adoption by other provinces within Canada. *See id*.

[62] *See* BONTA ET AL., *supra* note 61 at 3. EM use in most provinces is carried out by correctional officers monitoring sentenced individuals but in Saskatchewan EM is maintained by the court system and individuals are supervised by court personnel who monitor the whereabouts of probationers and offenders released before their trial via the ankle bracelet technology. *Id*.

[63] *See R. v. Braun*, 120 Sask. R. 189, 33 C.R. (4th) 381 (1994). [Reproduced in the accompanying notebook at Tab 15] In Braun, the defendant was charged with first-degree murder for the killing of his wife's alleged extra marital lover. The evidence against the defendant was strong, and defendant had reportedly admitted to his commission of the crime. Nonetheless, after an initial denial of his petition for judicial interim release, defendant was granted release on appeal subject to conditions including his participation in an electronic monitoring program. The court found that although the charge was serious and the evidence strong, defendant's release was proper under both the primary and secondary grounds of Section 515(10). *See id*.

detained pending their trials for serious crimes, because it demonstrates that even in serious crimes, pretrial release of an accused is a possibility.

The electronic monitoring of defendants released from custody while their trial is pending is within the scope of Canada's judicial interim release laws. Just as is the case in the U.S., EM technology is not mentioned specifically by the legislature in the laws of Canada, but falls within the range of permissible conditions a judge can impose upon the pretrial release of a defendant. Although EM programs are not practiced uniformly throughout Canada, the technology is still very young and its rapid diffusion throughout the nation lends some support to the technologies general success.[64] As was the case with the laws of the United States, the laws of Canada seem to favor judicial interim release, and denial of release is only appropriate if the prosecution can *show cause* why continued detainment is justified.[65] This is quite a different standard than that applied by the International Criminal Tribunal where bail can be granted only in "*exceptional circumstances.*"[66]

Despite the differences of when the granting of pretrial release is appropriate, the rules defining the scope of permissible conditions that can be imposed upon the release seem to be quite similar.[67] In Canada and the U.S., conditions can be imposed upon the release severely restricting the defendant's travel and movement, while at the Tribunal the Trial Chambers can impose such conditions upon the release as they may "*determine appropriate*."[68] While the

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[64] *See generally* BONTA ET AL., *supra* note 61. [Reproduced in the accompanying notebook at Tab 20].

[65] *See* Criminal Code s. 515(1). [Reproduced in the accompanying notebook at Tab 8].

[66] Rules of Procedure and Evidence, U.N. Doc. ITR/3/Rev.2, 31 May 2001, Rule 65(B). [Reproduced in the accompanying notebook at Tab 3].

[67] *See* Criminal Code s. 515(4). *See also* Rules of Procedure and Evidence, U.N. Doc. ITR/3/Rev.2, 31 May 2001, Rule 65(C).

[68] *Id.*

Tribunal Rules do not list conditions that can be imposed, it is reasonable to conclude that if the Trial Chambers implemented EM, they could defend legal challenges against its use on the grounds that they determined its use appropriate.

C. The Laws of the United Kingdom

Under the laws of England, an individual accused of a crime is accorded a general right to bail.[69] While the United Kingdom's Bail Act provides defendants with a general right to bail, it also sets aside specific instances when bail can be withheld. The Bail Act states:

> The defendant need not be granted bail if the court is satisfied that there are substantial grounds for believing that the defendant, if released on bail (whether subject to conditions or not) would--
>
> (a) fail to surrender to custody, or
>
> (b) commit an offence while on bail, or
>
> (c) interfere with witnesses or otherwise obstruct the course of justice, whether in relation to himself or any other person.[70]

When conditions such as these are present courts are permitted to balance the defendant's right to bail against the likelihood of the occurrence of one of the listed events to come to a decision of whether or not to grant bail. In sum, while there is a general right to bail, this right is not an absolute right and in limited instances the court need not grant bail to an accused. Again, as in

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[69] *See* The Bail Act c. 63 s. 4 (1976) (UK). Sweet and Maxwell United Kingdom Law in Force. [Reproduced in the accompanying notebook at Tab 9]. " A person to whom this section applies shall be granted bail except as provided in Schedule 1 to this Act." *See id.*. *See also* Hart, *supra* note 3 at 12. [Reproduced in the accompanying notebook at Tab 33].

[70] The Bail Act c. 63 Sch. 1 Para 2 (1976) (UK). Sweet and Maxwell United Kingdom Law in Force. [Reproduced in the accompanying notebook at Tab 9]. The goals of England's Bail Act comport with the dual goals of the other legal systems thus far analyzed. Securing the presence of the accused at trial and the protection of the community and course of justice are central to Schedule 1 chapter 63 of the Bail Act. *See id.*

other legal systems, England favors the pretrial release of an accused and will grant bail unless there are superior countervailing reasons that overpower the presumption of granting bail.

In accordance with The Bail Act, conditions may be imposed upon the granting of bail to insure that the defendant appears for trial and remains crime free while out on bail. Under the general provisions of the Act, a defendant:

> may be required to comply, before release on bail or later, with such requirements as appear to the court to be necessary to secure that--
>
> (a) he surrenders to custody,
>
> (b) he does not commit an offence while on bail,
>
> (c) he does not interfere with witnesses or otherwise obstruct the course of justice whether in relation to himself or any other person,
>
> (d) he makes himself available for the purpose of enabling inquiries or a report to be made to assist the court in dealing with him for the offence.[71]

The conditions are similar to those we have seen in other countries where a legal system determines that release subject to conditions is the most just alternative between an accused being held in custody pending trial and absolute pretrial release.

In most legal jurisdictions, the use of EM technology is not explicitly stated in the statute but instead evolves from the statute provisions permitting the imposition of conditions upon bail. In England, the practice evolved similarly to the EM programs in other jurisdictions but is also provided for explicitly in the Bail Act.[72] Interestingly, just as in other jurisdictions, where EM is

[71] The Bail Act 1976 c.63 s.3 (1976) (UK).. [Reproduced in the accompanying notebook at Tab 9]

[72] *See* The Bail Act 1976 c.63 s.3 (6ZAA) (1976) (UK). *See also* The Bail Act 1976 c.63 s3AA. [Reproduced in the accompanying notebook at Tab 9]. The statute provisions dealing with electronic monitoring of compliance with bail conditions are concerned mainly with insuring that children who do not meet certain minimum requirements shall not have EM imposed upon them as a condition of bail. *See id.*

used as both a tool of the courts and as sentence in and of itself, the United Kingdom uses EM technology in a similar manner.[73]

The first use of EM in the United Kingdom was in 1989 in a pilot program in which defendants were subjected to electronic monitoring as a condition of their pretrial release.[74] "The equipment [then] available proved unreliable in use and it was not until 1995 that a further pilot, involving the use [of EM technology monitoring] curfew orders, began."[75] EM was first used in The United Kingdom as tool of the court, but it soon evolved into a sentence with the advent of successful home detention pilots. Since 1995, "EM has been in continuous use in England and Wales" following successful trials where the technology was used to monitor curfew orders. New uses for the technology are continually being developed and use of the technology is generally expected to expanded as each pilot program markets electronic monitoring's potential uses.[76] Most recently, EM technology has "revisited" bail as a possible

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[73] *See e.g*. Kath Dodgson & Ed Mortimer, *Home Detention Curfew- The First Year of Operation,* Research Findings No. 110. London: Home Office Research and Statistics Directorate, (1999). [Reproduced in the accompanying notebook at Tab 24]. *See also* Scottish Executive, *Tagging Offenders: The Role of Electronic Monitoring in the Scottish Criminal Justice System: Scottish Executive, 2000a* (visited April 4, 2002) <http://www.soctland.gov.uk/consultations/justice/toem-00.asp>. [Reproduced in the accompanying notebook at Tab 37].

[74] *See* Scottish Executive, *supra* note 73 at 4.9.

[75] *Id.* at 2.3. Although early trials using EM with released pre-trial detainees were criticized for faulty equipment, currently "there is extensive use of electronic monitoring in England and Wales both for short term prisoners on early release and for curfew orders imposed by the court. Recent pilots have focused on fine defaulters, petty offenders and bailees." *Id.*

[76] *See generally* Dodgson & Mortimer, *supra* note 73. Demonstrative evidence of the successful spread of the technology is found in the establishment of the Home Detention Curfew Program. Following the success of earlier trial programs, in 1999 the Home Detention Curfew was designed to "ease the transition of prisoners from custody to the community." *Id.* Under the scheme prisoners are released from their sentences early subject to compliance in an EM program. [Reproduced in the accompanying notebook at Tab 24]. *See also* Gaby Hinsliff & Martin Bright, 'Soft Touch' Plan to End Jail Crisis, THE OBSERVER, February 3, 2002, (visited April 2, 2002) <http://www.observer.couk/politics/story/0,6903,644055,00.html>. [Reproduced in the accompanying notebook at Tab 32] Under this recently discussed plan to help end an overcrowding crisis, "Offenders and remand prisoners would be locked up at evenings and weekends, with strict curfews and tagging to keep track of them, but released during the day to work, do community service or maintain relationships with families." *Id.*

usage, and trials have again begun using EM "as an alternative . . . to court [ordered] remand in custody."[77]

EM use in the United Kingdom appears to be firmly rooted. From its relative slow start as a bail implementation, EM technology has evolved to achieve significant successes as a corrections tool to aid in the monitoring of home detention orders. Also, EM is again being used in England to monitor released pretrial detainees and use of the technology is expected to increase as officials attempt to deal with the current prison overcrowding crisis. Similar to the Tribunal, England did not originally list EM as a condition that could be imposed upon bail but merely stated that *requirements* could be imposed upon the pretrial release of an accused "as appear to the court to be necessary."[78] It was only later, when certain limitations were placed upon the imposition of EM on defendants, that the practice appeared in statute.[79] Measuring the similarity of The Bail Act with Rule 65 seems to imply that because EM is a permissible requirement imposed upon bail under English law, it would likewise be permissible under the laws of the Tribunal.

[77] Scottish Executive, *supra* note 73 at 4.9. [Reproduced in the accompanying notebook at Tab 37].

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[79] *See* Bail Act 1976 c.63 s.3 (6ZAA) (1976)(UK). [Reproduced in the accompanying notebook at Tab 9]. As was stated earlier the limitations are generally concerned with insuring that minimum requirements are met before child defendants are subjected to electronic monitoring.

D. The Laws of France

In France, pretrial release has been available to defendants for some time,[80] while the new innovations of electronic monitoring have come to the country relatively recently. Under the laws of France defendants are granted a presumption that they shall remain free while the date of their trial is pending.[81] "Once made a suspect, article 137 of the [French] Code of Criminal Procedure provides that 'the accused shall remain free unless, for reasons of the necessities of the investigation or as a security measure, he is submitted to *controle judiciare* or, exceptionally, he is remanded in provisional custody."[82] Just as in the other jurisdictions where a defendant could be released, held in remand or released subject to conditions, France can impose conditions upon the release of an accused under what is known as *controle judiciare.*[83] "*[C]ontrole judiciare* imposes conditions on freedom, such as might be imposed as bail conditions"[84] in other jurisdictions. Under Article 138 of the Code the accused may be obliged " to submit . . . to one or several of the following conditions [:]"[85]

1. not to leave the territorial limits determined by the examining magistrate;

2. not to absent himself from his domicile or the residence fixed by the examining magistrate except on the conditions and for the reasons set forth by this magistrate;

3. not to frequent certain places, or to only frequent those places determined by the examining magistrate;

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[80] *See* C. PR. PEN. Arts. 137-148 (Fr) (1988). [Reproduced in the accompanying notebook at Tab 10]. Articles 137 through 148 of the French Criminal Procedure Code govern the granting or denial of pretrial release of French defendants.

[81] *See* C. PR. PEN. Art. 137(Fr) (1988). [Reproduced in the accompanying notebook at Tab 10].

[82] JOHN BELL ET AL., PRINCLIPLES OF FRENCH LAW, 132 (1998). [Reproduced in the accompanying notebook at Tab 19].

[83] *See id*. at 132.

[84] *Id*.

[85] C. PR. PEN. Art. 138(Fr) (1988). [Reproduced in the accompanying notebook at Tab 10].

4. to inform the examining magistrate of any movement beyond the determined limits;

5. to present himself periodically to the . . . authorities[;]

6. to answer any summons . . .

7. to remit . . . all documents . . . particularly [his] passport[;]

8. to abstain from driving all vehicles . . .

9. to abstain from receiving or meeting certain persons specifically designated by the examining magistrate, as well as from entering in relation with them, in any fashion whatsoever; [86]

In total, Article 138 lists 16 conditions that an accused may be *obliged* to submit to when granted conditional pretrial release. "The main bail conditions applied aim to prevent the suspect from becoming a fugitive, for example by imposing a condition that they must not go outside a fixed geographical area."[87] The imposition of conditions seeks to breach the gap between absolute release and outright pretrial detention. In France, the pretrial release of defendants is favored and only in certain serious crimes, or when circumstances are insufficient to guarantee the safety of the community, may pretrial detention be ordered.[88]

[86] *Id.* Although Article 138 contains 16 conditions, the nine provisions reported here are the most significant in regard to bail and electronic monitoring of released pre-trial detainees.

[87] CATHERINE ELLIOT & CATHERINE VERNON, FRENCH LEGAL SYSTEM, 162 (2000). [Reproduced in the accompanying notebook at Tab 21].

[88] *See* PR. PEN Art. 144 (Fr) (1988). [Reproduced in the accompanying notebook at Tab 10]. "[P]retrial detention can be ordered or maintained: 1. when pretrial detention of the defendant is the only means of conserving the proof or material evidence, or to prevent pressure on witnesses or victims, or a fraudulent conspiracy between defendants and accomplices; 2. when . . . detention is necessary to preserve the public order from the trouble caused by the offense or to protect the defendant, to put an end to an offense or prevent its renewal or to guarantee the maintenance of the defendant at the disposition of justice." *Id*.

France's justice system has not adopted EM technology as readily as other jurisdictions.[89] Recently, however, trial programs of EM have begun in France as "part of the French Ministry of Justice's evaluation program, testing operational aspects as well as the underlying concept of electronic monitoring programs."[90] Currently, the legislation in France "permits . . . offenders sentenced to a prison term of twelve months or less, as well as those serving the last 12 months of any jail term"[91] to participate in an electronically monitored home detention program. The electronic monitoring of home detention program participants generally indicates that the technology is being incorporated into the sentencing schemes of the correctional systems and is not in use by the court system in monitoring individuals released on bail. In England, the use of EM was scrapped for use in bail situations after initial failures, but after successful trials using EM to monitor home detention curfews, the technology's use in conjunction with bail was revived.[92] Perhaps, France's trial use of EM as a monitor of home confinement sentences is just the beginning of the country's adoption of the technology. Certainly, France's bail laws are similar in scope and breadth to those we have examined already, and use of the technology could be extremely effective in insuring that defendants do not violate geographical restrictions placed upon their pretrial release. Although EM is a relatively recent innovation in France, it is reasonable to assume that as the country's justice system becomes more acquainted with the

[89] *See* Scottish Executive, *supra* note 73 at 2.2. [Reproduced in the accompanying notebook at Tab 37]. While the European countries of Belgium, Switzerland, Sweden, the Netherlands, and the United Kingdom have adopted the use of EM technology other countries such as Germany, France, Norway and Denmark have been more reluctant and only in the last few years has use of the technology been considered.

[90] Elmo Tech: Electronic Monitoring Technologies, *News Release-Elmo Tech Awarded Home Detention Pilot Program in Dijon, France 13 February 2002* (visited April 5, 2002) <http://elmotech.com /news/pr13-02-02.html>. [Reproduced in the accompanying notebook at Tab 29].

[91] *Id.*

[92] *See* Scottish Executive, *supra* note 73 at 2.3. *Id.* at 4.9. [Reproduced in the accompanying notebook at Tab 37].

technology and its benefits, uses of the monitoring technology will expand into areas where it is currently not employed.[93]

E. Pretrial Release Laws of South Africa

As was seen in the earlier Tribunal Brief by Edward Hart, African nations also have notions of when pretrial release is appropriate. The general conclusion on the status of bail in the African nations surveyed is that although "bail is not a protected right in [the surveyed African] countries, the right of due process is."[94] While a defendant has no absolute right to pretrial release, the accused must be tried within a reasonable time, or must be afforded a hearing to determine why continued detention is appropriate.[95] These requirements upon African justice systems are generally in line with the requirements imposed upon judicial systems the world over. An accused should either be released pending his trial, or be afforded a hearing where he can state a case for why his further pretrial confinement is not appropriate.

After successful EM trials in 1996 to 1997, South Africa took steps to become the first developing country to implement EM as part of their community corrections system.[96] To help alleviate a prison-overcrowding problem and assist a much over-tasked staff, South Africa sought to use the system extensively to monitor compliance with house arrest and no contact

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[93] *See* Elmo Tech, *supra* note 90. France's national electronic monitoring policy program is only in its second stage and is not expected to become fully operational until the year 2004.

[94] Hart, *supra* note 3 at 21. [Reproduced in the accompanying notebook at Tab 33]. *See also* John Harchard, *Bail and Public Security in Some African Jurisdictions,* 37 INT'L & COMP. L.Q. 952, 953 (1988). [Reproduced in the accompanying notebook at Tab 26].

[95] *See* Hart, *supra* note 3 at 22. *See also* Hatchard, *supra* note 94 at 959.

[96] *See* Is Van Der Merwe, *Prisons without Bars: Electronic Monitoring and Community Corrections,* CRIME & CONFLICT NO. 18, 21 (Summer 1999). [Reproduced in the accompanying notebook at Tab 28].

orders.[97] Although the technology is being used in a correctional context rather than bail, as we have seen in other jurisdictions, use of the technology in one segment of the justice system, commonly leads to its adoption by another. South Africa's adoption of the technology is especially significant to the Tribunal because the geographical and infrastructure conditions in the two areas are quite similar.[98] Problems with inaccessible areas, where phone lines and electricity are non-existent, are common to both jurisdictions and the Tribunal should monitor the results of South Africa's experience with EM closely. With the advent of the new EM technology currently developing, problems associated with EM's success in areas with a poor infrastructure should diminish as the EM equipment of the future overcomes these obstacles.[99]

V. Electronic Monitoring Characteristics and Components[100]

Just as electronic monitoring fulfills a multitude of roles in the justice system, the technology itself comes in a variety of forms each with its own benefits and limitations.[101] However varied the products may be, the basic purpose of virtually all EM equipment is that do electronically what traditionally has been performed manually, thereby saving time and money.

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[97] *See id.* Before the start of the program in 2000, South African officials envisioned "implementing EM countrywide at a rate of 10,000 per annum." *Id*. at 22.

[98] *See id.* The South African justice system was enthusiastic about the benefits and savings EM would generate in the context of monitoring offenders who reside in inaccessible rural areas. Before EM, actual house visits using expensive off road or four wheel drive vehicles were required to check on individuals sentenced to house arrest. Using EM, all that was necessary was that the area had phone lines and the offenders could be checked on via a central command unit. Newer EM technology does not even require phone lines. *See generally* Part V. EM Characteristics and Components.

[99] *See generally id.*

[100] Note: included in the attached notebook are website and contact information for electronic monitoring vendors. Many of the websites contain either an email or telephone point of contact and various other information related to the products sold by each vendor.

[101] *See* LCA, *Equipment: Electronic Monitoring and Home Detention Technology*, (visited Mar. 16, 2002) <http://www.lcaservices.com/pages/equipment.html>. [Reproduced in the accompanying notebook at Tab 35]. EM technology comes in a variety of forms such as, radio frequency electronic monitoring, video/breath alcohol testing, global positioning, in-home alcohol testing devices for use in home detention cases, and drug testing. *Id*.

Whether its goal is to reduce an officer's "face-to-face" home visits, or it just aims to eliminate the officer's need to leave the car as he checks of an offender[102], the technology seeks to maximize the efficiency of the system it is employed to assist. By saving time and money, EM programs seek to cut down significantly traditional jail costs.

The figures that are tossed around regarding costs saved by use of electronic monitoring are as varied as the equipment itself. "According to the 1997 estimates from the Federal Bureau of Prison and the Administrative Office of the United States Courts, the average daily cost of federal custody was $64.32 while the average daily cost of home confinement supervision with electronic monitoring was $17.98."[103] Although the figures are varied, there seems to be a general consensus among studies that electronic monitoring of an offender is more cost effective than the offender's incarceration.[104] Also, as technology increases, the cost of EM should go down while the costs associated with incarceration should continue to rise.

Some opponents of EM argue that although the technology is cheaper, application of EM is often more expensive.[105] In what has become known as "net widening," critics argue that

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[102] *See e.g* Van Der Merwe *supra* note 96 at 22. [Reproduced in the accompanying notebook at Tab 28]. Some EM components can check the whereabouts of an offender through the phone lines so the officer never has to leave the office, but in homes where phone lines are not present, an officer must at least conduct a "drive by." *See also* U.S. Probation & Pretrial Services, *supra* note 52. [Reproduced in the accompanying notebook at Tab 42]. In a "drive by" the officer uses a handheld device which can detect the presence or absence of the offender's tag or bracelet thereby verifying whether the offender is complying with the house arrest order. *See id*.

[103] Gowen, *supra* note 51at 11. [Reproduced in the accompanying notebook at Tab 25].

[104] *See* The Third Branch, *On the Trail, on the Computer, By Satellite* (visited Mar. 1, 2002) <http://www.uscourts.gov/ttb/july01ttb/julysat3.html>. [Reproduced in the accompanying notebook at Tab 40]. In the context of discussing GPS [satellite] tracking of EM program participants, the costs have dropped from $40 dollars a day to around $8-$12 a day. In the future as the technology develops the price is expected to drop to around $4.50 per day. This would represent a significant savings on the cost of incarceration, which may cost upwards of $50 a day. *See id*.

[105] *See* BONTA ET AL., *supra* note 61 at 6. [Reproduced in the accompanying notebook at Tab 20]. The basic argument against net widening is that the technology is being applied merely because it is available resulting in great costs that wouldn't normally be present in the absence of the technology.

defendants who would normally be released on personal recognizance at no cost, are now being subjected to EM with house arrest simply because it is available.[106] They argue that because the courts misapply the technology, the net has been widened to sweep up offenders not originally intended to be included in EM programs. Net widening is a valid argument for judicial systems that must determine whether to impose bail conditions upon tens of thousands of individuals,[107] but it does not really apply in the context of the Tribunal where bail decisions have had to be made for fewer than 100 individuals.[108]

The equipment desired by the Tribunal will also differ from that of other jurisdictions because of the unique needs of the Tribunal and its defendants. The main goal of the Tribunal is to insure that, if released, indicted individuals neither be a menace to the justice process, nor try to escape having to stand trial.[109] Two components of EM technology that could be beneficial in helping to achieve this goal are radio/telephone frequency electronic monitoring and global positioning monitoring.

In radio/telephone frequency electronic monitoring "participants wear a waterproof, shock-resistant transmitting device around their ankle 24 hours a day."[110] Besides being water and shock resistant, the systems are also tamper resist, and an alert frequency is sent to the

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[106] *Id*.

[107] *See also* U.S. Probation & Pretrial Services, *supra* note 52. [Reproduced in the accompanying notebook at Tab 42].

[108] *See* Press Briefing By the ICTR Spokesman, *supra* note 8. [Reproduced in the accompanying notebook at Tab 36].

[109] Rules of Procedure and Evidence, U.N. Doc. ITR/3/Rev.2, 31 May 2001, Rule 65. [Reproduced in the accompanying notebook at Tab 3].

[110] Gowen, *supra* note 51 at 12. [Reproduced in the accompanying notebook at Tab 25].

monitoring center if a program participant attempts to remove or tamper with the tag.[111] The ankle "transmitter emits a continuous electronic signal, which is detected by a receiving unit connected to the home telephone. When the transmitter comes within the signal range of the receiver unit, the receiver unit calls a monitoring center to indicate the participant is in range or at home."[112] If the offender leaves the assigned set range, the monitors at the center know immediately and can dispatch a reaction team if it is not an authorized departure. Also, since the equipment is constantly on, a relative journal exists detailing the exact times the tagged individual leaves and returns to the monitored area.[113]

In the federal program the radio/telephone equipment can be adjusted to give the tagged person a 150 ft radius around the telephone transmitter unit in which they can roam freely with out alerting the central monitors of a violation.[114] In an area where telephones or telephone lines are not present, similar arrangements can be made using radio transmitters in lieu of telephone lines.[115] In instance like this, a radio transmission device is substituted in place of a telephone and the ankle bracelet emissions are detected by the radio instead of the telephone.[116] Although this option is beneficial when there are no telephone lines, the system does at least require that

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[111] *See* generally Share Incorporated, Electronic Monitoring (visited Apr. 5, 2002) <http://www.sharemonitoring.com/equip.html>. [Reproduced in the accompanying notebook at Tab 38] *See also* EMS, *supra* note 40. [Reproduced in the accompanying notebook at Tab 30].

[112] Gowen, *supra* note 51 at 12. [Reproduced in the accompanying notebook at Tab 25].

[113] *See* LCA, *supra* note 100. [Reproduced in the accompanying notebook at Tab 35]. The receiver reports in to the central unit whenever the tagged offender leaves or returns to the monitored range and will immediately notify if the leaving is not authorized or if the return is a curfew violation.

[114] *See* Gowen, *supra* note 51 at 12. [Reproduced in the accompanying notebook at Tab 25].

[115] *See* Van Der Merwe, *supra* note 96 at 21. [Reproduced in the accompanying notebook at Tab 28].

[116] *See id*.

the home have electricity.[117] The telephone/radio form of EM is a viable alternative to pretrial confinement in jurisdictions where the infrastructure is sufficient, and the where the defendant and the central monitoring staff are in relative close proximity to each other. Because the ankle units only monitor the defendant's presence within the 150 ft sphere, the unit is virtually useless if the offender decides to abscond from the monitored area permanently.[118] Once outside the telephone or radio's range, the electronic ankle monitor would be almost useless in helping to locate the delinquent defendant.

GPS monitoring on the other hand addresses many of the shortcomings of radio/ telephone electronic monitoring. GPS does not rely on the use of phone lines and only batteries or a rechargeable power source are required. "GPS uses a network of 24 satellites to map the location of a portable field monitoring unit, which is carried by the defendant/offender and linked by radio frequency to a tamper-resistant ankle bracelet."[119] In this system, the satellites detect the location of the hand held field-monitoring unit [sometimes referred to as a plugger] that must stay within a close proximity to the ankle bracelet. The GPS system "combines global positioning with map overlays, to monitor offenders as they move about in an approved geographical region"[120] Human monitors in the central monitoring office can observe the defendant's movements throughout the day on their computer screens.[121] Using the computer map overlays, human monitors can track a defendant's movements in real time by observing a

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[117] *See id*. at 23.

[118] *See* Gowen, *supra* note 51 at 12. [Reproduced in the accompanying notebook at Tab 25].

[119] The Third Branch, *supra* note 103. [Reproduced in the accompanying notebook at Tab 40].

[120] LCA, *supra* note 100. [Reproduced in the accompanying notebook at Tab 35].

[121] *See id*.

dot that moves about the computer-generated maps on the screen.[122] Throughout the day, as the transmitter emits its signal, the date, time and exact geographic location is recorded and saved by the central monitors.[123] If supplied with the "appropriate computer maps, an officer using GPS could track a defendant/offender anywhere in the world."[124]

When using GPS, not only can a program participant be confined to a specific area, but also whole areas can be designated as off limits to an offender by entering their coordinates into the GPS monitoring system.[125] If the tagged individual leaves his assigned coordinates, or strays into an area that is off limits, the offender is notified through his portable unit, and the officers at central control are notified of the violation.[126] Currently, the equipment that is being used consists of the traditional ankle bracelet and a five-pound GPS unit the size of a small purse.[127] In the future as the technology increases, the size of the units is expected to decrease to around the size of a small beeper/pager device[128] and the newer units have their own built in cellular transmitters.[129]

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[122] *See* id. [Reproduced in the accompanying notebook at Tab 35]. *See also* The Third Branch, *supra* note 103. [Reproduced in the accompanying notebook at Tab 40].

[123] *See also* The Third Branch, *supra* note 103. [Reproduced in the accompanying notebook at Tab 40]. This is significant because agents have recorded proof of the whereabouts of tagged offenders even if the agents are not watching the defendant's movements in real time.

[124] *Id*.

[125] *See id*.

[126] See *id*. Used in tandem with the earlier discussed recording feature, tagged offenders who are not being monitored in real time can later on be held accountable for their violation when an officer examines the recorded data. Also, the exclusions zones are currently used to keep offenders away from victims, witnesses or areas where the individual used to buy drugs or perpetrate crimes.

[127] *See id*.

[128] *See id*.

[129] *See* LCA, *supra* note 100. [Reproduced in the accompanying notebook at Tab 35].

As was stated before the cost of the units is also expected to decrease as the technology gets more advanced. When GPS monitoring was first introduced, the costs of using the unit ran at about $40 a day.[130] Recently, costs have dropped down to between $8 and $12 dollars per day, and expectations are that it could get down to $4.50.[131] Also in the U.S., in jurisdictions that are experimenting with GPS monitoring, the tagged individuals, not the courts, pay for the use of the system.[132]

It seems that if the Tribunal were to adopt the electronic monitoring of pretrial detainees released on bail, the GPS system may be the best option available to meet its various goals. However, even with all of GPS's benefits and attributes, because of the unique circumstances surrounding the Tribunal and its defendants, adoption of any system may not be ideal.

In sum, the use of any local system of EM such as the radio or telephone systems must be almost immediately withdrawn from consideration because its adoption would be fraught with infrastructure and technological problems. Also, because the defendants generally do not wish to remain in the local vicinity upon their release,[133] GPS seems to be the only option. Tracking defendants who wish to leave the continent when provisionally released could really only be effectively carried out by the ICTR via the GPS system. It is possible that the radio/telephone method could be used on detainees released to other jurisdictions, but the program would need to be regulated by the local authorities and would be wholly independent of any effective

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[130] *See* The Third Branch, *supra* note 103. [Reproduced in the accompanying notebook at Tab 40].

[131] *See id*.

[132] *See id*.

[133] *See Prosecutor v. Kanyabashi*, Case No.: ICTR 96-15-T, Decision on the Defense Motion for the Provisional Release of the Accused, 21 February 2001. [Reproduced in the accompanying notebook at Tab 12]. In Kanyabashi, the defendant moved for provisional release so that he could live with his family in Belgium. *See also Prosecutor v. Bicamumpaka*, Case No.: ICTR-99-50-T, Decision on the Defense's Motion for Provisional Release Pursuant to

monitoring by the Tribunal. Even with a GPS system, close coordination between the central monitoring office and the local authorities in the vicinity of the tagged individual would need to be paramount if there was to be any hope of policing the system. The GPS equipment is very capable of tracking an individual wherever he's located around the world, but the sheer geographic distances that may be encountered may limit the Tribunal's ability to effectively monitor a released pretrial detainee who is allowed to travel. However, if a detainee is released and must remain within the vicinity of the Tribunal, either system could be of potential value providing that the telephone or electric infrastructure is present to support use of the radio/telephone system.

Conclusion regarding the legality and feasibility of implementing electronic monitoring technology as a condition of provisional release

By examining the similarities and differences of bail statutes around the world, and comparing how each jurisdiction has adopted the use of electronic monitoring technology, it seems apparent that the International Criminal Tribunal could adopt EM as a condition they *determine appropriate* when releasing pretrial detainees. While the possible adoption of the technology appears to be legal, its actual implementation by the ITCR would likely be rather rare because of the high standard of *exceptional circumstances* required by Rule 65(B). The ITCY, on the other hand, has eliminated the requirement of *exceptional circumstances*, so use of EM in that jurisdiction may be more prevalent if the technology is adopted.

Rule 65 of The Rules, 25 July 2001. [Reproduced in the accompanying notebook at Tab 11]. Here, the defendant wished to move to Canada to await his trial if the court granted his motion for provisional release.

The decision of whether EM is a feasible alternative to the Tribunal bail scheme currently in place is an unsettled one because of the variable factors that would need to be addressed before any use of EM is implemented. The unique circumstances surrounding the Tribunal's defendants and their wishes to travel great distances if provisionally released, place additional stresses upon choosing which EM system, if any, is appropriate for the Tribunal detainees. If the released detainees are permitted to travel, GPS seems like the only option, while either system may be appropriate if the released detainees must stay within the Tribunal's vicinity and the infrastructure is sufficient. In order to make a decision regarding which EM supervisory equipment is appropriate, the Tribunal would need to decide whether the released detainees would be allowed to leave the Tribunal's vicinity before they grant provisional release subject to the condition of electronic monitoring. Once it is decided where a released detainee will be permitted to reside, an effective decision regarding which EM system is appropriate, can then be made.