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TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT IN RELATION TO DETENTION AND IMPRISONMENT

Analytical summary by the Secretary-General

CONTENTS

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CONTENTS (continued)

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INTRODUCTION

1. By resolution 3218 (XXIX) of 6 November 1974 on torture and other cruel, inhuman or degrading treatment or punishment in relation to detention and imprisonment, the General Assembly requested Member States to furnish the Secretary-General in time for submission to the Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders and to the General Assembly at its thirtieth session: (a) information relating to the legislative, administrative and judicial measures, including remedies and sanctions, aimed at safeguarding persons within their jurisdiction from being subjected to torture and other cruel, inhuman or degrading treatment or punishment; (b) their observations and comments on articles 24 to 27 of the draft principles on freedom from arbitrary arrest and detention prepared for the Commission on Human Rights. 1/

2. The Assembly requested the Secretary-General to prepare an analytical summary of the information received under paragraph 1 above for submission to the Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, to the General Assembly at its thirtieth session, to the Commission on Human Rights and to the Sub-Commission on Prevention of Discrimination and Protection of Minorities. The present report was prepared by the Secretary-General in implementation of this resolution of the General Assembly.

3. The General Assembly, in the preamble of resolution 3218 (XXIX) noted with appreciation the parallel action taken by the Sub-Commission concerning the human rights of persons subjected to any form of detention or imprisonment. It may be recalled, in that connexion, that at its twenty-sixth session, the Sub-Commission on Prevention of Discrimination and Protection of Minorities had asked the Commission on Human Rights to authorize the Sub-Commission to include in the agenda of its next session an item entitled "The question of the human rights of persons subjected to any form of detention or imprisonment" (E/CN.4/1128, part B). By resolution 3059 (XXVIII) of 2 November 1973, the General Assembly, bearing in mind this request of the Sub-Commission, requested the Secretary-General to inform the Assembly, under the report of the Economic and Social Council, of the consideration which may be given to this question by the Sub-Commission, the Commission on Human Rights and other bodies concerned. The Assembly also decided to examine the question of torture and other cruel, inhuman or degrading treatment or punishment in relation to detention and imprisonment as an item at one of its future sessions.

4. At its thirtieth session, on 6 March 1974, the Commission on Human Rights authorized the Sub-Commission to include the above-mentioned question in the agenda of its next session. 2/ At its twenty-seventh session, the Sub-Commission on Prevention of Discrimination and Protection of Minorities therefore included

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1/ Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile (United Nations publication, Sales No.: 1965.XIV.2), part VI.

2/ See Official Records of the Economic and Social Council, Fifty-sixth Session, Supplement No. 5 (E/5464), chap. XIX.B.6.

in its agenda the item entitled "The question of the human rights of persons subjected to any form of detention or imprisonment". The Sub-Commission adopted, on 20 August 1974, resolution 7 (XXVII). In paragraph 1 of the resolution the Sub-Commission decided to review annually the situation concerning the human rights of the persons subjected to any form of detention or imprisonment, taking into account any reliably attested information from Governments, the special agencies, the regional intergovernmental organizations and the non-governmental organizations in consultative status with the Economic and Social Council concerned, provided that such non-governmental organization act in good faith and that their information is not politically motivated, contrary to the principles of the Charter of the United Nations.

5. In accordance with resolution 3218 (XXIX) of the General Assembly, the Secretary-General sent notes verbales to the Governments of States Members of the United Nations. As at 30 July 1975, the Governments of the following countries had transmitted information and observations: Australia, Bahrain, Barbados, Belgium, Congo, Cyprus, Dahomey, Denmark, Ecuador, Egypt, El Salvador, Germany (Federal Republic of), Finland, Hungary, Iceland, Indonesia, Iran, Iraq, Israel, Italy, Japan, Jordan, Kenya, Kuwait, Lebanon, Madagascar, Mali, Netherlands, Niger, Oman, Panama, Philippines, Poland, Qatar, Romania, Sudan, Swaziland, Sweden, Thailand, Togo, Ukrainian SSR, and USSR.

6. The information forwarded by Governments deals not only with measures which aim directly at protecting persons against torture and other inhuman or degrading treatment or punishment, but also with various rights guaranteed to persons subjected to detention and imprisonment, for instance, the right to assistance by counsel, the right to remain silent at interrogation, and the right to communicate with family and friends. It appears that such rights were considered as playing a significant, albeit an indirect part in any system for the protection of the prisoners against torture and ill-treatment. Therefore, the present analytical summary of information includes the laws and practice concerning these various rights.

7. References to countries throughout the present report are made by way of examples. They are not intended to be exhaustive.

PART ONE

INFORMATION RELATING TO THE LEGISLATIVE, ADMINISTRATIVE AND JUDICIAL MEASURES, INCLUDING REMEDIES AND SANCTIONS, AIMED AT SAFEGUARDING PERSONS WITHIN THEIR JURISDICTION FROM BEING SUBJECTED TO TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

8. The Universal Declaration of Human Rights (art. 5) and the International Covenant on Civil and Political Rights (hereafter cited as the International Covenant) (art. 7) declare that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. The International Covenant (art. 10 (1)) also provides that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. These principles have been recognized in the constitutions and statutes of most countries. It is guaranteed in the Constitution of Bahrain, for example, that no person shall be subjected to physical or moral torture, or degrading treatment and the law shall specify the penalty for persons guilty of such acts. In Iceland, the law stipulates that when a person is kept in detention, the custody must be effective and good order must be maintained, however the steps must be taken, as far as possible, to ensure that the person in custody is not subject to harsh or cruel treatment. The Constitution of Italy declares that all the physical and mental violences to the person subjected to the restrictions of liberty shall be punished. The Constitution of Kenya provides that no person shall be subject to torture, inhuman or degrading treatment. The Constitution of Kuwait also provides that the infliction of physical or moral injury on an accused person is prohibited. The Constitution of the Philippines declares that no cruel or unusual punishment shall be inflicted. In Poland, it is provided that restrictions of individual rights must not exceed the limits necessary for the proper execution of punishment decided on by the courts towards the offenders and the proper implementation of pre-trial detention towards arrested persons suspected of committing an offence, and that punishment should be executed in a humanitarian manner with respect for the human dignity of the sentenced person. The Australian Government considers that international action to deal with the practice of torture is worthy of strong support. It draws attention to the preambular paragraph of resolution 3218 (XXIX) which notes the increase in the number of alarming reports on torture, and states that further and sustained efforts are necessary to protect under all circumstances basic rights. It is of the view that consideration should be given as a matter of urgency to the formulation of an international instrument devoted specifically to the elimination of torture and other cruel, inhuman and degrading treatment or punishment.

I. SAFEGUARDS AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT FOR THE PERSONS DETAINED PENDING INVESTIGATION AND TRIAL

9. The Universal Declaration of Human Rights (art. 11 (1)) and the International Covenant (art. 14 (2)) state that everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law. This principle has been recognized in the constitutions and statutes of most countries on which information has been received, for example, Ecuador, El Salvador, Hungary, Indonesia, Kuwait, Sudan and Thailand.

A. Grounds for arrest and pre-trial detention, and relevant procedures

10. It may be recalled that the comments under article 1 of the draft Principles on Freedom from Arbitrary Arrest and Detention, contain suggested definitions of "arrest" and "detention": "arrest" will mean the act of taking a person into custody under the authority of the law or by compulsion of another kind and includes the period from the moment he is placed under restraint up to the time he is brought before an authority competent to order his continued custody or to release him. "Detention" will apply to the act of confining a person to a certain place, whether or not in continuation of arrest, and under restraints which prevent him from living with his family or carrying out his normal occupational and social activities.

11. The Universal Declaration of Human Rights declares that no one shall be subjected to arbitrary arrest or detention (art. 9). The International Covenant also provides that everyone has the right to liberty and security of person, that no one shall be subjected to arbitrary arrest or detention, and that no one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law (art. 9 (1)).

12. It is generally recognized that danger for a person to be subjected to torture or to cruel, inhuman or degrading treatment tends to increase when he is deprived of his liberty and taken under the control of the police. In order to reduce or eliminate this risk, the laws of most countries require, first, that certain prior conditions be met before an arrest may be ordered. Thus in most countries, in El Salvador and Romania among many others, an arrest may be made only when there is a reasonable suspicion that a person has committed a criminal offence. Furthermore, the law often provides that no arrest may be made unless the offence of which the person concerned, is suspected, entails a penalty of a minimum gravity. In addition it is generally required that reasonable findings be made to justify the fear that the suspected person may evade the proceedings or obstruct the investigation.

13. As it is provided in the laws of many countries, in Ecuador and Madagascar for example, except in flagrante delicto and in urgent cases, an arrest may be made only upon the authority of a warrant of arrest issued by a judge or other competent

authorities. According to the Law Concerning the Basic Provisions on the Judicial Procedure of Indonesia, nobody can be subjected to arrest unless there is a written warrant by the legal authority in cases, and in accordance with the procedures prescribed by law. The Constitution of the Sudan provides that a citizen shall not be arrested without a valid warrant of arrest issued by a competent court having jurisdiction save where the law otherwise provides. The Constitution of the USSR provides that no person shall be placed under arrest except by decision of a court of law or with the sanction of a Procurator.

14. The International Covenant provides that anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power (art. 9 (3)).

15. In many countries the law requires that the arrested person should be brought before a judicial or other competent authority shortly after his arrest in order to determine whether the person should be kept for further detention. In many countries the arrested person is to be taken before a judge or a court. The Constitution of Bahrain provides, for example, that arrested persons must be brought before a court within 48 hours, unless a public holiday intervenes, and are not kept in further custody thereafter unless the court so orders. The Constitution of Cyprus, also, stipulates that a person arrested shall, as soon as is practicable after his arrest, and in any event not later than 24 hours after the arrest, be brought before a judge, if not earlier released. The Code of criminal procedure of the Federal Republic of Germany specifies that any person held in custody, unless released by the police, must without delay, but no later than the day after his apprehension, be brought before the District Court Judge in whose district the apprehension took place. According to the Regulations Governing the Internal Security Forces of Lebanon, persons taken into police custody must appear before the competent judicial authorities within a certain time-limit. The Criminal Procedure Act of the Sudan provides that the person executing a warrant of arrest shall without unnecessary delay bring the arrested person before the Court of Magistrate specified in the warrant.

16. In various countries the public prosecutor has the authority to conduct the first interrogation of the arrested person. In Dahomey, for example, at the end of the time-limit of the police custody shortly after the arrest (garde à vue), the person in custody must be taken before the public prosecutor. In the Niger, in case there exist serious circumstances in support of the charge against the arrested person, the police officer should take him before the public prosecutor within 28 hours from his arrest; otherwise, the suspect must be released.

17. In the USSR, the militia officer who arrests a suspect is to draw up a protocol indicating the grounds and motives of detention and to inform a procurator about it within 24 hours. During 48 hours from the moment of his being informed of the detention of a person, the procurator is to issue a sanction for continued custody or the release of the suspect.

18. The law in many countries specifies the time-limit within which the police must bring the arrested person before a judge or another competent authority.

This maximum duration for custody by the police between the arrest and the first appearance before such authorities varies from country to country: 24 hours in Cyprus, 48 hours in Bahrain, Mali and the Niger, 72 hours in the Congo. The initial period of police custody could be extended by the authorization of a judge or a public prosecutor for a specified maximum duration, for example, 48 hours in the Niger.

19. In order to secure the observance of these time-limits, in Dahomey, among various other countries, police officers are required by law to record the date and the hour of the first appearance before a magistrate in a procès-verbal, which must be signed by the arrested person.

20. The judge or other competent authority before whom the arrested person is brought may take the decision either (1) to release him or (2) to order his provisional release with or without conditions, or (3) to order his continued detention pending investigation and trial. It is generally required that the competent authority should make these decisions only after hearing or interrogating the suspect. In El Salvador, for example, when the arrested person is brought before a court, the judge informs him of the offence of which he is suspected and of his rights under the law, and he proceeds to take his statement. The counsel, if already being retained, is entitled to attend this examination. In the Federal Republic of Germany the judge examines the person brought before him, informing him of the reasons for his detention and of his right to raise objections or to refuse to make a statement. He must be given the opportunity to remove the grounds for suspicion against him and for his detention and to present the facts in his favour. If the judge, after examination, considers that continued detention of the person is unjustified or the grounds for it have been removed, he should order his release. If he does not release the suspect, he should, at the request of the public prosecutor or on his own authority, issue a written warrant of detention. In Finland, a special Act on Preliminary Examination is being prepared in the Ministry of Justice with a view to codifying the principles concerning the rights of the person examined, now contained in the administrative instructions given to the police by the Ministry of the Interior.

21. The decision to continue the detention may be made by various authorities established by law. In many countries, the order for continued detention is issued by a judge or a court. In Ecuador, for instance, the judge who ordered the arrest shall issue a signed order for continued detention setting forth the legal reasons for the detention. In Kenya, an arrested person brought before the court is either remanded in custody for further detention or, if granted bail or bond, is freed subject to the conditions of the bail or bond. In Thailand, if further detention of the arrested person is considered necessary, the investigating officer files a motion requesting the court to issue a warrant of detention for the person. In various countries authorities other than a court may make a decision of continued detention. In Romania, for instance, the order of detention may be issued either by a public prosecutor or a court. In the USSR the decision of continued detention is taken on the basis of the order of an official investigator authorized by the procurator, on an order of the procurator or a judgement or decision of a court.

22. In many countries, the grounds justifying pre-trial detention are specified by law. They are, broadly speaking, similar to those provided for arrest: (1) reasonable suspicion of guilt, (2) the offence charged must be sufficiently serious and (3) presence of certain circumstances, e.g., danger that the suspect may evade the proceedings or danger that he may obstruct the investigation. In Romania, for example, detention is admitted, in principle, only where the crime is punishable by imprisonment for more than two years, but if the suspected or accused person is a recidivist, detention may be ordered even for a crime punishable by imprisonment for one year. In the Sudan, no person shall be held in custody when fine is the only punishment prescribed for the offence. In any case, it is cumulatively requested that there exist certain circumstances which justify the continued detention. In Hungary, detention is, in principle, authorized only if it is absolutely necessary for the conduct of the criminal proceedings. In the USSR, detention may be allowed only on the grounds that there is a reasonable cause to believe that the accused, if left in liberty would avoid investigation and trial, prevent establishment of the truth in criminal case, or engage in criminal activities.

23. As to the duration of detention, in Cyprus for example, remand ordered by a judge may not exceed eight days which may be renewed from time to time for the same length of time, the total period not to exceed three months from the date of the arrest. In Hungary, the initial period of detention is one month. It may be extended if such prolongation is absolutely necessary in view of the complexity of the case. However, after three months, it may be extended only by a decision of the Chief Public Prosecutor, and when it is to be prolonged for more than a year in exceptional cases, the extension may be authorized only by the Supreme Court. In Romania also, the first period of detention may not be longer than one month. Detention may be extended by a court or a public prosecutor if it is proved that further custody is necessary.

24. In order to avoid illegal or unnecessary pre-trial detention, the law in many countries has established various procedures to afford the detained person an opportunity to challenge the grounds for detention and to deny the need for his continued custody. In the Federal Republic of Germany, among other countries, the right to appeal against the order of detention is guaranteed to the detained person. Habeas Corpus and similar remedies which will be mentioned later are available in various countries (see paras. 109-116).

25. In the countries where the law specifies a maximum term for detention, the validity of grounds are usually to be checked by a judicial or other competent authorities at the end of the first period of detention. In countries where a specific term is not set forth by law or where the period of detention determined by law is relatively long, the law sometimes imposes upon the court or the public prosecutor the duty to examine the validity of the grounds for detention periodically, with power to terminate detention if it is found illegal. In the Federal Republic of Germany, for instance, a court should ex officio examine whether the detention should be rescinded or suspended, if the application for such judicial examination is not made by the detained person by the end of three months after the issuance of the order of detention. In Hungary, it is provided that the prosecutor should examine the legality of detention at least once a month.

26. In many countries provisional release including release on bail may, or should, be ordered ex officio or upon application by the detained person or other persons concerned. Under the Criminal Procedure Ordinance of Israel, for instance, an arrested person must be released on bail unless the offence is punishable by death, imprisonment for life or imprisonment for at least 15 years, or the person has no fixed abode or there are reasonable grounds for believing that he has escaped from lawful imprisonment. The Constitution of the Philippines declares that all persons, except those charged with capital offences when evidence of guilt is strong, shall, before conviction, be bailable by sufficient sureties and that excessive bail shall not be required. The Constitution of the Sudan also provides that release on bail is a right in cases prescribed by law and the sum demanded for release on bail shall not be excessive.

B. Rights of the arrested or detained person in connexion with the investigation

(a) Right to be informed of the offence charged

27. The International Covenant declares that anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him (art. 9 (2)). It also provides that, in the determination of any criminal charge against him, everyone shall be entitled to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him (art. 14 (3) (a)).

28. The right to be informed of the offence charged is recognized in many countries. In El Salvador, for example, the arrested person is entitled to be informed of the acts of which he is suspected at the time of his arrest. In the countries where an arrest is made upon a written warrant, the nature of the offence upon which the arrest is grounded is usually specified in the warrant. In the Sudan, among many other countries, the person executing a warrant of arrest must notify the content thereof to the person to be arrested and, if so required, he should show him the warrant.

29. In various countries, such notice is given at the initial appearance of the arrested person before a judicial authority. In El Salvador, for instance, when the arrested person is taken before the court, the judge should inform the person of the offence of which he is suspected. In the Niger, among other countries, the examining magistrate must, after confirming the identity of the person taken before him, inform him of the acts for which he is charged, the fact of warning being recorded in the protocol.

30. In some countries, in the Federal Republic of Germany for example, it is required that at the beginning of the first interrogation by the police, the suspect should be told what charge is being brought against him and what penal provisions may apply. In Romania, before the interrogation of the accused, the prosecuting authorities must inform him of the fact for which he is charged. The Code of Criminal Procedure of Thailand also provides that the inquiry official shall inform the arrested person of the offence charged.

(b) Right of the arrested or detained person to be informed of his rights

31. In various countries, at the beginning of the interrogation by the investigating authorities, the arrested or detained person has a right to be informed of the rights granted to him. In some countries it is provided that at the beginning of the interrogation by the police immediately after the arrest, a suspect should be warned that he has a right to remain silent and/or that any statement he makes may be used as evidence against him. According to the Code of Criminal Procedure of Japan, for instance, before the suspect is questioned by an investigating officer, he should be notified that he is not required to make any statements against his will. In certain countries such as Barbados, Cyprus and Kenya, where the so-called Judges' Rules have become the law of the land, 3/ once a police officer has evidence which gives him reasonable grounds for suspecting that a person has committed an offence, he is obliged to caution the accused that he is not obliged to say anything unless he wishes to do so, but that whatever he says may be put into writing and given in evidence against him.

32. In Madagascar, among many countries, the right to remain silent should be notified to the arrested person at his initial appearance before a judge or other competent authorities. Thus the examining magistrate must, at his interrogation of the accused, inform him that he is free not to make any statements.

33. In accordance with the Code of Criminal Procedure of the Netherlands, the examining magistrate or official must, before questioning the suspect, inform him of his right to refuse to make any statement.

34. In some countries the law also provides that a suspect has a right to make statements and to request inquiries in his favour and that this right must be notified to him at the interrogation. In the Federal Republic of Germany, for instance, prior to questioning the suspect must be informed that he may apply for additional testimony to be heard in order to prove his innocence.

35. Under the Code of Criminal Procedure of the Federal Republic of Germany, when a judge issues the order of detention, he must inform the suspect of his right to make an appeal against the order.

36. In various countries, in Romania for instance, at the interrogation of the accused, the prosecuting authorities must inform him of his right to make a complaint when his rights are infringed by illegal acts of investigation.

3/ The Judges' Rules are the rules for the guidance of the police on the methods of questioning persons suspected of or charged with crime, which have been formulated by judges in England since the beginning of the twentieth century and are now embodied in Home Office Circulars. The Rules contain, among others, the obligations of a police officer to caution the suspected or charged person, before questioning him, that he is not obliged to say anything and that what he says may be put into writing and given in evidence.

37. In certain countries the arrested or detained person must be informed of his right to counsel at various stages of the investigation. In the Federal Republic of Germany, for instance, at the beginning of the first interrogation by the police, the suspect must be informed that he may consult a lawyer of his own choice at any time. In the Niger, for example, the right to choose a counsel must be notified to the accused at his initial appearance before the magistrate.

(c) Rights relating to the investigation

38. The International Covenant provides that, in the determination of any criminal charge against him, everyone shall be entitled not to be compelled to testify against himself or to confess guilt (Article 14 (3) (g)).

39. Most of the countries from which information has been received guarantee that every person has the right to refuse to make statements which may tend to incriminate himself. The Constitution of Thailand provides, for instance, that every person has the right not to make any statement which may result in criminal prosecution being taken against him. This privilege against self-incrimination is sometimes recognized particularly for the person in custody at the stage of investigation. The Constitution of Bahrain specifies that no one in custody is required to incriminate himself.

40. In Ecuador, among many other countries, this guarantee against self-incrimination is extended to a right to remain silent in respect of all questions without restriction. The Constitution of the Philippines declares, for example, that any person under investigation for the commission of an offence shall have the right to remain silent.

41. This right to remain silent may not be guaranteed effectively if suspect's failure to make statements may be deemed as justifying a presumption of guilt. Thus the Code of Criminal Procedure of Ecuador provides that the silence of the accused shall not be deemed to constitute evidence against him.

42. In the Federal Republic of Germany, for instance, during the police interrogation, the suspect should be given an opportunity to challenge the grounds for suspicion against him and to present the facts in his favour. In Poland, among many other countries, the arrested or detained person has a right to make statements and to request inquiries in his favour. In Romania, before the interrogation of the accused by the prosecuting authorities, he must be granted a chance to make written statements concerning the facts for which he is charged. In the USSR the suspect has the right to give evidence relating to charges against him in connexion with other circumstances relating to the case.

(d) Right to counsel

43. The International Covenant provides that, in the determination of any criminal charge against him, everyone shall be entitled to communicate with counsel of his own choosing, to defend himself through legal assistance, to be informed, if he

does not have legal assistance, of this right, and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it (Article 14 (3) (b) (d)). Rule 93 of the Standard Minimum Rules for the Treatment of Prisoners (hereafter cited as Standard Minimum Rules or Rules) 4/ provides that for the purpose of his defence, an untried prisoner shall be allowed to apply for free legal aid where such aid is available, and to receive visits from his legal adviser with a view to his defence and to prepare and hand to him confidential instructions and that, for these purposes, he shall, if he so desires be supplied with writing material. The same Rule further states that interviews between the prisoner and his legal adviser may be within sight but not within the hearing of a police or institution official.

44. The right to legal assistance, available immediately on arrest and throughout detention is generally considered as one of the basic safeguards against illegal investigation and torture and other cruel, inhuman or degrading treatment. Without the assistance of a competent and independent counsel the individual remains at a great disadvantage faced with the whole machinery of the prosecution, and he cannot effectively prevent the occurrence of abuses. Assistance by counsel is guaranteed in the constitutions and statutes of many countries from which information has been received. The Constitution of the Philippines declares, for instance, that any person under investigation for the commission of an offence shall have the right to counsel and to be informed of such a right. The Constitution of the Sudan provides that every citizen has an absolute and unfettered right to obtain independent legal advice.

45. The stage of the criminal proceedings from which this right to retain counsel of his own choice is guaranteed varies from country to country. In the Federal Republic of Germany, the suspect may retain counsel at any time, even before the police interrogation. At any rate, this right to choose an attorney must be notified to him at the beginning of the first interrogation. In the Niger, at the initial appearance of the accused, the examining magistrate must inform him of his right to choose a counsel among the defence attorneys who have registered in the Niger or in one of the countries which have concluded a reciprocal agreement with Niger. In Hungary the defendant may choose a counsel from the beginning of the institution of the proceedings. After communication of the charges, the suspect should be reminded that he can choose a counsel.

46. In Hungary, among other countries, the law allows the relatives and the legal representatives of the detained person to select a counsel for him, considering that an arrested or detained person has sometimes difficulties to choose a lawyer himself.

47. In various countries counsel is appointed by the State under certain conditions. In Hungary, for instance, in cases where legal assistance is

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4/ Report of the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders (United Nations Publication, Sales No.: 1956.IV.4), annex I.A.

mandatory, after the communication of the charge, the State must appoint a counsel if a defence attorney is not retained by the accused within three days. This right to be assisted by an appointed lawyer must be notified to the suspect. In Poland, this system of defence ex officio is extensively used, particularly in serious cases where the defendant is of insufficient means to retain counsel. In Sweden, the arrested person has an unconditional right to the assistance of a lawyer, if necessary, at public expense. The officer in charge of the investigation should ask the court for the appointment of a defender, even if the suspect has not made a request to this effect. In Finland, a law on the public defence of persons suspected of crimes is being prepared, according to which a defender must always be appointed if the accused is otherwise unable to uphold his rights.

48. In many countries, an arrested or detained person is entitled to communicate and consult with his counsel without the supervision of the investigating authority. In Barbados, an accused person is allowed to communicate with his lawyer at any time. In El Salvador, an arrested person is entitled, at the time of arrest, to contact a lawyer or other authorized persons to prepare his defence. In the Federal Republic of Germany, the suspect may consult with a lawyer of his own choice at any time even before the beginning of the police interrogation. In accordance with the Article 97 of the Law on Penal Procedure of Hungary, a person detained under remand may, after the first interrogation, communicate orally with his counsel without supervision. He can also communicate with his lawyer in writing under supervision.

49. In El Salvador, among many other countries, a counsel is entitled to attend the examination of the accused at his initial appearance before a judge. The lawyer may ask the accused questions through the judge and, at the end of the judicial interrogation, read the statements made by the accused as they are recorded in a protocol. In case the accused shows a sign of fatigue or distress during the interrogation, his counsel may request the judge to suspend the proceedings.

50. In accordance with Article 186 of the Code of Criminal Procedure of the Netherlands, a counsel, who should have free access to the suspect in custody, is authorized to attend the interrogation by the examining magistrate during the closed preliminary judicial inquiry.

51. In some countries, the law provides that defence counsel is entitled to inspect the records of the case at a certain stage of the proceedings. In Romania, for example, at the end of the investigation, the records for the prosecution must be presented to the detained person for examination in the presence of his counsel. The detained person may express his observations, require a new examination of evidence and make supplementary statements, which must be kept in record and taken into consideration by the prosecuting authorities.

(e) Right to communicate with family and friends

52. The Standard Minimum Rules provide that an untried prisoner shall be allowed to inform immediately his family of his detention and shall be given all reasonable facilities for communicating with his family and friends, and for receiving visits from them, subject only to such restrictions and supervision as are necessary in the interests of the administration of justice and of the security and good order of the institution (Rule 92). The right of the arrested or detained person to communicate with his family and friends is also one of the effective measures to prevent indirectly torture and ill-treatment. The family and friends of the detained, after communicating with him, may lodge appeals against the order of detention on his behalf, retain a counsel for him and take other effective actions to terminate the illegal detention and the ill-treatment.

53. In Finland, for instance, a detained person has a right to see his relatives unless there are special grounds for refusing it. In Hungary also, a detained person is entitled to communicate orally or in writing with his relatives or other persons under the supervision of the investigating authority. In the Sudan, an arrested person is allowed to communicate with his relatives under the supervision of the police. Their written messages may be conveyed to the arrested person through the police, and interviews may take place in the presence of a police officer.

C. Protection against improper methods of interrogation

54. The Universal Declaration of Human Rights (Article 5) and the International Covenant (Article 7) declare that no one shall be subjected to torture or to cruel, inhuman or degrading treatment.

55. In many of the countries from which information has been received, it is expressly prohibited to use methods of interrogation which violate the dignity or integrity of an arrested or detained person or which tend to impair or weaken his freedom of decision or action. The Code of Criminal Procedure of the Netherlands provides, for example, that in all cases in which a suspect is questioned the examining magistrate or official shall abstain from the use of any method intended to produce a statement which may not be regarded as voluntary. The Constitution of Thailand declares that any statement of a person obtained through torture, threat, coercion, or any act which causes such statement to be made involuntarily shall not be admissible as evidence. The Code of Criminal Procedure of the same country provides that no inquiry official shall recommend recourse to any fraudulent means or use such means to prevent any person from making any statement of his own free will. No inquiry official shall make or cause to be made, any deception, threat or promise to any alleged offender inducing such person to make any particular statement concerning the charge against him. Any evidence likely to prove the guilt or innocense of the accused is inadmissible if it is obtained through inducement, promise, threat, deception or other unlawful means. Article 22 of the Criminal Procedure Code of the Ukrainian SSR contains a rule which prohibits any attempts to obtain evidence from accused person by force, threats or other

illegal means. The Criminal Procedure Act of the Sudan provides that no policeman or other person in authority shall influence an accused person by means of torture, threat, enticement or any other means to induce him to disclose or withhold any matter within his knowledge, and that any statement given by the accused as a result of such influence shall not be accepted as evidence against him or against any other person and shall be without any legal effect.

56. The express prohibition of the use of physical torture, violence or compulsion is found in the laws of most countries. According to the Code of Penal Procedure of Ecuador, for instance, the use of torture to obtain the statements of the accused is totally prohibited. The Code of Criminal Procedure of the Federal Republic of Germany provides that all forms of physical influence including ill-treatment and use of physical force during interrogation are prohibited. The Law on Penal Procedure of Hungary stipulates that nobody may be forced to make a confession by violence. In Swaziland also the subjection of any arrested person to physical and mental compulsion or torture is expressly prohibited.

57. Mental compulsion is explicitly prohibited in a number of countries. Thus, the Constitution of Bahrain declares that no person shall be subjected to moral torture. The Constitution of the Philippines declares that no threat, intimidation or any other means which vitiates the free will of the arrested person shall be used against him. In Finland, Hungary, Romania, the Sudan and Thailand also, among many other countries, the law expressly provides that nobody may be compelled by threat or any similar means to give a confession.

58. Promise and inducement are also prohibited in many countries, for example, in Bahrain, Barbados, Romania, the Sudan and Thailand. In some countries, the Federal Republic of Germany, for instance, even if the methods of interrogation used by the examining authority do not constitute physical compulsion, threat or promise, measures designed to induce fatigue as well as simple deceit which may result in direct influence on the subject are also prohibited.

59. In various countries the use of modern scientific technique for the purpose of eliciting confessions is prohibited or regulated by law. According to article 141 of the Code of Penal Procedure of Ecuador, for example, narcoanalysis is not allowed as a means of interrogation. In Finland, under the Police Act and Administrative Instructions to the Police, the use of hypnosis or drugs is prohibited at the interrogation of the suspect. According to article 136a of the Code of Criminal Procedure of the Federal Republic of Germany, it is unlawful to administer drugs or to have recourse to hypnosis in order to obtain a confession. In Romania, it is prohibited to use any method of a chemical-pharmaceutical or medical character at interrogation.

60. One of the effective measures to prevent the use of improper methods of interrogation by the investigating authority is to declare inadmissible as evidence any confession or statement obtained through physical or mental compulsion or other methods in violation of the human rights of the accused. Such provisions are found in the Constitutions and statutes of various countries. The Constitution of

Bahrain declares, for example, that statements obtained by prohibited methods from persons in Public Security custody are not admissible in evidence in any judicial proceedings. In Barbados, any statement made by an accused person through physical or mental compulsion, torture, violence, threats or inducements of any kind, or protracted questioning is admissible in evidence. Under the Consitution of Egypt, any statement which is proved to have been obtained from the accused person as a result of physical or mental degrading treatment is null and void. According to the Code of Penal Procedure of the Federal Republic of Germany, a confession obtained under any form of physical or mental influence which tends to impair or weaken the freedom of action or decision of the suspect during interrogation is excluded from the evidence, even when the accused agrees to such evidence being admitted. In Romania a confession of the arrested or detained person may not be used as evidence against him unless it is made voluntarily. Under the Police Act of Swaziland, extra legal methods of obtaining evidence from an arrested person are severely discouraged and evidence given under pressure or duress shall not be used against the accused in any proceedings. In Thailand any statement obtained through torture, threat, coercion, inducement, promise, deception or other unlawful means is inadmissible in evidence.

61. In some countries, confession is excluded, without requiring evidence of actual pressure, if the confession is obtained under circumstances which are considered as being of an inherently coercive nature. Thus, according to the article 38 of the Constitution of Japan, if the suspect is interrogated after prolonged arrest or detention, the confession obtained during such interrogation is inadmissible even if no improper method of questioning has been actually used. The Constitution of the Philippines provides that, in addition to the exclusion of the confession taken through force, violence, threat, intimidation or any other improper methods, the confession is not admissible in evidence if it is obtained in violation of the rights of the accused to remain silent, of his right to counsel and/or his right to be informed of his rights. The Government of Australia states that, in addition to the exclusion from evidence of confessions involuntarily made, the judge has discretion to exclude confessional statements when he considers that admission of the evidence would be unfair to the accused.

62. In many countries, confession is admissible only when it is made before specified authorities, e.g., a judge or a public prosecutor. In Romania, for instance, confession is admissible only when it is made in the presence of a judge, a public prosecutor or other authorities qualified by law to exercise judicial functions.

63. In various countries, Japan, Romania and the USSR, for instance, incriminating statements may not constitute by themselves proof of guilt unless they are corroborated by other independent evidence, and the accused may not be convicted in cases where the only proof against him is his own confession.

64. In some countries the suspect taken in custody for interrogation by the investigating authority is granted an opportunity to undergo medical examination

at his request or at the request of other persons concerned, or by order of the investigating authority. In Dahomey, among other countries, during the period of police custody which precedes the first appearance before a judicial authority (garde à vue), the public prosecutor may, if he considers it necessary, ex officio or at the request of a member of the family of the arrested person, appoint at any time a doctor to examine the detained person.

65. In some countries, consecutive interrogation is not permitted to last more than a certain period of time and it is also required that proper rest and meals be given to the arrested or detained person. Thus, in Finland, examination of a suspect must be carried out between 6 a.m. and 9 p.m. unless serious reasons concerning the investigation otherwise require. The suspect may not be examined for an uninterrupted period of more than twelve hours and shall not, in principle, be subjected to further interrogation in connexion with the same case before a lapse of twelve hours. Adequate time for rest and regular meals must be set aside for him.

66. In some countries the law requires the length of interrogation of the person in custody by the investigating authority and the intervals of rest to be duly recorded. Thus according to article 52 of the Code of Criminal Procedure of Dahomey, for instance, the police officer who interrogates the suspect taken in custody (garde à vue) must record in the procès-verbal the duration of the interrogations to which the suspect was subjected and the period of rests he was permitted to take between the interrogation. The procès-verbal should be signed by the suspect.

D. Treatment in the place of custody 5/

67. The International Covenant provides that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person; and that accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons (article 10). The Standard Minimum Rules also state that untried prisoners shall be kept separate from convicted prisoners (Rules 8 (b) and 85 (1)).

68. The principle of separation of accused persons from convicted persons in the place of custody has been recognized in the practice of many countries in Jordan for example. In some countries, an arrested or detained person may not be kept in penal institutions for convicted persons but must be detained in another place designed for that purpose. In Poland, for instance, in accordance with article 83 of the Penal Executive Code, pre-trial detention is executed, in principle, in prisons for detention pending inquiry under the supervision of the Ministry of Justice.

69. In some other countries accused persons are detained in an ordinary prison but separately from convicted prisoners. In the Federal Republic of Germany, for

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5/ See also paras. 74-107.

instance, it is provided that the untried prisoner may not share a room with other prisoners unless he makes a written application for this or his physical or mental state calls for such an arrangement. As a general rule, it is required that untried prisoners should, as far as possible, be kept separate from convicted prisoners. In the Sudan, among other countries, the law stipulates that accused persons shall be kept separate from convicted persons and shall be treated in a manner compatible with their status as persons not yet convicted.

70. In many countries, the principle is proclaimed that arrested or detained persons are not subject to compulsory labour. In Thailand, for instance, all prisoners under sentence are required to engage in labour assigned by the prison administration, but persons detained pending investigation and trial are required to work only for purposes of proper sanitation and maintenance of the prison.

71. While untried prisoners are not obliged to work, in many countries they are granted an opportunity to work, in conformity with Rule 89 of the Standard Minimum Rules. Thus, in Hungary, a person under remand may perform productive work at his own request and with the permission of the prosecutor.

72. It may be recalled that the Standard Minimum Rules provide in their Rules 84 to 93 standards applicable specifically to the treatment of prisoners under arrest or awaiting trial.

73. The laws and practice of most countries grant to untried prisoners broader rights and privileges than to convicted prisoners. In the Federal Republic of Germany, for example, the untried prisoner may procure at his own expense various amenities as long as they are compatible with the purpose of detention and good order of the institution. In Hungary, persons under remand should, in principle, be kept in individual rooms. They may, (1) wear their own clothes, (2) use their occasional earnings for their own purposes, (3) spend the money they have deposited or which has been sent to them in the same amount that may be used from earnings in the prison, (4) receive parcels of clean underwear and toilet articles, and with the permission of the Governor of the prison, (5) fiction and technical books, and (6) exchange correspondence, receive visitors and food parcels at shorter intervals than those allowed for convicted prisoners.

II. SAFEGUARDS AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT FOR CONVICTED PRISONERS

A. General principles

74. The International Covenant provides that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person (art. 10 (1)). It also states that the penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation (art. 10 (3)). It may be also recalled that the Standard Minimum Rules provide in their Rules 56 to 66 standards concerning the treatment of prisoners under sentence and the administration of the penal institutions. Rule 57, in particular, states that imprisonment and other measures which result in cutting off an offender from the outside world are afflictive by the very fact of depriving him of his liberty, and that therefore the prison system shall not, except as incidental to justifiable segregation or the maintenance of discipline, aggravate the suffering inherent in such a situation.

75. In various countries, the basic purposes and philosophy of punishment are expressly defined in laws and regulations. In the Regulations on the Execution of Sentences of the Federal Republic of Germany, it is provided that prison sentences are intended to protect the public, help the prisoner to understand that he must take responsibility for crimes he has committed, encourage him and strengthen his capacity in future to lead an orderly, law-abiding life, and ultimately to reintegrate him into the community. In that country, it is also provided that the prisoner should be treated in a just and humane manner and that factors such as the prisoner's sex, age, physical and mental health, previous life, the nature of his offence and his conduct in prison should be taken into consideration. The Penal Code of Hungary provides, for instance, that the aim of punishment is to protect society, to reform the offender and to make members of society refrain from committing crimes. In the USSR, in order to achieve the purposes of correction and re-education of convicted persons, the law strictly differentiates its applicability with a view to determining the most appropriate measures for every convicted person and to awarding a just punishment in the most humane conditions.

76. The International Covenant provides that no one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation (art. 11).

77. In many countries, Ecuador for instance, it is provided that there shall be no imprisonment for debts, costs, fees, taxes, fines or, in general, obligations of a civil nature.

78. As regards the methods of punishment, it should be noted that, in most countries, corporal punishment is expressly prohibited. It is reported that in Cyprus, for instance, sentence of flogging has been considered unconstitutional since 1960 and was formally abolished by the Criminal Code of 1972.

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B. Medical examination and medical services

79. Medical examination by qualified doctors and proper medical care is one of the most important safeguards against the ill-treatment of prisoners in penal institutions. The Standard Minimum Rules provide that the medical officer shall see and examine every prisoner as soon as possible after his admission and thereafter as necessary (Rule 24). The Rules also state that the medical officer shall have the care of the physical and mental health of the prisoners and should daily see all sick prisoners, all who complain of illness, and any prisoner to whom his attention is specially directed and that he shall report to the Director whenever he considers that a prisoner's physical or mental health has been or will be injuriously affected by continued imprisonment or by any condition of imprisonment (Rule 25).

80. The prison rules of Barbados provide, for example, that every prisoner shall, as soon as possible after admission and in any case within 24 hours of admission, be separately examined by the medical officer. In Egypt, the prison medical officer must examine every prisoner on his admission into the prison, in no case later than the morning following his admission. He determines the prisoner's physical fitness and the kind of work he may undertake. He is responsible for all health measures designed to maintain the health of prisoners. If he considers that a person sentenced to hard labour is unfit for work in the prison, he must inform the Director of the prison in order to proceed to examine the prisoner for his transfer to a general prison. Except in case of sick prisoners, the prison medical officer must visit prisoners at least once a week and examine to check upon their physical fitness. In Israel, a prisoner undergoes a medical examination as soon as possible after admission to the prison and until then he must, as far as possible, be kept apart from other prisoners. The medical officer also takes general medical care of prisoners. He must notify the prison Governor of any matter connected with the prison or with the treatment of prisoners requiring consideration on medical grounds. In central prisons the medical officer must conduct a daily visit and he should visit other prisons at least once a week and whenever called upon to administer care to a sick person. In the Sudan, the medical officer has various duties concerning the health, food, drink and accommodation of prisoners. In Thailand, the Penitentiary Act provides that the medical officer shall see and examine every prisoner upon his admission to the institution and that the medical officer shall regularly supervise the hygiene and sanitation of the institution, etc.

81. The Standard Minimum Rules provide that sick prisoners who require specialist treatment shall be transferred to specialized institutions or to civil hospitals (Rule 22 (2)).

82. In Egypt, for example, a prison medical officer must visit all sick prisoners every day and, if necessary, may order the transfer of the prisoner to the prison hospital. In El Salvador, a court may, on the advice of medical specialists, allow a sick person who cannot be properly taken care of in the penal institution to be transferred to a State health centre. A judge may also issue an order, if he considers it necessary, to transfer a sick prisoner to a private medical

institution under guard for the clinical treatment for a certain period. In the Federal Republic of Germany, it is provided in the Regulations on the Execution of Sentences that prisoners who are ill must receive the necessary medical treatment and care and that, if necessary, they must be transferred to a prison or public hospital.

83. The Standard Minimum Rules require a medical examination be conducted when prisoners undergo disciplinary punishment (Rule 32).

84. In Barbados, for example, a medical officer must attend when a corporal punishment is inflicted and examine the prisoner. He may recommend the interruption of the punishment if he deems it necessary. In Egypt, the prison medical officer must pay a visit every day to a prisoner held in solitary confinement. In Israel, every prisoner under penal diet or in solitary confinement must be examined by a medical officer.

C. Disciplinary and security measures

85. It may be recalled that the Standard Minimum Rules provide in their Rules 27 to 32 the standards which should be followed concerning discipline and punishment in the penal institutions. Rule 31 states particularly that corporal punishment, punishment by placing in a dark cell, and all cruel, inhuman or degrading punishments shall be completely prohibited as punishments for disciplinary offences.

86. In most countries disciplinary measures may be imposed upon a person in custody if he breaks certain rules and regulations of the place of custody. Frequently, the types of punishment which may be inflicted are determined by law or the prison regulations. In the Federal Republic of Germany, for instance, the most severe disciplinary measures which are provided for in the Regulations are: (1) hard bed for up to one week, (2) reduction of diet for one or several days, up to a maximum of seven days or (3) disciplinary confinement for up to four weeks. These measures may only be carried out with the consent of the prison doctor. In Lebanon, the disciplinary measures specified by the prison regulations vary from suspension of certain rights granted to prisoners including the right to communicate with the outside world and the right to receive financial or material aid from the outside, to solitary confinement and/or reduction of food. In a large number of countries, for instance in El Salvador and Romania, it is prohibited to impose disciplinary measures which are likely to cause danger to the life or health of prisoners.

87. In some countries, the procedures to impose disciplinary measures are also laid down by law or administrative regulations. Thus, in the Sudan, it is provided in the prison regulations that no prisoner shall be punished until he has an opportunity of hearing the charge against him and making his defence. In Qatar, in case a prisoner breaks the written laws of the prison, he should be tried according to the written punishment rules, on the condition that he is provided with the opportunity to defend himself. In many countries, disciplinary

measures are usually ordered by the director or the superintendent of the prison. However, in Lebanon for instance, if it is considered that disciplinary measures which are more stringent than ordinary ones are necessary, a special report concerning the matter must be submitted to the Minister of the Interior who decides on the action to be taken.

88. In the Federal Republic of Germany, for instance, all disciplinary measures imposed on a prisoner by the prison authorities may be reviewed by the criminal division of a Higher Regional Court. Every prisoner is also entitled to file a complaint with the Federal Constitutional Court on the grounds that decisions of Higher Regional Courts constitute unlawful violations of his basic rights.

89. The Standard Minimum Rules provide that discipline and order shall be maintained with firmness, but with no more restriction than is necessary for safe custody and well-ordered community life (Rule 27).

90. In some countries, it is provided that the police or other officials may use force or restraint only when it is indispensable for maintaining order or the safety of persons in the place of custody. The Penal Executive Code of Poland provides that towards the persons under detention no other restriction may be imposed, apart from those which are necessary for the maintenance of order and security in the penal institution. It is provided in the Prison Law of Qatar, for instance, that the Prison Administrator should not use coercion with the prisoners except when it is strictly necessary.

91. The Standard Minimum Rules provide that instruments of restraint, such as handcuffs, chains, irons and strait-jackets, shall never be applied as a punishment, and that chains or irons shall not be used even as restraints (Rule 33).

92. In Cyprus, for instance, it is provided in the prison regulations that mechanical restraints shall not be used as a punishment, although they may be used as a precaution against escape during a transfer, on medical grounds or in order to prevent a prisoner from injuring himself or others. They should not be used longer than is strictly necessary. In Finland, chaining or fettering may only be used to prevent escaping during transportation or in case violence caused by a prisoner cannot otherwise be controlled or prevented. The chaining or fettering should not be prolonged and may not be more severe than is deemed necessary. The fact of chaining or fettering must be recorded in the books. In the Federal Republic of Germany, a prisoner may only be bound when there is a danger that he will use violence against persons or property, when he offers resistance, tries to escape, or when, in a specific set of circumstances i.e. the situation of the prisoner and conditions likely to facilitate escape, there is a danger that the prisoner will escape from custody, or when there is a danger that he will commit suicide or self-mutilation and when, in addition, such a danger cannot be counteracted by other less rigorous measures.

93. Confinement in special cells is also sometimes used as a security measure in certain conditions. In the Federal Republic of Germany, a prisoner may be put

in a special escape-proof cell ("strong box") if there is a strong suspicion that a prisoner, on account of his personality or his mental state, may attempt to escape, use violence against persons or property, or commit suicide or self-mutilation. A doctor must visit a prisoner placed in a special cell immediately after his confinement and thereafter every day.

D. Supervision of prison and complaints by prisoners

94. In many countries, penitentiary institutions are, in addition to the control by the Director of the Prison, subject to the supervision and inspection of authorities from outside the prison. The purpose of such inspection and supervision is to inquire into conditions at the place of custody, to ensure the proper application of the laws and regulations and to protect the rights of prisoners. This supervisory authority is sometimes granted to an administrative board or committee appointed by the Ministers concerned. In Cyprus, for example, the condition of prisoners and their treatment are supervised by the Prison Board consisting of members appointed by the Council of Ministers. The Prison Board may hear any complaints made by prisoners and has the power to remit any excessive or unjust punishment ordered by the Director of the prison. In Thailand, the Prison Inspection Committee, members of which are appointed by the Minister of Interior, is responsible for supervising prisons and giving practical suggestions on matters relating to correctional activities.

95. In some countries, Public Prosecutors are responsible for the supervision of prisons. In the Niger, for instance, Public Prosecutors may, whenever considered necessary, visit penal institutions to check upon the legality of detention.

96. In Hungary, the regular supervision carried out by the Prosecutor in the penitentiaries includes the examination of the conditions of imprisonment and control of the observance of the rights of prisoners. The Prosecutor may examine the documents concerning the detention and interrogate detained persons. In Romania also, Public Prosecutors are empowered to supervise the legality of detention and the enforcement of penalty. They should examine the requests and complaints made by detainees. They may conduct hearings of prisoners without anyone else being present. If they consider that the detention is illegal or that the laws and regulations are not observed, he must take appropriate measures provided by law. In the Ukrainian SSR, supervision of strict compliance with the requirements of the law in place of detention is exercised by the Procurators. In accordance with the legislation in force in the Ukrainian Soviet Socialist Republic, a Procurator is obliged to pay regular visits to places of detention, to acquaint himself at first-hand with the activities of the Administrations of these places, to suspend the execution of any instructions or orders by the administrations of places of detention which are contrary to the law, and to contest these instructions and orders in accordance with the established procedure.

97. In many countries, Australia, Egypt, Kenya, Madagascar, Mali, the Niger and Romania for example, judges are entitled to visit prisons regularly to control the legality of detention, observe the conditions of the places of custody, hear

and investigate complaints of prisoners, and report thereon. The periodicity of inspections may be left to the discretion of judges, or it may be specified by law. The specified intervals between each visit vary from country to country. In Egypt, for instance, judges as well as public prosecutors should visit all prisons within their jurisdiction regularly to ensure that no person is detained illegally. They may consult and make copies of documents involving prison records, detention orders and warrants of arrest. They may also interview detainees and hear any grievances which they may wish to voice. In El Salvador, a judge may visit penal institutions whenever it is necessary or appropriate, and in any event on the last days of January, May and September, to control whether adequate facilities and conditions of living are provided, how the inmates are treated by prison guards, etc. The judge who visits a prison calls before him the detainees and informs them of the dates and stages of the trials and the dates of final judgements. He also sees to it that convicted persons are notified of the date when their prison term expire. Under Kenyan law, a judge may visit any prison at any time and make observations concerning the management and treatment of arrested or detained persons in a visitor's book kept for this purpose. In that country, visiting organs make reports on the treatment and conditions of prisoners or detained persons after they visit various prisons which are taken into account for the improvement of the conditions of places of custody. In the Niger, prisons are visited by an examining magistrate once a month, by the president of the Cour d'assises at least once during each session and by other judges whenever they consider it necessary.

98. In some countries, for instance in Poland, Penitentiary Judges are appointed, who, together with Public Prosecutors, supervise the legality of the provisional detention and the execution of penalties of imprisonment. They may enter penal institutions any time for inspection.

99. In some other jurisdictions, inspection of prison is entrusted to a commission which includes judges in its composition. In Barbados, for instance, a Visiting Committee of which at least one member must be a magistrate pays frequent visits to prisons and hears complaints made by prisoners. Members of this Committee may enter prisons at any time and have access to any prisoner. In Israel, visiting organs composed of judges and senior officials of the Ministry of Justice carry out inspections of every prison once every two months. They may call for all records relating to the management and disciplines of a prison, visit every place therein and see every prisoner. They may summon witnesses and administer oaths. On completion of a visit, they must record in a special book their remarks, suggestions and recommendations.

100. In some countries, Finland for example, the inspection of place of custody is carried out by the Judicial Ombudsman.

101. In the Ukrainian Soviet Socialist Republic, in its Decree of 28 February 1967, the Presidium of the Supreme Soviet of the Ukrainian Soviet Socialist Republic confirmed the "Provisions concerning the supervisory commissions attached to the Executive Committees of district and city Soviets of Workers' Deputies in the Ukrainian Soviet Socialist Republic". In Article 6 of

these Provisions, it is stated that one of the main tasks of the supervisory commissions is to exercise permanent public supervision to determine how the prescribed régime and conditions for the maintenance of prisoners are being adhered to in places where prisoners are serving terms of detention.

102. The Standard Minimum Rules provide for the right of prisoners to make requests or complaints (1) to the Director of the penal institution, (2) to the inspector of prisons during his visits and (3) to the central prison administration, the judicial authority or other competent authorities (Rule 36). The Rules also state that the authorized procedures of making complaints, along with other rights and obligations of the prisoners, should be notified to the prisoners in writing (Rule 35).

103. In many countries, prisoners are guaranteed a right to make complaints or petitions to the Director of the prison. Thus, in Cyprus among other countries, prisoners have an opportunity to make complaints and requests to the prison staff which are to be reported to the Director of the prison. In Egypt, a prisoner may at any time submit an oral or written complaint to the warden of the prison, who records the complaint in the special register.

104. Various laws provide that prisoners may send complaints to authorities outside the prison. Thus, in Egypt, prisoners may request the warden of the prison to transmit the complaint he makes to the public prosecutor. In Hungary, prisoners are allowed to lodge complaints with the prosecutor's department. In Romania, public prosecutors and judges are responsible for examining the written and oral requests and complaints made by detained and convicted persons. In the Ukrainian Soviet Socialist Republic, in the event of violations of the rights of persons sentenced to detention, article 44 of the Correctional Labour Code states that such persons have the right to address complaints, pleas and letters to State organs, public organizations and officials. Complaints, pleas and letters from convicted persons are forwarded to the appropriate authorities, and are dealt with in accordance with the procedure established by law. In this connexion, the Code contains a special stipulation to the effect that complaints, pleas and letters addressed to the Procurator shall not be examined by the administration of the correctional labour institution concerned, and shall be transmitted to the appropriate authority within 24 hours of their receipt.

105. In some countries, for instance in Australia, a person claiming to have been subjected to cruel and inhuman treatment may write to a Member of Parliament or the appropriate Minister and seek a parliamentary or ministerial investigation or other inquiry into the allegation.

106. In some countries, in Australia for instance, complaints by persons detained or imprisoned may in addition be examined by an Ombudsman.

107. In some countries, prisoners are also entitled to make requests or complaints to the people who visited prisons for inspection. Thus, in Australia, Magistrates or Justices of the Peace are required to visit prisons regularly to hear and investigate complaints of prisoners. In Egypt, judges and prosecutors who visit prisons for inspection receive grievances made by the prisoners.

III. REMEDIES AND SANCTIONS

108. The International Covenant provides that each State Party to the Covenant undertakes (a) to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity (b) to ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority and to develop the possibilities of judicial remedy and (c) to ensure that the competent authorities shall enforce such remedies when granted (article 2 (3)).

A. Procedures to terminate illegal detention

109. It may be recalled that the International Covenant provides that any arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power (article 9 (3)). The Covenant also states that anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court in order for that court to decide without delay on the lawfulness of his detention and order his release if the detention is not lawful (article 9 (4)).

110. As mentioned above (see paras. 10-26), in many countries it is required that the arrested person should be taken without delay before a magistrate or other competent authority who should rule on the question whether he should be kept for detention. At this initial appearance before a judge, the arrested person is granted a first opportunity to challenge the legality of his arrest and/or the grounds for continued detention.

111. In many countries, the Federal Republic of Germany for instance, at the stage where a magistrate has issued a decision of pretrial detention, the arrested person has a right to make an appeal against the order of detention in accordance with the provisions of the Code of Criminal Procedure.

112. In various jurisdictions, during pre-trial custody, a detained person is entitled to require a court or other competent authorities to review whether his detention should be continued. Under the Code of Criminal Procedure of the Federal Republic of Germany, for instance, a person in custody awaiting trial may at any time during detention apply for a judicial examination of the question whether the order of detention should not be rescinded or suspended. If the detained person or his defence attorney has not submitted such an application within three months, the examination must be carried out ex officio.

113. As mentioned above (see paras. 94-107), in many countries all prisoners including persons kept in pre-trial detention are entitled to make complaints and petitions to the Director of the Prison and/or authorities outside the prison, e.g., a judge and a public prosecutor, regarding their treatment in prison.

114. In various countries, Australia and the Philippines, for instance, where special remedies such as habeas corpus or amparo are available, a person who considers that he is unlawfully detained may seek from a court a writ ordering his release from custody. The court requires the responsible officials to appear forthwith or without delay and explain the grounds for detention, and it calls the person in custody for hearing. If the court comes to the conclusion that the applicant is unlawfully detained, it orders the detained person to be released immediately. The Magna Carta of Panama, similarly, guarantees the remedy of habeas corpus for arrested persons. The remedy may be applied immediately after arrest, regardless of the gravity of the penalty applicable to the offence committed.

115. In Ecuador, the petition of habeas corpus is to be submitted to the President of the Council of the Canton where the person is kept in custody.

116. In the countries, the USSR for example, where the supervision of the strict observance of all the laws is exercised by the Procurator or under his authority, the legality and validity of detention is controlled by this authority. The law of Hungary on the Prosceutors' Department Supervision of the Legality of the Investigation provides, for instance, that the Prosecutor shall ensure that no person be deprived of his personal freedom or exposed to illegal deprivations or to restrictions of his rights or to vexations. He supervises the legality of detention. A person under remand or his counsel may at any time lodge a complaint with the Prosecutor. The Prosecutor should also check the legality of detention pending trial, ex officio, at least once a month.

B. Exclusion of confessions obtained illegally and annulment of proceedings

117. As mentioned above (see paras. 54-66), in many countries, in order to prevent investigating organs from using improper methods of interrogation, confession is excluded from the evidence if it is obtained during the interrogation through physical or mental compulsion or other improper methods. In some countries, Japan for instance, confession is not admissible in evidence where it is considered that it has been obtained under circumstances which have an inherently coercive nature, regardless of whether the suspect has been actually subjected to physical or mental compulsion. Under the Constitution of the Philippines, confession is excluded, when it is obtained in violation of the right to remain silent, of the right to counsel and/or the right of the suspect to be informed of his rights, even in cases where force, threat or other improper methods are not used at interrogation.

118. In some systems, the law provides for the annulment of rescission by the courts of proceedings which are vitiated through the non-observance of certain rights of the arrested or detained person, e.g., failure to inform him of the offence charged, failure to warn him of his rights to remain silent and to have legal assistance.

C. Civil remedies and state compensation

119. The International Covenant provides that anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation (article 9 (5)).

120. In several countries, Indonesia, Iran, the Niger and Sweden, for example, a person who has been subjected to torture or other cruel treatment or whose rights have been infringed by the police or other public authorities may under certain conditions claim damages in civil proceedings before a court against the public officer concerned. In Australia, for instance, civil proceedings may be brought for assault or false imprisonment if the presence of unlawful intention is proved on the part of the officer concerned. In Lebanon, in accordance with the Law Organizing the Internation Security Forces, members of the internal security are responsible for civil damage if they act contrary to the legislative provisions concerning detention or restriction of liberties. In accordance with the Civil Code of the Philippines, a public officer or employee who directly or indirectly obstructs, defeats, violates or in any manner impedes or impairs the rights and liberties of another person, including freedom from arbitrary or illegal detention, the right to counsel, the right to be informed of the nature and cause of the accusation, freedom from being forced to confess guilt and freedom from cruel and unusual punishment, shall be liable to the victim for civil damages.

121. In Japan, in accordance with the Regulations for Suspect's Compensation or with the Criminal Compensation Law, where it becomes evident before indictment that a person unlawfully arrested or detained has not committed a crime or where such a person has been prosecuted but found not guilty by the court, he is entitled to receive compensation from the State within the limits determined by law, irrespective of whether there exists criminal intent or negligence on the part of the public officer concerned. Also, in that country, in case a public officer who exercises public authority inflicts damage upon a person intentionally or negligently in the performance of his duties, the State is liable to compensate for the damage in accordance with the State Redress Law, subject to the right to claim reimbursement from the public official concerned under certain conditions.

122. In the Ukrainian SSR, it is stated in the Civil Code that the State organs concerned bear a primary responsibility for compensation, in case and within limits especially provided for by the law, on account of damage caused by incorrect conduct on the part of officials of the organs responsible for inquiries, preliminary investigations, prosecution and trial.

D. Disciplinary sanctions

123. In most countries, in case of infringements of the rights of arrested or detained persons on the part of the investigating organ, disciplinary sanctions may be applied to the public officer concerned by the authorities to which he

is responsible. In Finland, for example, in case of an unlawful practice or an infringement of the administrative regulations on the part of an official, the official concerned may be subject to administrative disciplinary measures which include a fine and a warning in their range. In the Netherlands, under the Civil Service Regulations Governing the Municipal Police and the National Police Corps, a police official who does not comply with the articles prohibiting the use of illegal methods of investigation may be subject to disciplinary action.

E. Penal sanctions

124. Torture and cruel, inhuman or degrading treatment are criminal offences in all the countries on which information is available. In addition to offences such as murder, manslaughter, assault and battery, unlawful arrest and detention, duress, coercion and unlawful threat for which any guilty person may be punished, the Penal Codes of many countries provide for specific types of crimes, either in the form of distinct offences or of aggravated types of ordinary offences, for which only police officers, public prosecutors, wardens of prisons and other competent public officials are to be punished. In Ecuador, Iran, Lebanon and the Sudan, among other countries, public officers including police officers who arrest or detain a person knowing that they are not authorized to do so are punished under a specific penal provision. In Iran and the Niger, there exist special provisions punishing prison wardens who receive a prisoner without a warrant or judgement. In Ecuador and Lebanon, it is a crime when police officers unduly refuse to bring before a competent magistrate a person in their custody.

125. In various countries, Hungary, Lebanon, the USSR for example, there exist special penal provisions to punish the act of obtaining confessions and other evidence by way of threats or other unlawful methods. Similarly, in Denmark, the use of unlawful means with a view to obtaining confession or evidence is punishable. In the Criminal Code of the Ukrainian Soviet Socialist Republic, extracting evidence by force is regarded as a serious crime. The extraction of evidence during an interrogation by illegal acts on the part of the officer conducting the interrogation or preliminary inquiry is punishable by detention for periods of up to three years. Forcing a person to give evidence, combined with the use of violence or humiliation against the person under interrogation, is punishable by detention for a longer period.

126. In a number of countries, Belgium, Ecuador, Egypt, Iran, Kuwait, Romania, for example, torture or ill-treatment of a person by public officers is specifically punished. According to the Penal Code of Belgium, for instance, if the arrested or detained person is subjected to physical torture, the offender shall be punished by imprisonment for no less than 10 nor more than 15 years. The Penal Code of Egypt provides the penalty of imprisonment for no less than 3 nor more than 10 years for public officers who subject a defendant to torture. In case such a treatment causes the death of the defendant, the penalty applicable to the offence of premediated murder may be inflicted.

127. In some countries, Iran, the Niger and Togo, for instance, public officials may be punished if they refuse or fail to forward lawful complaints tending to establish illegal and arbitrary imprisonment.

128. Under those laws which punish specific offences committed by public officials, the penalties provided are usually more severe than those applicable to offences committed by private persons. In the Federal Republic of Germany, for instance, an official who causes bodily harm in the exercise of his functions may receive a prison sentence of up to five years, whereas an ordinary offender who commits the same act may be sentenced for a prison term not exceeding three years. In the Netherlands, a public official found guilty of any offence, thereby violating his official duty or abusing his official authority, is subject to a heavier penalty which increases by one third the maximum fine or term of imprisonment provided for ordinary offenders.

129. In some countries, Ecuador, Iran and Madagascar, for example, the conviction of a public official for unlawful acts may entail deprivation of civil rights and/or suspension from public office. In Finland, an official found guilty of any unlawful practices or of an infringement of administrative regulations amounting to a misconduct may be subjected to a special penalty for government officials including warning and discharge or suspension from duties.

130. In Sweden, if a person alleges that he has been subjected to torture or to other cruel treatment, his allegations may be submitted to a public prosecutor for investigation. In case the public prosecutor decides not to prosecute, the alleged victim may himself institute criminal proceedings before a court. Similarly, in Finland, a person who has been subjected to treatment which violates the law or administrative regulations, has, under certain conditions, the right to institute criminal proceedings himself.

131. In some countries, a person who has been subjected to ill-treatment by public officials may, as a general rule of procedure, submit jointly a complaint in violation of criminal law and a claim for damages (constitution de partie civile) which compels the competent authorities to prosecute and investigate the offence.

132. According to the Code of Criminal Procedure of Japan, for instance, in cases where the public prosecutor does not prosecute a crime committed by public officers, if a victim or person concerned is dissatisfied with the prosecutor's decision not to institute prosecution, he may make an application to a court for having the case committed for trial, such a court having discretion to commit the case to another court for trial.

133. In Japan, for instance, there exists an organ called the Inquest of Prosecution, consisting of eleven members selected by lot among citizens, completely independent of the prosecutor's office, which reviews the cases the public prosecutor has decided not to prosecute, including crimes committed by public officials, and sends a written recommendation on the case to the Chief Prosecutor of the District Prosecutor's Office concerned.

F. The Ombudsman

134. In certain countries, Australia and the Scandinavian countries, for instance, the Ombudsman (Parliamentary Commissioner) has the power to supervise the activities of judicial or administrative organs. In Sweden, a person who feels that he has been badly treated by a police officer, a prison warden or any other public officers may submit a complaint to the Parliamentary Ombudsman who will then investigate the matter, and, if need be, take appropriate action. In Finland, the instructions of the Parliamentary Ombudsman specifically state that the Ombudsman is to see to it that judges and other officials comply with the laws and decrees. The duty of the Ombudsman is to take appropriate measures whenever a judge or other official in the performance of his official duties has made himself guilty of deceit, partiality, gross negligence, violations of the rights of a private citizen, or if such official has exceeded his jurisdiction.

PART TWO

OBSERVATIONS AND COMMENTS BY GOVERNMENTS ON ARTICLES 24 TO 27 OF THE DRAFT PRINCIPLES ON FREEDOM FROM ARBITRARY ARREST AND DETENTION

135. The Governments which have sent observations are in general agreement with the concepts that form the basis of articles 24 to 27 of the Draft Principles. It was pointed out by the Governments of Ecuador and the Philippines that articles 24 to 27 of the Draft Principles on Freedom from Arbitrary Arrest and Detention are in harmony with the provisions of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. The Government of Sweden considers that articles 24 to 27 of the Draft Principles represent a valuable attempt to improve the condition of detainees. It would seem, however, that in some respects these rules should be slightly more flexible than in their present wording. Otherwise even some States whose laws afford quite adequate legal guarantees to detainees would have difficulties in complying with the rules in all their details.

136. Several Governments are of the view that further consideration is required of the scope of the articles and of various detailed provisions.

Article 24 6/

"1. No arrested or detained person shall be subjected to physical or mental compulsion, torture, violence, threats or inducements of any kind, deceit, trickery, misleading suggestions, protracted questioning, hypnosis, administration of drugs or any other means which tend to impair or weaken his freedom of action or decision, his memory or his judgement.

"2. Any statement which he may be induced into making through any of the above prohibited methods, as well as any evidence obtained as a result thereof, shall not be admissible in evidence against him in any proceedings.

"3. No confession or admission by an arrested or detained person can be used against him in evidence unless it is made voluntarily in the presence of his counsel and before a judge or other officer authorized by law to exercise judicial power."

Observations and comments :

137. The Governments of Australia, Cyprus, the Federal Republic of Germany and Japan declared that they agreed with the provisions of this article as a whole.

6/ Article 7 of the Covenant reads as follows: "No one shall be subjected to cruel inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation".

Paragraph 1

138. The Governments of the Federal Republic of Germany, Hungary and Poland pointed out that the provisions of paragraph 1 of article 24 correspond with their legal systems.

139. The Government of Barbados is of the view that paragraph 1 of article 24 is somewhat loosely drafted, because the words "no arrested or detained person shall be subjected to physical compulsion ... which tends to impair ... his freedom of action" might be interpreted to forbid all measures of detention.

140. According to the reply of the Government of Israel, it may be desirable to include after the words "shall be subjected" the words "without his consent", since it is doubtful whether hypnosis and the administration of drugs do in fact tend always to impair memory and judgement and the list of offending practices is left open by the words "any other means". According to the same reply, there also seems no place for the words "freedom of action" because the very facts of arrest or detention would offend against the envisaged principle. The Government of Poland feels that the principle according to which arrested persons may not be subjected to any compulsion requires further improvements in wording. The necessity to apply coercive measures towards a suspect in order to bring him to a law enforcement agency, to arrest a suspect in hiding, to confiscate specified objects, etc., cannot be avoided and should be taken into account.

141. As far as the term "protracted questioning" is concerned, the Government of Poland suggests that it should be added that it relates to intentional protracting of questioning.

142. The Government of El Salvador considers that there is a need to state what should be the legal consequences of a breach of the provisions of paragraph 1.

Paragraph 2

143. The Government of Hungary considers that the principle of paragraph 2 of article 24 is correct.

144. It is the view of the Government of Israel that there seems to be no good reason for excluding all evidence obtained as a result of the prohibited methods; only such evidence as directly incriminates the person involved should be excluded.

Paragraph 3

145. As regards paragraph 3 of article 24, it is suggested by the Ukrainian Soviet Socialist Republic that, with the aim of strengthening the guarantee of the rights of the accused the following sentence should be added at the end of this paragraph: "A confession by the accused may be used in evidence only when it is corroborated by the whole of the evidence relating to the case."

146. The Governments of Japan, Poland and Romania expressed reservations concerning essentially the requirement of the presence of counsel.

147. In the view of the Government of Japan, the term "in the presence of his counsel" is unnecessary in Japan, because many other provisions safeguarding the rights of a suspect or an accused person at all stages of criminal procedure are applied in an effective manner.

148. The Government of Poland considers as too far-reaching the principle under which no confession by an arrested person may be used as evidence against him unless it is made in the presence of his counsel.

149. The Government of Romania feels that paragraph 3 of article 24 should be worded in the following way: "No confession or consent (admission) by an arrested or detained person shall be used against him in evidence unless it is made voluntarily in the presence of a public prosecutor, judge or other officer authorized by law to exercise judicial power, and only to the extent that it is confirmed by the facts and the circumstances established by the existing evidence considered as a whole".

150. The Governments of Barbados, El Salvador, Hungary and Swaziland have expressed reservations concerning various aspects of the principle embodied in paragraph 3.

151. In the opinion of the Government of Barbados the requirement that no confession or admission should be admissible in evidence unless made in the presence of counsel and before a judge is unnecessarily onerous, in view of the fact that, under the "Judges Rules", once a police officer has evidence which gives him reasonable grounds for suspecting that a person has committed an offence, he is obliged to issue a caution to the accused. This caution is that he is not obliged to say anything but that what he says may be put in writing and used in evidence. The Government of Barbados feels that, in practice, there would be few confessions obtained where counsel attends, as indeed the advice of counsel would almost invariably be against making such a confession. The formal setting which results from the presence of a judge would in itself militate against confession being given. In the opinion of the Barbados Government, statements made by the accused immediately on being arrested, such as a promise to return goods if he is given a chance to go free, would be excluded under article 24, paragraph 3.

152. The Government of El Salvador feels that it is inappropriate to indicate in a declaration of principles the specific circumstances in which a person under trial should make his preliminary statement. Such circumstances should rather be defined by the internal legislation of each country. For that reason, the Government considers that paragraph 3 of article 24 should be deleted, and that article 24 of the Draft Principles might be worded as follows:

> "1. No person who has been arrested or detained, for whatever reason, shall be subjected to physical or moral pressure, or to torture, deceit, drugs or trickery of any kind that might impair or weaken his free will or his

freedom of expression. Any person who violates this provision shall incur criminal liability for any offences or misdemeanours resulting from such acts.

"2. Any statement or confession by an arrested or detained person which is elicited by any of the methods referred to in the foregoing paragraph shall not be admissible in evidence in the proceedings concerned."

153. The Government of Hungary considers that paragraph 3 expresses a rightful aim, but its form seems to be too rigid. The participation of a counsel, in its opinion, should of course be made possible in all cases, and in certain cases the participation of a counsel should be mandatory. In cases, however, where assistance by counsel is not mandatory it would be unjustified to require the presence of counsel in order to be allowed to use a confession as evidence. Optimal guarantee can be ensured by application of the principle that the court may base its final decision only upon the evidence directly examined at trial. It is also important to ensure that the defendant and his counsel be allowed at all stages of the proceedings and during the trial to introduce proposals and observations concerning the evidence. The Government of Hungary considers that these principles are valid in other fields as well and that their restatement in connexion with the principles on freedom from arbitrary arrest or detention seems to be unnecessary. As paragraphs 1 and 2 of article 24, in the opinion of the Government, deal with the most important principles in a thorough and satisfactory manner, it proposes the omission of paragraph 3.

154. The Government of Swaziland is of the opinion that paragraph 3 of article 24 is often not observed and does not strictly correspond with the laws of Swaziland.

Article 25 7/

"No one may be required to incriminate himself. Before the arrested or detained person is examined or interrogated, he shall be informed of his right to refuse to make any statement."

Observations and comments

155. It is the view of the Government of Israel that the first sentence of this article is too broadly worded. In fiscal matters, for instance, it is the usual practice to require a person to make a statement on his financial affairs which

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7/ Article 14 (3) (g) Of the Covenant reads as follows: "3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:...(g) Not to be compelled to testify against himself or to confess guilt."

may well turn out to be incriminating. It would be going too far to make it necessary for him to be informed of his right to refuse to make any statement.

156. The observation of the Government of Finland is that it seems too contradictory to oblige, under threat of penalty, the victim of the crime and the witness to tell the truth, and at the same time virtually encourage the person suspected of the crime to conceal or falsify the truth. Therefore, the Government of Finland finds the second sentence of the article too categorical and too favourable to the person suspected of a crime.

157. According to the Government of El Salvador, an arrested or detained person has no right to refuse to make a statement, since such refusal indicates a lack of respect for, or disobedience of, the interrogating authority. It is proposed that article 25 should be deleted from the Draft Principles for this reason, and also because the principle that "no one may be required to incriminate himself" is already included in paragraph 2 of article 24.

158. The Government of Romania stated that its attitude regarding article 24 is determined by the principles of the Code of Penal Procedure. According to these principles, interrogation of the accused or detained person should be mandatory and its purpose should be to seek the truth of the facts and circumstances of the case. This does not exclude the right of the accused to refuse to make any statement. Compulsion, violence, threats or inducements of any kind, misleading suggestions and other compulsory measures are not only prohibited but also punishable. However, the sincere participation of the accused in the criminal proceedings that directly concern him is in his interest, since his sincere attitude during the trial and his sincere account of the facts may, under Romanian criminal procedure, constitute attenuating circumstances. It is therefore suggested that article 25 should be redrafted as follows:

> "No one may be required to make a confession. Before the arrested or detained person is examined or interrogated, he shall be informed of his rights under the procedure and of his legitimate interests, with a view to seeking the truth, establishing correctly what offence has been committed and ensuring the just outcome of the trial."

Article 26

> "The arrested person shall not be kept in police custody after he is brought before the competent authority as provided in article 10. 8/ The officials responsible for his custody shall be entirely independent of the authorities conducting the investigation."

8/ Article 10 (1) of the Covenant reads: "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."

Observations and comments

159. It is stated that the legislation of the Federal Republic of Germany, Hungary, Poland and Sweden are in harmony with the principle set forth in this article.

160. The Government of Finland states that in accordance with the principal rule laid down in the Act concerning preliminary detention, anyone whose detention is ordered on suspicion of a crime shall immediately be transferred to an ordinary prison. Nonetheless, as criminal investigations by the police often continue after such transfer, prisons are few, and the distances between them long, the investigations might be rendered needlessly slow and cumbersome if the police would continually have to travel between the prison and their offices. Therefore, the law states, in addition to the principal rule, that whenever it is necessary for establishing the facts of the case, the authority which had made the decision on detention may order the detained person to be kept in custody in some appropriate place, other than an ordinary prison, for a period not exceeding the time when the court begins to investigate the case. Taking into account these circumstances, the Finnish Government is of the opinion that a clause should be added to article 26, allowing for short term exceptions under special circumstances, such as are referred to above, to be made to the principal rule expressed.

161. The Government of Japan states that a police gaol may be used as a substitute for a detention house in Japan. In view of the present situation regarding the facilities for detention, it is not feasible at present to abolish this system completely. However, in the view of the actual operation of this system and of the existence of many legal provisions safeguarding human rights, it is considered unnecessary to have in Japan a provision such as that embodied in article 26.

162. In the view of the Government of Israel, it is impossible in practice in many legal systems, especially accusatorial, for custody officials to be entirely independent of the investigating authorities.

163. It is the opinion of the Government of Thailand that the principle expressed in the second sentence of article 26 may have positive as well as negative effects. The advantage of not placing investigation and custody powers in the same authorities is that persons in custody are thereby protected against abuse on the part of the investigating authorities. On the other hand, the reciprocal independence of custody and investigation authorities, might to some extent hinder the conduct of the investigation. The inquiries are smooth and efficient when permission from the custody authorities is not required whenever there is a need for the interrogation of detained persons.

164. It has been suggested by the Government of El Salvador that article 26 of the Draft Principles might be worded as follows, so as specifically to cover both men and women:

"Once an arrested person has been brought before the authority which is to try his case, he may not be kept in the custody of any public security force but shall remain in custody in the place stipulated by the said authority, in accordance with the applicable provisions of internal law."

Article 27

"1. Pre-trial detention not being a penalty, the imposition of any restrictions or hardships not dictated by the necessities of the inquiry or the maintenance of order in the place of detention, together with all vexatious treatment, shall be forbidden.

"2. The treatment accorded to the arrested or detained person, whether in police custody or in prison custody, must not be less favourable than that stipulated by the 'Standard Minimum Rules for the Treatment of Prisoners'.

"3. Inspectors shall be appointed by judicial authorities to supervise all places of custody and to report on the management and treatment of arrested and detained persons therein."

Observations and comments

165. The Governments of Cyprus, the Federal Republic of Germany, Hungary, Japan and Thailand stated that they are in agreement with the provisions of this article. Specifically, the Government of Cyprus is of the opinion that people in custody should be accorded all facilities to see their advocates, be examined by doctors of their own choice and have an opportunity to lodge complaints if they allege ill-treatment or any other kind of hardships or unnecessary restrictions while in detention.

Paragraph 1

166. In the view of the Government of Sweden, paragraph 1 of article 27 is worded in a manner which appears as rather restrictive of the power of competent authorities. Swedish law, for instance, permits certain restrictions for the purpose of preventing the detained person, while in detention, from planning or carrying on criminal activity outside the place of custody as well as for the purpose of preventing his escape. These are the matters that should presumably be considered as relating to the maintenance of order in the place of detention. If the paragraph is given such a broad interpretation, Sweden considers it as acceptable.

167. The Government of Kenya considers that the provision of this paragraph is a mere statement of intent, because once a suspect is remanded in custody he is obviously thereby confined.

Paragraph 2

168. As regards paragraph 2 of article 27, the Government of Poland states that the "Standard Minimum Rules for the Treatment of Prisoners" are respected in Polish law. It considers that some deviations from the Rules are possible. For instance, medical treatment of arrested persons in Poland is carried on at the expense of the State. Their food is also provided at the expense of the State.

169. The Government of Sweden considers it useful that a reference is made in paragraph 2 to the norms set by the "Standard Minimum Rules for the Treatment of Prisoners". In its opinion, however, these Rules only seek, on the basis of the general consensus of contemporary thought and the essential elements of the most satisfactory penal systems of today, to set out what is generally accepted as being good practice in the treatment of prisoners and the management of institutions. On that basis, it seems appropriate to allow Governments to make certain deviations from the rules, provided of course that such deviations do not, in essence, entail treatment inferior to the one laid down in the "Standard Minimum Rules for the Treatment of Prisoners". In this context, the Government of Sweden recalls that the Committee of Ministers of the Council of Europe in 1973 adopted a revised text of the "Standard Minimum Rules for the Treatment of Prisoners", which had been elaborated for the purpose of adapting the text of the United Nations to the need of contemporary penal policy and of furthering its effective application in the States which are members of the Council of Europe.

170. The Government of El Salvador suggests the following wording in order to broaden the scope of the paragraph:

> "2. The treatment to be accorded to the arrested or detained person, whether in the custody of any security force or confined to a penal institution, shall not be less favourable than that laid down in the 'Standard Minimum Rules for the Treatment of Prisoners'."

Paragraph 3

171. Concerning paragraph 3 of article 27 the Government of Hungary states that it proposes a modification of the wording of this paragraph to take into account the legal system of the socialist countries in general and the legal system of Hungary in particular. Under such legislation, the duties mentioned in paragraph 3 are performed by the Prosecutor's Department. The Prosecutor acts not only as public prosecutor, but also as the authority entrusted with the supervision of the legality of the proceedings. When they carry out the functions of supervising the legality of pre-trial detention, there are guarantees which in this sphere makes their action equivalent to that of the inspectors appointed by the Court, referred to in paragraph 3 of article 27.

172. In Finland inspection of places of custody are not performed by the judicial authorities referred to in the article, but in addition to the police authorities themselves, by the Judicial Ombudsman and in some cases the Chancellor of Justice.

Therefore, the Government of Finland considers that the principle is correct, but the reference to judicial authorities might be changed to read, for example, that the inspectors should be chosen from among authorities and officials other than those in charge of the places of custody.

173. Similarly, it is pointed out in the reply of the Government of Sweden, that Swedish law does not conform to the principle embodied in paragraph 3. In regard to some places of custody kept by the police, the supervision is exercised by the National Police Board, while the National Correctional Administration is charged with the supervision of all other places of custody. Furthermore, both the Parliamentary Ombudsman and the Chancellor of Justice perform supervisory functions with regard to places of custody in Sweden. Any abuse or defect in the administration of a place of custody or the treatment of an arrested or detained person is, of course, acted upon, possibly referred to a public prosecutor for investigation and, later on, to a Court for judicial examination. These safeguards have proved adequate, and it is not being envisaged to replace the present system by a system corresponding to that proposed in paragraph 3.

174. The view of the Government of Israel is that it is practically impossible for inspectors to be appointed by the judicial authorities for all places of custody including police stations. It considers that provisions of the Israeli legislation in this regard are sufficient for ensuring the proper treatment of detained persons in prisons. There may be some case for extending these provisions to police stations, except that, according to the regulations, persons are only kept at such places for a short period and that in a busy police station supervision by a Justice would become a full time occupation.

175. In view of the fact that, according to the legislation of different countries, inspection and supervision of places of custody is exercised by different authorities, it is suggested by the Ukrainian SSR to replace the words "judicial authorities" by the words "competent authorities".

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