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STUDY OF THE RIGHT OF EVERYONE TO BE FREE FROM ARBITRARY ARREST, DETENTION AND EXILE

Report of the Committee

Chairman-Rapporteur: Mr. Francisco A. Delgado (Philippines)

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ANNEXES

INTRODUCTION

A. Terms of reference

1. This study on the right of everyone to be free from arbitrary arrest, detention and exile has been prepared pursuant to resolution II of the twelfth session of the Commission on Human Rights and resolution 624 B (XXII) of the Economic and Social Council.

2. Recognizing that studies of specific rights or groups of rights "are necessary for the purpose of ascertaining the existing conditions, the results obtained and the difficulties encountered in the work of States Members of the United Nations and of the specialized agencies for the wider observance of, and respect for, human rights and fundamental freedoms", the Commission in resolution II of its twelfth session decided to undertake such studies and "to stress in these studies general developments, progress achieved and measures taken to safeguard human liberty, with such recommendations of an objective and general character as may be necessary". The Commission further decided "to select, subject to the approval of the Economic and Social Council, as its first subject for study, the right of everyone to be free from arbitrary arrest, detention and exile". Subsequently, the Council in resolution 624 B (XXII) approved the first subject for special study as selected by the Commission.

B. Composition of the Committee

3. The Commission decided to appoint a committee of four of its members to prepare the study, it being agreed that the members of the committee would be States represented on the Commission, not individuals. At its twelfth session the Commission elected Chile, Norway, Pakistan and the Philippines as members of the Committee.[1/] At its thirteenth session (1957) the Commission elected Argentina and Ceylon to replace Chile and Pakistan, which had ceased to be members of the Committee on the expiry of their terms of office on the Commission.[2/] In 1959 the

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1/ Official Records of the Economic and Social Council, Twenty-second session, Supplement No. 3, paragraph 82.

2/ Ibid., Twenty-fourth session, Supplement No. 8, paragraph 121.

Commission similarly elected Belgium to replace Norway, and in 1960 it elected Pakistan to replace Ceylon.[1/]

4. After its appointment the Committee elected Mr. Felixberto M. Serrano of the Philippines as its Chairman-Rapporteur. In 1958 the Committee elected Mr. Francisco A. Delgado, who had succeeded Mr. Serrano as the representative of the Philippines on the Commission on Human Rights, as its Chairman-Rapporteur. Mr. John P. Humphrey, Director of the Division of Human Rights, represented the Secretary-General, and Mr. M. Tardu acted as secretary of the Committee.

5. The Committee met in fifteen formal meetings; at other times the members of the Committee held informal consultations. The Committee submitted a preliminary report to the thirteenth session of the Commission and progress reports to the fourteenth, fifteenth and sixteenth sessions. These reports, of which the Commission took note after brief discussions, are contained in documents E/CN.4/739, 763, 779 and Add.1, and 799.

C. Co-operation of specialized agencies

6. By resolution 624 B (XXII) the Council requested the specialized agencies to co-operate in carrying out the study. Accordingly, the Committee invited the ILO, UNESCO and WHO to submit suggestions or information relating to the study.

7. The Director-General of the International Labour Office, by letter of 11 October 1956, recalled that the Governing Body of the ILO had noted with satisfaction the selection of the subject for study which it felt would complement in a most useful manner the work of the ILO in connexion with freedom of association and forced labour.[2/] Subsequently, a representative of the organization attended several meetings of the Committee and submitted information on matters within the competence of his organization.[3/]

1/ Official Records of the Economic and Social Council, Twenty-sixth session, Supplement No. 8, paragraph 166 and Thirtieth session, Supplement No. 8, paragraph 33; see annex I for the representation on the Committee.

2/ Governing Body of the ILO, 132nd session (May-June 1956); document E/2908.

3/ See annex II for representation of the ILO at the meetings of the Committee and annex V for the principal statement made by a representative of the organization.

8. The Director-General of UNESCO, by letter of 17 October 1956, informed the Committee that the subject matter of the study was not within the scope of the UNESCO programme and that he was thus unable to make any contribution to the Committee's work; he assured the Committee of UNESCO's readiness, however, to supply any information on all questions within its competence.

9. The Director-General of the World Health Organization, by letter of 11 October 1956, informed the Committee that his organization was not competent to participate, since the subject of the study did not come within the constitutional responsibilities of the organization.

D. Consultation with non-governmental organizations

10. The Council also invited the co-operation of the non-governmental organizations in consultative relationship with it, and the Secretary-General, on behalf of the Committee, requested those organizations likely to be concerned with the study to submit information or suggestions.

11. Ten organizations in Category B and one organization on the Register submitted material to the Committee. Category B: Anti-Slavery Society; International Commission of Jurists; International Commission Against Concentration Camp Practices; International Committee of the Red Cross; International Criminal Police Organization; International Federation for the Rights of Man and Affiliates; International Federation of Women Lawyers; International League for the Rights of Man and Affiliates; International Society of Social Defence; and Pax Romana. Register: International Federation of Senior Police Officers.

12. Representatives of the Consultative Council of Jewish Organizations, the International League for the Rights of Man and the World Jewish Congress attended the fourth meeting of the Committee.[1/]

E. Source material

13. In resolution II of its twelfth session the Commission authorized the Committee to "prepare the study with such assistance from the Secretariat as it may require, utilizing published material and written statements necessary for the

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1/ See annex II for representatives of non-governmental organizations attending meetings of the Committee.

study, such material to be drawn from the following sources: (i) Governments of States Members of the United Nations and of the specialized agencies, (ii) the Secretary-General, (iii) specialized agencies, (iv) non-governmental organizations in consultative relationship, and (v) writings of recognized scholars and scientists".

14. Material from Governments was available in two sources: first, the statements submitted by fifty-six Governments,[1] under resolution I on the Yearbook on Human Rights adopted by the Commission at its eleventh session, concerning "the application and, so far as necessary, the evolution of the right" of everyone to be free from arbitrary arrest, detention and exile; second, the triennial reports submitted by Governments, under Council resolution 624 B (XXII), which contained a special section on the right under study.[2] The ILO drew the Committee's attention to documentation relating to forced labour and to trade union rights.[3] The Committee received information from the eleven non-governmental organizations mentioned in paragraph 11 above. The Committee also had recourse to official government publications and to published court decisions, where available.

15. The Committee has consulted the travaux préparatoires on the Universal Declaration of Human Rights and the draft international covenants on human rights; reports of the seminars held under the advisory services programme in human rights in the Philippines, Chile, Japan and Austria on the protection of human rights in criminal law or procedure; the work of the social defence programme of the Social Commission and the Standard Minimum Rules for the Treatment of Prisoners adopted in 1955. The Committee has also had the benefit of having before it the conclusions of the meeting of technical organizations on treatment of witnesses and accused persons submitted to the Assembly of the League of Nations in 1939, and of the work undertaken by regional inter-governmental organizations, such as the Organization of American States and the Council of Europe.

1/ See annex III for the list of fifty-six Governments. The statements have been published as the first supplementary volume of the Yearbook on Human Rights under the title Freedom from Arbitrary Arrest, Detention and Exile (United Nations, New York, 1959).

2/ See annex III for the list of the governments submitting such information.

3/ See annex V.

F. Country monographs

16. The Committee has endeavoured to conduct the study in accordance with its terms of reference. To that end it has collected information relating to the laws and practices concerning arrest, detention and exile in as many countries as possible and has prepared a monograph on each country. The Committee decided that, as a matter of principle, it would not make use in its study of any information or material on which the government concerned had not had an opportunity to comment. It therefore forwarded the drafts of the country monographs to the governments concerned for checking, verification and comment and revised them in the light of the observations received. Where no observations were received, the Committee decided reluctantly to issue the monographs with an appropriate note indicating that the text had been forwarded to the governments concerned. A list of the country monographs issued in the form of conference room papers appears in annex IV. The Committee regrets that it was unable to prepare monographs in respect of a few countries, since it was not able to procure the information required.

17. The Committee wishes to point out that wherever in the present report it gives references to individual countries or legal systems, these references are made by way of examples and are not intended to be exhaustive.

G. Arrest, detention, exile

18. As the Committee informed the Commission in its progress report, it has not dealt with the question of deprivation of liberty by virtue of a final court sentence in criminal proceedings. The study concentrates largely on procedural laws governing deprivation of liberty prior to, or otherwise than by, such a court sentence. In respect of exile, however, substantive law has of necessity been referred to. The Committee had also informed the Commission in its progress report that for working purposes it had adopted certain tentative descriptions of "arrest", "detention" and "exile". The Committee has not found it necessary to modify these tentative descriptions in any substantial manner.

19. For the purpose of the study the words "arrest" and "detention" will be given their primary functional definitions. "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 a competent authority (usually judicial) 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 or social activities.

20. The term "exile" encompasses: (a) the expulsion or exclusion of a person from the country of which he is a national and (b) the banishment of a person within the country by way of forceable removal from the place of his habitual residence.

H. The meaning of "arbitrary"

21. At the twelfth session of the Commission on Human Rights, when it decided to proceed with the present study, a suggestion was made that the word "arbitrary" for the purpose of the study, should be understood to mean arrest or detention either:

> "(a) on grounds or in accordance with procedures other than those established by law, or
>
> "(b) under the provisions of a law the basic purpose of which is incompatible with respect for the right to liberty and security of person."

The Commission did not discuss the question; however, the view was expressed that one of the results of the study would be to define the term "arbitrary".

22. In attempting to understand the term "arbitrary", the Committee has examined the travaux préparatoires on article 9 of the Universal Declaration of Human Rights, as well as article 9 of the draft covenant on civil and political rights. At the third session of the General Assembly, the Third Committee considered the text of the present article 9 of the Declaration, as formulated by the Commission on Human Rights, which read: "No one shall be subjected to arbitrary arrest or detention". There were, broadly speaking, two views regarding the meaning of the word "arbitrary". One view was that "arbitrary" was open to subjective interpretation and should be substituted by "except in the cases or according to the procedures prescribed by prior legislation". The other view was that "arbitrary" was a key word in the article and that an arrest or detention, which might be perfectly legal, could nevertheless be arbitrary.

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23. The first paragraph of article 9 of the draft covenant on civil and political rights, as prepared by the Commission on Human Rights, read as follows:

> "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law."

During the discussion on this article, the view was expressed that the term "arbitrary" meant "illegal" or "unjust" or "both illegal and unjust". The Commission, however, did not favour a suggestion formally to record this view.[1/] When this paragraph was discussed by the Third Committee of the General Assembly at its thirteenth session, views were expressed to the effect that an arrest or detention was arbitrary if it was carried out "without any legal grounds" or "contrary to law" or pursuant to a law which was in itself "unjust", or "incompatible with the dignity of the human person", or "incompatible with the respect for the right to liberty and security of person".[2/]

24. The Committee has also examined the reports of the United Nations seminars in Baguio City, the Philippines, and in Santiago, Chile, on the protection of human rights in criminal law and procedure. At the Philippine seminar, "arbitrary arrest" was defined as an "arrest authorized by a law which fails adequately to protect human rights because either (a) the legal right to arrest has been too widely defined, or (b) the means, circumstances or physical force attendant on the arrest exceed the reasonable requirements of effecting arrest".[3/] The report of the seminar further states that:

> "Members of the seminar thus recognized the possibility of a legal but arbitrary arrest. They agreed, however, that differing social, economic and political circumstances in the countries represented at the seminar might give a differing meaning to this concept. Thus the concept 'arbitrary arrest' may very well differ from country to country. Nevertheless, members agreed that it could be used in an endeavour to evaluate the existing law and practice of arrest from the standpoint of human rights." [4/]

1/ E/CN.4/SR.47, paragraph 43.

2/ Official Records, General Assembly, Thirteenth Session, agenda item 32, annexes, A/4045, paragraphs 43-49.

3/ Report of the Seminar on the Protection of Human Rights in Criminal Law and Procedure, held at Baguio City, the Philippines, 17-28 February 1958, ST/TAA/HR/2, para. 22; hereinafter referred to as the Baguio Seminar.

4/ Baguio Seminar Report, ST/TAA/HR/2, para. 23.

At the seminar held in Chile, three different definitions of the term "arbitrary" were put forward:

"(a) action under a positive law which does not duly protect human rights;

"(b) improper application of a law; and

"(c) 'arbitrary' in the sense of 'illegal', although it implied something that was done capriciously or that depended on the will alone." 1/

The report of the seminar goes on to state:

> "Although the majority of the participants were inclined to adopt the broad formula which came out of the Philippines seminar ... and which embraced the first two positions described above, the present seminar preferred not to adopt a single definition but stressed the fact that, from the point of view of protection of human rights, the first position might be adequate." 2/

25. In the light of the travaux préparatoires on article 9 of the Universal Declaration and article 9 of the draft covenant on civil and political rights and in the light of the discussions on the term "arbitrary" at the Baguio City and Santiago seminars, the Committee has come to the opinion that "arbitrary" is not synonomous with "illegal" and that the former signifies more than the latter. It seems clear that, while an illegal arrest or detention is almost always arbitrary, an arrest or detention which is in accordance with law may nevertheless be arbitrary. The Committee, therefore, basing its decision upon the definition of the term "arbitrary" as presented to the twelfth session of the Commission (see paragraph 21 above), has adopted the following definition: an arrest or detention is arbitrary if it is (a) on grounds or in accordance with procedures other than those established by law, or (b) under the provisions of a law the purpose of which is incompatible with respect for the right to liberty and security of person.

26. This definition, in the view of the Committee, is corroborated by article 29 (2) of the Universal Declaration, which reads:

1/ Report of the Seminar on the Protection of Human Rights in Criminal Law and Procedure, held at Santiago, Chile, 19-30 May 1958, ST/TAA/HR/3, para. 70; hereinafter referred to as the Santiago Seminar Report.

2/ Santiago Seminar Report, ST/TAA/HR/3, para. 71.

> "In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."

Under this paragraph, the right to liberty and security of person, just as other human rights, is "subject only to such limitations as are determined by law". Furthermore, the law itself shall be "solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society". Any law or arrest or detention which is contrary to this purpose must be considered objectionable from the point of view of article 29 (2) as well as article 9 of the Universal Declaration.

27. Since the Committee is an international body, it follows that its approach to the subject under study is necessarily different from that of a judge in a national court. Apart from cases where he has the right to examine the constitutionality of legislation, a judge is bound by any law duly enacted and promulgated, whatever its substance and purpose, and whether or not it might be considered as "arbitrary". In making the present study, the Committee has recourse to other criteria. These are to be found in the Universal Declaration and in other relevant international instruments.

28. In this study, the Committee does not pass any judgement on the laws and practices of any particular country. As stated in its preliminary report (E/CN.4/739), the Committee will "describe the rules and practices under different legal systems in respect of arrest, detention and exile, to the end that nations may share experiences and may work individually or jointly toward the achievement of the common standards set forth in the Universal Declaration of Human Rights. The Committee will conduct the study as objectively as possible and will approach all legal systems with a view to understanding the outstanding features of each and any notable differences among them. The Committee will be particularly interested in such rules and practices as contribute significantly to the protection and enhancement of the dignity, liberty and security of the human person."

I. Outline of the study

29. The present study follows generally the outline which the Committee presented to the Commission at its fourteenth session (E/CN.4/763). Part I of the study

deals with fundamental or constitutional principles relating to arrest, detention and exile, independence of the judiciary and emergency and exceptional measures. Part II covers the procedures under which a person suspected or accused of a criminal offence may be arrested or detained, the rights and privileges of a person under arrest or detention, and remedies and sanctions against arbitrary or wrongful arrest or detention. Part III discusses briefly certain categories of civil and administrative detention. Part IV is devoted to the question of exile and banishment. As instructed by the Commission, the Committee also makes conclusions and recommendations of a general and objective character.

J. Adoption of the report

30. The draft of the present report was considered by the Committee in first reading at its seventh to twelfth meetings on 9, 11, 28 July and 1, 10, 24 August 1960. The present text was approved by the Committee in second reading at its thirteenth, fourteenth and fifteenth meetings on 27-29 December 1960.

31. The Committee is keenly aware of the fact that the subject under study is vast in scope and highly technical in character and that no study of this kind can be free from errors of fact or interpretation. The Committee is sure that in considering the study the members of the Commission will present useful comments and suggestions. The Committee will be happy to revise the study in light of the members' comments and suggestions.

PART I

FUNDAMENTAL PRINCIPLES

A. FUNDAMENTAL LAWS

32. In many countries a distinction is made between constitutional or fundamental laws, on the one hand, and ordinary or other law, on the other. The importance of this distinction for this study derives from the fact that the constitutional instruments often set forth rights, procedures and remedies relating to arrest, detention and exile. In most systems the constitutional instruments are supreme. Often their provisions can be amended only by a method different from, and more cumbersome than, that whereby ordinary laws can be enacted or repealed. In many countries, the ordinary courts or special judicial or quasi-judicial bodies are charged with the task of ensuring that ordinary legislation conforms with the fundamental law. The fact, however, that a country does not have a written constitution, that its legislature is supreme, that its constitution is "flexible" and can be amended by ordinary legislation, or that its constitution does not contain provisions regulating arrest, detention and exile, does, of course, not mean that protection against arbitrary arrest, detention or exile is not there guaranteed.

33. In such countries, such protection is guaranteed by statutory or customary law or by judicial decisions which apply and often develop the law. In some countries, moreover, constitutional practices which are sometimes called "conventions of the constitution" and which are based upon long usage, tradition and popular support afford that protection which in other countries is given by "rigid" constitutions.

1. Types of fundamental provisions on arbitrary arrest, detention and exile

34. In some systems the fundamental law contains provisions on arrest, detention, or exile, which are no more than proclamations of ideals, statements of general principles, or exhortations. In these systems the powers of the legislature are hardly limited, or not limited at all. Such provisions are nevertheless not

devoid of value since they enunciate public policy and serve, if not as limitations upon, then as guides to, the legislature and also to the judiciary and to the executive.

35. The right to liberty of the person is often recognized in the fundamental law in such phrases as that personal liberty is inviolable or that individual liberty is guaranteed.[1/] Such recognition is often followed by provisions which in one form or another express the idea formulated in the last sentence of paragraph 1 of article 9 of the draft covenant on civil and political rights, as adopted by the Third Committee of the General Assembly, that no one shall "be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law".[2/] A recent constitution provides that no one may be arbitrarily detained, and that the judicial authority shall ensure respect for this principle under the conditions stipulated by law.[3/] Some constitutions contain general limitation clauses which qualify the power of the legislature to enact limitations on personal liberty. An example is a provision to the effect that respect for the rights and freedoms of others and the requirements of public order and the general welfare alone justify limitations upon the guaranteed rights.[4/] A provision that citizens may not be banished within and without the State save as provided by law[5/] affords protection against the executive and the judiciary, but not against the legislature.

36. The fundamental laws of many countries go beyond this and contain provisions for specific rights, procedures and remedies on the lines of those specified

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1/ Belgium, Czechoslovakia, Denmark, Greece, Italy, USSR, Yugoslavia, Federal Republic of Germany, Republic of Korea. References to countries throughout this report are made by way as examples; they are not intended to be exhaustive. See paragraph 17.

2/ Belgium, Brazil, Cambodia, Chile, China, Czechoslovakia, Denmark, Finland, Haiti, Iraq, Italy, Japan, Jordan, Lebanon, Liberia, Luxembourg, Netherlands, Nicaragua, Norway, Poland, Romania, Turkey, United Arab Republic (Egyptian region), Federal Republic of Germany, Republic of Korea.

3/ France.

4/ Ethiopia.

5/ Albania, Ethiopia (Eritrea).

in article 9, paragraphs 2 to 5 of the draft covenant on civil and political rights. Some of these constitutional provisions are subject to further regulation by statute. In many cases they are intended to be directly applicable and enforceable and to prohibit or limit the enactment of limitations of rights which are incompatible with them. Thus, one constitution provides that constitutionally and legally permissible restrictions on personal freedom must be applicable generally and not solely in individual cases,[1/] while another stipulates that no citizen shall be deprived of his liberty because of his political or religious convictions or because of his descent.[2/] Many constitutions contain provisions relating to the procedure applicable to arrest under a warrant or without warrant. One constitution provides that except when an offender is apprehended in flagrante delicto, no one can be arrested without a warrant which must be issued by a judge, state the reason for the arrest, and be produced at the time of arrest or not more than twenty-four hours thereafter.[3/] Often constitutional provisions require an arrested person to be brought before the competent authority, usually a judge, within a certain time limit. For example, it may be provided that detention is legal only if there is an order from a judicial authority accompanied by a statement of reasons; the qualification is added, however, that in exceptional cases of necessity and urgency positively indicated by law, public security authorities may take provisional measures; these must be communicated to a judicial authority within forty-eight hours; if they are not validated by the judicial authority within the next forty-eight hours, they must be rescinded and are null and void.[4/] In another system, it is provided that no one may be detained for more than three days except by decision of a court or by the authorization of a public prosecutor.[5/] Another constitution provides that no one may be arrested or detained unless he is at once informed of the charge against him. It also guarantees the right to require that the cause for detention be shown in open court.[6/] Constitutional provisions that all

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1/ Federal Republic of Germany.

2/ Denmark.

3/ Belgium.

4/ Italy.

5/ Albania.

6/ Japan.

prisoners are bailable by sufficient sureties unless apprehended for capital offences when the proof is evident or presumption is great belong in the same category. Other examples are provisions prohibiting the requirement of excessive bail.[1/]

37. Often specific provisions relating to the defence and treatment of persons under arrest or detention are contained in constitutions. Examples are provisions that the right of defence at every stage and level of proceedings is inviolable;[2/] that the right to have the prompt assistance of counsel shall be guaranteed;[3/] that it is unlawful to hold an accused incommunicado;[4/] that detained persons may not be subjected either to mental or physical ill-treatment;[5/] that any statement obtained by means of force is null and void.[6/]

38. The writ of habeas corpus, the remedy of amparo and similar remedies as well as rights of appeal are often provided for in the constitution. One constitution contains detailed provisions on such remedies, viz. that upon complaint being made by or on behalf of any person to the High Court or any judge thereof alleging that such person is being unlawfully detained, the High Court and any and every judge thereof to whom such complaint is made shall forthwith inquire into the said complaint and may order the person in whose custody such person is detained to produce the body of the person before the court on a named day and to certify in writing the grounds of his detention. That constitution further provides that the High Court shall, upon the detained person being produced and after giving the person in whose custody he is detained an opportunity of justifying the detention, order the release of such detained person from such detention unless satisfied that he is being detained in accordance with the law. It goes on to say that, if the Court is satisfied that the person is being detained in accordance with the law but that such law is unconstitutional, the High Court shall refer the question of the validity of the law to the Supreme Court by way of case stated and may, at the time of such reference or at any time thereafter, free the person on such bail and subject to such conditions as the High Court

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1/ Liberia.

2/ Italy.

3/ Republic of Korea.

4/ Mexico.

5/ Federal Republic of Germany.

6/ Costa Rica.

shall fix until the Supreme Court has decided the question.[1] Another constitution stipulates that a judgement rendered by a judge before whom an arrested person is brought may at once be appealed to a higher court of justice.[2] Some constitutions contain provisions which prohibit the removal of a person against his will from the jurisdiction of the judge to whom the law assigns him.[3]

39. Some constitutions make officials responsible for their acts or grant the right to compensation for damage suffered through illegal action. One constitution provides that any public officer who violates the liberty of another person shall be criminally and civilly liable, besides being subject to disciplinary action; it also says that the injured person may apply to the State for compensation for injuries sustained.[4] One constitution provides that in case of manifest violation of a constitutional provision to the detriment of any person, the order of a superior shall not exempt the agent who executed it from responsibility.[5] Another fundamental law stipulates that each deprivation of liberty illegally ordered or prolonged creates the obligation of the State to compensate the injured person.[6] One constitution goes into great detail by providing that those in charge of prisons must not receive therein anyone as an arrested, indicted or imprisoned person without transcribing in their registers the detention order issued by a legal authority, and that while they may receive within the precincts of the prison for detention those brought for the purpose of being presented before the proper judge, they are under an obligation to render an account to the latter within twenty-four hours.[7]

40. Some constitutional provisions specifically prohibit the exiling of nationals.[8] Others expressly enumerate the cases in which arrest or detention must not be ordered, whether in reference to criminal or non-criminal matters.

1/ Ireland.

2/ Denmark.

3/ Argentina, Belgium, Ecuador, Luxembourg.

4/ China.

5/ Colombia.

6/ Austria.

7/ Chile.

8/ Colombia, Federation of Malaya, Guatemala, Jordan, United Arab Republic (Egyptian region).

Thus, it is provided that no person may be taken into custody for an offence which is punishable merely by fine or (light) imprisonment[1] (as distinct from more severe penalties). Provisions against imprisonment for debts are common.[2] One constitution provides that for minor offences or for (mere) infractions of regulations, persons whose identity and trustworthiness can be established by means of documents or through the testimony of persons of known standing must not be detained. In such cases, the authority involved can only inform the appropriate judge of the act committed and warn the offender to appear before the court within the following forty-eight hours. Persons who are unable to identify themselves may be placed at the disposal of the appropriate judge for judgement within one business hour after the warrant of the arrest. This constitution even defines the term "business hours": it provides that the hours of 8 a.m. to 6 p.m. are to be considered as business hours and that every day in the year is a business day.[3]

41. In some constitutions there are provisions which refer to various criteria such as "necessity", "reasonableness" or "due process of law". These have been interpreted as laying down standards relating to arrest, detention or exile which go beyond any specific provisions contained in the fundamental law. Such provisions may require the application of what is called the "principles of natural justice".[4]

42. Many constitutions include provisions relating to the independence of the judiciary, which plays a vital role in matters related to arrest and detention. Some constitutions contain detailed provisions concerning the appointment, tenure of office, removability, remuneration, etc., of the members of the judiciary, at least of the highest or higher courts (see further part I, B).

43. Reference has already been made to the fact that the protection of individual rights set forth in a constitution is dependent, among other things, on the status of the constitutional instrument in the "hierarchy" of provisions, or

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1/ Denmark, Iceland.

2/ Brazil, Costa Rica, Ecuador, Philippines.

3/ Guatemala.

4/ Philippines, United States of America.

"norms" of a given legal system. In general, amendments of fundamental laws are possible but usually (i.e., in the cases of so-called "rigid" constitutions) a procedure different from that by which ordinary laws are enacted or repealed. Even when under a "rigid" constitution the legislature has the authority to amend or to repeal a constitutional law, a qualified vote within the legislature, or a special procedure, or, in addition, a referendum or plebiscite, or the consent of legislatures or conventions of constituent States of a federal State, or action by extraneous authorities, may be required. In a number of countries, amendments to the constitutions can be enacted by the legislature with a special qualified vote.1/ In others, changes of the constitution require approval at successive sessions of the legislature, normally after new elections.2/ Some countries provide that an amendment may be adopted by the legislature subject to ratification by special conventions.3/ Others require such amendments to be ratified by referendum.4/ In federal States the assent of federal units is usually required.5/

44. The effectiveness of the supremacy over ordinary legislation of the fundamental law on arrest, detention or exile depends upon the manner in which conformity to it of other laws, and of acts by the various branches of government is safeguarded. The executive and administrative branches of government have to act in conformity with both the fundamental law and other laws. Subject to their right to review the constitutionality of ordinary legislation, which is vested in them in some systems, the same applies also to the courts. In general, the right of the individual to appeal to the higher courts or to other competent authorities of the State against decisions of lower courts and acts of executive and administrative authorities is part of the normal administration of justice and the laws. Usually the proper exercise of discretionary powers of arrest, detention or exile by the executive or the administration is also, at least in normal times, subject to control by the courts. Fundamental law, however,

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1/ Bulgaria, Chile, Czechoslovakia, Hungary, Poland, Romania, Turkey, Union of South Africa, USSR, Yugoslavia.

2/ Belgium, Bolivia, Brazil, Colombia, Ecuador, Finland, Greece, Luxembourg, Netherlands, Nicaragua, Norway, Sweden.

3/ Dominican Republic, Guatemala, Paraguay.

4/ Austria, Denmark, France, Haiti, Italy, Japan, Portugal, Uruguay, Switzerland.

5/ India, Mexico, United States of America, Venezuela.

gains in effectiveness and occupies a place of supremacy over other laws if, and to the extent to which, it also binds the legislative branch of the government.

45. The power to decide whether ordinary law is in conformity with the fundamental law may be vested in the judiciary, the legislature, a combination of the two, or in a special authority. In the paragraphs that follow the Committee proposes to give illustrative examples of the systems which are in force in various countries of the world.

46. In many countries this power belongs to the courts.[1/] Such power may be conferred by a specific provision in the fundamental law itself,[2/] or by virtue of other laws,[3/] or as a result of custom or interpretation of the fundamental law or through theories resting on the separation of powers of different branches of government.[4/] If, as is the case in many countries, definite standards and rights are set out in the fundamental law which must not be infringed or limited by ordinary law, they form rules which the court or other authorities vested with this right will enforce against ordinary laws that are repugnant to them. In other countries the power of judicial review may be enlarged if criteria of necessity, reasonableness or due process of law exist, so that a court may, even in the absence of definite standards in the fundamental law, give its opinion as to whether a particular legislation conforms to the various tests.

47. In some countries the power to review the constitutionality of legislation is vested in special "Constitutional Courts".[5/] In some the power is exercised by the Supreme Court or the highest courts.[6/] In others the power is available to all courts with the highest court as the final appellate court.[7/] In most

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1/ Argentina, Austria, Bolivia, Brazil, Burma, Chile, Colombia, Costa Rica, Denmark, El Salvador, Federation of Malaya, Greece, Guatemala, Haiti, Honduras, Iceland, India, Ireland, Japan, Jordan, Libya, Mexico, Nicaragua, Norway, Panama, Paraguay, Philippines, Portugal, United States of America, Uruguay, Venezuela, Federal Republic of Germany.

2/ Austria, Costa Rica, Greece, Ireland, Italy, Japan, Federal Republic of Germany.

3/ Jordan.

4/ Argentina, Denmark, Iceland, Norway, United States of America.

5/ Austria, Italy, Federal Republic of Germany.

6/ Burma, Chile, Federation of Malaya, Haiti, India, Ireland, Japan, Jordan, Panama, Uruguay.

7/ Argentina, Bolivia, Brazil, Colombia, Costa Rica, Denmark, El Salvador, Guatemala, Honduras, Iceland, Mexico, Nicaragua, Norway, Paraguay, Portugal, United States of America, Venezuela.

cases it is necessary to assert an actual or alleged violation of the fundamental law and a legal interest therein. In some, even an individual or a group, none of whom may have been adversely affected by the specific law, may bring suit, such as acción pública and acción popular.[1] (actio popularis). In some, other authorities, such as a branch of the legislature of federal units, may have recourse to judicial proceedings.[2] The effect of a judicial determination may be to repeal the law, to hold it invalid, to determine the issue before the court without affecting the law, or to give other relief to the parties concerned. A special majority may be required for the decision, such as that eleven out of the fourteen judges of the Supreme Court must participate in the case and the judgement must have the support of a majority of eight,[3] or that in case of a tie vote, the law concerned cannot be declared invalid.[4] In some countries the judgement may be pronounced by a single judge only.[5]

48. One constitution provides that where a judgement by the Supreme Court involves the constitutionality of a law the court is to refer it to a constitution committee whose decision is binding on the court. The committee consists of the Vice-President of the Republic as Chairman, five justices of the Supreme Court, three members of the House of Representatives, two of the House of Councillors. A two-thirds majority vote of the committee is required to hold a law unconstitutional.[6]

49. In another country a special judicial Yuan has power to interpret the constitution and to ensure that other laws are in conformity with it. The body consists of high ranking, judicial officers recommended by the President and appointed with the consent of a Control Yuan.[7]

50. In other States the courts have no right to determine such matters either directly or indirectly. In some of these States such determination is left to

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1/ Haiti, Venezuela.

2/ Austria, Italy, Federal Republic of Germany.

3/ Japan.

4/ Federal Republic of Germany.

5/ Burma, Ireland.

6/ Republic of Korea.

7/ China.

the legislature.[1] In some, legislation cannot be questioned but its interpretation in relation to the fundamental law may be vested in a body elected by the legislature.[2] In many countries the question of constitutionality is determined by various procedures applicable before the promulgation of the law, as described hereafter.

51. Although generally control over ordinary law comes only after the law has been promulgated and in most cases where an injury is alleged, in a number of countries provision is made for an advance determination of the constitutionality of a law. Such determination has usually an advisory character only; it is assumed, however, that the advice is accepted in most cases. In some systems the advice or opinion of the judiciary, usually of the highest court, may be sought before the law is promulgated.[3] Thus, one constitution provides that where the President of the legislature is doubtful about the constitutionality of a Bill he can send the proposal to the law office of the legislature and consult the House Management Committee and if this body finds the proposal unconstitutional the President will not accept it.[4] In one country the legislature can obtain the opinion of the Supreme Court on legal questions.[5] In another, the President after consulting the Council of State can send a bill passed by the legislature to the Supreme Court for decision as to its constitutionality and if the court finds it unconstitutional the President refrains from sanctioning it; if the court pronounces the bill constitutional the question of its constitutionality cannot be raised again.[6]

52. Advance determination may also be sought from administrative courts and from legislative or special committees or distinct organs. Thus, under one system every proposed enactment is sent to the Conseil d'Etat for its opinion. The Conseil d'Etat may suggest amendments and revised drafts, but its opinion

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1/ Belgium, Netherlands, Peru, Turkey.

2/ Albania, Bulgaria, Czechoslovakia, USSR, Yugoslavia.

3/ Colombia, Costa Rica, Ecuador, El Salvador, Honduras, India, Japan, Libya, Nicaragua, Norway, Panama.

4/ Japan.

5/ Norway.

6/ Ireland.

is only advisory.[1] Another system provides that a constitution committee may be consulted at the request of the Assembly or a committee, and that every committee is obliged to consider first whether the draft law is constitutional.[2] In some countries it appears that the presiding officer of the legislature may decide without appeal that a proposal which is contrary to the constitution is out of order and is not to be decided or voted upon.[3] In some, the decision of the presiding officer may be subject to appeal to a special body, sometimes composed of members of the legislature.[4] There are also systems for various forms of executive veto of legislation which may be based upon principles derived from the fundamental law. In some countries the Assembly or legislature decides for itself.[5] In one country it is provided that if the President (head of State) and the legislature disagree as to the constitutionality of a legislative act it is submitted to the Supreme Court.[6]

53. A recent constitution provides for a Constitutional Council, three of whose members are appointed by the President of the Republic and three for each of the legislative bodies by their Presidents. The ex-presidents of the Republic are also members of this Council. Council members cannot be members of the legislature or of the ministry. All organic laws are submitted to the Council for determination of their constitutionality before promulgation. Ordinary laws may be submitted to the Council for a similar determination by the President of the Republic or the President of either house of the Assembly. The Council must rule within one month and upon the request of the Government in emergency cases within eight days. A provision declared unconstitutional by the Council cannot be promulgated or implemented. There is no appeal from the decision of the Council to any jurisdiction whatsoever and the decision must be recognized by governmental authorities.[7]

1/ Luxembourg.

2/ Turkey.

3/ Denmark, Iceland, India.

4/ Finland, Sweden.

5/ Belgium, Netherlands.

6/ Ecuador.

7/ France.

2. Concluding remarks

54. An attempt has been made in the preceding paragraphs to show that most countries acknowledge and recognize a difference between the fundamental law and other laws; that many countries incorporate in their fundamental laws specific guarantees and remedies on matters pertaining to arrest, detention or exile; that many also provide for means to avoid or to control transgressions by the other laws of the fundamental law; that other elements, such as custom, tradition and public opinion are equally important in sustaining fundamental law, and in some countries, such elements combine to accord to the ordinary legislation and judicial practice on arrest, detention or exile a place usually accorded elsewhere to the fundamental law.

55. Although the Committee has no reason to doubt that the enjoyment of the right to be free from arbitrary arrest, detention or exile can be properly safeguarded by the ordinary law, it wishes to emphasize that in most countries the fundamental law is set forth in constitutions. Where this is the case the Committee considers it a desirable safeguard against arbitrary action that the indispensable rights, procedures and remedies pertaining to arrest, detention and exile be entrenched in constitutional provisions which cannot be abolished by the normal legislative process. The Committee is fortified in expressing this view by the efforts of the United Nations, and also of inter-governmental regional organizations, to lay down in international conventions certain basic rights and freedoms which are not subject to restrictions or other alterations by national legislation.

56. The Santiago Seminar agreed that "in view of their intrinsic importance and in order to secure their observance by national legislations and to ensure their precedence over domestic laws, the principles proclaimed in the Universal Declaration of Human Rights concerning the protection of the individual in the field of criminal law and procedure should be embodied as fundamental guarantees in the political constitution of States".[1/]

57. The Committee considers it important that provisions of the fundamental law which afford protection against arbitrary arrest, detention and exile, should not be alterable by the ordinary procedure of the enactment of laws. It would contribute to an effective protection of the right under study if either

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1/ Santiago Seminar Report, ST/TAA/HR/3, para. 155.

the head of State or the presiding officer of the legislature were under a duty to draw the attention of the legislature to the fact that a proposal before it is in his opinion contrary to the pertinent provisions of the fundamental law. In case of disagreement the matter would be referable to a court or to another organ which is permanent and sufficiently independent.

58. The Committee does not feel that it is called upon to express an opinion on the desirability, or otherwise, of institutions which have jurisdiction to determine whether an enactment duly passed and promulgated is in conformity with the fundamental law regulating arrest, detention and exile. While, as stated above, such institutions exist in an increasing number of countries, in others it is felt that determination of this question by the legislature itself is as effective as, and more desirable than, subsequent judicial review or review by a special organ. In another group of countries, the principle of the sovereignty of the legislature is maintained and it is held that this principle would be infringed if the validity of enactments could be called into question by some other authority. Whatever the national attitude to this problem may be, it cannot be doubted that in matters of arrest and detention in particular the judiciary plays a central role.

B. INDEPENDENCE OF THE JUDICIARY

59. Of all branches of government the judiciary is probably vested with the greatest responsibility in matters affecting liberty and security of person. Generally speaking, it is the judge who issues the warrant of arrest and the order of detention. When a person is arrested by a police officer or private person, as a rule it is the judge who decides whether the person should be placed under detention. Furthermore, if a person is arbitrarily arrested or detained, whether by a police officer or private person or by order of a judge, any remedial measures against such arbitrary action must be decided by a competent court.

60. The special position of the judiciary in relation to human rights is clearly recognized in the Universal Declaration of Human Rights, which provides in article 8 that "everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law", and in article 10 that "every is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."

61. It is universally recognized that one of the best guarantees against arbitrary deprivation of personal liberty is the existence of an independent judiciary. In its progress report (E/CN.4/763) the Committee stated that it would collect information on the "principles safeguarding the independence of the judiciary" although it did not "intend to deal in detail with provisions relating to the selection, the appointment and the tenure of judges in various countries".

62. The Committee notes that in the constitutions or basic laws of practically all countries there are provisions which are designed to ensure that the judiciary is free from political pressure or influence and that the judge is competent and independent. In many constitutions or basic laws it is provided that the judiciary shall be independent in the exercise of its functions or that it shall be separated from the administration at all levels. It is sometimes stipulated that neither the executive nor the legislature may exercise any judicial function, or intervene in any judicial proceedings. Some constitutions[1/] prohibit the establishment of any extraordinary commissions or tribunals of a temporary nature, outside the framework of the judiciary, to try any particular cases or persons. It is a general principle that decisions of the supreme court are final and that decisions of a lower court may not be altered except by a higher competent court.

63. There are various methods by which judges are selected: they may be appointed or elected, or they may be recruited by competitive examination. In many countries judges are appointed by the executive.[2/] They may be appointed by the executive with the advice and consent of the legislative body or of one of its chambers,[3/] or upon the nomination or with the advice or approval of a judicial body (the supreme court or a superior judicial council).[4/] Sometimes judges of the supreme court or of the higher or superior court are appointed by the executive, while judges of lower courts are appointed by the supreme court.[5/] In a number of

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1/ Belgium, Denmark, Finland, Peru, Portugal.

2/ Canada, Ceylon, Finland, Netherlands, New Zealand.

3/ Argentina, Burma, China (with the consent of the Control Yuan), India, Mexico, Panama, Philippines, United States of America.

4/ Austria, Belgium, Chile, Federation of Malaya, Iraq, Israel, Jordan, Lebanon, Republic of Korea.

5/ Finland, Guatemala, Ireland, Mexico, Panama, Paraguay.

countries[1] judges are elected by the people at large, or by the people's assembly, or by the legislative organ. In some other countries[2] the judiciary is a permanent career service. Entrance to that service is by competitive examination. Those who pass the examination are appointed judges of the junior grade. They are promoted upon the nomination of a superior judicial council or a judicial service commission.

64. The qualifications of judges vary from country to country. Generally speaking, under an appointive or elective system a candidate for a high judicial post must be a person of great legal experience, but a justice of the peace or a magistrate may be a person with little legal training. Where the judicial service is a career service, the judge of the lowest rank possesses at least a minimum of legal competence, while the judges of higher rank are usually persons of greater experience.

65. A judge who is elected usually serves a fixed term and may be reelected. A judge who is appointed may serve a fixed term or may have life tenure during good behaviour. In a career service a judge is assured of a permanent post; he may be promoted; in some countries he may not be transferred without his consent.[3]

66. As regards removal of judges, it may be said that removal at the discretion of the executive has become a thing of the past. The general trend is to develop procedures which make it difficult to remove judges. Such procedures vary from country to country, but they are usually invoked in cases of misconduct, incompetence or incapacity, or pursuant to a criminal or disciplinary action. Among various procedures a few may be noted. A judge of senior rank may be impeached by the legislature;[4] or he may be removed by the chief executive upon an address by the legislature.[5] In some countries a judge may be dismissed only

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1/ Albania, Bolivia, Bulgaria, Costa Rica, Czechoslovakia, Ecuador, Guatemala, USSR, Venezuela.

2/ Colombia, France.

3/ Belgium, Bolivia, Denmark, Guatemala, Italy, Luxembourg, Norway.

4/ Lebanon, Paraguay, Philippines, Republic of Korea.

5/ Canada, Ghana, Ireland, New Zealand, Union of South Africa, United Kingdom (England and Wales, Northern Ireland).

pursuant to a decision of a high court.[1] A judge who is elected may be recalled by the body who has elected him or may be removed pursuant to a decision of a court.[2] In some countries a judge may be removed by decision of a superior judicial council or a judicial service commission.[3]

67. As a rule,[4] judges may not engage in partisan political activities nor in the practice of law or commerce which are incompatible with judicial duties.

68. It would be beyond the scope of the present study to examine in any detail the provisions of different judicial systems. In the matter of arrest and detention, the Committee wishes to draw attention to the special role of the judge of the lower rank - the justice of the peace, the examining magistrate, the juge d'instruction. It is he who issues the warrant of arrest and the order of detention; it is he who decides whether a person arrested without warrant, or under instructions of a police chief, should be placed under custody, and whether a person kept under custody for an initial period of a few days should be kept for another period; it is he who decides whether an arrested or detained person should be provisionally released and under what conditions; it is he who has the authority and the responsibility to ensure that the rights of the arrested or detained person are properly respected, etc. He is, in fact, the key person in all matters concerning arrest and detention pending trial. The judge of the superior rank intervenes only a posteriori, as, for example, in habeas corpus, amparo or other remedial proceedings.

69. It appears to the Committee from the constitutions and basic laws examined, that the judiciary is almost universally considered as an independent branch of government and that the following basic principles are valuable in safeguarding the independence of the judiciary:

1/ Albania, Belgium, Brazil, Chile, Guatemala, Iceland, Israel, Netherlands, Norway, Federal Republic of Germany.

2/ Albania, USSR, Yugoslavia.

3/ Finland, France, Iraq, Italy, Jordan, Lebanon, Libya.

4/ Belgium, Colombia, Ireland, Nicaragua, Panama.

(a) that the judiciary shall be independent in the exercise of its functions and shall be separated from the administration at all levels;

(b) that neither the executive nor the legislative branch of government shall exercise any judicial functions or intervene in any judicial proceedings;

(c) that no extraordinary commission or special tribunal of a temporary character shall be established, outside the framework of the judiciary, to try any particular cases or persons; and

(d) that decisions of the supreme court shall be final and that decisions of a lower court may not be altered except by a higher competent court.

PART II

ARREST AND DETENTION OF PERSONS SUSPECTED OR ACCUSED OF A CRIMINAL OFFENCE

70. The Universal Declaration of Human Rights is premised upon "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family", and represents a reaffirmation of faith "in the dignity and worth of the human person ..." (Preamble). Article 3 proclaims that everyone has the right to liberty and security of person, and in safeguarding that right the provision in article 9 that "No one shall be subjected to arbitrary arrest, detention or exile" is of crucial importance, for most of the other rights enumerated in the Declaration cannot be enjoyed or exercised if a person is not free. Arrest destroys privacy,[1/] curtails freedom of movement,[2/] requires separation from family[3/] and denies opportunity to enjoy the political and economic rights promulgated in the Declaration.

71. The necessity of subjecting a person suspected of or charged with a criminal offence to restraint of his liberty is recognized in all jurisdictions. The laws on the subject reveal a variety of reasons for holding the suspect or accused in custody. Particularly if the offence charged is a serious one for which severe punishment is possible, there is danger that he may abscond and evade justice. If the case is under investigation, it is manifest that the investigation will be facilitated if the suspect is constantly and immediately available to the examining officials. Among other reasons advanced in the law are the need to keep the accused from tampering with the evidence or otherwise obstructing the establishment of the truth, and the danger that, if allowed to remain at liberty or released, he might try to repeat, complete or commit a crime.

72. In any legal system which gives effect to the principle that "Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law",[4/] the arrest or detention of a suspected or accused person before

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1/ Universal Declaration of Human Rights, art. 12.

2/ Ibid., art .13.

3/ Ibid., art. 16.

4/ Ibid., art. 11.

his guilt has been established seems something of an anomaly. This chapter examines how the national laws of various countries provide a foundation for the enjoyment of all other rights by the protections they have developed against illegal or arbitrary exercise of the power to deprive the individual of his liberty.

73. Protection against illegal or arbitrary arrest and detention is achieved by certain controls which in varying forms exist in the different legal systems of the world. These controls are:

(a) Limitations on the power of arrest by requirements that before a person can be deprived of his liberty certain conditions established by law must be satisfied and certain procedures followed;

(b) A system of checks and controls which, forming part of the process of arrest and detention, provide built-in safeguards against illegal or arbitrary action;

(c) Legal remedies designed to permit the arrested or detained person to obtain speedy adjudication of the validity of his arrest or detention;

(d) Civil, criminal and disciplinary sanctions which act as deterrents to violations of the safeguards established by law against illegal or arbitrary arrest and detention.

74. In addition to the above controls, it is recognized that the person arrested or detained should be granted certain rights and accorded such treatment as would enable him to avail himself of the safeguards which the law may have provided for his protection.

75. The European Convention for the Protection of Human Rights, which is based on an earlier draft of the United Nations covenant on civil and political rights, sets an international standard regarding the conditions under which a person may be deprived of his liberty and the safeguards, rights and remedies essential for his protection. Article 5 of the Convention provides as follows:

"(1) Everyone has the right to liberty and security of person.

"No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) The lawful detention of a person after conviction by a competent court;

(b) The lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

(c) The lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(d) The detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(e) The lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(f) The lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

"(2) Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

"(3) Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

"(4) Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

"(5) Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation."

76. The draft covenant on civil and political rights lays down in article 9 [1] the limitations on the power of arrest and the protections to be accorded to the individual. The article reads as follows:

1/ Text adopted by the Third Committee of the General Assembly at its thirteenth session; see Official Records of the General Assembly, Thirteenth Session, Annexes, Agenda item 32, document A/4045.

"1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.

"2. 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.

"3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

"4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that such court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

"5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation."

A. ARREST, DETENTION AND PROVISIONAL RELEASE

1. Arrest

77. When an offence has been committed, investigation leading to the prosecution of the offender has to be started by the competent authorities. The responsibility for establishing the immediate facts and finding the offender usually lies initially with the police. They have to start an investigation or inquiry at once and for this purpose interrogate persons who may have information essential to the discovery of the offender. Obviously the person suspected of having committed the offence will be among the first to be subjected to interrogation. It may be necessary for the police to hold the suspect for some hours at least so that the facts can be promptly established or the disappearance of the evidence prevented. Arrest is the device by which the suspect's liberty is restrained in order that he may be brought under the immediate control of the investigating authority and, in proper cases, held in custody pending further investigation or trial.

78. While "arrest" and "detention" have technical meanings which vary from country to country, for the purpose of the present study the term "arrest" will be understood to include the period from the moment that the suspect or accused[1/] is physically restrained and placed under custody up to the time that he is brought before an authority (usually judicial) competent to order his continued custody or his release.

79. The operation of the State's power of arrest may in some situations pose no serious problems. If the suspect is apprehended in the very act of committing an offence (in flagrante delicto) there is a likelihood that he is guilty and no error will be made in immediately restraining him. Even in this most obvious situation, however, mistakes may occur, as where the act which reasonably appears to the arresting authority to be an offence may in fact turn out to be non-criminal. In most cases, furthermore, the suspect is not caught in the very act, but arrested some time later, and the chances for error are accordingly greater.

80. For the suspect or accused, arrest may well be the most critical stage in the entire criminal process. His normal activities and economic livelihood are abruptly terminated, and he is subjected to a confinement at the will of the police or investigating authority for a period of time which, in some jurisdictions, may last for days. During such period he is usually in police custody, subject to search by the police and to questioning which may be unreasonable in intensity precisely because of the time limits against which the police must work. It is at this stage, when the arrested person is in the immediate and often exclusive control of the police or investigating officials, and, in cases, possibly kept incommunicado, that the danger of abuses being committed appears to be greatest.

81. To control and at least minimize the risk of mistakes and abuses, the law has placed a wide variety of limitations upon the power to make arrests. These limitations fall into two major categories:

(a) No national rule of law allows its police a wholly capricious power to arrest at whim. All require that a lawful deprivation of liberty must be based upon grounds previously established in law against which a proposed invasion of privacy and personal integrity can be measured.

1/ The expression "the suspect or accused" has been used frequently in this Part, since arrest may take place either before or after a person has been formally charged with an offence.

(b) Most legal systems have not been content to leave compliance with the prerequisites of arrest to the good faith and integrity of the police, but have surrounded their administration of arrest law with independent safeguards which come into operation both before and after the act of arrest. Most codes make provision in at least some cases for an independent judicial or administrative adjudication of the necessity for and justification of a proposed arrest, and many countries narrowly restrict the powers of the police to act independently of such a check to cases where necessity makes it impossible to obtain a prior written order of arrest from a competent authority. Once the apprehension has been consummated, it is usual to require a prompt check upon the legality and propriety of arrest by a hearing or examination before a competent judicial or administrative body. This judicial-administrative process within which the police must act is a first line of defence against abusive or arbitrary police practices, for while other remedies and sanctions against illegality exist and will be studied below, these may be time-consuming and uncertain in their actual application. The day-by-day judicial or other independent control of the police provided for by warrant and hearing requirements in most legal systems contemplates an immediate and continuing check against violations of human rights.

(a) Prerequisites of arrest

(i) Reasonable suspicion of guilt

82. While there are certain exceptions which will be noted later,[1] on the whole the existence of circumstances sufficient to warrant belief that the suspect has committed an offence is a basic prerequisite of arrest in all legal systems. This important policy may be explicitly laid down in the constitution of a country[2] or implied in consitutional protections against deprivation of liberty "without due process of law".[3] But whether constitutionally guaranteed or not, the requirement of reasonable cause is generally to be found in the code of

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1/ See paras. 121-122 below.

2/ Argentina, Costa Rica, Mexico, Philippines, United States of America.

3/ Philippines, United States of America.

criminal procedure of every country. Reasonable suspicion as a basic criterion, although often combined with other prerequisites, such as the seriousness of the offence and the existence of circumstances justifying arrest,[1] is found with minor variations in wording in most countries. Shadings of language are numerous: "reasonable suspicion";[2] existence of "sufficient evidence of guilt";[3] "probable cause";[4] facts "making the guilt of the accused probable";[5] "reasonable presumption of guilt";[6] "strong suspicion";[7] "strongly suspected of the offence".[8]

83. The difficulties of such general formulations are obvious. To indicate that the subjective conviction or belief of the official or authority making the arrest is not sufficient, the law may explicitly require that the suspicion must be founded on objective grounds, i.e., from facts and circumstances.[9] The appreciation of the facts and circumstances, however, will have to be made by the authorities concerned. In cases where a prior order of arrest is required, the authority competent to issue such order (usually a judicial authority) determines whether on the basis of the available facts there exists sufficient reason to believe that the suspect has committed the offence. Under case law in one country,[10] "no rule can be laid down which will govern the discretion of the court in this matter".

84. In cases where arrest without warrant is authorized, the law tends to be more explicit and precise in defining the situations which justify an arrest. These cases which will be discussed below in some detail[11] are generally restricted to situations where the arresting authority has seen the offence being committed

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1/ See paras. 85-99.

2/ Chile.

3/ Italy.

4/ United States of America.

5/ Mexico.

6/ Netherlands.

7/ China.

8/ Federal Republic of Germany.

9/ Netherlands.

10/ Philippines.

11/ See paras. 110-124.

or apprehends the presumed offender shortly after its commission. Where, however, an arrest without warrant is permitted upon ex post facto information and after some time has elapsed from the commission of the offence, the interpretation of facts which will justify a finding of probable cause or reasonable suspicion will have to be made by the arresting officer. Since in such cases the independent checks and controls provided by law come into operation only after the act of arrest, the immediate protection of the individual would lie, initially at least, in the good faith and good training of the police or other authority making the arrest.

(ii) Nature and gravity of offence

85. The law may require as a further condition for arrest that the offence alleged to be committed by the suspect or accused is sufficiently serious to warrant taking him into custody. The seriousness of an offence is normally indicated by the penalty prescribed by the law. In many jurisdictions an arrest may not be ordered as a rule, unless the offence is punishable by deprivation of liberty.[1/] The law may specify the severity of the penalty. Some codes for example may require, as a prerequisite of arrest, that the offence should be punishable with "imprisonment for a term of not less than one year",[2/] or "death, life imprisonment or imprisonment for more than five years".[3/] The seriousness of an offence may in fact, under some codes, make the arrest of the suspect mandatory.[4/]

86. Generally speaking, arrest is usually not permitted in the case of minor offences,[5/] e.g., misdemeanours, petty offences or contraventions. Exceptions, however, may be recognized by the law in certain situations, such as, inter alia, where the suspect is surprised in flagrante delicto,[6/] or where he is about to escape,[7/] or is without a fixed or known residence[8/] or is an unknown person

1/ Argentina, Costa Rica, Ecuador, Mexico, USSR.

2/ Poland.

3/ China.

4/ See paras. 100-101.

5/ Chile, Denmark, Ecuador, Japan, Philippines.

6/ Denmark, Mexico, Norway.

7/ Norway.

8/ Norway, Philippines.

concerning whose name and whereabouts no reliable information is at hand or can be procured.[1] In such cases, arrest is often authorized without regard to the seriousness of the offence.

87. The nature of the offence itself may also be made a factor in determining whether or not an arrest may be made. Some codes, for example, provide for the arrest of persons suspected of certain specified offences, such as offences against State property (misappropriation of public moneys, embezzlement, etc.),[2] or begging and vagrancy.[3] On the other hand, the law may indicate certain offences for which arrest is not permitted, e.g., libel and slander,[4] insults or calumny,[5] offences committed through the press[6] or offences which are not subject to prosecution ex officio or to public prosecution.[7]

(iii) Existence of grounds justifying arrest

88. In addition to the above prerequisites, the law may require that certain grounds exist to justify the need to place the suspect or accused under custody. The grounds justifying arrest may not be specified by the law, but left to the discretion of the arresting authority to determine in each case. The law may, for example, allow an arrest to be made whenever the exigencies of the investigation so require.[8] There is a tendency, however, in modern legislation to define with increasing explicitness the grounds for arrest. Variations in detail and wording are many, but on the whole the grounds for arrest fall under the following broad categories:

1/ Denmark.
2/ Peru.
3/ Denmark.
4/ Colombia.
5/ Argentina.
6/ United Arab Republic (Egyptian region).
7/ Ecuador, Federal Republic of Germany.
8/ France.

a. Danger that the suspect or accused will evade the proceedings

89. One of the most commonly accepted reasons for placing the suspect or accused under custody is to ensure his presence whenever it is required for the purpose of the inquiry or investigation and the trial and, in the event of conviction, to ensure that he is available to serve his sentence. Thus, most systems authorize an arrest when there is danger that the suspect or accused might flee if not put immediately under physical restraint, or if there is any reason to believe that he will not be available to the authorities who will conduct the investigation or trial.

90. Under some codes the suspect may be arrested or detained if he has escaped,[1/] or attempts[2/] or is about to escape or is preparing to do so,[3/] or is found in the act of escaping or in hiding.[4/] Generally, however, a reasonable suspicion or fear of escape is deemed sufficient.[5/] The circumstances of the case, "in particular the situation of the accused and the circumstances with regard to an escape",[6/] are factors to be taken into consideration in determining whether there is reasonable danger that the accused will escape. Regard may be had to the extent of the punishment and other reasons such as, for example, the character of the accused or nature of the crime which would justify a belief that the individual concerned is likely to evade prosecution or punishment.[7/] Some codes provide for a rebuttable presumption of the existence of danger of escape if the crime is serious or the accused has no established residence or cannot furnish proof of identity.[8/]

91. Certain other grounds mentioned in the law as justification for arrest or detention are related to the fear that the suspect might evade or might not be

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1/ China, Republic of Korea.

2/ USSR.

3/ Norway.

4/ Yugoslavia, Federal Republic of Germany.

5/ China, Norway, Yugoslavia, Federal Republic of Germany.

6/ Federal Republic of Germany.

7/ Denmark, Norway.

8/ Federal Republic of Germany.

available for the investigation or trial. These are, for example, the seriousness of the offence charged or the severity of the possible penalty;[1] the fact that the accused has no residence within the country or within the district where the proceedings are to be held;[2] the fact that he has no fixed dwelling,[3] that he is a vagrant,[4] or that his identity is not known or cannot be established.[5]

b. Danger of obstructing the investigation

92. A typical provision of this type provides for continued custody when "definite facts exist to indicate that there is a danger that the accused may, by destroying material or other evidence of the offence or by influencing witnesses or accomplices, make it more difficult to ascertain the truth".[6]

93. Some codes allow arrest or detention for this purpose only when the penalty attached to the offence charged is, at least, of some degree of severity. In one country, for example, the fear that the suspect might impede the investigation by destroying evidence or tampering with witnesses would justify his arrest only when the penalty prescribed for the offence is more than six months' imprisonment.[7] In another country, arrest on these grounds is permitted only where the offence is punishable by more than two years' imprisonment.[8]

c. Potential danger to society

94. The fear that the suspect or accused, if not taken into custody, might engage in criminal conduct and endanger the safety of others or of society is recognized in several jurisdictions as a sufficient cause for arresting or detaining him. One code,[9] for example, explicitly provides that arrest may be ordered in certain cases "as a guarantee of public order".

1/ See paras. 85-86.

2/ Belgium, United Arab Republic (Egyptian region).

3/ Iceland, USSR.

4/ Brazil, Denmark.

5/ USSR, Yugoslavia.

6/ Federal Republic of Germany.

7/ Norway.

8/ Yugoslavia.

9/ Brazil.

95. Many codes authorize the arrest of a suspect if there is reason to fear that he will repeat the punishable offence or commit a punishable offence which he has attempted or threatened to do so.[1/] Detention may also be ordered in certain jurisdictions "where it is considered necessary in order to prevent a person charged with certain serious threats from executing the latter".[2/]

96. The fact that the suspect, in a case involving malicious or premeditated crimes, has been "previously condemned for an identical offence"[3/] or the fact that he is a "recidivist"[4/] may be sufficient justification, under some systems, for placing him in custody, the reason being, it would seem, that such person by his record or conduct represents a social danger.

97. Some jurisdictions authorize the arrest or detention of persons accused of certain grave crimes which may or may not be specified in the law.[5/] The basis for such arrest or detention seems to be the danger which the crime poses to the State or society. Among the crimes listed in one code[6/] are: crimes against the State, unlawful crossing of the frontier, failure to return from abroad, disclosure of State secrets and treason committed by military men. Another code[7/] indicates as a reason for arrest the fact that the offence charged "carries a considerable measure of danger to society, either due to the gravity of the offence or to the fact that offences of this kind are spreading".

98. The fear that the presence of the accused might cause a scandal among the people in the community may be taken as a circumstance which justifies his confinement in custody.[8/] In this case, it would seem that the immediate or most direct object of detention is to appease public opinion, although it may also be argued that the confinement of the alleged offender is for his own protection.

1/ Czechoslovakia, Denmark, Netherlands, Norway, Yugoslavia.

2/ Denmark.

3/ Brazil.

4/ Peru.

5/ Bulgaria, Poland, USSR.

6/ Bulgaria.

7/ Poland.

8/ Belgium.

99. This factor of possible future criminality or fear of potential harm to society is unrelated to the limited purpose of assuring the defendant's presence at the preliminary examination or the trial. It was doubtless for this reason that in one country the law has eliminated the danger of future offences as a reason for depriving the suspect of his liberty "on the grounds that such reason was incompatible with the nature and purpose of detention pending inquiry".1/

(b) When arrest is mandatory

100. The authority empowered to arrest is not generally under an obligation to take the person suspected or accused of an offence into custody, even where conditions justifying his arrest may exist. The arresting authority is usually given discretion to determine in each case whether or not it is necessary to arrest the suspect or accused. The law may indicate certain factors to be taken into consideration, such as the weight of the evidence against the accused, the nature of his occupation and his age, health and family status.2/ Furthermore, the law may, as already indicated above,3/ specify the grounds which would warrant taking the suspect or accused into custody.

101. Mandatory arrests are often limited to offences of a certain nature or for which the penalty prescribed is of a certain degree of severity, e.g., death,4/ life imprisonment,5/ or imprisonment for not less than ten years.6/ Some codes also make arrest compulsory where the offender is caught in flagrante delicto,7/ particularly if the offence is serious.8/

1/ Federal Republic of Germany.

2/ USSR.

3/ See paras. 89-99.

4/ Yugoslavia.

5/ Austria.

6/ Austria, Brazil.

7/ Mexico, Panama.

8/ Italy, Lebanon.

(c) The procedure of arrest

(i) Requirement of prior written order

102. The requirement that before an arrest can be made a prior written order issued by an authority independent of the police must be obtained is one of the widely recognized devices for controlling the risk of improper arrests. The warrant requirement is guaranteed in the constitutions and statutes of most countries of the world. Its wide-spread use suggests the importance with which this protection against police or administrative abuse or excesses is apparently regarded.

103. Considerable differences exist in the national laws of various countries concerning the situations in which a prior written order is required and the officials who have competence to issue the order.

a. When a warrant is required

104. An examination of the various laws on the subject seems to reveal, in general, two quite different basic policies on the matter of warrant requirement. One policy is to require a warrant in all cases, except where the peculiar circumstances of the individual case justify a waiver of the rule, as where the offender is found in flagrante delicto or shortly after the commission of the offence or where other circumstances suggest that he has just committed an offence. A second broad policy is to make the requirement of a warrant turn on the seriousness of the offence imputed to the suspect or accused. The law may simply list the offences for which the police may arrest without a warrant, or may confer a greater power of arrest without warrant in more serious cases. In the first case the policy appears to be that of requiring, as a rule, a prior judicial or administrative check in all cases in which deprivation of liberty are contemplated. The broader power given to the police to arrest without warrant for all more serious crime classifications, on the other hand, reflects a desire to prevent the inconvenience of arrest in minor cases without a prior check, leaving, however, without comparable protection offenders suspected of more serious offences, though it may well be that in practice recourse to such powers of arrest without prior judicial or other authorization is not frequent.

b. Who may issue a warrant

105. In most jurisdictions the power to issue the order or warrant of arrest is viewed as a judicial function[1] and, subject sometimes to exceptions noted below,[2] vested exclusively in the examining magistrate, judge or other competent judicial official.

106. In some jurisdictions public prosecutors[3] or procurators,[4] certain administrative officials[5] or superior police officials[6] are competent to issue warrants of arrest. The law may in some instances indicate the specific cases in which and the particular purpose for which the administrative officials concerned may issue warrants of arrest.[7]

107. In come countries judicial issuance of the warrant is the normal practice, but exceptions are made to allow the prosecuting authority[8] or certain administrative[9] or police[10] officials to issue the order if an arrest cannot be safely delayed until a court order could be obtained.

c. Requisites and form

108. An order of arrest may be issued ex officio,[11] or upon request by the police or investigating organ,[12] the prosecuting authority,[13] or the complainant.[14] Before an order of arrest may be issued, the authority concerned has to be satisfied that there are sufficient grounds for its issuance. Some jurisdictions

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1/ France, India, Norway, Philippines, United States of America, Federal Republic of Germany.

2/ See para. 107.

3/ Italy, Portugal.

4/ China, USSR.

5/ Chile, Thailand.

6/ Finland, Portugal, Thailand.

7/ Chile.

8/ Norway.

9/ Costa Rica, Philippines.

10/ Costa Rica.

11/ Brazil, Thailand.

12/ Brazil, Japan, Thailand.

13/ Brazil, Czechoslovakia, Japan, Mexico, Thailand.

14/ Brazil.

require a sworn complaint or affidavit containing a statement of facts sufficient to constitute probable cause,[1] or a charge, accusation or complaint supported by a declaration under oath of a trustworthy person or by other information indicating the probable responsibility of the accused.[2] The judge may conduct a preliminary inquiry or investigation to determine whether the proposed arrest is justified, and for this purpose may hear the complainant and witnesses, with or without the suspect or accused being present; however, the judge may rely on the statement of the prosecuting authority alone, or of any other person whose statement is, in his opinion, entitled to credit.[3]

109. Typically the warrant must be in writing, must state the name of the person to be arrested or an adequate description of him, must specify the offence charged and the reason or grounds for his being taken into custody, be authenticated and signed by the official issuing it, and may be required to state the person who is to execute it, the place to which the accused is to be taken or the name of the judge before whom he is to be produced.[4] It follows from the policy underlying the warrant requirement that general, conditional, blank or unaddressed warrants are frequently held invalid.[5]

(ii) Arrest without warrant

a. Arrest of suspects caught in flagrante delicto

110. The requirement of a prior written order may be dispensed with in certain cases defined by law. The most familiar group of such cases are embraced in the concept of flagrante delicto. In some jurisdictions, the law authorizes arrest without warrant in such cases, subject, however, to additional requirements, such as, that the offence is serious,[6] that the arrest is necessary in order to prevent flight[7] or secure the evidence,[8] or that the offender cannot be identified

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1/ United States of America.

2/ Mexico.

3/ Philippines.

4/ Chile, Costa Rica, India, Norway, United States of America, Yugoslavia.

5/ Philippines, United Kingdom (England and Wales), United States of America.

6/ Lebanon, United Arab Republic (Egyptian region).

7/ Norway, Federal Republic of Germany.

8/ Norway.

immediately.[1] In a few countries the power to arrest without a warrant is limited to flagrante delicto cases.[2]

111. The situations regarded in the law as coming within the concept of flagrante delicto vary considerably from country to country. The most obvious and universally recognized situation is that of an offence being committed in the presence or within the view or hearing of the arresting officer who immediately apprehends or pursues the offender.[3] In such cases, the evidence giving rise to the suspicion or belief that the person arrested has committed the offence has been directly observed by the arresting officer.

112. In many jurisdictions an offender is also deemed to be surprised flagrante delicto if within a short time of the offence he is pursued by hue and cry, or is found in possession of goods, weapons or instruments or bearing marks on his person or clothing which give reason to believe that he has taken part in the offence.[4]

113. In some countries the procedure applicable to flagrante delicto cases is also applied to crimes committed in a house the head of which requests the prosecutor or an officer of the criminal police to establish the facts.[5]

114. In certain countries, the law may not require actual physical pursuit of the suspect; "an almost unanimous charge ... publicly made against a particular person is necessary and sufficient".[6] "Hue and cry" is to be carefully distinguished from unsupported "public rumour" or "common knowledge", which arise ex post facto.[7] Distinction is also made batween pursuit with hue and cry, which justifies an arrest in most cases, from hot pursuit of one who is actually taking flight, which is required for certain minor offences.[8]

1/ Federal Republic of Germany.

2/ China, France.

3/ Japan, Philippines, United States of America.

4/ China, France, Japan, Mexico, Thailand.

5/ France, Morocco.

6/ Belgium.

7/ Belgium.

8/ Japan.

115. What constitutes "a short time of the offence" may vary considerably from country to country, although there is little available data. In one country the courts have held that arrests were not made in flagrante delicto where (a) the arrest took place eight hours after the offence without the offender being subject to pursuit, and (b) after the accused "was already in his residence".1/ In another country a period of twenty-four hours has been suggested, but the courts have recognized that the period of time must depend on the circumstances.2/

b. Arrest in urgent cases

116. By either code provision or court construction, most countries extend the power to arrest without warrant beyond cases which can be considered in flagrante delicto. In many jurisdictions, arrest without warrant is authorized in cases where it cannot be safely delayed until a written order or warrant is obtained from the competent authority.3/ The law may require that, while the suspect is being apprehended, an application for a warrant of arrest must be made to the competent authority; if such application is rejected, the suspect must be immediately released.4/

117. The circumstances which justify an immediate arrest without warrant may be specified by the law, e.g., where the offence is serious and there is danger that the suspect will escape or destroy the evidence if not apprehended at once;5/ or where there is no judicial authority available at the place of the offence and there are reasonable grounds to believe that the suspect may abscond or evade criminal action.6/ The law may limit this power of immediate arrest to specified situations or cases, such as, for instance, where the suspect is a vagrant or of unknown identity or without a known residence; where the suspect is caught while committing an offence subject to public prosecution; where there are special reasons for suspecting him of a serious offence or certain specified offences; or in the event of a riot or a breach of the peace.7/

1/ Brazil.

2/ Belgium.

3/ Austria, Czechoslovakia, Japan, Norway, Poland, Federal Republic of Germany.

4/ Japan.

5/ Republic of Korea.

6/ Mexico.

7/ Denmark.

118. In the foregoing cases failure to obtain a warrant before effecting an arrest is justified on the theory that, as in the flagrante delicto situations, delay would be unsafe and immediate decision is required to secure apprehension of the suspect.

c. Arrest on reasonable suspicion

119. A third category of rules justifying arrest without warrant is both much broader and less explicitly defined than cases of flagrante delicto or situations related thereto. In one country,[1] for example, notwithstanding the constitutional provision that no person may be arrested without a warrant except in the case of an offender apprehended flagrante delicto, "certain practical considerations have forced the legislature to depart from the rigid principle and to provide for exceptions". The officers and agents of the criminal police are authorized, where there is strong evidence of the guilt of the presumed perpetrator of a crime or offence, to place him in custody for the purpose of bringing him before the competent court, even if he is not surprised in flagrante delicto. The role of the court in determining whether arrest is justified is, in such cases, transferred to the police; "in each case it should be considered whether it is possible and probable that a warrant for the arrest of the individual will be issued".

120. In its effect this policy is similar to that in force in countries whose criminal procedure has been influenced by Anglo-American common law. Under the common law offences are classified as felonies (more serious) and misdemeanours (less serious), one of the distinctions between the two relating to the power of arrest. While subject to considerable statutory modification particularly as to misdemeanours, the basic common law rules generally applicable provide that an officer can arrest without a warrant for a misdemeanour only if it amounts to a breach of the peace; the arrest must take place while the offence is being committed in his presence or immediately thereafter. For a felony, on the other hand, wide power is given to arrest without warrant, it being possible for a peace officer to make such an arrest if he reasonably believes that a felony has been committed and that the person to be arrested has committed it.[2] Here the controlling factor is the classification of the offence believed to have been

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1/ Belgium.

2/ Australia, Canada, Ireland, New Zealand, United Kingdom (England and Wales), United States of America.

committed; remoteness of time from the commission of the offence or opportunity to obtain a warrant without risking escape of the suspect are irrelevant. The same pattern is followed in certain countries[1] where legislation classifies offences as "cognizable" or "seizable", defined as offences for which a police officer may arrest without a warrant, and as "non-cognizable" or "non-seizable". Such classification by offence may de-emphasize the warrant and the role of prior judicial control, but gives the police a relatively simple rule. While the police must still make a determination of whether or not the required quantum of reasonable suspicion exists, beyond that they have only to classify the offence to know of their rights.

d. Arrest of persons found in suspicious circumstances

121. In all of the situations discussed to this point the person who is to be arrested is reasonably suspected of having committed a specific offence. Reasonable suspicion that the suspect is probably guilty of a specific offence is, however, to be distinguished from the lesser "mere suspicion" that he might be guilty of something. The protection of personal liberty which such a distinction achieves is lessened in many countries by additional powers granted to the police or other competent authority to arrest without warrant persons found in suspicious circumstances.

122. Explicit provisions may be made for the arrest without warrant of any person found loitering in the night-time under suspicious circumstances,[2] or loitering with criminal intent unless able to give a satisfactory account of his conduct.[3] One factor which may help establish the existence of reasonable belief that the suspect intends to commit a crime is that he be found under circumstances where he is trying to conceal himself.[4] Possession of house-breaking tools or other implements of crime frequently justifies arrest, presumably on the theory that it may be presumed either that the suspect plans to commit crimes in the future or has committed them in the past.[5] In one country the law permits security

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1/ Ceylon, Federation of Malaya, India.

2/ Australia, New Zealand, Union of South Africa, United Kingdom.

3/ Chile.

4/ India.

5/ India.

measures including arrest without warrant to be taken against "those who have been convicted for offences against property and are caught with objects whose legal possession they cannot satisfactorily explain or with instruments, keys, mechanisms or devices habitually used in robberies".[1] In another country police constables are often obliged to arrest and bring before police officers unknown persons whose behaviour gives rise to suspicion; such persons are kept under arrest until their identity is established.[2]

e. Arrest by a private person

123. Necessity may require that in some instances arrests be effected by private persons. Thus in most jurisdictions the law empowers private persons to arrest an offender discovered in flagrante delicto. Indeed, in such situations a private person may be under a duty to arrest.[3]

124. Except in obvious cases, however, a private person contemplating an arrest is at a great disadvantage. Criminal codes are complex and technical, and the private person has no training comparable to that given judicial, prosecuting and even police authorities. The result is that under most laws the power of a private person to arrest is more restricted than the power of the police, and a country's legal policy may effectively discourage execution of the power. Even within the concept of flagrante delicto, the private person's authority to arrest may be confined to instances where the suspect is apprehended in the very act or on immediate pursuit.[4]

125. As a further protection, the codes typically require that in the event of a private arrest the accused must be turned over to the police or other competent authority without delay.[5]

(iii) Manner of executing arrest

126. An arrest is the taking of a person into actual physical custody, as, for example, by physical apprehension, by barring passage in a street, or by the action of the officer who "shall actually touch or confine the body of the person to be

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1/ Chile.

2/ Belgium.

3/ Belgium.

4/ Denmark, Norway.

5/ Chile, India, United Kingdom (England and Wales).

arrested" unless he submits to custody by word or action.[1] As physical force is thus contemplated, the most critical human rights issues are the limitations which the law places upon the amount of force which can be utilized. The codes may require that the arrest be carried out as leniently as possible,[2] or "with such consideration for the suspect as is compatible with the purpose" of the arrest.[3] Force is typically limited to that necessary in meeting resistance or attempt to escape[4] or "indispensable in order to effect an arrest"[5] or reasonably necessary in the circumstances.[6] The amount of force authorized to effect the arrest may also be proportionate to the seriousness of the offence with which the suspect is charged, with less force warranted for less serious offences.[7] Bodily injury, insults or shooting may be forbidden; however, should the suspect offer resistance to a legitimate apprehension, the arresting authority is entitled to self-defence.[8] Protection of the person carrying out the arrest justifies the obvious provision, usually embodied in the law, authorizing search of the person arrested.

127. Where the person to be arrested has taken refuge in another's domicile or building, the law may[9] or may not[10] require that a search warrant be obtained before the building can be entered. Limitations may be imposed upon execution of the warrant during the night, e.g., a requirement that written permission of the authority which issued the warrant is necessary to "enter houses or closed places adjoining houses, in order to execute a warrant, during the period between one hour after sunset and one hour before dawn."[11]

1/ India, Federal Republic of Germany.

2/ Norway.

3/ Denmark.

4/ Portugal.

5/ Argentina.

6/ Philippines, United Kingdom (England and Wales), restricting even handcuffing unless reasonably necessary.

7/ United States of America.

8/ Federal Republic of Germany.

9/ Argentina, Colombia.

10/ Costa Rica, India, Portugal.

11/ Italy, contra, Federal Republic of Germany.

(iv) Resistance to arrest

128. Resistance to a lawful arrest is generally punishable under the criminal code.[1] On the ohher hand, where the arrest is illegal the person arrested may have a right under the law to resist the arrest. One constitution, for instance, provides that "a person may resist arrest or detention ... if such arrest ... is not carried out in accordance with procedure prescribed by law".[2] Under the codes of many countries, resistance to an illegal arrest is not punishable if done in justified self-defence.[3] Whether the plea of self-defence is applicable to resistance against an unlawful or presumably unlawful arrest will depend on the circumstances of each individual case.[4] It may be required that for resistance to be justified, the arrest must be manifestly illegal.[5] In some jurisdictions, however, the right to resist an arrest on the ground that it is illegal is, in general, not recognized.[6]

(d) Appearance of arrested person before an authority competent to order or confirm his detention

129. In most countries the law requires that shortly after arrest, the person arrested should be brought before a judicial or other competent authority who will pass upon the propriety of the arrest and determine whether he should be kept in custody or released. This requirement of a post-arrest check affords the arrested person ipso jure a prompt opportunity to have the legality of, as well as the necessity for, his arrest determined by an independent authority. The usefulness of such a requirement has been explained as follows:

> "The purpose of the statutes /requiring law enforcement officers to bring the arrested person promptly before a judicial authority/ is to subject the legality of detention to judicial scrutiny at the earliest practicable moment, to afford the defendant an opportunity to obtain counsel and, if the offence is bailable, admission to bail; indirectly, they are designed to safeguard against the 'third degree' and similar police abuses." [7]

1/ Philippines.

2/ China.

3/ Philippines.

4/ Austria, Federal Republic of Germany.

5/ Belgium.

6/ Argentina.

7/ United States of America.

130. Competent authority. In most jurisdictions the arrested person must be brought before a judicial authority. This may be, for example, the examining magistrate or judge who is to conduct the preliminary investigation or the trial,[1] the nearest examining magistrate,[2] the court competent to deal with the case or the court of the place where the arrest took place,[3] or a commissioner or other officer empowered to commit the suspect for trial.[4] In some countries, the person arrested may be brought either before a judge or before a public prosecutor,[5] while in others he is to be taken before the public prosecutor if he cannot be brought before the nearest examining magistrate within a specified time limit.[6] In a number of countries, the public prosecutor or public procurator is the authority designated by the law, before whom the arrested person is to be taken,[7] or who must be notified or informed of the arrest and whose sanction is required to be secured by the arresting authority.[8]

131. Time limit. In most countries the arresting authority may not hold the suspect or accused without the sanction of a judge or public prosecutor except for a relatively brief period of time, the duration of which may or may not be specified by law. The limited duration of the period is often indicated by provisions which require the arrested person to be brought before the competent authority, or the arrest to be communicated to such authority, "immediately",[9] "at once",[10] "speedily",[11] "forthwith",[12] "without delay",[13] "without

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1/ Canada, Philippines.
2/ Liberia.
3/ Portugal.
4/ United States of America.
5/ Czechoslovakia, Italy.
6/ Norway.
7/ Japan, Republic of Korea.
8/ Bulgaria, USSR.
9/ Argentina, Brazil, Italy, Japan.
10/ Yugoslavia.
11/ United Kingdom (England and Wales).
12/ Federal Republic of Germany.
13/ Liberia, Mexico.

unnecessary delay".[1] Many codes place a definite time limit beyond which the arresting authority may not hold the suspect without bringing him before a judicial officer or a public prosecutor. The time limits vary considerably from country to country, ranging from a number of hours to several days, e.g., six to eighteen hours, depending on the seriousness of the offence;[2] twenty-four hours;[3] forty-eight hours;[4] "upon the very same day of the arrest";[5] "no longer than the day following the apprehension";[6] "in the next office hours" of the nearest judge;[7] three days;[8] ten days.[9] The law may provide that the time necessary for the journey from the place of arrest to the place where the competent authority is located shall not be counted.[10] Taking the arrested person by a circuitous, instead of the ordinary direct road, may be explicitly forbidden.[11] One code stipulates that if it appears impracticable to bring the arrested person before a magistrate within twenty-four hours and the offence is not of a serious nature, the police may release him on bail.[12]

132. To ensure the observance of the specified time limits, the law may require the exact time of apprehension and of the appearance in court of the arrested person to be stated in the official court records.[13] If the police fail to observe the time limit, the judge may demand an explanation; he may also cancel

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1/ Federation of Malaya, Philippines, United States of America.

2/ Philippines.

3/ Ceylon, Denmark, France, India, Italy, USSR.

4/ Austria, Bulgaria, Czechoslovakia, Israel, Japan, Peru, Thailand.

5/ Turkey.

6/ Federal Republic of Germany.

7/ Argentina.

8/ Ecuador.

9/ Peru, Republic of Korea.

10/ Federation of Malaya, India.

11/ United Kingdom (England and Wales).

12/ Ghana.

13/ Denmark.

the arrest.[1] The responsible authority may also be subject to penal and disciplinary sanctions.

133. The period within which the suspect may be held by the arresting authority may be extended by permission or order of a judge or public prosecutor for a specified period, e.g., by another twenty-four[2] or forty-eight hours,[3] or up to three days,[4] five days,[5] seven days[6] or two weeks.[7] The extension may be granted by the competent authority only after hearing the person concerned.[8] The police may also be empowered by law to prolong custody of the suspect for a specified period "if owing to the temporary absence or illness of the magistrate of the area or for other adequate cause it is impossible to bring him before a magistrate".[9]

134. In defining time limits, the law may be stricter in the case of arrest without warrant than in the case of arrests pursuant to a warrant. One court has observed that:[10]

> "There can be no manner of doubt that arrests without warrant issued by a Court call for greater protection than do arrests under such warrants. The provision that the arrested person should within twenty-four hours be produced before the nearest Magistrate is particularly desirable in the case of arrest otherwise than under a warrant issued by the Court, for it ensures the immediate application of a judicial mind to the legal authority of the person making the arrest and the regularity of the procedure adopted by him. In the case of arrest under warrant issued by a Court, the judicial mind had already been applied to the case when the warrant was issued and, therefore, there is less reason for making such production in that case a matter of substantive fundamental right."

1/ Denmark.
2/ France.
3/ Israel.
4/ Yugoslavia.
5/ Chile, Portugal.
6/ Italy, Thailand.
7/ Bulgaria, Ceylon.
8/ France.
9/ Israel.
10/ India.

2. Detention Pending Investigation or Trial

(a) Prerequisites for detention

135. Pre-trial detention is not a penalty, but a precautionary measure justified solely by necessity. The need to control such measures is universally recognized and is reflected in the many safeguards and limitations with which most codes of penal procedure surround its application.

136. It is usually required that the detention of the suspect or accused must be ordered by some judicial or other competent authority in accordance with certain formalities established by the law. Furthermore, the law in most jurisdictions often prescribes the conditions which must be satisfied before detention may be ordered. These are, broadly speaking, the same as those required for arrest,[1/] i.e., existence of probable guilt of the accused; requirement that the offence charged must be sufficiently serious; presence of certain circumstances which make it necessary to place the accused under physical restraint. It is further usually required that the suspect or accused be examined or interrogated before the order of detention may issue. The order of detention is often required to be in writing,[2/] to specify the reasons or grounds for the detention[3/] and to be made known or notified to the person to be detained.[4/]

(b) Authority empowered to order detention

137. The determination of the question whether sufficient grounds exist for keeping the suspect or accused in custody should not be left to the police authority. In most countries the power to order detention pending inquiry or investigation is usually vested exclusively in the judge or magistrate before whom the suspected or accused person is brought subsequent to his arrest.[5/] The law may require that the public prosecutor must be heard,[6/] or that the judge must act in consultation

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1/ See paras. 82-99.

2/ India, Federal Republic of Germany.

3/ India, Norway.

4/ Austria, Denmark, Mexico.

5/ Argentina, Burma, India, Philippines.

6/ United Arab Republic (Egyptian region).

with such official.[1] In some countries, however, detention may be ordered by the public prosecutor or procurator,[2] or responsibility may be divided, with the public prosecutor having limited power to continue custody for a few days after which a court order is required.[3]

(c) Interrogation of the arrested person

138. The judge or other authority competent to order detention is usually required to issue the order only after hearing or interrogating the suspect or accused.[4] The law may in fact make the examination of the accused an indispenable requisite, the omission of which would render the warrant of detention void.[5]

139. The examination or interrogation is usually to be made by the judge or examining official without delay, especially if the suspect or accused is in custody.[6] Many codes specify the time limit within which the arrested person must be interrogated or examined, e.g., within twenty-four hours of his arrest[7] or from the moment he is brought before the examining judge;[8] within the first forty-eight hours;[9] "as soon as possible and in any case within the third day".[10]

(d) Time limit for issuance of detention order

140. In many jurisdictions the law lays down a specific time limit within which the judge or other competent authority must decide whether to detain the suspect or release him, e.g., within twenty-four[11] or seventy-two[12] hours after the suspect

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1/ Lebanon.
2/ Bulgaria, China, Czechoslovakia, USSR.
3/ Netherlands.
4/ Denmark, France, United Arab Republic (Egyptian region).
5/ Belgium.
6/ Argentina, Czechoslovakia.
7/ Yugoslavia.
8/ Austria, Chile.
9/ Mexico.
10/ Italy.
11/ Japan.
12/ Mexico.

is placed at the disposal of the authority concerned. To ensure that no person may be held under detention without an order from the competent authority, the law may require the official in charge of the place of detention to release the detained person if no detention order is received within a specified time limit.1/

(e) Duration of detention

141. The detention of suspects or accused persons must not be unduly prolonged and should, in any event, not last longer than strictly necessary. Control of the duration of the detention is achieved in various ways. Under some systems, no specific time limit is fixed by the law. It is, however, not uncommon for the law to provide explicitly that the detention should last only as long as the reasons for it still apply.2/ Judges and examining officials are often enjoined to make sure that the detention of suspects or accused persons is not unnecessarily prolonged.3/ They may terminate the detention at any stage of the proceedings when the grounds for such detention no longer exist,4/ or whenever it appears that the accused has no case to answer.5/ Release may be ordered by the judge ex officio, or upon application by the prosecutor, the accused, his defence counsel or the relatives of the accused.6/ In some jurisdictions, release from custody has a certain finality; the released person may not be re-arrested on the same grounds unless there has been a change in the factual situation.7/

142. Where no specific time limit is fixed either by the law or by the competent authority, the detention may last for the duration of the investigation or proceedings. It is in the interest of the detained suspect or accused that the proceedings should be brought to a speedy termination, and in this connexion the guarantee of speedy trial which in some jurisidictions is a constitutional right

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1/ Costa Rica, Mexico.

2/ Chile, Costa Rica, Federal Republic of Germany.

3/ Austria, Chile, Costa Rica.

4/ Denmark.

5/ Argentina, Chile.

6/ Republic of Korea.

7/ Austria.

of the accused,[1] as well as provisions establishing time limits for the conclusion of the inquiry or investigation[2] and the trial, or for adjournments,[3] assume special importance. The time limits for the termination of the proceedings or for adjournments are usually shorter if the accused is in custody than if he were at liberty.[4] The law may require that the detained person is to be released, with or without bail, if the proceedings are not concluded within the time limit fixed,[5] if no charges have been filed against him within a certain time,[6] or if he has been detained for a period equal to or longer than the maximum penalty fixed by law for the offence charged.[7] If the time limit for the closing of the investigation is exceeded, the detention of the suspect or accused may be declared illegal.[8]

143. Many legal systems, however, do not favour indefinite detention, but fix the maximum period of time within which a suspect or accused may be kept in custody. Various time limits have been prescribed, e.g., fourteen days,[9] one month,[10] two months,[11] and three months.[12] The maximum limits for the duration of detention may be fixed by the law without regard to the nature or gravity of the offence charged, or may be made to depend on the seriousness of the offence[13] or on other conditions, such as previous imprisonment or conviction of the accused, his lack of domicile or his being a vagrant.[14] Frequently, the law fixes a

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1/ Philippines, United States of America.

2/ Bulgaria, Ecuador, Panama.

3/ Ireland, United Kingdom (England and Wales).

4/ Brazil, Portugal.

5/ Brazil.

6/ Brazil, Italy, Japan.

7/ Colombia, Mexico, Peru.

8/ Brazil.

9/ United Arab Republic (Egyptian region).

10/ Belgium.

11/ Czechoslovakia, Japan, USSR, Republic of Korea.

12/ Poland.

13/ Italy.

14/ France.

shorter time limit for detention pending police investigation than for custody pending the inquiry or investigation conducted by the judge or examining official.[1]

144. The value of such specific time limits may be rendered doubtful by the wide freedom which may be granted by the law to the authorities concerned to extend the period of detention, or by the fact that the maximum limit fixed for the original period of detention, plus the extensions allowed, may add up to a considerable period of time. To control the danger of excessive extensions, the law may require that such extensions may be allowed only once[2] or for a specified maximum limit,[3] or allowed only in serious cases or on certain specified grounds.[4] It may also be required that extensions beyond a certain period have to be applied for or ordered by some high prosecuting official,[5] or to be authorized by a high judicial authority.[6] The circumstances or reasons justifying the extension of the period of detention may be required by law to be specified by the authority concerned.[7]

(f) Review of detention

145. Unnecessary prolongation of detention may be avoided if the authority which has ordered the detention or some other competent authority shall from time to time examine the necessity for the continued custody of the accused. Such a review may be required by law to be undertaken ex officio at stated intervals or at any time upon application by the interested party. On the basis of the review the order of detention may be maintained or withdrawn, or the accused may be admitted to bail.

146. In those cases in which the law has fixed a specific time limit for the duration of detention which may not be extended without the sanction of a judicial

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1/ India.

2/ Japan. Exceptions are, however, provided, e.g., where the offence is punishable by death, penal servitude or imprisonment for an indeterminate period; where there is danger that the accused will destroy the evidence; etc.

3/ Thailand.

4/ Belgium, Czechoslovakia.

5/ Czechoslovakia, Israel, USSR.

6/ Yugoslavia.

7/ Japan.

or other competent authority, a review of the grounds for detention will, in effect, automatically take place before any extension may be granted.[1]

147. The law may require review of detention to be made by the competent authorities at stated periods or upon application by the detained person, his legal counsel, legal representative or relatives. In one country,[2] for example, the court is required of its own motion and within specified time limits to investigate whether detention pending trial shall be continued; the first review is to be held after one month of detention and if the detained person is not then discharged the court shall specify when the next review shall be held. The detained person and his counsel are to be heard before a decision is taken in such review proceedings.

148. It is provided in one code[3] that when detention upon a warrant of detention has lasted for an unreasonably long period, the court shall ex officio or upon the request of the detained person, his counsel, legal representative or relatives, rescind the detention or allow release on bail.

149. Some countries have established a system of periodic checks on the maintenance of persons in detention.[4] For example, in one country[5] the law requires prison officials to submit to the court semi-annually a list of detained persons whose trial is pending, with information on the length of time they have been in custody. The court holds semi-annual hearings with the assistance of the prosecutor to examine the reasons which have caused the prolonged custody of the accused persons without their having been brought to trial. On the basis of such hearings the court may release, under surveillance of authority, those accused persons who have been detained for a period of time equal to or longer than that of the possible penalty to which they are liable, without prejudice to their immediate trial. The court must issue a reasoned opinion expressing the grounds for granting or denying the release.

150. In another country,[6] a quarterly list of cases involving offences punishable by more than two years' imprisonment, the preliminary examination of which has not

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1/ Belgium.

2/ Federal Republic of Germany.

3/ Japan.

4/ France.

5/ Peru.

6/ Portugal.

been concluded within the statutory limit, has to be submitted by the government counsel to the procurator. The procurator may decide that the preliminary examination should proceed or may transmit the information on the case to the Procurator-General, who may take whatever steps he deems appropriate.

(g) Provisions applicable to special categories of accused persons

151. The law in some jurisdictions exempts certain categories of persons from arrest or detention for humanitarian reasons, or subjects them to special treatment. These include minors, pregnant women, nursing mothers and sick persons. The following are some of the typical provisions:

(a) An accused less than sixteen years of age is to be committed to the care of the child welfare board, instead of being detained.[1/]

(b) If the accused is under eighteen, the judge may order his detention pending trial or entrust him to his parents or guardian, reputable person, or public or voluntary charitable institution, or a public reformatory for minors, where he will remain under the supervision of the court, exercised through specialized staff.[2/]

(c) A juvenile may be placed under detention only if the purpose of the detention cannot be achieved by other means.[3/]

(d) Sick persons, pregnant women and nursing mothers may not be detained, but must be admitted by order, after consultation with a medical practitioner, to a hospital or other suitable place in such a way as to safeguard their health.[4/]

(e) A woman who is expected to bear a child in the course of the next six weeks, or who has borne a child in the course of the last six weeks, should not be arrested or detained, unless it is certified by a physician or, in cases of urgency, by a midwife, that this can safely be done, and the arrest or detention is considered to be urgently necessary having regard to the woman herself or to the public security; a woman nursing her child is not,

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1/ Iceland.

2/ Argentina.

3/ Czechoslovakia.

4/ Iceland.

as a general rule, to be arrested or detained until nine months after the birth of the child.[1/]

(f) In every case where the committal or remand of any person for custody pending inquiry or trial is authorized by any written law, the court may, if such person is a woman or under sixteen years, in lieu of committing or remanding such person to the custody of the fiscal, direct such person to remain in the custody of a probation officer or in an approved home for the period concerned.[2/]

3. Provisional Release

152. The controls with which the law has surrounded arrest and detention are intended primarily to ensure that the suspect or accused shall not be unnecessarily subjected to physical restraint and deprived of his personal liberty while the question of his guilt or innocence is being inquired into or determined by the competent authorities. To reduce further the incidence of such restraint and deprivation of liberty, provisional release may be granted the suspect or accused. Such release, although provisional in nature and normally subject to conditions, obviates the serious consequences which confinement in custody normally entails for the accused and his family.

153. The value and effectiveness of provisional release as a safeguard for the protection of human rights depends to a large degree on the extent to which the right is available to the accused. It is recognized that the right to provisional release is not absolute, but may be subject to limitations and conditions. Here again, as in arrest and detention, the law has to maintain a just balance between the rights of the individual and the legitimate interests of the State.

(a) Availability of provisional release

154. The wide variety of conditions, limitations and exceptions laid down in the law restrict to a greater or lesser degree the availability of provisional release. The only statement of general applicability which can be made is that provisional release is not available as of right in capital cases and cases

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1/ Norway.

2/ Ceylon.

pending appeal to a higher court after conviction in the court of original jurisdiction. Even in these situations bail may be granted at the discretion of the court. It would also be generally true that for petty offences where the possible penalty involved is only a short jail term provisional release exists as of right, but there are exceptions and qualifications to that statement.1/

155. Beyond these generalities there are striking differences in the law of various countries. One country may give an absolute right to release on bail in every non-capital case,2/ while another may make the granting of provisional release a matter of discretion in every case.3/ The law may indicate the specific cases in which provisional release may not be granted, such as (1) where the accused is charged with an offence punishable with a penalty of a certain degree of severity,4/ (2) where the accused is charged with certain specified offences,5/ (3) where the accused has a previous conviction6/ or is a recidivist,7/ (4) where the accused has previously broken bail8/ or has committed an offence while on

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1/ See para. 155.

2/ Liberia, Philippines, United States of America.

3/ Albania, Italy, USSR.

4/ Panama. No provisional release is allowed to persons accused of an offence punishable by a penalty of five or more years of major imprisonment with hard labour.

5/ Colombia. Provisional release is not permitted for any of the following offences, if the penalty prescribed is imprisonment with hard labour or simple imprisonment: offences against existence and security of the State; offences against constitutional system and against internal security of the State; offences against the public administration; offences against the administration of justice; criminal association; offences against public credit; offences against public health and well-being; offences against the national economy, industry and trade; offences against the public franchise; offences against individual liberty; offences against sexual freedom and sexual honour; offences against the family in the case of abduction, incest and bigamy; homicide, etc.; intentional bodily injury; robbery with violence, extortion and blackmail; theft, fraud in the cases where the value of the object is more than 200 pesos; embezzlement.

6/ Argentina.

7/ Ecuador, Peru.

8/ Brazil, Ecuador.

provisional release,[1] (5) where the accused is a vagrant,[2] (6) where the accused was caught in flagrante delicto,[3] (7) when detention is considered strictly necessary for the investigation or for the safety of the accused or victim,[4] (8) where the accused has attempted to escape during the proceedings.[5]

156. Some jurisdictions[6] allow provisional release only if detention has been ordered on account of danger of escape; such release may be subject to conditions which minimize, if not eliminate, the risk of escape. On the other hand, release may be expressly forbidden where the defendant is detained on the ground that he might destroy or suppress evidence.[7]

(i) Release as a matter of right

157. In some jurisdictions,[8] every defendant charged with a non-capital offence is entitled to be released on bail as a matter of right. This right, however, exists only before conviction of the accused by the trial court; after conviction at trial and while the case is on appeal to the higher courts, the granting of bail usually becomes a matter of discretion for the courts. Some countries allow release on bail as of right even in capital cases, except where the proof of guilt is strong.[9]

158. In certain countries,[10] the law classifies offences for the purpose of provisional release as "bailable" or "non-bailable". The latter are usually offences of a serious nature, including those carrying the death penalty or imprisonment for life. In all bailable offences the accused is entitled as a matter of right to release on bail with sufficient sureties or on personal bond

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1/ Chile.
2/ Brazil, Ecuador.
3/ Ecuador.
4/ Chile.
5/ Venezuela.
6/ Yugoslavia, Federal Republic of Germany.
7/ Norway.
8/ Liberia, Philippines, United States of America.
9/ Liberia, Philippines, United States of America.
10/ Burma, Ceylon, Federation of Malaya, India.

without sureties. In non-bailable cases, bail may be granted at the discretion of the court or the police, except where offences punishable with death or life imprisonment are involved.[1]

159. Some codes grant provisional release as of right in all cases where the maximum penalty prescribed for the offence charged is imprisonment not exceeding a certain specified limit. The limit varies from country to country. It may, for example, be anywhere from three months,[2] six months,[3] one year[4] to five years.[5] The law may, in addition, prescribe certain other conditions which must be met, such as, for instance, that the accused has an established residence within the country,[6] that he has not previously been convicted of a felony or sentenced to more than three months' imprisonment,[7] that the case is not triable by a court sitting with a jury,[8] or that arrest or detention has been ordered because of danger of escape and the suspect promises not to evade or thwart the proceedings and that he, or somebody else, furnishes security.[9]

160. The law may make provisional release mandatory in certain cases after the suspect or accused has been in custody for a specified period of time. For example, the law may stipulate that provisional release follows ipso jure after the expiration of five days from the time of the first appearance of the defendant before the examining judge, provided that the offence charged is a correctional offence the maximum penalty for which is less than two years' imprisonment, that the defendant is domiciled within the country and that he has never been previously convicted of a crime or sentenced to imprisonment exceeding three months, without suspension of the execution of the penalty, for a correctional offence under ordinary law.[10]

1/ India.
2/ Brazil.
3/ China, Norway.
4/ Jordan.
5/ Austria.
6/ Jordan.
7/ Jordan.
8/ Norway.
9/ Austria.
10/ France.

161. Release on bail as a matter of right may be restricted by exceptions laid down in the law. One code[1/] provides that a request for release on bail must be granted, except in the following cases: (a) where the offence charged is punishable with death or imprisonment with or without forced labour for life or for not less than one year; (b) where the accused was previously convicted of an offence punishable with death or imprisonment with or without forced labour for life or for a maximum of more than ten years; (c) where the accused has habitually committed an offence punishable with imprisonment, with or without forced labour, for a maximum of three years or more; (d) where there are reasonable grounds to suspect that the accused may destroy evidence; (e) where there are sufficient grounds to suspect that the accused may harm the person or property of the injured party or some other persons considered to have information necessary for the trial, or do some threatening act towards them; (f) where the name or dwelling of the accused is unknown.

162. Release on bail may be made mandatory by the law on humanitarian grounds. One code,[2/] for example, provides that an application for release on bail may not be rejected where the accused has been pregnant for seven or more months or has given birth to a child within one month of the application for release, or where the accused is ill and requires medical treatment outside of the place of detention.

(ii) Release as a matter of discretion

163. Outside of those cases in which it is mandatory, provisional release is generally left to the discretion of the court or other competent authority. In the application of this discretion, the law may indicate a presumption in favour of pre-trial release, as where it specifies that continued custody is an "exceptional measure".[3/]

164. Many codes indicate factors to be considered in determining whether the suspect or accused should be granted or denied provisional release. These factors are substantially the same as those already discussed above as conditions for arrest and detention.[4/] They include, inter alia, the following: nature and gravity of the offence, severity of the penalty prescribed for the offence,

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1/ Japan.

2/ China.

3/ France.

4/ See paras. 82-99.

strength of the evidence against the accused, and danger that the accused might evade the proceedings, destroy evidence or engage in further criminal activity. Implicit in the above factors is the desire of the law to ensure that the accused will not use his freedom to frustrate the ends of justice or endanger public order or the safety of others.

165. Some codes also mention as factors to be considered the probability of a reasonably speedy trial for the accused,[1] the length of time that he has been in custody,[2] his age or health,[3] the possible harm or injury to which the accused might be exposed if set at liberty,[4] or the possible prejudice to the accused's preparation of his case if he were kept in custody.[5]

(b) Conditions of release

166. Provisional release, whether granted as of right or as a matter of discretion, is subject to conditions intended primarily to secure the presence of the accused whenever required for the investigation or trial, or to ensure that he will not impede the course of justice.

167. The requirement of financial security or bail is the most widely used method of ensuring the appearance of the accused. Such requirement is sometimes coupled with certain other condition or conditions. The accused may be made to promise to appear at any stage of the proceedings whenever required,[6] to take up residence within the jurisdiction of the authority hearing the case,[7] not to leave his residence without permission,[8] to keep the examining judge informed of all his movements,[9] or to appear in court at periodic intervals.[10]

1/ Ireland.
2/ Japan.
3/ Brazil, India.
4/ Thailand.
5/ Stack v. Boyle, 342 U.S. 1 (1951).
6/ France, United Arab Republic (Egyptian region).
7/ Belgium, France, Norway.
8/ Mexico, Yugoslavia.
9/ France.
10/ Mexico.

168. The law may dispense with the requirement of financial security and provide, in lieu thereof, certain measures designed to ensure that the accused would not abscond or frustrate the ends of justice.[1]

(i) Requirement of financial security

169. Nature of security. Where financial security is required, the law may prescribe that it be given in the form of a deposit of cash, stocks or valuables, certified cheque, government securities or bonds, precious stones, precious metals or other precious items, or in the form of mortgage of real estate.[2] Bail may also be given in the form of personal commitment by one or more persons to pay the amount fixed should the accused abscond or fail to comply with the conditions of the bail.[3] The sureties may have to be citizens,[4] or resident householders or property owners.[5] In some countries, professional bondsmen or bonding companies are authorized to put up bail for an accused.[6]

170. Amount of security. The amount is usually determined by the judge or official granting the bail. The law may require that in the determination of the amount the public prosecutor should be heard.[7] In some jurisdictions, while the authority to grant bail lies with the court, the amount is determined by the public prosecutor.[8]

171. The following are factors which may be taken into consideration in determining the amount of bail: nature and seriousness of the offence,[9] circumstances of the case,[10] weight of the evidence against the accused,[11]

1/ See para. 176.

2/ Brazil, India, Japan, Norway, Portugal, USSR, Yugoslavia.

3/ India, Japan, Norway, Portugal, USSR.

4/ Yugoslavia.

5/ Philippines.

6/ Philippines, United States of America.

7/ Portugal.

8/ Yugoslavia.

9/ Argentina, Chile, Japan, Mexico, Portugal, Yugoslavia.

10/ Burma, India, Iraq.

11/ Brazil, Japan, United States of America, Republic of Korea.

certainty of guilt,[1] forfeiture of bail bonds in previous cases,[2] the personal and family conditions of the accused,[3] his past record,[4] his social standing,[5] his character,[6] his health,[7] his financial capacity or that of the persons who offer to be his sureties,[8] the nature of the security offered,[9] sufficiency of amount to ensure appearance of the accused,[10] and approximate amount of the civil liability of the accused.[11] In many jurisdictions, it is provided either in the constitution or by statute that "excessive" bail shall not be required.[12]

172. While in many jurisdictions the determination of the amount of security is left entirely to the discretion of the authority competent to grant bail, in some countries the law indicates a specific amount which is to serve as a basis or guide in fixing the amount of bail to be required.[13] For example, according to one code,[14] an accused may obtain provisional release by entering bail himself in the amount fixed by the judge and calculated on the basis of a certain sum of money (2 to 10 sucres) for each day of penalty prescribed for the offence charged. In another country,[15] the law fixes the minimum and maximum limits of the amount of bail (200 to 20,000 cruzeiros) and provides that if due to the economic situation of the accused the maximum established would not safeguard judicial action, the judge or police authority concerned may increase the bail up to three times the amount permitted by law.

1/ United States of America.
2/ United States of America.
3/ Yugoslavia.
4/ Argentina, Chile, Mexico, Republic of Korea.
5/ Argentina, Chile.
6/ Japan, United States of America.
7/ United States of America.
8/ Brazil, Denmark, Ireland, Japan, Mexico, Portugal, Yugoslavia.
9/ Mexico.
10/ Japan.
11/ Argentina.
12/ Burma, India, Iraq, Ireland.
13/ Liberia.
14/ Ecuador.
15/ Brazil.

(ii) Financial security and the indigent accused

173. The requirement of bail or financial security may operate to restrict the availability of provisional release. Its effect in fact may be to discriminate between well-to-do defendants and defendants who cannot afford to raise the amount required. It is for this reason that the institution of bail is not recognized or given much prominence in some jurisdictions.[1/] In one country, for example, bail is not recognized as it is considered to lead to inequality before the law.[2/]

174. If the defendant is indigent, as many or most of them frequently are, it is unlikely that he can provide any substantial security, or that he will have friends who can do so for him, or that he can provide the collateral protection which professional bondsmen or surety companies usually require. The theory of financial security to act as a restraint upon the accused's motive to flee, whose validity is speculative at best when applied to financially responsible persons, breaks down completely in this situation. The law may provide that "the court shall not fix bail money beyond the financial ability of the accused",[3/] but it is difficult to see how this can be applied in many cases except by a complete waiver of the requirement for financial security. There are limited provisions in some codes for such waivers, such as release after the court verifies that the offender owing to his economic situation cannot afford the amount required. For example, one code provides that if the judge is convinced that the accused does not have any possibility to post bail, the judge, on recommendation of the government counsel department, may grant provisional release upon the accused's recognizance to appear periodically in court or before the police authorities. Such release may be granted only to persons proved to be poor, who have a good record, and who are not likely to evade penal action or commit a new criminal infraction. Non-compliance with the conditions of the release, without a justified reason, within twenty-four hours shall be punished as disobedience of the court. Such non-compliance shall necessitate the immediate detention of the accused who shall not obtain a provisional release again.[4/]

1/ Working Paper B, p. 12, submitted to the United Nations Seminar on the Protection of Human Rights in Criminal Procedure, Vienna, Austria, 20 June-4 July 1960. This Seminar is referred to hereinafter as Vienna Seminar.

2/ Vienna Seminar, Working Paper 1, p. 3.

3/ Republic of Korea.

4/ Brazil, Portugal.

175. Another code provides that an accused who is indigent and lives by his daily work may be exempted from furnishing bail for purposes of obtaining his provisional release in bailable cases, provided he proves by means of statements from three well-known reputable witnesses attesting his indigence, good character and previous good conduct. The statements shall be made by the witnesses concerned after being summoned by the representatives of the public prosecutor (Ministerio Público). The officials receiving such statements, after fully ascertaining the facts, must certify the good repute of the deponents. No court fees of any kind shall be due in respect of the recording of the statements. The documents in these cases shall record the promise of the accused to appear when summoned, to inform the examining judge of his place of residence and not to change such residence without notifying the judge thereof, to be of good behaviour and to fulfil all other obligations which the judge may impose upon him on pain of a fine of not less than twenty nor more than fifty pesos, which may be converted into detention and loss of the benefit of release.[1/]

176. Alternative protections against flight may also be utilized, either as a supplement to financial security or as a substitute therefor. Such measures, which include requiring the accused to report to the court or the police authorities at regular intervals, restricting his residence or freedom of movement, confiscation or surrender of passport or identity papers, release on written declaration or promise of the accused to appear whenever required to do so at every stage of the proceedings and release of the accused to the custody of a responsible third party, will be discussed in some detail below.[2/]

(c) Procedures for release

(i) Mechanics of provisional release

177. Provisional release may be granted ex officio[3/] or upon application by the accused himself, his counsel, legal representative or relatives,[4/] or upon request of the public prosecutor.[5/]

1/ Colombia.

2/ See paras. 195-203.

3/ France, Japan, Republic of Korea.

4/ Japan, Republic of Korea, France - by the accused or his counsel.

5/ France.

178. Depending upon the stage of the proceedings at which application is made, provisional release may be granted by the examining magistrate or official conducting the inquiry or investigation, or by the magistrate or judge conducting the trial of the case. Should the application for release be denied by the investigating authority or the trial court, the law may allow an appeal or complaint to be made to some other authority.[1] In some jurisdictions, the remedy of habeas corpus[2] or amparo[3] is available in case bail is denied without justifiable cause.

179. The police may also be authorized to grant provisional release before the accused is placed at the disposal of the judge or official competent to order his detention. The law may vest such authority in police officers of certain rank, or in police officers in charge of the police station to which the arrested person is brought.[4]

180. In some jurisdictions, the authority to grant bail is deemed a judicial function; accordingly, only judicial officers have the power to allow bail.[5]

181. In the determination of the question whether provisional release is to be granted or not, the law may require that the public prosecutor should be heard or consulted.[6] The complainant or civil claimant may also by heard.[7]

182. Many codes regulate the time limit within which the competent court or authority must rule on an application for provisional release, or within which the public prosecutor is to give his opinion before a ruling is made. In one country, for example, the prescribed period for release proceedings is forty-eight hours, within which the public prosecutor and the complainant, if any, are required to make their statements, and the judge to render his decision.[8] In another country

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1/ United Kingdom (England and Wales).

2/ United Kingdom (England and Wales).

3/ Mexico.

4/ Federation of Malaya, India, United Kingdom (England and Wales).

5/ United States of America.

6/ France, Japan, Peru, Republic of Korea.

7/ Argentina, France.

8/ Argentina.

the decision on the application for provisional release shall be taken within twenty-four hours after its submission; if the opinion of the State counsel is requested, such opinion must be furnished within twenty-four hours, and a decision shall be taken on the application within the next twenty-four hours.[1/]

183. It is provided in one code[2/] that if no opinion is expressed by the prosecutor within three days, he is deemed to concur in the release of the accused.

184. If an application for provisional release is not decided within the time specified by law, an appeal may be taken to a higher authority. In one country, for example, if the magistrate to whom an application for provisional release is submitted fails to render his decision on the application within the prescribed time limit of five days, the defendant may appeal to the arraignments chamber, which must give its decision within fifteen days of such application.[3/]

185. In some jurisdictions the law requires that any decision denying a request for provisional release must be accompanied by a statement of reasons.[4/]

(ii) Stages at which provisional release is available

186. In general, provisional release may be applied for, or granted ex officio, at any stage of the proceedings, even on appeal from a judgement of conviction by the trial court. It is important, of course, that the person arrested or detained should be given opportunity to obtain provisional release at the earliest possible moment. While usually the first opportunity for provisional release may occur after the arrested person has been brought before the judge or other official competent to order his detention, it may be possible for him to be released before such time. In some countries, particularly those which follow the accusatorial procedure, the suspect or accused may avoid being taken into custody by the police by furnishing security conditioned on his promise to appear before the competent judge or magistrate who shall conduct the investigation or trial of the case.[5/] In cases of arrest under warrant, the law may authorize the court to direct by endorsement on the warrant that if the person arrested executes a bond with

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1/ Chile.

2/ Republic of Korea.

3/ France.

4/ Chile.

5/ India, Philippines.

sufficient sureties for his attendance before the court, he may be released from custody.[1] Some codes provide that the judge may refrain from ordering the arrest or detention of the accused if the latter should furnish adequate security.[2]

187. In some jurisdictions, however, the right to provisional release is not available until the suspect becomes an accused, that is to say, until he is charged formally[3] or committed for trial.[4]

(d) Revocation of provisional release

188. Provisional release, whether granted as of right or as a matter of discretion, may be revoked whenever the accused fails to observe without lawful excuse any of the conditions of his release or violates any of the restrictions imposed on him. For example, if he fails without good excuse to appear as required or when summoned,[5] or if he violates residence or travel restrictions,[6] or changes his address without permission,[7] his release may be rescinded.

189. The existence of new circumstances which render detention necessary also justifies cancellation of provisional release.[8] Generally, these circumstances are similar to those which constitute grounds for refusing provisional release, e.g. danger of evasion,[9] tampering with evidence,[9] commission of further offences,[10] danger to public safety,[11] gravity of offence as shown by newly discovered facts or evidence,[12] etc.

1/ India, United Kingdom (England and Wales).

2/ Brazil, Chile, Ecuador.

3/ Baguio Seminar, Working Paper g, p. 8.

4/ Argentina.

5/ Belgium, Brazil, France, Philippines, Yugoslavia.

6/ Brazil, Mexico, Portugal, Republic of Korea.

7/ Mexico.

8/ Belgium, France, Federal Republic of Germany.

9/ Mexico, Yugoslavia.

10/ Brazil, Mexico.

11/ France.

12/ Mexico, Federal Republic of Germany.

190. If release has been granted against security, its cancellation may take place whenever the sureties request it, provided they surrender the accused at the same time,[1] or if they should become insolvent.[2]

191. Revocation of provisional release may also be requested by the accused.[3]

192. Authority to revoke provisional release generally rests on the court or organ which granted it. In some instances, the law may vest in certain judicial officers authority to order the arrest or detention of the accused, regardless of which judicial authority may have granted the provisional release.[4] The police and sureties have authority, in some jurisdictions, to arrest without warrant a person released on bail if they have reasonable grounds for believing that such person is about to abscond for the purpose of evading justice; the law may require the arrested person to be brought as soon as possible before a judicial officer authorized to review the order for bail.[5]

193. If provisional release is cancelled, the accused is usually arrested and placed in custody.[6] If the accused has violated any of the conditions of his release, the security given or part of such security,[7] may be forfeited to the State. In some jurisdictions bail may be forfeited only where the accused has absconded.[8]

194. The law may require that the order cancelling the provisional release of the accused must specify the reasons therefor[9] or that the accused must be informed of such reasons.[10] A copy of the order may be required to be shown to the accused.[11]

1/ Argentina, Mexico.

2/ Mexico.

3/ Mexico.

4/ Belgium.

5/ Israel.

6/ United Arab Republic (Egyptian region). The reincarceration of the accused who violates any of the conditions of his release does not seem to be obligatory.

7/ Brazil, France, Republic of Korea.

8/ Belgium, Yugoslavia.

9/ Brazil, Italy.

10/ Mexico.

11/ Japan.

4. Alternatives to Arrest or Detention

195. Involving as they do a total deprivation of liberty, arrest and detention are properly regarded as serious measures and the codes of many countries reflect a desire to avoid their employment where this is reasonably possible. This may be shown by restrictions which the law has placed on the number of cases in which arrest is mandatory,[1] and by provisions for the use of summons and other less drastic measures to ensure the availability of the suspect or accused for investigation or trial.

(a) Summons

196. The appearance of the suspect or accused before a judge or other competent authority conducting the preliminary investigation or trial may be secured through the use of a summons or order to appear. The issuance of a summons, instead of a warrant of arrest or other warrants involving the use of compulsion, may be discretionary upon the authority concerned. In some countries the appearance of the suspect before a court is generally secured by means of a summons rather than arrest.[2] In one country, for instance, "it is the ordinary practice of magistrates to issue a summons in a criminal case in the first instance, and a warrant is issued only where there are reasons for taking this course, e.g., the gravity of the charge, or the likelihood that the defendant would not obey a summons".[3]

197. The issuance of a summons may be discretionary in less serious cases only,[4] or in all or most cases.[5] In many countries the use of a summons is mandatory in cases involving less serious offences unless the accused has absconded,[6] or he has no fixed dwelling or known residence,[7] or he is a recidivist, a fugitive from justice or accused of certain specified offences,[8] or arrest is deemed essential

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1/ See paras. 100-101.

2/ Denmark, Ireland, Luxembourg, New Zealand, United Kingdom (England and Wales).

3/ United Kingdom (England and Wales).

4/ Italy, Argentina (Province of Cordoba).

5/ Belgium, Cambodia, France.

6/ India.

7/ Chile.

8/ Philippines.

to protect the safety of the injured party or prevent frustration of the investigation.[1] For the purpose of determining what constitutes a less serious offence involving such mandatory use of the summons, the law may specify the maximum penalty involved, e.g., imprisonment for not more than three years,[2] or 341 days,[3] or thirty days.[4]

(b) Promise to appear when required

198. In some countries, the accused may be released on his promise to appear before the court at the designated time and place or whenever required to do so. Such release, however, is usually allowed in limited situations. For example, in one country, release on recognizance (bajo protesta) is allowed, provided the following prerequisites are fulfilled: (a) the accused has fixed and known domicile at the place of the proceedings and has maintained residence therein for at least two years under common court procedure and one year under federal procedure; (b) the accused has a profession or occupation to secure him a decent way of living; (c) the offence is punishable with less than two years' imprisonment under federal procedure or less than six months' imprisonment under common court procedure; (d) that the accused is a first offender; (e) the court believes that there is no fear that the accused will attempt to escape or evade penal action; and (f) the accused declares under oath that he will appear in court whenever requested to do so.[5] In certain other jurisdictions, such release is permitted whenever in view of the personal circumstances of the accused and the facts of the case a suspended sentence is likely to be imposed and his record is such that there is no reason to believe that he may attempt to frustrate the ends of justice;[6] or if the authority ruling on the detention regards the written declaration of the accused to appear when summoned as sufficient, having regard to the character of such accused and the nature of the offence.[7]

1/ Chile.
2/ India.
3/ Chile.
4/ Philippines.
5/ Mexico.
6/ Argentina.
7/ Czechoslovakia.

(c) Release into the custody of a responsible third party

199. A detained person may be released without bail and committed to the custody of a reliable third party within the locality of the court.[1] The person to whom custody is entrusted may be a relative of the accused, a protective institution or the like.[2] Such person or institution may be required to file a written undertaking that the accused will be produced whenever summoned. However, if the accused fails to appear, the person or institution entrusted with his custody has no legal right to apply force. The remedy is rescission of the suspension of detention.[3]

200. The accused may also be released into the custody of a public organization. In one country, for example, any public organization (e.g., a trade union) may submit a petition requesting that the accused be released into its custody. The public organization gives a written undertaking to the effect that it vouches for the defendant's proper conduct and his appearance before the officer conducting the investigations, the examining officer, the procurator of the court whenever summoned.[4]

(d) House arrest or detention

201. Instead of being detained in custody, the accused may be placed under house arrest in order to ensure his appearance before the examining official of the court.[5] The accused may be kept under guard at his home or under some other supervision.[6] In issuing such an order, consideration may be given to the circumstances of the alleged offence and moral qualities of the accused.[7]

1/ China.

2/ Japan, Republic of Korea.

3/ S. Dando and H. Tamiya, "Conditional Release of an Accused in Japan", University of Pennsylvania Law Review, Vol. 108, No. 3, January 1960, pp. 323, 331-332.

4/ USSR.

5/ Albania.

6/ Denmark.

7/ Italy. With the revision of the Code of Criminal Procedure in 1955, the "social status" of the accused is no longer to be taken into consideration.

(e) Other measures

202. The accused may be released, without security, subject to the obligation to report at regular intervals to the court[1] or the police.[2] He may be required to surrender his passport or identity papers,[3] or his residence[4] or freedom of movement[5] may be restricted. The accused may be required to live at a place of his choice other than the place where the offence was committed or forbidden access to a specified place,[6] or he may be prohibited from leaving his place of residence without permission of the court or public prosecutor or official conducting the inquiry.[7]

203. These measures may be applied as alternatives to detention[8] or only in cases where the court finds that the accused is unable to furnish security.[9]

5. Concluding remarks

204. All systems of criminal justice authorize the use of compulsion to bring persons suspected of an offence under the immediate control of the competent investigating or judicial authority. No system, however, sanctions the grant of unlimited power to arrest and detain suspects at will. The power of arrest and detention is subject to legal controls which aim at preventing its abuse and providing guarantees to the individual against unnecessary invasion of his personal freedom.

205. In the present study the Committee is concerned mainly with the safeguards developed in the various laws or codes of criminal procedure against arbitrary arrest and detention. It does not mean, however, that the protection of personal freedom hinges upon the law alone. The vital role which the police and other

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1/ Norway, Federal Republic of Germany.

2/ United Arab Republic (Egyptian region).

3/ Federal Republic of Germany.

4/ China, Japan.

5/ Denmark, Federal Republic of Germany.

6/ United Arab Republic (Egyptian region).

7/ Poland, USSR.

8/ Denmark, USSR, Federal Republic of Germany.

9/ United Arab Republic (Egyptian region).

agents of the law play in connexion with the protection of human rights in the administration of criminal justice is so widely recognized that it hardly needs to be stressed. While it is not within the scope of the present study to deal with questions relating to police organization and training, it is essential to bear in mind that the maintenance of a high standard of organization, training and discipline in the police force is of great practical importance in the prevention of arbitrary arrest and detention.

206. The concept of arrest and detention necessarily varies from country to country to meet differences in social conditions and legal philosophy. There are, moreover, divergencies in procedures for the investigation of crime and preparation for trial which may affect each country's standards as to when it is appropriate to keep a suspect in custody during the pre-trial process. The role of the suspect at the pre-trial stage may range from the wholly passive one of awaiting the outcome of a process in which he takes no part to one in which he is personally involved at every step of the way. Under the so-called "accusatorial" system, the process of discovery of the available evidence is usually the task of the police, who normally will have already completed their investigations before the preliminary hearing or examination takes place. The police investigations may wholly be ex parte the suspect, who may know little or nothing of the evidence against him until the preliminary examination or even the trial. During the police investigation and the preliminary hearing the suspect may not be compelled to make a statement and is, in fact, usually warned upon arrest that he has a right to remain silent. Under the so-called "inquisitorial" system, on the other hand, the suspect is brought into the proceedings much earlier and may have a substantial right to be present and participate in the entire process of investigation. A preliminary examination is conducted in camera by, or under the supervision of, an examining magistrate or public prosecutor. The purpose of the preliminary examination is to discover all available evidence, whether favourable or unfavourable to the suspect, and to determine on the basis of the assembled evidence whether he should be committed for trial. The suspect is subject to interrogation and his statement must be taken by the examining official during such examination.

207. The contrasting methods of investigation noted above are necessarily described in over-simplified terms. It is important not to over-emphasize the

differences, as there are not just two "systems" but many degrees of gradation between the extremes. Moreover, many of the critical human rights issues which arise in arrest law are basically the same under any system.

208. However, the procedures may differ, each country must resolve the problem of establishing lines within which it may exercise the awesome power to deprive a person of his liberty. Arrest and detention constitute a violent invasion of the freedom of the individual. The suspect who is arrested and kept in custody undergoes an incarceration which, by any realistic view, may amount to punishment, no matter how it may be labelled. His enforced isolation means complete interruption of his normal activites, probable loss of employment and separation from family, and - especially if his detention is prolonged - he is bound to suffer from the close confinement, regimentation and abnormal living conditions of prison life. Moreover, his confinement may handicap him in establishing his innocence and in the preparation of his defence. To this is added the risk that, while in custody, he may be subjected to improper methods of investigation by the police or other investigating authority, a danger which is both sufficiently real and sufficiently difficult to eradicate that it is the subject of elaborate legislation on admissions and confessions which will be discussed below.[1/] Even if the suspect is promptly released without having suffered any physical harm or financial loss, he has been subjected to humiliation and tainted with suspicion in the eyes of his neighbours and associates.

209. In view of the serious consequences which deprivation of liberty entails for the individual concerned, the power of arrest and detention should be used sparingly. Arrest and detention should be regarded as exceptional measures, to be resorted to only when strictly necessary. This principle is widely accepted and has been unanimously affirmed at the Santiago and Vienna seminars. The draft covenant on civil and political rights enunciates the principle in article 9, as follows:

> "... It shall not be the general rule that persons awaiting trial shall be detained in custody ..."

(a) Purposes of arrest and detention

210. Various controls have been developed in the law to ensure that the suspect is not unnecessarily subjected to a deprivation of his liberty before he is found

1/ See paras. 414-430.

guilty of an offence. A meaningful appraisal of the variant provisions on this subject cannot be made, however, without first considering the purposes of pre-trial arrest and detention.

211. It is a well recognized principle that pre-trial custody is not a penalty and should never be employed to accomplish ends which legitimately fall within the province of penal sanctions. Arrest and detention are widely regarded as precautionary measures whose primary purpose is to ensure that the administration of criminal justice will not be frustrated or obstructed by those who may become subject to its processes. Thus it is universally acknowledged that the suspect may be kept in custody if this is found to be necessary to ensure his appearance or presence before the authorities conducting the investigation or trial of the case. The suspect may also be kept in custody if there is danger that he will hamper or impede the investigation by destroying, tampering with or concealing the evidence, intimidating or influencing witnesses, etc.

212. The need to prevent the suspect from committing a further offence or continuing his criminal activity is recognized in many jurisdictions as a legitimate cause for arresting or detaining him, but some countries have rejected this ground as incompatible with the nature and purpose of pre-trial detention. It would seem that such arrest or detention goes beyond the main purpose of pre-trial custody, which, as noted above, is to ensure that the suspect or accused does not evade or hamper the proceedings. Arrest and detention in such a case partake of the nature of preventive custody. It is difficult to reconcile such use of arrest with the principle that preventive measures should not be based on mere anticipation of criminal behaviour. The fact that the individual involved is one who is suspected or accused of an offence cannot in itself justify departure from this principle. To allow deprivation of liberty, without trial, on mere anticipation of future criminality can lead to arbitrary action of all kinds. The Committee believes that pre-trial custody should not be employed as a preventive measure, except for the limited purpose of averting an immediate harm or injury that the person concerned may cause to others.

213. Pre-trial custody is permitted in various jurisdictions in order that the suspect can be questioned. It is recognized that under certain systems of investigation the interrogation of the person suspected of an offence is allowed,

or may even be required, but this is usually done under conditions which afford adequate safeguards to the individual concerned. The examination of the suspect, for example, is usually undertaken by, or under the supervision of, a judicial authority or an official independent of the police. In such cases, the existence of reasonable belief that the suspect has committed an offence is required in order to justify his arrest or detention. It is an entirely different matter, however, to allow persons to be taken in for questioning by the police without any definite charges being made against them. Persons may be arrested on vague suspicions, with the expectation that the questioning which follows may produce the requisite evidence to warrant taking further steps against them. Some countries have adopted the course of legalizing the practice of police interrogation, but subjecting it to strict controls, such as by providing a very brief time limit within which the person concerned must be brought before a judicial authority.

214. There are other objectives, whether avowed or unavowed, for which arrest and detention may be used. Arrest and detention may sometimes be justified as being necessary for the protection of the suspect himself. It would seem, however, that such protection ought to be provided without the individual concerned having to suffer loss of liberty. Arrest for the purpose of establishing the identity of the suspect is frequently authorized; in such a case, however, arrest should be allowed only if his identity cannot be readily established. Among other, if unacknowledged, objectives of arrest and detention in practice are: to bring pressure to bear on the suspect and induce him to confess, to appease public opinion, and to serve as a deterrent to others. These objectives are a distortion of the nature and purpose of pre-trial custody and should never be sanctioned.

(b) Prerequisites of arrest and detention

215. Reasonable suspicion of guilt. The requirement that before a person can be arrested or detained there must exist reasonable cause for suspecting him of having committed an offence is a safeguard against needless or capricious interference with one's liberty. The degree of protection afforded by such a requirement will depend, to a great extent, on the intensity of belief or suspicion required to warrant the arrest or detention of the suspect. Beyond the case of

an offender caught in flagrante delicto where the evidence of probable guilt is obviously the strongest, the quantum of suspicion deemed sufficient to justify an arrest or an order of detention is not easy to define with precision. Many variations exist in the formulation of this important requirement, e.g., "reasonable suspicion", "probable cause", "prima facie evidence of guilt", "reasonable presumption of guilt", "strong suspicion", etc. Meaningful comparisons, however, cannot be made purely on the basis of the language of the law.

216. What constitutes sufficient cause for arrest may depend, to a large degree, on the view that is taken regarding the legitimate purposes of pre-trial custody. If arrest is permitted for the purpose of holding a suspect for questioning, almost any circumstance of suspicion may suffice. If on the other hand the suspect cannot be subjected to questioning upon arrest, he should not be taken into custody until the evidence available constitutes a substantial prima facie case against him.

217. The requirement of probable cause is, in general, more stringent in the case of detention. The prolongation of custody after initial arrest should not be ordered unless the evidence induces reasonable belief that the suspect is probably guilty of the offence charged. The Santiago Seminar adopted the view that pre-trial detention should not be authorized unless the presumptive evidence against the accused is of sufficient gravity to arouse legitimate fears which would justify such a precautionary measure.1/

218. A further safeguard would lie in the requirement that suspicion must be founded on objective grounds, i.e., from facts and circumstances. The subjective conviction or belief of the official or authority making the arrest should never be admitted as a basis for arrest and detention.

219. Seriousness of the offence. It is common to limit the power to arrest and detain suspects by excluding minor offences. Many codes in fact authorize arrest and detention usually only in connexion with offences which are punishable with bodily restraint or deprivation of liberty. The rationale of these provisions seems clear. It is obvious that the precautionary measure to be taken should not be more severe than the penalty which the accused would suffer, should he be eventually convicted. This principle was affirmed by the Vienna Seminar which adopted the view that, generally speaking, arrest before trial should be authorized

1/ Santiago Seminar Report, ST/TAA/HR/3, para. 72.

only for violations for which a penalty involving personal restraint is imposed, and only in respect of the most serious of such violations.[1/]

220. Circumstances justifying need to arrest or detain suspect. In addition to the above conditions, it may be required that substantial grounds exist to anticipate certain risks, such as danger of escape, collusion, destruction or suppression of evidence, or commission or repetition of an offence.

221. Some systems allow an unrestricted discretionary power of arrest and detention, leaving the authorities concerned free to determine in each case the circumstances which would justify the need to keep the suspect in custody. Others, however, specify and limit the cases which would justify the arrest or detention of the suspect. While the latter method would appear to afford better protection to the suspect, it seems that the two systems yield similar results in practice. Both systems were discussed at the Vienna Seminar.[2/] A number of participants insisted on the fact that the safeguarding of human rights is less a result of the existence of written legal provisions than of the intervention of a magistrate or of a specially qualified body making its decisions according to a general system of law.

222. Whichever system obtains in a given country, it appears desirable that arrest and detention should in no case be made mandatory. Even in those cases in which the circumstances may legally justify an arrest or detention, the competent authority concerned should be able to take into consideration the personal circumstances of the suspect or accused, such as his age, health, occupation and family status. There are several codes which require these factors to be taken into account, and many countries, in fact, exempt certain categories of persons, e.g., juveniles, pregnant women, etc., from arrest and detention or subject them to special measures.

(c) Safeguards in arrest procedures

223. Requirement of prior warrant or order of arrest. Most jurisdictions require a prior determination by a judicial or other competent authority of the necessity for and justification of a proposed arrest. Such requirement indicates a belief

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1/ Vienna Seminar Report, ST/TAO/HR/8, para. 30.

2/ Ibid., paras. 35-38.

that arrest is too serious a matter to be left to the judgement of the police alone, and that, except where circumstances demand immediate action, some other more disinterested authority should pass on the case before deprivation of liberty occurs.

224. Such prior check is effected through the requirement that before an arrest can be made a written warrant or order must be obtained from a judicial or other competent authority.

225. It is essential that the issuance of the warrant should be entrusted to a judicial officer or some other specially qualified authority who can provide the independent judgement which is the objective of the warrant requirement. The application for a warrant must be supported by such evidence as will satisfy the issuing officer of the existence of sufficient grounds to justify an arrest.

226. The effectiveness of the warrant as a safeguard against arbitrary arrests would depend, to a large degree, on the extent to which the issuing authority satisfies himself of the sufficiency of the evidence supporting the warrant application. If the procedure for the issuance of the warrant becomes perfunctory, the warrant requirement will afford no more than a nominal check on the evil it is designed to prevent.

227. Limitations on arrest without warrant. The practical importance of the warrant requirement would also be affected by the extent to which arrest without warrant is authorized. Exemption from the requirement of a warrant is commonly allowed either with reference to the gravity of the offence or by reason of the circumstances in the particular case. In the former case, arrests without warrant are generally permitted for all more serious offences; even in such cases, however, it may often be the policy or practice to require a warrant to be obtained, whenever possible, before an arrest is made. Where exemption from the warrant requirement is made to depend on the circumstances of the individual case, the power to arrest without prior judicial authorization is generally limited to situations in which immediate action is necessary. The most universally recognized situation is that where the suspect is caught in flagrante delicto. In many cases, however, the exemption may extend to situations which are not strictly of an urgent nature.

228. Whatever criterion may be adopted in determining the exceptions to the requirement of a warrant, the Committee considers it important to stress the

desirability of limiting strictly the cases in which arrest without warrant is possible by requiring a warrant to be obtained in every case, unless arrest cannot safely be delayed until such warrant can be secured from the competent authority.

229. Production of arrested person before a competent authority. The requirement that the arrested person should be brought promptly before a judicial or other competent authority is one of the basic safeguards of individual liberty in arrest law. This post-arrest proceedings can serve a number of purposes. It makes possible an immediate review of the propriety of an arrest. It affords indirectly a check on some police abuses, in that the physical condition of the suspect can be observed and his complaints heard. The suspect can be informed of his rights and of the charges against him, and he can have an opportunity to obtain counsel. The hearing affords him an opportunity to show by his evidence that there are no reasonable grounds to believe that he is guilty of the offence charged. Finally it enables the question of his continued detention to be determined by a judicial or like authority.

230. In most legal systems it is required that the arrested person must be brought before a judicial authority. Some systems on the other hand designate the public prosecutor as the authority before whom the arrested person has to be brought or who should be notified of the arrest. Article 9 of the draft covenant on civil and political rights provides that the person arrested or detained on a criminal charge "shall be brought promptly before a judge or other officer authorized by law to exercise judicial power ...".

231. At the Vienna Seminar, the participants were agreed that the arrested person should, as soon as possible and within a time limit which should be expressly provided, be led before a magistrate or other authority different from the one which carried out the arrest; that he must be able to explain his case before these authorities; and that it would be desirable to have some right of appeal against the decision made on his case. They considered that the period of time within which the police may hold the suspect should be strictly limited (twenty-four or forty-eight hours) and that the rule requiring the arrested person to be brought as soon as possible before an authority other than the police should be strictly applied.[1/]

1/ Vienna Seminar Report, ST/TAO/HR/8, paras. 28 and 38.

232. Time limits. The Committee notes that in many countries no specific time limit is fixed by the law within which the arrested person must be brought before the competent authority, although in general the use of such expressions as "immediately", "forthwith", "speedily", "without delay", etc. indicates that a brief period is contemplated. Various codes, however, impose a specific time limit within which this must be done, ranging from a few hours (e.g., six hours) to a number of days (e.g., ten days). The time required for the necessary journey from the place of arrest to the seat of the court or authority where the suspect has to be brought is not to be counted, according to some codes.

233. The importance of limiting strictly the duration of police custody is widely acknowledged. The arresting authority should be required to deliver the suspect promptly to a competent authority; in any case such delivery should take place not later than a definite time limit to be specified by the law. Without a prescribed definite time limit, it may or may not be possible for the suspect to complain effectively in the case of delay. While recognizing that reasonable allowance has to be made in each case for varying conditions and needs, the Committee considers twenty-four hours to be a desirable maximum limit; this may be extended once for another twenty-four hours, but only upon authorization by a judicial officer or public prosecutor based on a showing of good and sufficient cause.

234. To ensure strict observance of the time limit, the Committee feels that, apart from penal and disciplinary sanctions which may be provided, the law should provide that if the arrested person is not produced before the competent authority within the specified time limit, his detention shall become unlawful and he should be released immediately. It is desirable that the exact time of apprehension and of the appearance of the arrested person before the competent authority should be indicated in the official records of the proceedings.

235. Once the suspect is brought before the competent authority there should be no delay in reaching a determination of the propriety of the arrest. Some codes specify a time limit, ranging usually from twenty-four to seventy-two hours, within which such determination must be made after the suspect has been placed at the disposal of the competent authority. It would be desirable to require the competent authority to decide on the propriety of the arrest within twenty-four hours from the time the suspect is placed at his disposal.

(d) Safeguards in the procedures for detention

236. Authority competent to order detention. Practically all legal systems require that the detention or continued custody of the suspect or accused be authorized by an authority different from the one which has carried out the arrest. Usually this authority is the one who conducts, or is in charge of or supervises, the preliminary investigations. Thus in most countries the power to order detention is vested in the examining magistrate or judge. In some countries the public prosecutor is the authority empowered to order the detention of the suspect or accused, especially during the preliminary investigation stage.

237. The Committee feels that there should be no exception to the rule that pre-trial detention must be ordered by a judicial officer or an authority other than the one which has carried out the arrest.

238. Right of the suspect or accused to be heard. It is generally required that before detention may be ordered the suspect or accused has to be heard. A number of codes, in fact, make this condition an indispensable prerequisite of detention.

239. Reasons for detention. Many codes require that the order of detention should specify the reasons or grounds for the detention. The Committee considers this requirement to be a useful safeguard against arbitrary action. At the Vienna Seminar, it was suggested that "an effective safeguard might be provided by making it the duty of the magistrate or competent authority to state expressly the reasons why he or it considers detention pending trial to be necessary".1/

240. Duration of detention. One of the most important and most difficult problems in connexion with detention is how to effectively ensure that it is not unnecessarily prolonged. Many countries permit indefinite detention, but there is a tendency in modern legislation to subject the duration of detention to strict time limits. It appears desirable that detention should be authorized for a definite period which should be reasonably brief; if upon expiry of this period, it should be found still necessary to keep the suspect or accused in custody, the initial detention may be extended for a like period. Such a system has the advantage of compelling the competent authority, at the end of the initial period, to review the detention and determine whether it would still be necessary, in the

1/ Vienna Seminar Report, ST/TAO/HR/8, para. 39.

light of the circumstances then existing, to continue to keep the suspect or accused in custody. Further guarantees may consist in requirements that extensions may be allowed only for serious reasons to be specified in the law, that they can be authorized only by high judicial or other competent authorities and that the circumstances or reasons justifying an extension must be specified in the order granting it.

241. Whether duration of detention is indefinite or subject to a specific time limit, it is in the interest of the detained person that custody should not last longer than strictly necessary. Detention should cease as soon as the reasons for it no longer apply. This principle, affirmed at the Vienna Seminar,[1/] is widely accepted and has found recognition in the codes of many countries. Opportunities should be provided for a constant check on the necessity of keeping the detained in continued custody.

242. It is also clearly in the interest of the detained suspect or accused, particularly where his custody may last for the duration of the investigation or trial, that the proceedings should be brought to a speedy conclusion. The Santiago Seminar affirmed that "there is never any justification for undue prolongation of the period of such detention because of the slowness of the judicial investigation, for which the time should be reasonably short".

243. Review of detention. To ensure that detention is not unnecessarily prolonged, systems have been devised whereby the grounds for holding the suspect or accused in custody are reviewed by a judicial authority at stated periods ex officio or at any time upon application of the detainee himself or by someone on his behalf. The detainee will be released if it is found that there are no longer any sufficient grounds for keeping him in custody.

(e) Provisional release

244. The practical importance of provisional release as a means of reducing the incidence of arrest and detention depends primarily on the extent to which it can be availed of by the suspect or accused. The wide variety of provisions on the subject do not lend themselves to easy generalizations. Broadly speaking, the

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1/ Vienna Seminar Report, ST/TAO/HR/8, para. 40.

availability of provisional release is usually made to turn upon the seriousness of the offence and on the character, past record and past conduct of the suspect or accused.

245. The question was discussed at length at the Baguio and Vienna Seminars. The Baguio Seminar adopted the view that where attendance could be secured without holding the accused in custody, bail or conditional release should be the normal practice until the accused was actually convicted.[1/] At the Vienna Seminar, the participants were agreed that after a person has been placed under detention, the eventual request for conditional release should always be made possible and that it should, when possible, be considered according to a specific procedure or at least in a jurisdictional manner.[2/]

246. It is desirable that the suspect or accused be given an opportunity to obtain his provisional release at the earliest possible moment. The Committee notes that in many countries, the suspect may avoid being taken into custody by furnishing security conditioned on his promise to appear before the competent authority as or when required. In any event, it should be possible for the suspect to obtain provisional release when he is brought before the authority competent to order his continued detention, as well as at any stage of the proceedings thereafter, either on his application, or on application by his counsel or relatives, or by the authorities on their own motion. In case of denial of provisional release, an immediate appeal or some other speedy recourse should be available.

247. Where provisional release is permitted, it is normally subject to conditions designed to ensure against the anticipated risks which would have been avoided by the custody of the suspect or accused. Bail or financial security is required in most jurisdictions as a condition for the release of the suspect or accused. The economic discrimination inherent in the bail system, however, raises a serious human rights problem. It is for this reason that the bail system is not given much prominence in some jurisdictions. In some countries there are limited provisions for the waiver of bail requirement. It is also usually required in most countries

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1/ Baguio Seminar Report, ST/TAA/HR/2, para. 36.

2/ Vienna Seminar Report, ST/TAO/HR/8, para. 41.

that in fixing the amount of bail, the authorities should take into consideration the financial position of the accused person. These provisions, however, do not provide a completely satisfactory answer to the problem. At the Baguio seminar, the following suggestions were made: (a) that other forms of provisional release than upon financial security should be adopted, e.g. by entrusting the accused to the care of his relatives or releasing him on supervision; (b) that as and when the general level of education and the standard of the police force allowed it, resort should be had increasingly to summons instead of arrest; this would avoid placing persons in custody until they were found guilty. It was argued that these measures would also offer a practical solution to the difficult problem of indigent persons, ensuring that they would not be subjected to detention merely because of their lack of means.1/

(f) Alternatives to arrest and detention

248. Arrest and detention being drastic measures, the codes of many countries reflect a desire to avoid their employment where other measures less injurious to the liberty and integrity of the individual may suffice. The availability of the suspect for the investigation or trial may be secured without necessarily placing him under lock and key.

249. The appearance of the suspect or accused before the competent authority may be secured through the use of summons. While most countries limit the use of summons to minor offences, the experience in various countries shows that the summons can be a practical alternative in a wide range of cases. The developing tendency to diminish the need for arrest by extending the use of procedure by way of summons was noted and approved by the participants at the Baguio Seminar.2/

250. Other significant alternative measures have been developed in various countries. They include release on written declaration or promise of the accused to appear whenever required to do so, release of the accused to the custody of a responsible third party, confiscation or surrender of passport or identity papers of the accused, and obligation to report to the court or the police authorities at regular intervals. Lacking available data, the Committee is not in a position to evaluate the extent to which these measures have proved to be useful in practice.

1/ Baguio Seminar Report, ST/TAA/HR/2, para. 37.

2/ Baguio Seminar Report, ST/TAA/HR/2, para. 35.

(g) Arrest law and the crime problem

251. In the above survey attention has been focused mainly on the legal controls imposed on the power of arrest and detention to safeguard the individual against arbitrary exercise of that power. If nothing has been said about how the effectiveness of law enforcement may be affected by such controls, it is not because the Committee is unaware of society's vital stake in the suppression of lawlessness and crime. The Committee recognizes the essential and acknowledged right of society to defend itself against crime. It has to be remembered, however, that in taking measures to combat crime, society cannot well afford to disregard certain values which it is also in its supreme interest to protect. The preservation of human dignity and human liberty is of paramount importance to every democratic society. Efficiency in the administration of criminal law should not be achieved at the expense of so vital a concept as human freedom. It has been rightly observed that:

> "It is vital, no doubt, that criminals should be detected, and that all relevant evidence should be secured. On the other hand, it cannot be said too often that what is involved far transcends the fate of some sordid offender. Nothing less is involved than that which makes for an atmosphere of freedom as against a feeling of fear and repression for society as a whole." 1/

The aim of criminal justice is not merely to discover every offence and fix responsibility therefor upon an offender. Every system of criminal justice has a dual objective. It must achieve protection of individual liberties, and it must serve as a bulwark of society against the depredations of its criminal members.

252. The law on arrest and detention necessarily involves a careful balancing between security in freedom on the one hand and the legitimate requirements of the administration of penal justice on the other. It is in this area that some of the most pressing human rights problems of our time have arisen. It would be a mistake, however, to view the law of arrest as if the interests of the individual and those of society were necessarily opposed to one another. A healthy regard for the rights and freedom of the individual will in the long run contribute to,

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1/ Mr. Justice Frankfurter in Harris v. U.S. (1947) 67 Sup. Court 1098.

rather than weaken, the efforts of society to combat lawlessness and crime. If little regard is shown for the rights and liberties of the citizen, the law enforcement agencies cannot hope to win the respect and confidence of the law-abiding elements of society, without whose support and co-operation effective law enforcement would become a difficult, if not impossible, task.

B. RIGHTS OF THE ARRESTED OR DETAINED PERSON

1. The right of an arrested or detained person to be informed of his rights and obligations

253. There is very little information available on whether an arrested or detained person has a right to be informed of all his rights and obligations and on when such information should be given to him.

254. The laws of one country provide that a notice in the main languages of the country setting forth the rights and obligations of a person in custody should be displayed at the entrance of each police lock-up and at accessible places in each prison. Where necessary, the contents of the notice should be communicated to persons in a language they understand, and it should be read to those unable to read within twenty-four hours of their admission.[1/]

255. Another country's laws provide that the court, the procurator, the investigator, and the examining official must explain to all persons concerned what rights they enjoy and ensure that they are able to exercise them.[2/]

256. Similar provisions may exist in the law or practice of other countries. Moreover, the laws regulating the first hearing in many countries show that the hearing is expected to serve as an occasion for informing the suspected or accused person of at least some of his rights. The person in custody will be informed of the charge against him if this has not been done beforehand. He may be informed about his right to counsel. If the case is one in which provisional release is applicable, the court may have to tell him how to go about effecting such release. He may be informed of other rights, such as that he is not required to make any statement and the ways in which he can appeal from an order for continued custody or take further action to test the validity of his custody. The Yearbook on Human Rights for 1950 contains the text of a law which provides that at the commencement of the first interrogation the judge or the examining prosecutor must inform the accused of his rights and "the fact that the accused has been so notified shall be entered in the record and confirmed by his signature".[3/]

1/ Federation of Malaya.

2/ USSR.

3/ Page 237.

257. Concluding remarks. The participants at the Santiago Seminar were of the view that a person in custody "should immediately be informed of all his rights and how to avail himself of them".[1/] It was suggested that the information might be imparted "by means of a notice or poster, conspicuously displayed in the place of detention, which would also advise him of his right to obtain medical attention and legal assistance, and to communicate with his family or, in the case of an alien, with the diplomatic representative of his country". The Standard Minimum Rules for the Treatment of Prisoners, approved by the United Nations in 1957, provide that a person on admission to a prison should be furnished "with written information about the regulations governing the treatment of prisoners of his category, the disciplinary requirements of the institution, the authorized methods of seeking information and making complaints, and all such other matters as are necessary to enable him to understand both his rights and his obligations and to adapt himself to the life of the institution"; if a prisoner is illiterate, the information should be "conveyed to him orally".[2/]

258. The Committee supports the views expressed at the Santiago Seminar and the provisions of the Standard Minimum Rules. It suggests that every arrested or detained person should be informed of all his rights and obligations and how to avail himself of his rights immediately on being taken into custody. He should receive this information orally in the first instance. Thereafter he should be able at any time to seek further information or elucidation of his rights, orally or in writing. In addition, judicial and other authorities should be required to inform him at each stage of the proceedings of his rights and obligations.

2. Right to be informed of the criminal offence

259. A suspected person should be informed by the competent authorities of the offence for which he is being arrested or detained. Without knowledge of the offence he will be unable to seek his release or to defend himself properly until proved guilty. Both the nature of the information relating to the offence and the time when the information is given will be of importance to him.

1/ Santiago Seminar Report, ST/TAA/HR/3, para. 11●.

2/ A/CONF/6/1, Annex I A, Rule 35.

(a) Arrest under a warrant or order

260. Generally, the laws which regulate the issue of a warrant or order to arrest a person stipulate that the warrant or order should indicate the offence for which the person is to be arrested. Some laws provide that the offence need not be indicated in the warrant if to do so would be incompatible with the secrecy of judicial instructions, or if there is a serious reason for its omission.[1] As regards the details of the offence, some laws require a brief description,[2] others prescribe for a summary mention with a reference to the provision of the law concerned,[3] and some demand a clear and specific accusation to be set out.[4]

261. Most laws require that the contents of the warrant be communicated to the person to be arrested at the time of arrest. The communication may be oral,[5] or the warrant may have to be shown or delivered.[6] Some laws provide for the production of the warrant at the time of arrest, or as soon as possible thereafter, on the demand of the person to be arrested.[7] In some countries officials can execute a warrant without having it in their possession, but they are obliged to produce it within a certain time limit, or as soon as possible, after the arrest.[8]

(b) Arrest without warrant or order

262. A person making an arrest without a warrant may be required to inform the person to be arrested of the offence alleged against him at the time of arrest,[9] or without delay,[10] or as soon as may be,[11] or there may be no indication of when the information is to be given.[12]

1/ Chile, Italy.
2/ Ethiopia, Netherlands.
3/ France, Italy.
4/ Burma, India, Norway, Turkey, United States of America, Federal Republic of Germany.
5/ Norway.
6/ Costa Rica, Greece, Italy, Portugal, United Arab Republic (Egyptian region), Republic of Korea.
7/ Federation of Malaya, India, Thailand, United Kingdom (England and Wales).
8/ Japan, Netherlands, United States of America.
9/ Canada, Ceylon, Denmark, United Kingdom (England and Wales).
10/ Ghana.
11/ India.
12/ Finland, Thailand.

263. In some countries information of the offence need not be given when the person is arrested while committing an offence or immediately thereafter, or when he flees or forcibly resists before there has been an opportunity to so inform him, or when the giving of such information would imperil arrest.[1] There are laws, however, which stipulate that a person arrested flagrante delicto must be informed of the offence within a certain time limit, such as within twenty-four hours after the arrest.[2]

264. Some laws require the release of the arrested person if he has not been informed of the nature of his offence within a certain time limit, which may be twenty-four hours or five days.[3]

265. The information about the offence varies from those stating the "true ground of arrest" to those giving a general description or indication of the offence.[4]

266. Whether or not an arrested person has been notified of the offence beforehand, he is usually informed of it before his first interrogation,[5] or when he is brought before the authority competent to determine the regularity of his arrest or to order his detention.[6]

(c) Detention

267. The general rule is that the authority issuing an order of detention must mention in some detail in the order itself the offence or offences with which the person to be detained is charged. The order is usually made and read out in the presence of the person to be detained. A copy of the order is also delivered to him.

(d) Concluding remarks

268. Article 9, paragraph 2, of the draft covenant on civil and political rights provides that "anyone who is arrested shall be informed, at the time of arrest,

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1/ Philippines, United Kingdom (England and Wales).
2/ Brazil, China, Iran, Portugal.
3/ Romania, USSR.
4/ Austria, United Kingdom (England and Wales).
5/ Belgium, France, Yugoslavia.
6/ Argentina, Italy, Federal Republic of Germany.

of the reasons for his arrest and shall be promptly informed of any charges against him". The participants at the Vienna Seminar agreed that "the person arrested should immediately be informed of the reasons for his arrest and of the charges preferred against him".[1/] Laws and practice of countries usually conform to the provision of the draft covenant in cases of arrest under a warrant, but not in the case of arrest without a warrant. The Committee suggests that the provision of the draft covenant should be applicable to all arrests. Such a requirement would enable the arrested person to challenge his arrest or to prepare for his defence at the earliest opportunity. It would also put the authorities on guard to scrutinize their actions before taking them and to observe strictly the requirements of law and practice.

3. The right to communication

269. It appears from the laws and regulations of various countries that, in general, the right to communication is most limited after the initial arrest and least limited during detention in the course of the trial. Usually some form of communication is allowed except where provision is made for keeping a person incommunicado, or under similar restrictions. In countries following the "inquisitorial" system far-reaching limitations may be placed in the interests of the preliminary investigation. Under the "accusatorial" system, where the investigation is largely ex parte the accused, there is less reason for restricting communication, and total prohibition of communication is unknown.

270. Inadequate material is available for a detailed study of all the questions that arise. The Committee will consider the following: (a) notice of the arrest or detention to relatives or other persons; (b) keeping a person in custody incommunicado or under similar restrictions; (c) visits and correspondence in general; (d) communication with officials and authorities. Under (e) the Committee will submit some concluding observations. The question of communication between the person in custody and his counsel is dealt with under the right to counsel.[2/]

1/ Vienna Seminar Report, ST/TAO/HR/8, para. 27.
2/ See paras. 317-321.

(a) Notice of the arrest or detention to relatives or other persons

271. The laws of various countries provide for notice of arrest or detention to relatives and other persons by the person restrained or by the authorities; some provide for both.

272. A typical example of notice by the person in custody is a law which provides that a person is entitled to write a letter on admission to a police lock-up.[1/]

273. In a number of countries responsibility for giving notice of the arrest or detention is placed on the authorities, in most cases, whether or not the person in custody avails himself of any opportunity given to him to make his own notification.

274. The giving of such notice by the authorities may be mandatory,[2/] or it may be subject to the interests of the proceedings or to the wishes of the person in custody. The laws of one country, for example, provide that notice may be withheld if it is against the wish of the person in custody or if it would impair the investigation.[3/] Another country's laws provide that notice shall be made as soon as possible without obstructing the examination, and that it shall not be given against the wish of the person in custody without special reasons.[4/]

275. The laws of various countries mention the following as the persons who are to be notified: close relatives,[5/] nearest relative,[6/] relative and friends,[7/] relative or another person enjoying the confidence of the restrained person,[8/] next of kin,[9/] defence or legal representative.[10/] Notice may also be given to the household or the place of residence of the person in custody.[11/] The choice of the person to be notified may be left in some countries to the person in custody.[12/]

1/ Federation of Malaya.
2/ China, Czechoslovakia, Japan, Poland, USSR, Federal Republic of Germany, Republic of Korea.
3/ Denmark.
4/ Finland.
5/ USSR.
6/ Poland.
7/ China.
8/ Federal Republic of Germany.
9/ Finland.
10/ Japan, Republic of Korea.
11/ Denmark, Finland.
12/ China, Federal Republic of Germany.

276. The notice may have to be given within twenty-four hours at the latest,[1] within the shortest possible time,[2] within three days,[3] or without delay.[4]

277. A notable example is a constitutional provision that "a relative of the person detained or a person enjoying his confidence must be notified without delay of any judicial decision ordering or extending a deprivation of liberty".[5] The person in custody may not waive or oppose notification, but account may be taken of his preference in the choice of persons enjoying his confidence. Official notice is mandatory even if the person in custody uses his right to make his own notification.[6]

(b) Keeping a person in custody incommunicado or under similar restrictions

278. Although some countries have abolished the practice of incommunicado,[7] the laws of a number of countries still provide for keeping a person in custody in seclusion from the outside world. These countries usually follow the "inquisitorial" system of criminal proceedings. The object of keeping a person in seclusion, or incommunicado or mise au secret as it is often called, is to safeguard the interests of the investigation. Its purposes are stated to be to prevent collusion, assistance to accomplices, and destruction or suppression of evidence.

279. Some laws permit a person to be held incommunicado immediately on arrest;[8] some only if a warrant or order of arrest specifically provides for it.[9] The duration of incommunicado may last from twenty-four hours to five days,[10] depending upon the country concerned, and it may be extended for further periods up to

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1/ China.
2/ Poland.
3/ Republic of Korea.
4/ Czechoslovakia, Japan, Federal Republic of Germany.
5/ Federal Republic of Germany.
6/ Federal Republic of Germany.
7/ Cuba, Mexico. According to the laws of one country wrongful confinement in the nature of detention incommunicado is punishable with imprisonment up to two years; United Kingdom (Aden), 32.
8/ Colombia, Costa Rica, Ecuador, Panama, Portugal, Spain.
9/ Brazil, Chile.
10/ Brazil, Chile, Colombia, Costa Rica, Ecuador, Panama, Portugal, Spain.

fifteen days.[1] Some laws provide that a person may be held incommunicado only by an order made after his arrest.[2] There are also laws which provide that an order for holding a person incommunicado may be made before or after the first interrogation of the person,[3] and during investigation.[4] The laws usually require that post arrest orders for incommunicado should be made by a judge or official in charge of the pre-trial proceedings. They also provide that the order may be made only if there are sufficient reasons to justify it in the interests of the investigation. The duration of incommunicado under such orders is limited, but it may be extended. Appeals to higher authorities against the order and its duration may or may not be allowed. In one country, for instance, an order may be made to hold a person incommunicado for not more than five days if sufficient reasons exist for it, and the period may be extended for another five days, again for sufficient reasons.[5] In another country the law empowers the examining official to prohibit all communication up to fifteen days in the interest of the investigation. The prohibition may be continued for a further ten days after the official has drawn up a "reasoned decision". The decision is forwarded to the person in custody who may lodge an appeal against it to the procurator supervising the investigation. The procurator must decide on the appeal within twenty-four hours of receiving it.[6]

280. The law of one country provides that the Public Prosecutor may order that "the detained defendant" should not be allowed to communicate with others for a period of ten days, which is renewable for a further period of ten days.[7]

281. Although communication with the outside world is prohibited, except perhaps with the legal counsel,[8] the laws of certain countries allow a restricted right to communication after prior authorization and under strict supervision.[9] The laws of one country, for example, provide that a person may communicate after the first interrogation with certain relatives by permission of the judge and in the presence of the police or an officer of the court on subjects other than "the guilt".[10]

1/ Chile.
2/ Argentina.
3/ Belgium, Peru.
4/ Romania.
5/ Argentina, Peru.
6/ Romania.
7/ Jordan.
8/ See right to counsel, para. 317-321.
9/ Belgium, Lebanon.
10/ Portugal.

282. Even outside of provisions for incommunicado or mise au secret the laws of countries where the "inquisitorial" system operates may provide for restrictions on the right to communication in the interests of the investigation, which may amount to prohibition of both correspondence and visits. Such restrictions may be imposed by the police or, what is more common, by the examining official or court, with or without a right of appeal to higher authorities.1/ For instance, the laws of one country provide that under the judge's supervision care shall always be taken to ensure that the detained person does not communicate with others if this would jeopardize the investigation.2/ Another country's laws empower the judicial authorities to impose restrictions in the interests of the investigation, such as a ban on correspondence and a prohibition on visitors, but an appeal against the restrictions may be lodged with the court by the person in custody.3/

(c) Visits and correspondence in general

283. Outside of custody incommunicado (or under similar restrictions) and where there are no provisions for incommunicado the right to communication is subject usually to such restrictions and supervision as are necessary to prevent collusion or escape, to preserve security and order in the place of custody, and to safeguard the interests of the proceedings.

284. Visits may be allowed at the request of the person in custody or of the visitor. Sometimes the prior permission or order of a judge, minister, procurator, police official, or other authority is required; there may or may not be a right to appeal from a refusal of permission.4/ Limits may be placed on the number of visitors that may be allowed during a stated period of time or at any one visit.5/ Special days and times may be set aside for visits, with or without provision for exceptions, and a time limit may be imposed on each visit.6/ Visitors may have to register and to submit to search; a refusal to permit search may result in the visit being disallowed.7/ The presence during the interview of a

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1/ Argentina, Austria, Belgium, France, Norway, Yugoslavia.
2/ Iceland.
3/ Netherlands
4/ Austria, Belgium, Chile, Costa Rica, Denmark, Lebanon, Liberia, Libya, Panama, Sudan.
5/ Federation of Malaya.
6/ Canada, Federation of Malaya, Lebanon, Liberia.
7/ Ceylon, India, Jordan.

police of prison or court official may be mandatory, though rules such as that the interview should take place within the sight and hearing of the official may not apply to visits by a legal counsel.[1/]

285. Concerning the persons who may visit, the laws and regulations usually place fewer restrictions on visits from close relatives, ministers of religion and doctors than on visits from others.[2/] In one country the law provides that a person who is in custody because he was unable to procure bail can see any friends on any day, at any reasonable time, for the bona fide purpose of arranging bail.[3/]

286. Correspondence, whether from or to the person in custody, is usually inspected or read by the competent authorities. It may sometimes be disallowed, or parts of it may be withheld.[4/] Strict censorship may be imposed by order of a judge, or the police, or other competent authority, in the interests of the judicial proceedings.[5/] Correspondence voicing complaints against treatment in the place of custody may be forbidden.[6/]

(d) Communication with officials and authorities

287. The constitutions and laws of many countries exclude the application of the normal laws and regulations from communications between the person in custody and judicial or other officials or authorities.[7/] The latter may also be obliged to act upon matters raised in such communications, sometimes within a certain time limit.[8/]

(e) Concluding remarks

288. The Committee considers that, irrespective of the right to communication in general, the person in custody should "be allowed to inform immediately his family of his detention", as provided in the Standard Minimum Rules for the Treatment of

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1/ Ceylon, United Kingdom (Tanganyika). See also right to counsel, para. 317.
2/ Belgium, Cambodia, Chile, Denmark, France.
3/ Sudan.
4/ Norway.
5/ Austria, Denmark.
6/ Lebanon.
7/ Federal Republic of Germany.
8/ Albania, Argentina, Austria, Bulgaria, Chile, Costa Rica, Ecuador, Italy, Lebanon, Morocco, Romania, Spain, USSR.

Prisoners.[1] It suggests that, in addition, responsibility should be placed on the appropriate authorities, as is already done in some countries, to give notice of the arrest or detention to the family and other persons designated by the person in custody. The giving of such notice will obviate any difficulty that may arise if the person in custody is unable to communicate because he is kept incommunicado or under similar restrictions. It may be recalled that the conclusions on the treatment of witnesses and accused persons submitted by the technical organizations to the League of Nations in 1939 suggested that "the authorities should be required immediately to notify the family of an accused person of his arrest".[2]

289. The Committee finds the provision of the Standard Minimum Rules that communication with family and friends should be "subject only to such restrictions as are necessary in the interests of the administration of justice and of the security and good order of the institution"[3] useful but too general. The Committee prefers as a general criterion the agreement reached at the Vienna Seminar, namely, "communication with family and friends may properly be restricted to prevent collusion and the passing of information which may assist the suspect's escape or assist accomplices who have not yet been found by the police".[4]

290. Concerning laws and regulations providing for incommunicado, mise au secret, or similar restrictions, the Committee draws attention to certain comments and suggestions made at the Vienna and Santiago Semirars. At the Vienna Seminar participants from six European countries considered that mise au secret, which they recognize, "can have no other purpose than to preclude any collusion between the accused, his accomplices and the witnesses and any suppression of evidence of the offence".[5] They agreed to recommend to their Governments for inclusion in a bill, inter alia, the following principles: "that mise au secret shall not exceed eight days in duration and shall not be extended"; and "that it shall not subject the accused to conditions of detention more rigorous than are strictly

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1/ Rule 92.
2/ League of Nations document A.20.1939.IV,5.
3/ Rule 92.
4/ Vienna Seminar Report, ST/TAO/HR/8, para. 80.
5/ Ibid., para. 81. For the views of the Seminar on communication with legal counsel, see right to counsel, para. 351.

necessary for its purpose". At the Santiago Seminar the participants considered that "in order to strike a proper balance between the social interest in establishing the truth and the protection of human rights, it was desirable that in countries where the detention of persons incommunicado was permitted by law such detention should be effected in accordance with the following rules: (a) it should be applied only in cases of absolute and immediate necessity or of extreme urgency, and only by a judicial order containing a statement of the reasons therefor; (b) it should be limited to the shortest possible period of time, without extensions which would have the effect of vitiating the time limitation".[1/] The Committee fully shares the desire shown by the participants at these seminars to clearly define and strictly limit the operation of laws relating to incommunicado, mise au secret, or similar restrictions.

291. To go beyond these observations and to determine what legitimate restrictions may be placed on the right to communication requires a more thorough inquiry than that made in this study. It requires also the gathering of more precise information than was possible for the Committee. The need for further study and action on the right to communication, however, is fully justified. It is an important right. It safeguards the principle that a person is to be presumed innocent until proved guilty according to law and is therefore entitled to freedom of action necessary to defend himself. It helps him to protect his family or business interests and to make full use of his rights and remedies. Accordingly, the Committee suggests that the Commission should give favourable consideration to the recommendation, unanimously adopted at the Vienna Seminar, for "concluding under the auspices of the United Nations, with due regard to the national legislation of the different States concerned and the Standard Minimum Rules for the Treatment of Prisoners already adopted by the United Nations, an international convention on the right of arrested persons to communicate with those whom it is necessary for them to consult in order to ensure their defence or to protect their essential interests".[2/]

1/ Santiago Seminar Report, ST/TAA/HR/3, para. 91.
2/ Vienna Seminar Report, ST/TAO/HR/8, para. 83.

4. Right to counsel

292. An arrested or detained person needs to be assisted by a person who has knowledge and experience of the relevant procedure, because without such assistance, he may well overlook certain defences which would have helped him to secure his definitive or provisional release.

293. As stated by one Supreme Court, "in criminal cases there can be no fair hearing unless the accused be given an opportunity to be heard by counsel. ... Even the most intelligent or educated man may have no skill in the science of law, particularly in the rules of procedure, and without counsel, he may be convicted not because he is guilty but because he does not know how to establish his innocence. And this can happen more easily to persons who are ignorant or uneducated."[1/]

294. Assistance by counsel is dealt with in the constitutions or statutes of all the countries on which information is available.

295. The Committee will consider: (a) the procedures to obtain legal assistance; (b) the periods during which legal assistance is available; (c) communications between the arrested or detained person and his counsel; (d) the access of counsel to relevant evidence and records, and the participation of counsel in the preliminary proceedings; and (e) the remedies available in case of non-observance of the legal requirements concerning assistance by counsel; under (f) the Committee will submit some concluding remarks.

(a) Procedures to obtain legal assistance

296. In all countries on which material is available, persons arrested or detained on a criminal charge have the right to engage counsel by private agreement, at least at some stage of the proceedings. In most countries, their freedom of choice is restricted only by provisions which require that practising lawyers should have a minimum training and should abide by the rules of a professional Code of Ethics. This rule may be qualified by the proviso that, if there are not enough professional lawyers at the location of the Court, some other individuals who are considered by the judge to be capable of offering

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1/ Supreme Court of the Philippines, Yearbook on Human Rights for 1950, p. 230.

effective assistance may be selected as counsel.[1] Freedom of choice may, however, be restricted further, as under one law which provides that, in cases tried before certain courts, counsel may be selected only from a list kept by the Ministry of Justice.[2]

297. Various laws tend to ensure that the arrested or detained person is in a position to decide intelligently whether or not he wishes to have legal assistance, and to provide guarantees to facilitate the proper selection of counsel.

298. A basic requirement in most countries is that, at some stage of the proceedings, the accused should be orally informed by the competent authorities of his right to engage counsel and of various relevant rules concerning the participation of counsel in the proceedings. Various laws provide that the competent authorities should thereafter ask the accused to state expressly whether or not he wishes to have legal assistance.[3] The accused is presumably able to answer this question intelligently if the nature of the charges or suspicions against him with all their implications have been explained to him (see right to be informed of the criminal offence, paras. 259-267).

299. In some countries lists of attorneys and written notices inter alia, on legal assistance, must be posted at appropriate places in jails, and where necessary the contents of these notices must be communicated to detained persons in a language which they understand.[4]

300. Difficulties of communication with people outside the prison may prevent the detained person from communicating with a lawyer (see right to communication, paras. 269-286; see also paras. 317-321). Certain laws expressly provide that the police are duty bound to deliver any message from the detained person to an attorney requesting his services.[5]

301. In some countries, the relatives and friends of the arrested or detained person can select counsel for him.[6] The law may provide that the accused should be allowed a reasonable time for selecting counsel.[7]

1/ Yugoslavia.
2/ Czechoslovakia.
3/ Philippines.
4/ Federation of Malaya, Lebanon.
5/ Philippines.
6/ China, Republic of Korea, Union of Soviet Socialist Republics, Yugoslavia.
7/ Argentina, Philippines.

302. In the absence of private agreement, with a lawyer, the courts or other competent authorities must, in certain countries, appoint counsel if the accused so requests. This rule may apply in all cases or at least in all the cases which are subject to preliminary examination;[1] or in specific circumstances, for instance when serious penalties may be incurred,[2] when the accused is in detention,[3] or when his detention has lasted more than a stated period (e.g., more than three months).[4] Various laws provide that the arrested or detained person should be orally informed of that right and asked specifically whether he wishes the court to take such action.[5]

303. In certain circumstances, legal assistance is "mandatory": the courts or other authorities must ex officio provide uncounselled accused with a lawyer, even if no formal request to that effect is forthcoming. In certain countries legal assistance seems to be mandatory in all cases which are subject to preliminary examination.[6] Other laws provide that legal assistance is required in the following specific circumstances:

(a) When serious penalties are incurred,[7] a standard which may refer to the death penalty or severe imprisonment, or may include cases involving imprisonment for three years or even less; or

(b) in all cases tried before certain courts,[8] a standard which often, but not always, parallels that described in (a) supra; or

(c) where certain circumstances relating to the personality of the accused are likely to hamper his defence, such as: minority, advanced age, blindness, deafness or dumbness, when the accused does not know the language of the Court, or when there is suspicion that he is mentally unsound;[9] or

(d) if there are several accused persons and one of them, assisted by counsel, has interests which conflict with those of the others;[10] or

(e) if the trial is to be held in absentia.[11]

1/ France, Luxembourg, Philippines, Union of Soviet Socialist Republics.
2/ Thailand.
3/ Denmark, Iceland.
4/ Federal Republic of Germany.
5/ France, Luxembourg.
6/ Brazil, Bolivia, Colombia, Italy.
7/ Bulgaria, Czechoslovakia, China, Republic of Korea, USSR, Yugoslavia.
8/ Argentina, Belgium, Cambodia, China, Haiti, Poland, United Arab Republic, (Egyptian region).
9/ Luxembourg, Morocco, Union of Soviet Socialist Republics, Yugoslavia, Federal Republic of Germany.
10/ Albania, Bulgaria, Iceland.
11/ Argentina, Belgium.

/...

304. Additional provisions grant to the courts, in various countries, discretionary powers to appoint counsel ex officio if there are difficult points of law or fact,[1] in view of the special circumstances of the case,[2] or if it is deemed advisable for the better consideration of the case.[3]

305. The circumstances mentioned in paragraph 303 (a) above, relating to the gravity of the penalties incurred, are often among those which in various countries justify or even require detention pending trial, so that a certain number of detained persons probably enjoy the benefit of mandatory legal assistance. Few laws, however, make such assistance mandatory merely on account of the detention of the accused.[4] One provision expressly requires that counsel be appointed, if the accused has not already selected an attorney, in certain appellate proceedings to review the legality or propriety of detention orders.[5]

306. Where assistance by counsel is "mandatory", this may be interpreted as a requirement which exists regardless of the accused's wishes,[6] or he may still be permitted to waive his right and expressly elect to be tried without counsel or without his lawyer fully participating in the proceedings.[7]

307. In a large number of countries, persons of insufficient means and who wish to have counsel may, under certain conditions, be exempted from paying legal fees. Certain laws appear to provide that free legal aid should be granted solely upon proof of indigence.[8] In accordance with several provisions, such aid must be given at least for the most serious offences (i.e. murder charges) or in other cases where the law declares legal assistance to be mandatory.[9] In addition to, or instead of, such specific provisions, various laws grant to the courts discretionary powers to extend free legal aid to indigents if they consider it desirable "in the interests of justice", or in view of the special circumstances

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1/ Federal Republic of Germany.
2/ Norway.
3/ Argentina.
4/ Netherlands; Vienna Seminar, working paper 1, p. 3.
5/ Federal Republic of Germany.
6/ Poland; Santiago Seminar, working paper H, p. 57; Vienna Seminar, working paper 6, p. 11.
7/ France; Union of Soviet Socialist Republics; Santiago Seminar, working paper H, p. 57.
8/ Brazil, Chile, Liberia, Yugoslavia, Republic of Korea.
9/ Ceylon, Haiti, India, United Arab Republic (Egyptian region), United Kingdom (England and Wales).

of the case.[1] The practical tests to ascertain the eligibility of indigent persons for free legal services, and the procedures for appointing counsel and paying his fees, vary from country to country; a detailed analysis of these questions is contained in a working paper submitted to the Santiago Seminar.[2]

308. When counsel is appointed by the court or other competent authorities, including cases where free legal aid is granted, the freedom of choice of the accused is restricted in varying degrees. Such attorneys are often selected in turn by the appointive authority from panels established by the courts and/or professional associations.[3] Certain laws, however, provide that the accused should be given an opportunity to indicate his preference[4] or that within the limits of those available on the panel, the accused may choose.[5]

309. Many laws provide that Court-appointed lawyers are bound, on pain of disbarment and/or fines, to defend the accused and may be excused only on account of illness or other compelling circumstances.[6]

310. It is recognized in various countries that, in spite of all the above-mentioned guarantees, there may still be circumstances where an accused, against his own interests, goes on trial uncounselled. Certain laws and judicial decisions try, therefore, to ensure that refusals to engage counsel or waivers of mandatory legal assistance are decided upon freely and in full knowledge of the consequences of such act. It may be provided, for instance, that waivers by minors or persons who are unable to exercise their right to defence because of some physical or mental disability are not binding on the examining authorities or the courts.[7] In one country, a waiver made at the trial court, when the defence counsel (already selected), unexpectedly failed to appear, was held by the Supreme Court to be inadmissible as possibly involving some element of psychological compulsion.[8]

1/ Australia, Israel, New Zealand, Norway, United Kingdom (England and Wales).
2/ Santiago Seminar, working paper H, p. 58-60.
3/ Santiago Seminar, working paper H, p. 58.
4/ Iceland.
5/ Canada.
6/ Colombia, Costa Rica, Poland.
7/ Union of Soviet Socialist Republics.
8/ USSR.

In various countries, the law stresses that waiver of the right to legal assistance is never final and that counsel may be selected or requested from the court at any subsequent stage of the proceedings.1/

(b) Periods during which legal assistance is available

311. On the basis of the information collected, it has not always been easy to ascertain from what stage of the criminal proceedings the arrested or detained person may exercise his right to legal assistance.

312. In certain countries, the law provides in general terms that the accused may retain, and consult with, counsel "at all stages of the proceedings", or "at all stages of the prosecution".2/ More specifically, some statutes and leading judicial decisions provide that these rights accrue to the person concerned "from the time of arrest"3/ or "immediately" after arrest.4/

313. In other countries, the accused must be informed of his right to counsel only at subsequent stages of the proceedings: at the time of his first appearance before the examining magistrate or other authority competent to order his detention,5/ or when the preliminary examination is completed and the accused is committed for trial;6/ and the laws do not appear to contain any provision concerning legal assistance while the arrested person is under police custody, prior to his appearance before the examining authority.

314. The silence of the law in this respect cannot be construed as prohibiting the engagement of legal advisers at the early stages of the proceedings. There are indications that, in practice, lawyers can be retained while the person concerned is under police custody, even though the law does not expressly recognize such right during that period.7/ Some of the laws and practices mentioned above, concerning, for instance, the posting in jails of relevant information, the immediate transmittal by prison wardens of requests for legal aid, the retention of counsel by relatives of the accused, help to secure a prompt selection of counsel.

1/ Canada, France.
2/ Australia, Austria, Ecuador, Federal Republic of Germany, Netherlands, Norway, Philippines, Turkey.
3/ Colombia, Ghana, India, Mexico, New Zealand, United Kingdom (Tanganyika).
4/ Japan, United States of America.
5/ Belgium, Costa Rica, France, Lebanon, Morocco, Panama, Thailand.
6/ Albania, Bulgaria, Chile.
7/ Ethiopia, France, Haiti, Thailand.

315. It appears, however, that, in countries where there are no legal provisions concerning legal assistance at the early stage of the proceedings, the arrested person under police custody may not enjoy the benefits of such assistance as fully as he may upon his first appearance before the examining authority: as will be shown later, his right to communicate with counsel, and the access of counsel to relevant interrogations and proceedings, may be restricted during the period of police custody.

316. There is not enough information to ascertain the periods during which court-appointed counsel are available. In a working paper submitted to the Santiago Seminar, only a few laws are mentioned under which appointed counsel are available during the preliminary investigation.[1/]

(c) Communication between the arrested or detained person and his counsel[2/]

317. The laws of many countries expressly provide that the arrested or detained person is entitled to see his counsel, and to correspond with him, for the purpose of preparing his defence. Such rights may be defined in absolute terms,[3/] or they may be regulated as regards the timing and length of the counsel's visits and made subject to a certain degree of surveillance by the judge or other competent authorities: consultations may, for instance, take place only in the presence of a court official or warden.[4/] It is often provided, however, that such official should not be in a position to hear the conversations.[5/]

318. In certain countries, the right so defined may not be exercised at all stages of the proceedings. Under some of the legislations which do not expressly provide for legal assistance during the period of police custody, incommunicado appears to be the rule prior to the appearance of the arrested person before the examining authority.[6/] This rule would seem to make it impossible for the arrested person to consult with his lawyer at that early stage, if the competent authorities were not empowered to make exceptions and permit some degree of communication with counsel.[7/]

1/ Santiago Seminar, Working Paper H, p. 59.
2/ See also rights to communication, paras. 269-287.
3/ Philippines.
4/ Austria, Yugoslavia, Federal Republic of Germany.
5/ Federation of Malaya, India, Sudan.
6/ Belgium, Panama, Portugal.
7/ Belgium, Panama, Portugal.

319. As was mentioned in paragraphs 279, incommunicado for limited specific periods may, in various countries, be ordered even after the first appearance of the arrested person before the examining authority. Some of these provisions worded in terms so comprehensive as to cover, presumably, lawyer-client relationship.1/

320. Certain laws expressly allow the examining magistrate to curtail or suspend communications with counsel if such contacts are deemed to impede the investigation.2/ In some countries, it is expressly provided that orders of that kind are subject to appeal.3/

321. Various laws stress that incommunicado, at least when it is ordered after the first appearance before a magistrate, may not affect in any way the right of the accused to consult freely and confidentially with his counsel.4/

(d) Access of counsel to relevant evidence and records; participation of counsel in the preliminary proceedings

322. When counsel is engaged, he may know, through his client, the charges which were contained in the warrant. However, in order to prepare the defence adequately, counsel must also be informed of the evidence which supports the charges, of the facts upon which orders of detention are based, and of any pertinent procedural decision.

323. Implementation of this principle has been carried out in various ways. As noted in a working paper submitted to the Santiago Seminar, in countries which follow the "accusatorial" procedure, the accused is usually entitled to prompt preliminary hearing, oral, and contradictory, and usually in public, where he and his counsel may be informed of "at least some of the prosecution's evidence";5/ furthermore, at these hearings, counsel may make oral pleadings, obtain the compulsory attendance of witnesses and cross-examine prosecution witnesses.6/

1/ Argentina, Belgium, Portugal.
2/ Austria, Netherlands, Yugoslavia.
3/ Austria, Netherlands, Yugoslavia.
4/ Cambodia, France, Greece, Libya, Luxembourg, Morocco, Republic of Korea.
5/ Santiago Seminar, Working Paper H, page 61.
6/ Australia, Israel, Japan, Philippines, United Kingdom (England and Wales), United States of America.

324. According to the same working paper, in some countries at least, "these preliminary hearings are likely to be short and hurried and fall far short of being a full development of the prosecution's case... once the accused has been held by the preliminary hearing, the defence will normally have almost no right to inspect or 'discover' the prosecution's evidence until it is presented at the trial."1/

325. In countries where the laws were patterned after the "inquisitorial" system, there is no public and contradictory hearing before trial. In the system as it was applied originally, the preliminary examination was secret, even vis-à-vis the accused and his counsel, and few facilities were given them to refute the charges or make observations before trial. Today there is still no public and contradictory hearing before trial, but the working paper mentioned above notes that "the trend is towards fuller disclosure".2/ In various countries of that category, the laws have been so amended during the last fifty years that the accused and his counsel have at present the right "to know and contest the prosecution's evidence during all stages of the preliminary examination".3/ Evidence of such a trend will be found below.

326. It may be noted, first of all, that certain laws grant to "the accused" access to the relevant evidence and the right to be present at various preliminary proceedings, without stating expressly that such rights also accrue to counsel.4/ The Committee assumes that the latter provision is implicit, since such laws also stress that the purpose of the right to assistance by counsel is to "defend the legitimate rights and interests /of the accused/". Furthermore, in one of the countries coming under this category, it is provided that counsel may perform all actions to which the accused is entitled.5/

327. In most countries, defence counsel is guaranteed the right to see or inspect the records of the case, or parts thereof, at some stages of the proceedings. It is doubtful whether this right may be exercised while the arrested person is

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1/ Santiago Seminar, working paper H, page 61.
2/ Santiago Seminar, working paper H, page 63.
3/ Santiago Seminar, working paper H, page 50.
4/ Albania, Bulgaria, Czechoslovakia, Romania, USSR.
5/ Yugoslavia.

under police custody, prior to his first appearance before the examining authority or under procedures applicable when the person is arrested flagrante delicto. There are indications, however, that the transcripts of police interrogations, inasmuch as they form part of the file transmitted to the examining authority and the trial court, may be seen by the lawyer at subsequent stages of the proceedings.1/ The police may also, "as a matter of grace", permit counsel to have access to their reports.2/

328. As regards the period between the first appearance of the accused before the examining authority and the closing of the preliminary examination, certain distinctions may be made. Some legislations provide that counsel is entitled to inspect all the records of the case without restriction.3/ Other laws grant him the right to see the records of interrogations and of all other judicial activities which counsel was entitled to attend, but the competent authorities may deny him the right to know other evidence if they consider that such disclosures would endanger the purpose of the preliminary examination.4/

329. Counsel is usually not free to see the records any time he chooses. He may do so only at certain stages of the proceedings and on certain occasions; for instance, as it is frequently provided, before each interrogation of the accused. Under some provisions, counsel may also exercise that right before appellate or periodic review hearings on questions directly relating to detention or provisional release.5/

330. It is frequently provided that the records should be made available to the accused and his counsel during a minimum period before such interrogations or court sessions. Provisions may be found under which the hearings should be postponed, if necessary, to allow defence counsel appropriate time to study the case.6/

331. Distinctions between various stages of the preliminary proceedings may also be made as regards the attendance of counsel when his client is interrogated or confronted with witnesses.

1/ France.
2/ Canada.
3/ Austria, Belgium, Cambodia, France, Morocco, USSR.
4/ Czechoslovakia, Iceland, Yugoslavia, Federal Republic of Germany.
5/ Belgium, France.
6/ Cambodia.

332. The right for a lawyer to be present at such occasions is not usually provided for prior to the first appearance of the accused before the examining authority nor during interrogations by the police or prosecutor in case of arrest flagrante delicto. However, one recently enacted law concerning arrest flagrante delicto provides that the prosecutor may not interrogate a suspect except in the presence of counsel, if such person appears spontaneously, accompanied by his counsel.1/

333. After the first appearance of the accused before the examining authority, the presence of counsel is in various countries a legal requirement during interrogations and confrontations.2/ Exceptions may be made to that rule, however, in urgent cases, for instance when the accused or a witness is in danger of death or some evidence is on the point of disappearing.3/ Exceptions so ordered may be subject to appeal.4/

334. Efforts have been made in various countries to ensure greater participation of counsel in the appellate and periodic review proceedings concerning detention. In accordance with certain laws, some of which were recently enacted, counsel may not only submit written memoranda to the competent organs, but also appear before them and make oral observations.5/

335. In general, with the exception of countries which apply the accusatorial system, and where counsel fully participates in the preliminary hearings, counsel's rights during the preliminary examination are not equal to those which he enjoys at the trial. Counsel is usually not authorized to make oral pleadings.6/ He may ask questions, apply for various measures which he considers appropriate for the defence, but only upon the authorization of the examining magistrate, who may refuse them for stated reasons.7/

1/ France.
2/ Cambodia, Colombia, France, Greece, Israel, Morocco, Peru, Portugal, United Arab Republic (Egyptian region).
3/ Cambodia, Colombia, France.
4/ France.
5/ Belgium, Cambodia, France, Federal Republic of Germany.
6/ Argentina, Chile, France.
7/ Argentina, Denmark.

(e) Remedies in case of non-observance of legal requirements concerning assistance by counsel

336. Although the subject of remedies and sanctions will be examined later, it may be noted, at this stage, that annulment of the proceedings, and/or the inadmissibility at trial of evidence gathered in the examination, often constitutes the main sanctions where the requirements as to effective legal assistance have not been complied with.

337. A request for annulment may be made, for instance, when the accused has not been notified of his right to counsel; when legal assistance is mandatory and no lawyer has been chosen by the accused or appointed by the competent authorities; or when the lawyer has not been called for attendance at his client's interrogations.

338. In some countries, the arrested or detained person may petition the courts for a writ of habeas corpus or mandamus to compel the authorities to afford him free communication with his counsel.[1/] Penal sanctions of imprisonment are provided, in some jurisdictions, against any public official who prevents defence counsel from visiting his client.[2/]

(f) Concluding remarks

339. Many laws and judicial decisions recognize the importance of the right to counsel and provide various guarantees for its implementation. The Committee, in concurrence with the views expressed by various technical organizations and United Nations Seminars on Human Rights, believes that such efforts should be energetically pursued in keeping with the suggestions made below.

(i) Procedures to obtain legal assistance

340. Arrested or detained persons should be given all possible facilities to engage a lawyer or to apply for a court-appointed counsel in due time and intelligently (see paragraphs 296-303). It is necessary for that purpose that the arrested or detained person be orally notified of his right to counsel and of all the rules concerning legal assistance, such notifications to be duly recorded;

1/ Canada.

2/ Philippines.

that lists and addresses of lawyers be posted in jail or otherwise communicated to him; that the prison authorities fully co-operate with him in his search for a lawyer and, in particular, forward immediately and without censorship any request for legal assistance, including requests to the courts for a publicly appointed lawyer; and that the person concerned be granted a reasonable time, before the proceedings start, to decide whether or not he wishes to have legal assistance and to make a reasoned choice from among available attorneys. Furthermore, the Committee believes that the relatives, friends, or legal representatives of the arrested or detained person should be allowed to select counsel for him, subject to his subsequent approval: even in those countries where incommunicado is unknown, persons at liberty are in a much better position, obviously, to make extensive enquiries and to communicate with lawyers directly.

341. The Courts should see to it that decisions by accused persons to refuse legal assistance are free from pressures of any kind and are not taken lightly. At any rate, it should be provided that the accused may at any time change his mind and select counsel. In the view of the Committee, provisions which permit waivers of legal assistance when such assistance is declared "mandatory" are self-contradictory (on these questions, see paragraph 310).

342. The Committee has noted that few countries consider the fact that the accused is in detention is per se a ground for mandatory legal assistance (see paragraphs 303-305).

343. The Committee believes, however, that in spite of all the guarantees suggested above, the fact of detention deprives the accused of many of the facilities needed to engage counsel intelligently by private arrangement. There is always risk that the detained person may be misinformed about his right to legal assistance, prevented from making the necessary contacts or requesting a court-appointed lawyer, and discouraged under various psychological pressures from seeking legal advice. There is, therefore, in the opinion of the Committee, much to say in favour of the view that, should the detained person fail to select a lawyer or to ask for a court-appointed counsel, the courts or other competent authorities must appoint an attorney ex officio. It may at least be suggested that legal assistance be made mandatory in any case of detention incommunicado or whenever the detained person alleges abuses on the part of the police or prison authorities.

344. Ideally, indigent persons should be granted a court-appointed counsel and be exempted from paying legal fees, in criminal cases whenever they are willing, but unable to retain counsel themselves. The Committee is aware of the fact that various countries may for the time being find that the implementation of such a principle would tax public funds too severely. The Committee would, however, suggest that governments endeavour to enlarge progressively the scope of provisions concerning free legal aid. They should be invited to consider granting free legal aid not only "where a person is accused of a serious offence" (minimum measure recommended by the Baguio Seminar)[1] but also more generally "in any case where the interests of justice so require" (formula contained in article 14 (3) (d) of the draft covenant on civil and political rights),[2] including, but not restricted to, all cases where legal assistance is made mandatory by law. The principle of free legal aid for indigent persons was reaffirmed without restrictions by the Santiago and Vienna Seminars.[3]

(ii) Periods during which legal assistance is available

345. One of the conclusions on treatment of witnesses and accused persons submitted by technical organizations to the League of Nations in 1939 was that "the law should require the authorities to inform such person /the accused/ of his right /to engage counsel/ on his first appearance before them".[4]

346. In the view of the Committee, if the word "authorities" means "a magistrate or other authority competent to order detention", the recommendation of the technical organizations does not go far enough. During the period between arrest and their first appearance before a magistrate, the uncounselled accused, subjected to police inquiries and interrogations, may make serious mistakes and neglect essential defences. Indeed it may be said that it is during this initial period, when much adverse evidence may be gathered, that legal assistance is most important.

1/ Baguio Seminar report, ST/TAA/HR/2, para. 56.

2/ Text as adopted by the Third Committee of the General Assembly, General Assembly, official records, 14th session, a.i. 34, annexes, A/4299, para. 64.

3/ Santiago Seminar report, ST/TAA/HR/3, para. 98; Vienna Seminar report, ST/TAO/HR/8, para. 86.

4/ League of Nations, document A.20.1939.IV,20.

347. The Committee therefore strongly concurs with the opinion, expressed at the Baguio Seminar, according to which the right to legal assistance "should exist from the time when a person is either arrested or has received a summons to appear in court".[1/]

348. From the moment of his apprehension, the suspected or accused person should be fully informed of his right to counsel and granted all the above-mentioned facilities to obtain legal assistance. Communications between the arrested person and his lawyer during the initial period may be subject to certain regulations, but not to a greater extent than is considered justified after the first appearance of the accused before a magistrate (see paragraph 352). In general, the Committee fails to see the reasons for maintaining sharp differences, as far as legal assistance is concerned, between the period of arrest and the period extending after the first appearance before a magistrate.

(iii) Communications between the arrested or detained person and his counsel

349. The Committee wishes to refer to the observations it has made on the subject of communications as a whole and to its endorsement of the recommendation made by the Vienna Seminar (see paragraph 291).

350. It should be noted that the Third Committee of the General Assembly thought it desirable to insert as a distinct guarantee, in the text of article 14 (3) (b) of the draft covenant on civil and political rights, "the right of the accused ... to communicate with counsel of his own choosing".[2/]

351. The Committee fully supports the unanimous view of the Vienna Seminar that "the suspect or accused should have completely free and private communication with counsel",[3/] and the proposal made at that Seminar by several participants that "mise au secret /incommunicado/ shall not apply to communication between the accused and his defender".[4/]

1/ Baguio seminar report, ST/TAA/HR/2, para. 53. See also Santiago Seminar report, ST/TAA/HR/3, para. 96; and Vienna Seminar report, ST/TAO/HR/8, para. 85.

2/ General Assembly, official records, 14th session, a.i. 34, annexes, A/4299, paras. 56 and 64.

3/ Vienna Seminar report, ST/TAO/HR/8, para. 14.

4/ Ibid., para. 81

352. The Standard Minimum Rules for the Treatment of Prisoners, drawn up in 1955, already stated without restrictions, that "for the purpose of his defence, an untried prisoner shall be allowed ... to receive visits from his legal adviser ... and to prepare and hand him confidential instructions".[1/] The arrested or detained person should likewise be allowed to communicate freely with his lawyer in writing or by telephone and such messages should not be censored or their transmittal delayed, by prison authorities. In the view of the Committee, all these rights should accrue to the arrested or detained person equally prior and after his first appearance before a magistrate.

353. Communications with counsel might be regulated to the extent strictly necessary to ensure that they are not misused, for instance, to organize the evasion of the detained person. As stated in the Minimum Rules, it may be provided that "interviews between the prisoner and his legal adviser may be within sight, but not within hearing of a police or institution official."[2/] The courts, however, should see to it that such controls are not applied in such a manner as to frustrate the purposes of communications with counsel: the adequate preparation of the defence.

(iv) Access of counsel to relevant evidence and records; participation of counsel in the preliminary proceedings

354. In keeping with a recommendation made by the Santiago Seminar, the Committee believes that, regardless of the type of procedure adopted, no measure should be taken "which absolutely denies the right of the accused, arrested or detained person, and particularly his counsel, to information concerning the proceedings of the investigation and the trial".[3/]

355. Counsel should be entitled to see the relevant records, especially those of early interrogations conducted before the accused had selected a lawyer. Such inspections should be permitted: before each interrogation; before the arrested or detained person signs any statement recognizing the accuracy of the records

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1/ Rule 93.

2/ Ibid.

3/ Santiago Seminar report, ST/TAA/HR/3, para. 101.

or the legality of the preliminary examination; and before any hearing on the question of detention (periodic reviews; requests for provisional or definitive release). A reasonable time should be allowed to counsel for studying these records before the hearings.

356. As recommended by the Santiago Seminar, "interrogation in the absence of counsel should not be permitted".1/ As soon as he is selected or appointed, counsel should be duly called for attendance a reasonable time before each interrogation and confrontation. Since, in the view of the Committee, arrested persons should have the opportunity to obtain legal assistance from the time of arrest, they should normally enjoy the benefit of their lawyers' attendance not only at interrogations and confrontations conducted by the examining magistrate, but also at those conducted by the police or the prosecutor prior to the first appearance before a magistrate. Exceptions to the principle of the counsel's attendance might be made only on grounds of obvious urgency (see paragraph 333), for stated reasons, and should be subject to appeal.

357. Regardless of the type of procedure followed, counsel should be allowed to appear at all hearings concerned with the question of detention, and to submit motions and give oral explanations at such hearings.

(v) Remedies in case of non-observance of requirements concerning legal assistance

358. The Committee concurs with the recommendation made by the Santiago Seminar that "defence by a lawyer should be provided on pain of nullity in accordance with the established procedure of the legal system concerned for quashing convictions".2/

359. The Committee finally wishes to stress that the effectiveness of legal assistance for arrested or detained persons depends on the competence and integrity of the defenders as well as on the adequacy of the relevant rules of procedure. It concurs with the opinion voiced at the Santiago Seminar that "a defence conducted by a person other than a lawyer or by the accused, arrested or detained person himself could /not/ be considered as being on the same level as a defence conducted by a lawyer".3/

1/ Santiago Seminar report, ST/TAA/HR/3, para. 121 (a).

2/ Ibid., para. 96.

3/ Ibid., para. 97.

5. Rights relating to interrogations

360. The purpose of interrogations, as it is universally recognized today, is to establish the truth impartially. The accused has an obvious interest to be heard in order to exculpate himself and to secure his release as soon as possible. To choose a simple example, cases of arrests made upon mistaken identity may be promptly settled only upon the appearance of the accused before the competent authorities.

361. Interrogations, on the other hand, do involve great dangers for the accused. These dangers arise from the very fact that an individual, whose freedom is at stake, is confronted with the whole investigative and repressive machinery of society; and that the temptation always exists for the competent authorities to deviate from the basic requirement of objective and impartial examination.

362. In order to correct - to some extent - such a lack of balance, the accused person should, at interrogations, be left as free as possible to adopt any attitude he deems appropriate for his own interest. The accused should not be the "object" of, but a free participant in, the examination.[1/]

363. This principle emphasizes, in a special situation, the fundamental rights of man to freedom of decision and expression. The limitations to be placed on the powers of the investigating authority derive also from the prohibition of cruel, inhuman or degrading treatment, laid down in article 5 of the Universal Declaration; and from the right to privacy, construed as including, inter alia, the right to the "inviolability of the inner self", set forth in article 12 of that Declaration.[2/]

364. It is obvious that the powers of the competent authorities are greatest, and the necessity to maintain the accused's free will most imperative, when the accused is interrogated while he is under arrest or detention.

365. The Committee will consider: (a) the provision enabling the arrested or detained person to participate intelligently in the proceedings (right to an adequate medium of communication); (b) the manifestations of the free will of the

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1/ Santiago Seminar, working paper H, pages 79-80.

2/ Santiago Seminar Report, ST/TAA/HR/3, para. 116; Vienna Seminar, working paper B, page 17.

arrested or detained person (right to speak or to remain silent at interrogations); and (c) the protection of the arrested or detained person against treatment which tends to impair his free will at interrogations. Under (d), the Committee will submit some concluding remarks.

(a) Provisions enabling the arrested or detained person to participate intelligently in the proceedings (right to an adequate medium of communication)

366. Most, if not all, legal systems recognize the right of the accused to special facilities, in case he does not have a sufficient command of the language used in the proceedings. Appointment of qualified interpreters to interpret the questions and convey the answers and the statements of the accused, appears to be made by the courts ex officio, regardless of whether or not the accused formally requests it. Some systems, however, provide that this right may be waived if the accused is assisted by counsel who knows the language of interrogation.1/ In other countries the law stresses that interpretation is required, whether or not the accused is assisted by a lawyer.2/

367. According to some provisions, it is specified that no police officer should be permitted to act as an interpreter.3/

368. In certain jurisdictions, it is provided that the relevant written evidence and other documents used in the proceedings should be translated into a language which the accused understands,4/ or that he has the right to acquaint himself with the files through an interpreter.5/ In other countries, the courts have the discretionary power to order the translation of as many of the documents put forward for the purpose of formal proof as appears necessary6/ or to provide for the translation of documents if, in their opinion, the importance of the case requires it.7/

1/ Australia.
2/ United Kingdom (Hong Kong).
3/ Ceylon.
4/ Union of Soviet Socialist Republics.
5/ Poland.
6/ Federation of Malaya, India, United Kingdom (Aden).
7/ Norway.

369. The laws of various countries provide that deaf and mute persons should be interrogated in writing; and that, if they are illiterate, a special interpreter should be appointed.[1/]

370. In certain countries interrogations before trial, conducted by the police, the prosecutor or the examining magistrate, are clearly included within the scope of the provisions concerning interpretation.[2/] In other systems, it is equally clear that the right to interpretation obtains only before the courts,[3/] although it is stated with respect to one country that, if necessary, interpreters are in fact provided during police interrogations as well.[4/] Many of the laws collected are worded in terms so general, such as "all judicial proceedings",[5/] that it is not easy to ascertain their scope, in the absence of more detailed information.

(b) Manifestations of the free will of the arrested or detained person (right to speak or to remain silent at interrogations)

371. The accused may choose to speak in order to point out elements in his favour; or he may prefer to keep silent. In most countries, he is entitled freely to exercise this choice, at least at some of the interrogations. He usually must be informed of these rights at the outset of the interrogation; and he must, in many countries, be warned that if he chooses to speak, "any" statement he makes "may" be taken as evidence against him, although this may not "necessarily" be the case for "all" of his statements. Various systems attach the greatest importance to these prior warnings and provide very elaborate rules on the matter.[6/]

(i) Right to make statements and to request inquiries

372. As has already been noted (see right to counsel, para. 323), in countries which follow the "accusatorial" system, the accused enjoys, at the preliminary hearings, extensive freedom to make statements and observations, introduce

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1/ Argentina, Austria, Chile, China, Federal Republic of Germany.
2/ Belgium, Iceland.
3/ Norway, Federal Republic of Germany.
4/ Norway.
5/ Austria, China, Union of Soviet Socialist Republics, United Kingdom (Hong Kong).
6/ Ceylon; India; United Kingdom (England and Wales); Santiago Seminar, working paper H, pp. 74-76.

evidence, ask for the compulsory attendance of witnesses and cross-examine prosecution's witnesses.[1] This is not necessarily the case during police interrogations before the preliminary hearings.

373. In countries whose laws were patterned after the "inquisitorial" system, there is in general no such preliminary hearing before trial, but, as will be shown below, various codes have been so amended as to afford to the accused the opportunity to participate in the preliminary examination more actively than in the past. There remains, however, noticeable differences between the right of initiative of the accused during the preliminary examination and his rights before the trial court.

374. The right of the accused at examinations to make statements on his own initiative is guaranteed in general terms in most countries, as well as his right to introduce existing evidence in his own behalf.

375. Certain laws expressly provide that the accused may, in these statements, refute the reasons for which he is suspected, point out matters which he regards as beneficial to him and request an investigation and a search for evidence on such matters.[2]

376. As an ultimate precaution, certain provisions entitle the accused, when reading the files at the closing of the preliminary examination, to request that additional investigations be made, and to have a report thereon included in the files.[3]

377. Various laws specify that the examining magistrate decides whether to grant or refuse the requests for supplementary investigation or for the introduction of evidence made by the accused. He must determine whether the matters pointed out by the accused are relevant to the case under consideration.[4] Certain legislation stress that this is not a discretionary power of the examining magistrate: if he refuses to accede to the proposals of the accused, he must

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1/ Israel; Philippines; United States of America; Santiago Seminar, working paper H, p. 92.

2/ Denmark, Union of Soviet Socialist Republids, Federal Republic of Germany, Republic of Korea.

3/ Turkey, Romania.

4/ Argentina, Bulgaria, Colombia, Denmark, Romania, Union of Soviet Socialist Republics.

state his reasons in writing, and such statement is to be included in the records.[1]

(ii) Right of the arrested or detained person to remain silent

378. In most countries today, the accused has the right to refuse to answer at least certain types of questions, and to refuse to make statements. Such rules seem to apply, in most cases, as regards both police interrogations and examinations by a magistrate.

379. The right of the accused to remain silent may be formulated in respect of all questions without restriction;[2] or it may be provided for with regard to answers which would tend to incriminate the accused.[3] Available information are not detailed enough to ascertain whether there are substantial differences in practice between those two formulations.

380. Certain exceptions to these rules may be found, for instance, as regards offences involving divulgation of State secrets.[4]

381. Furthermore, some statutes and leading judicial decisions provide that the accused has the right to give false or misleading answers with impunity;[5] and in no country does the law expressly prohibit the accused to resort to such practices.

382. It is expressly provided in some laws, however, that the silence or false answers of the accused, while they do not entail punishment or imply confession, may nevertheless be interpreted to his disadvantage.[6] On the other hand, provisions may be found which tend to prevent any adverse inference to be drawn from the silence of the accused, by forbidding any adverse comment to be made thereon at the trial.[7]

1/ Bulgaria, Romania, Union of Soviet Socialist Republics.
2/ Albania, Belgium, Denmark, Ghana, Japan, Iraq, Italy, New Zealand, Netherlands, Thailand, United Kingdom, United States of America, Yugoslavia.
3/ Argentina, Burma, Colombia, Federation of Malaya, India, Liberia, Philippines.
4/ United Kingdom (England and Wales).
5/ Albania, Italy.
6/ Brazil, Iceland.
7/ New Zealand.

(c) Protection of the arrested or detained person against treatment which tends to impair his free will at interrogations

383. There is perhaps no problem in criminal procedure which is more debated today than the property of various methods of interrogation.

384. Any method of investigation can be evaluated from two points of view: the reliability of the findings obtained through such methods, and the implication for human rights from their use. The Committee considers that only the latter problem falls within its terms of reference. The technique involved should, in its view, be prohibited, if it can be considered as infringing upon the fundamental right of the arrested or detained person to the preservation of his free will, his memory or his judgement.

385. The Committee will mention: the types of methods which are generally considered as impairing the free will of the accused, and the safeguards against improper methods of interrogation.

(i) Types of improper methods of interrogation

386. Improper methods of interrogation, as defined above, are very numerous and can be classified as follows: physical harm, torture, brutal treatment; threats; promises; protracted or suggestive questioning; means of investigating the unconscious of the arrested or detained person; and misleading practices.

387. Physical harm, torture, brutal treatment. If such practices were officially admitted or even required, in many countries, as means of investigation up to the end of the eighteenth century, they have long since been condemned and are now prohibited in all the countries on which information is available. It is sometimes difficult to say where rough treatment, albeit not likely to coerce the accused, ends and torture begins. Various judicial decisions interpret the word "torture" or "violence" rather broadly, as encompassing such practices as depriving the accused of proper food or attaching him with fetters for some time.[1/]

388. Threats. Most countries forbid, under various conditions, the use of threats at interrogations. While certain laws restrict the scope of the prohibition to threats relating to specific acts (killing, violence, or any illegal measure),[2/]

1/ France, United Arab Republic (Egyptian region).
2/ Belgium, France, Federal Republic of Germany.

others condemn the use of threats in comprehensive terms, the criterion adopted being that the threat should be likely to induce the accused to confess against his will.[1] It is sometimes specified that the threat is also prohibited if it is directed not against the accused but against one of his relatives.[2] Some laws specify that, to be prohibited, the threat should relate to acts of a "temporal nature" which could be carried out by persons in authority;[3] or that a "moral adjuration" does not constitute a threat.[4]

389. Promises. Various laws expressly condemn, as an improper practice, the promise of definite advantages to the accused.[5] As noted in a working paper submitted to the Santiago Seminar, promises of immunity or of a lighter sentence in return for a confession may well impair the freedom of decision of the accused.[6]

390. Protracted or suggestive questioning. This method consists of interrogating the accused for very long periods without sufficient rest, and/or asking confused, ambiguous or leading questions with great intensity. It has been recognized that such practices, while not constituting physical harm, threats or promises, may impair the freedom of decision of the accused.[7]

391. As noted by some commentators, the question whether an accused has been "coerced" by subjection to such questioning raises particularly difficult problems; the Courts must weigh carefully the circumstances of pressure against the capacity of resistance of the accused, according to the age and the physical and mental health of the victim.[8] Various laws and judicial decisions have, however, attempted to deal with the problem. Certain laws direct the examing authorities to ask only "clear, short and unambiguous questions".[9] One criterion adopted in various countries is that questioning should not be so prolonged or so intensive as to cause "fatigue" and deprive the accused of the "equanimity" or "serenity of mind" necessary to reply.[10]

1/ Australia, Federation of Malaya, India, Japan, United Kingdom (England and Wales) Union of Soviet Socialist Republics.
2/ United Arab Republic (Egyptian region).
3/ India.
4/ Ghana.
5/ Australia, China, Liberia, Federal Republic of Germany, Philippines, Sudan, United Arab Republic (Egyptian region), United Kingdom (England and Wales).
6/ Santiago Seminar, Working Paper H, pp. 73-74.
7/ France; United States of America; Santiago Seminar, Working Paper H, p. 72.
8/ Santiago Seminar, Working Paper H, p. 74.
9/ Argentina, Chile, Colombia, Iceland, Yugoslavia.
10/ Argentina, Chile, United States of America, Federal Republic of Germany. /...

392. Means of investigating the unconscious of the arrested or detained person. These are modern methods which aim at obtaining confessions, or checking the accuracy of the answers, by means of hypnosis, or through the use of "lie-detectors" or of certain drugs (for instance, narco-analysis under the influence of sodium pentothal). The two latter techniques seem to be the most frequently used.

393. Few laws have been collected which expressly refer to this problem. This may be explained by the relative novelty of the techniques in question. Various leading judicial decisions have, however, been rendered on the subject, which is currently being debated by judicial circles, bar associations, and medical authorities.

394. All the available statutes and judicial decisions which expressly refer to the problem prohibit the use of hypnosis, lie-detectors or drugs.[1/] Some courts have achieved this result by interpreting broadly statutory provisions which condemn "violence" or provide that the accused may not be compelled to "testify against himself".[2/]

395. The country monographs contain very little information on two points which are being raised in the current debate on this subject. One of these two questions is whether such methods of interrogation might be allowed if their use is requested by the accused himself or if he has consented thereto.[3/] The Committee was able to ascertain that, in some countries at least, the law condemns such practices regardless of the accused's wishes.[4/]

396. The other question is whether narco-analysis should be permitted, not to elicit evidence, but to examine and classify the personality of the accused with a view to determine the best means of rehabilitation.[5/]

397. Misleading practices. There are a great variety of methods of investigation the purpose of which is to obtain evidence against the accused through the use of

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1/ Argentina, Belgium, Ceylon, Colombia, Federation of Malaya, India, Yugoslavia, Federal Republic of Germany.
2/ Argentina, Colombia.
3/ Santiago Seminar, Working Paper H, p. 78.
4/ Belgium, Federal Republic of Germany.
5/ Vienna Seminar, Working Paper B, pp. 16-17.

some tricks or deceptions. These practices do not involve the use of direct physical or mental coercion or influence upon the accused. They usually tend, by false representations or other fraudulent means, to make him believe that his situation is beyond hope, and that the only way left to him is to confess. This is tantamount to depriving the accused of his freedom of decision.

398. In some of their crudest forms, fraudulent practices may involve: presenting false evidence to the accused, confronting him with false witnesses or making him believe that his co-defendants have confessed. Such means are universally condemned and their use tends to become less frequent, as the controls and checks upon police activities and the administration of justice become stricter and better organized.

399. The same observations apply to the simple fraud which consists of misrepresenting the answers of the accused. Most countries have laws which oblige the police and examining magistrates to record the interrogations in full, sometimes under the dictation of the accused; these laws further provide that the accused, after reading the records, may ask for their correction and, in case of refusal, may refuse to sign them and voice his protests at the trial.[1/]

400. Two practices seem to raise more problems. One practice consists of interrogating the suspected person, not as an accused under charge, but as a "witness", thereby evading all legal requirements concerning prior warnings, the right to silence and the right to counsel.[2/] A witness is in many cases bound to answer questions under oath, therefore, even if no other coercion is made use of, a strong element of compulsion is present. Evidence so elicited may facilitate, to a great extent, the placing of the accused in detention, and endanger his position at the trial. A somewhat different device is the questioning of an arrested person on an offence different from that for which he has been arrested.[3/] In various countries, it was for a long time difficult to combat such practices, mainly because it was thought that the police authorities should be allowed a certain measure of freedom in making "preparatory investigations" (enquête officieuse).[4/] Some recent enactments, however, have attempted to lay down

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1/ Ceylon, Chile, Colombia, France, Iceland, India, United Kingdom (England and Wales).
2/ France.
3/ United States of America.
4/ Vienna Seminar, Working Paper B, p.13.

safeguards against such frauds: in one country, the law provides, for instance, that any person against whom a complaint has been submitted may refuse to be heard as a witness and should be informed of that right; and that, even if no complaint is submitted, no person, on pain of nullity, may be heard as a witness if there exist against him serious presumptions of guilt.[1/]

401. The question is also raised as to the lawfulness of modern devices such as tape-recorders and wire-tapping apparatus, when they are used to register the words of an accused who is unaware of such surveillance. These practices have been condemned in certain judicial decisions.[2/]

(ii) Safeguards against improper methods of interrogation

402. Before mentioning the principal means of combating improper practices of interrogation, some general observations seem to be called for.

403. In some systems sanctions are provided for, in comprehensive terms, against the use of "any improper method of interrogation" which involve "compulsion" or "coercion" on the accused.[3/] Other laws enumerate the prohibited practices in some detail, and take into account various circumstances to determine the type and gravity of the penalties incurred. It may be noted, in this connexion, that coercive practices are more readily punished, in many countries, if they have actually compelled the accused to confess, and/or if they were resorted to by police officers.

404. That opinion is often expressed by specialists, and reflected in various laws, that the risk of improper pressures arises mainly during police interrogations. The following views have been advanced in support of this contention:

(a) Police officers do not usually possess the same guarantees of independence and security of tenure as are enjoyed by judges; and, with a view to promoting their career, they may be more inclined to obtain convictions by easy means, than to seek the truth impartially;

(b) under police custody, the arrested persons do not, in various countries, enjoy the full benefit of assistance by counsel[4/] and they may, in some countries, be kept in solitary confinement;[5/]

1/ France.
2/ Vienna Seminar, Working Paper B, page 16.
3/ Bulgaria, Mexico, Union of Soviet Socialist Republics.
4/ See paras. 315 and 317-325.
5/ Ibid.

(c) police inquiries are not, in certain countries, subject to effective judicial control, and police officers are not always placed under the disciplinary power of judicial authorities;[1]

(d) judges and examining magistrates, confronted with an ever-increasing flow of cases, may be tempted to rely too heavily on the findings of the police, or delegate broad powers of interrogation to the police authorities.[2]

405. One radical solution, which has been adopted or contemplated in a few countries, consists of prohibiting police interrogations altogether.[3] Most countries, however, allow police interrogations, but provide stricter controls and make abuses more easily sanctionable, with respect to police officers than when judges are involved. Illustrations of such a trend will be shown below, particularly under the heading "limitations on the use of confessions as evidence".

406. Since the subject of remedies and sanctions will be dealt with as a whole in a separate section of the present report, the Committee will examine here only the extent to which various sanctions are applicable to, and may effectively prevent, improper interrogations. One type of sanction which is specifically designed as a deterrent against improper interrogations, namely the "limitations of the use of confessions as evidence", will be dealt with in greater detail.

407. The means of combating improper methods of interrogation may be classified under two main headings: preventive measures, and remedies and sanctions.

a. Preventive measures

408. On the basis of a finding that abusive practices mainly take place during police interrogations, some countries have enacted laws to strengthen the control of police officers by judicial authorities, and to limit the extent to which judges may delegate their powers of interrogation to police officers.[4]

409. Other preventive measures, more specific in character, consists in the obligations imposed upon investigating authorities: to limit the length of

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1/ France.
2/ Vienna Seminar, working paper B, p.19.
3/ United Kingdom (Scotland); Santiago Seminar, working paper H, p.71.
4/ France; Baguio Seminar, working paper C, p.8.

interrogations;[1] to allow for proper rests between interrogations,[2] and to have the accused examined by a physician at certain stages of the preliminary examination.[3] A comparison of medical findings, before and after interrogations, may serve as a means to verify, a posteriori, whether or not improper pressures have been applied.

b. Remedies and sanctions

i. Criminal penalties

410. While physical harm and threats of violence are generally punishable acts under criminal law, this is not always the case as regards the more modern techniques of coercion, because they were not in use whem many penal codes were enacted. A few criminal legislations, however, specifically prohibit the use of drugs, or have been judicially interpreted so as to encompass such modern techniques.[4] Various penal statutes require proof of malicious intent, a proof which may be difficult to administer as regards various types of pressures.

ii. Disciplinary sanctions

411. There is little doubt that improper methods of interrogation, at least in their most serious forms, may be grounds for disciplinary sanctions against magistrates and police officers. The Committee does not possess enough information, however, to ascertain the conditions under which persons guilty of such practices may be censured or dismissed.

iii. Award of damages to the victim of coercion

412. Under the general law of torts or civil responsibility, it is open to the victim, in most countries, to sue the officials involved and/or the State and to ask for compensation.

413. The basic requirement that an actual damage be proved may be difficult to comply with. The culprits are careful to avoid using any coercion likely to leave physical traces or to impair the victim's health significantly; and it

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1/ Argentina, Chile.
2/ Ceylon, France.
3/ Ceylon, France, Sudan.
4/ Argentina, India.

is hard to prove that detention orders or convictions were "based" upon evidence obtained under pressure.

iv. Limitation on the use of confessions and incriminating statements as evidence

414. Many countries limit or prohibit the use of confessions or incriminating statements as evidence against the accused, if there is ground to believe that such statements have been made under improper conditions. These limitations are not primarily based on the presumption that statements rendered in such circumstances are probably untrue. Under many laws the truth of the statements is regarded as immaterial; the main purpose of the legislators was rather to provide an effective deterrent against the use of improper methods of interrogation.

415. One striking feature of some systems is the absolute prohibition of confessions made to police officers, when a magistrate or judge is not present. It is expressly stated in respect of one of these laws that such a stringent rule appeared necessary since the likelihood of improper practices was greatest during police inquiries.1/

416. Some provisions specifically prohibit police officers from taking and recording confessions, and declare such confessions inadmissible as evidence.2/ Other laws provide that only judges may take admissible confessions.3/

417. In other countries, confessions or incriminating statements made to police officers are admissible upon condition, not only that the statements were not made under pressure, but, further, that they were made after the accused has been cautioned in great detail on the possible consequences of his decision.4/

418. Under certain legislation, it is the duty of the examining magistrate, before recording a confession, to investigate ex officio the circumstances of the confession, and to satisfy himself that no pressure was made by police officers;

1/ Santiago Seminar, Working Paper H, p. 71.
2/ Burma, Ceylon, Federation of Malaya, India, United Kingdom (Aden).
3/ Argentina, Chile, Colombia.
4/ Union of South Africa; United Kingdom (England and Wales); the English law and practices, in particular the "Judge's rules", seem to be applied also in various countries such as Scotland; Northern Ireland; Hong Kong; Tanganyika. See also Santiago Seminar, Working Paper H, pp. 75-76.

as a further precaution, it may be provided that the accused who wishes to confess should not be remanded in police custody.[1/]

419. In various countries, however, confessions made to the police are not considered, per se, with greater suspicion than those rendered to magistrates. Rather, both types of confession are declared inadmissible if they are made under improper circumstances.

420. Certain distinctions seem to be called for concerning the burden of proof. In some countries, it appears that confessions are declared admissible as evidence, unless the accused proves - sometimes he must prove it "beyond doubt" - that he was in obvious error or that his freedom of decision was otherwise impaired.[2/]

421. In accordance with various laws, on the other hand, the prosecution must "show" that the confession was made voluntarily.[3/]

422. Regardless of the rules concerning the burden of proof, legislators and judges have to decide what constitutes evidence of a causal relationship between pressures and the accused's confession.

423. Certain laws seem to require evidence that the confession was "produced by" or "obtained" or "extracted through" pressures.[4/]

424. In other countries, the Courts hold confessions to be inadmissible as evidence if they "appear to have been caused by"[5/] inducements, threats or promises, or merely if the judges "suspect"[6/] that such was the case.

425. In certain jurisdictions it is presumed that the free will of the accused was impaired if the following conditions are met: the inducements, threats or promises must have reference to the charge; they must proceed from persons in authority; the impression created by such inducements, threats or promises must, in the opinion of the Court, still be acting to some extent on the mind of the accused when he makes his confession; the pressures must be sufficient, in the opinion of the Court, to "give the accused person grounds which would appear to him reasonable for supposing that by making /the confession/ he would gain

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1/ Ceylon, India, Japan.
2/ Argentina, Chile, Colombia, Panama.
3/ Australia; Union of South Africa; United Kingdom (England and Wales), (Northern Ireland), (Hong Kong), and (Tanganyika).
4/ China, France, Republic of Korea.
5/ India.
6/ Japan.

any advantage or avoid any evil of a temporal nature in reference to the proceedings against him".[1] With reference to the condition that the pressure must proceed from persons "in authority", it may be noted that, according to one Supreme Court, confessions are inadmissible even when promises were made by persons who had no authority to secure the benefits suggested but whom the accused "believed" to be so empowered.[2] With reference to the last condition - that the inducement be sufficient to lead the accused to make a confession - the Courts often take into account the age of the accused and other elements of his personality in order to decide as to his degree of resistance to pressures.[3]

426. Certain Courts are inclined to infer voluntariness of confession from a language which "reflects spontaneity and coherence and which psychologically cannot be associated with a mind to which violence and torture have been applied."[4]

427. Some statutes and judicial decisions reject confessions made "after" prolonged questioning and harassments, without requiring evidence of actual pressure, on the ground that such a situation is "inherently coercive".[5]

428. In various countries, lack of evidence or lack of suspicion of pressures is not the only requirement for the admissibility of confessions: as a further precaution, incriminating statements may be rejected if they constitute the only proof of guilt, or if they are not corroborated by other evidence.[6]

429. Under some systems which contain no precise provision governing the admissibility of confessions as evidence, the Courts are granted wide powers to exclude evidence, even ex officio, if they consider that the circumstances under which they were obtained substantially hampered the rights of the defence.[7] There is not enough information available to ascertain to what extent this flexible criterion coincides with that of "the impairment of the accused's free will".

1/ Ceylon, Federation of Malaya, India.
2/ Liberia.
3/ Santiago Seminar, Working Paper H, p. 74.
4/ Philippines.
5/ Japan, United States of America, Republic of Korea.
6/ Chile, China, Republic of Korea.
7/ Belgium, Czechoslovakia, France, United Arab Republic (Egyptian region).

430. In various jurisdictions, a finding that a confession was extracted by improper methods leads to a decision to remove the statement itself from the body of evidence submitted to the trial Court. In certain countries where confessions made under unlawful conditions (for instance, made solely to the police) are inadmissible as evidence of guilt, it is nevertheless provided that, should facts be discovered "in consequence of information received from the accused... in the custody of a police officer, so much of such information as relates distinctly to the facts thereby discovered may be proved".[1/]

(d) *Concluding remarks*

431. The Committee wishes to submit below some observations and suggestions concerning the guarantees which appear to be desirable in order to preserve the free will of the arrested or detained person at interrogations.

(i) Provisions enabling the arrested or detained person to participate intelligently in the proceedings (right to an adequate medium of communication)

432. Although the rights relating to interpretation seem to be fully recognized in most countries, it may be necessary to stress the particular needs of the arrested or detained person in that connexion. Interpretation should be provided from the time of arrest. The arrested or detained person may need an interpreter, not only when he is called for interrogations, but also whenever he wishes to appear before the competent authorities or to communicate with them in order to complain against mistreatment or other wrongful conditions of detention. The Committee also believes that adequate provision should be made, when necessary, for an interpreter to assist the accused in his consultations with his lawyer.

433. The right to interpretation should not be subject to waiver. As pointed out by the Baguio Seminar, "even in cases where counsel represented accused, justice might not appear to the accused to be fully done unless he was made aware through interpretation of what was being done at his trial".[2/]

1/ Federation of Malaya, India, Ireland, Philippines.
2/ Baguio Seminar Report, ST/TAA/HR/2, para. 64.

(ii) Manifestations of the free will of the arrested or detained person (right to speak; right to remain silent at interrogations)

434. The arrested or detained person should be left as free as possible to adopt any attitude with regard to the charges and to the grounds for detention as he deems advisable for his defence. From the time of arrest, he should be fully informed of this right and duly warned of the consequences which may attach to any statement he may wish to make (See right of an arrested or detained person to be informed of his rights and obligations, paras. 253-258).

435. The Committee associates itself with the following recommendations made by the technical organizations to the League of Nations in 1939:

> "The interrogation should in all cases bear upon facts tending to establish the innocence of accused persons as well as on those likely to incriminate them. Accused persons should be afforded an opportunity of making a full statement, and also of referring to matters on which they have not been questioned. Accused persons must be invited to indicate by what evidence their statements can be substantiated, and the summoning of witnesses for the defence must be facilitated." 1/ and

> "it is desirable that the law should expressly lay down the principle that no person may be required to incriminate himself. Should a person charged refuse to make a statement, it shall be for the court to draw whatever conclusions it may think fit from such refusal in the light of the other evidence adduced and his silence should not be regarded as in itself an indication of guilt."2/

(iii) Protection of the arrested or detained person against treatment which tends to impair his free will at interrogations

a. Types of improper methods of interrogation

436. The Universal Declaration of Human Rights provides in article 5 that no one shall be subjected to torture or to criminal, inhuman or degrading treatment [or punishment]. This provision is also contained in article 7 of the draft covenant on civil and political rights as adopted by the Third Committee of the General Assembly at its thirteenth session.

437. The Committee strongly supports the general recommendations expressed by the Baguio, Santiago and Vienna Seminars, according to which "the use, with

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1/ League of Nations document A.20.1939.IV,31.
2/ League of Nations document A.20.1939.IV.28.

respect to accused, arrested or detained persons of any methods of bodily or mental coercion... should be strictly prohibited".[1]

438. In the view of the Committee, the reasons for such recommendation are adequately explained by the Santiago Seminar, as follows:

> "The basis of this general prohibition is to be found in the Universal Declaration of Human Rights (articles 5, 11 and 30) and, at the level of municipal law, in the constitutional and statutory provisions which lay down that no one may be compelled to be a witness against himself, or, in other words that a statement by an accused person is not valid unless it was made without coercion of any kind and in the state of consciousness. While the purpose of criminal proceedings is the discovery of the truth, this does not imply any right to harass the accused and, even less, to subject him to psychological coercion.... The inner consciousness of a man /is/ a sanctuary which /is/ barred to all other men, except for any revelation which he might choose to make naturally, directly and voluntarily." [2]

439. As expressly indicated by the technical organization to the League of Nations in 1939, such prohibition should extend to "threats", "inducements of any kind", "deceit or trickery", "misleading suggestions, captious or leading questions" and "protracted questioning".[3]

440. It should be stressed that both the Santiago Seminar and the Vienna Seminar condemned the use of "lie detectors, drugs, or any other method of investigating the unconscious".[4] At the Santiago Seminar, "it was also agreed to extend the prohibition to cases in which such methods are used with the consent or at the request of the accused person or his counsel, because even in such cases the procedure involves the interpretation of unconscious reactions by a person other than the accused and the latter has no control over his responses".[5] This passage adequately reflects the Committee's position.

441. At the Vienna Seminar, some participants contended that "narco-analysis might well be used therapeutically after a conviction, for it would then be used to assist the offender and not be adverse to him".[6] The Committee does not wish

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1/ Santiago Seminar Report, ST/TAA/HR/3, para. 121 (b); Baguio Seminar Report, ST/TAA/HR/2, para. 42; Vienna Seminar Report, ST/TAO/HR/8, para. 67. See also League of Nations document A.20.1939.IV.33.

2/ Santiago Seminar Report, ST/TAA/HR/3, paras. 116 and 118.

3/ League of Nations document A.20.1939.IV.33.

4/ Santiago Seminar Report, ST/TAA/HR/3, para. 121 (b); Vienna Seminar Report, ST/TAO/HR/8, para. 72.

5/ Santiago Seminar Report, ST/TAA/HR/3, para. 119.

6/ Vienna Seminar Report, ST/TAO/HR/8, para. 72.

to enter into questions relating to the treatment of convicted persons. It is inclined to share the apprehensions to various specialists who stress that narco-analysis for medical purposes, when applied to unconvicted prisoners, might "too easily /lead to/ a confusion between the establishment of guilt and examination of the offender's personality".[1/]

b. Safeguards against improper methods of interrogation

i. Preventive measures

442. The Committee has noted that, according to various specialists, the risk of improper questioning arises mainly during police interrogations (see paragraph 405). It has been further noted that various laws accordingly forbid the police to take and record confessions. Whether or not this prohibition is in force, the Committee believes that the police inquiry should be subject to strict supervision and disciplinary control by the judiciary (see disciplinary sanctions, paras. 634-645). Suggestions to that effect were made inter alia by the VIth International Congress of Penal Law (Rome, September-October 1953),[2/] the Baguio seminar[3/] and the Vienna seminar.[4/] The Committee further suggests that it would be advisable to provide that judges may not, save in circumstances of extreme urgency, delegate their powers of interrogation to the police.[5/]

443. The Santiago Seminar recommended that "accused, arrested or detained persons should undergo physical examination before interrogation and, if requested by the person concerned or his counsel, after interrogation"[6/] (see paragraph 409). In the view of the Committee, physical examination before and after interrogation should be mandatory, regardless of the accused's wishes. If physical examination were to depend on a formal request by the accused, the risk could not always be excluded that refusal to make such a request be due to

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1/ Vienna Seminar, working paper B, p. 25.
2/ Revue internationale de droit pénal, 1952, nos. 1-4.
3/ Baguio Seminar Report, ST/TAA/HR/2, paras. 32-33.
4/ Vienna Seminar Report, ST/TAA/HR/8, para. 33.
5/ VIth International Congress of Penal Law (1953), Revue internationale de droit pénal, 1953, nos. 1-4.
6/ Santiago Seminar Report, ST/TAA/HR, para. 121 (e).

certain pressures, especially in respect of interrogations which defence counsel is not necessarily allowed to attend. If physical examination is not mandatory, at least the accused's relatives should have the right, at any stage of the proceedings, to request and obtain such examination for him. The arrested or detained person or his relatives should also have the right to challenge, for stated reasons, official physicians provided by the authorities and to obtain examination by a practitioner of their own choosing. The Committee realizes that these suggestions might entail a certain increase in public expenditures. It is aware of the fact that the Standard Minimum Rules for the Treatment of Prisoners provide that an untried prisoner should be allowed to be visited by his own doctor only "if... he is able to pay any expenses incurred."[1/] The Committee believes, however, that no arrested or detained person should be deprived of what it considers as a very important guarantee at interrogations because of his indigence: schemes of medical aid might be contemplated, in the light of the experience acquired with respect to legal aid.

444. Consecutive interrogation should not be allowed to last more than a stated period and proper rest and meals should be given to the arrested or detained person[2/] (see paragraph 409).

445. The fact that the arrested or detained person underwent physical examination, the names of the doctors and the results of such examination, as well as the length of interrogations and of the intervals of rest, should be duly recorded.

ii. Remedies and sanctions

446. The Santiago Seminar stressed that "judges before whom confessions or statements are produced or relied upon, should subject to strict and rigorous scrutiny the procedures employed to obtain such confessions or statements, or to suppress replies".[3/] If the courts, having conducted such an inquiry, find that improper practices were resorted to, various remedial measures and sanctions should be available.

447. The Committee agrees with the suggestion made by the Santiago seminar according to which "habeas corpus" should be extended or, if it does not already

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1/ Rule 90.

2/ League of Nations, document A.20.1939.IV,33, Vienna Seminar Report, ST/TAO/HR/8, para. 49.

3/ Santiago Seminar Report, ST/TAA/HR/3, para. 121 (d); see also Vienna Seminar Report, ST/TAO/HR/8, para. 76.

/...

exist, introduced to protect all persons, including witnesses, who are interrogated by such prohibited methods".[1]

448. In accordance with another suggestion of that seminar, penal and disciplinary sanctions should be applicable.[2] If any damage can be proven (not only injury to health, but also damages resulting from a conviction or a prolonged detention based upon unvoluntary confessions) the victim should be compensated.

449. The Committee is inclined to stress the importance of the limitations to be placed on the admissibility of confessions as evidence, as this type of sanction appears to be a particularly useful deterrent against improper interrogations. At the Baguio and Vienna Seminars, "it was generally agreed that no unvoluntary confessions and admissions should be admissible as evidence".[3]

450. Various suggestions were put forward about methods for ensuring that only voluntary confessions are used as evidence before the trial courts. At the Baguio Seminar, one view was that, in principle "all confessions made to police officers should be totally excluded from evidence", on the presumption that they "were generally obtained under duress or by means of threats or promises".[4] Other participants at the same seminar expressed the opinion that "confessions made to police officials should be admissible but that if the accused complained at the trial that the confession was not voluntary[5] the court should itself determine that issue...." The Committee has noted that the laws of various countries, in accordance with the former suggestion, exclude in principle all confessions obtained by the police. Even if such a rule applies, however, the problem remains of ascertaining that confessions made to persons in authority other than police officials were free from pressures.

451. While recognizing the various difficulties involved, the Committee feels that judicial determination of the admissibility of confessions might be facilitated if certain principles and criteria were adopted. Confessions should be excluded as evidence not only when it is proven beyond doubt that they were obtained under pressure - a burden which seems to be very heavy indeed on the arrested or detained person - but also when certain circumstances warrant a reasonable presumption to

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1/ Santiago Seminar Report, ST/TAA/HR/3, para. 121 (c).
2/ Ibid., para. 121 (b).
3/ Baguio Seminar Report, ST/TAA/HR.2, para. 42; see also Vienna Seminar Report, ST/TAO/HR/8, para. 75.
4/ Baguio Seminar Report, ST/TAA/HR/2, paras. 39 and 43.
5/ Baguio Seminar Report, ST/TAA/HR/2, para. 42.

that effect. For instance, such facts as failures to give the accused prior warning that any statement he makes may be used against him, protracted interrogations without proper rest, and denials of physical examination, may justifiably contribute to build such a presumption. The age and personality of the arrested or detained person should be taken into account in assessing his capacity of resistance.

452. Even when it appears that the confession was free from pressure, it should not be retained as evidence unless it is corroborated by other evidence or at least unless "the corpus delicti /is/ furnished by means other than confession".1/

453. At the Vienna Seminar, some participants pointed out that "a statement improperly obtained may lead to other information, as when an accused is induced to say where stolen goods have been deposited: whilst the accused's statement may be excluded, it is in practice essential to allow other evidence of the finding of the stolen goods at such and such a place".2/ The Committee recognizes that practical difficulties may arise in that connexion. It believes, however, that the States should endeavour to set strict limits to the admissibility of such "leading information" in court, lest the principle of exclusion of unvoluntary confession lose its deterrent value. At the Baguio Seminar, several members urged that "confessions should not be used even for that purpose /i.e. "getting a lead to other evidence"/ unless they were voluntary".3/

454. The Committee also wishes to stress the importance of the principle, widely acknowledged today, according to which confessions, even when they are voluntary and confirmed by other facts, should in no way bind the courts to convict the accused. Judges should be free to accept or reject them, as any other evidence, according to their conscience.

455. The Committee is aware of the fact, of course, that the question of the admissibility of evidence per se does not come within its terms of reference. It believes, however, that limitations on the admissibility of certain evidence, and in particular of confessions made during arrest and detention, are of relevance to the protection of the arrested or detained person against treatment tending to impair his free will at interrogations. It is for this reason that it has included the above considerations in the present report.

1/ Santiago Seminar Report, ST/TAA/HR/3, para. 141; see also Vienna Seminar Report, ST/TAO/HR/8, para. 104.

2/ Vienna Seminar Report, ST/TAO/HR/8, para. 10; see also Baguio Seminar Report, ST/TAA/HR/2, para. 43.

3/ Baguio Seminar Report, ST/TAA/HR/2, para. 39.

6. Treatment in places of custody

456. The laws of most countries recognize that the treatment of an arrested or detained person in custody should be in accord with the presumption that he is innocent until proved guilty according to law and that he should not be subjected to the same treatment as a convicted person. Many laws set forth guiding principles for the treatment of persons under arrest or detention. Some of them, for example, provide that a person in custody should be treated with humanity,[1] or without offending his dignity,[2] or without harshness or severity.[3] Some prescribe that restrictions should be placed on his freedom of mind and action only if necessary to maintain order and security in the place of custody,[4] or to prevent escape or collusion,[5] or to safeguard the successful conduct of the investigation or trial.[6]

(a) Place of custody

457. A person under arrest may be kept in a different place of custody from a person under detention. He may be kept in police custody immediately after his arrest. Examples from the available information may be noted. The laws of some countries provide that a person under arrest or detention may not be kept in a public prison for criminals but must be lodged in another place designated for that purpose.[7] The law of one country provides that a person under arrest should not be kept in a prison until his detention is ordered.[8] In another country an arrested person may be kept in an ordinary prison, but the investigating authority may order his removal to another place if this is necessary for the investigation.[9]

458. The laws of several countries provide that young persons should be kept in separate institutions. One country's law, for instance, stipulates that arrested or detained persons under eighteen years of age should be kept in a special

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1/ Philippines.
2/ Yugoslavia.
3/ Iceland.
4/ Chile.
5/ Yugoslavia.
6/ Austria
7/ Argentina, Czechoslovakia, Haiti.
8/ Denmark.
9/ Finland.

training school or reformatory for minors.[1] In another country the law provides that a person between the age of nine and eighteen should be detained in a special place of custody, but if the public prosecutor or court is satisfied that he is so mutinous or of such corrupt character that it would be unsafe to place him there, he may be detained in a prison under such conditions as apply to persons of his category.[2]

459. Many countries provide for segregation of persons under arrest or detention on suspicion or accusation of a criminal offence from other persons in custody, particularly from convicted persons. In some countries segregation is to be carried out "as far as possible," or whenever space permits.[3] Within the place of custody separation of juveniles from adults and of persons of different sexes is mandatory. Other grounds on which various laws provide for separation include personal history, background, educational level, sickness, pregnancy, nursing of infants, nature of the offence, association with hardened criminals or with persons remanded on the same charge.[4]

460. National laws often require that persons under arrest or detention should sleep separately in single rooms. In some countries this requirement may be waived if space is not available; it may also be waived by consent of the arrested or detained person.[5]

(b) Health, food, clothing and other amenities

461. The laws of many countries stipulate that the place of custody should be healthy and should provide for proper medical care and treatment.[6] Some laws permit outside medical treatment if adequate treatment is not available in the place of custody, and some allow such treatment only after permission by the court or the prosecutor.[7] In one country it is provided that officials in whose

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1/ Colombia.
2/ Jordan.
3/ Chile, Costa Rica, Morocco, Paraguay.
4/ Argentina, Austria, Finland, Spain.
5/ Chile, Denmark, Iceland, Federal Republic of Germany.
6/ Argentina, China, Federation of Malaya, Finland, Ghana, Thailand, Yugoslavia, Republic of Korea.
7/ Argentina, China.

custody a person is kept on his initial arrest must appoint a medical officer to examine him on the application of members of his family, and that twenty-four hours after arrest they cannot deny his own request to be so examined.1/

462. Specific provisions are laid down in the laws of some countries for rest and exercise, such as the right to have eight hours of uninterrupted rest in every twenty-four hours,2/ and the right to at least one or two hours' movement out of doors daily.3/

463. The law and practice of many countries allow a person in custody to procure his own food from outside at his own expense or at the expense of his family or friends, to wear his own clothes or at least not the same clothes as those worn by a convicted prisoner, and to obtain books, newspapers and other amenities. Such rights may be restricted in the interests of the administration of justice or in order to maintain security and good order in the place of custody.4/ A few examples may be noted. In one country the police may not refuse to supply, or withhold the supply of, food and clothing if they are satisfied that no objectionable articles are supplied.5/ The laws of another country permit a person in custody to procure meals at his own expense, wear his own clothes, use his own bedding, obtain books, newspapers and other things of regular need at his own expense, provided this does not prejudice the conduct of the criminal proceedings and the decisions of inquiring or investigating organs.6/ Another country's laws stipulate that food and necessities, books and other articles may be seized or their delivery stopped by the authorities if there is danger that the person in custody might escape, the evidence might be destroyed, forged or otherwise altered, or collusion might take place between the person in custody and his conspirators or the witnesses.7/

1/ France.

2/ Yugoslavia.

3/ China, Netherlands, Yugoslavia.

4/ Austria, Chile, China, Costa Rica, Denmark, Finland, Iceland, India, Libya, Thailand, United Arab Republic (Egyptian region), Yugoslavia.

5/ India.

6/ Yugoslavia.

7/ China.

(c) Protection against compulsory labour

464. It appears from a survey on prison labour covering some fifty countries which was published by the United Nations in 1955 that compulsory work for untried prisoners is rarely provided for; that in a few countries such prisoners are not permitted to work; that in some countries there are no provisions for work; that in the majority of the countries work for untried prisoners is optional.[1/] The information available to the Committee corroborates the position depicted in the survey.

465. Very few countries provide for compulsory work. One country provides that if a detained person is neither sick nor physically disabled, he must do work assigned to him in accordance with prison rules, for which he is to be paid.[2/] Another country provides that detained persons are obliged to work; those who have the financial means to support themselves may choose the type of work.[3/] The law of another country provides for compulsory work with the right of the detained person to choose the type of work he wants to do within the limits allowed by the regulations. The work should be performed preferably out of doors, and it must be organized with a view to providing educational and technical opportunities as well as some earning.[4/]

466. The laws of some countries provide that persons in custody are not required to do any labour other than that reasonably necessary to keep their persons, dress and place of custody in a proper state.[5/]

467. Many countries do not provide for compulsory work, but they recognize the right of the person in custody to work or to keep himself occupied; some provide that work may be assigned at the request of the person in custody.[6/] The choice

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1/ Prison Labour, 1955.IV.7, paras. 8-10.

2/ Mexico.

3/ Portugal.

4/ Peru.

5/ Federation of Malaya, Libya, Philippines, Yugoslavia.

6/ Austria, Belgium, Ghana, Jordan, Lebanon, New Zealand, United Arab Republic (Egyptian region), United Kingdom (Hong Kong), Federal Republic of Germany.

of work is subject usually to the requirements of security and good order in the place of custody.[1] Very often payment is made for the work done. In one country the law provides that a detained person has the right to work and to keep the proceeds of his labour.[2] Another country's laws recognize the right of the person in custody to work, preferably for pay.[3]

(d) Measures of restraint, torture and ill-treatment, disciplinary measures and punishment

468. Many constitutions and laws provide that a person in custody shall not be subjected to physical or mental torture or to other methods of ill-treatment, such as provocations, insults, threats, deception and fraudulent practice, use of drugs and other things.[4] The Supreme Court of one country had this to say of the constitutional prohibition of physical and moral violence: "The use of any means which may destroy or reduce the psychic freedom of an accused is not only forbidden but also constitutes a crime".[5]

469. Some laws and regulations forbid the taking of extraordinary security measures against persons in custody, such as confinement in special cells, use of fetters or chains, except by order of a judge in cases of disobedience, violence or revolt.[6] Persons in custody who are under a certain age, such as under eighteen years, may be exempted altogether from such measures.[7] Some laws provide that the police or other officials may use force or restraint only when it is indispensable for maintaining order or safety of persons in the place of custody, or in the event of resistance, escape, or attempt at evasion or suicide.[8]

1/ Iceland.

2/ Finland.

3/ Denmark.

4/ Argentina, Belgium, Cambodia, Colombia, Costa Rica, Ecuador, France, Ghana, Italy, Liberia, Romania, Thailand, United Arab Republic (Egyptian region), United States of America, Yugoslavia, Republic of Korea.

5/ Italy.

6/ Chile, Costa Rica, Nicaragua, Turkey.

7/ Colombia.

8/ Guatemala, Portugal, Thailand.

470. The laws of most countries provide that punishment or disciplinary measures may be imposed on a person in custody if he breaks certain rules and regulations of the place of custody. The punishments or disciplinary measures allowed may range from restrictions on the right to communication, or on the procuring or supply of food and other amenities, to isolation in a cell. For example, in one country the law provides that when a person in custody has been found on investigation, and after being heard, to have wilfully committed certain offences he may be punished by being confined to a cell on a restricted diet. The confinement can be ordered only after a certification of fitness by a medical officer, and it is not to exceed three days.[1/] Such punishments, however, are rare. Moreover, punishments or disciplinary measures involving mutilation, branding, beating and torture of any kind, or uncommon or unusual penalties, are as a rule forbidden.[2/]

(e) Inspection and supervision of places of custody

471. The laws of many countries provide for inspection and supervision of places of custody. The object of these provisions is to inquire into the general state and condition of the place of custody, to ensure the proper application of the laws and regulations, and to safeguard the rights of the person restrained.

472. Inspection and supervisory functions may be entrusted to judges or magistrates,[3/] or to judicial and administrative authorities.[4/] They may be assigned to procurators, prosecuting officials, or director-general of prisons.[5/] In one country supervision over places of custody is entrusted to two members elected by the local municipal council for four years.[6/]

473. Some laws empower judges and magistrates to intervene and inquire into the treatment of persons in custody whose cases are before them, whether or not they act as inspectors and supervisors.[7/]

1/ Federation of Malaya.

2/ Mexico, Panama, Philippines.

3/ Haiti, Yugoslavia, Federal Republic of Germany.

4/ Argentina, Colombia, Jordan, Paraguay, Philippines.

5/ Chile, Czechoslovakia, Liberia, USSR; Republic of Korea.

6/ Denmark.

7/ Colombia, Haiti, Iceland, Lebanon, Panama, Yugoslavia.

474. Inspection may have to be frequent and regular,[1] at least once a month,[2] more than once a month,[3] or "every Saturday".[4]

475. Laws and regulations often require that all facilities should be made available for a proper inspection, including access to the person in custody. For example, the laws of one country provide that inspectors and supervisors are authorized to examine all records and documents, visit any ward or cell, inspect food and look into matters relating to health and hygiene.[5] In another country, the laws authorize the inspector to visit persons in custody at any time, and to speak to them without anyone else being present.[6] One country's laws provide that the supervisory authorities may be accompanied during inspection by the legal counsel of the person in custody.[7]

476. Frequently, the constitutions and laws of countries provide that a person in custody should not be hindered in sending, or presenting in person, petitions, complaints or grievances to the appropriate authorities.[8] In one country the officials of the place of custody are under a duty to assist any person in custody, at his request, in writing and making such applications.[9]

477. Inspectors and supervisors usually have to report on their findings to the minister of justice or some other authority; they may draw attention in their report to any abuse or defect noted in the administration or treatment. The appropriate authority may have to investigate complaints and irregularities mentioned in such reports.[10] Some laws empower the inspectors and supervisors to receive complaints, claims, or petitions, and either to decide upon them or to refer them to the proper authorities.[11]

1/ Liberia.

2/ Haiti.

3/ Republic of Korea.

4/ Colombia.

5/ Jordan

6/ Czechoslovakia.

7/ Argentina.

8/ Albania, Argentina, Austria, Bulgaria, Chile, Italy, Lebanon, Morocco, Romania, Spain, USSR.

9/ Norway.

10/ Argentina, Denmark, Paraguay, Philippines.

11/ Argentina, Czechoslovakia, Federation of Malaya.

(f) Concluding remarks

478. The Committee notes that the general trend of the laws of countries is to recognize, in the words of article 10 of the draft covenant on civil and political rights, 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 be subject to separate treatment appropriate to their status as unconvicted persons". This of course is in line with the general prohibition of torture and cruel, inhuman or degrading treatment which is set forth in article 5 of the Universal Declaration of Human Rights and repeated in article 7 of the draft covenant on civil and political rights. The Committee finds that many national laws and regulations follow the essential requirements of the special régime for persons under arrest or detention described in part IIC of the Standard Minimum Rules for the Treatment of Prisoners. These rules were adopted in 1955 by the First United Nations Congress for the Prevention of Crime and Treatment of Offenders and approved and recommended to Member Governments by the Economic and Social Council in 1957 (resolution 650 (XXIV) of 31 July 1957). The Council also asked Member Governments to report on their application of the rules every five years. The United Nations can in this way follow the developments in countries on the topics dealt with in this section of the study.

479. The Committee finds useful the provisions of the Standard Minimum Rules relating to segregation and separation of persons in places of custody;[1/] supervision and inspection of places of custody;[2/] health, food, clothing and other amenities;[3/] measures of restraint, torture, ill-treatment, disciplinary measures and punishments.[4/] In connexion with the latter, the Committee commends the following suggestion contained in the conclusions on treatment of witnesses and detained persons submitted by the technical organizations to the League of Nations in 1939: "means of constraint must not be used save where necessary to prevent the escape of an accused person or where the latter constitutes a danger to the lives or bodily health of other persons".[5/]

1/ See Rules 85 and 86. See also article 10, paragraph 2, of the draft covenant on civil and political rights.

2/ See Rules 36 and 55.

3/ See Rules 17, 20, 21, 22-25, 39, 40, 87, 88, 90 and 91.

4/ See Rules 27-34.

5/ League of Nations document A.20.1939.IV, 17.

480. The Committee endorses the following suggestions contained in the same conclusions submitted to the League of Nations: "Police prisons must be placed under the direct authority and supervision of judicial authorities. Detention in such establishments must be of very short duration."[1/] The adoption of these suggestions will minimize the risk of undue pressure or maltreatment of the person in custody by the police, especially after the initial arrest when the police are anxious to obtain as much information as possible about the criminal offence in order to build up their case. The Committee also commends another suggestion made in the conclusions, namely, "the officials responsible for the custody of accused persons should be entirely independent of the authorities conducting the investigation".[2/]

481. The Committee considers that compulsory work is "incompatible with the purposes and nature of detention pending inquiry,"[3/] but it believes that denial of work may not be a benefit for the person in custody. It finds merit in a provision that persons under custody "may procure for themselves work compatible with security and good order".[4/] It fully supports Rule 89 of the Standard Minimum Rules: "an untried prisoner shall always be offered opportunity to work, but shall not be required to work. If he chooses to work, he shall be paid for it."

482. The provisions of Rule 89 of the Standard Minimum Rules for the Treatment of Prisoners are consistent with the provisions of the International Labour Convention on Forced Labour, No. 29, of 1930. The Committee has received the following observations from the International Labour Office:

> "As regards work of untried prisoners, it would appear that:
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> (i) any work performed 'voluntarily' by an untried prisoner in accordance with Rule 89 of the Standard Minimum Rules for the Treatment of Prisoners would not appear to fall within the definition of Article 2, paragraph 1, of the Forced Labour

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1/ League of Nations document A.20.1939.IV, 44.

2/ Ibid., 18.

3/ Federal Republic of Germany.

4/ Iceland.

Convention, 1930 (No. 29) as the said person 'offers himself voluntarily'; 1/

(ii) on the other hand, where untried prisoners are 'required to work', such work should be considered as 'forced and compulsory labour' within the meaning of the Forced Labour Convention, 1930 (No. 29) as it is neither voluntary nor performed 'as a consequence of a conviction in a court of law'; 2/ in these circumstances recourse to such labour may be had only subject to the conditions and guarantees provided for by the Convention, and every country where this Convention is in force is under the obligation 'to suppress... /it/ within the shortest possible period'." 3/

483. The Committee finally wishes to recall that the subject of treatment of persons in places of custody comes within the social defence programme of the Social Commission of the United Nations. It was under this programme that the Standard Minimum Rules for the Treatment of Prisoners were formulated. The Committee notes that the ad hoc Advisory Committee of Experts on the Prevention of Crime and Treatment of Offenders has made certain suggestions for further studies on the subject of the régime for adults and juveniles detained prior to sentence or commitment, 4/ and that these suggestions will be considered by the Social Commission at its next session in 1961.

1/ Article 2, paragraph 1, of the Convention contains the following provisions: "For the purpose of this Convention the term 'forced or compulsory labour' shall mean all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily."

2/ The relevant provisions of article 2, paragraph 2, of the Convention are: "2. Nevertheless, for the purpose of this Convention, the term 'forced or compulsory labour' shall not include - ...
(c) Any work or service exacted from any person as a consequence of a conviction in a court of law, provided that the said work or service is carried out under the supervision and control of a public authority and that the said person is not hired to or placed at the disposal of private individuals, companies or associations; ...".

3/ Article 1, paragraph 1, of the Convention.

4/ E/CN.5/345, paras. 36-39.

C. REMEDIES AVAILABLE TO THE ARRESTED OR DETAINED PERSON AND SANCTIONS FOR THE VIOLATION OF HIS RIGHTS

484. The remedies and sanctions provided by law against wrongful deprivation of liberty are very numerous and not always easy to describe in their complexity. The Committee has found it convenient to consider them according to their purposes, as follows:[1/]

Procedures to terminate wrongful detention and to restore freedom. It is of course this most urgent corrective measure which the person concerned first seeks to obtain.

Procedures to obtain annulment of the proceedings in case of violation of the rights of the arrested or detained person and to declare inadmissible at trial evidence gathered in wrongful proceedings. One important aspect of such remedies, the "limitations on the use of confessions as evidence", has already been considered (see paras. 414-430).

Penal Sanctions and Disciplinary Sanctions deal with measures, the purpose of which is to punish the perpetrators of the wrongful acts and to provide deterrents against the recurrence of the evil.

Compensations for wrongful arrest or detention deal with measures which are more complex since they may not only tend to grant redress to the aggrieved person but also to provide a deterrent against improper acts.

"Some other types of sanctions" will be mentioned briefly.

485. The Committee will devote its attention to appraising the extent to which in accordance with article 8 of the Universal Declaration, the laws in force provide "effective" remedies and sanctions against wrongful arrest or detention.

1. Procedures to terminate wrongful detention and to restore freedom

486. The Committee will consider various procedures by which persons deprived of their liberty may obtain their release if their detention was wrongful.

1/ See E/CN.4/763, paragraph 29.

487. The Committee will describe here procedures which tend to terminate detention either because the grounds for deprivation of liberty are illegal, or are not supported by the facts of the case; or because the measure of arrest or detention was ordered or effected in violation of procedural requirements, or because such measures, although taken on legal grounds and in the manner prescribed by law, were subsequently vitiated through disregard of certain rights of the arrested or detained person: right to be informed of the charges; right to be brought before an examining magistrate within a stated time-limit; right to counsel, etc. It should be observed, however, that in certain systems violations of the above-mentioned rights of the detained person are not sanctioned through termination of custody; instead, the proceedings are declared void and no evidence obtained as a consequence of the rescinded acts is admissible at the trial. Sanctions of this type will be considered separately.

488. As has been noted earlier (see Part II, A) the release of wrongfully arrested or detained persons may, in various countries, be effected through action taken ex officio by the courts or other supervisory authorities, without need for the person concerned to set any procedure in motion.[1/] To ensure the effectiveness of ex officio action, various laws provide that periodic reports must be submitted to the courts or other supervisory authorities on the progress of the investigation and the status of the suspected or accused person or that such authorities have the right to inspect places of detention, examine the relevant records and files and talk with the detained persons. Such ex officio action may be very useful as an additional safeguard in case the detained person is prevented from filing petitions or appeals. The Committee believes, however, that, no matter how efficient and impartial the supervisory authorities may be, they cannot be expected to pay as much attention to cases of wrongful deprivation of liberty as the detained person himself, or his relatives, friends or legal representative. The Committee will therefore devote its attention essentially to procedures which are initiated by persons in custody or by some other private persons in their behalf.

1/ Bolivia, Burma, Ceylon, Federation of Malaya, France, India, Union of Soviet Socialist Republics.

489. The Committee will first describe, under (a), the main types of remedies. It will subsequently proceed to consider the operation of such procedures, on a topical basis, as follows: (b) Scope of the remedies; (c) Extent to which the decisions complained of may be reviewed; (d) Rules governing the institution of proceedings; (e) Nature of the proceedings and participation of the detained person therein; (f) Burden of proof; (g) Duration of the proceedings; (h) Effect and enforcement of remedial measures. Under (i) the Committee will submit some concluding remarks.

(a) Main types of remedies

490. In most countries, the laws on criminal procedure contain provisions for appeals against various orders of arrest or detention issued in the course of the preliminary examination. Such remedies will be referred to here as "regular appeals". The basic principle according to which those "regular appeals" constitute an integral part of criminal procedure may explain to a large extent several of their main features: (a) their restricted scope, which excludes all measures of detention outside of criminal procedure and, frequently, also arrests and seizures of persons suspected of having committed a criminal offence, when such measures are taken prior to the formal initiation of the preliminary examinations; (b) the fact that the appellate courts, in various countries, act as examining organs of second instance and review the findings of facts made by the detaining authorities; and (c) certain restrictive rules (e.g.: relative secrecy of the appellate proceedings; non-suspensive character of the appeal) which seem to be designed to allow only minimum interference with the preliminary examination.

491. In addition to regular appeals, a number of countries provide "special remedies" such as habeas corpus,[1/] queja, "complaints", or amparo.[2/] The laws which establish such remedies are usually not embodied in the codes of criminal procedure, as their purpose is to secure adequate remedies against any deprivation of liberty effected for reasons or in a manner not prescribed by law, whether such measures were taken in criminal matters or in other fields. For instance, in

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1/ See Yearbook on Human Rights for 1949, pp. 229-234.

2/ See Yearbook on Human Rights for 1946, p. 203; Mejorada, C.S. "The writ of amparo - Mexican procedure to protect human rights", the Annals of the American Academy of Political and Social Science, vol. 243, January 1946.

various countries, the remedy of habeas corpus is also available to secure the release of persons confined in mental institutions,[1] or of foreigners detained pending deportation,[2] or to obtain custody of children.[3] The remedy of amparo may aim at protecting the individual against violations of any of his human rights set forth in the constitutions.[4]

492. Habeas corpus and amparo are often available not only to challenge the legality of custody but also to correct improper conditions of custody and to safeguard various other rights of the detained person.[5]

493. The few cases in which such remedies do not lie in certain jurisdictions include for instance: custody ordered upon conviction and sentence; detention of persons suspected or accused of having committed police contraventions, military offences or any offence flagrante delicto;[6] administrative arrests of persons responsible for government money or valuables;[7] committals for contempt;[8] and acts of a political nature.[9]

494. The remedies of habeas corpus and amparo are generally available with respect to citizens and aliens alike. In some jurisdictions there are limitations on its availability with respect to certain classes of persons, such as, for example, members of the armed forces or forces charged with the maintenance of public order, or enemy aliens;[10] incorrigible criminals, deserters from the army, navy, air force, the police force, military conscripts, etc.[11]

1/ United States of America.

2/ Panama.

3/ See Yearbook on Human Rights for 1949, p. 232.

4/ Costa Rica, Mexico.

5/ Argentina, United Kingdom (England and Wales).

6/ Ecuador.

7/ Brazil.

8/ United Kingdom (England and Wales).

9/ Mexico.

10/ India.

11/ Peru.

495. The extent to which the courts may, under habeas corpus and amparo procedures, review the findings of the examining magistrates appears to vary from country to country.

496. Many provisions tend to make habeas corpus and amparo procedures as simple, inexpensive and speedy as possible. While there are many variations in detail, the common procedure is for submission to the competent court or authority of a simplified "petition" alleging unlawful custody. The court then requires the responsible official to appear, explain the reasons for detention, and produce before the court the person in custody. If, at the conclusion of expeditious proceedings, the deprivation of liberty is found to be illegal, the court orders the detained person to be released immediately.

497. The procedural relationship between regular appeals and special remedies seems to be rather a complex one. Various laws on habeas corpus or amparo require that ordinary remedies be first exhausted by the petitioner.1/

498. Although a few exceptions may be found,2/ it appears that it is as a rule the judicial authorities or organs which are competent to entertain regular appeals or habeas corpus or amparo petitions.

499. In certain systems, complaints against wrongful custody are dealt with by special supervisory authorities usually called "procurators". The Procurator-General is appointed by the legislative organ for a stated term; he in turn appoints procurators of intermediate rank, while officials of the lower echelon are appointed by the procurators of intermediate rank with the approval of the Procurator-General.3/ The laws of all the countries concerned stress that the Procurator-General is independent of all other authorities; so are the procurators of intermediate and lower ranks who are subordinate solely to the Procurator-General.4/

1/ Mexico, Nicaragua, United States of America.

2/ Ecuador. (Habeas corpus petition to be adjudicated upon by administrative authorities).

3/ Albania, Bulgaria, Poland, Romania, USSR.

4/ Albania, Bulgaria, Poland, Union of Soviet Socialist Republics.

500. The scope of the procurators' duties is very broad, since these officials must, according to the law, "ensure particular vigilance to see that no citizen is subjected to unlawful or unjustified criminal prosecution or to any other unlawful restrictions of his rights".[1/]

501. In the field of criminal procedure, the procurators are to perform various functions. They closely supervise the proceedings up to the trial stage and may give binding orders to the examining officials.[2/] No arrest may be valid without the approval of the procurator, to be given within a stated time-limit.[3/] The procurator must release wrongfully detained persons either ex officio or upon complaint by the person concerned.[4/] Complaints against orders of custody issued or confirmed by the procurator are to be addressed to a procurator higher in rank.[5/]

502. Provisions concerning complaints to the procurators do not exclude recourses to the courts, under certain conditions. Thus, it is provided that appeals may be made to the courts against negative decisions of the procurator;[6/] or that, when the case is brought before the trial courts, all petitions and complaints against actions of the examining official or of the procurator are to be dealt with by these courts.[7/]

(b) Scope of the remedies

503. The Committee will now consider what actions or decisions affecting personal liberty may be complained against, under the various systems described above. It seems appropriate to consider successively the remedies available against

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1/ Union of Soviet Socialist Republics.

2/ Romania, Union of Soviet Socialist Republics, Vienna Seminar, Working Paper C, pp. 18-19.

3/ Bulgaria, Romania, Union of Soviet Socialist Republics, Vienna Seminar, Working Paper C, pp. 9-10.

4/ Albania, Bulgaria, Poland, Romania, Union of Soviet Socialist Republics, Vienna Seminar, Working Paper C, p. 19.

5/ Poland, Romania, Union of Soviet Socialist Republics.

6/ Union of Soviet Socialist Republics.

7/ Albania, Bulgaria.

threatened or impending arrest; arrests effected without judicial warrant, and various wrongful acts committed prior to the issuance of a judicial order of detention, and decisions of judges or other examining authorities ordering detention or violating the rights of the detained person.

(i) Remedies available when deprivation of liberty is threatened or impending

504. Certain laws provide that a person may lodge a petition for habeas corpus or amparo, and the courts should investigate the matter, when arrest or restraint or violence in any form is "threatened" and he is "in imminent danger of suffering prejudices".[1/] If the court considers justified the reasons underlying a request for habeas corpus, of a preventive character, the judge issues a safe conduct which provides the applicant with safequards against the threat of illegal restraint or violence.[2/]

505. However, most of the laws on special remedies, and all provisions relating to regular appeals, require that the recourse should concern a person whose liberty is actually restrained.

(ii) Remedies available against arrests effected without judicial warrant, and against various acts committed prior to the issuance of a judicial order of detention

506. As was noted earlier (see para. 29), many laws provide that, when an arrest is effected by the prosecutor, the police or a private person, the arrested person should be brought, within a stated time-limit, before a magistrate, who should either confirm the arrest by issuing a detention order or release the person. If the arrestor fails to bring the suspect before a magistrate within the prescribed time-limit, or if the magistrate refrains from taking any decision on the question of detention, the arrested person must ipso jure be set free. These provisions may be regarded as affording a certain degree of protection to the arrested person. The questions remain, however, as to what remedy is available to him during the interval between arrest and appearance before a magistrate, a crucial period during which he may be subjected to police

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1/ Argentina, Brazil, Costa Rica, Ecuador, Nicaragua, Panama.

2/ Brazil.

interrogation; and as to what recourse may be made in case the above-mentioned rules are violated and "mandatory" release does not ensue.

507. The provisions on regular appeals contained in the laws on criminal procedure do not usually allow recourse against initial arrests effected without judicial warrant, nor do they usually permit appeals against failure to effect the "mandatory" release mentioned above. Most regular appeals become available only when detention is ordered or confirmed by a judge or examining magistrate. This might perhaps be explained, historically, by the fact that, while regular appeals were intended to afford an opportunity for reviewing various acts of the preliminary examination, initial police inquiries (including police arrest, "garde à vue") had an unofficial character and were not regarded as being part of the preliminary examination.[1/] It was probably considered that the intervention of supervisory authorities, as well as penal and disciplinary sanctions, were sufficient checks against wrongful police actions.

508. Certain enactments, however, appear to enlarge the scope of regular appeals procedures. Some laws recognize a right of appeal, in very general terms, against "decisions concerning arrest and detention or other control of the accused",[2/] or against "any deprivation of personal liberty in violation of the law or without authority in existing legislation",[3/] or it is provided, without further precision, that "the legality of arrest may be tested before a court."[4/] In one country, the law establishes a procedure for review of "orders of custody", supplemented by appeals to the courts against any "infringement of a person's rights" by non-judicial authorities.[5/] In another country, it is provided that, in addition to any recourse alleging "encroachments of personal freedom imposed by a judge", appeals may be made against "any order or warrant for seizure or arrest issued at any stage or level of the proceedings."[6/] One law stresses that

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1/ Vienna Seminar, Working Paper B, p. 13.

2/ Iceland.

3/ Norway.

4/ Haiti.

5/ Federal Republic of Germany.

6/ Italy.

"decisions on custody" are appealable "regardless of whether they were made by the investigating judge or the judge of district court or by the organs of international affairs."[1] Since many of these laws have been recently enacted, it is not always easy to determine their actual scope.

509. The laws on habeas corpus and amparo, being worded in very general terms - such as: "any illegal restraint by any person whatsoever" or "by any public official or private person" - it must be inferred that such remedies lie unless the acts complained against are expressly excluded from their scope. Except under very few laws which exclude cases of arrest flagrante delicto,[2] it is certain that habeas corpus and amparo petitions may be directed against any arrest effected by the police or private persons without judicial warrants. It is clear that "one who is illegally arrested does not have to wait for the preliminary examination before a committing magistrate; he may file the petition immediately after his arrest."[3]

510. In various jurisdictions, it is specified that relief may be sought not only from custody in jail but from other forms of restraint as well, such as "the placing of guards around a private residence."[4]

511. The petitioner will be released if the police officer or other respondent does not satisfy the court that the restraint was effected on legal grounds and in the manner prescribed by law.

512. Furthermore, an arrest, even when it was made in accordance with the law, becomes wrongful, and release will be ordered, if various rights of the arrested person have subsequently been violated: for instance, when the person is not informed of the grounds for arrest within the prescribed time-limit,[5] when he has been illegally prevented from communicating with counsel,[6] or when he has been subjected to violence or harsh treatment.[7] A person arrested on legal grounds and

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1/ Yugoslavia.

2/ Ecuador (habeas corpus).

3/ United States of America.

4/ Peru.

5/ Argentina; Panama.

6/ Canada.

7/ Brazil, Guatemala.

in accordance with legal forms will nevertheless be set free by the courts if he has not been brought before the examining magistrate or other authority competent to order detention within the prescribed time-limit.[1]

513. In countries which entrust to the procurators the task of ensuring the observance of the law, it is provided that an arrested person may appeal to the procurator against "any action" of various authorities, including "an officer conducting an inquiry"[2] and it is stressed that the procurators must "ensure the legality of detention by the organs of the militia."[3]

(iii) Remedies available against decisions of judges or other examining authorities ordering detention or violating the rights of the detained person

514. It will be recalled that, in various countries, detention ordered by the examining magistrate or other competent authorities is subject to automatic, periodic reviews at the expiry of stated time-limits, and that the person concerned must be released if he is not brought before the reviewing organ or if such organ fails to issue an extension order at a prescribed time (see paras. 141-144). While such laws afford certain safeguards to the detained person, they do not provide remedies to challenge the validity of initial or extended detention orders as soon as they are issued; nor do they provide for release as a sanction for the violation of the rights of the detained person.

515. In some countries, the law provides in comprehensive terms that regular appeals are available against any "order by the examining courts... concerning custody or provisional release",[4] against "decisions involving an encroachment on personal freedom made by ordinary or special courts",[5] or against "any order or delay of the investigating judge", including those relating to arrest and detention.[6]

1/ Chile, Panama, Peru.

2/ Bulgaria, Union of Soviet Socialist Republics.

3/ Union of Soviet Socialist Republics.

4/ Cambodia.

5/ Italy.

6/ Austria.

516. Other laws contain lists of appealable decisions which are, for instance, any order of the examining magistrate when it is challenged on the ground that he lacked jurisdiction;[1] the first order of detention issued after the appearance of the suspect before the examining magistrate;[2] any decision to confirm detention orders or extend their effects beyond a stated time-limit;[3] any refusal to grant provisional release and revocation of such measure;[4] any decision fixing the amount of security for provisional release;[5] any decision to commit the accused for trial, which frequently involves a fresh order, or a confirmation, of detention.[6]

517. In various countries, the scope of regular appeals against judicial orders does not extend to all the cases mentioned above. For instance, in some countries where detention orders are subject to automatic reviews, a decision to confirm the order or to extend its effects is appealable but no recourse may be submitted (save in the form of a request for provisional release) against the first detention order issued by the examining magistrate.[7] Certain laws permit regular appeals to be lodged only against refusal to grant provisional release,[8] or only against orders of committal for trial.[9]

518. All the laws on regular appeals mentioned above make it possible to challenge the validity of decisions which place or maintain the accused in detention: they do not provide for release as a sanction for the violation by judicial authorities of various rights of the detained person (right to legal assistance; right not to be subjected to improper interrogations, etc.). If such violations take place, the person concerned may, in certain countries, ask for his release under habeas corpus or amparo provisions; or, where such special remedies are not available, he may ask for annulment of the proceedings and

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1/ France, Mexico, United Arab Republic (Egyptian region).

2/ Mexico, Netherlands, Portugal, Spain, Yugoslavia, Federal Republic of Germany.

3/ Belgium, France, Netherlands, Portugal, Yugoslavia.

4/ Belgium, Brazil, France, Luxembourg, Mexico, Morocco, Peru, Portugal, Yugoslavia, Federal Republic of Germany.

5/ Brazil, Peru, Portugal.

6/ Brazil, Ecuador, Luxembourg, Mexico, Portugal.

7/ Belgium, France.

8/ Morocco.

9/ Ecuador.

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challenge, at trial, the admissibility of evidence obtained as a consequence of such wrongful measures (see paras. 587-596).

519. As noted before, the laws on habeas corpus and amparo are worded in terms so comprehensive that judicial orders of detention as well as various judicial measures violating the rights of the detained person seem to come within their scope. Some laws expressly provide for the availability of special remedies against "any act of either judicial or administrative authorities."1/

520. A person may obtain his release in habeas corpus or amparo proceedings if the grounds upon which the judicial order is based are illegal, or even, in certain countries, when the law defining the offence with which he is charged is declared unconstitutional.2/ The petition is also granted, in various systems, when detention is prolonged beyond the limits prescribed by law, or when the judge has failed to renew or extend detention at the expiry of a stated time-limit after the issuance of the initial detention order.3/ One law provides that the detained person should be released, upon his petition, if he is not served with an indictment within a prescribed period or if he is still detained beyond a stated time-limit after his committal for trial.4/

521. Decisions which "unduly refuse to grant release" may, in various countries, be challenged under habeas corpus procedures.5/

522. The provisions mentioned under the preceding heading (see paragraph 512) according to which release should be granted if the petitioner has been prevented from communicating with counsel or if he has been subjected to violence or harsh treatment seem to be applicable at all stages of the proceedings, and whatever be the authority responsible.

1/ Ecuador (queja), Mexico (amparo).

2/ India.

3/ Argentina, India.

4/ United Kingdom (Scotland).

5/ Argentina.

523. Certain distinctions seem, however, to be called for as regards the availability of special remedies against judicial orders. The requirement, provided for in various laws, concerning the absence or prior exhaustion of ordinary remedies would seem to bar habeas corpus or amparo reliefs where regular appeals are available against judicial decisions. This rule, however, appears to be a flexible one, in various countries, where it may be disregarded if the court feels that other recourses would entail "undue expenses or delay"[1/] or in all cases involving "danger to personal liberty."[2/]

524. In certain countries, the law contains provisions under which special remedies are not available when the petitioner "challenges the decisions of courts or judicial officers in matters within their jurisdiction",[3/] and such provisions are distinct from the rule concerning the prior exhaustion of ordinary remedies.[4/] There is not enough material available to ascertain whether these laws merely restate in a particular field the requirement concerning prior exhaustion of regular appeals; or whether their effect is to bar habeas corpus and amparo petitions against judicial orders even when regular appeals are not available.

525. The extent to which judicial orders may be reviewed, under habeas corpus and amparo provisions will be examined later in greater detail.

526. In countries where the institution of the procurator-general's office exists, complaints against orders of detention issued by "examining officials" may be made to the procurator; when the preliminary examination is conducted by a procurator, a complaint may be made to a procurator higher in rank or to the courts.[5/]

1/ Israel.

2/ Mexico.

3/ Costa Rica, Cuba, Panama, Paraguay, Nicaragua.

4/ Costa Rica, Nicaragua.

5/ Union of Soviet Socialist Republics.

(c) Extent to which the decisions complained of may be reviewed

527. In various countries, the courts which adjudicate upon regular appeals are not restricted to verifying whether the decisions challenged were taken by a competent authority, for reasons recognized by law, and in accordance with the rules of procedure. They must, in addition, review all the circumstances pointed out by the parties, which have a bearing on the question of detention; decide whether such facts were duly established and correctly evaluated by the arresting authorities; and rescind detention orders, even if legally drawn, when they do not appear to be justified in the light of the relevant facts.1/ The appellate courts may grant release after investigating facts which were dismissed by the examining magistrate and not even mentioned in the warrant.2/

528. In conducting their investigations into the grounds for detention, the appellate courts may be led to inquire into the merits of the charges. They have to decide, for instance, whether or not there is "sufficient evidence" against the accused to justify continued detention.3/ In certain jurisdictions, the appellate courts, may, for that purpose, substitute themselves, at least temporarily, for the examining magistrate and conduct the preliminary investigation (powers of "évocation").4/ It may be significant, in that connexion, to note that the courts competent to hear regular appeals against detention orders are, in various countries, the same organs which should review or confirm the indictment.5/

529. With respect to some other countries where regular appeals may be made only on grounds of "violation of the law",6/ it is not clear whether the review of detention orders may go as much into substantive questions as it is the case under the above-mentioned laws. It should also be mentioned that, when considering

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1/ Belgium, France.

2/ France.

3/ Mexico.

4/ Belgium, France, United Arab Republic (Egyptian region).

5/ Belgium, Cambodia, France, Luxembourg, United Arab Republic (Egyptian region).

6/ Italy, Turkey.

applications made against the negative decisions of appellate organs (e.g., pourvoi en cassation), the supreme courts are, as a rule, only empowered to verify whether legal provisions have been correctly applied and interpreted; they must accept the facts as established and evaluated by the lower courts.[1]

530. There is no doubt that, under many habeas corpus and amparo provisions, the courts may set the arrested or detained person free if the grounds for detention submitted by the arrestor or mentioned in the warrant are not "recognized by law",[2] or a fortiori, if no ground is mentioned; if the authority or person responsible for the arrest or detention was not legally "competent" to order or effect such measure,[3] or if "procedural guarantees" have been violated.[4]

531. In the absence of detailed information, it is not easy to ascertain whether the courts may terminate custody when the reasons adduced therefor are recognized by law, but the fact underlying the reasons for detention have been evaluated erroneously or maliciously by the competent authorities.

532. On the one hand, certain laws expressly provide that habeas corpus and amparo petitions are adjudicated upon "entirely without reference to any question of substance on which they may have a bearing";[5] or that "the courts will not go into the merits of the case (i.e., whether or not an offence has been committed)".[6] One commentator states that "in criminal cases, i.e. where the prisoner has been committed to prison by a court on a criminal charge, the court dealing with the habeas corpus proceedings cannot inquire into the truth or falsity of the facts so stated /in the return to the writ/. The function of the court is to decide whether, on those facts, the detention is lawful or unlawful."[7]

1/ Belgium, France, Luxembourg.

2/ Argentina, Panama, Portugal.

3/ Brazil, Costa Rica, Israel (detention ordered by a military court over a civilian).

4/ Argentina, India, Panama.

5/ Panama.

6/ Argentina.

7/ Yearbook on Human Rights for 1949, p. 233.

Under such laws it seems that the courts may not go into an examination of the merits of the charges (whether or not a criminal offence has been committed, whether or not there is sufficient evidence to warrant a reasonable suspicion that the detained person has committed it), although these questions have an important bearing on the propriety of custody. It is not known whether the courts are debarred from reviewing the correctness of other relevant findings made by the competent authorities, for instance: the suspect is attempting or is about to escape; or certain facts indicate that the suspect, if released, would tamper with the evidence or otherwise obstruct the investigation (see Part II A, which contains a more detailed list of the reasons usually adduced for arresting or detaining a suspect). As noted earlier, (see paras. 520-525), in various countries the law provides that relief will not be granted if petitions for habeas corpus or amparo "challenge decisions taken by judicial officers in matters within their jurisdictions". It would seem that, under such provisions, the courts may not go further than ascertaining the competence of judicial officers. It appears that the applicant may obtain a review of the grounds for detention only by making a regular appeal (see para. 528).

533. On the other hand, certain habeas corpus and amparo laws provide for the termination of custody on various grounds, even when the measure of detention was legal "on the face of it" and the rules of procedures have been complied with. In accordance with some statutes, it appears that the courts must examine the circumstances of detention with a view to ascertaining whether it was not ordered "with the intent to try the same person twice for the same offence."[1/] In one country, it is said that the courts may terminate detention not only when a warrant is "bad on the face of it" but also when "irregularities" are not "apparent" and it is found that detention was ordered "arbitrarily or maliciously".[2/] Certain laws provide for the termination of "illegal or improper" custody,[3/] and, in one of those countries, the term "improper" has been defined as referring to measures which constitute "a fraud on an act or an abuse of powers

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1/ Panama.

2/ Israel.

3/ Burma, Ceylon, Federation of Malaya, India, United Kingdom (Aden) and (Tanganyika).

given by the legislature", although "forms of law have been observed".[1] In some countries, the petitioner must be released when "there is no good ground for restraint"[2] or when "all requisite legal conditions have been fulfilled but it is not established by the proceedings that it is necessary to detain the person concerned".[3]

534. The laws and regulations on the powers of the procurators provide that such officials must see to it that no citizen is subjected to "unlawful or unjustified" criminal prosecution or to "any other unlawful" restrictions of his rights.[4] The procurators must consider the decisions taken by the competent authorities "in which the grounds and reasons for temporary detention should be indicated"[5] and thoroughly "examine all the materials of the case".[6] It is said, in respect of one of the countries where the institution exists, that the procurator has the right to overrule any "erroneous" decision of the investigating authorities.[7] There is no further information available, however, concerning the extent of the procurator's inquiries.

(d) Rules governing the institution of proceedings

535. Under this heading the Committee will consider: who may institute proceedings; forms and costs of application and measures to facilitate its preparation and transmittal; and the time-limits for application.

(i) Who may institute proceedings

536. In all countries on which material is available, regular appeals may be lodged only by the person who was deprived of his liberty, and sometimes also

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1/ India.
2/ Brazil.
3/ Chile.
4/ Union of Soviet Socialist Republics.
5/ Union of Soviet Socialist Republics.
6/ Union of Soviet Socialist Republics.
7/ Bulgaria.

by the prosecutor acting "in the interest of the accused".[1] As stressed by various judicial decisions, proof that the appellant has a "direct interest" in the case appears to be an essential requirement in such procedures.[2]

537. In contrast, most or all provisions concerning habeas corpus, amparo, or similar remedies allow petitions to be made by persons other than the detained party himself. In most cases, the law provides that applications may be filed by persons who enjoy the confidence of the detained person or are related to him or entitled to represent him, such as his counsel,[3] legal representative,[4] spouse,[5] relative,[6] or friend,[7] or any interested person,[8] any person "provided he is not an absolute stranger".[9] Some codes, further, allow proceedings to be instituted by "any citizen",[10] "any inhabitant of the country,[11] or "any person without need for a power of attorney".[12]

538. The law in some countries specifies conditions under which application may be made by persons not related to the detained individual. For example, it may be provided that any person may institute the proceedings if the aggrieved party is unable to do so; the judge shall secure the appearance of the aggrieved party in order to ratify the application within three days, failing which the

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1/ Belgium, United Arab Republic (Egyptian region).

2/ Belgium, France.

3/ Japan, Mexico, Republic of Korea.

4/ Japan, Mexico, Republic of Korea.

5/ Japan, Mexico, Portugal; Thailand, Republic of Korea.

6/ Argentina, Costa Rica; Guatemala, Peru, Thailand, Liberia, Republic of Korea.

7/ Argentina, Japan, Liberia.

8/ Thailand.

9/ India.

10/ Costa Rica.

11/ Nicaragua.

12/ Panama.

petition shall be disregarded.[1] One code[2] provides that an application may be made by any citizen on behalf of the detained person who is unable, de jure or de facto, to file the application and has no legal representative or relative. Another law[3] states that the affidavit required in support of the petition may be made by the detained person or by some person on his behalf, with his knowledge and consent, or, if permitted at the discretion of the judge or court, whenever it appears that the person detained is so coerced as to be incapable of making the affidavit. Similarly, it is provided in a code[4] that the supporting affidavit may be made by a person other than the detained party if it is shown that the latter is unable to do so by reason of restraint or coercion or other sufficient cause.

539. In some countries the public prosecutor may initiate habeas corpus proceedings.[5] It is also provided in some codes[6] that the court of competent authority may initiate proceedings and grant relief ex officio if it should come to its knowledge that a person is illegally detained or is about to be unlawfully deprived of his liberty. Prison officials may initiate the proceedings,[7] or may be required to inform the competent authorities immediately whenever they have knowledge of facts giving rise to habeas corpus.[8]

(ii) Forms and cost of application and measures to facilitate its preparation and transmittal

540. There is very little information available on the form of application under regular appeals procedures. Provisions which expressly allow application to be made orally seem to exist only in a few countries.[9]

1/ Mexico.
2/ Costa Rica.
3/ Ireland.
4/ Federation of Malaya.
5/ Brazil, Thailand.
6/ Brazil, Guatemala, Panama, Paraguay.
7/ Thailand.
8/ Guatemala.
9/ Mexico.

541. Under many laws on habeas corpus and amparo, the procedures and forms of application are very simple. Where the law provides that applications must be made in writing, it seems that no prescribed formulae has to be used and that counsel's signature is not required. It may be provided that the original order of detention or a copy thereof be furnished, but this rule may be waived in various circumstances where the petitioner alleges that he was unable to obtain such a document[1] or in any case where the requirement would "impair the efficacy of the remedy".[2]

542. In many countries, habeas corpus and amparo petitions may be made orally[3] or by telegram[4] as well as by letter. In whatever form they are submitted, petitions must contain certain essential indications: the name of the petitioner, the name of the arrestor; the reason alleged for detention; and the date and place of detention. "Brief statements" on the circumstances of the case are, however, sufficient.[5]

543. In various countries, "the courts never refuse to entertain /habeas corpus or amparo/ petitions ... for want of form,"[6] or "the court shall disregard matters of form and technicalities in respect of any warrant or order of commitment".[7]

544. No particular form seems to be required as regards complaints to the procurators. It is expressly provided that such complaints may be made "orally or in writing", and that in the former case a record has to be drawn up.[8]

545. In preparing his application, the arrested or detained person may wish to consult a lawyer. Provisions relating to legal assistance have already been dealt with (see paras. 292-359). It may be recalled that all countries permit the

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1/ Cuba, Panama.

2/ Philippines.

3/ Guatemala, Panama, Nicaragua.

4/ Costa Rica, Chile, Mexico, Panama, Nicaragua.

5/ Guatemala, Panama.

6/ Israel.

7/ Philippines.

8/ Union of Soviet Socialist Republics.

arrested or detained person to select counsel and, under certain conditions, to communicate with him for the purpose, inter alia, of preparing appeals and petitions. Very few countries, however, provide for a court-appointed counsel (mandatory legal assistance) for the arrested or detained person in appellate, habeas corpus or amparo proceedings; and it seems that free legal aid does not frequently extend to the appeals stage.1/ Rather than providing for court-appointed counsel when the applicant is unable to engage a lawyer, various laws, especially several provisions relating to habeas corpus and amparo, tend to make the procedure and forms of application so simple that the need for legal assistance is greatly reduced.

546. In one country, where special remedies such as habeas corpus and amparo do not exist, detained persons are entitled to receive help from the authorities, on request, in writing appeals to the courts.2/

547. The transmittal of the application is facilitated, under the various systems, by laws which guarantee free correspondence of the detained person with judicial authorities and oblige the prison or other authorities to forward the application to the competent organ within a prescribed time-limit.3/ Criminal penalties are frequently provided for any official who obstructs or delays the transmittal of the application, and even, in certain countries, for any post-office or telegraph employee who refuses to transmit amparo petitions immediately and without cost.4/ The suppression of petitions for habeas corpus or "deliberate delays in transmitting them" frequently constitutes contempt of court.5/

548. There is very little material available on the cost of applications under regular appeals procedures and as regards appeals to the procurators. In accordance with certain provisions on regular appeals, if the Supreme Court

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1/ Santiago seminar, Working Paper H, p. 59.

2/ Norway.

3/ Austria, Chile, Morocco, Turkey, Union of Soviet Socialist Republics.

4/ Mexico.

5/ India.

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rejects the appeal, the applicant must pay the costs of the proceedings and a fine;[1] it is not known whether a bond for that purpose must be deposited with the application. The laws on habeas corpus and amparo frequently provide that written petitions may be made on unstamped paper;[2] that telegrams requesting amparo must be sent free of cost;[3] and that petitions for habeas corpus are exempt from court fees.[4] Various laws, similar to that mentioned above, concerning regular appeals, provide that the applicant or his counsel must pay the costs of the proceedings and a fine if the petition is considered groundless or futile;[5] and it is not known whether a bond for that purpose is to be deposited with the application. On the other hand, certain provisions oblige the arresting authority to pay the whole cost of the proceedings if he has ordered the wrongful detention "on account of malice or evident abuse of power."[6]

(iii) Time-limits for application

549. Although the preparation of the appeal and its transmittal through the prison authorities may require some time, the time-limits within which regular appeals must be made is usually short: 1 to 3 days,[7] in some countries 5 days,[8] from the time the detained person received notification of the detention order. Somewhat longer periods are allowed for applications to the Supreme Court against illegal decisions of the appellate organ (e.g., 10 days from the notification of the latter decision).[9] In some countries regular appeals against certain detention orders, or decisions to prolong detention, may be made "at any time".[10]

1/ France.

2/ Costa Rica, Nicaragua.

3/ Mexico.

4/ Israel.

5/ Costa Rica, Panama.

6/ Brazil.

7/ Belgium, France, Ireland, Luxembourg, Netherlands, Yugoslavia.

8/ Brazil, Chile, Venezuela.

9/ Belgium.

10/ Austria, Finland, Netherlands.

550. Few provisions were found which set time-limits for the submission of habeas corpus or amparo petitions. Where such provisions are reported, it appears that the time-limits are somewhat longer than those prescribed for regular appeals; it may be provided for instance, that requests for amparo must be filed within fifteen[1/] or thirty[2/] days from the notification of the detention order to the person concerned. Failure of the aggrieved party to complain in time may be deemed acceptance of the act, thus making a later complaint inadmissible.[3/] In one country no precise time-limit is provided but "inordinate delay in initiating the proceedings may affect relief;[4/] however, delays which are due to the fact that the detained person "is otherwise seeking release from the authorities concerned" have no such adverse effect.[5/]

551. In countries where the institution of the procurator-general exists, the law frequently provides that complaints to the procurator in matters of arrest or detention may be made without time-limit.[6/]

(e) Nature of the proceedings and participation of the detained person therein

552. At the beginning of the century, regular appeals proceedings had, in various countries, the following characteristics: they were held in camera without the presence of the appellant or his counsel; the courts considered, as a rule, only written mémoires of the parties; and the procedure was not adversary, since the prosecutor's rebuttals were not communicated to the appellant.[7/]

553. Various laws nowadays give greater guarantees to the appellant. Regular appeals proceedings have become adversary in many countries, at least inasmuch as it is required that the appellant receives communication of all mémoires and

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1/ Mexico.

2/ Nicaragua.

3/ Mexico.

4/ India.

5/ India.

6/ Union of Soviet Socialist Republics.

7/ H. Donnedieu de Vabres, Traité de droit criminel et de législation pénale comparée, Sirey, Paris, 1947, pp. 781-782.

written evidence submitted by the prosecutor.[1] The appellate courts may,[2] or must,[3] invite the plaintiff and/or his counsel to appear and give oral explanations. In one country, the presence of the detained person at the proceedings seems to be an essential requirement: the appellant should attend "unless he has waived his right to attend or unless distance, illness or other unavoidable circumstances prevent his being brought", in which cases defence counsel must be present.[4]

554. Habeas corpus and amparo proceedings are, as a rule, conducted orally,[5] and they are adversary. The petition and the writ are communicated to the arrestor and the arrestor's return (or "report") is communicated to the petitioner. At the hearing, the detained person and his counsel may orally refute the evidence submitted in the return,[6] cross-examine the respondent[7] and offer evidence themselves.[8]

555. The personal appearance of the detained party before the court is an "imperative" requirement under most of the habeas corpus and amparo laws.[9] The arrestor is ordered to produce the "body" of the detained person and failure to do so frequently constitutes contempt of the court and/or entails criminal penalties. Thus, the court may be able to see immediately whether the detained person bears traces of torture or mistreatment; and a decision of release can be carried out forthwith.

556. Exception to the requirement concerning personal appearance may be made on account of illness, in which case the court may require proof that the illness is serious,[10] or the judge may proceed to the place of detention in order to have

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1/ France, Iceland, Luxembourg.

2/ France.

3/ Belgium, Cambodia, Luxembourg, Netherlands.

4/ Federal Republic of Germany.

5/ Argentina, Costa Rica, Mexico, Panama.

6/ Panama.

7/ Israel.

8/ Mexico, Panama.

9/ Argentina, Cuba, Guatemala, Nicaragua, Panama, Philippines, United States of America.

10/ Philippines.

direct contact with the detained person notwithstanding his illness.[1] In one country where the personal appearance of the detained party is the general rule, one high court has nevertheless observed that "the direction for attendance of the detenu in court is discretionary and the detenu need not be produced if he can be adequately represented by a lawyer or if his interests are not likely to suffer by reason of non-attendance".[2]

557. One law requires the judge, upon receiving the petition, to go immediately to the place where the person is alleged to be detained in order to investigate the facts; if he is satisfied that the information given in the petition is sufficient on its face, he must order the release of the detained person and inform the superior court of his decision.[3]

(f) Burden of proof

558. It should be stressed that, under habeas corpus laws, the detained person is not brought before the court in order to submit detailed evidence of the wrongful character of custody. On the contrary, one of the original features of such special remedies is that the petition needs to show only a "prima facie" case of illegal restraint. It is primarily on the arresting authority that the burden of proof rests: he must, in his "return" to the writ, "show cause" why the applicant should be maintained in custody.[4] The detained person, present in court, may then cross-examine him on the evidence so furnished. The court may not presume the existence of any legal cause for detention which the return does not show.[5]

1/ Brazil.

2/ India.

3/ Peru.

4/ India; see also Yearbook on Human Rights for 1949, p. 233.

5/ India.

(g) Duration of the proceedings

559. Delays in the adjudication of regular appeals may occur under some laws which provide that, if the appeal asks for the review of orders issued prior to the indictment, the application will be considered by the appellate court only at the time when the appeal from the decision of indictment is filed.[1/]

560. Several other laws stress that whenever regular appeals deal with questions affecting personal liberty, they should be considered "with the utmost dispatch"[2/] or even "in absolute priority".[3/] Time-limits are often set forth within which the courts must reach a decision: forty-eight hours from the receipt of the appeal by the court;[4/] fifteen days from the filing of the appeal;[5/] or fifteen days from the receipt of all relevant documents by the court.[6/] It is, in some countries, expressly provided that, if no decision is taken within those time-limits, the appellant must as of right be released.[7/]

561. Such laws are, however, sometimes qualified by provisos under which the appellate courts have a discretionary power to order any further inquiries they deem necessary; in such cases, the time-limits within which the courts must give their decisions may be extended.[8/] In one country, the law does not allow "time-consuming additional investigations".[9/]

562. Regular appeals against detention orders have, as a rule, no suspensive effect; the detained person remains in jail till the court declares the detention order wrongful.[10/] In accordance with certain laws, however, the courts, especially when they feel that investigations would take some time, may suspend

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1/ Portugal.
2/ Belgium.
3/ Italy.
4/ Yugoslavia.
5/ France.
6/ Iceland.
7/ France.
8/ France.
9/ Federal Republic of Germany.
10/ Austria, Belgium, Finland, footnote 2; Netherlands.

execution of the detention order[1] or grant provisional release either on the appellant's request or ex officio.[2]

563. The laws on habeas corpus and amparo contain detailed provisions to ensure that the proceedings are conducted in the most speedy and expeditious manner. If the application is found sufficient on its face, the court must issue, "forthwith",[3] "immediately"[4] or "without delay",[5] an order or "writ" requiring the authority responsible for the detention to produce the person detained and to inform the court of the reasons for his detention. The order has to be served on the authority concerned "within a stated time-limit", usually very short, for instance, within two hours,[6] or twenty-four hours[7] following its issuance. Upon receipt of that order, the authority concerned must deliver the detained person and file an answer ("return", or "report") in court immediately or within prescribed time-limits, such as, within two hours[8] or twenty-four hours[9] plus statutory allowances for distance, or within two days.[10] Failure of the respondent to comply with these rules often constitutes contempt of court and may be punished as a criminal offence.

564. It is provided in various countries that the court must meet "immediately" upon receipt of the return and production of the detained person;[11] and that habeas corpus and amparo hearings have priority over all other cases.[12]

565. All laws relating to the special remedies provide that the proceedings must be "brief". The law rarely allows for special inquiries and investigations; and, when such provisions exist, it is stressed that a report on the inquiries

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1/ Federal Republic of Germany.
2/ France.
3/ Cuba.
4/ Argentina, Paraguay.
5/ Dominican Republic.
6/ Panama.
7/ China.
8/ Panama.
9/ Costa Rica.
10/ Israel.
11/ Panama, Philippines.
12/ Chile, Costa Rica, Israel.

must be submitted within a stated period.[1] In certain countries, the prosecutor must be heard[2] but other laws expressly dispense with such a requirement in order not to delay the disposition of the case.[3] It has been stated by one high court that "because of the summary character of the /habeas corpus/ proceedings, all procedural steps which are of a dilatory nature and which are embodied in ordinary common law cases must be set aside ...".[4] Various laws provide that the decision of the court must be rendered within twenty-four hours.[5] Certain codes allow a longer period.[6]

566. To ensure that the act complained of may not be consummated or irreparable injury caused to the detained person while the application is being adjudicated, the law in some jurisdictions provides for suspension of the detention order.[7] Various jurisdictions provide for the granting of provisional release to the detained person.[8]

567. In countries where appeals may be made to the procurator, the law provides that the matter must be examined, and a decision taken thereon, within three days from the receipt of the application by the procurator.[9]

(h) Effect and enforcement of remedial measures

568. Under regular appeals procedures, the competent courts may only declare the wrongful arrest or detention void; they may not usually order the examining authorities, the prosecutors or the police to set the person concerned free. In fact, it appears that release of the appellant follows automatically, since any official who would refuse or delay it would incur the criminal and disciplinary penalties provided for groundless detention, and might have to pay damages on account of such a detention.

1/ Chile, Costa Rica.

2/ Argentina, Mexico.

3/ Peru.

4/ Argentina.

5/ Brazil, Chile, Panama.

6/ Ecuador (queja - forty-eight hours), Paraguay (habeas corpus - within three days from the appearance of the detained person in court).

7/ Costa Rica, Mexico.

8/ Burma, Ireland, Japan.

9/ Albania, Poland, Union of Soviet Socialist Republics.

569. Under habeas corpus and amparo procedures, the competent courts order the immediate release of the wrongfully detained person. Delay in carrying out, or failure to comply with, such orders constitute criminal offences[1] and/or contempt of court.[2] In addition, such disobedience may subject the official concerned to disciplinary action[3] and a claim for damages.

570. There is little information available as to whether or not appeals may be made from the decisions which declare the arrest or detention void and/or order the release of the detained person. Under regular appeals procedures, it is sometimes provided in general terms that the prosecutor may, in the interests of justice, challenge before the supreme court the decisions of the appellate organs;[4] but such further applications by the prosecutor are barred in certain cases, for instance, when a decision to release the accused, made at periodic review hearings, has been upheld by the appellate courts.[5] The right of the complainant in a criminal prosecution (partie civile) to appeal against release of the accused has been curtailed in some countries.[6] Under some habeas corpus and amparo provisions, no appeal may be made from the order releasing the detained person;[7] others, while allowing an appeal, specify that the order of release must be carried out even if an appeal has been lodged.[8] In one country, the detained person is not set free if the authority responsible for his detention decides to appeal from the order of release.[9]

571. Under either types of remedial procedures judicial decisions on the legality or propriety of detention does not stop the criminal investigation. It appears that the examining authorities may issue a fresh order of detention, provided "new and serious circumstances" render this measure necessary[10] or

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1/ Argentina, Costa Rica, Guatemala, Panama.

2/ India, Union of South Africa, United Kingdom (England and Wales).

3/ Ecuador, Mexico.

4/ Belgium, France, Luxembourg.

5/ Belgium.

6/ France.

7/ United Kingdom.

8/ Argentina.

9/ Philippines.

10/ France.

provided the "facts and reasons" brought forward as grounds for resumed custody are not "the same" as were mentioned in the first detention order.1/ It is open to the person concerned, or where permitted, to his relatives and friends, to submit a petition or lodge an appeal against the new order.

(i) Concluding remarks

572. Article 9 (4) of the draft covenant on civil and political rights, as adopted by the Third Committee of the General Assembly, provides that:

> "Anyone who is deprived of his liberty shall be entitled to take proceedings before a Court, in order that such court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful." 2/

573. In the light of the foregoing analysis, the Committee will attempt to formulate observations concerning the conditions under which the principle laid down in article 9 (4) of the draft covenant may be implemented.

574. As regard the scope of the remedies (see paras. 503-526), the Committee believes that all cases of wrongful deprivation of liberty from the very initial arrest or seizure by the police or private persons to confirmations or extensions of custody by judicial authorities, must be reviewable. This result may be achieved in various ways: either by introducing habeas corpus or amparo in their unrestricted form; or by greatly expanding the scope of regular appeals procedures; or by establishing a proper relationship between regular appeals and special remedies.

575. Efforts should be vigorously pursued to expand the scope of existing remedies available to persons deprived of their liberty. In particular, termination of custody must be ordered not only when the measure of arrest or detention itself is illegal or improper, but also in case of violation of the basic rights of the arrested or detained person. The Committee endorses, in that respect, the recommendation of the Santiago seminar according to which "habeas corpus should be extended to, or, if it does not already exist, introduced, to protect all persons, including witnesses, who are interrogated ... by prohibited methods."3/

1/ Brazil, Panama, Philippines.

2/ General Assembly, Official Records, 13th session, a.i.32, annexes, A/4045.

3/ Santiago seminar report, ST/TAA/HR/3, para. 121 (c). See "rights relating to interrogations", paras. 360-455.

576. Termination of custody in case of violation of the basic rights of the detained person should not preclude the application of other sanctions, in particular the annulment of wrongful proceedings and the inadmissibility as evidence of information obtained during such proceedings.

577. Detention is obviously wrongful when it is ordered by authorities who lack jurisdiction, or in violation of the rules of procedure, or when the reasons adduced therefor are not recognized by law. Detention is no less wrongful when the reasons for custody are ill-founded, due to malicious or incorrect evaluation of the facts. From the latter principle, it follows that the Courts should review all the relevant facts in order to ascertain that the suspicions which led to the issuance of arrest or detention orders were reasonable ones: be it the suspicion that "the person concerned committed a criminal offence" (substantive charge), or that "the accused, if left free, would escape from justice or tamper with the evidence", or any other reason for custody invoked by the arresting or detaining authorities. In a matter as important as the protection of personal liberty, there should be little scope for discretionary power of the arrestor. Substantive review of detention on appeal should be available against the decisions of all authorities, including judicial authorities. (On these questions, see paras. 527-534).

578. The arrested or detained person should be duly informed of his right to challenge the legality and propriety of custody (see right of the arrested or detained person to be informed of his rights and obligations, paras. 253-258) and he should be able to obtain legal assistance, free of charge if necessary, in order to understand fully the questions involved and to prepare his appeal or petition in the best possible manner. The following Standard Minimum Rule for the Treatment of Prisoners should be strictly applied, notwithstanding any provision on incommunicado, as regards the transmittal of appeals and petitions for release: "Every prisoner shall be allowed to make a request or complaint, without censorship as to substance but in proper form, to the judicial authorities or other authorities through approved channels".[1/] (On these questions, see paras. 545-548).

579. In spite of the above-mentioned guarantees, the arrested or detained person may still be prevented or discouraged from lodging appeals or petitions. It is

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1/ Rule 36 (3).

therefore necessary, in the view of the Committee, to consider whether the right to initiate proceedings should not be granted to other persons as well. The question was discussed in the Third Committee of the General Assembly in connexion with its consideration of article 9, paragraph 4 of the draft covenant on civil and political rights. An amendment was proposed to the effect that "the appropriate proceedings may be instituted by any person on behalf and as representative of the person detained."[1/] Objections to the proposal were raised on grounds that it might open the door to the misplaced zeal of any ill-advised person or group who wished to exploit a given situation to make an application in which they had no legitimate interest. It was argued that any provision which might give rise to multifarious and inappropriate proceedings could paralyse the courts and delay all the procedures and, in the end, be prejudicial to the interests of the detained persons. Some representatives wanted it clearly specified that the party instituting proceedings on behalf of a detained individual must show a legitimate interest, claim or right in the matter, or proper and lawful reasons for doing so. The view was also expressed that it was more important to ensure that the detained person should not be held incommunicado and should have the right to communicate with a lawyer or any other person able to act on his behalf. Despite the contention that the experience of countries having provisions similar to that proposed did not show that there was any real danger of abuse, it was felt that it would be difficult to find a formula which would be suitable for all countries. The proposal was not accepted. The Committee, while aware of the difficulties pointed out by various members of the Third Committee, believes that the institution of recourse proceedings by persons other than the aggrieved party would, in various circumstances, greatly contribute to strengthen the effectiveness of the remedy. Without contemplating an "actio popularis", the Committee feels that it would be very useful to consider the experience of countries which allow such recourse when the courts are satisfied that the detained person is unable to apply by reason of restraint or coercion or on account of other compelling circumstances. (On this question, see paras. 536-539).

580. The procedure and forms of application should be as simple as possible, so that even ill-educated and uncounselled persons can avail themselves of the remedy.

1/ General Assembly, Official Records, thirteenth session, a.i. 32, annexes A/4045.

Many laws on habeas corpus and amparo contain interesting provisions to that effect. Generally speaking, the Committee believes that no appeal or petition concerning personal liberty should be rejected merely on technical grounds. Applications should be drawn up and transmitted free, or at greatly reduced cost, and be exempt from court fees.

581. As various laws provide that waiver of the right to legal assistance is never definitive (see para. 310), similarly it should never be presumed that arrested or detained persons have irrevocably renounced to avail themselves of existing remedies. It is presumably in application of that principle that various laws concerning special remedies and the regulations on the powers of the procurators expressly provide that applications may be made without time-limit. When time-limits are set forth, the Committee suggests that they should be liberally applied and subject to extensions, whenever it appears that compelling or restraining circumstances prevented the person concerned from applying in time; for instance, because of ill-health, or because he was not informed of his right to appeal, or if he was held incommunicado or denied access to relevant evidence, etc. (On these questions, see paras. 540-544, 549-551).

582. Since it is increasingly accepted that detention pending investigation and trial should be an exceptional measure, it appears logical that the arresting authority should bear the onus of proving positively the legality and propriety of detention. It has been noted that such a principle is applied in habeas corpus procedure. Both the arrested or detained person and the authority responsible for his detention should be heard in oral proceedings and all written evidence submitted by one party should be communicated to the other. The arrested or detained person or his counsel should be entitled to submit evidence, obtain the attendance of witnesses, and cross-examine the other party and his witnesses. (On these questions, see para. 558).

583. The proceedings should be expeditious. Various requirements which are normally applied in judicial proceedings (such as obtaining the conclusions of the public prosecutor) should be dispensed with whenever the court considers that their observance would cause undue delay. As is provided for under various systems, time-limits should be set forth for the completion of each phase of the proceedings and for the rendering of the decision. The word "expeditious" is not, however,

synonymous with the word "perfunctory". If the courts are to review the relevant facts - as the Committee believes they should do - it may be necessary for them to spend some time conducting special inquiries or seeking experts' advice. Meanwhile, the petitioner should be allowed to apply for provisional release or suspension of the detention order. (On these questions, see paras. 559-567).

584. Decisions granting release should be carried out immediately. It may be noted that, in various countries, the rules governing the effect of appeals upon the execution of the decision complained of seem to be self-contradictory: appeals by detained persons do not ipso jure stay the execution of detention orders, but appeals made by prosecutors against decisions of release have a suspensive effect. As a result, detained persons may remain in custody until the courts reject the prosecutors' appeals. Such a system seems difficult to justify: why should one judicial decision (the judicial order of detention) have more authority than another (the judicial order of release) and why should a prosecutor's misgivings carry more weight than a judicial order of release? The Committee believes that such contradictions should be removed and that the detained person should be set free as soon as relief is granted, notwithstanding any appeal against the decision of release.

585. Effective sanctions - punishment for contempt, penal and disciplinary sanctions, the payment of damages - should be applicable to officials who disobey the order of release, or obstruct or delay its execution.

586. The law should provide that the detained person may not be placed in custody again in connexion with the same facts or for the same reasons. In order to prevent the authorities concerned from circumventing the order of release, they should be required to indicate with precision the new facts or circumstances which, in their view, justify a fresh warrant of arrest, and the new measure should be appealable in the same way as the initial order of detention. (On these questions, see paras. 568-571).

2. Annulment of the proceedings in case of violation of the rights of the arrested or detained person

587. It has been noted that, under certain laws on habeas corpus and amparo custody may be terminated when various rights of the arrested or detained person have been violated (see para. 512).

588. In addition to, or instead of, termination of custody, various laws provide for the annulment or rescission of proceedings vitiated through non-observance of certain rights of the arrested or detained person.

589. In certain countries, the law provides in broad terms that "all decisions of the examining judge"[1/] or "any act which constitutes an infringement of the provisions relating to judicial inquiries"[2/] may be cancelled by a higher court, or that requests may be made for "quashing the proceedings on technical grounds".[3/] The laws and regulations concerning the powers of the procurators are also formulated in a comprehensive manner. The procurators must see to it that "authorities responsible for investigations and preliminary examinations comply scrupulously with the statutory procedure for criminal investigations".[4/] The arrested or detained person is entitled to appeal to procurators against "any action" of the officers conducting inquiries or of examining officials which "violate or limit his rights".[5/]

590. In other countries, the law contains a list of specific acts or omissions which may be the object of annulment. These are, for example: failure to inform the arrested or detained person of the charges against him;[6/] failure to warn him of his rights to remain silent, and to have legal assistance;[7/] orders restricting communications between the arrested or detained person and his counsel;[8/] interrogation of the accused outside the presence of his counsel;[9/]

1/ Spain.

2/ Greece.

3/ Mexico.

4/ Union of Soviet Socialist Republics.

5/ Albania, Bulgaria, Poland, Romania, Union of Soviet Socialist Republics.

6/ Argentina, France, United Arab Republic (Egyptian region).

7/ Argentina, Belgium, France, Lebanon, Luxembourg, Morocco, United Arab Republic (Egyptian region).

8/ Netherlands.

9/ France, Morocco.

refusal to grant the accused's request for a contentious examination;[1] the taking and recording of confessions by the police outside the presence of a judge, and the use of improper methods of interrogation.[2] In certain systems, the courts have interpreted such statutes broadly as permitting annulment whenever the non-observance of any rule of procedure "substantially hampers the rights of the defence".[3]

591. The courts pronounce the annulment of the wrongful decision itself, of the acts done as a consequence thereof, and, in serious cases (for instance, in case of violation of the rules concerning legal assistance), of all the subsequent proceedings.[4] The records of the annulled acts should be removed from the files and no evidence against the accused may be drawn from them at trial.[5]

592. It may be noted that, while the right to initiate annulment proceedings is generally granted to the prosecutor acting "in the interests of justice", it does not always accrue to the detained person.[6] The law often provides that the courts, or other competent authorities, acting ex officio or upon the prosecutor's request, are duty bound to declare wrongful decisions null and void; but, if these organs are reluctant to do so, the institution of criminal proceedings seems to be the only way to compel them to act.

593. It is sometimes provided that the person concerned should lodge his request for annulment immediately after being informed of the wrongful decision, or within a short time-limit thereafter,[7] and at any rate before completion of the preliminary examination;[8] and that, when the case reaches the trial stage, all acts not previously objected to are deemed to be lawful.

594. The Committee believes that provisions such as those considered above, which tend to deprive the police or examining authorities of the fruits of their

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1/ Portugal.

2/ See rights relating to interrogations, paras. 414-430.

3/ Belgium, France, United Arab Republic (Egyptian region).

4/ France, Lebanon, United Arab Republic (Egyptian region).

5/ France, United Arab Republic (Egyptian region).

6/ Cambodia, France.

7/ Luxembourg, United Arab Republic, (Egyptian region).

8/ France.

wrongful acts, may constitute a useful additional deterrent against abuses of power. Decisions excluding from the files evidence wrongfully obtained may enhance the accused's chances of release and acquittal. The importance of this type of sanction has already been illustrated as regards the "limitations on the use of confessions as evidence" (see paras. 414-430).

595. The Committee therefore endorses the recommendation of the Santiago seminar according to which "defence by a lawyer should be provided on pain of nullity in accordance with the established procedure of the legal system concerned for quashing convictions",[1/] and believes that such a sanction should be introduced, where it does not already exist, in case of violation of other basic rights of the arrested or detained person: right to be informed of the charges; rights relating to interrogations; rights to be protected against improper methods of interrogations, etc.

596. The Committee feels, however, that certain improvements should be contemplated in respect of existing annulment procedures, in particular the right to initiate proceedings should be granted in all cases to the accused or his counsel; and the time-limits for lodging requests may need to be extended, since the preparation of such requests, dealing with complex questions of procedure, often requires thorough consultations between the accused and his counsel.

3. Penal sanctions

597. Wrongful deprivation of liberty and certain acts committed to the prejudice of arrested or detained persons are criminal offences under the laws of all countries on which information is available.

598. The Committee will consider, first the following rules, which apply to private persons and public officials alike, as regards: (a) the material elements of the offence; (b) the requirements concerning the unlawful or arbitrary character of the act; (c) the requirements concerning the state of mind of the offender; (d) the procedures; and (e) the nature and range of penalties. The Committee will then mention: (f) the special rules which govern the criminal responsibility of public officials when acting in the exercise of their functions. Under (g), the Committee will submit some concluding remarks.

1/ Santiago seminar report, ST/TAA/HR/3, para. 96.

(a) Material elements of the offence

599. Under the criminal laws of several countries the fact that a public official or a private person orders or effects a wrongful "deprivation of liberty", or wrongfully places a person under "arrest", "custody", "detention", or "imprisonment" is punishable. Available information shows that, in various countries, these terms have not been given any technical and restricted meaning, but have been judicially interpreted so as to cover "any type of restraint to personal liberty".1/

600. All or many types of wrongful arrests or detentions are criminal offences under statutes which prohibit in general terms "any act" prejudicial to the "human rights" or "freedoms" of individuals.2/

601. Instead of, or in addition to, providing sanctions, in general terms, for wrongful deprivation of liberty, several laws make the following specific acts criminally punishable as distinct offences under conditions which will be mentioned under (b) and (c) below: receiving a person in jail without being shown a proper warrant or judicial order (special responsibility of prison wardens);3/ delaying the appearance of an arrested person before a magistrate (special responsibility of police officers);4/ subjecting the arrested or detained person to torture or ill-treatment,5/ or to "compulsion" or "coercion" for certain purposes (these facts may constitute either a distinct offence, or aggravating circumstances of the offence of wrongful detention);6/ keeping the detained person incommunicado in violation of the law;7/ obstructing communications between the detained person and his friends or counsel;8/ delaying or obstructing the release

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1/ Colombia, France, Portugal, United Kingdom (England and Wales).

2/ Albania, Belgium, France, Haiti, Liberia, Luxembourg, Morocco, Romania, United Kingdom (Tanganyika).

3/ Chile, Colombia, France, Haiti, Iraq, Lebanon, Luxembourg, Mexico, Morocco, Panama.

4/ Argentina, China, France, Haiti, Lebanon, Panama, Philippines, United States of America.

5/ Bulgaria, Chile, Colombia, Ghana, India, Jordan, Philippines.

6/ Albania, Ethiopia, India, United Kingdom (Aden), Union of Soviet Social Republics, United States of America, Yugoslavia.

7/ Argentina, Colombia, Costa Rica, Peru, Spain, United Kingdom (Aden).

8/ Ceylon, Philippines.

of a person whose provisional or definitive release has been duly ordered;[1] failure to transmit to the courts an application for release made by the accused or his relatives.[2]

602. In accordance with provisions which are found in a number of codes, any public official, or even any person, who has knowledge of a wrongful arrest or detention but fails to report it to the competent authorities, entails criminal responsibility,[3] and such authorities (usually prosecutors) incur penal sanctions if they fail to bring redress in a speedy manner.[4]

(b) Requirements concerning the unlawful or arbitrary character of the deprivation of liberty

603. In all countries, the law requires that deprivation of liberty to be criminally punishable, should be ordered or effected "wrongfully". This condition certainly covers cases where acts were committed "contrary to the law", "in violation of the law" or "in disregard of legal requirements".

604. Under certain legislation, it is more explicitly provided that deprivation of liberty is punishable, unless it is done "in cases where the law permits or requires arrest or detention" and "upon the order of competent authorities".[5]

605. In various countries, the term "arbitrary", which is used to describe a punishable arrest or detention, seems to raise problems of interpretation.

606. Under certain legislation, the requirement concerning the "arbitrary" character of the act is additional to that which relates to its "illegal" or "unlawful" character;[6] or the term "arbitrary" has been judicially interpreted

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1/ Argentina, Brazil, Colombia, Philippines, United Kingdom (Aden).

2/ Spain.

3/ Belgium, France, Haiti, Mexico, Peru, Venezuela.

4/ France, Haiti, Luxembourg, Turkey.

5/ Belgium, France, Haiti, Luxembourg.

6/ Chile, Luxembourg, Panama.

as involving the prerequisite of "illegality". For instance, in some countries, the courts have defined an "arbitrary deprivation of liberty" as an act which is "not supported by any legal provision" and for which the offender cannot submit "any justification", or which was "solely the result of offender's whim" or of his "malicious intent".1/

607. In other laws, the term "arbitrary" is presented as an alternative to the term "illegal", the formula being: "illegal or arbitrary"; or the term "arbitrary" stands alone, without precision as to its relationship with the term "illegal".2/ The Committee has very little information on the meaning of the laws of the latter category. There seems to be a trend, in certain judicial decisions, to equate the term "arbitrary" with the terms "illegal", "without legal grounds", or "for illegal purposes".3/ A legal definition of the term "arbitrary" in the Spanish language, which seems difficult to translate exactly in English, is: "con incompetencia manifesta".4/ The view has been held by some commentators that "an unlawful measure is invariably arbitrary, but a lawful arrest may be arbitrary if it is ordered for improper motives".5/

(c) Requirements concerning the state of mind of the offender

608. While some laws expressly provide sanctions in cases of negligence,6/ other codes punish only intentional acts of unlawful arrest or detention.7/ Mistake of law is generally not admissible as an excuse. Mistake of fact, if made "honestly" or "in good faith" may in several countries relieve the offender from criminal responsibility.8/

609. Several statutes or judicial decisions require, in addition to proof of criminal intent, evidence that the offender acted for purposes or with motivations which are defined with varying degrees of precision: with "malicious"

1/ Belgium, Colombia.

2/ Ecuador, France, Guatemala, Haiti, Morocco, Peru.

3/ France, Philippines.

4/ Guatemala.

5/ France.

6/ Czechoslovakia, Norway, Thailand, Federal Republic of Germany.

7/ Belgium, France, Netherlands.

8/ Burma, France, India.

or "evil" intent;[1] for "unjust", "selfish", "corrupt", or "unworthy" motives;[2] for "purpose of gain",[3] or for the purpose of "extracting a confession from the accused".[4]

(d) Procedures

610. The Committee does not consider that a thorough examination of the procedures applicable for the prosecution and judgement of offences against personal liberty would be of particular interest for the purpose of the present study. It appears that, in most countries, and subject to exceptions in cases of offences committed by judges and prosecutors (see para. 622), the ordinary rules of criminal procedure apply.

611. In various countries, under the ordinary rules of procedure, the aggrieved person may, by submitting jointly a complaint and a claim for damages (constitution de partie civile), compel the competent authorities to prosecute and investigate the offence.[5] This provision seems to be relevant in order to differentiate penal sanctions from disciplinary sanctions (see para. 637).

(e) Nature and range of penalties

612. The penalties incurred are usually those provided for offences of intermediate gravity: fines, or imprisonment up to five years, or both. The laws of some countries provide heavier penalties for certain offences: imprisonment up to seven, eight, nine or ten years, or terms of hard labour.[6]

613. Extenuating and aggravating circumstances have an important place in most criminal statutes relating to unlawful arrest and detention. More severe

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1/ Burma, Ceylon, India, Peru.

2/ Albania, Czechoslovakia, India, Union of Soviet Socialist Republics.

3/ United Kingdom (Tanganyika).

4/ Bulgaria, Ecuador, Ethiopia, United Kingdom (Aden), United States of America, Yugoslavia.

5/ France.

6/ China, France, India, Italy, Mexico, Morocco, Republic of Korea.

punishments, sometimes including hard labour for life or even the death penalty,[1] are provided for when the wrongful detention lasted more than a certain time,[2] when the arrested person was tortured or subjected to ill-treatment (see para. 601); or when the wrongful acts were committed with malicious or evil intent (see para. 609).

614. While the damage actually done to the victim is, in general, not a basic constituent of the offence, various laws increase the penalties if the victim's health was substantially affected through mistreatment, and, a fortiori, when tortures caused the death of the arrested person.[3]

(f) Special rules governing the criminal responsibility of public officials acting in the exercise of their functions

615. The laws so far examined contain rules which are applicable to every offender. In a number of countries, certain provisions modify these basic rules, when the offence is committed by a public official acting in the exercise of his functions.

616. The purposes of these special provisions are, on the one hand, to render prosecution of public officials subject to more requirements and to make it altogether more difficult, than the prosecution of private persons; and, on the other hand, to inflict special and, in various countries, more severe punishments on public officials than on private persons. These two aspects of the provisions are not in contradiction with each other: it is felt desirable to eliminate harassing or trival complaints which are likely to intimidate public officials unduly and to impair the effectiveness of law enforcement; but it is considered equally appropriate to provide severe sanctions against public officials in well-ascertained cases of serious violations.

1/ France.

2/ Ethiopia (more than seven days), France (more than one month), Mexico (more than eight days), Yugoslavia (more than one month), Federal Republic of Germany (more than one week).

3/ Belgium, Japan, Luxembourg, Union of Soviet Socialist Republics, Yugoslavia.

617. The first of those purposes is expressed in the following provisions. The prior sanction of Executive Authorities (Head of State, Minister of Justice, Attorney-General)[1] or of special judicial bodies[2] may be a prerequisite of the institution of any criminal proceedings against judges, and sometimes prosecutors, acting in - or even outside - the exercise of their functions. No information has been obtained as to the standards applied by such authorities to grant or refuse their sanctions. Prior authorization used to be required, according to several laws, for the prosecution of other public officials, including police officers, but such laws have been abrogated in various countries.[3] Prior sanction of the Government is not required, according to certain laws, for the prosecution of police officers who use violence against detained persons.[4]

618. It is required in several countries that, to be punishable, deprivation of liberty effected by public officials should constitute an "abuse of authority". This term is not precisely defined in the laws and seems to raise problems of interpretation similar to those relating to the term "arbitrary" (which often applies equally to private persons and to public officials). While in some countries an "abuse of authority" involves a violation of the law or should be made "for unlawful purposes",[5] in other statutes the term in question either stands alone or is presented as an alternative to the "illegal" character of the act.[6] There is too little information on these laws to warrant any attempt at interpretations by the Committee.

619. The requirements concerning the state of mind of public officials prosecuted for offence against personal liberty appear generally to be more stringent than the corresponding rules applicable to private persons. Such requirements may qualify the basic criterion of "abuse of authority". Thus it is often provided

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1/ Burma, India, United Kingdom (Tanganyika).

2/ United Arab Republic (Egyption region).

3/ United Arab Republic (Egyption region), Haiti.

4/ India.

5/ China, Italy, Morocco, Turkey, Yugoslavia, Republic of Korea.

6/ Argentina, Ceylon, India, Japan, Mexico, Romania, United Kingdom (Tanganyika), Venezuela.

that judges do not incur criminal responsibility unless it is provided that the offence was committed with "unjust or corrupt motives".[1] Some laws extend similar protection to police officers who are not held responsible if they acted "in good faith and in the interest of public security".[2]

620. Many laws exempt all public officials from punishment if they acted on the strength of a judicial warrant or upon any other order from their superiors. It is specified, however, in various countries, that such orders, to constitute valid excuses, should be given according to legal forms before the commission of the offence, by an official acting within his jurisdiction, whom the offender was bound to obey.[3] Certain laws, on the other hand, provide that the excuse of superior orders stands even when the warrant was irregular in form or when it was issued by a magistrate lacking jurisdiction.[4] In various countries, it is provided that the penalty should be applied to the person who gave the order.[5]

621. Few laws expressly reject the defence of superior orders.[6] One of these laws contains an interesting proviso under which, if deprivation of liberty was ordered by the higher authorities of the Government, the penalty may still be imposed upon the person who effected the arrest, but the Court is also to report the case to the legislative body for appropriate action.[7]

622. While police officers are generally subject to the ordinary rules of procedure, offences committed by judges and sometimes prosecutors usually come within the jurisdiction of high courts and the relevant procedures contain special features.[8]

623. Whatever the procedures may be, a concern has been expressed that prosecutors may be reluctant to request the application of penal sanctions against their

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1/ Albania, Belgium, France, India.

2/ Ethiopia, Israel, Jordan.

3/ Ceylon, Federation of Malaya, France, Haiti, India, Morocco.

4/ New Zealand.

5/ France, Haiti, Morocco.

6/ Liberia, Peru.

7/ Peru.

8/ France, Haiti, India, Luxembourg, Morocco.

colleagues or subordinates.[1] With a view to eliminating such a risk, some recent laws provide that Parliament-appointed Commissioners may, upon receipt of a complaint by the aggrieved person, "order the prosecuting authorities to institute preliminary proceedings or to bring a charge before the ordinary law courts for misconduct in public service...".[2] However, judges acting in the exercise of their functions are not always within the jurisdiction of the parliamentary commissioners.[3] In one country, if the prosecutor drops a case against a public official, the complaining victim may, under certain conditions, directly request the Court to consider the case.[4] It has already been noted that, in some countries, (see para. 611 above), prosecutors are compelled to act if the aggrieved person initiates a combined criminal and civil action against the public official.[5] This rule applies equally to actions against private persons and to those against public officials.

624. Once the criminal responsibility of public officials is established - in accordance with the special rules mentioned above - they may incur, under various systems, basic punishments more severe than those applicable to private persons. Thus, the maximum terms of imprisonment may be longer;[6] or a minimum term of imprisonment may be prescribed;[7] or the public official, in addition to serving a jail sentence, or paying a fine, may be deprived of certain rights including the right to hold public office.[8]

1/ Santiago Seminar, Working Paper H, p. 20, Baguio Seminar, Working Paper G, p. 7.

2/ Working Paper 2, p. 3, and annex I, sec. 9, submitted to the Seminar on Judicial and other Remedies against the Illegal Exercise or Abuse of Authority, held in Peradeninga (Kandy) Ceylon, 4-15 May 1959. This seminar is hereinafter referred to as the Kandy Seminar.

3/ Ibid., p. 2, and annex I, sec. 1.

4/ Baguio Seminar, Working Paper G, p. 7.

5/ Santiago Seminar, Working Paper H, p. 22.

6/ China, Ethiopia, India, Mexico, Norway, Yugoslavia.

7/ Federal Republic of Germany.

8/ Argentina, Belgium, Luxembourg, Spain.

625. In a few countries, on the other hand, the basic penalties appear to be less severe for public officials than for private offenders.[1/] It should be noted, however, that penalties intended for public officials may be increased on account of aggravating circumstances and thus made, sometimes, more severe than the maximum punishments provided for private persons.

(g) Concluding remarks

626. The technical organizations recommended to the League of Nations in 1939 that "the criminal laws should provide for the infliction of severe penalties on any police officer, official or magistrate responsible for an illegal arrest or illegal detention or using force or other means of physical or mental compulsion, or causing them to be used, for the purpose of extracting confessions or depositions.[2/]

627. In line with this recommendation, penalties which may be regarded as "severe" are provided for such offences in many countries. It is often asserted, however, that "penal sanctions against such violations are ineffective"[3/] and even that such statutes "are almost never enforced".[4/] The Baguio Seminar, while agreeing that criminal sanctions should be applicable to police officers, recognized "the difficulties facing prosecuting authorities in proceedings against police officers in this type of case."[5/] The Committee had not enough data on the application of criminal statutes to evaluate the degree of effectiveness of the above-mentioned sanctions; it has, however, the impression that there have been relatively few instances of successful prosecution under many of those statutes.

628. The Committee is inclined to agree with the opinions expressed in a working paper submitted to the Tokyo Seminar, according to which: "there is a naive idea that crimes may be deterred or prevented by increasing the severity of

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1/ Ecuador, France, Haiti, Morocco.

2/ League of Nations document A.20.1939.IV, 51.

3/ Working Paper E, p. 9, submitted to the Seminar on the Role of Substantive Criminal Law in the Protection of Human Rights and the Purposes and Legitimate Limits of Penal Sanctions, held in Tokyo, Japan, 10-24 May 1960. This seminar is hereinafter referred to as the Tokyo Seminar.

4/ Santiago Seminar, Working Paper H, p. 20.

5/ Baguio Seminar report, ST/TAA/HR/2, para. 29.

punishment",[1] and: "probably crimes may be better prevented by the certainty of punishment, even if the punishment is not so severe".[2] The Committee feels that the effectiveness of criminal sanctions in case of wrongful arrest or detention might be improved, not by increasing the penalties, but by promoting certain changes in the present systems, along the following lines:

629. As regards the material elements of the offences (see paras. 599-602), it would be appropriate to supplement criminal laws which punish wrongful deprivation of liberty in general terms by well-defined provisions to prevent the commission of specific offences against personal liberty. Following a trend which is apparent in many countries, efforts should be made to co-ordinate the respective responsibilities of judges, prosecutors, police officers, prison wardens and private persons so as to secure a closely-knit set of guarantees for the arrested person.

630. The requirements concerning the state of mind of the offender (see paras. 608-609) seem to place too heavy a burden on the plaintiff in various cases where specific purposes or motives are among the basic constituents of the offences. While it is in general agreement with the trend to "individualize" criminal law, the Committee does not believe that this trend should be carried so far as to seriously impair the effectiveness of sanctions against wrongful arrest or detention. It would be sufficient, in the view of the Committee, to require that the offences, to be punishable, should be committed intentionally. There may even be a justification, in a field so important for human rights, for broadening the scope of punishment for negligence. At the same time, the Committee would agree that the motives of the offender be taken into account as aggravating or extenuating circumstances.

631. Special rules governing the criminal responsibility of public officials (see paras. 615-625) may be justified on the ground that judges and law-enforcement officers should be protected against malicious or frivolous complaints and prosecution. It is felt, however, that the requirement concerning prior sanctions, granting wide or discretionary powers to the Executive, may offer too great a temptation to condone illegal acts. The sifting of complaints should rather be

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1/ Tokyo Seminar, Working Paper E, p. 2.

2/ Ibid.

carried out by judicial bodies conducting a preliminary investigation of the case in accordance with standards and rules laid down by law. Furthermore, public officials, when unjustly accused, may, in many countries, sue for malicious prosecution.

632. It has been pointed out that the main difficulty with offences against personal liberty is that "they must rest on the assumption that the police will be willing to police themselves... Someone will have to initiate the prosecution of the offending official and the relationship between prosecution and police is such that this eventuality is most improbable."[1/] Reference has been made to this important problem in paragraph 623 above.

633. The Committee, in agreement with many specialists, feels that two kinds of remedies should be contemplated:

(a) First, efforts should be made to promote and maintain high standards of efficiency and integrity among police officers, prosecutors and judges. This presupposes that the relevant public services are well organized; that minimum educational and moral standards are required on recruitment and maintained thereafter; and that an effective disciplinary system is established.[2/] The need is also recognized to secure the independence of prosecutors and police officers from each other, so as to prevent undue leniency towards close colleagues who may have some power to influence the career of the prosecuting or investigating officials.[3/]

(b) It may be advisable to devise appropriate procedures (for instance, by allowing the victim, under certain conditions, to seize directly the examining magistrate or the Court; or by providing for the supervisory control of "parliamentary commissioners"), under which cases could be brought before judicial authorities, notwithstanding the reluctance of prosecutors to take action against public officials.

1/ Santiago Seminar, Working Paper H, p. 20.

2/ Baguio Seminar report, ST/TAA/HR/2, paras. 30 and 31; Santiago Seminar, Working Paper H, p. 19.

3/ Revue internationale de Droit Pénal, 1952, Nos. 2-3, and 1953, Nos. 1-2, 3 and 4: "Rapports présentés au VIème Congrès international de Droit pénal (Rome, September-October 1953)"; Baguio Seminar report, ST/TAA/HR/2, para. 29.

4. Disciplinary sanctions

634. The grounds for disciplinary sanctions against judges, prosecutors and police officers are often set forth in very general terms, such as "violation of the law or of police regulations" or "misconduct prejudicial to the good order or discipline of the service".[1/]

635. In certain countries the laws and regulations provide disciplinary penalties on more specific grounds, such as performing unlawful or "impetuous and improvident" arrests or detention,[2/] delaying the appearance of arrested persons before the magistrates,[3/] delaying the release of accused persons whose provisional release has been ordered,[4/] using violence,[5/] or committing any unlawful act which results in loss or injury to accused persons.[6/]

636. Usually, unlawful arrests or detentions or other illegal acts which are punishable under criminal law also entail disciplinary action; in certain countries disciplinary sanctions seem to be mandatory when the official concerned is convicted on such offences by criminal courts.[7/] The scope of disciplinary laws and regulations, however, goes beyond that of criminal law and the purposes of the two sets of laws have traditionally been distinct: an act which does not constitute a penal offence may nevertheless prejudice the "good order of the administration" and be subject, as such, to disciplinary sanctions. Various laws indeed provide that disciplinary sanctions may be incurred even when the conditions for criminal responsibility are not fulfilled.[8/] While the penal codes often require proof of malicious intent on the part of the official concerned (see para. 609), many disciplinary sanctions are applicable even in case of negligence.[9/]

1/ Ghana, Italy, New Zealand, Philippines, United Kingdom (Hong Kong).

2/ Denmark.

3/ Argentina.

4/ Portugal.

5/ India.

6/ United Kingdom (Hong Kong).

7/ Chile, Colombia, Liberia, Republic of Korea.

8/ Ethiopia, Ghana, India, Israel, Federal Republic of Germany.

9/ China, Ghana, Italy, New Zealand.

637. The distinction between criminal law and disciplinary law, and, more generally, what has been called the "autonomous" character of disciplinary law, is further emphasized as follows: while acts amounting to criminal offences are punished, in accordance with penal provisions, by judges, disciplinary sanctions are applied by the authorities which had the power of appointing the officials concerned (Head of State, Ministers of Justice, or chief prosecutors, as the case may be). These authorities have a wide latitude, amounting sometimes to discretionary power, to investigate or to dismiss a case, and to apply whatever disciplinary sanction they deem proper; the fact that the aggrieved person submits a complaint is irrelevant, and could not compel the competent authorities to take action. Within this framework, disciplinary action would appear, so to speak, as an "internal affair" of the administration concerned, more than as a means of safeguarding the rights of private persons.

638. There has always been an important exception to the principle according to which disciplinary powers belonged to the authorities competent to appoint the officials concerned. Usually, judges (although they are appointed in many countries by the Head of State or the Minister of Justice) can be suspended or removed from their offices only by decisions of the courts or of special bodies composed of judges. The philosophy underlying this rule is obviously that, if judges were to be dismissed by order of executive authorities, the independence of the judiciary would be seriously endangered.

639. Furthermore, there is a trend in certain countries to subject police officers to the disciplinary control of judges, besides the controls already exercised upon these officers by their superiors (chief police officers, prosecutors, Ministers of Justice).[1/] This trend seems to express the fear that superiors of the officials concerned may be too inclined to condone illegal practices committed by their subordinates, with a view to maintaining the good reputation of the administration.[2/]

640. Recent provisions which tend to compel administrative authorities to institute disciplinary proceedings may also be noted. Thus, in countries where

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1/ France.

2/ Santiago Seminar, Working Paper H, page 71.

Parliamentary Commissioners supervise administrative agencies, the law provides that such commissioners "may order the administrative authority concerned to institute disciplinary proceedings".1/ Judges, however, are in some countries excluded from the scope of the Commissioner's control. Under a few recent laws, the submission of a complaint by the aggrieved person seems to constitute an important element in the disciplinary proceedings, although it is not quite clear whether the receipt of such complaints makes it mandatory for the competent authorities to investigate the case.2/

641. The disciplinary penalties applicable to officials guilty of unlawful arrests or detentions extend from warnings, to reprimands (written or oral), delays in promotion or salary increases, demotion, and in the most serious cases or in case of recidivism, to suspension without pay or dismissal. In various laws, however, the maximum penalty of dismissal is not expressly provided for.3/ There is a trend in some countries to provide for disciplinary penalties more serious and effective than those applied in the past.4/

642. The Committee believes that disciplinary sanctions, by virtue of their flexible character and extensive scope, may afford a useful remedy in cases where stringent requirements prevent the imposition of other sanctions. It would therefore be worth while for specialists and legislators in various countries to devote more attention to disciplinary laws than has apparently been the case in the past.

643. The importance of disciplinary sanctions was stressed in the following terms in the conclusions on the treatment of witnesses and accused persons submitted by technical organizations convened to the League of Nations in 1939:

> "Apart from the remedies which the law must afford citizens against all illegal proceedings, those responsible for the administration of criminal justice should be placed under the strict and permanent supervision of their official superiors." 5/

1/ Kandy seminar, working paper 2, p. 3, and annex I, sec. 9.

2/ Japan, Federal Republic of Germany.

3/ Ghana, India, Italy, Portugal, Republic of Korea.

4/ France.

5/ League of Nations document A.20.1939.IV., 50.

644. At the Baguio Seminar, "there was an exchange of views on disciplining police officers by administrative process, and it was noted that such processes have proved most effective in minimizing the incidence of arbitrary as well as illegal arrest and detentions".1/

645. The Committee would like to submit the following suggestions:

(a) the effectiveness of disciplinary sanctions, as well as that of penal sanctions depends to a large extent upon the good internal organization of the relevant services;

(b) the grounds for disciplinary sanctions should be defined at least in their broad lines and published so as to provide each official with a useful guide of conduct and to give to the public a clear notion of what they could expect from the law-enforcement agencies;

(c) with a view to preventing undue leniency on the part of the superiors of the offending official, and at least in the most serious cases (prolonged detention, ill-treatment), investigation of the wrongful act for disciplinary purpose should be made mandatory; special procedures (such as the intervention of parliamentary commissioners) may be established to that end;

(d) for the same purpose it may be desirable to provide for some form of judicial control over disciplinary proceedings.2/

5. Compensation for wrongful arrest or detention

646. Article 9, paragraph 5, of the draft covenant on civil and political rights, as adopted by the Third Committee of the General Assembly, provides that:

> "Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation." 3/

The laws of most countries on which information is available provide for such compensation.

647. Article 14, paragraph 6, of the same draft covenant, as adopted by the Third Committee, deals with compensation to be granted to persons whose conviction has been reversed for miscarriage of justice and "who have suffered punishment as a

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1/ Baguio Seminar Report, ST/TAA/HR/2, para. 32.

2/ Baguio Seminar Report, ST/TAA/HR/2, para. 33.

3/ General Assembly, Official Records, Thirteenth Session, Annexes, agenda item 32, document A/4045, para. 67.

result of such conviction."[1] Various laws contain provisions to that effect. The Committee notes that their purpose is to grant redress in case of erroneous "conviction" and on account of the "punishment" inflicted as a consequence of such conviction, rather than to compensate for damages arising out of arrest and detention pending investigation and trial. Since the Committee has previously decided, and the Commission on Human Rights has noted, that the question of imprisonment imposed by a Court sentence did not come within its terms of reference,[2] it will refrain from considering laws which apply the principle set forth in article 14, paragraph 6, of the draft covenant.

648. The Committee will consider: (a) The basic principles governing compensation for wrongful arrest or detention; (b) The rules governing the individual liability of public officials and other persons; and (c) The rules governing the liability of the State and of other public entities. Under (i), the Committee will submit some concluding remarks.

(a) Basic principles governing compensation for wrongful arrest or detention

649. Irrespective of where civil liability lies (exclusively on individual offenders or concurrently on the individual offenders and the State), all legal systems contain, in various forms, basic rules concerning the wrongful character of the deprivation of liberty; and the nature of the damage and the extent of reparation.

(i) Requirements concerning the wrongful character of the deprivation of liberty

650. Wrongful arrest or detention amounting to a criminal offence gives rise, in all countries, to claims for compensation. The definition of "wrongful" or "unlawful" deprivation of liberty for purpose of indemnification is, however, usually broader than the corresponding definition set forth in criminal statutes. It may be provided, for instance, that any act which "directly or indirectly obstructs, defeats, violates or in any manner impedes or impairs" individual liberty without justification[3] may, if damages are proven, give valid grounds for a civil suit.

1/ General Assembly, Official Records, Fourteenth Session, Annexes, agenda item 34, document A/4299, para. 64.

2/ E/CN.4/763, para. 14.

3/ Philippines.

651. In various countries the relevant statutes and judicial decisions specifically provide that the term "wrongful deprivation of liberty" covers not only cases where the substantive charges are dismissed as groundless; but also arrests made under reasonable suspicion which are otherwise unlawful through violations of certain procedural rules. Damages may, for instance, be recovered when police officers use more force than necessary to effect an arrest, or delay the appearance of the accused before a judge, or detain a person for a longer time than permitted by law;[1/] or when a magistrate orders committal without ascertaining the validity of the charges made out by the police and prosecutors.[2/] A claim for damages may be made, in these countries, on account of any period of detention, however short it may be, and at any stage of the proceedings.[3/] Under such laws, the question of redress for wrongful deprivation of liberty is clearly distinguished from that of compensation for groundless prosecution.

652. In other countries, persons claiming compensation must have been released upon "dismissal of the charges" or "acquittal" by the examining authority, or the trial court.[4/] Such laws sometimes specify that a person so released is entitled to compensation for the whole period during which he has been deprived of his liberty, including the period spent in police custody prior to his appearance before the examining authority.[5/] They do not provide for compensation, however, where the police arrest, and subsequently release, a person without bringing him before a magistrate for examination.

653. It is further required, under certain laws, that the competent authorities, in discharging or acquitting the detained person, should "clearly establish" that "the alleged offence was never committed",[6/] or that "the accused did not commit it",[7/] or at least that "no valid grounds for suspicion existed against

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1/ Japan, United Kingdom (England and Wales).

2/ Canada.

3/ United Kingdom (England and Wales).

4/ Czechoslovakia, Iraq, Netherlands, Romania, Federal Republic of Germany, Republic of Korea.

5/ Romania, Federal Republic of Germany.

6/ Finland, Iceland, Romania.

7/ Finland, Netherlands, Romania, Federal Republic of Germany, Vienna Seminar, Working Paper 5, p. 21.

him".[1] These provisions exclude from the scope of compensation suspected persons who were discharged merely on the basis of insufficient evidence, by application of the rule in dubio pro reo. Persons who were declared irresponsible on such grounds as drunkenness,[2] or who benefited from measures of pardon or amnesty[3] are likewise excluded. It appears that, in countries of that category, the question of compensation for wrongful detention is closely related to the question whether the substantive charges against the plaintiff were valid.

654. In various countries, deprivation of liberty of an innocent person is not regarded as "wrongful" and does not justify a claim for compensation if the person concerned wilfully led the authorities to believe that they had valid grounds for suspicion. Such objectionable conduct of the plaintiff includes: frauds, misleading statements, attempted flight, or other deliberate attempts to hinder the investigation.[4] The rule seems to be implicit in other laws which exempt public officials from civil liability if they believed "in good faith" that they had "reasonable or probable grounds" for the arrest or detention.[5] Certain provisions further exclude compensation if the victim "contributed" to the damage through his "gross negligence",[6] or failed to avail himself of existing remedies.[7]

655. It is not always easy to ascertain, on the basis of the available material, whether the burden of proof, under the various provisions mentioned above, lies on the plaintiff or on the offending official. In some countries, the relevant statutes or judicial decisions clearly provide that compensation may be granted solely upon proof of a physical act of restraint and of damage arising thereby; it is up to the arrestor to prove that the deprivation of liberty was lawful.[8]

656. The determination of the "good" or "bad" faith of the offending official, to which reference has already been made, and other considerations relating

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1/ Federal Republic of Germany.

2/ Federal Republic of Germany, Vienna Seminar, Working Paper 4, p. 17.

3/ Czechoslovakia.

4/ Czechoslovakia, Denmark, Italy, Norway, Vienna Seminar, Working Paper 5, p. 21.

5/ Canada.

6/ Iceland, Federal Republic of Germany.

7/ Yugoslavia contra Federal Republic of Germany.

8/ Canada, United Kingdom (England and Wales).

to the state of his mind play an important part in all laws governing compensation for wrongful arrest or detention. Such requirements are formulated differently in provisions concerning the individual liability of public officials and in the laws which provide for the responsibility of the State. The Committee will therefore consider these rules under headings (b) and (c) below.

(ii) Nature of the damage and extent of reparation

657. Under certain laws, it is presumed that a wrongful deprivation of liberty results in damage.[1/] In other countries, the claimant must prove the damage.[2/]

658. The requirement, contained in many laws, concerning the "direct" or "immediate" relationship[3/] between the wrongful detention and the damage may sometimes give rise to difficulties of application.

659. Difficulties may also arise when the law provides for the compensation, not only of losses of income and injury to health, but also of "moral" damages: sufferings, humiliation, injury to reputation. Moral damages, however, are expressly covered under vatious laws.[4/]

660. Damages may be sustained not only by the arrested person but also by his spouse and dependent children or relatives who did not receive proper support, care, and education during the period of detention. Such losses may be compensated for under various laws.[5/] The right of the victim's heirs to request compensation, which is recognized in many systems, appears to be based on the principle of the transmissibility of civil claims as well as of loss of support actually sustained by the heirs.

661. With regard to reparation, it is generally agreed that the courts should try to restore the status quo ante as far as possible. Thus, the courts may decide to issue a statement recognizing that the arrest or detention of the victim was unwarranted;[6/] or that the victim should be reinstated in public

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1/ United Kingdom (England and Wales).

2/ Belgium, Cambodia, France.

3/ Santiago Seminar, Working Paper C, para. 46; Netherlands.

4/ Iceland, India, Poland, Romania.

5/ Federal Republic of Germany.

6/ Iceland, Santiago Seminar, Working Paper C, para. 48; Vienna Seminar, Working Paper 4, p. 17.

office with retroactive enjoyment of relevant benefits.[1] In most countries, however, reparation usually takes the form of an award of money only.

662. The courts are usually granted wide discretion for ascertaining the damages and fixing the nature and amount of compensation. In various countries however, the law sets forth either a minimum,[2] or a maximum[3] amount of recoverable damages, or both a minimum and a maximum.[4] In some of these laws, compensation is to be awarded within such limits (minima and/or maxima) for "each day of wrongful deprivation of liberty".[5]

663. Rules concerning the award of "exemplary" or "punitive" damages, as distinct from strictly "compensatory" damages, may vary, according to the system adopted whether the individual defendants are exclusively liable or whether there is responsibility of the State in concurrence with individual liability. Such rules will be considered under headings (b) and (c) below.

(b) Individual liability of public officials and other persons

664. The laws of all countries contain general provisions under which any person may be held civilly responsible for damages arising out of unlawful acts. Under most of these laws, the defendant is liable not only for intentional acts but also for his negligence (lack of due care).

665. In many countries, the individual liability of public officials acting in the exercise of their functions is governed by special laws, which sometimes exclude the concurrent responsibility of the State,[6] and which, to a greater degree than the ordinary laws of civil responsibility, take into consideration the state of mind of the defendant.

666. It is frequently provided that public officials are exempt from liability if they believed "in good faith" that they had jurisdiction or there were

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1/ Union of Soviet Socialist Republics, Vienna Seminar, Working Paper 4, paras. 48 and 49.

2/ France.

3/ Federal Republic of Germany.

4/ Republic of Korea.

5/ France, Republic of Korea.

6/ Australia, Colombia, Mexico, Philippines.

"sufficient" or "reasonable and probable" grounds for suspicion,[1] or when the arrest was made "in good faith and in the interest of public security",[2] for instance on a valid suspicion that the plaintiff would have committed some other criminal offence had he not been arrested.[3] Some of these provisions specify that the burden of proof in such cases is on the offending official.[4]

667. Judges usually enjoy immunity from civil suit to a much greater degree. They may incur civil liability only if they were guilty of fraud or bribery or of specific acts such as "denials of justice" (refusal to consider formal requests made by the arrested person), or if they committed other serious intentional or malicious acts.[5] Some laws restrict the scope of judicial liability to cases where magistrates acted wholly outside of their jurisdiction or issued warrants of arrest when no criminal charges had been made;[6] the burden of proof in such cases seems to be on the plaintiff.

668. Under special rules of procedure which in some countries govern the civil liability of judges, the plaintiff is fined if his claim is rejected.[7]

669. Prosecutors sometimes enjoy the same immunities as judges.[8] Although under certain laws police officers, when acting under the authority of judges or prosecutors, receive similar protection,[9] they are, in various countries, liable for any "abuse of power"[10] or even for their negligence,[11] except when they can prove their good faith.

670. The application of the rules concerning judicial immunities and the excuse of "good faith" may lead to situations where the victim could claim damages

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1/ Australia, Canada, Federation of Malaya, India, Union of South Africa, United Arab Republic (Egyptian region).

2/ Israel, Jordan.

3/ Israel.

4/ Canada, United Kingdom (England and Wales).

5/ Belgium, Cambodia, France, Luxembourg, Morocco, United Arab Republic (Egyptian region).

6/ Israel, United States of America.

7/ Belgium, Cambodia, United Arab Republic (Egyptian region).

8/ Belgium, France, United Arab Republic (Egyptian region).

9/ Belgium, France.

10/ Mexico, United Arab Republic (Egyptian region).

11/ China.

only from the person whose complaint or denunciation "caused" the arrest to be ordered. Special provisions to that effect are in force in various countries.1/ It is frequently provided under such laws that the compensation awarded to the victim may not exceed a stated amount.

671. With the exception of the latter provisions concerning the civil responsibility of denunciators, there is usually no statutory limit to the damages which may be awarded under systems of individual liability. Moreover, in various countries, the courts are inclined to award "exemplary" or "punitive" damages which may actually exceed the amount of ascertainable losses.2/

672. It has been observed that the persons "against whom the action must be brought are usually not wealthy, so that even if the plaintiff can obtain a judgement from a court it is unlikely that he will be able to collect anything from the defendant."3/ In a few countries, "an effort has been made to get around this limitation by the requirement that police officers be bonded or insured, but the conditions of the insurance have been so limited that it has not had much practical effect."4/

(c) Liability of the State and of other public entities

673. During the last fifty years or so, there has been a trend in many countries to provide for the civil liability of the State and of other public entities on account of wrongful arrest or detention committed by public officials.5/ This principle has recently been given statutory recognition even in various countries whose systems were traditionally based on the concept of individual liability.6/

674. Such a trend seems to be based essentially on practical considerations of equity: it is believed of paramount importance to secure compensation to the victim, regardless of the rules which may restrict the individual responsibility

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1/ Bolivia, Ceylon, Federation of Malaya, India, Sudan.

2/ Australia, Baguio Seminar, Working Paper P (2), p. 5; Santiago Seminar, Working Paper H, p. 23.

3/ Santiago Seminar, Working Paper H, p. 24.

4/ Ibid.

5/ Albania, Austria, Belgium, China, Czechoslovakia, Denmark, Ethiopia, Federation of Malaya, Finland, France, Haiti, Iceland, India, Italy, Japan, Morocco, Norway, Poland, Romania, Union of Soviet Socialist Republics, Yugoslavia, Federal Republic of Germany, Republic of Korea.

6/ Israel, Union of South Africa; for some States of the United States of America; Santiago Seminar, Working Paper H, p. 28.

of public officials, and regardless of the degree of solvency of the offenders. Only the State, with its great financial resources, is deemed to be in a position to grant adequate redress.

675. The relationship between State and individual responsibility within these systems is often governed by complex rules. Various factors, including theoretical considerations on the legal position of the State vis-à-vis public officials and plaintiffs, may account for this complexity. While the Committee does not intend to analyse the various theoretical arguments for or against State liability, it believes that some of the views advanced may usefully be summarized in order to understand the meaning of present day legislation.

676. The laws of certain countries recognize State liability only in accordance with private law rules governing the responsibility of "masters" or "principals" for wrongful acts of their "servants" or "agents". According to this theory, the State, regarded as "principal", may be immune from civil suits whenever the law grants discretionary power to public officials (e.g. frequently in such matters as the issuance of arrest warrants),[1/] or whenever high governmental authorities have not expressly authorized or confirmed the wrongful act.[2/]

677. Another view which is reflected in the case-law of some countries is that criminal or malicious intent or gross negligence reveal personal defects in the individual offender, not a defective functioning of the State machinery; the State could not therefore be held responsible for such acts.[3/] The consequence of this theory would seem to be that the State is usually liable only for acts of negligence on the part of the officials concerned and that damages caused by malicious acts may not be compensated if the individual offender is insolvent.

678. Still another situation is exemplified in laws under which the State may be sued for acts of public officials only on grounds which would have made the

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1/ Union of South Africa.

2/ India, Israel.

3/ Belgium, Haiti.

offenders individually liable: for instance, in case of judges or prosecutors only upon proof of serious intentional faults, fraud, or denial of justice.[1] It would seem that, in accordance with some of these laws, damages caused by judges and prosecutors out of negligence may not be compensated at all.

679. In various countries, while the provisions concerning individual liability have been maintained, more recent laws have made the State answerable for "any intentional or negligent acts" of public official, including judges, acting in the exercise of their functions.[2] It should be noted that, in these countries, the responsibility of the State seems to be broader in scope than the individual liability of public officials: as was previously stated, judges, for instance, may not be individually responsible for their negligence.

680. None of the laws available to the Committee makes the State responsible in any case of detention followed by discharge or acquittal, without requiring proof of a fault or negligence on the part of public officials. However, in one country at least, bills to that effect have been submitted to the legislative body.[3]

681. There is very little information available on the procedural relationship between claims against the State and suits directed against individuals. In accordance with various laws, the State may be sued "directly"[4] or "in the first place",[5] or it may be provided that the admissibility of claims against the State is not dependent upon a prior finding that the individual offender is insolvent.[6] This rule may be qualified by a proviso according to which, in relatively minor cases (for instance when the wrongful detention lasted a

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1/ Morocco, Union of South Africa, United Arab Republic (Egyptian region).

2/ Finland, Japan, Federal Republic of Germany, Republic of Korea.

3/ Belgium.

4/ Denmark, France, Union of Soviet Socialist Republics.

5/ Federal Republic of Germany.

6/ Finland.

short time), the victim should first bring a claim against the public official; and the State becomes liable only if the individual offender cannot pay the damages.[1] In one country at least, the individual liability of public officials towards the arrested or detained persons seems to have been eliminated save in exceptional circumstances, and the State is normally the only defendant, either for intentional or for negligent acts of public officials.[2]

682. As far as procedures are concerned, it may be noted that, under some of the laws which provide for State liability, the plaintiff should, first, apply for compensation to the prosecutor's office; it is only in case of refusal or inadequate compensation that an action may be brought in court.[3] It has been said that such rules "would allow most claimants to obtain adjudication of their rights under a simple (administrative) procedure, without the necessity for expensive court proceedings."[4]

683. Under most of the provisions concerning State liability, the State may claim reimbursement from the public official concerned at least if the latter was guilty of intentional fault or gross negligence.[5]

684. As noted by some commentators, a desire to limit public expenses might contribute to explain certain rules and practices in countries where systems of direct State liability are in force.[6] Provisions which grant compensation for wrongful arrest or detention only to persons whose innocence is determined (see paragraph 653) are frequently found in those countries.[7] In one of them, the plaintiff, even if successful, must pay the costs of the case; only if he is "manifestly innocent" will the State compensate him for such costs.[8] On the basis of the material available, the Committee has not found any law or leading

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1/ Vienna Seminar, Working Paper 2, p. 15.

2/ Federal Republic of Germany, Santiago Seminar, Working Paper H, pp. 25-27.

3/ Czechoslovakia, Federal Republic of Germany.

4/ Santiago Seminar, Working Paper H, p. 27.

5/ Japan, Federal Republic of Germany, Republic of Korea, Morocco, United Arab Republic (Egyptian region), Yugoslavia.

6/ Vienna Seminar, Working Paper 5, pp. 20-21.

7/ Finland, Iceland, Netherlands, Romania, Vienna Seminar, Working Paper 5, pp. 20-21.

8/ Vienna Seminar, Working Paper, p. 6.

judicial decision concerning the award of "exemplary" or "punitive" damage within the framework of State liability systems. There is no definite pattern concerning the compensation of moral damages under such systems: while certain laws provide only for compensation of "property damages",[1] other provisions take into account the "sufferings" and "humiliation" of the victim.[2]

(d) Concluding remarks

685. It has been said that, although perhaps "not obvious", "the deterrent force which indemnification can exert against improper police or judicial practices may well be its most significant aspect".[3] Indeed "the initiation of a civil action does not require the action of any possible reluctant State official and the promise of a financial reward may induce the claimant to act".[4]

686. Many specialists think that claimants may be discouraged from bringing suits, and the effectiveness of the remedy may consequently be hampered, if the aggrieved person is not entitled to claim compensation from the State.[5] As has already been noted, certain stringent requirements concerning the proof of "serious faults" committed by judges or other officials, and the limited financial resources of most individual offenders, constitute important obstacles in systems which recognize only the individual liability of public officials.

687. At the international level, the trend towards wider acceptance of the principle of State liability was expressed during the discussions in the Commission on Human Rights, on article 9, paragraph 5, of the draft covenant on civil and political rights. Although the provision, as drafted by the Commission and later adopted by the Third Committee of the General Assembly, does not specify who should be responsible, the records of discussion seem to show that, in the opinion of the majority of the Commission, the right to compensation, as enunciated in the article, "could be invoked against the State as well as against individuals".[6] An amendment

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1/ Czechoslovakia, Federal Republic of Germany.

2/ Denmark, Finland, Iceland, Romania.

3/ Santiago Seminar, Working Paper H, p. 19.

4/ Ibid., p. 21.

5/ See authorities quoted in Santiago Seminar, Working Paper H, p. 28.

6/ Annotations on the draft convenants, General Assembly, Tenth Session, Official Records, a.i., 28, Annexes (IInd part), document A/2929, under "article 9 of the draft covenant on civil and political rights", para. 36.

tending to recognize the civil responsibility only of "individuals who by their malicious or grossly negligent conduct directly caused the unlawful arrest or detention" was not accepted by the Commission.[1/]

688. At the Baguio Seminar, "suggestions were made on the desirability that either by law or practice the State should hold itself financially responsible to the individual injured by the illegal act of one of its officers acting in the course of his duties. Developments in several countries where the State is by law so responsible were noted and approved."[2/]

689. The Santiago Seminar discussed thoroughly the question of indemnification for wrongful deprivation of liberty, and the great majority of the participants agreed on the following principles:

> "(a) Persons wrongfully accused, arrested, detained or convicted have a right to be indemnified by the State for material and moral damages caused thereby.
>
> The right is based on the Universal Declaration of Human Rights.
>
> (b) The State is liable for such reparation because if the judge or other public official responsible for the error was to be liable, indemnification would be illusory in most cases; if the claim was brought first against the public official and then against the State, many difficulties and delays would result and in the end the claim would invariably have to be brought against the State. The State is, therefore, considered to be directly liable, without prejudice to its right, once the victim of the error has been duly indemnified to institute civil, administrative or criminal proceedings against the public official responsible.
>
> (c) The principle of the liability of the State is operative only in cases in which the error, duly established to have occurred, was that of the judge. It does not apply, therefore, where the injured person by his own conduct misleads the judge." [3/]

690. The Committee endorses the principle of direct State liability and believes that the principles quoted above may form the basis of legal systems which would secure adequate compensation and constitute useful deterrents against wrongful

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1/ Annotations on the draft convenants, General Assembly, Tenth Session, Official Records, a.i., 28, Annexes (IInd part), document A/2929, under "article 9 of the draft covenant on civil and political rights", para. 36.

2/ Baguio Seminar Report, ST/TAA/HR/2, para. 28.

3/ Santiago Seminar Report, ST/TAA/HR/3, para. 66.

arrest or detention. The Committee would like to add a few observations in the following paragraphs.

691. While some specialists think that compensation should be granted only to persons whose innocence is established "beyond doubt", many others strongly maintain that no distinction should be made between discharged or acquitted persons.[1/] (See paragraph 653.)

692. While the Committee agrees that compensation may be denied when the injured person by his own deliberate conduct misleads the authorities, it wishes to stress that the legitimate exercise of procedural rights, such as the right to remain silent at interrogations, should never be regarded as a reprehensible attitude barring compensation;[2/] nor should failure of the injured party to avail himself of existing remedies be necessarily so regarded. (See paragraph 654.)

693. The Committee believes that the recognition of direct State liability should not eliminate the concept of individual responsibility. The latter should be retained, in some form, because of its deterrent value. As recommended by the Santiago Seminar (see paragraph 689 above) the question of individual responsibility should be determined in litigations between the State and the offending official, once the victim has been duly indemnified. (See paragraph 683.)

694. As regards the nature of the damages to be compensated, the Committee strongly concurs with the recommendation of the Santiago Seminar according to which both the "material losses sustained" and the "pain or suffering of the victim",[3/] including injury to his reputation, should as far as possible be compensated. In some cases, when for example the period of detention is short, the material losses sustained may be small, while the injury to reputation subsists. (See paragraphs 659-660.)

1/ This question was fully discussed at the VIth International Congress of Penal Law (Rome) September-October 1953; Revue internationale de droit pénal, 1953; Nos. 1-4; see also Vienna Seminar, Working Paper 5, p. 21.

2/ Santiago Seminar, Working Paper C, para. 40.

3/ Santiago Seminar Report, ST/TAA/HR/3, para. 61.

695. As regards the nature of the reparation (see paragraph 661) the Committee believes that, in addition to the award of money, other measures may be contemplated. In particular, the issuance of a written statement recognizing that the arrest or detention was unwarranted, and reinstatement of the victim in public employment, might to some extent help the injured person regain the confidence of society. It would be difficult, however, to find methods which would eliminate outright the injury to reputation suffered by the victim of a wrongful arrest or detention and restore the status quo ante in its entirety. The public, no matter how categorical a declaration of innocence may be, is too often inclined to believe that "there was something wrong" with a person who has been arrested. The situation would be improved if principles of criminal procedure were better known and, in particular, if the basic idea were more widely spread and accepted in the general public that an arrested or detained person should be considered innocent until proved guilty at trial.

6. Some other types of sanctions

696. In addition to the remedies and sanctions dealt with in the preceding chapters, the laws of various countries have established certain procedures of supervision and control over the acts of administrative and judicial authorities which may provide additional deterrents against abuses of power. The Committee merely wishes to mention some of these provisions, without attempting to be exhaustive.

697. In many countries, the legislative organs may not only discuss the general policy of the Government but may also publicly express their views and criticisms on specific acts of the administration, including the police, and investigate alleged abuses brought to their attention by way of individual petition or otherwise.[1/] Such investigations may lead to the enactment of corrective legislation, the removal of the "cabinet" (in the parliamentary system), or the removal, under impeachment procedures, of individuals from higher executive or judicial offices. In various countries, for example, judges of the Supreme Court

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1/ Report of Seminar on Judicial and other Remedies against the Illegal Exercise or Abuse of Administrative Authority, held in Buenos Aires, Argentina, 31 August-11 September 1959, ST/TAA/HR/6, para. 51. (This seminar is hereinafter referred to as Buenos Aires Seminar.)

may be removed from office only on the ground of proved misbehaviour or incapacity by an order of the Head of State issued upon a proposal of Parliament made by a qualified majority of voting members.[1]

698. In certain legal systems, the legislative organ appoints "parliamentary commissioners" with power to supervise administrative activities and also, in some of those countries, judicial activities.[2] These commissioners are guaranteed full independence in the performance of their functions. They carry out their investigations, either ex officio or upon complaints by individuals. It is expressly provided, in particular, that "any person deprived of his liberty is entitled to address written communications in sealed envelopes to the commissioner".[3] On the basis of their inquiries, and if they have not been able to persuade the officials concerned to correct their wrongful acts, the commissioners may inform Parliament and the Minister concerned of any mistake or negligence of major importance, or of any defect in existing laws or regulations; and, at any rate, they must publish and transmit to Parliament each year general reports on their activities.[4]

699. It has already been noted that the parliamentary commissioners may, in addition, compel the prosecutors to institute criminal proceedings, and the administrative authority concerned to institute disciplinary proceedings, against the responsible officials.[5]

700. In another country, powers of censure and impeachment are exercised not by the legislative organ, but by a "control organ" which constitutes a separate and independent branch of government.[6] This control organ carries out investigations similar to those performed by the parilamentary commissioners and usually publishes reports disclosing full details of the cases.

1/ India.

2/ Kandy Seminar, working paper 2.

3/ Kandy Seminar, working paper 2, annex I, p. 19.

4/ Ibid., pp. 20-21.

5/ See paras. 623 and 640.

6/ Kandy Seminar, working paper 10, pp. 17-20.

701. It is not always easy to ascertain the extent to which the provisions for supervision and control mentioned above encompass matters concerning arrest and detention of persons accused of criminal offences. It has been stated by one of the parliamentary commissioners that part of the complaints he receives from individuals concerned "the prison authorities and the police".1/

702. The Committee has too little material on the subject to attempt assessing the degree of effectiveness of such sanctions. It notes, however, that, according to one specialist, the officials concerned may prefer to negotiate with the supervisory organ regarding "correction of a decision" or "revision of the general procedure", rather than expose themselves to public and parliamentary criticism and possible disciplinary action.2/

1/ Kandy Seminar, working paper 2, p. 11.

2/ Ibid., pp. 4 and 10.

D. ARREST AND DETENTION UNDER ADMINISTRATIVE PENAL LAW

703. It was the Committee's original intention to analyse the procedures under administrative penal law in the same manner as the procedures applied under what, in contradistinction, is often referred to as judicial penal law, so as to round out the picture of the position of the individual in matters of arrest and detention upon suspicion or accusation of the commission of an offence. The information available has, however, proved so scanty regarding both geographic coverage and details of procedure as to permit discussion of only the broadest aspects of the question.

704. Administrative penal law, which authorizes the investigation of alleged offences and the imposition of penalities by administrative, rather than judicial, authorities, may be regarded partly as a vestige of older systems which did not always separate administrative from judicial organs or which, though establishing separate organs, reserved jurisdiction over certain offences to the administrative organs; and partly as an attempt to deal with minor infractions of the law in a speedy and simple manner.

705. Historically, administrative penal law par excellence was concerned with offences against public order and safety (merged to some extent with concepts of public policy and security or "political offences") and with offences against government property and funds. The former concept included such matters as rioting, illegal assembly, disturbing the peace, drunkenness, offences against morals, etc., while the latter extended to such matters as taxes and customs. Aliens also used to be subject to administrative penal law.[1/]

706. Although the modern tendency is to assign more serious infractions of any kind to the law courts, administrative penal law continues to exist in many forms; in many modern jurisdictions it is dealt with as an integral part of general administrative law. Frequently, administrative authorities having supervisory or regulatory powers in matters relating to health, sanitation, transportation, etc., are empowered to impose fines or other sanctions for infractions of regulations within their competence, without these powers being classified as a

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1/ Cf. James Goldschmidt, Das Verwaltungsstrafrecht (Berlin: 1902).

separate system of administrative penal law. Elsewhere, investigation and punishment of whole categories of minor offences may be entrusted to administrative authorities.1/ Or else, administrative, rather than judicial, penal proceedings may be provided by law for specifically designated offences of greater or lesser seriousness, such as offences in fiscal2/ or customs3/ matters. Matters relating to public order and safety may be dealt with administratively, usually by the police,4/ sometimes also by other authorities.5/

707. It may be noted in passing that the concept of nulla poena sine lege took longer to establish itself in the field of administrative adjudication than it did in judicial adjudication.6/ Moreover, due largely to the fact that much of administrative penal law is concerned with the observance or non-observance of administrative regulations, it is frequently regarded as not lending itself to codification in the same way and to the same extent as judicial penal law, although administrative penal codes, as well as codes of administrative penal procedure, exist in a number of countries.7/

1. Enforcement measures and penalties

708. Not all authorities enforcing administrative penal procedures have necessarily powers of arrest and detention. In many instances the measures which they are entitled to take are limited to the imposition of fines and the confiscation of objects used in connexion with the offence, prohibition to follow one's occupation, suspension of business activities, etc.

709. There are instances, however, where administrative authorities are empowered to arrest suspected offenders and detain them pending disposition of the case. Usually, these authorities too are empowered to impose fines; sometimes, however,

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1/ Austria (44), Czechoslovakia (19,20,92), Mexico (12), Yugoslavia (104).

2/ Austria.

3/ Republic of Korea.

4/ Federal Republic of Germany, Morocco.

5/ Union of South Africa.

6/ Cf. Goldschmidt., op. cit., p. 117 ff.

7/ Austria, Czechoslovakia.

they have powers to impose detention, either as a direct penalty or in case of non-payment of the fine. The Committee has not excluded such detention from its consideration, since it believes that administrative findings cannot be regarded as belonging ipso facto to the category of final court sentences in criminal proceedings which, as stated in the introduction, are outside the scope of its present study.[1/]

710. In some jurisdictions there are provisions which authorize prolonged detention by authorities other than those ordinarily charged with the investigation of alleged offences, in certain specified matters such as offences relating to government property or funds. It might be argued that these are not instances of the exercise of administrative penal jurisdiction, since the detention is not considered to be a punishment, and upon completion of the administrative action or investigation, the case, where necessary, is turned over to the regular organs dealing with criminal matters. Nevertheless, the length of the detention, which may amount to ninety days[2/] or to six months,[3/] coupled with the fact that such detention takes place outside of regular judicial channels, may be said to bring such proceedings within the field of the present study.

711. It may be recalled here that not all administrative decisions to detain are taken under administrative penal law. In addition to administrative detention for causes which do not in themselves constitute offences, such as contagious disease,[4/] there are borderline cases, such as administrative detention imposed for purposes of rehabilitation and cure. These may, however, result from the commission of an offence, such as vagrancy; such detention applies more particularly to persons who, as a result of previous convictions for the same offence, have been classified under special categories, such as "vagrants", "habitual drunkards", etc.

1/ See below, under Competent authorities and Remedies, paras. 713, 721-727.

2/ Brazil. The detention is ordered "against persons retaining government funds so as to compel them to deliver them to the government treasury".

3/ Burma.

4/ See Part III, para. 738.

712. Moreover, there is administrative detention which is imposed not in connexion with an offence alleged to have been committed but rather to prevent prejudicial action, generally, action prejudicial to security or the maintenance of public order. While there may be a penal element in this kind of detention, legislation authorizing what is frequently referred to as "preventive detention" (internement de sûreté) has not, in modern times, been classified as administrative penal law.[1/]

2. Competent authorities

713. The authorities competent to implement administrative penal law vary from country to country, depending upon the offences covered and the general organization of the governmental machinery. Most frequently arrest is ordered and the case decided by the authority within whose field of administration the alleged violation occurs. Thus it may be the police (administrative police)[2/] in matters relating to public order and safety; or financial authorities[3/] in matters relating to government funds, taxes and customs; or general executive authority such as "the Governor-General or any of his deputies"[4/] for disregard or defiance of certain orders issued by that authority. Different administrative authorities within a given jurisdiction may be responsible for dealing with different offences; or else organs of local government, such as People's Committees,[5/] may have jurisdiction under a system which places under administrative penal law entire categories of minor offences. Arrest may be carried out by the competent authorities themselves or else, upon their request, by the police.

3. Grounds for, and duration of, arrest and detention

714. Little specific information is available concerning the conditions under which a person may be arrested and detained under administrative penal procedures.[6/]

1/ For preventive detention, see Part IV.

2/ China, Federal Republic of Germany.

3/ Republic of Korea.

4/ Union of South Africa.

5/ Yugoslavia.

6/ Much of the information available deals with the kind of offences for which administrative arrest is provided or else simply indicates a criterion of necessity.

Moreover, in view of the varying seriousness of the offences covered by administrative penal law, few useful generalizations may be made. In one country, where provisions concerning arrest on account of a contravention of administrative law are set forth in the Administrative Penal Code, it is provided that arrest is permissible in cases of apprehension in flagrante delicto if the person is not known to the arresting agent, is unable to give an account of himself and his identity cannot be immediately established; if there is a well-founded suspicion that he will attempt to evade criminal prosecution; or if, despite warning, he persists in, or attempts to repeat, the punishable act. If the reason for his arrest ceases to exist, he must be released.1/ In another country, where administrative penal law covers the category of "petty offences", arrest may take place only if the person's identity cannot be established or if he has no fixed abode and there is good reason to believe that he has committed a petty offence and will abscond.2/ Arrest may also take place as the result of failure to obey a summons to appear before an administrative authority.3/

715. As for detention pending an administrative finding, some systems may provide that the total period of administrative custody may not exceed forty-eight hours.4/ Others may specify that where detention pending administrative finding is necessary, it must be limited to twenty-four hours. Grounds for such detention may be: "Good reason" for the belief that the person concerned committed the offence in question and that he will abscond, if that person cannot establish his identity or has no fixed abode (in the example in question the period of detention must be deducted from any final sentence).5/ Or such detention may be imposed, provided the person cannot obtain bail, where "preliminary investigation is necessary", especially when the address of the person is unknown and there is "reasonable suspicion" that he might escape.6/ Elsewhere it may be provided that a person arrested

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1/ Austria.
2/ Yugoslavia.
3/ Jordan.
4/ Austria.
5/ Yugoslavia.
6/ China.

must be tried within a week.[1] An example of prolonged detention (up to ninety days) comes from a system which authorizes detention for a specifically-designated offence.[2]

716. Detention may also be imposed for non-payment of an administrative fine, as mentioned before. An example at the Committee's disposal, pertaining to one of the systems which place under administrative penal law certain categories of minor offences, authorizes such detention for up to fifteen days.[3]

717. As for detention imposed upon administrative finding, the available material shows penalties ranging from thirty-six hours to three months. Detention for up to one year may also be imposed for failure to give an undertaking (bond, with or without sureties), to keep the peace, to refrain from certain acts likely to disturb the public tranquillity or to maintain good behaviour; detention for up to six months may be imposed for a violation of the conditions of police surveillance ordered in addition to, or in lieu of, the above-mentioned bond.[4]

4. Procedures, rights

718. The information available on administrative penal procedures and the rights of the person concerned is too scanty to permit any meaningful comparison with judicial penal procedures, which themselves vary considerably from one country to another.

719. Few specific data are available on such matters as the right of the person concerned to be informed of the reason for his arrest or detention; notification of, and communication with, relatives or friends; the rights of the individual in respect of interrogation; or the place of his confinement, either pending or

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1/ Jordan.

2/ Brazil (failure to deposit government funds).

3/ Mexico.

4/ Jordan. In this particular legislation these measures are applicable, inter alia, to (a) persons found under circumstances leading the commissioner (Mutasarrif) to believe that he was about to commit or to assist in the commission of an offence, and (b) persons who habitually committed burglaries or thefts, or were habitually in possession of stolen property or habitually gave protection or shelter to thieves or helped them to conceal or dispose of stolen property.

following an administrative finding. Information is available indicating that there is a right to counsel in some systems. In one of the systems of administrative penal law which cover an entire category of minor offences, the accused is entitled to have counsel, to submit evidence, "plead and use other legal procedures" and examine and copy documents; if he does not know the official language he is entitled to follow the proceedings through an interpreter and to use his own language in the proceedings.[1/] Release on bail may be specifically barred,[2/] or else detention may be foreseen only where bail cannot be obtained.[3/] The offences covered in these two examples may, however, not be comparable. In some systems the procedure followed may be the same as in judicial courts of the first instance, including right to counsel, without there being a need, however, to prove commission of a specific act.[4/] It may be specified that accused and witnesses must be examined and that decisions be in writing and be read to the accused.[5/]

720. As for the treatment of persons detained upon administrative finding, it is provided in one of the systems which place under administrative penal law an entire category of minor offences that persons "sentenced to detention may not be assigned to work except with their consent", that they may "send and receive communications without restriction" and that they may receive visitors "in accordance with the rules of the institutions, but more freely than may persons sentenced to detention for criminal offences", i.e., under judicial penal law.[6/]

5. Remedies

721. The question of the remedies available to the individual arrested or detained may be regarded as the touchstone of the entire system of administrative penal law. Since the original decisions in administrative penal matters are

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1/ Yugoslavia.

2/ Brazil.

3/ China.

4/ Jordan; in this example, referred to in para. 717, detention is imposed in the absence of a bond.

5/ China.

6/ Yugoslavia.

frequently taken by a variety of authorities concerned primarily with the execution of administrative tasks, staffed by officials who may or may not possess legal training and who in the nature of administrative organization are subject to higher authority, the possibility which the individual may have of testing the legality of his arrest or detention and of appealing an administrative finding may well determine the entire character of the proceedings.

722. As for testing the legality of detention, in some of the systems which recognize remedies in the nature of habeas corpus, an application for habeas corpus may be made in cases of administrative penal detention.1/ Other systems recognizing this remedy may bar its use in all or some cases of administrative penal detention2/ or may bar its use prior to the expiration of the period legally permitted for such detention.3/ In countries which have special courts for the adjudication of alleged violations of fundamental rights of the citizen, a person who has been illegally deprived of his liberty, whether under administrative penal law or otherwise, may be able to appeal to that court.4/ There is no information available on the situation in jurisdictions which do not have remedies in the nature of habeas corpus or special courts of the nature just mentioned.

723. As for lodging an appeal against detention imposed as a penalty, four possibilities may be said to exist.

724. The first is that no appeal is possible at all or not before the person has been imprisoned for a specified time.5/

725. The second possibility is an appeal to a higher organ of the administrative authority which imposed the penalty.6/ Such a system is sometimes regarded as assuring familiarity of the appellate organ with the subject matter involved, in those instances where the original penalty is imposed by the authority responsible

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1/ Burma, China, United States of America.

2/ Peru, Union of South Africa.

3/ Brazil.

4/ Austria.

5/ Union of South Africa.

6/ China. In this example the appeal has delaying effect.

for the administration of the matter in which the alleged violation occurred. On the other hand, one author remarks that, in view of the hierarchical organization of administrative authorities, such an appeal to a higher organ will be without effect where the original decision was in fact issued in accordance with directives received from above.1/

726. The third possibility is an appeal to an administrative court.2/ Much of what has been said in the chapter on the independence of the judiciary applies, possibly to an even greater extent, to administrative courts. Thus the system for appointing the members of such courts; the degree of their involvement in the work of the authorities whose decisions they are to review; the duration and security of their tenure; and the degree of their insulation from general administrative directives are elements which may combine so as to produce under the designation of administrative courts a variety of sometimes non-comparable institutions.

727. The fourth possibility is review by the ordinary courts of the land of decisions made under administrative penal law.3/ Such review would seem to accord persons deprived of their liberty ultimately the same safeguards as persons dealt with under the judicial penal law of the particular jurisdiction.

6. Sanctions

728. It would appear that where the constitution provides for the punishment of wrongful arrest, these provisions extend to all arrests, including those made by administrative authorities.4/ Moreover, the penal and disciplinary sanctions discussed in paras. 597-645 above would appear to apply to arrest and detention carried out by administrative authorities unless special exemption were provided. The information before the Committee does not include any examples of such exemption.

1/ Ludwig Adamovich, Grundriss des österreichischen Verwaltungsrechtes (Vienna: Springer, 4th ed., 1948), pp. 58-59.

2/ Federal Republic of Germany.

3/ Poland.

4/ Austria.

729. Similarly, constitutional provisions regarding compensation for wrongful arrest and detention would also seem to apply to administrative penal law.[1] Administrative penal law may, however, stipulate the conditions under which compensation, if any, is to be paid, such as compensation for "material damage" resulting from a "wrongful sentence".[2]

7. Concluding remarks

730. The paucity of the available material and the great difference in the scope and procedures of administrative penal law disclosed by even that documentation make the Committee hesitate to express a final opinion on the basic issue of whether arrest and detention under administrative penal law should be possible at all, but it has apprehensions and reservations concerning this subject. It can see a certain advantage accruing to the persons suspected of having committed very minor infractions of the law, if they are spared the stigma of being involved in proceedings before the ordinary criminal courts, provided that a system of judicial review of administrative action is in force. It believes, however, that where administrative authorities are authorized to arrest and, in particular, to detain, whether for investigative purposes or as a penalty, it would seem highly desirable that procedures be adopted for all authorities so authorized, safeguarding the rights of the individual to the same extent as under the judicial penal procedure of the country concerned, in particular as regards treatment, the right to counsel, and the possibilities of appeal. Specifically, it would seem advisable that:

(a) the persons in charge of administrative penal proceedings possess legal training;

(b) there exist a possibility for testing the legality of every arrest or detention under administrative penal law in the courts;[3] and

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1/ Austria.

2/ Yugoslavia.

3/ This was also the view of the Buenos Aires seminar; the seminar agreed that participating countries should give the broadest scope to the remedy of amparo or similar remedies under their law (taking into account existing conditions and certain examples referred to at the seminar). See ST/TAO/HR/6, para. 49.

(c) the appellate authorities be regularly constituted administrative courts, permanent, and independent in organization and personnel from the authorities whose cases they review;[1] or, that the final appellate authority in the case of decisions imposing deprivation of liberty as a penalty be the judicial courts;

(d) in general, that administrative penal law be used only as a speedy and simple method of disposing of minor infractions, and not as a parallel system of justice reserved for certain specific offences.

1/ It was also the view of the Buenos Aires seminar that the "reviewing authority in the final instance should be different from that which made the original decision". The seminar was referring to administrative decisions in general, which would include administrative penal decisions. See ST/TAO/HR/6, para. 27.

PART III

DETENTION ON GROUNDS UNCONNECTED WITH CRIMINAL LAW

731. In making the present study, the Committee has been principally concerned with problems relating to arrest and detention of persons who are suspected or accused of having committed criminal offences. The Committee has also considered problems of detention on other grounds. A person, for example, may be placed under compulsory confinement if he is afflicted with a mental illness or with an infectious disease, or if he is a drug addict or an alcoholic. An alien may be detained pending a deportation proceeding. A person may be imprisoned for contempt of court, or for non-payment of a debt. Information on these and similar subjects may be found in statements submitted by Governments[1/] and in the country monographs. An examination of the information reveals that the laws and regulations on these subjects vary greatly from region to region and from country to country. The Committee does not feel called upon to discuss such laws and regulations in any detail, but to indicate briefly some of the procedural safeguards provided therein which are designed to prevent any arbitrary deprivation of personal liberty.

A. Persons of unsound mind

732. A person of unsound mind may be temporarily or permanently committed to a mental institution or hospital against his will. The commitment procedures vary greatly from country to country. Generally speaking, a person of unsound mind is committed to a mental institution or hospital either by an administrative authority or by a competent court.

733. A person suspected of being unsound mentally may be admitted to an institution for examination and treatment upon the application of himself, his spouse, a relative or guardian. Once admitted, he may not leave the institution if he is found to be insane and to constitute a danger to himself and to others.

1/ Freedom From Arbitrary Arrest, Detention and Exile (Yearbook on Human Rights: First Supplementary Volume), United Nations, New York, 1959.

In some countries the institution is required to submit a medical report or reports to a public authority or local court.[1/]

734. Sometimes a person suspected to be insane may be arrested by a police officer,[2/] if he is found wandering at large or in the act of attempting to commit an offence. He may also be taken into custody upon the application of his spouse, a relative or a guardian, if the application is supported by the certificate of one or two physicians.[3/] He may be committed to a mental institution or hospital by a medical officer, or by a public authority upon the recommendation of one or two doctors or psychiatrists.[4/]

735. In many countries,[5/] the commitment of an insane person to an asylum is a judicial procedure. A relative or a public officer may petition a competent court for committing such a person to an asylum. It is sometimes provided that the petition should be accompanied by the certificate of one or two qualified physicians.[6/] A hearing is required, and notice must be given to the person alleged to be insane and his relative and his legal counsel. The court will examine the person in question, hear witnesses and medical experts and make the final decision. In some countries, trial by jury is required.[7/]

1/ Austria, Czechoslovakia, France, Ghana, Ireland, Lebanon, Liberia, Luxembourg, Japan.

2/ Argentina, Australia, Ecuador, India, Ireland, Norway, Republic of Korea.

3/ Liberia, Lebanon, Norway, Portugal.

4/ Denmark, Ecuador, Federation of Malaya, Finland, France, Ireland, Israel, Morocco, Norway, Philippines, Federal Republic of Germany.

5/ Argentina, Australia, Austria, Belgium, Brazil, Ceylon, Chile, Czechoslovakia, Ecuador, Federation of Malaya, Ghana, India, Italy, Luxembourg, Liberia, Netherlands, New Zealand, Peru, Philippines, Portugal, Romania, United Kingdom (England and Wales), United Kingdom (Hong Kong), United Kingdom (Northern Ireland), United Kingdom (Scotland), United Kingdom (Tanganyika), Union of South Africa, United States of America, Federal Republic of Germany.

6/ Luxembourg, New Zealand, United Kingdom (England and Wales), United Kingdom (Northern Ireland).

7/ Liberia, United States of America.

736. Generally speaking, a person committed to an institution will be released or discharged if the authority of the institution certifies that he is no longer a danger to himself or to others or he has recovered his sanity.[1/]

737. There are laws and regulations which provide remedies against the arbitrary commitment of persons of unsound mind. Against an order of commitment issued by a court, a medical officer or a police authority, an appeal may be made to a higher court, the chief medical officer or to the ministry of justice in some countries.[2/] In some countries if a person is arbitarily committed to an institution, he himself or his relative or counsel may petition to a competent court to have the legality of the commitment determined.[3/]

B. Persons afflicted with infectious diseases

738. Many countries have special laws and regulations for the protection of the community against the spreading of infectious diseases. Individuals suspected or found by medical and physical examinations to be afflicted with such diseases are taken to hospitals specially established for receiving, isolating and treating such patients.[4/] Pending treatment, such isolated or detained persons may not be discharged until they have recovered or have ceased to be carriers of infectious diseases. According to some laws, they should be informed of their right to appeal against any arbitrary isolation or detention.

1/ Belgium, Ceylon, Ecuador, Federation of Malaya, France, Ghana, India, Ireland, Japan, Lebanon, Luxembourg, Netherlands, New Zealand, Peru, Philippines, Portugal, Romania, United Kingdom (England and Wales), United Kingdom (Northern Ireland), United Kingdom (Tanganyika), Union of South Africa, United States of America.

2/ Austria, Belgium, Ceylon, Denmark, India, Israel, Luxembourg, Portugal, Romania, United Kingdom (Northern Ireland).

3/ Argentina, Denmark, India, New Zealand, Portugal, Union of South Africa, United Kingdom (England and Wales), United States of America.

4/ Albania, Argentina, Chile, Costa Rica, Czechoslovakia, Denmark, Ethiopia, Federation of Malaya, Finland, Guatemala, India, Ireland, Israel, Liberia, Norway, Philippines, Thailand, Union of Soviet Socialist Republics, United Kingdom (England and Wales), United Kingdom (Tanganyika), United States of America, Federal Republic of Germany, Republic of Korea.

C. Narcotic addicts and alcoholics

739. A person addicted to narcotic drugs may be arrested and sent to a hospital or institution, where he may be detained for treatment.[1] In some countries,[2] a hearing before a judge is necessary before the addict can be detained in a hospital for treatment. Arrest or detention may be ordered by the competent judge upon the advice or recommendation of a medical doctor or a local authority.[3] An addict may not be discharged from the hospital where he is detained for treatment without the consent of the authority having committed him, such consent to be based on medical certification.[4]

740. An inebriate or habitual drunkard who may cause disturbance and endanger public safety may be committed to an institution by a public authority or court, sometimes with a hearing.[5] At such hearing the person complained of has a right to be informed of the charge, to defend against the charge, to cross-examine witnesses, and to offer evidence.[6]

D. Detention of aliens

741. When a person is suspected of attempting to make an unauthorized entry into a country, he may be put under arrest and detention pending inquiry and decision by the competent authorities of that country.[7] In some countries, the arrested person must be brought before a judicial officer.[8] In other

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1/ Brazil, Chile, Colombia, Czechoslovakia, Ecuador, Peru, Portugal, Romania, United States of America, Republic of Korea.

2/ Brazil, Czechoslovakia, Portugal.

3/ Brazil, Czechoslovakia, Federal Republic of Germany.

4/ Brazil, Czechoslovakia, United States of America.

5/ Belgium, Chile, Colombia, Czechoslovakia, Denmark, Ecuador, Finland, Peru, Portugal, Romania, United States of America.

6/ Portugal, United States of America.

7/ Brazil, Burma, Canada, Ceylon, Chile, Denmark, Federation of Malaya, India, Ireland, Israel, Japan, Liberia, Libya; Mexico, New Zealand, Norway; Philippines, Thailand, United Kingdom (England and Wales); United States of America.

8/ Ceylon, India.

countries, the inquiry and decision are made by an immigration authority, the decision of the authority being subject to appeal.[1] In some countries, an alien under such detention has a right to institute habeas corpus or similar proceedings[2] or the right to apply for release on bail.[3]

742. An alien subject to deportation may be arrested and detained.[4] In some countries, such an alien is heard by an administrative authority, and the decision of the authority is subject to judicial review.[5] In some other countries, detention pending deportation can only be imposed by a court.[6] In some countries, he may apply for a writ of habeas corpus[7] or may be released on bail.[8] In other countries, similar remedies are expressly denied.[9]

E. Contempt of court

743. In order to ensure the carrying out of their functions and to uphold their dignity, courts everywhere have the inherent power to punish summarily for contempt by means of detention or short-term imprisonment.[10] In some countries, refusal to obey court orders is treated as an ordinary criminal offence.[11]

1/ Canada, Denmark, Federation of Malaya, United States of America.

2/ Canada, Norway Philippines, United States of America.

3/ Canada, Ethiopia, Liberia, Philippines, New Zealand.

4/ Austria, Belgium, Bolivia, Brazil, Burma, Canada, Ceylon, Chile, China, Denmark, Ecuador, Ethiopia, Federation of Malaya, Ireland, Israel, Japan, Liberia, Libya, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Peru, Philippines, Thailand, United Arab Republic (Egyptian region), United Kingdom (England and Wales) (Tanganyika), United States of America, Republic of Korea.

5/ Austria, Belgium, Brazil, Canada, Denmark, Philippines, United Arab Republic (Egyptian region), United States of America.

6/ Austria.

7/ Philippines, United States of America.

8/ Ethiopia, Federation of Malaya, Liberia, Philippines, Thailand, United States of America.

9/ Japan, Mexico, Peru.

10/ Austria, Bolivia, Brazil, China, Denmark, Ecuador, India, Israel, Jordan, Liberia, Netherlands, Philippines, Poland, Thailand, United Kingdom (Scotland), Union of Soviet Socialist Republics, United States of America, Federal Republic of Germany, Republic of Korea.

11/ Albania, Libya, Portugal.

F. Detention for debt

744. Many countries have abolished the practice of deprivation of personal liberty on account of a simple money debt. Accordingly, the general rule is that no person may be imprisoned for failure to pay a debt. To this rule there are many exceptions, among which are, for instance, cases where elements of fraud or wilful refusal are involved,[1/] where the debtor is about to abscond,[2/] or where the debts are owed to the State,[3/] or are judgement-debts.[4/]

G. Concluding remarks

745. In the foregoing pages the Committee has reviewed very briefly a few categories of detention on non-criminal grounds. It is felt that in all such detention, one essential consideration must be consistently borne in mind, namely, the dignity of the human person. When a person is placed under arrest or detention by an administrative authority or a civil court, he is not charged with, nor convicted of, any criminal offence. If a person arrested or detained on criminal grounds has the right to counsel, the right to communication, the right to a hearing, the right to conditional release, etc., it goes without saying that a person under administrative or civil detention should be equally entitled to those rights.

746. The commitment of a mentally ill person to an asylum presents some serious and difficult problems. In the first place, the definitions of insanity are still extremely vague. In the second place, there is a great shortage of well-trained psychiatrists. Finally, a mentally ill person seldom knows he is ill; the more ill he is, the saner he usually claims to be. In committing a person to an insane asylum, the margin of error remains wide, even with the greatest prudence.

1/ Bolivia, China, Israel, New Zealand, United Kingdom (Aden), United Kingdom (Hong Kong), United Arab Republic (Egyptian region), United States of America.

2/ Australia, Cambodia, Denmark, Ghana, Norway, United Kingdom (Aden).

3/ Bolivia, Cambodia, Haiti, Israel.

4/ China, India, Iraq, Israel, Jordan, Lebanon, Liberia, Libya, Luxembourg, Morocco, Netherlands, New Zealand, Thailand, United Kingdom (Aden), United Kingdom (Northern Ireland), United Kingdom (Tanganyika), United States of America.

747. It is noted that in many countries a person may not be detained for failure to pay a debt. In this connexion, attention is drawn to article 11 of the draft covenant on civil and political rights, as adopted by the Third Committee of the General Assembly at its thirteenth session, which reads: "No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation."

748. A word may be said about the detention of aliens. Not in all countries are aliens subject to deportation entitled to be informed of the grounds for expulsion, or to apply for a writ of habeas corpus. It seems that aliens, oftentimes strangers to the language and customs of the country in which they find themselves, should be given more humane consideration.

749. As regards the treatment of persons under administrative or civil detention, attention is drawn to rule 94 on civil prisoners of the Standard Minimum Rules for the Treatment of Prisoners. The rule reads as follows:

> "In countries where the law permits imprisonment for debt or by order of a court under any other non-criminal process, persons so imprisoned shall not be subjected to any greater restriction or severity than is necessary to ensure safe custody and good order. Their treatment shall be not less favourable than that of untried prisoners, with the reservation, however, that they may possibly be required to work."

750. Article 9 of the draft covenant on civil and political rights, as adopted by the Third Committee of the General Assembly at its thirteenth session, provides in paragraphs 4 and 5 as follows:

> "4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that such court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
>
> "5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation."

751. Article 5, paragraphs 4 and 5, of the European Convention on the Protection of Human Rights and Fundamental Freedoms, which is based on an earlier draft of the United Nations Covenant, contains similar provisions.

752. In order to guarantee against arbitrary detention, the Committee is of the opinion that in all cases of civil or administrative detention, there should be a speedy procedure by which the legality of the detention may be determined, and there should be an enforceable right to compensation in the case of arbitrary detention.

PART IV

ARREST AND DETENTION IN EMERGENCY OR EXCEPTIONAL SITUATIONS

753. It is common in most countries to use special powers in an emergency or other abnormal situation. In many countries the special powers are mentioned in the constitutions.[1/] Such special powers frequently limit the right of everyone to be free from arbitrary arrest or detention. They may do so by restricting, modifying, or suspending the operation of the normal laws and procedures. They may also do so by providing for arrest, detention, or exile for reasons other than, and under procedures different from, those applying in normal times.

A. Initiation and duration of emergency and exceptional measures

754. The grounds mentioned in various constitutions and laws for invoking emergency and exceptional measures include:[2/] international conflict, war, invasion, defence or security of the State or parts of the country; civil war, rebellion, insurrection, subversion, or harmful activities of counter-revolutionary elements; disturbance of peace, public order or safety; danger to the constitution and authorities created by it; natural or public calamity or disaster; danger to the economic life of the country or parts of it; maintenance of essential supplies and services for the community.

1/ Argentina, Bolivia, Brazil, Burma, Cambodia, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, Ethiopia, Federation of Malaya, France, Greece, Guatemala, Haiti, Honduras, India, Ireland, Jordan, Liberia, Luxembourg, Mexico, Nicaragua, Pakistan, Panama, Paraguay, Peru, Philippines, Portugal, Spain, Thailand, Turkey, United States of America, Venezuela.

2/ Argentina, Australia, Belgium, Burma, Cambodia, Ceylon, Chile, Colombia, Costa Rica, Czechoslovakia, Ecuador, Ethiopia, Federation of Malaya, Finland, France, Ghana, Guatemala, Haiti, India, Iraq, Ireland, Italy, Jordan, Lebanon, Luxembourg, Mexico, Netherlands, Panama, Peru, Philippines, Portugal, Thailand, Union of South Africa, United Kingdom, United States of America, Venezuela.

755. Many constitutions and laws regulate details relating to the grounds mentioned. For instance, in one country an elaborate law on public order sets forth specific measures which may be taken in a state of preparation, a state of alarm, a state of public calamity, a state of siege, or a state of war.[1] Another country's laws provide for special measures in times of war or of "heightened danger to the State", and the latter is defined "as a time when the country is in a state of military preparedness, or a time of events endangering to a heightened degree the independence, constitutional unity, territorial integrity, people's democratic state institutions or social order of the republic, or the public peace and order".[2] One country's constitution declares that "time of war" includes "a time when there is taking place an armed conflict in which the State is not a participant but in respect of which each" house of the legislature has resolved that, "arising out of such armed conflict, a national emergency exists affecting the vital interests of the State". The constitutional provision also covers such time after termination of any war as may elapse until each house of the legislature has resolved that the national emergency has ceased to exist.[3]

756. The designation given to the emergency measures differs from country to country; it often reflects the grounds for which the measures were invoked. As examples may be mentioned declarations of state of war,[4] state of siege,[5] state of emergency,[6] state of public danger,[7] state of civil emergency,[8]

1/ Guatemala.

2/ Czechoslovakia.

3/ Ireland.

4/ Chile (known as estado de asamblea), Guatemala, Italy, Netherlands.

5/ Argentina, Belgium, Brazil, Chile, Colombia, Ethiopia, France, Guatemala, Haiti, Luxembourg, Netherlands, Panama, Portugal.

6/ Ghana, Union of South Africa.

7/ Italy.

8/ Netherlands.

local state of emergency and limited state of emergency,[1] suspension of constitutional rights or guarantees,[2] suspension of the writ of habeas corpus,[3] and martial law.[4]

757. Whether an emergency exists or not is usually determined by the executive or the legislature; in a few countries it may be determined by the courts. Sometimes executive determination is all that is required.[5] Frequently, however, executive determination is subject to control or review by the legislature.[6] The most direct form of determination by the legislature is the requirement that emergency measures may be taken only pursuant to a law enacted for that purpose when the emergency arises, or immediately before or thereafter.[7] Another method is to allow the executive to decide if the legislature is not in session, subject to subsequent approval of the decision by the legislature.[8] Some constitutions and laws require that if the legislature is not in session, the executive must consult or get the approval of permanent committees of the legislature.[9] In some countries a court may decide whether an emergency situation altually exists, or existed, at a particular time.[10]

758. There is an underlying assumption in the laws of most countries that emergency measures should cease when the situation giving rise to them has come to an end. Some laws provide that emergency measures should be applied during the shortest possible time necessary to accomplish the purposes for which they were authorized.[11] In some countries the duration of the emergency is decided

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1/ Ghana.

2/ Cambodia, Costa Rica, Ethiopia, Finland, Guatemala, Mexico, Peru, Philippines, Venezuela.

3/ Philippines, United States of America.

4/ Ethiopia, Iraq, Jordan, Thailand.

5/ Belgium, Ceylon, Italy, Luxembourg, Philippines, Union of South Africa.

6/ Burma, Chile, Colombia, Ethiopia, France, India, Jordan.

7/ Australia, Czechoslovakia, Portugal, United Kingdom (England and Wales).

8/ Argentina, Cost Rica, Guatemala.

9/ Mexico, Panama.

10/ United States of America.

11/ France, Const., art. 16; Mexico.

by the executive.[1] In others, the legislature controls the duration.[2] For example, it may be provided that the declaration of an emergency may not last longer than forty-eight hours without approval of the legislature, or that it may not continue beyond twelve months after such approval; some laws may permit renewal for further periods.[3] One country's constitution provides that the assembly may suspend constitutional guarantees relating to arrest and detention by a vote of not less than two thirds of its members for a period of up to thirty days. If the assembly is in recess the executive can order the suspension of the guarantees by decree, but the decree itself has the effect of summoning the assembly to meet within forty-eight hours. The failure of the assembly on convening to confirm the decree by a two-thirds vote of all the members automatically restores the guarantees. If the assembly cannot meet because of lack of a quorum, it must meet on the following day regardless of the number of members, and the decree will remain in effect only if approved by two thirds of the members present.[4]

759. The laws generally require an official proclamation of an emergency and a proclamation to announce the end of the emergency. The proclamation must also indicate the areas of the country where the emergency measures may be applied.

B. Powers of arrest and detention

760. In an emergency a person may be arrested or detained for precautionary or preventive purposes or for other reasons connected with the emergency. Power to arrest and detail a person for such purposes may be granted expressly or it may be made available by restricting, suspending or modifying the operation of normal laws and regulations. For instance, constitutional guarantees relating to personal liberties may be restricted, or the remedy of habeas corpus and similar procedures to challenge an arrest or detention may be suspended. The regular courts may be deprived of their jurisdiction to deal with such offences as those relating to public order, safety, welfare, and security of the State. The

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1/ Philippines, Venezuela.

2/ Burma, Cambodia, Ceylon, Chile, Costa Rica, Ecuador, Ethiopia, France, Ghana, India, Panama, Peru.

3/ Burma, Costa Rica.

4/ Costa Rica.

functions of these courts may be assigned to military tribunals or to special courts. The latter may exercise their powers under summary rules of procedure, and their decisions may be final. Arrest and detention of persons suspected or accused of committing special offences created to meet the emergency may also be provided under procedures different from those in normal times.

761. The powers of arrest and detention may differ according to the nature of the emergency. Drastic powers may be made available during a war. The use and exercise of the powers may be subject to scrutiny by the legislature during or after the emergency. They are rarely subject to review by the ordinary courts.

762. Frequently, arrest and detention of a person may be allowed upon a subjective decision of the executive that it is necessary for the purpose, or on the grounds, for which the emergency was proclaimed. Detailed reasons for the arrest or detention may not be given to the arrested person. He may be informed simply that his activities are considered prejudicial or that his detention is necessary. He may or may not have the right to lodge objections or to appeal against the order of detention. The order may be subject to some review by a special committee or board or military authority, and these may have some judicial representation. The decision of the committee on the order may or may not be binding on the executive. Recourse to the ordinary courts may be unavailable. There is little information concerning the right to counsel or the treatment of the detained person, though it is often required that the place of custody should not be the same as that for ordinary criminals. Persons exercising powers of arrest and detention are not usually subject to penal sanctions or civil liability for their acts during the emergency, but they may be so subject afterwards. Indemnity for official acts done in good faith may be provided beforehand or at the end of the emergency, or after a stated period from the end of the emergency.

763. Such a variety of laws and procedures exists, and not all of them are reflected in the available material, that many generalizations might tend to distort the picture. Some examples may be noted.

764. In one country during the two world wars special powers of detention for the safety of the realm were conferred on the executive by the legislature.[1/] The Regulation under this authority in force in the last war empowered the

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1/ United Kingdom.

Secretary of State for Home Affairs to order the detention of persons whom he had reasonable cause to believe to be of hostile origin or associations, to have been recently concerned in acts prejudicial to the public safety or the defence of the realm, to have been members of certain kinds of organization, or to have shown enemy sympathies. The grounds for the Secretary of State's belief could not be questioned by the courts, and accordingly, in the absence of any formal defect, the detention could not be successfully challenged by habeas corpus. Any person detained had, however, the right, under the regulation, to make objection and present his case to an advisory committee appointed by the Secretary of State. The Chairman of the advisory committee was duty bound to inform the person of the grounds on which the order was made and to furnish him with such particulars as in the opinion of the Chairman were sufficient to enable him to present his case. Although the Secretary of State was not bound to follow the decision or advice of the committee, he had to make a report to Parliament at least once in every month on actions taken under the regulation and on the number of cases, if any, in which he had declined to follow the advice of the committee. Another regulation gave the police and the military powers of arrest, and of detention, for a limited period, pending inquiries, of suspected persons. The internment of enemy aliens was effected under the prerogative powers of the Crown to intern enemy aliens for the safety of the realm; the exercise of this power cannot be questioned by the courts.

765. In another country the head of the state is empowered by law to proclaim a state of emergency in all or parts of the country when he is of the opinion that public safety or order is threatened and the ordinary law of the land is inadequate to ensure the safety of the public or to maintain public order. The proclamation of the state of emergency is valid up to twelve months, and it may be renewed by a new proclamation. During the emergency the executive may make regulations to ensure the maintanance of public order and safety under which a person may be summarily arrested and detained for more than thirty days. The only check on the exercise of this power may be the tabling of the detained person's name in both houses of the legislature within the usual time limits.[1/]

766. One country's laws provide that in times of emergency the Prime Minister may direct the arrest and detention or conditional release of any person for

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1/ Union of South Africa.

security purposes or for the defence of the country. If martial law has been declared, the Military Governor-General, his assistants and any local Military Governor may order arrest and detention of any person for reasons of security and defence, for any period they consider appropriate; such orders are not subject to further appeal or review by courts. If the order is made solely in the interest of peace and public safety, the detained person must be brought before the Military Governor-General within seven days for confirmation of the order. If his arrest and detention was on a specific charge of committing certain offences, even if the offence was committed before the declaration of martial law, he is to be tried before the competent military court within fifteen days. The military courts are not bound by the Code of Criminal Procedure or by the law of evidence, and their decisions are not subject to appeal to any court. The offences specified are: offences affecting the external and internal security of the state or public safety; communication with the enemy, crossing borders and smuggling; belonging to any dissolved or unlicensed political party; violation of any order issued by the Military Governor-General or the local military governors; violation of the defence law or any regulation or order issued thereunder; assaulting a government employees, or a member of the armed forces or police, or obstructing his official work; any other offence or violation added thereto by order of the Military Governor-General.[1/]

767. The constitution of another country provides that in case of internal commotion or foreign attack endangering the operation of the constitution and of the authorities created by it, the province or territory in which the disturbance of order exists may be declared to be in a state of siege and the constitutional guarantees may be suspended. During the emergency the President of the Republic cannot himself convict or apply penalties. He may only arrest persons or transfer them from one part of the national territory to another, if they should not prefer to leave the country. The exercise of this power is not generally subject to judicial review, but the remedy of habeas corpus remains available. The Supreme Court of the country has held that only if the detained person prefers not to leave the territory may he be kept under arrest without

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1/ Jordan.

a court order or transferred from one part of the country to another. The Court has held also that a request by a person to leave the country must not be denied or made subject to improper conditions, such as the choosing of the place where he may go, but the executive can object to a choice to go to a neighbouring country where he will not be far removed from the area of his previous activities. The detention of a person is a temporary measure, not a penalty, and it must terminate at the end of the state of siege or earlier if the person wishes to leave the country.[1/]

768. Another country[2/] reports that although the constitution provides for the suspension of the privilege of the writ of habeas corpus in time of rebellion or invasion, the Supreme Court of the country has held that suspension of the writ is unconstitutional except in areas of active military operations where the civil courts are unable to continue in the proper and unobstructed exercise of their jurisdiction. An example is given of the release of certain persons detained in a territory placed under martial law after the Supreme Court had decided that the ordinary courts in that territory were in a position to function but had been closed only under military orders which were not warranted by the prevailing situation. In another case involving a law which permitted relocation of persons belonging to a certain ancestry, the Supreme Court held that a citizen of that ancestry, conceded by the government to be loyal and law abiding, could not be detained unwillingly in a relocation centre, since the detention had no relationship to the protection of the war effort against espionage and sabotage as provided by the law. The same country also mentions the enactment of an emergency detention law under which the president of the country is authorized to proclaim an internal security emergency in the event of war, invasion or insurrection in aid of a foreign power. During the emergency, the president would be authorized to apprehend and detain any person who he had reasonable ground to believe would probably engage in or would conspire with others to engage in acts of espionage and sabotage. The arrest would be made only under a warrant issued upon probable cause. A preliminary hearing would

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1/ Argentina.

2/ United States of America.

take place within forty-eight hours of the arrest. The hearing would be held before a board appointed to carry out the provisions of the law, and in keeping with the due process requirements of the country's administrative procedure law. The arrested person would be able to take habeas corpus proceedings. After hearing and determination by the board, there would be a right of appeal to a detention review board, and the latter's orders would be subject to judicial review by the regular courts.

769. The law of one country provides that if a civil emergency has been declared, a person with respect to whom there are reasonable grounds for suspecting that he is a danger to public order, peace and security may be detained by order of the Minister of the Interior or commissioner of a province. The detained person can lodge an objection against the order with the court. The court may also act proprio motu. The court gives its opinion to the Minister of the Interior. If the person has been illegally or illegitimately detained, he may be indemnified.[1/]

770. One country states in connexion with a territory that because of the grave situation existing there the legislature has empowered the government to take more vigorous action to safeguard the public peace and to guarantee respect for national sovereignty. The administrative authorities of the territory have been given special powers, but the application of such powers is subject to review by the legislature. Under the various emergency laws the jurisdiction of the ordinary courts may be transferred to the military courts for some criminal offences, including all crimes against the internal security of the state, armed rebellion, participation in or incitement to a criminal assembly, conspiracy, wilful homicide and manslaughter, and in a general way all crimes or offences adversely affecting national defence. Provisions are made for defence counsel and appointment for counsel ex officio, if the accused fails to appoint a counsel, and for appeal to the permanent military appeals courts. Another provision empowers the Minister of the Interior (and those to whom he delegates powers) to place in administrative confinement persons whom he considers to be dangerous to the public safety by reason of the direct or indirect material aid furnished by them to the rebels. An "examining committee", the majority of

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1/ Netherlands.

whom are judges, has to give its opinion on the order within one month. The detained person may submit applications to the committee, and he must be heard on his request if the time limit of one month is not observed. The Minister of the Interior must rule within one month and on the advice of the committee whether the detention order should be continued or revoked. The committee regularly visits the detention centres. It may hear persons confined therein and make representations to the minister concerned. The Council of State has jurisdiction to rule on applications for the rescission of detention orders on the ground of excès de pouvoir.[1/]

771. In another country a proclaimation made under the emergency law authorizes the arrest and detention of persons indulging in activities of a nature calculated to disturb public security. It empowers the Commissioner of Police to order arrest and detention of any person, who, in his opinion, would be a danger to public security if he were left at large because of being concerned in political activities, espionage, propaganda, subversive activities, activities prejudicial to the interests and safety of armed forces or the government, or acts prejudicial to the public safety. The Commissioner of Police must bring the person without delay before the High Court. If the High Court is of the opinion that the Commissioner's action is justified, the order of detention remains in force for three months, and it is renewable for further periods not exceeding three months each on application by the Commissioner (or someone on his behalf) to the High Court. The prevailing practice, however, is not for the Commissioner to approach the court to confirm the detention but for a relative or a lawyer of the detained person to lodge an application to the High Court claiming that the person is wrongfully detained. The release of a detained person may be ordered at any time by the Commissioner of Police with the permission of the High Court. The Commissioner of Police may, on order of the Minister of the Interior, instead of arresting and detaining a person, require him to reside in a fixed place. The Commissioner is not required to justify such an order before the High Court, but he must inform the High Court of the order and the conditions relating thereto.[2/]

1/ France.

2/ Ethiopia.

772. One country reported a decree passed for one year to prevent the harmful activities of counter-revolutionary elements and of persons who impeded the restoration or consolidation of public security and public order. Any person who, by his acts or conduct, endangered public order or public security, or in particular disturbed productive work and communications, might be placed under public security detention. The order of detention had to be made by the competent procurator on the proposal of police authorities. Within thirty days from the date of detention the order of detention automatically came up for review by the chief procurator. If the circumstances in which the detention was ordered had come to an end, steps had to be taken to end the detention forthwith. If detention was continued it had to be reviewed within three months from the date of the detention. The maximum duration of the detention was fixed at six months. Detailed regulations were to be provided by a decree of the chief procurator with the concurrence of the Minister of the Armed Forces.1/

773. Some countries allow arrest and detention of persons for preventive or precautionary purposes, not necessarily connected with an emergency.2/ Although the laws and regulations of the countries vary considerably, most of them authorize the executive or the administration, including sometimes the armed forces, to order the detention of a person on being satisfied that this is necessary for the security of the State. Other reasons for allowing preventive detention include the maintenance of public order and safety, the interests of foreign relations, and maintenance of supplies and services essential to the community.

774. The authorities empowered to order arrest and detention may range from a police official to the head of the state. The order of a junior official may be subject to confirmation or revocation by superior authorities. The detained person is usually informed of the grounds for his arrest and detention, but the information given to him may not be the same as in the case of a criminal offence, and facts considered to be against the public interest to divulge may not be

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1/ Hungary.

2/ Burma, Ghana, India, Ireland, Israel, Federation of Malaya, United Kingdom, (Northern Ireland), Hong Kong.

disclosed. Often the detained person is given an opportunity to lodge a protest or make a representation against the order. He may also have the right to legal counsel.

775. Usually, some provision is made for a review of the order by an advisory committee or board, which may include persons with legal or judicial qualifications. The decisions of the committee on the order or on the continuance of the detention may or may not be binding on the executive. The detained person may have the right to be heard by the committee on his request or the committee may have discretion in the matter. Representation by counsel in the committee may not be permitted.

776. Usually, there is no provision for judicial recourse to the ordinary courts, and acts of the authorities done in good faith are exempt from criminal or civil proceedings. Sometimes habeas corpus or similar procedures may be available in a restricted form; for instance, to test the observance of the formalities of the law and the bona fides or mala fides of an order. It may be possible in this way to challenge an order as being mala fide because it is alleged that the grounds given for the order can be tried under the ordinary laws of the country.

777. Detention may last from a few days to five or more years. Sometimes a maximum time limit for detention under any one order may be laid down, such as twelve months. Further detention of the same person may be permitted under a fresh order or a new order made on facts other than those on which the initial order was made. The executive authorities are usually empowered at any time to release a detained person or to release him on bail or other security.

778. It is often required that the executive authorities should report to the legislature from time to time on the use of the powers of preventive detention and on the number of persons under detention.

779. To give an example, under the Preventive Detention Act of one country the head of the state is empowered to order the detention of a citizen for up to five years without trial or judicial review under certain conditions. The Act was passed on 18 July 1958 for five years and it may be extended for a further period of three years by a resolution of the assembly. Arrest and detention may be ordered, if the head of the state is satisfied that it is necessary to prevent a person from acting in any manner prejudicial to the defence of the country, the relations of the country with other countries, or for the security

of the State. Within five days after detention, the detained person must be informed of the grounds of detention and given an opportunity to make representations in writing to the head of the state. Attempt to evade arrest may entail detention for a period twice as long as that specified in the original order. The head of the state may suspend the order of detention against a person and require him instead to notify his movements and furnish bail; failure to comply with these requirements may lead to detention under the original order for a period not exceeding five years or during the pleasure of the head of the state.1/

780. Provisions on preventive detention in another country may be summarized as follows.2/ The law on preventive detention was passed in 1950 and it has been extended in an amended form from time to time; recently it was extended for a further period. Under the law a person can be detained only if certain executive authorities are satisfied that it is necessary to detain him in order to prevent him from acting in a manner prejudicial to the defence of the country, the relations of the country with foreign powers, the security of the country or parts of it, the maintenance of public order, or the maintenance of supplies and services essential to the community. If the person is a foreigner he may be detained also with a view to regulating his continued presence in the country or to making arrangements for his expulsion from the country. In every case the ultimate power of scrutiny and control rests with the highest executive authority and without its approval the order of detention expires at the end of twelve days. The satisfaction of the detaining authority must be based on some grounds and these must be communicated to the person detained within a period of five days. The grounds supplied to him must be specific and sufficient particulars in respect of each ground must be given to him so as to afford him an opportunity of making an effective representation against the order of detention. Even if one of the grounds given to him is irrelevant or vague, the detention order becomes illegal and he has the right to move the Supreme Court

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1/ Ghana.

2/ India.

or the High Courts for being set at liberty. Within thirty days of the detention the grounds of detention and the representation of the detained person, if any, must be placed before an advisory board. The board consists of independent persons qualified to be judges of a high court. The detained person has the right to be heard in person before the board. He may have legal counsel, but he cannot be represented by a lawyer before the board. The board's proceedings are held in camera. A report on the case must be submitted by the board within ten weeks from the date of detention. Detention cannot be continued if the board finds that it is unnecessary. The maximum period of detention under an order is twelve months. The detained person can be released at any time and the government may release him for any specified period with or without conditions. He has the right to move the Supreme Court or any of the high courts in habeas corpus, if the order of detention has been made mala fide, that is to say, if the order is made for a purpose outside the scope of the law or if it is made with a wrong intent. The courts can similarly be moved if any of the rights guaranteed to him are not observed or if the procedure prescribed is not strictly followed.

781. In one country the law on preventive detention is subject to judicial control.[1/] The law was enacted in 1948; it has a clause under which the President, by a notification, can terminate its operation. Under the law a police officer of a specified rank or an officer specially empowered for the purpose may arrest without warrant "any person who pursues a course of action calculated to disturb public tranquillity or in a manner prejudicial to public safety". The arrested person may be detained up to fifteen days. The arrest must be reported to the President of the country, and detention beyond the fifteen days can only be ordered by the President or by some authority to whom his powers are specifically delegated. The proceedings are subject to scrutiny by the High Court or the Supreme Court on an application by the aggrieved party for directions in the nature of habeas corpus. The courts have not hesitated to direct the release of the detained person if, in the judgement of the court, there was not sufficient material to justify arrest and detention.

1/ Burma.

C. Concluding remarks

782. It is not for the Committee to comment on the merits of a country's decision to take emergency or exceptional measures involving special powers of arrest and detention. It considers, however, that in the interests of human rights such special powers should be granted and applied to the extent strictly required by the exigencies of the situation as provided in article 4 of the draft Covenant on Civil and Political Rights.[1/] Similar provisions are made in article 15 of the European Convention for the Protection of Human Rights and Fundamental Freedoms,[2/] and in article 19 of the draft Inter-American Convention of Human Rights. The Committee also endorses another provision of the same article of the draft Covenant that emergency measures should "not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin".[3/]

783. The Committee believes that the unsuitability of normal laws and procedures should be clearly made evident before any of them are restricted, suspended, or changed. It also believes that before additional powers of arrest and detention are granted, their necessity should be justified. Control over the use of special powers should be vested in organs or authorities independent of those exercising the powers. Persons who abuse authority or exercise unreasonable powers should bear responsibility for their acts, and such acts should be subject to some form of sanctions, even if the sanctions are imposed a posteriori. This is not an unreasonable requirement since neither the courts nor the legislatures (or other authorities) are likely to ignore a plea of necessity in the exercise of powers.

784. The Committee endorses the general agreement reached at the Baguio Seminar that "the writ of habeas corpus or similar remedy of access to the

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1/ This article has yet to be considered by the General Assembly.

2/ A case involving the interpretation of article 15 of the European Convention (emergency measures) in relation to article 5 of the same Convention (arrest and detention) is before the European Court of Human Rights. See the judgement of the Court of 14 November 1960 in the "Lawless" case (preliminary objections and questions of procedure). According to this judgement the Court decided unanimously to proceed to the examination of the merits of the case.

3/ A similar provision is made in article 19 of the draft Inter-American Convention on Human Rights.

courts to test the legality and bona fides of the exercise of the emergency powers should never be denied to the citizen".[1] It draws attention to the following passage from the report of the seminar:

> "All members recognized that in times of emergency it might be necessary to restrict temporarily the freedom of the individual. But they were firmly of the view that, whatever temporary restrictive measures might be necessary, recourse to the courts through the writ of habeas corpus or other similar remedy should never be suspended. Rather the legislature could, if necessary, subject to well-defined procedures safeguarding human dignity, authorize the temporary detention of persons for reasons specified in the law. By that means the executive can act as emergency may require but the ultimate judicial protection of individual liberty is preserved .... Members held strongly that it is a fundamental principle that the individual should never be deprived of the means of testing the legality of his arrest or custody by recourse to judicial process even in times of emergency. If that principle is departed from the liberty of the individual is immediately put in great peril." [2]

785. The Committee also supports the opinion expressed at the same seminar that "close conformity to ordinary criminal procedure was desirable as a safeguard to liberty and that a citizen detained should be entitled to know the grounds for his detention, to be heard, and to have his case reviewed from time to time".[3]

786. In particular, the Committee suggests that before a person is arrested or detained for preventive or precautionary purposes an order in writing should be required from the competent authority indicating the reasons and facts supporting the order. A copy of the order should be given to the person at the time of his arrest. Within twenty-four hours of his arrest (excluding the period of any necessary journey), he should be entitled to be heard by a judge of the ordinary courts or, if the ordinary courts are not functioning, by some other independent authority. At the hearing the formal legality of the arrest should be determined, and if the arrest is legal the arrested person should be informed of his right to make a representation against the order and to have a legal counsel; he should also be notified of his other rights and obligations. Within three days of the hearing the order of arrest and detention should be submitted to a designated

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1/ Baguio Seminar Report, ST/TAA/HR/2, para. 75.

2/ Ibid., paras. 26, 27.

3/ Ibid., para. 75.

court (ordinary or special) or an advisory committee (or review board), at least half of whose members should be from the ordinary judiciary. The court or advisory committee should receive the representation, if any, of the detained person and it should be furnished with such information by the government or other competent authorities as it requests. The detained person should be entitled to be heard as of right and he should be entitled to be represented by a legal counsel. The court or committee should decide whether to release him (for example, if there are insufficient grounds for his detention) or to continue his detention. If his detention is continued, there should be periodic reviews by the court or the committee to determine the need for further detention and to inquire into the treatment accorded to him in the place of custody. The authority ordering the arrest and detention should be bound by the decision of the court or the committee, but without prejudice to its powers to release a person conditionally or otherwise at any time. For a fixed period of time after the end of the emergency any person who was detained should have a right of recourse to the ordinary courts to question any excess or abuse of powers or the unreasonable exercise of powers. He should also have a right to compensation if his contentions are upheld or if the court declares any act to have been illegal. It may be necessary to deviate from some of these suggestions in areas of actual warfare or conflict, but this should not affect the right of recourse to the courts after the end of the emergency for the purposes mentioned above.

PART V

EXILE

787. In its progress report presented to the fourteenth session of the Commission, the Committee stated:[1] "Exile means the exclusion of a person from the country of which he is a national. The banishment of an individual to a specific, possibly remote, part of his own country is also described as exile." Accordingly, this part of the report will discuss, first, the problem of exile proper and, second, the problem of banishment within the country.[2]

788. Exile is an institution of long historical standing. It existed in small communities, such as city states, communes and principalities, in the ancient and medieval ages. It was applied either as a penalty for criminal offences or as a preventive measure of a political character. Criminals and political dissenters were exiled, as they were considered dangerous to the harmony and tranquillity of the body politic. With the formation of large territorial States, exile has been less frequently resorted to. Its vestiges, however, remain. A form of intra-territorial exile, namely, banishment within the country, has been in practice. Individuals or groups of individuals have been banished to particular regions, sometimes remote or inaccessible regions, within the boundaries of the large territorial States.

789. There is a close connexion between the right of everyone to be free from arbitrary exile and the right of everyone to return to his country, which are dealt with, respectively, in articles 9 and 13 (2) of the Universal Declaration of Human Rights. In article 12 of the draft covenant on civil and political rights, as prepared by the Commission, these two rights were set forth as follows:

1/ E/CN.4/763, para. 15.

2/ Although the terms "exile" and "banishment" are interchangeable in general usage, in this report the former is used to denote expulsion or exclusion from one's own country; the latter, compulsory sojourn in a specific, possibly remote, region within the country. In other words, "exile" is used in the extra-territorial sense; "banishment", intra-territorial.

"(a) No one shall be subjected to arbitrary exile;

"(b) Subject to the preceding sub-paragraph, anyone shall be free to enter his own country."

When this article was examined by the Third Committee of the General Assembly at its fourteenth session, sub-paragraph (a) was rejected, as the laws of many countries either prohibited exile or did not recognize it.[1/] The text finally adopted (paragraph 4 of article 12) was as follows:

"No one shall be arbitrarily deprived of the right to enter his own country."

It is clear that the right of everyone to return to his own country is an important aspect of the right of everyone to be free from arbitrary exile. However, the Committee will not deal with that aspect in any detail, as the Sub-Commission on Prevention of Discrimination and Protection of Minorities has decided to undertake a study of discrimination in the matter of the right of everyone to leave any country, including his own, and to return to his country.[2/]

790. In its progress report to the fourteenth session of the Commission, the Committee stated:[3/] "It is assumed that the expulsion of foreigners is outside the scope of the notion of exile." The Committee's attention, however, has been drawn to a situation in which a national may be deprived of his nationality or denaturalized and may then become liable to expulsion or deportation as an alien. The right of everyone to a nationality and the right of everyone not to be arbitrarily deprived of his nationality, as set forth in article 15 of the Universal Declaration, as well as the problem of statelessness, are, of course, outside the scope of the present study; but it should not be overlooked that if a person is arbitrarily deprived of his nationality and is thereafter expelled, such expulsion may amount to a form of exile.

1/ General Assembly Official Records, Fourteenth Session, annexes, agenda item 34, A/4299, para. 17.

2/ E/CN.4/800, resolution 5 (XII).

3/ E/CN.4/763, para. 15.

791. There is also a close connexion between banishment within a country and the right to freedom of movement and residence within the borders of each State, as set forth in article 13 (1) of the Universal Declaration.

792. In the following pages the Committee will review briefly the laws and practices regarding exile and banishment. It will consider such questions as exile as a penalty and as a special measure; banishment as a penalty and as a preventive or security measure, under normal or under emergency legislation; grounds on which decisions regarding exile and banishment are made; authorities, judicial or administrative, that make decisions on exile and banishment, and judicial or administrative review, if any, of such decisions; and the duration of exile and banishment.

A. Exile

793. The Committee has found that, in a very large number of countries, a national may not be exiled. In some countries, exile is expressly prohibited by a constitutional or statutory provision or by an interpretation thereof.[1/] In others, exile is not authorized or permitted by any statutory provision, or is not practised.[2/] Furthermore, in a number of countries,[3/] exile as a penalty does not exist. In some trust and Non-Self-Governing Territories,[4/] a person born in the territory and having permanent ties with it cannot be expelled therefrom.

1. Exile as a penalty

794. In a few countries,[5/] exile exists as a form of punishment. It is a punishment sometimes for offences of a political character. The duration of exile is sometimes

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1/ Austria, Cambodia, Canada, Ecuador, El Salvador, Ethiopia, Federation of Malaya, Finland, Ghana, India, Thailand, United Arab Republic (Egyptian Region), Yugoslavia, and Federal Republic of Germany.

2/ Australia, Belgium, Burma, Ceylon, Colombia, Denmark, Greece, Hungary, Israel, Luxembourg, Mexico, Morocco, Netherlands and Netherlands Antilles, New Zealand, Norway, Philippines, Poland, Union of South Africa, United Kingdom, United States of America.

3/ Argentina, China, Japan, Romania, Panama, Republic of Korea.

4/ New Zealand Island Territories including the Tokelau Islands, the Cook Islands, the Niue Islands, United Kingdom (Aden, Hong Kong, Tanganyika).

5/ Costa Rica, France, Haiti, Lebanon, Peru.

indicated: e.g., "not less than six months and not more than ten years", [1] or "not less than three months and not more than three years".[2] As a penalty under criminal law, exile is presumably imposed by the ordinary criminal courts in accordance with ordinary criminal procedure. In recent years it appears that in some of these countries this penalty has seldom been imposed.

2. Exile as a special or emergency measure.

795. Exile is sometimes applied, not as a penalty under criminal law, but as a special measure. For example, the constitution of one country prohibits the entry and sojourn in that country of its ex-kings, their consorts and male descendants.[3] In another country exile has been applied "as an exceptional measure in times of acute political crisis".[4] In some countries,[5] under the constitutional provisions relating to emergency powers, a person who otherwise may be arrested, detained, or transferred from one part of the national territory to another may voluntarily choose to leave the country. He may return when the state of emergency ends.

B. Banishment within the country

796. Banishment within a country is a much more frequent occurrence than exile, expulsion or exclusion therefrom.

797. Banishment exists in law or in practice in a considerable number of countries. It is applied either as a penal sanction or as a preventive or security measure. In both cases the main purpose is the same, namely, to remove a person from a place where he is considered dangerous or is likely to continue his anti-social behaviour.

1/ Peru.

2/ Lebanon.

3/ Italy. A similar provision existed in France but was repealed in 1950.

4/ Brazil.

5/ Argentina, Ecuador.

798. It may be noted that formerly a person might be banished from a metropolitan area to a colonial territory. This practice has been discontinued.[1/]

1. Banishment as a penalty

799. The grounds on which banishment as a penalty may be imposed vary. They include political offences or offences which affect the external or internal security of the State;[2/] activities which are considered dangerous to society,[3/] such offences as smuggling or use of narcotics, etc.,[4/] and other acts.[5/]

800. In some countries[6/] banishment may be imposed only as a subsidiary penalty to a principal penalty, to which a person is sentenced. In some other countries, banishment may be either a principal or a subsidiary penalty, depending upon the nature of the offence,[7/] or at the discretion of the court.[8/]

801. Banishment as a penalty is presumably imposed by an ordinary court in accordance with the usual criminal procedure.[9/]

802. Banishment may be perpetual,[10/] or may be for a fixed term, varying from three months to twenty years, depending upon the nature of the offence.[11/]

803. The court may banish a person to a particular place,[12/] or may have the discretionary power either to assign or not to assign a particular place;[13/] or may prohibit a person to live or appear in a specific place or places.[14/]

1/ France, United Kingdom.
2/ Haiti, Lebanon.
3/ Albania, Spain.
4/ Greece.
5/ Philippines.
6/ Cambodia, Czechoslovakia, France, Luxembourg, Morocco.
7/ Colombia, USSR.
8/ Albania.
9/ France, Turkey.
10/ Haiti, Luxembourg.
11/ Colombia, Czechoslovakia, France, Morocco.
12/ Colombia, Greece, Lebanon, Panama, Portugal, Venezuela.
13/ Albania, Haiti; USSR.
14/ Czechoslovakia, Morocco, Philippines, Spain.

2. Banishment as a preventive or security measure

804. Banishment is sometimes applied, not as a penal sanction, but as a preventive or security measure. Such measure is imposed upon a person, not to punish him for any specific offence, but to prevent him from committing acts which may be dangerous to the State or society. Such measure may be taken under normal legislation or under emergency powers.

(a) Under normal legislation

805. Banishment may be imposed, under normal legislation, upon a person whose conduct is prejudicial to public order or peace;[1/] who is socially dangerous or undesirable (habitual rogue, vagabond, beggar, thief, smuggler, illicit trafficker, gambler, drunkard, etc.);[2/] who is engaged in acts contrary to public morals (exploitation of prostitutes, traffic in women, corruption of minors, etc.).[3/] Sometimes it is imposed upon a person who promotes any feeling of hostility between different groups of the population.[4/]

806. Sometimes banishment is imposed only upon an individual belonging to a particular ethnic group.[5/]

807. As a security measure banishment or compulsory residence is generally imposed by an administrative authority,[6/] for example, a police chief, a native commissioner, a district commissioner, a provincial governor, or a public security commission. An appeal against an order of banishment may sometimes be made to a higher administrative authority.[7/] In some countries,[8/] banishment or compulsory residence may follow upon judicial decision, which may be subject to appeal.

1/ Ruanda-Urundi, Iran.

2/ Italy, Jordan, Union of South Africa, United Arab Republic (Egyptian Region).

3/ Italy.

4/ United Kingdom (Tanganyika), Union of South Africa.

5/ Union of South Africa.

6/ Ruanda-Urundi, Iran, Jordan, United Kingdom (Tanganyika), Union of South Africa.

7/ Ruanda-Urundi, Italy.

8/ Italy.

808. The duration of banishment varies.[1] Sometimes the law prescribes the minimum period, not the maximum; sometimes both the minimum and maximum. Generally, the duration is determined by the authority in each case within the limits which may be prescribed by law.

809. The degree of restraint upon a banished person also varies. Sometimes he is simply prohibited from residing in a particular place where he is considered socially dangerous; he may be assigned to a particular place, or allowed to choose a place; or he may be transferred from one place to another.[2] Sometimes he is removed to a farm colony or a work colony;[3] sometimes he is free to engage in any occupation. He may be under police surveillance or may be relatively free to move about within the locality to which he is assigned.

(b) Under emergency powers

810. In many countries banishment is imposed upon an individual, not under ordinary legislation, but under emergency powers.[4] Sometimes it may be imposed under ordinary legislation but only in times of emergency.[5] The grounds on which banishment may be imposed in an emergency are: defence of national security, protection of public safety, maintenance of public order, suppression of mutiny or rebellion, etc.[6] It is generally imposed upon a person who is dangerous to the State, for example, a person who is suspected of abetting a foreign invasion or internal disturbances or assisting enemies or rebels,[7] or who it is feared may be engaged in subversive activities or in espionage or sabotage.[8] The grounds are generally stated in broad terms, the overriding consideration being the security of the State. Banishment in times of emergency is considered a preventive or precautionary measure.

1/ Iran, Italy, Jordan, United Arab Republic (Egyptian Region).

2/ Iran, Italy, Jordan, Ruanda-Urundi, United Kingdom (Tanganyika), Union of South Africa.

3/ Union of South Africa.

4/ Argentina, Belgium, Brazil, Chile, Costa Rica, Ecuador, France, Israel, Jordan, Lebanon, United States of America.

5/ Greece, Spain.

6/ Argentina, Belgium, Israel, Jordan.

7/ Ecuador, France.

8/ Lebanon, United States of America.

811. The duration of banishment in emergency generally ends as soon as the emergency ceases.[1] Sometimes an order of local banishment is limited to a specific maximum period.[2] Sometimes there may be a specific limit on the period of emergency itself.[3]

812. In times of emergency persons who are considered dangerous may be moved to specifically designated areas or may be excluded from certain defined areas.[4] Sometimes an individual may be assigned a compulsory residence or may be transferred from one place to another.[5] Sometimes an individual may choose to be confined in an area in lieu of being placed under arrest or detention.[6] In some cases the administration provides for the subsistence and lodging of banished persons.[7] In some countries, the law provides that the place to which they are banished should not be deserted or unhealthy,[8] or should not be beyond a specified distance.[9] Sometimes they are under supervision and may not move beyond the limits of the designated area.[10]

813. Banishment within the country, during an emergency, is usually ordered by a competent political or military authority and not by any judicial authority. Sometimes the order of banishment may be reviewed by an advisory organ; sometimes there seems to be some judicial control a posteriori.

1/ Argentina, Ecuador.

2/ France.

3/ Costa Rica.

4/ Belgium, France, Israel, Jordan, United States of America.

5/ Argentina, Brazil, Chile.

6/ Ecuador.

7/ France.

8/ Brazil, Costa Rica.

9/ Spain.

10/ Israel.

814. In several countries[1] banishment may be ordered by a military authority. In some other countries it may be ordered by a political authority.[2] Still in others[3] it may be ordered either by a political or a military authority, depending upon the nature of emergency. An order of banishment, whether by a political or military authority, is not subject to judicial review in some countries.[4] Sometimes a person to be banished may raise an objection to an advisory committee against the order of banishment.[5] Sometimes he may request an advisory committee to rescind the order, or may appeal to an administrative court against the order.[6] In one country a person banished to a certain area within the country may choose to leave the country, and if the exercise of this optional right is improperly refused, he is entitled to be heard by a court on a petition of habeas corpus.[7] In another country the executive is required to report to the Assembly on measures taken under emergency powers.[8]

C. Concluding remarks

815. Exile. The Committee notes that exile has virtually disappeared. Whether as a penalty or as a political measure, exile is either prohibited or not practised in most countries. Only in a very few countries is exile applied as a punishment and then only for political offences, as a special measure in times of crisis, or as an optional measure (in lieu of imprisonment or banishment).

816. Banishment. Banishment within the country - a form of intra-territorial exile - is a more frequent occurrence and hence a more serious problem than exile itself.

1/ France, Israel, Lebanon.
2/ Argentina, Chile, Costa Rica.
3/ Belgium, Jordan.
4/ Jordan.
5/ Israel.
6/ France.
7/ Argentina.
8/ Costa Rica.

817. The Committee notes that perpetual banishment to a remote place, whether overseas or within the country itself, appears to be on the decline.

818. The Committee is of the opinion that as a penalty under criminal law banishment should not be imposed on any person except pursuant to a decision of a competent court and in accordance with proper criminal procedure; and that the right to appeal to a higher court against a decision of a lower court on a question of banishment should be guaranteed.

819. Banishment is oftentimes imposed as a preventive measure under normal legislation. It is believed that the grounds on which such measure may be taken should be specific or precisely defined. When an administrative authority has the power to banish any person who is considered to be socially dangerous or undesirable, who disturbs public peace or order, who promotes hostilities between different ethnic groups, etc., that power may easily be abused. When banishment is imposed only upon individuals belonging to a particular ethnic group, it is arbitrary and discriminatory. It appears to the Committee that to issue an order of banishment as a preventive measure, an administrative authority should seek the advice of an organ on which the judiciary is represented; and that the order should be subject to review by a higher administrative authority or, better still, by a judicial authority.

820. As a banishment under emergency legislation, the Committee believes that the reasons must be imperative. The order of banishment should be carried out only upon those who are in fact dangerous to the State. While such measure is usually taken by a political or military authority, the Committee is of the opinion that it should be subject to parliamentary control, or to automatic review by an advisory board or by a competent court, or that the person so banished should have the right to appeal to an advisory board or to a competent court.

821. The place to which a person is banished, whether under normal or under emergency legislation, should be a livable place and the authority concerned should defray the costs of transportation and subsistence. Considering that such banishment is a preventive or a security measure the duration of banishment should be relatively short, i.e., it should end as soon as the person becomes socially less dangerous or less undesirable, or as soon as the emergency ceases, as the case may be.

ANNEX I

Representatives on the Committee

The members of the Committee were represented as follows:

1956

Chile:	Mr. Rudecindo ORTEGA
Norway:	Mr. P. VENNEMOE
Pakistan:	Mr. Abdul WAHEED, Mr. Niaz A. NAIK
Philippines:	Mr. F.M. SERRANO (Chairman-Rapporteur)

1957

Argentina:	Mr. R.A.J. QUIJANO
Ceylon:	Mr. R.S.S. GUNEWARDENE, Mr. A. BASNAYAKE
Norway:	Mr. P. VENNEMOE
Philippines:	Mr. F.M. SERRANO (Chairman-Rapporteur), Mr. H.J. BRILLANTES

1958 and 1959

Argentina:	Mr. R.A.J. QUIJANO (1958), Mr. L. TETTAMANTI (1959)
Belgium:	Mr. J. WOULBROUN
Ceylon:	Mr. R.S.S. GUNEWARDENE, Mr. N.T.D. KANAKARATNE
Philippines:	Mr. F.A. DELGADO (Chairman-Rapporteur), Mr. H.J. BRILLANTES

1960

Argentina:	Mr. L. TETTAMANTI, Mr. R.A.J. QUIJANO
Belgium:	Mr. J. d'ANETHAN, Mr. E. BAL
Pakistan:	Mr. B.W.W. WALKE
Philippines:	Mr. F.A. DELGADO (Chairman-Rapporteur), Mr. H.J. BRILLANTES, Mr. L.D. CAYCO.

ANNEX II

Representatives of specialized agencies and of non-governmental organizations in consultative relationship attending meetings of the Committee

1. The International Labour Organisation was represented at various meetings of the Committee by Mr. P. Blamont (1958, 1959) and Mr. E. Zmirou (1960).

2. The representatives of the following non-governmental organizations in consultative status (category B) attended meetings of the Committee:

Consultative Council of Jewish Organizations:	Mr. Moses Moskowitz
International League for the Rights of Man:	Mr. Max Beer
World Jewish Congress:	Mr. Gerhard Jacoby.

ANNEX III

Information received from Governments

1. Statements under Council resolution 303 H (XI) and resolution I adopted by the Commission on Human Rights at its eleventh session	Information under Council resolution 624 B (XXII) 1/
Argentina	
Australia	
Austria	Austria
Belgium	
Bolivia	
Brazil	Brazil
Burma	
Byelorussian SSR	Byelorussian SSR
Cambodia	Cambodia
Canada	
Ceylon	Ceylon
Chile	
China	China
Colombia	
Costa Rica	Costa Rica
Cuba	
	Czechoslovakia
Denmark	
Dominican Republic	Dominican Republic
Ecuador	
	El Salvador
Ethiopia	
Finland	Finland
France	France
Federal Republic of Germany	Federal Republic of Germany
Greece	
Honduras	
Hungary	Hungary
India	
Iran	
Iraq	
Israel	Israel
Italy	

1/ This material consists partly of separate sections relating to arbitrary arrest, detention and exile prepared by Governments in accordance with paragraph 2 of Council resolution 624 B I (XXII) and partly of information relating to the legal systems of countries, contained in other sections of the triennial reports.

Statements under Council resolution 303 H (XI) and resolution I adopted by the Commission on Human Rights at its eleventh session (cont'd)	Information under Council resolution 624 B (XXII) (cont'd)
Japan	Japan
Libya	
Liechtenstein	
Luxembourg	Luxembourg
Mexico	Mexico
Monaco	
	Morocco
	Nepal
Netherlands	Netherlands
New Zealand	
Norway	Norway
Pakistan	Pakistan
	Panama
Philippines	Philippines
Poland	Poland
Portugal	Portugal
Romania	Romania
Spain	Spain
Sweden	
Thailand	
Turkey	
Ukrainian SSR	Ukrainian SSR
Union of South Africa	
USSR	USSR
United Arab Republic (Egyptian Region)	
United Kingdom	United Kingdom
United States of America	United States of America
Republic of Viet-Nam	Republic of Viet-Nam

2. Information transmitted in other ways

Some information concerning a number of countries not listed above may be found in the material supplied by Governments, or government-appointed correspondents, to the United Nations Yearbook on Human Rights, 1946 to 1958.

ANNEX IV

Country monographs prepared by the Committee

(Asterisks denote observations received from Governments concerned on the draft monographs as of 7 January 1961)

Albania*
Argentina*
Australia*
Austria*
Belgium
  Pt. I : Metropolitan*
  Pt. II: Belgian Congo and Ruanda-Urundi*
Bolivia
Brazil*
Bulgaria
Burma*
Cambodia*
Canada
Ceylon*
Chile*
China*
Colombia
Costa Rica
Cuba
Czechoslovakia*
Denmark*
Dominican Republic
Ecuador
El Salvador
Ethiopia*
Federation of Malaya*
Finland*
France*
Federal Republic of Germany*
Ghana*
Greece
Guatemala
Haiti
Honduras
Hungary
Iceland
India*
Iraq*
Ireland*
Israel*
Italy*
Japan*
Jordan
Republic of Korea*
Lebanon*
Liberia*
Libya*
Luxembourg*
Mexico
Morocco*
Nepal
Netherlands*
New Zealand
Nicaragua
Norway*
Pakistan
Panama
Paraguay
Peru*
Philippines*
Poland*
Portugal*
Romania*
Spain
Sudan*
Thailand*
Turkey
Union of South Africa*
USSR (including Byelorussian and Ukrainian SSR's)
United Arab Republic (Egyptian region)*
United Kingdom
  Pt. I : England and Wales*
  Pt. II : Scotland*
  Pt. III: Northern Ireland*
  Pt. IV : Aden*
  Pt. V : Hong Kong*
  Pt. VI : Tanganyika*
United States of America*
Uruguay
Venezuela
Yugoslavia*

ANNEX V

Statement made by the representative of the ILO at the fifth meeting of the Committee, held on 19 January 1959

The Governing Body of the International Labour Office, having been informed at its 132nd meeting (Geneva, June 1956) of the decision of the United Nations Economic and Social Council to undertake a study of the right of everyone to be free from arbitrary arrest, detention and exile, expressed the view that such a study "would complement in a most useful manner the work of the ILO in connexion with freedom of association and forced labour".

Subsequently, the United Nations Economic and Social Council invited the specialized agencies to transmit information on that question (resolution 624 B (XXII)). For its part, the International Labour Conference at its last session, in June 1958, adopted a resolution in which it expressed the belief that "the protection of human rights by the rule of law on the basis of fundamental liberties such as freedom of opinion and expression, freedom of peaceful assembly and association, and freedom from arbitrary arrest, detention, or exile, all of which are proclaimed by the Universal Declaration of Human Rights", was "of fundamental importance for the fulfilment of the objectives of the International Labour Organisation". In the same resolution the Conference pledged "the continued co-operation of the International Labour Organisation with the United Nations in the promotion of universal respect for and observance of human rights and fundamental freedoms on the basis of the dignity and worth of the human person".

In accordance with the objectives assigned to it in its Constitution, the ILO has devoted its main efforts to securing observance of and respect for those social, economic and cultural rights which are proclaimed by the Universal Declaration and which come within its technical competence. A fairly detailed description of the international standards which have been adopted for this purpose was included in the "Survey of progress made in the field of human rights during the period 1954-1956" which was transmitted to the United Nations at the end of 1957.

It is mainly in connexion with its efforts to ensure the protection of trade union rights and of the right of association that the ILO has concerned

itself with the right to freedom from arbitrary arrest, detention or exile. This right is implicitly upheld, for the benefit of trade unionists and for the protection of their trade union activities, in article 3 of Convention 87 concerning freedom of association and protection of the right to organize. The article provides that workers' and employers' organizations shall have the right to organize their activities freely and that "the public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof". Furthermore, article 8 of the same Convention, which stipulates that workers and employers and their respective organizations shall respect the law of the land, states explicitly that "the law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in this Convention".

Among the various bodies which are concerned with respect for trade union freedoms in the different member States of the Organisation, the Committee on Freedom of Association of the Governing Body has, in the course of examining some 200 cases so far brought before it, been called upon most frequently to consider the question of respect for fundamental freedoms, including questions of arrest, detention and deportation of trade union members.

In January 1950, the ILO Governing Body, acting on behalf of the United Nations and the International Labour Organisation, set up a Fact-finding and Conciliation Commission on Freedom of Association, and in 1951 it established the Committee on Freedom of Association, with the task of conducting preliminary inquiries into complaints alleging infringements of trade union freedoms.

In all the cases where it had been alleged that trade unionists had been detained for preventive reasons, the Committee stated that "holding persons indefinitely in custody without trial ... is a practice which involves inherent dangers of abuse and it is for that reason subject to criticism". Furthermore the Committee stressed the fundamental importance of "the right of all detained persons to receive a fair trial at the earliest possible moment". In those cases, the Committee also stated that all Governments should make it a rule

to keep a careful watch on the observance of human rights and, in particular, the right of any detained person to receive a fair trial as soon as possible.1/

In all cases where it had been alleged that trade unionists had been subjected to some form of arrest, the Committee stressed that every arrested person should enjoy the safeguards of due process.2/ When, in particular, trade unionists had been accused of political or criminal offences which their Government considered to be outside the scope of trade union activity, the Committee stressed the importance of the principle that everyone should be judged promptly by an impartial and independent judicial authority and that, in such cases, the principle of the non-retroactivity of the penal law should be observed.

In dealing with several cases where it was alleged that trade unionists had been deported or expelled, the Committee felt that, although measures of deportation or exile, which, according to the Governments concerned, had been ordered in respect of the offenders because of their political activities, were outside its competence, such measures applied to trade unionists by reason of their union activities constituted an infringement of trade union rights.3/

1/ See for example First Report of the Committee on Freedom of Association, para. 125: case No. 2 (Venezuela), para. 134: case no. 3 (Dominican Republic); Second Report, para. 139: no. 13 (Bolivia); Third Report, para. 35 and 36: case No. 6 (Iran); Fifth Report, para. 18: case no. 3 (Dominican Republic); Sixth Report, para. 1,012: case no. 2 (Venezuela); Twelfth Report, para. 253: case no. 93 (Iran); para. 481 and 482: case no. 61 (France/Tunisia); Nineteenth Report, paras. 16 and 38: case no. 92 (Peru); Twentieth Report, para. 96: case nos. 72 and 122 (Venezuela); Twenty-seventh Report, para. 399: case no. 136 (United Kingdom/Cyprus).

2/ See for example Fourth Report, para. 18 and 51: case no. 5 (India); para. 52 and 88: case no. 10 (Chile); para. 140 and 161; case no. 30 (United Kingdom/Malaya); Sixth Report, para. 704 and 736: case no. 47 (India), para. 770 and 813; case no. 49 (Pakistan); Twelfth Report, para. 223 and 240: case no. 87 (India); para. 257 and 276: case no. 63 (Union of South Africa); para. 292 and 428: case no. 16 (France/Morocco); Thirteenth Report, para. 18 and 89: case no. 62 (Netherlands); Sixteenth Report, para. 57 and 86: case no. 112 (Greece); Seventeenth Report, para. 97 and 148: case no. 142 (Honduras); Twenty-fifth Report, para. 97 and 178: case no. 136 (United Kingdom/Cyprus), para. 320 and 333: case no. 158 (Hungary); Twenty-sixth Report, para. 112 and 156: case no. 136 (United Kingdom/Cyprus); Twenty-seventh Report, para. 417 and 498: case no. 160 (Hungary); Twenty-eighth Report, para. 91 and 110: case no. 143 (Spain).

3/ See foot-note 1/ above.

In connexion with its efforts to ensure recognition of and respect for the right to free choice of work, i.e. mainly in the course of its activities for the abolition of forced labour, the ILO does not appear to have had occasion to refer to the right to freedom from arbitrary arrest, detention or exile. It would seem, however, useful to mention here the work of the Ad Hoc Committee on Forced Labour established jointly by the United Nations and the ILO. In its report,[1] this Committee stressed that the system of forced labour used as a means of political coercion in certain countries existed "in its fullest form and in the form which most endangers human rights ... when /a person/ may be sentenced by procedures which do not afford him full rights of defence, often by a purely administrative order".

The work of this Committee was subsequently taken over by a new Committee on Forced Labour established in 1956 by the ILO Governing Body. In its report, this Committee stated that in one country the authorities were legally entitled to penalize a member of a family of a person liable to punishment and added that such action constituted "a violation of the principle that no one can be punished for an act which he has not committed".[2]

Generally speaking, it is obvious that the prohibition of forced labour has the effect of restricting the possibility of arbitrary arrest, detention and deportation.

In that respect, mention should be made of Convention No. 29 concerning Forced Labour (1930) which was ratified by fifty-four States and Convention No. 105 concerning the Abolition of Forced Labour (1957) which was ratified by nineteen States.[3]

1/ Official Records of the Economic and Social Council, Sixteenth Session, Supplement No. 13 (E/2431).

2/ Document of the ILO Governing Body GB.135/4/1, 135th Session, Report of the ILO Committee on Forced Labour, para. 67 and 500.

3/ As of 15 December 1960, seventy-four States had ratified or acceded to Convention No. 29 and thirty-nine States had ratified or acceded to Convention No. 105.