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HUMAN RIGHTS AND SCIENTIFIC AND TECHNOLOGICAL DEVELOPMENT

Respect for the privacy of individuals and the integrity and
sovereignty of nations in the light of advances in recording
and other techniques

Report of the Secretary-General*

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* The present document contains the general introduction and part one of the report. Part two, "Respect for the integrity and sovereignty of nations in the light of advances in recording and other techniques", will be issued as document E/CN.4/1116/Add.3

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INTRODUCTION

1. The present report is the first of a series which the General Assembly invited the Secretary-General to prepare concerning the influence of recent scientific and technological developments on human rights.
2. The benefits which scientific knowledge and its application through technology have brought to mankind are immense, in terms of the liberation of the mind and an enhanced understanding by man of himself and of the universe surrounding him and in terms of the improvement of man's physical well-being. The United Nations and its specialized agencies are concentrating much of their effort on programmes which encourage and support the application of scientific knowledge and technology to the betterment of the conditions of human life.
3. During the nineteenth and early twentieth centuries scientific advance was widely assumed to be inevitably favourable to human progress, and no essential conflict was generally envisaged between the two. Subsequent events, however - in particular the devastation caused by two world wars, which was made possible to a great extent by scientific and technological developments - have raised doubts as to the existence of such an inevitable alliance between scientific advance and human progress. More specifically there has been a growing realization that, whereas scientific knowledge by itself may well be neutral, much of it can be applied in ways that are harmful to humanity. Such harm may be done knowingly, in the pursuit of goals considered of overriding importance, or unwittingly, owing to lack of knowledge of consequences or side-effects.
4. The question of the impact of recent scientific and technological developments on human rights was brought before the United Nations as the result of an initiative taken in 1968 by the International Conference on Human Rights, convened at Teheran, Iran, as part of the programme for the International Year for Human Rights. The Conference adopted a Proclamation on Human Rights, which pointed out, among other things, that while recent scientific discoveries and technological advances have opened vast prospects for economic, social and cultural progress, such developments might nevertheless endanger the rights and freedoms of individuals and would require continuing attention. 1/ The Conference, more specifically, recommended that the organizations of the United Nations family should undertake a study of the problems with respect to human rights arising from developments in science and technology, particularly with regard to certain specified topics. 1/
5. Later in 1968, the General Assembly adopted resolution 2450 (XXIII) of 19 December 1968, on human rights and scientific and technological developments, in which, sharing the concern expressed by the Conference that recent scientific discoveries and technological advances, although they opened up vast prospects for economic, social and cultural progress, might nevertheless endanger the rights and freedoms of individuals and peoples and consequently called for constant attention, and endorsing the idea that these problems required thorough and continuous interdisciplinary studies, both national and international, which might

1/ Proclamation of Teheran, point 18; and resolution XI, Final Act of the International Conference on Human Rights, Teheran, 22 April to 13 May 1968 (United Nations publication, Sales No. 68.XIV.2).

serve as a basis for drawing up appropriate standards to protect human rights and fundamental freedoms, invited the Secretary-General to undertake, with the assistance of, *inter alia*, the Advisory Committee on the Application of Science and Technology to Development and in co-operation with the executive heads of the competent specialized agencies, a study of the problems in connexion with human rights arising from developments in science and technology, in particular from the following standpoints, which were those specified in resolution XI of the Conference:

"(a) Respect for the privacy of individuals and the integrity and sovereignty of nations in the light of advances in recording and other techniques;

"(b) Protection of the human personality and its physical and intellectual integrity, in the light of advances in biology, medicine and biochemistry;

"(c) Uses of electronics which may affect the rights of the person and the limits which should be placed on such uses in a democratic society;

"(d) More generally, the balance which should be established between scientific and technological progress and the intellectual, spiritual, cultural and moral advancement of humanity."

6. The Assembly requested the Secretary-General to prepare, on a preliminary basis, a report comprising a summary account of studies already made or in progress on the aforementioned subjects, emanating in particular from governmental and intergovernmental sources, the specialized agencies and the competent non-governmental organizations; and a draft programme of work to be undertaken in fields in which subsequent surveys would be necessary for the attainment of the objectives of the resolution; and to submit that report to the Commission on Human Rights at its twenty-sixth session for consideration and transmittal, through the Economic and Social Council, to the General Assembly at its twenty-fifth session.

7. The preliminary report of the Secretary-General was considered by the Commission on Human Rights at its twenty-seventh (1971) session. ^{2/} Following consideration of the report, the Commission adopted resolution 10 (XXVII) of 18 March 1971, which to some extent elaborated on resolution 2450 (XXIII) of the General Assembly.

8. In resolution 10 (XXVII), the Commission expressed the view that each State should, individually and through international co-operation with due regard to the principles of inviolability, sovereignty and equality of States, make use of scientific and technological developments to promote the exercise of human rights and fundamental freedoms as fully as possible; and that problems of protecting

^{2/} Document E/CN.4/1028, Add.1-6 and Add.3/Corr.1. The Commission also had before it a preliminary memorandum submitted by the World Health Organization (A/8055/Add.1).

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these rights and freedoms in the context of scientific and technological progress should be tackled at the national and international levels in accordance with the principles underlying the structure of the State and society, specific economic and social conditions, and cultural tradition.

9. The Commission also recognized the need during the Second United Nations Development Decade to concentrate its attention on the most important and basic problems of protecting human rights and fundamental freedoms in the context of scientific and technological progress, and in particular on:

"(a) Protection of human rights in the economic, social and cultural fields in accordance with the structure and resources of States and the scientific and technological level they have reached, as well as protection of the right to work in conditions of the automation and mechanization of production;

"(b) The use of scientific and technological developments to foster respect for human rights and the legitimate interests of other peoples and respect for generally recognized moral standards and standards of international law; and

"(c) Prevention of the use of scientific and technological achievements to restrict fundamental democratic rights and freedoms."

10. The Commission requested the Secretary-General to continue his study of the consequences, for the observance of human rights, of current developments in science and technology, taking into account also the possibility of using them to improve living conditions and the enjoyment of economic, social and cultural rights.

11. It requested Governments to submit to the Secretary-General any material they might have on problems arising in connexion with the protection of human rights within the context of scientific and technological progress, including information on the problems mentioned in paragraph 9 above, and on the development of legislation, court decisions and national practice and any projects they had in view in connexion with the matters dealt with in the resolution. It moreover requested the International Labour Organisation, the United Nations Educational, Scientific and Cultural Organization, the World Health Organization, the other specialized agencies and the International Atomic Energy Agency to submit to the Commission, through the Secretary-General, a report on the above problems in relation to those human rights which fall within their competence; other intergovernmental organizations, especially regional organizations, to transmit to the Secretary-General their comments and observations on these problems; and the non-governmental organizations in consultative status with the Economic and Social Council to transmit any communications they considered relevant to these problems.

12. The Commission further requested the Secretary-General, bearing in mind the information received from Governments and in the light of the discussions at the Commission's twenty-seventh session to supplement his studies so as to present a balanced picture of all basic problems arising in connexion with the exercise of

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human rights and fundamental freedoms in conditions of scientific and technological progress; and to submit to the Commission one or more reports, in fields where sufficient documentation and studies were available, which could be used "as a basis for exploring the possibility of preparing international instruments designed to strengthen the protection of the human rights proclaimed in the Universal Declaration of Human Rights".

13. The present study was prepared by the Secretary-General in implementation of paragraph 1 (a) of General Assembly resolution 2450 (XXIII), keeping in mind Commission resolution 10 (XXVII).

14. Preparatory to undertaking the study the Secretary-General, on 25 April 1972, addressed a request to Governments of States Members of the United Nations or of the specialized agencies for information, particularly laws, draft laws, implementing regulations, court decisions and model codes relating to the various devices and techniques affecting the privacy of the individual, as well as information relating to the protection of the integrity and sovereignty of nations in the light of advances in recording and other techniques.

15. As of 31 December 1972, replies had been received from the following 34 Governments: Argentina, Austria, Bahrain, Barbados, Belgium, Bhutan, Brazil, Bulgaria, Canada, Cyprus, Denmark, Finland, Federal Republic of Germany, Greece, Guatemala, Holy See, Italy, Kuwait, Madagascar, Morocco, Nauru, Netherlands, Niger, Pakistan, Sierra Leone, Sweden, Switzerland, Togo, Trinidad and Tobago, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Arab Emirates, United Kingdom of Great Britain and Northern Ireland and United States of America.

16. An earlier request for information had been sent by the Secretary-General to Governments on 24 March 1969, in connexion with the preparation of the preliminary report. Replies, many of them containing information on the subject of the present study, were received from the following 29 Governments: Argentina, Australia, Austria, Barbados, Belgium, Byelorussian Soviet Socialist Republic, Canada, Costa Rica, Dahomey, Denmark, Finland, France, Federal Republic of Germany, Guyana, Italy, Japan, Laos, Malawi, Malta, Mauritius, Netherlands, Niger, Pakistan, Singapore, Somalia, Sweden, Switzerland, United Kingdom of Great Britain and Northern Ireland and United States of America.

17. On 24 June 1971, moreover, the Secretary-General forwarded to Governments the request of the Commission on Human Rights for information specified in resolution 10 (XXVII), as indicated in paragraphs 9 and 10 above. Replies were received from the following 20 Governments: Afghanistan, Australia, Austria, Barbados, Belgium, Byelorussian Soviet Socialist Republic, Egypt, Finland, Federal Republic of Germany, Ireland, Jordan, Kenya, Kuwait, Madagascar, Mexico, Nauru, Netherlands, Norway, Singapore and Switzerland. Some of these replies also related to the questions dealt with in the present study.

18. A total of 54 Governments thus replied to the requests for information sent out by the Secretary-General in connexion with the study on human rights and

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scientific and technological developments. Some 15 Governments stated that they had no information, studies or comments to forward.

19. Requests for information were also addressed to the specialized agencies, the regional intergovernmental organizations and certain other intergovernmental bodies and to a wide range of non-governmental organizations in consultative status with the Economic and Social Council, as well as to a number of national academies, institutions of learning and other institutions and individual scholars. Further material was collected by research.

20. As a result of these inquiries, as of 31 December 1972, information had been received from the following specialized agencies: International Atomic Energy Agency, International Labour Organisation, International Telecommunication Union, United Nations Educational, Scientific and Cultural Organization, Universal Postal Union and World Health Organization.

21. Information had, moreover, been received from the Council of Europe, the League of Arab States, the Organization of American States, the Organization for Economic Co-operation and Development and the International Criminal Police Organization.

22. Information was received from the following non-governmental organizations in consultative status with the Economic and Social Council: Category I: International Co-operative Alliance, International Council on Social Welfare, International Organization of Employers, International Union of Local Authorities; Category II: Carnegie Endowment for International Peace, Commission of the Churches on International Affairs, International Association of Democratic Lawyers, International Association of Lawyers, International Association of Youth Magistrates, International Astronautic Federation, International Catholic Child Bureau, International Catholic Movement for Intellectual and Cultural Affairs (Pax Romana), International Christian Union of Business Executives, International Commission of Jurists, International Conference of Catholic Charities, International Council of Scientific Unions, International Federation of Business and Professional Women, International Institute of Administrative Sciences, International League for the Rights of Man, International Planned Parenthood Federation, Soroptimist International Association, World Union of Catholic Women's Organizations; Roster: Battelle Memorial Institute, Council for International Organizations of Medical Sciences, International Commission on Radiological Protection, International Council for Philosophy and Humanistic Studies, International Council of Nurses, International Dental Federation, International Federation of Air Line Pilots Associations, International Federation of Senior Police Officers, International Federation of Surgical Colleges, International Leprosy Association, International Pharmaceutical Federation, International Police Association, International Sociological Association, International Union of Police Federations, World Federation of Scientific Workers, and World Medical Association.

23. Information was also received from a number of other organizations and institutes and from individual scholars.

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I. BRIEF STATEMENT OF QUESTIONS EXAMINED

24. For about two decades, steadily increasing concern has been expressed as to the feasibility of protecting the privacy of the individual in the light of rapid advances in recording and other techniques that make it relatively easy for a person to be heard and seen, to have his voice recorded and his picture filmed, without his being aware of it, both in public places and in places which he has reason to believe are secluded. These advances are due largely to developments in the field of electronics (in particular, the invention of transistor), optics and acoustics and the miniaturization of the devices developed, with new technological processes continually becoming available. Similar concern has been expressed about the technologically unrelated but contemporaneous development of the invasion of privacy by psychological and physical testing methods that are being utilized for non-medical purposes. It has also been suggested, however, that scientific and technological progress by itself does not threaten human rights; and that what is required in the present context is an analysis of the nature of the new inventions in question and the formulation of guarantees and procedures to ensure that their use will not violate the privacy of the individual. 3/

25. It should be noted at the outset that most of the new techniques employed in invading the privacy of the individual were not originally developed for that purpose but were by-products of research in other fields. 4/ This fact, and the fact that many of them have benign or beneficial uses, tend to add to the difficulty of, first, identifying and, secondly, controlling a host of new devices and techniques that continue to be developed and that may be used to invade the privacy of the individual.

26. The invasions of individual privacy which have been made possible by the newly-developed techniques are being divided for the purposes of the study being carried out in accordance with General Assembly resolution 2450 (XXIII) into three categories: auditory and visual invasions, psychological and physical invasions, and invasions by data surveillance. The present report, following the provisions of paragraph 1 (a) of that resolution, deals with auditory and visual invasions of privacy, covering, for example, the use of wire-taps, microphones, transmitters and tape-recorders, and telescopic lenses, candid cameras, two-way mirrors and closed-circuit television; and with psychological and physical invasions of privacy, covering such matters as the use for non-medical purposes of personality tests, "lie-detectors", narco-analysis, and blood and breath tests. The question of invasion of privacy by data surveillance will be dealt with in a subsequent paper to be prepared under paragraph 1 (c) of resolution 2450 (XXIII).

3/ Meeting of Experts on the Right to Privacy, UNESCO, Paris, 19-23 January 1970, final report (SHC/CONF.12/11), sect. D (8).

4/ See e.g., Alan F. Westin, Privacy and Freedom (New York, Atheneum, 1967), p. 367.

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II. INTERNATIONAL RECOGNITION OF THE RIGHT TO PRIVACY. THE SCOPE OF PRIVACY. OTHER RIGHTS AFFECTED BY INVASION OF PRIVACY. TRADITIONAL METHODS OF PROTECTING PRIVACY.

A. International recognition of the right to privacy

1. Action taken by the United Nations

27. The Universal Declaration of Human Rights provides in article 12:

"No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."

28. The International Covenant on Civil and Political Rights 5/ contains provisions (article 17) identical with the text quoted above, except that it speaks of arbitrary "or unlawful" interference and of "unlawful" attacks. Both of these provisions are drafted so as to cover interference and attacks by individuals as well as by governmental authorities. 6/

29. Article 12 of the Universal Declaration is, however, subject to the provisions of article 29 of that instrument, which reads in part:

"(2) 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.

5/ The International Covenants on Human Rights, consisting of the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and an Optional Protocol to the latter, were adopted by the General Assembly by resolution 2200 (XXI) of 16 December 1966. These instruments are not as yet in force, pending receipt of the necessary number of ratifications.

6/ It may be noted in this connexion that the annotations on the text of the draft International Covenants on Human Rights, prepared by the Secretary-General for the tenth session of the General Assembly, contain the following passage:

"Paragraph 1 of article 17... seeks to protect the individual against acts not only of public authorities, but also of private persons. The view was expressed in the Commission on Human Rights that the article should be confined to imposing restraints on governmental action and should not deal with acts of private individuals, which were a matter for municipal legislation. It was feared that the article as formulated might be construed as requiring changes to be made in existing rules of private law and this would raise considerable difficulties, particularly for countries with Anglo-Saxon legal traditions. On the other hand, it was pointed out that the article, which was couched in general terms, merely enunciated principles, leaving each State free to decide how those principles were to be put into effect." (Official Records of the General Assembly, Tenth Session, Annexes, agenda item 28 (part II), A/2929, chap. VI, para. 100.)

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"(3) These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations."

30. Article 17 of the International Covenant on Civil and Political Rights should be read in conjunction with article 5 of that Covenant, which reads:

"(1) Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.

"(2) There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent."

31. "In times of public emergency which threatens the life of the nation and the existence of which is officially proclaimed", Parties may, under article 4 of the Covenant, take measures derogating from certain of their obligations under the Covenant, including article 17,

"to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin." 1/

2. Regional action

32. The European Convention on Human Rights of 1950 states that everyone has the right to respect for his private and family life, home and correspondence (article 8 (1)). It specifies that there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others (article 8 (2)). 7/

7/ In 1970, the Consultative Assembly of the Council of Europe recommended that the Committee of Ministers instruct the Committee of Experts on Human Rights to make recommendations on the establishment of an agreed interpretation of article 8 (2) of the Convention, by means of a protocol or otherwise, so as to make it clear that the right to privacy is effectively protected against interference "not only by public authorities but also by private persons or the mass media" (Recommendation 582 (1970), para. 8 (e) (iii)).

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33. Moreover, in 1970, the Consultative Assembly of the Council of Europe adopted a Declaration on Mass Communication Media and Human Rights, which contains guidance of the mass media concerning respect for privacy. The relevant passages read as follows:

"B. Measures to secure responsibility of the press and other mass media

"It is the duty of the press and other mass media to discharge their functions with a sense of responsibility towards the community and towards the individual citizens. For this purpose, it is desirable to institute (where not already done):

(a) professional training for journalists under the responsibility of editors and journalists;

(b) a professional code of ethics for journalists; this should cover inter alia such matters as accurate and well balanced reporting, rectification of inaccurate information, clear distinction between reported information and comments, avoidance of calumny, respect for privacy, respect for the right to a fair trial as guaranteed by Article 6 of the European Convention on Human Rights;

(c) press councils empowered to investigate and even to censure instances of unprofessional conduct with a view to the exercising of self-control by the press itself.

"C. Measures to protect the individual against interference with his right to privacy

"1. There is an area in which the exercise of the right of freedom of information and freedom of expression may conflict with the right to privacy protected by Article 8 of the European Convention on Human Rights. The exercise of the former right must not be allowed to destroy the existence of the latter.

"2. The right to privacy consists essentially in the right to live one's own life with a minimum of interference. It concerns private, family and home life, physical and moral integrity, honour and reputation, avoidance of being placed in a false light, non-revelation of irrelevant and embarrassing facts, unauthorised publication of private photographs, protection against misuse of private communications, protection from disclosure of information given or received by the individual confidentially. Those who, by their own actions, have encouraged indiscreet revelations about which they complain later on, cannot avail themselves of the right to privacy.

"3. A particular problem arises as regards the privacy of persons in public life. The phrase 'where public life begins, private life ends' is inadequate to cover this situation. The private lives of public figures are entitled to protection, save where they may have an impact upon public events. The fact that an individual figures in the news does not deprive him of a right to a private life.

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"4. Another particular problem arises from attempts to obtain information by modern technical devices (wire-tapping, hidden microphones, the use of computers etc.), which infringe the right to privacy. Further consideration of this problem is required.

"Paragraph 5 relates to data banks"

"6. In order to counter these dangers, national law should provide a right of action enforceable at law against persons responsible for such infringements of the right to privacy.

"7. The right to privacy afforded by Article 8 of the Convention on Human Rights should not only protect an individual against interference by public authorities, but also against interference by private persons or institutions, including the mass media. National legislations should comprise provisions guaranteeing this protection."

34. The American Convention of Human Rights 8/ provides that no one may be the object of arbitrary or abusive interference with his private life, his family, home or correspondence, or of unlawful attacks on his honour or reputation; and that everyone has the right to the protection of the law against such interference or attacks (article 11 (2) and (3)).

B. The scope of privacy

35. While the international community as represented by the United Nations has recognized and proclaimed that no one shall be subjected to arbitrary interference with his privacy, it has not attempted either to establish a concise international definition of privacy or to spell out in detail the components which make up the right to privacy.

36. Nor is it the purpose of this paper to elaborate such definitions. Nevertheless, the very existence of an internationally-recognized right to privacy presupposes agreement that there are certain areas of the individual's life that are outside the concern of either governmental authorities or the general public, areas which may vary in size from country to country but which do possess a common central core. The Committee of Experts on Human Rights of the Council of Europe has concluded that there is no generally accepted definition of private life in either international or national legislation, jurisprudence or practice, or in legal writings; but that, nevertheless, there exists a consensus on certain of the elements which are, or should be, part of private life (E/CN.4/1089/Add.1, section V (a)).

8/ Adopted on 22 November 1969 by the Inter-American Specialized Conference on Human Rights, held at San José, Costa Rica; not yet in force, pending receipt of the required number of ratifications or accessions.

37. At the national level, various aspects of privacy have, in effect, been enjoying the protection of the law for some time, to a greater or lesser extent, without a specific right to privacy or a definition of privacy appearing on the statute books. Some of the traditional measures which have served to afford a degree of protection for the privacy of the individual are referred to in paragraphs 53-74 below. They include measures limiting access by strangers to a person's dwelling, protecting the secrecy of correspondence and safeguarding a person's right to his own likeness.

38. In some Civil Law systems, privacy is considered to form part of the "rights of the personality".

39. In the words of the Federal Council of Switzerland:

"The right to protection of the part of a person's life which is personal and secret is an expression of the conviction that the individual cannot develop his personality unless he is assured of protection from interference with his private life, by the State or by other persons. This is among the rights which, in a liberal juridical order, are recognized as the rights to which every individual is entitled by the very act of being a person. The protection of these rights is one of the duties of the State, based on law." 9/

40. The concept of "protection of the personality" appears also in articles 11-16 of the Czechoslovak Civil Code, Act No. 40/1964 of the Collection of Laws. 10/

41. Other legal systems, again without providing for a specific statutory right to "privacy" as such, are considered to have taken over a concept of the common law of England which has been summarized as securing to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments and emotions shall be communicated to others 11/ and have provided some safeguards and remedies accordingly. Studies of privacy made in Canada, the United Kingdom and the United States frequently refer to the right "to be let alone", mentioned in the United States by Judge Thomas Cooley in his treatise on torts, published in 1879; and quote Justice Brandeis of the United States Supreme Court, who in 1928 stated with regard to privacy vis-à-vis governmental authorities:

9/ "Message du Conseil fédéral à l'assemblée fédérale concernant le renforcement de la protection pénale du domaine personnel secret (du 21 février 1968)"; forwarded by the Government of Switzerland on 9 June 1972 (hereafter cited as "Switzerland, Message").

10/ See Yearbook on Human Rights for 1964, p. 91.

11/ Cf. Samuel D. Warren and Louis D. Brandeis, "The right to privacy", Harvard Law Review, vol. IV, No. 5 (1890), p. 193.

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"The makers of our Constitution 12/... sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred as against the Government, the right to be let alone - the most comprehensive of the rights of man and the right most valued by civilized men." 13/

42. A report on privacy prepared for the Government of the Canadian Province of Ontario points out that privacy is considered, on the one hand, a basic human psychological and physiological need and, on the other hand a "socio-political" claim, in the sense that certain beliefs, attitudes and activities may not be made the subject of compulsion, involuntary disclosure or surveillance either by the Government or by the community in a democratic society. 14/

43. In all of these systems it is accepted that there are some spheres in every person's life that should not normally be subject, without the permission of the person concerned, to scrutiny by other parties, be they private individuals or groups, or governmental authorities.

In the words of a French judge, "the sphere of anyone's private life is sometimes rather difficult to define, but that sphere certainly embraces everything that concerns his love life, his family life, his resources and the non-public aspects of his professional life and his leisure; conversely, what is generally outside the sphere of an individual's private life is that part of his life which is necessarily lived in the public eye and his participation in the public life of his city." 15/

44. In recent years, in view of the increasing ease with which the privacy of the individual may be violated with the help of new devices and techniques, attempts have been made to define privacy, primarily for the purpose of protective legislation, although, according to the information available to the Secretary-General, such over-all definitions have not as yet been actually enacted into law. Where such attempts at definition were made, two different approaches have been taken.

12/ The Constitution of the United States does not itself mention "privacy", but the courts in that country have recognized the right to privacy in rulings in a variety of cases, on the basis of other constitutional provisions.

13/ Olmstead v. United States, 277 U. S. 438 at p. 478, dissent of Justice Brandeis, quoted here from The Wiretapping Problem Today rev. ed. (New York, American Civil Liberties Union, 1968), p. 7. Information forwarded by the International League for the Rights of Man on 15 May 1969.

14/ Report on Protection of Privacy in Ontario (Ontario Law Reform Commission, Department of the Attorney-General, 1968), pp. 1-2.

15/ Roger Nerson, "Jurisprudence française en matière de droit civil", Revue trimestrielle de Droit civil, 1971 (obs. No. 1 and 2, p. 364), citing a court order issued by the juge des référés du tribunal de grande instance at Grasse on 27 February 1971 and Juris Classeur Périodique 1971.2.16734, obs. Raymond Lindon.

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45. One has been to prepare a detailed, comprehensive definition of the right to privacy that would ban specific acts, among them the use of modern techniques of intrusion. Such an approach was taken by the 1967 Nordic Conference on the Right to Privacy. The conclusions adopted by that Conference recommended that the right to privacy be recognized as "a fundamental right of mankind," protecting the individual against intrusions by "public authorities, the public in general and other individuals". They defined the right to privacy as "the right to be let alone to live one's own life with the minimum degree of interference". In expanded form, it was specified, this meant:

"The right of the individual to lead his own life protected against:
(a) interference with his private, family and home life; (b) interference with his physical or mental integrity or his moral or intellectual freedom;
(c) attacks on his honour and reputation; (d) being placed in a false light;
(e) the disclosure of irrelevant embarrassing facts relating to his private life; (f) the use of his name, identity or likeness; (g) spying, prying, watching and besetting; (h) interference with his correspondence; (i) misuse of his private communications, written or oral; (j) disclosure of information given or received by him in circumstances of professional confidence." 16/

46. The conclusions listed specific acts which the above definition was intended to cover (see below, para. 151). Limitations of the right were also set forth.

47. The other approach has been to define privacy in brief, general terms only and to render punishable actions that are deemed to violate the privacy of the individual. One example of this approach was a bill laid before the House of Commons of the United Kingdom in 1967, 17/ which was not however, adopted. It would have defined the "right to privacy" as "the right of any person to preserve the seclusion of himself, his family or his property from any other person", and would have given any person who had been subject to any "serious and unreasonable infringement of his right of privacy" a course of action against the offender (while enumerating exemptions from the liability provision).

48. Essential components of the right to privacy were included in the Declaration on Mass Communication Media and Human Rights adopted in 1970 by the Consultative Assembly of the Council of Europe (see para. 33, above). This description or definition, based to some extent upon the above-mentioned conclusions of the Nordic Conference on the Right to Privacy, was, however, meant for the guidance of journalists rather than for litigation purposes.

16/ Conclusions, Nordic Conference on the Right to Privacy, Stockholm, 22-23 May 1967, part I.

17/ Bill 181 of 8 February 1967, "A Bill to Protect a Person from any Unreasonable and Serious Interference with His Seclusion of Himself, His Family or His Property from the Public", forwarded by the National Council for Civil Liberties, United Kingdom, on 20 May 1969.

49. The comment is sometimes made that in some areas of the world the sphere of privacy should be understood as pertaining not to the individual but to the family or the tribe. ^{18/} Even where such conditions prevail, that is to say, where all members of the extended family or tribe live in a closed unit, the sphere of privacy would, however, still operate against intrusion from outside the extended family or tribe.

C. Other rights affected by invasion of privacy

50. There is a recognizable reciprocal relationship between respect for the privacy of the individual on the one hand and the protection of certain other human rights on the other hand, the effect being one of mutual reinforcement. This interaction is not new but has been receiving renewed attention lately in view of the increased opportunities for violations of privacy afforded by recent scientific and technological developments.

51. Among the rights which may be affected by invasion of privacy is the right of everyone to freedom of opinion and expression, proclaimed in article 19 of the Universal Declaration of Human Rights and dealt with in article 19 of the International Covenant on Civil and Political Rights; to freedom of thought, conscience and religion (article 18 of the Universal Declaration and article 18 of the Covenant); and to a fair and public hearing in the determination of the individual's rights and obligations and of any criminal charge against him, including various rights of the defendants in penal proceedings (articles 10 and 11 of the Universal Declaration and articles 14 and 15 of the Covenant). ^{19/} Questions are being asked such as whether invasion of privacy by means of listening and recording devices or of certain psychological and physical tests in connexion with penal proceedings do not, in fact, lead to violations of existing guarantees against self-incrimination, an aspect of the right to a fair hearing, and connected procedural guarantees dealt with in the above-mentioned provisions of the Universal Declaration and the International Covenant on Civil and Political Rights; article 14 (3) of the latter requires that in the determination of any criminal charge against him, everyone shall be entitled to certain minimum guarantees, including "(g) not to be compelled to testify against himself or to confess guilt". ^{20/} Infringements upon privacy by modern methods of auditory and visual surveillance may also, under certain circumstances, violate guarantees against arbitrary interference with the family; with the home, including existing requirements in some countries for judicial warrants or other authorization before

^{18/} E.g., communication forwarded by UNESCO on 10 June 1970.

^{19/} E.g., communications dated 8 March 1972 from the Government of Austria, and 11 April 1970 from the League of Arab States.

^{20/} E.g., communication dated 11 April 1970 from League of Arab States; also Stanley M. Beck, "Electronic surveillance and the administration of justice", Canadian Bar Review, vol. XLVI (1968), p. 666 and foot-note 147.

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governmental agents may enter a dwelling to search it and to seize specified objects; with the secrecy of correspondence, in particular through the tapping of telephone conversations; and with guarantees against attacks on one's honour and reputation (article 12 of the Universal Declaration and article 17 of the Covenant). 21/

52. The connexion existing between the enjoyment of privacy and of other human rights has been summarized as follows:

Wholesale invasions of privacy inhibit liberty, often purposely. This is particularly true of surreptitious invasions, like electronic eavesdropping, spies, informers, entrappers, and psychological testing; of the existence of which the subject is often unaware until too late. The community becomes fear-ridden, and no one can be trusted, whether he be family, friend or associate; indeed, a person may be led to continual distrust of himself, as his efforts at individual self-fulfilment conflict with the norms of authority. This destruction of trust is one of the major dangers to a free society. A pervasive mistrust of others impairs freedom of assembly, for men fearful of spies and informers, human or mechanical, are loath to join together meaningfully. And a man's awareness that others lack faith in him seriously weakens his chance for self-fulfilment, for few men can develop adequately without the confidence of others. Thus, the detailed questionnaire for employment, housing, insurance and other matters, the hidden but suspected cameras in the washroom, the psychological tests, the lie detector and truth serum - all of these devices for ferreting out intimate and often unconscious details of our lives, produce a pervasive insecurity which suppresses individuality, discourages responsibility and encourages frightened conformity.

The above touches only some of the interests protected by the right of privacy. Equally important to the quality of human life are the intimacies which are too precious to disclose to a prurient, nosy or disapproving public. 22/

21/ Communications dated 8 March 1972 from the Government of Austria and 11 April 1970 from the League of Arab States; also Stig Stromholm, "Right of privacy and rights of the personality, a comparative survey", Acta Instituti Upsaliensis Iurisprudentiae Comparativae, VIII (Stockholm, P. A. Norstedt, 1967), pp. 88-97, as regards entry and search of premises; and communication dated 5 August 1969 from Government of the Netherlands as regards monitoring of telephone conversations. The communication of 11 April 1970 from the League of Arab States also refers, as regards protection of the family, to the provisions of the International Covenant on Economic, Social and Cultural Rights (art. 10 (1)).

22/ Sub-Committee on Administrative Practices and Procedures of the United States Senate Judiciary Committee, testimony of the American Civil Liberties Union, 20 April 1967, concerning a bill on the right to privacy (S. 928), information forwarded by the International League for the Rights of Man on 15 May 1969.

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D. Traditional methods tending to protect privacy

53. As mentioned above, at the national level various aspects of privacy have been enjoying the protection of the law for some time, without a separate right to privacy appearing on the statute books. Broadly speaking, these are aspects which are connected with the various other rights that are affected by invasions of privacy. In general the laws in question have not contemplated the threats posed by modern surveillance devices.

54. Traditional methods which have had the effect of protecting, to some extent, the privacy of the individual include constitutional, judicial and legislative provisions safeguarding the inviolability of the home, i. e., limiting access by strangers to a person's dwelling; protecting against arbitrary searches and seizures; safeguarding the secrecy of correspondence; guaranteeing the accused certain rights in penal matters; limiting the unauthorized use of a person's likeness; and providing some protection against attacks upon honour or reputation. Some of these traditional measures provide protection against intrusions by governmental authorities, some against intrusions by private individuals or groups, and some against both; in some countries remedies are also available against individual governmental agents acting in an unlawful manner. In practice, the effectiveness of these various measures in protecting privacy may vary, quite apart from the substantive scope of such provisions.

55. The following are some examples of traditional provisions relating to the inviolability of the home, protection against searches and seizures, and the secrecy of correspondence, contained in eighteenth and nineteenth-century constitutions still in force:

- (i) "The private domicile is inviolable; no search of premises can take place except in cases provided for by law and according to the form therein prescribed... The privacy of correspondence is inviolable. The law shall determine who are the agents responsible for the violation of the secrecy of letters entrusted to the post" (Constitution of Belgium of 7 February 1831, articles 10 and 22). 23/
- (ii) "House searches shall not take place except in criminal cases" (Constitution of Norway of 17 May 1814, article 102). 24/
- (iii) "The King... shall not disturb or allow to be disturbed the peace of any person in his home" (Constitution of Sweden of 6 June 1809, article 16). 25/

23/ Yearbook on Human Rights for 1946, p. 36.

24/ Yearbook on Human Rights for 1948, p. 168.

25/ Text forwarded by the Government of Sweden on 8 June 1972.

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- (iv) "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized" (Constitution of the United States of America of 1789, Fourth Amendment). 26/

56. Twentieth-century constitutions, including constitutions of newly-independent States, also contain provisions relating to these rights:

- (i) "Inviolability of the home, the privacy of the mails and all other forms of communication, as well as freedom of domicile, shall be guaranteed" (Constitution of the Czechoslovak Socialist Republic of 11 July 1960, article 31). 27/
- (ii) "The home shall be inviolable.
"The secrecy of correspondence shall be guaranteed by order"
(Constitution of Dahomey of 7 May 1970 (Charter of the Presidential Council), articles 7 and 8). 28/
- (iii) "(1) Except with his own consent, no person shall be subjected to the search of his person or his property or the entry by others on his premises.

"(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision:

"(a) that is reasonably required in the interests of defence, public safety, public order, public morality, public health, town and country planning, the development and utilization of mineral resources, or the development or utilization of any property for a purpose beneficial to the community;

"(b) that is reasonably required for the purpose of protecting the rights or freedoms of other persons;

"(c) that authorizes an officer or agent of the Government..., a local government authority or a body corporate established by law for public purposes to enter on the premises of any person in order to inspect those premises or anything thereon for the purpose of any tax, rate or due or in order to carry out work connected with any property that is lawfully on those premises and that belongs to that Government, authority or body corporate, as the case may be; or

26/ Text forwarded by the Government of the United States of America on 5 July 1972.

27/ Yearbook on Human Rights for 1960, p. 88.

28/ To appear in Yearbook on Human Rights for 1970.

"(d) that authorizes, for the purpose of enforcing the judgement or order of a court in any civil proceedings, the search of any person or property by order of a court or entry upon any premises by such order,

"and except so far as the provision or, as the case may be, anything done under the authority thereof is shown not to be reasonably justifiable in a democratic society" (Constitution of Gambia of 24 April 1970, article 19). 29/

- (iv) "Whereas every person... is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, tribe, place of origin or residence or other local connexion, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely:

...

"(c) Protection for the privacy of his home and other property...

the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest" (Constitution of Kenya of 1969, article 70). 30/

- (v) "No person, his family, domicile, papers, or possessions may be molested except by virtue of a written order by a competent authority establishing and supporting the legal basis of the proceeding.... Every search warrant, which may be issued only by judicial authority and always in writing, shall state the place to be inspected, the person or persons to be apprehended, and the objects to be sought, to which the search should be exclusively limited, and upon the conclusion of said search a circumstantial report shall be drawn up in the presence of two witnesses proposed by the occupant of the place searched, or, in his absence or at his refusal, by the officer making the investigation.

"Administrative officials may enter domiciles only to assure themselves that sanitary and police regulations have been complied with; and to require the exhibition of books and papers necessary to prove that fiscal

29/ To be issued in Yearbook on Human Rights for 1970.

30/ Yearbook on Human Rights for 1969, p. 141.

regulations have been respected, subject in these cases to the respective laws and to the formalities prescribed for searches" (Constitution of Mexico of 5 February 1917, article 16), 31/

- (vi) "Inviolability of the home and secrecy of correspondence are guaranteed, save in the exceptional cases prescribed by law" (Constitution of the Republic of Tunisia of 1 June 1959, article 9). 32/
- (vii) "The inviolability of the home of citizens and privacy of correspondence are protected by law" (Constitution (Fundamental Law) of the USSR of 5 December 1936, article 128). 33/

57. In addition to requirements for warrants as regards entry, and searches and seizures by governmental agents, the home - and the privacy of the individual in his home - have traditionally received protection from provisions which make entry into a dwelling subject to the consent of the person living there. Such protective provisions are contained in legislation making illegal entry a punishable offence and in provisions of the common law relating to trespass.

58. The point has been made that the protection afforded by the law of trespass has been somewhat eroded by legislation which bestows the right to entry, for specific purposes, upon a variety of officials such as "the police, gas inspectors... and medical officers of health". 34/

59. The secrecy of correspondence, and thus the individual's privacy, has traditionally received additional protection from provisions such as those contained in the Norwegian Penal Code, which lay down penalties of fine or imprisonment for persons who unlawfully open "a letter or other closed document" or break "into another's locked depository", or are accessories to such acts. Where injury is caused through the "unauthorized knowledge" acquired by such acts, or the offence is committed for the purpose of unlawful gain, imprisonment may be for up to two years. Public prosecution is, however, initiated only upon request of the victim (article 145). The law similarly provides penalties for unlawfully causing failure of a written message to be delivered or to reach the addressee on time (article 146). 35/

60. With the development of the telegraph and the telephone, the question arose whether constitutional provisions protecting the secrecy of correspondence automatically covered newer ways of correspondence, carried on by telecommunication

31/ Yearbook on Human Rights for 1946, p. 191.

32/ Yearbook on Human Rights for 1959, p. 284.

33/ Yearbook on Human Rights for 1947, p. 309.

34/ Cf. Price of Privacy: Majority Report of the Privacy Committee of the Society of Conservative Lawyers (London, 1971), (sent to the Younger Committee on Privacy), p. 9.

35/ Information forwarded by Government of Norway on 7 September 1972.

rather than by letter. 36/ This question was solved in different ways by different countries, some of the more recent constitutions specifically mentioning telephonic or telegraphic messages in the following manner:

- (i) "The secrecy of correspondence and of telephone conversations shall be guaranteed" (Constitution of the Socialist Republic of Romania of 1965, article 33). 37/
- (ii) "Freedom and privacy of postal, telegraphic and other correspondence are guaranteed in accordance with the law" (Provisional Constitution of the United Arab Emirates of 28 July 1971/25 shamad 1391 Hej, article 31). 38/

61. In any case, most countries have enacted telecommunication laws, many if not most of which include a prohibition against interception or disclosure of messages passing over telegraph or telephone wires. In some jurisdictions allowance is made for interception and disclosure by governmental authority in certain cases. Such provisions vary greatly in scope.

62. An example of telecommunication legislation is a law enacted in Belgium in 1930 providing for a penalty of imprisonment from eight days to one month, a fine, or both, for anyone who conceals a telegram entrusted to the Telegraph and Telephone Administration, or opens it or seizes it with a view to acquiring wrongfully knowledge of its contents, or who uses means ("aura employé un moyen") of overhearing messages passing over the public telegraph or telephone lines. Somewhat heavier penalties apply where the offence is committed by an agent of the Government. Penalties of imprisonment from two weeks to six months plus a fine are provided where information thus obtained is disclosed, exception being made for court proceedings and for disclosure mandated by law. Where the offences are committed according to orders issued by a hierarchical superior acting within his domain, the penalties are applicable only to the superior (Belgian law of 13 October 1930, co-ordinating legislative provisions relating to wire telegraph and telephone service). 39/

63. Legislation originally enacted in 1885 makes it a criminal offence punishable by imprisonment for up to three years and a fine for anyone in Pakistan to

36/ The Government of the Netherlands, in its communication of 5 August 1969, raised the question of whether article 12 of the Universal Declaration on Human Rights and article 8 of the European Convention on Human Rights (both of which refer to "correspondence") cover the secrecy of telephone conversations.

37/ Yearbook on Human Rights for 1965, p. 241.

38/ Text forwarded by the Government of the United Arab Emirates on 30 May 1972.

39/ Text communicated by the Government of Belgium on 13 July 1972. Cf. also Ordinance No. 60-159 of 3 October 1960, information forwarded by the Government of Madagascar on 28 June 1972; Act V of 1961 on the Penal Code of the Hungarian People's Republic, Yearbook on Human Rights for 1961, p. 165.

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intercept or to acquaint himself with the contents of a message destined for another person or to disclose the contents to a person not entitled to receive it; provision being made, however, for interception, detention or disclosure of such messages by governmental authorities during periods of national emergency or in the interest of "public safety and tranquillity". 40/

64. Many countries have penal provisions directed specifically against violations of the secrecy of correspondence by employees of the postal and telegraph services, though in some countries the employees' obligation to maintain secrecy is subject to exceptions specified by law. 41/

65. A law of 1967 amending the Penal Code of Monaco contains the following provision:

"The privacy of the mails shall be deemed to have been violated if their contents have been discovered by any means whatsoever or if an attempt has been made to discover or divulge the name of the sender or addressee." 42/

66. A number of constitutions contain provisions guaranteeing that no person shall be compelled in any criminal case "to be a witness against himself". 43/ Other provisions, not necessarily embodied in the constitution, exist in a number of countries, recognizing in effect the right of the accused to remain silent and often requiring his being warned that if he chooses to speak, any statement he makes may be taken as evidence against him. 44/ Provisions of this kind have acquired a new significance in the light of modern recording techniques.

67. The question of the protection of privacy, which had long been of importance in connexion with eavesdropping, unauthorized entry or interference with the secrecy of the mails (whether on behalf of governmental authorities or private individuals) acquired a new dimension with the development of inexpensive photographic processes and - of cameras able to take pictures of moving objects.

40/ Telegraph Act of 1885, sections 25 and 26. Information forwarded by the Government of Pakistan on 6 September 1972.

41/ Madagascar, Postal and Telecommunications Code, Ordinance No. 60-159 of 3 October 1960, article 96; information forwarded by the Government of Madagascar on 25 January 1972; Greece, Penal Code, articles 249-250, information forwarded by the Government of Greece on 12 July 1972; Austria, Telecommunications Act, article 19 (1) (a) and (b), (3), and (4), information forwarded by the Government of Austria on 16 October 1972; Czechoslovakia, Law of 5 June 1964 on Telecommunication, section VIII, article 20, Yearbook on Human Rights for 1964, p. 94.

42/ Act. No. 829 of 28 September 1967 amending the Criminal Code, article 342; text in Yearbook on Human Rights for 1967, p. 244.

43/ E.g., Constitution of the United States of America, Fifth Amendment, Yearbook on Human Rights for 1946, p. 322; Constitution of India of 26 November 1949, article 20 (3), Yearbook on Human Rights for 1949, p. 101; Constitution of Nepal of 16 December 1962, article 11 (5), Yearbook on Human Rights for 1962, p. 206.

44/ Cf. Study of the Right of Everyone to be free from Arbitrary Arrest, Detention and Exile (United Nations Publication Sales No.: 65.XIV.2), para. 373.

The elimination of the need to have the subject "pose" made it possible to take his picture without his consent and even without his knowledge. Large-scale duplication of pictures also became feasible.

68. In many countries a body of legislation and adjudication has grown up in response to this situation, pertaining to the utilization (rather more than to the making) of personal likeness, more particularly by the press and in advertising. ^{45/} The right protected in this connexion was often referred to as the "right to one's own likeness".

69. Privacy has also been safeguarded, if to a limited extent, by legislation protecting the individual's honour and reputation. Such legislation, the scope of which has varied greatly from one country to the next, has basically enabled an aggrieved person to bring suit in court in matters involving libel, slander, attacks on his honour, etc., and to demand some kind of monetary compensation. In many countries this remedy has been restricted, however, to cases where the statement in question is untrue and results in financial loss to the person affected, thus leaving the individual defenceless against statements which, though not untrue, grossly violates his privacy.

70. In some legal systems, however, the publication of discreditable facts concerning private and family life may under certain circumstances be subject to penalties even if true. ^{46/} In the Austrian legal system, for example, such acts may be considered as "injuries to honour", which are punished as petty misdemeanours by arrest from one week to three months or, if committed in print, from one to six months. Persons who attempt to disseminate such statements are subject to the same penalties as the person with whom they originated.

^{45/} Cf. article 12 of the Czechoslovak Civil Code, Act No. 40/1964 of the Collection of Laws; article 83 (2) of Act. No. IV of 1959 (Civil Code) of Hungary (Yearbook on Human Rights for 1959, p. 131); Karel Knap, "Ochrana podoby v československém občanském právu" (Protection of a person's likeness in Czechoslovak civil law), Právní Obzor (Bratislava), vol. LII, No. 2 (1969), pp. 122-134; and Roger Nerson, obs. No. 1, cp. cit., pp. 110-112; Karel Knap, "Ochrana osobnosti. Nové občanské právo" (Protection of the personality. New Civil Law), Orbis, Prague 1965, pp. 55-57; Stefan Luby, "Ochrana osobnosti občana v návrhu občianskono zákonníka" (The Protection of the personality of the citizen in the draft of the civil code), Právní Obzor, Bratislava, vol. XLVI, No. 2, 1963, pp. 68-82.

^{46/} E.g., Austrian Penal Code, articles 489 and 493. Cf. W.P. Pahr, "La situation juridique en Autriche en matière de protection de la vie privée", working paper (WP/6) submitted to the United Nations seminar on human rights and scientific and technological developments held in Vienna, Austria, 19 June to 1 July 1972.

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71. Finally, some protection of the individual's right to privacy may be provided by civil law provisions - existing, with certain variations, in many countries - according to which a person who suffers "an attack on his personal interests may bring suits for damages to repair the moral harm caused, to stop the attack and both to stop the attack and to establish its illiciters". 47/

72. An example of such a provision may be found in article 1382 of the French Civil Code, which provides:

"Any individual who is responsible for committing an act which causes harm to others is under the obligation to repair the harm he has done."

73. Under the provisions of this article, French courts have dealt with matters involving the protection of privacy and have not only accorded monetary indemnities but, where such a step was possible, ordered measures to be taken with a view to repairing the harm done ("mesure réparatrice appropriée au dommage subi"). The cases referred to in the literature available deal with invasions of privacy by the mass media by such means as the unauthorized publication of certain photographs or purported memoirs, and the measures ordered by the courts have included such steps as the seizure of the offending issue of the newspaper in question. 48/

74. An example of a somewhat different kind may be found in Madagascar law, which provides:

"No one who commits an act causing damage without making any physical attack on persons or property can be held responsible for that act unless he has committed an offence.

"This is so, for instance, in the case of attacks on the right of personality..." 49/

47/ Cf., e.g., Switzerland, Message.

48/ Cf. Roger Nerson, op. cit. obs. No. 1, pp. 110-111.

49/ Article 217 of "la théorie générale des obligations", information forwarded by the Government of Madagascar on 25 January 1972.

III. IMPACT ON THE PRIVACY OF THE INDIVIDUAL OF RECENT SCIENTIFIC AND TECHNOLOGICAL DEVELOPMENTS IN THE FIELD OF AUDITORY AND VISUAL SURVEILLANCE

A. Nature of the new devices and methods available

75. In order to gain a clearer picture of the technical and legal questions involved in the utilization of the new means of auditory and visual surveillance, it is essential to consider first the nature of the new devices which have become available. Surveys of such devices may be found in the reports of various governmental and government-sponsored bodies that have been dealing with the question of protecting privacy, ^{50/} in books published in recent years by scholars and non-governmental organizations, in accounts contained in the periodical literature and the daily newspapers, ranging from scholarly journals to the popular press, and even in newspaper advertisements (see below paras. 133-175). No list of such devices can be complete, however, due both to the great variety of existing techniques and to the continuing development of improved or new devices. The present description is therefore merely intended to convey an idea of the principal techniques available.

76. The devices may be divided into auditory and visual. Some of each type perceive, while others both perceive and record. Modern technology moreover permits simultaneous auditory and visual surveillance.

1. Devices for auditory surveillance

77. One of the oldest among the modern methods of auditory surveillance is the wire-tap. Long before the Second World War, phones were tapped by means of direct cuts into telephone wires and splices into a set of earphones, which permitted eavesdroppers to overhear both sides of telephone conversations. Such "direct taps" could take place anywhere between the voice piece of the telephone and the main telephone exchange. They interfered sometimes with clear transmission, however, and were subject to discovery by physical inspection. ^{51/}

^{50/} See, e.g., Switzerland, Message; Skydd mot avlyssning (Protection against eavesdropping), Betänkande av integritets sskyddskommittén, Statens offentliga utredningar, 1970:47, Justitie-departamentet (Stockholm, 1970), pp. 22-33, forwarded by the Government of Sweden on 8 June 1972, hereafter referred to as "Sweden, Skydd mot avlyssning"; the Danish Straffelovradets betaenkning om privatlivets fred, Betaenkning No. 601 (1971), (hereafter referred to as "Denmark, Privatlivets fred"), pp. 12-15, and the United Kingdom Report of the Committee on Privacy, Chairman: The Rt. Hon. Kenneth Younger, Cmnd. 5012 (London, HMSO, 1972), hereafter referred to as "United Kingdom, Younger Report", pp. 154-156.

^{51/} Alan F. Westin, Privacy and Freedom (New York, Atheneum, 1967), p. 77.

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78. The major innovation in wire-tapping before 1941, and still the leading technique, uses the induction coil. By this technique an induction coil is placed a few feet from the telephone or near its various connecting wires at any point before it is mixed with other lines. This requires no cutting or breaking into the telephone wires or equipment. The coil, being in the magnetic field carrying the voice signal, draws off a very small amount of that signal and carries it to a receiver that permits listening to or recording of conversations. 52/

79. In addition to their use as "planted" devices, induction coils can also be used as portable devices when kept in a pocket and wired to a pocket recorder. In this way calls have been tapped by "investigators sitting in waiting rooms outside business, law, and government offices, from rooms adjoining those of hotel guests, and even from the street outside a building when a phone is near the sidewalk". 53/

80. Techniques are being developed in several countries which make it possible to identify persons speaking on the telephone without reference to the contents of the conversation. An advertisement by a telephone company in a weekly magazine, entitled "A warning to people who make obscene phone calls", refers to work being done on the "voice print", described as an electronic picture of the human voice. 54/ While in the case in question the techniques are being used to protect telephone subscribers from abuses, their potential use is not limited to that purpose.

81. Microphones may be used for monitoring ordinary conversations, not carried over telephone wires.

82. Some of these microphones require external wire connexion to their source of power, others work on internal batteries. Some have to be introduced into the premises where the conversation takes place, others are able to monitor from outside. Examples of various types of microphones are listed below.

83. A simple microphone requires positioning on the premises in question, where it may be secretly left, connected by wire to a loudspeaker over which the conversations taking place may be heard outside the premises. 55/ There exist microphones that

52/ Ibid., p. 78.

53/ Ibid., p. 78.

54/ Life (New York), 1 May 1970, p. 14.

55/ F. Vangeenberghe, "Le droit au respect de la vie privée est-il menacé par les réalisations scientifiques et technologiques modernes?", Human Rights Journal, vol. III, No. 1 (Paris) January 1970, p. 8.

"through micro-miniaturization have been reduced to the size of a match-head. The transmission range is from 300 feet to more than a quarter of a mile. These tiny mikes can be placed inside a telephone, a flower pot, a picture frame or in any other object in the room. A common practice is to tape them to the underside of furniture. No wires are required for the FM microphones which have a built-in battery-operated radio transmitter. They can give a constant transmission for five days with a one and one-half ounce battery." 56/

84. Small devices exist which can be worn on the person. For example, magnetic microphones are on the market weighing about 5 grams, which may be hidden behind the lapels of a suit jacket. The diameter of the mouth-piece, visible in the buttonhole, measures 9 millimetres. It may be connected to a pocket tape-recorder or to a miniature transmitter. This device and variations working on the same general principle (such as cufflinks and fountain pens containing microphones) are said to be used by many journalists. 57/

85. Some types of microphones do not need to be placed inside the premises in which the conversation takes place. Directional microphones, for instance, are able to pick up sounds from the outside through any openings in a room, such as open windows. They may also be used to listen to conversations held outdoors, for example on park benches or in fields, hundreds of feet away. 58/ Some directional microphones are, moreover, able to monitor sounds through closed windows. They have a range of 40 to 50 metres. 59/

86. Another type of microphone which does not require trespassing on the premises concerned is the contact microphone. This device, which may be the size of a lima bean, can be attached to the outside of the wall of a room. When sound waves set up by speech strike the wall, it picks up enough of the vibration to permit accurate recording. Where the walls are too thick, a variation on the contact microphone, a "spike-mike" may be used. The vibrations in that case are transmitted through "spikes" the size of a small nail to contact microphones and then recorded. 60/

56/ Stanley M. Beck, "Electronic surveillance and the administration of criminal justice", Canadian Bar Review, vol. XLVI (1968), p. 651, citing Report of the Commission of Inquiry into the Invasion of Privacy (1967), pp. 30-31, n. 9, prepared by R. A. Sargent for the Government of the Province of British Columbia.

57/ Vangeenberghe, op. cit.

58/ Westin, Privacy and Freedom, p. 76.

59/ Vangeenberghe, op. cit.

60/ Beck, op. cit., p. 652.

/...

87. Another instrument for recording speech from a closed room is a "device that uses a reflector made of a thin diaphragm and a microwave antenna. The device is activated by a microwave beam that goes through solid walls and has a range of a city block. When activated it sends the vibrations in the room to an outside receiver and the conversation is recorded." 61/

88. "Micro-balles", i.e., microphone bullets, may be shot at windows by a special rifle, to catch the sound of speech from outside the window. 62/

89. A technique for taking sound out of rooms uses laser microphones. One such device, portable, sends out an invisible infra-red beam, which may travel for miles before reaching the target room. The returning beam having been modulated by the sound waves in the room, a photo amplifier at the listening post makes it possible to transform the returning light into sound. 63/

90. Tape recorders have been miniaturized and transistorized and are capable of recording for several hours without any need for changing the reel. Some tape recorders are self-activated by sound and stop of themselves when silence returns. Such devices may, for example, be built into briefcases. 64/

91. It has also been reported that a dentist, while filling a tooth cavity, may insert there a "miniature microphone capable of transmitting every word spoken by the person concerned during the day", or a "small transmitter emitting a signal permitting an operator in a distant room to follow closely the person's movements all over a city"; 65/ and that miniature transmitters exist which a person may swallow without his knowledge. 66/

92. Miniature transmitters may also be placed beneath the hood of a car, whence they emit a signal which can be tracked by portable receivers in other vehicles, miles away. 67/

61/ Beck, op. cit., p. 651.

62/ Tommaso Bucciarelli, La protection de la personnalité de l'homme (Paris, Union Internationale des Avocats, 1971), p. 18.

63/ Westin, op. cit., p. 75.

64/ Switzerland, Message, p. 7.

65/ Louis B. Sohn, "Science, technology and human rights", Policy Paper Series, No. 2, Center for International Studies, New York University; also published in Convergence: an International Christian Review (Fribourg, Switzerland, Pax Romana, 1968), PRJ6, p. 5; also Lord Ritchie-Calder, paper entitled "Technology and human rights" prepared for the Assembly for Human Rights, Montreal, 22-27 March 1968.

66/ "Des instruments de chantage", Journal de Genève, 26-27 December 1970 (hereafter referred to as "Des instruments de chantage").

67/ Ibid., and Kenneth Ira Solomon, "Wiretapping and bugging - a counter proposal", New York State Bar Journal (vol. 40, No. 2), February 1968, p. 96.

93. Ordinary telephones may be transformed into transmitters by processes requiring entry into the premises concerned. One such telephone-based transmitter, the "Harmonica Bug", is described as follows:

"Once this is installed in the telephone of the victim, the eavesdropper, who can be anywhere, even thousands of miles away, provided that he is on a direct dialing system, merely dials the victim's number and blows a predetermined musical note on a harmonica. This note is picked up by the device in the victim's telephone, and prevents it from ringing. At the same time it connects the telephone microphone into the line so that the eavesdropper can listen to any conversations that are taking place within ear-shot of the victim's telephone." 68/

94. The "internal telephone transmitter" is a miniaturized transmitter that resembles the microphone in the mouthpiece of the telephone receiver, for which it is substituted. It sends the voice impulses created by the use of the telephone to a transistorized FM receiver, set at the device's transmission frequency. The transmitter receives its power from the telephone line in question. 69/

95. There exist small, unobtrusive electronic devices to be worn or implanted on one's person; these devices emit signals permitting a monitor located some distance away to determine the wearer's location. Existing technology is, moreover, able to produce devices which can, in addition, monitor such bodily reactions as pulse rate and blood pressure as well as the sounds in the wearer's immediate surroundings, i.e., his conversations. 70/

96. Another device for electronic surveillance permits a person within a range of three or four city blocks to learn whether a television set is operating within a house and, if so, to which channel it is tuned. Radar-type equipment in a truck or nearby building is able to pick up signals known as horizontal oscillators, given off by TV sets, compare them with the particular signal produced for each channel, and identify the one in use, all within a fraction of a second. The developers of this device, intended for measuring television audience choices, state that they are also able to identify radio stations.

97. In addition, it has been reported that teleprinter signals can be tapped and deciphered. 71/

68/ R. V. Jones, "Some threats of technology to privacy", paper prepared for the Third International Colloquy about the European Convention on Human Rights, held at Brussels, 30 September to 3 October 1970 (hereafter referred to as "Third International Colloquy"), document H/Coll.(70)a/2, p. 6; also F. Vangeenberghe, op. cit., p. 10.

69/ Vangeenberghe, op. cit., p. 11.

70/ Charles Fried, "Privacy", Yale Law Journal, vol. 77, No. 3 (January 1968), pp. 475-493; Arthur R. Miller, The Assault on Privacy: Computers, Data Banks and Dossiers (Ann Arbor, University of Michigan Press, 1971), pp. 45-46.

71/ R. V. Jones, op. cit., p. 8.

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2. Devices for visual surveillance

98. Devices for visual surveillance may be classified into devices for viewing and for recording.

99. Devices for viewing include such diverse instruments as miniature implements containing a lens that can be used for secretly observing the occupants of a room by inserting it into a hole drilled through a wall; 72/ polaroid and other types of "one-way windows behind which people can sit and watch what is happening in another room without the occupants being aware"; 73/ and powerful telescopes that make it possible to observe locations which the persons who occupy them have reason to assume are secluded from public view.

100. Devices for recording pictures are primarily still and movie cameras. These instruments, like the ones for auditory surveillance, have been miniaturized and can be installed on premises or hidden on the person of the user in ways making detection difficult. Miniature still cameras hidden in a room can be pre-set to take pictures at periodic intervals or to be triggered in various ways, by a switch being turned on, a file drawer being opened, or a person entering the room. 74/ Telescopic lenses make it possible to photograph small objects from great distances. Thus, for instance, small telescopic devices exist, measuring 20 cm, which are able to photograph a type-written page at a distance of a hundred metres. 75/

101. Light intensifiers, used with or without cameras, provide normal vision in poor daylight or moonlight, and acceptable vision on an overcast, moonless night; and image stabilizers allow sharp pictures to be obtained from helicopters or by hand (even while the person with the camera is walking around). 76/

102. Television techniques may be used both for viewing and for recording. For viewing alone, so-called "live" transmissions are used, in the form of closed-circuit television.

103. Television "eyes" of very small dimensions (3 x 9 inches) can be hidden in a room whence they can send pictures to a receiver a block or two away. "Optical fibres" to which a lens is attached can bend light around corners. This makes it possible to place only the optical fibre and lens in the room under surveillance and to install the TV camera itself elsewhere. Moreover, TV cameras are available which are small enough to fit into a vest pocket and have an "eye" the width of a cigarette. 77/

72/ Westin, op. cit., p. 56.

73/ Ritchie-Calder, op. cit.

74/ Westin, op. cit., p. 71.

75/ "Des instruments de chantage".

76/ United Kingdom, Younger Report, para. 505.

77/ Westin, op. cit., p. 71; see also Sweden, Skydd mot avlyssning, pp. 28-30.

104. The development of television tape makes possible the recording and re-playing of televised situations and events.

105. Remote TV camera systems using telescopic lenses and video tape can be used for surveillance of public streets; they are also capable of penetrating through store or apartment windows. 78/

106. The use of infra-red light makes it possible to observe and to take pictures in the dark:

"concealed cameras equipped with infrared film can photograph actions in a dark room if an invisible infrared energy source has been placed within that room. One way this is done is by putting special bulbs in overhead fixtures or lamps. To the naked eye the bulb seems to be unlit, since no visible light is transmitted; but it is actually flooding the room with infrared light and will provide the basis for clear snapshots or film. Of course if the windows are bare, cameras outside the premises can photograph inside by projecting infrared illumination into the room." 79/

107. Moreover, substances exist which give the appearance of being solid wall panels and which do not permit the passage of regular light but do transmit infra-red light. The source of infra-red light need not be inside the room but may be supplied by a beam sent from the observation post. 80/

108. A miniature device has been placed on the market, which combines the television camera with a transmitter. It can transmit the pictures it takes and can operate in darkness with the use of an infra-red system. 81/

109. Modern technology makes it possible to pass visible light or "infra-red energy" through sealed envelopes and to take pictures:

"These pictures can then be read - or, more properly, deciphered - by persons skilled in reading handwriting or typing where lines are inverted and superimposed. There is also available today a needle-thin 'flashlight' that can be inserted in a sealed envelope to 'light it up' for quick reading by a trained investigator." 82/

78/ Robert B. Belair and Charles D. Bock, "Police use of remote camera systems for surveillance of public streets", Columbia Human Rights Law Review (New York), vol. 4, No. 1 (Winter 1972), pp. 143-145.

79/ Westin, op. cit., p. 72.

80/ Ibid., p. 71.

81/ "Des instruments de chantage".

82/ Westin, op. cit., p. 79.

110. Optical "scanners" have been developed, capable of scanning and recording typed or hand-printed letters, words and numbers at the rate of 840 single-spaced type-written pages per hour. 83/

111. Fluorescent powders or dyes have been produced

"which are applied secretly to a person's hands, shoes, clothing, hair, umbrella, and the like, or can be added to such items as soap, after-shave lotion, and hair tonic which an individual applies to himself. Although these substances are invisible under regular light, they register as 'glowing' substances on the person being followed when he is illuminated by an ultraviolet-light source carried by the investigator." 84/

112. A method of detecting the recent presence of persons is described as follows:

"Nearly all moving bodies or warm-blooded animals contain a source of motive power that inevitably develops heat as well as motion. It is thus possible to detect automobiles, tanks, ships, aircraft, and human beings, by the heat they radiate. As a result of World War II and the subsequent development of guided missiles, thermal detectors can now be made very sensitive, and can be made to give pictures of a scene in which the hotter objects show up more brightly than the cooler ones. The exposed portions of the human body radiate more heat than those that are clothed, and thus show up as 'whiter'. At the same time, the sensitivity of the thermal detector can be made so great that even a surface that is one thousandth of a degree centigrade above its surroundings will show up relative to these surroundings, and it is thus even possible to discover where a person has recently been sitting or lying, because his body has warmed the surface underneath, and this takes some minutes to cool down after he has left it. ... the amount of information that can be obtained in this way is very limited...." 85/

113. An aerial hovering device has been developed which may combine viewing and listening. This is:

"a unit with two counter-rotating rotor blades which is sent to hover aloft, attached by cable to ground-control equipment. About three to four feet in diameter and weighing forty to fifty pounds, the surveillance unit now carries closed-circuit TV equipment that transmits pictures of objects at ranges of one mile or more. It could carry listening equipment just as easily. The unit hovers at altitudes of 100 to 2,000 feet and rotates 360 degrees for tracking purposes...."

These systems are not difficult to operate and allow one to "watch, photograph, and listen to activity within a mile or more of his own property, without ever entering the physical air space of his neighbours". 86/

83/ Miller, op. cit., p. 43.

84/ Ritchie-Calder, op. cit., p. 69.

85/ Jones, op. cit., p. 3.

86/ Westin, op. cit., p. 88.

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B. Beneficial uses of devices

114. Many of the devices referred to in the preceding section have harmless or even beneficial uses in a variety of fields, including medicine, education, crime prevention and law enforcement.

115. Small, portable tape recorders are in common use in business as dictating machines as well as being used for recreational purposes. Directional microphones of the kind referred to above are used in connexion with public television broadcasts. Certain kinds of contact microphones have been advertised as super-stethoscopes capable of tracking termites or detecting stress irregularities in metal structures. 87/

116. Closed-circuit television is being used, among many other purposes, to relay lectures to additional classrooms; to survey stores with high shop-lifting records and to guard warehouses at night; or to help protect tenants in apartment house lobbies and elevators and riders on subways from assaults and robberies. 88/

117. Some of the techniques discussed have been found to be of great use in the field of medicine. Thus the principle of the "optical fibre", which makes it possible to transmit images along bent and curved paths, may be applied for use in surgery. 89/ The modern nursing technique of "intensive care" is dependent on electronic systems of remote surveillance and the recording of vital processes. Closed-circuit television is also an important tool in certain radiological techniques and in the education of members of health teams. The observation of mentally disordered patients is facilitated by the use of polaroid glass windows in wards or recreation rooms. It has been pointed out that when applied in the health and medical fields these techniques and devices have as their objective the good of the individual and that any invasion of his privacy is an incidental by-product. 90/

118. Moreover, it has been pointed out that persons engaged in criminal activities have at their disposal the products of modern science and technology, including the modern media of rapid communication and transportation, which enable them to plan and carry out their schemes more swiftly, over larger areas and in a less conspicuous manner than previously; and that, correspondingly, the law-enforcement agencies also need to avail themselves of modern techniques to be able to fight crime. 91/ The use of surveillance devices in the interests of national security is also known to exist.

87/ Vangeenberghe, op. cit., p. 9.

88/ Westin, op. cit., p. 71.

89/ Sweden, Skydd mot avlyssning, pp. 28-30.

90/ Preliminary memorandum forwarded by the World Health Organization on 20 October 1970 (A/8055/Add.1), para. 24.

91/ E.g. communication dated 27 October 1971 from INTERPOL; also Fred E. Inbau, of Northwestern University, United States of America, Position Paper No. 1 of Americans for Effective Law Enforcement, Inc., which states, inter alia, that a recording of a conversation not only furnishes a judge and jury with an accurate account thereof but "may also be a source of subsequent identification of the speakers themselves, by means of 'voice print' comparisons with the recorded voices of suspected persons" (Communication of 29 December 1972).

C. Threats and problems concerning the privacy of the individual arising in connexion with the new devices and techniques

119. Despite the harmless and beneficial uses which exist for modern methods of surveillance, such methods obviously can be used equally well in ways which threaten, or present problems for, the privacy of the individual. Many of the new surveillance devices are relatively low in price, easy to obtain or to put together from components, simple to install or operate, cheap to operate or hard to detect, or may combine various of these characteristics. Their power of perception vastly supplements that of the human ear or eye and their ability to record lends permanence to the perception. There is, therefore, a great temptation to find new uses for such devices, to the detriment of privacy, or to use them in traditional situations to replace traditional methods of surveillance. The latter, whether legitimate or illicit, beneficial or undesirable, relied mostly on the unaided human ear and eye and were of necessity more limited and selective in scope, considerably harder to keep secret, and provided relatively impermanent records (or at most, written records prepared in more or less summary form and dealing primarily with the specific purpose of the surveillance or inquiry). Thus, by comparison, they tended to be less intrusive into the individual's privacy than the mechanical techniques now available, whose capacity for vastly greater coverage and total recall constitute a quantitative augmentation which has, in fact, qualitative implications. 92/

120. It appears that not only governmental authorities but also private parties are availing themselves of the new surveillance technology to an increasing extent and in a variety of contexts. As was pointed out in this connexion in an article on privacy in the year 2000, soon

"intrusions will not be limited to government measures in aid of law enforcement or national security. The technology may become a commonplace in the hands of private parties - employers interested in the off-hours activities of employees, competitors interested in one another's integrity and trade secrets, estranged spouses interested in perfecting grounds for divorce, insurance companies interested in the subsequent health of personal injury claimants they have paid, and the idly curious who are just interested." 93/

121. A participant in UNESCO's 1970 meeting of experts on the right to privacy summarized as follows the basic problems involved in the utilization of the new recording techniques:

92/ Cf., e.g., William M. Beaney, "The right to privacy and American law", Law and Contemporary Problems (Durham, N.C.), vol. XXXI, No. 2 (Spring 1966), p. 264.

93/ Harry Kalven, Jr., "The problem of privacy in the year 2000", Daedalus, Journal of the American Academy of Arts and Sciences (Boston, Mass.), Summer 1967, p. 877.

"The factor which is typical of all the modern recording devices is that of their illicitness. Whether they are a telephoto lens, wire tapping and telephone espionage, polaroid glasses and perhaps, before long, mini-equipment which may make possible the surveillance or even the control of the behaviour of an individual at any time, without his knowledge...

"The utilization of these different devices by the public authorities raises many legal problems.

"Even though, in many countries, the courts and tribunals usually refuse to accept as evidence information obtained in this manner - particularly as the possibility of altering an authentic recording cannot be ruled out - studies should first be made of whether it is licit or illicit to make such recordings and use them in the legal sphere.

"However that may be, the danger is obvious when these procedures are used by State bodies which are usually beyond the parliamentary, jurisdictional, administrative or other controls to which the public services are usually subject. In a world where there are parallel, unofficial and even illicit organizations side by side in the spheres of the police, information and surveillance..., it is obvious that these services could use such recordings as a weapon for pressure and blackmail that could interfere with the legislative, executive and judicial aspects of the operation of any democratic society.

"But the danger does not come only from State bodies.

"The general use of recording devices opens up possibilities of private espionage by means which have nothing in common with the rudimentary techniques once used by jealous husbands, gossips, and inquisitive concierges. Such interference can take place in the building in which the family lives. In some cases, one member of the family may be spying on another member of the same family (seeking grounds for divorce, for instance). Lastly, in the commercial, technical and financial fields, competing companies can spy on each other, and not only on each other; private espionage can be used also within the company itself (secret recordings, for instance, of the conversations of the heads of departments made by the President or the Managing Director of the firm); in such cases, although there is no question of 'private life' questions of private law do arise.

"Information enterprises can be tempted all the more easily by the immense possibilities of these illicit recording techniques because they have long been used to using all the audio-visual techniques." 94/

122. Examples of traditional situations in which traditional methods of supervision or surveillance by persons are even now being replaced at times by technical devices, are the surveillance by means of microphones or closed-circuit television of students

94/ Pierre Juvigny, "The right to privacy in the modern world", Meeting of Experts on the Right to Privacy, UNESCO, Paris, 19-23 January 1970 (SHC/CONF.12/10), pp. 3-4.

/...

and teachers in classrooms, and of employees in places of work, such as factories and stores. The resulting transmissions may or may not be recorded on tape. They make it possible, depending on the technique chosen, to monitor and to record every gesture, facial expression or remark, every minor lapse or every confidential exchange of views between friends, however brief. Concern has similarly been expressed as to the use, for purposes other than accident or incident investigation, of flight data recorders, and particularly of cockpit voice recorders, which cover all of a pilot's conversations during a given flight. 94A/ The International Labour Organisation has drawn attention to certain aspects of this problem as it affects freedom of association, more particularly trade union rights, and the personal freedom of the individual. 95/

123. Other examples are the substitution of modern visual and auditory techniques, such as hidden microphones, tape recorders and secret cameras including microfilm devices, in investigations by private detectives; by private associations, in respect of activities of other groups, categories of individuals, or even their own members; and by the press. The use of modern devices in what is broadly referred to as "industrial espionage" is reported to be widespread.

124. The examples above relate to the adoption of modern recording and other devices on the non-governmental level. Governmental authorities and agencies are however also faced with the choice of substituting potentially unlimited, all-encompassing automatic surveillance for relatively limited, selective observation by human agents in such areas as crime prevention or the investigation of crimes actually committed.

125. In addition to the substitution of modern techniques such as wire-taps, secret microphones, transmitters and cameras for more traditional methods of supervision and surveillance, the new technology makes possible entirely new approaches to surveillance. It has been suggested, for instance, that small sensing devices of the kind referred to in paragraph 95 above, and which may monitor the location of and such other facts about the wearer as his pulse rate, and the sounds in his immediate surroundings, be worn by or implanted on prisoners released on parole. This would have the advantage not only of disclosing immediately any violation of some conditions of parole but also, presumably, of inhibiting such violations, thus making possible a more widespread use of release on parole. On the other hand, any utilization of such devices for parole purposes is being objected to on the grounds that it would involve a total and degrading deprivation of privacy, beyond even conditions existing in the average prison, which would make it impossible for the parolee to establish normal relations of love, friendship and trust required for successful social reintegration and would, moreover, destroy the element of trust implicit in the very concept of parole. 96/

94A/ Communications dated 9 May 1969 and 1 July 1971 from International Federation of Airline Pilots Associations.

95/ Technology for Freedom, International Labour Conference, fifty-seventh session, report of the Director-General (Geneva, ILO, 1972), hereafter referred to as Technology for Freedom (ILO), pp. 28-29.

96/ Charles Fried, "Privacy", Yale Law Journal, vol. 77, No. 3 (January 1968), pp. 475-493; also Miller, op. cit., pp. 45-46.

126. The rapidly developing products of a new technology are to some extent being utilized in a legal vacuum, since legal safeguards which evolved at a time when such devices did not exist may not cover them or may be insufficient or inapplicable. 97/ Thus, for example, telecommunications legislation adopted in the 1930s may be drafted in such a way as to punish technical wire-taps but not extend to the monitoring of telephone conversations by other methods, such as induction coils or miniature microphones. 98/ Modern devices have also created a new situation as regards the remedies available to the person whose privacy has been arbitrarily invaded. Thus legal provisions relating to trespass or unauthorized entry of premises may be couched in such language as to be inapplicable in situations where the surveillance device, though monitoring what is happening inside the premises, is installed on the outside. In other cases the provisions, theoretically applicable, may be so difficult to enforce as to provide little or no protection, as, for instance, where hard-to-detect surveillance devices are placed on the premises by persons obtaining legal entry on false pretences (e.g., by a person pretending to be a repairman or an employee of a gas company).

127. For a variety of reasons, existing provisions enabling aggrieved persons to sue for damages may be ineffective in cases involving invasions of privacy by modern recording or other techniques. The cases may not meet certain formal criteria, in particular where "privacy" as such is not protected by law; or the present law may be otherwise inadequate as, for example, where private conversations have been monitored or recorded by mechanical means and disclosed to and utilized by unauthorized persons but have not, prior to court action, reached the press; or the amount of damages obtainable may be so small as neither to compensate the victim nor to constitute a serious risk for the person thus attempting to invade another person's privacy. To an increasing extent, objectionable devices can operate without any trespass onto property.

128. The linking of computers to modern surveillance devices is considered by some as presenting "perhaps the most significant threats to personal freedom". An example, relating to telephonic communications, describes such a combination as follows:

"One of the simplest contemporary snooping devices is the pen register, which, when attached to a telephone line, records a series of dashes representing the numbers dialed from a particular telephone. This snooping capability could be magnified if the information drawn in by the pen register were automatically fed into a central computer for analysis. Widespread use of this technique would quickly reveal patterns of acquaintances and dealings among a substantial group of people." 99/

97/ See paras. 53-74 above.

98/ Cf., e.g., Westin, op. cit., p. 102.

99/ Miller, op. cit., p. 43. The author points out, however, that such monitoring will soon be possible without pen register: "When telephone communications are completely converted to digital transmission, it will be easy to prepare a ready-made machine-readable record of communications made from each telephone that can be cross-correlated with the record of calls made from other telephones to establish an individual's or a group's associations."

129. The "scanner" referred to in paragraph 110 above is capable of being used to establish an automated "mail cover", i.e. to record systematically the names, addresses, etc., of persons sending mail to a particular individual. Such information, too, may be forwarded to a computer for storage and analysis. 100/

130. The impact of the computer will be dealt with in a subsequent report, on "uses of electronics which may affect the rights of the person and the limits which should be placed on such uses in a democratic society", to be prepared under paragraph 1 (c) of General Assembly resolution 2450 (XXIII). The potential use for storage, analysis and retrieval, by governmental or private computer, of information obtained by means of modern surveillance devices should, however, be kept in mind in connexion with any discussion of the need to regulate the use of those devices.

131. Conflicts arise between the right to privacy and the freedom to "seek, receive and impart information and ideas through any media and regardless of frontiers". 101/ This problem is not new and, in fact, intrusions by the press have previously given rise to many court rulings concerning privacy. 102/ It has been made more acute, however, by the utilization on the part of the press of new devices that facilitate clandestine photography and the secret recording of conversations. 103/ Discussions of conflicts between individual privacy and the freedom of the press 104/ often revolve about the question of what situations are to be considered private or public, 105/ and of whether legal remedies should be available only where the material thus published is defamatory or also where, though not defamatory, it constitutes an unwarranted intrusion upon a person's privacy.

132. One scholar has observed that it remains for the courts to decide, depending upon the circumstances of each case, whether such a conflict is resolved in favour of the right to privacy or the right to freedom of expression. 106/

100/ Miller, op. cit., pp. 43-44.

101/ Article 19 of the Universal Declaration of Human Rights; see also article 19 (2) of the International Covenant on Civil and Political Rights.

102/ See, e.g., William L. Prosser, "Privacy", California Law Review, vol. 48, No. 3 (August 1960), pp. 383-423.

103/ See, e.g., Donald Madgwick, Privacy Under Attack, based on a study prepared for the Cobden Trust by Hilary Barker (London, National Council for Civil Liberties, 1968), pp. 26-28; forwarded by the United Kingdom National Council for Civil Liberties on 20 May 1969.

104/ See, e.g., Hansard, Parliamentary Debates, House of Lords, 5th series, vol. 302 (18 June 1969), cols. 1048-1049. Information forwarded by the Soroptimist International Association on 1 November 1969.

105/ Hansard, op. cit., vol. 229 (13 March 1961), cols. 607-662.

106/ See Roger Nerson, op. cit., obs. No. 1, p. 120.

D. Protection of privacy in the light of the new auditory
and visual devices and techniques

1. Studies and inquiries concerning improved protection of privacy

133. Aware of the challenge which the new surveillance technology poses to the privacy of the individual and, consequently, to other human rights, a number of Governments have authorized in-depth studies or hearings concerning the protection of privacy. These inquiries have varied in scope and emphasis but generally speaking have been directed toward the preparation of legislation to protect the rights of the individual against intrusion by governmental or private sources. 107/

134. In Canada, inquiries relating to the right to privacy were carried out in 1967 and 1968 under the auspices of two of the Provincial governments. 108/ In one of these, the Ontario Law Reform Commission initiated a "preliminary study to determine the nature of the existing and growing problems in the area referred to compendiously as the 'right to privacy' and the extent to which the solution to these problems might fall within the legislative competence of the provincial legislature". As a result of the study the Commission recommended that a Royal Commission or special Task Force be established to deal with the matter, preferably as a joint federal-provincial project. Attached to the report was a 20-point list of topics proposed for study. The proposed questions included the creation of an offence of invasion of privacy; the creation of a tort of invasion of privacy, with appropriate remedies; establishment of controls over the sale, advertising, use and possession of mechanical and electronic wiretapping, eavesdropping and surveillance devices; establishment of controls over acquisition, use and disclosure by governmental agencies or private parties of personal information, with appropriate personal remedies; and the definition of "consent" in its various contexts where consent means that privacy has not been invaded.

135. In March 1969, moreover, a federal Special Commission of the Senate on mass media was appointed in Canada, which concerned itself, among other topics, with professional standards to be observed by the media. The Commission looked into the need for an independent press council empowered to intervene on behalf of citizens "with a grievance against the print media short of defamation but considered injurious in some respect". 109/ In 1970, following a conference held in Kingston, Ontario, in which the federal Departments of Communications and of Justice participated, a federal Task Force on Privacy was established to consider the drafting of federal legislation to meet the need to protect privacy. 110/

107/ Many of these inquiries also dealt with the protection of privacy in connexion with the utilization of computers. This aspect will be discussed in the study referred to in paragraph 26 above.

108/ Report of the Commission of Enquiry into the Invasion of Privacy (1967), prepared by R. A. Sargent for the Government of the Province of British Columbia; Report on Protection of Privacy in Ontario (Department of the Attorney-General, Ontario Law Reform Commission, 1968). Information forwarded by the Government of Canada on 29 October 1969 and 20 July 1972 and by INTERPOL on 27 October 1971.

109/ Information forwarded by the Government of Canada on 22 October 1971 (E/CN.4/1066/Add.11, pp. 2 and 9).

110/ Information forwarded by the Government of Canada on 28 March 1972 (E/CN.4/1098, Canada, II.A.4).

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136. In Denmark, the Ministry of Justice in 1967 requested the Permanent Penal Law Council to consider revision of the provisions of the Penal Code relating to the protection of the privacy of individuals. In 1968, the Council's terms of reference were extended to include consideration of the possibility of affording the individual increased protection by providing compensation for non-financial damages. 111/ The Council considered such matters as the possibilities open to the individual to obtain cessation of an act violating his privacy and to obtain compensatory damages where a violation had actually taken place; Denmark's law concerning photography; rules governing the ethics of journalism; and penal legislation, including the questions of manufacture, sale and use of surveillance devices. It submitted its report on January 1971. 112/ A committee appointed by the Danish Ministry of Justice in September 1970, moreover, is considering the protection of the privacy of individuals in connexion with public and private registers, with special reference to technical developments in this field. 113/

137. In Sweden, a Royal Commission was established in 1966 to make proposals concerning legislation for the protection of privacy against invasion by modern scientific and technological devices. It was directed to consider in particular the following points in connexion with a possible revision of the Penal Code: extending the Code's provisions relating to the secrecy of correspondence and the inviolability of the domicile, with a view to protecting confidential oral communications against interference by unauthorized persons; making it a criminal offence to obtain information about the private affairs of other persons without their authorization; imposing criminal sanctions in regard to unauthorized eavesdropping, recording and taking of photographs; whether the problems connected with the publication of photographs taken without consent should be solved by legislation or in some other way; what rules should apply to the use, in court proceedings, of evidence obtained by unlawful methods of listening or photography; what restrictions should be imposed on the utilization of hidden microphones by the public authorities for the purpose of preventing crime; and whether the manufacture, import and dissemination of technical surveillance devices should be controlled by measures pertaining to business law. The Commission submitted its first report, covering listening and recording techniques, in September 1970. 114/

111/ Information forwarded by the Government of Denmark on 15 September 1969 and 10 April 1972.

112/ Denmark, Privatlivets Fred.

113/ Information forwarded by the Government of Denmark on 15 September 1969 and 10 April 1972.

114/ Sweden, Skydd mot avlyssning. In May 1969, moreover, Sweden established a Royal Commission on Publicity and Secrecy, and a Royal Commission on the Credit Information System. The terms of reference of the former were modified in 1971 to include examination of all legislative problems relating to computerized information regarding individuals. Information forwarded by the Government of Sweden on 8 June 1972. Neither Commission had submitted its report at that time.

138. In the United Kingdom a Committee of Privy Councillors (known as the Birkett Committee) was appointed in 1957 to inquire into the interception of communications by governmental authority. It submitted its report the same year. 115/ In March 1970, a 15-member Committee on Privacy (known as the "Younger Committée") was appointed by the Home Secretary to consider

"whether legislation was needed to give further protection to the individual citizen and to commercial and industrial interests against intrusions into privacy by private persons and organisations, or by companies, and to make recommendations".

139. The appointment of this Committee was an outgrowth of the debate held in the House of Commons in connexion with a Right to Privacy Bill, 116/ that would have provided for the statutory recognition of a general right to privacy, certain infringements of which would have been actionable at civil law. The report of the Younger Committee was presented to Parliament in July 1972. 117/

140. In the United States, a number of congressional hearings have been held concerning various aspects of the protection of privacy. These included, among others, the inquiries held in 1965 and 1966 by the Committee on Government Operations of the House of Representatives and the Sub-Committee on Administrative Practices and Procedure of the Senate Committee on the Judiciary. 118/

141. Regional intergovernmental organizations, too, have shown an interest in the problem.

142. The Consultative Assembly of the Council of Europe, in January 1968, recommended that a study be undertaken of the question whether, having regard to article 8 of the European Convention on Human Rights, the national legislation in the States members of the Council adequately protected the right to privacy against violations which may be committed "by the use of modern scientific and technical

115/ Report of the Committee of Privy Councillors Appointed to Inquire Into the Interception of Communications (London, HMSO, 1957), Cmnd.283, 43 pp.; information forwarded by the Government of the United Kingdom on 17 December 1969.

116/ House of Commons Official Report, 23 January 1970, column 941. This Bill, introduced by Mr. Brian Walden, with one small exception was based upon a draft Right of Privacy Bill published on 16 January 1970 by a Committee of "Justice", the British Section of the International Commission of Jurists, as part of a report on privacy and the Law.

117/ United Kingdom, Younger Report.

118/ Special Inquiry on Invasion of Privacy, part I, Hearings before a Sub-Committee of the Committee on Government Operations, House of Representatives, Eighty-ninth Congress, First Session, and *ibid.*, part 2, Second Session; and Hearings on Invasion of Privacy by Government Agencies before the Sub-Committee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, Eighty-ninth Congress, First Session (1965).

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methods"; and, should the answer to this question be in the negative, to make recommendations for the better protection of the right of privacy. 119/ Acting upon this recommendation, the Committee of Ministers of the Council of Europe, in April 1968, decided to include in the Council's intergovernmental programme of work an item entitled "The right to privacy as affected by: (a) the press and other mass media; and (b) modern scientific and technical devices. Study of the advisability of preparing a recommendation to Governments".

143. In view of the technical and legal complexities of the subject the Committee of Ministers decided that the item should be placed before three expert bodies, i.e., the Committee of Experts on Human Rights, the European Committee on Crime Problems and the European Committee on Legal Co-operation, so that each of them might consider the implications of the problem in its particular field. The Committee of Experts on Human Rights concluded its work concerning the "right to privacy as affected by modern scientific and technical devices" in November 1970 and its report was transmitted to the other two committees. It is continuing its work on the right to privacy as affected by the press and other mass media. 120/

144. On this latter item the Consultative Assembly, moreover, on the basis of a separate study by the Legal Affairs Committee, 121/ had earlier decided to organize a symposium for parliamentarians, representatives of the press and experts in the field of press law. 122/ The report of the Legal Affairs Committee on the symposium was submitted to the Consultative Assembly in 1970 and led to the adoption by the latter of the above-mentioned Declaration on Mass Communication Media and Human Rights. 123/

145. The Inter-American Commission on Human Rights appointed a rapporteur to prepare a study on human rights and the developments of science and technology. 124/

119/ Recommendation 509 (1968) of the Consultative Assembly. For action leading up to this recommendation, see Council of Europe documents 2206, 2226 and 2326 (report of the Consultative Assembly's Legal Committee). The Consultative Assembly, moreover, instructed its Legal Committee to continue its studies and submit final conclusions in due course (Order No. 266 (1968)).

120/ Information forwarded by Council of Europe on 17 December 1971 (E/CN.4/1089/Add.1, para. 20, pp. 15, 17).

121/ Council of Europe, document 2168, more particularly paras. 18, 33-39 and 51.

122/ Symposium on Human Rights and Mass Communications organized by the Consultative Assembly of the Council of Europe, with the assistance of the Government of Austria, Salzburg, Austria, 9-12 September 1968. This symposium considered questions relating to the protection of the privacy of the individual, among others.

123/ Consultative Assembly of the Council of Europe, document 2687 and resolution 428 (1970). See paras. 32-33 above.

124/ Cf. Communication of 14 February 1972, forwarded by Organization of American States (E/CN.4/1089/Add.3, section B 1).

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146. In recent years, the protection of individual privacy, more particularly against modern methods of intrusion, has moreover been a subject of discussion at a number of international meetings, officially sponsored or privately organized. Among them may be mentioned the Sixth Conference of European Ministers of Justice, which met at The Hague, 26 to 28 May 1970; 125/ the Third International Colloquy About the European Convention on Human Rights organized by the law faculties of the Belgian universities in co-operation with the secretariat of the Council of Europe and with the support of the Belgian Government, which met in Brussels, 30 September to 3 October 1970; 126/ the Meeting of Experts on the Right to Privacy organized by UNESCO, in Paris, 19-23 January 1970; 127/ and the seminar on human rights and scientific and technological developments organized by the United Nations in co-operation with the Government of Austria, 19 June to 1 July 1972; 128/ also the Nordic Conference on the Right to Privacy, organized by the Swedish section of the International Commission of Jurists in collaboration with the Commission's secretariat, held in Stockholm, 22-23 May 1967; 129/ the Assembly for Human Rights which met during the International Year for Human Rights in Montreal, Canada, 22-27 March 1968; 130/ the meetings of the International Association of Lawyers held in London, 1969, and Paris, 1971; 131/ and the Ninth Congress of the International Association of Democratic Lawyers, Helsinki, Finland, 15-19 July 1970.

147. In addition, an extensive literature, scholarly as well as popular, has grown up in recent years around the question of protecting individual privacy in the face of modern technology. The limited size of the present study precludes an enumeration of the many excellent monographs and articles which have appeared, but data and arguments given in some of them have been included by way of example.

125/ Information forwarded by the Government of Austria on 8 March 1972.

126/ For a list of reports and written communications prepared in connexion with this meeting, see Colloquy document H/Coll.(70)11.

127/ For report see UNESCO document SHC/CONF.12/11.

128/ For a list of documents prepared in connexion with this meeting, see report of seminar (ST/TAO/HR/45), paras. 14-15. Wire-tapping and other topics relevant to the question of privacy were also discussed at earlier United Nations seminars, e.g. the seminars on the protection of human rights in criminal law and procedure, held at Baguio City, the Philippines, 17 to 28 February 1958, and at Santiago, Chile, 19 to 30 May 1958; and on the protection of human rights in criminal procedure, Vienna, Austria, 20 June to 4 July 1960, respectively. (ST/TAO/HR/2, HR/3 and HR/8).

129/ Conclusions of the Conference and other documentation forwarded by the International Commission of Jurists on 6 May 1969.

130/ Montreal Statement of the Assembly for Human Rights, sect. IX.

131/ For draft conventions on protection of privacy submitted to Paris meeting see T. Bucciarelli, La protection de la personnalité de l'homme (Paris, Union internationale des avocats, 1971).

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148. The principal points of discussion in legislative as well as scholarly circles revolve around such questions as whether or not the privacy of the individual would be better protected by the enactment of a statutory "right to privacy"; the purposes for and conditions under which the use of modern surveillance devices might be permitted; the nature of the acts that should be subjected to penal sanctions in order to protect individual privacy from intrusion by modern surveillance devices: the feasibility or desirability of prohibiting or controlling the importation, manufacture, sale and use of modern recording and other devices; the use of such devices by the press; specific problems relating to photography; and the possibilities for the individual of obtaining compensation for violations of his privacy.

149. On the question of whether or not the privacy of the individual would be better protected by the enactment of a statutory "right to privacy", opinions are divided. One reason for this is the difficulty, referred to above, of drafting a useable legal definition of privacy. The Penal Law Council of Denmark, for instance, in its report of 1971, pointed out that, in addition to special legal provisions, a "general unwritten rule on the protection of the right to privacy and the integrity of the personality was assumed to apply in Danish law". Nevertheless, the Council concluded that in view of the need for precise wording in penal clauses, it was not considered feasible to draw up "a more general principle on the protection of the right to privacy sanctioned through punishment"; and that penal legislation in the field would have to continue to take the form of "a number of provisions delimiting the punishable behaviour in relation to the individual possibilities of violation". 132/

150. The 1972 report of the Younger Committee in the United Kingdom, too, pronounced itself against the creation of a general right of privacy, largely because of "the risks involved in propounding a general law, the scope of whose impact upon other important rights seems uncertain...": 133/

151. The Conclusions of the 1967 Nordic Conference on the Right to Privacy do contain a definition of the right to privacy (see paragraph 45 above). This is supplemented by the following, indicative list of acts violative of the individual's privacy which the definition is intended to cover for "practical purposes":

- (i) search of the person;
- (ii) entry on and search of premises or other property;
- (iii) medical examinations, psychological and physical tests;
- (iv) untrue or irrelevant embarrassing statements about a person;
- (v) interception of correspondence;

132/ Denmark, Privatlivets Fred, p. 91.

133/ United Kingdom, Younger Report, p. 11.

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- (vi) wire or telephone tapping;
- (vii) use of electronic surveillance or other bugging devices;
- (viii) recording, photographing or filming;
- (ix) importuning by the press or by agents of other mass media;
- (x) public disclosure of private facts;
- (xi) disclosure of information given to, or received from, professional advisers or to public authorities bound to observe secrecy;
- (xii) harassing a person (e.g. watching and besetting him or subjecting him to nuisance calls on the telephone). 134/

152. The Conference did not indicate whether or not it favoured the creation of a statutory right to privacy as such but limited itself to recommending "that all countries take appropriate measures to protect by legislation or other means the right to privacy in all its different aspects and to prescribe the remedies and criminal sanctions required for its protection". 135/

153. On the other hand, a study prepared by the International Commission of Jurists at the request of UNESCO and published in 1972 concludes that in the future the need will increasingly be felt for "an express and formally recognized legal right to privacy". While a general legal right to privacy "is bound to come into conflict with other legal rights, and in particular the rights of freedom of expression and freedom of the press," it is argued that "this is not a reason for refusing to recognize the need for such a right". Rather, solutions must be found within each country "which accord with its traditions and the respective weight which its society gives to these conflicting interests". 136/

154. While it remains a subject of discussion as to whether or not the creation of a separate right to privacy, or a separate offence of violation of privacy, would be the most desirable or effective way of providing protection against invasions by modern recording and other techniques, there is a widespread concurrence of views that, in any case, legislative and other steps are required in certain specific fields if the privacy of the individual is to be protected.

155. As to the purposes for and conditions under which the use of modern recording and other techniques might be admissible, a distinction is made between such use by private parties on the one hand and by governmental authorities on the other.

134/ Conclusions, Nordic Conference on the Right to Privacy, p. 3.

135/ Ibid., p. 9.

136/ "The legal protection of privacy: a comparative survey of ten countries by the International Commission of Jurists", International Social Science Journal (Paris, UNESCO), vol. XXIV, No. 3, 1972 (hereafter referred to as "The legal protection of privacy" (UNESCO)), pp. 412-584, at p. 577.

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156. It is considered that the use of modern recording, filming and other devices by private persons cannot be barred outright in view of the many harmless or beneficial uses which exist for them (cf. paras. 114 to 117 above). Rather, steps have been taken in many countries to prohibit certain uses, and in particular certain clandestine uses, of such devices and to make them subject to sanctions under penal law.

157. In this context, distinctions are frequently drawn between eavesdropping, the clandestine recording of conversations, and the disclosure or other use of information obtained by such means. In cases involving the clandestine recording of conversations, a distinction is often drawn, moreover, between recordings made by participants and recordings made by outsiders. The question has arisen whether consent to electronic eavesdropping (including wire tapping) and clandestine recording given by one party to a conversation is sufficient to make such action legal or whether the consent of all parties is required.

158. The report of the Younger Committee which, as stated above, was concerned with intrusions by private parties, submitted the following recommendations in respect of technical surveillance devices (pp. 15-16):

"53 (i) It should be unlawful to use an electronic or optical device for the purpose of rendering ineffective, as protection against being overheard or observed, circumstances in which, were it not for the use of the device, another person would be justified in believing that he had protected himself or his possessions from surveillance whether by overhearing or observation;

" (ii) Unlawful surveillance by device should, where it is done surreptitiously, be an offence punishable by imprisonment or fine and triable both summarily and on indictment;

" (iii) In certain circumstances the advertising of devices for unlawful surveillance should constitute the offence of incitement to commit the main offence;

" (iv) There should be a new tort of unlawful surveillance by device for which damages could be awarded as for other torts, or orders for an injunction could be made".

159. Recommendations have been made to the effect that all private detectives should be licensed. 137/

160. The use of electronic surveillance devices by employers to monitor their employees has raised problems of invasion of privacy. 138/ Some courts have issued rulings disallowing clandestine surveillance in the cases before them. The International Labour Organisation has called for studies of the problem of

137/ United Kingdom, Younger Report, p. 15.

138/ Technology for Freedom (ILO), p. 29.

clandestine surveillance in particular in connexion with the impact this may have on trade union rights. 139/

161. The use of modern recording and other devices by governmental authorities is generally considered to be necessary in certain situations relating to national security and common crimes. It has been widely stressed, however, that such use should be subject to conditions established by law and to specific prior authorization in each case, preferably by the Judiciary, though authorization at the ministerial level has also been mentioned in certain contexts. 140/ It has also been stressed that such authorization should be granted only if the request met criteria such as would be required for obtaining a search warrant, which in some countries would mean a sworn statement of "probable cause" describing the place (or telephone number), the person and the offence involved. The authorization itself, it has been argued, should also contain specifics comparable to those which would appear on a search warrant, e.g. the person, place and offence involved and the period for which it was valid. 141/ It has also been suggested that the burden of proof should be placed on those seeking the authorization, that alternative methods of surveillance less violative of privacy were not available. 142/ There is some discussion as to whether or not legislation should specify the types of crimes for which such surveillance might be authorized. 143/

162. Apprehension has, however, been expressed that, since wiretaps and eavesdropping devices left in place for any length of time will perforce monitor conversations between people and on subjects other than those specified in the authorization, such authorizations would tend to resemble more the "general warrants" of search and seizure of earlier centuries than the specific warrants required by modern practices respectful of the rights of the individual.

163. Much attention is also being paid to the question of the use in penal proceedings of information obtained by electronic surveillance. The discussion involves the entire field of admissions, confessions and self-incrimination and the distinction between using information as leads in investigations or as evidence in court. Where evidence has been obtained illegally, exclusionary rules in some legal systems will bar its use on that ground. Even where tapes of conversations have been obtained legally, their use as evidence is often questioned owing to the ease with which tapes can be altered and the difficulty of detecting any such tampering.

139/ Fifty-fourth session of the International Labour Conference (Geneva, 3-25 June 1970), resolution VIII of 25 June 1970, concerning trade union rights of and their relation to civil liberties, operative para. 15, called for studies which would, among other topics, deal with the right to inviolability of trade union premises as well as of correspondence and telephonic conversations.

140/ E.g. report of the United Nations 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 to 24 May 1960 (ST/TAO/HR/7) para. 55. The reference here is specifically to wiretapping; also Vangeenberghe, *op. cit.*, p. 18.

141/ E.g. communication by INTERPOL, dated 27 October 1971.

142/ Westin, *op. cit.*, pp. 371-372.

143/ E.g. Westin, *op. cit.*, pp. 376-377; communication dated 27 October 1971 from INTERPOL.

164. Similar questions have been raised in connexion with the use of tape in civil proceedings but requirements in such cases appear to be somewhat less stringent.

165. Differences of opinion exist as to whether or not privacy is violated where visual or auditory surveillance devices are used in places other than the subject's home, such as in restaurants, staircases and corridors of apartment houses, plazas or parks, which persons, when conversing there in the absence of other visitors, may have reason to consider as affording privacy.

166. It is widely agreed that, to protect the individual against invasions of his privacy by modern technological devices, the clandestine or unauthorized use of such devices must be made subject to penal sanctions of fine, imprisonment or both. Many States have, in fact, enacted legislation to this effect, though the definition of the offences and the penalties provided show some variations. While legislation banning electronic eavesdropping and clandestine recording presents relatively little difficulty, however, legislation concerning clandestine or unauthorized photography and filming may be somewhat more difficult to draft in some legal systems. Some countries recognize a person's right to his own likeness, but not all do. Nevertheless, legislation concerning clandestine photography and filming does exist in some countries.

167. With a view to protecting persons whose privacy has been violated from possible further harm, a number of countries have provisions whereby prosecution of offences like those described above is to be undertaken only at the request of the victim, rather than ex officio.

168. It has been suggested that the question of the use of modern recording and other devices by journalists in the exercise of their profession, involving as it does a potential conflict between the right to privacy and the right to seek, receive and impart information and ideas, should in the first instance be solved by the establishment and application of a journalists' code of ethics.

169. There is fairly widespread agreement that penal provisions alone are not sufficient to protect the individual against invasions of his privacy and that they should be supplemented by civil law remedies allowing the victim to appeal to the courts to obtain, where feasible, a cessation of the act violating his privacy; and, where the act has been completed, to recover damages, including damages for non-pecuniary injury. 144/

170. There is a considerable body of opinion which regards control over the import, manufacture, sale or other transfer of surveillance devices as necessary for the effective protection of the right to privacy. In view of the fact that many of these devices have legitimate uses or can be assembled from innocent and easily

144/ E.g., "The legal protection of privacy" (UNESCO), p. 578; Denmark, Privatlivets Fred, p. 91.

available components, the drafting of such legislation presents some difficulty but a number of States have adopted legislation with a view to establishing such controls. Moreover, a number of States have banned advertisements of surveillance devices. Some writers have drawn analogies between the control of the sale and possession of fire-arms and dangerous drugs and the desirable control over certain surveillance devices.

171. Many studies of the privacy question stress that one important factor in the protection of privacy is popular awareness of the need to protect privacy, of the means used to invade it and of measures required to protect it. 145/

172. Emphasis is also placed on the existence of counter-measures to detect or counteract the presence of surveillance devices. These include, among others, searches of the premises for hidden devices; metal-locating instruments; radio frequency probes; the use of "scrambling" devices to prevent eavesdropping on or tapping of telephone or radio messages; and lowering window shades to prevent infra-red photography from outside. 146/ For example, the easiest way of locating a transmitter microphone, it has been suggested,

"is to have a radio receiver loudspeaker - often a cheap FM transistor radio receiver will do - and tune this receiver through its full range, making sure that there is enough noise, perhaps by whistling, to activate the hidden microphone. The gain on the transistor receiver should be set at full volume. When the receiver is tuned to the frequency of the microphone radio transmitter any noise in the room is likely to be picked up by the microphone and transmitted to the receiver which radiates it again from its loudspeaker, and this feeds sound energy back to the microphone. The result of this interaction is usually a loud whistle or scream from the transistor set, and by turning the gain down until the scream stops and then moving the transistor set until it starts again, one can finally track down the site of the microphone.... The system has the objection that the generation of the squeal is a sure indication to the eavesdropper that his victim has awakened to the threat." 147/

173. Television surveillance using an infra-red sensitive eye for obtaining pictures in an apparently dark room could, it has been explained, be detected by an "infra-red photocell, rather like those carried by military vehicles and personnel to warn them when they are coming under infra-red surveillance". With the longer-wave infra-red devices, which work by the heat radiated by bodies themselves, and which are therefore "passive" such a method of warning does not work, however. 148/

145/ E.g., Kiyoshi Igarashi, "Technology and privacy", Jurist (Tokyo), January 1969, No. 413, pp. 134-138, at pp. 137-138; Westin, op. cit., p. 378.

146/ Westin, op. cit., pp. 80-85; Sweden, Skydd mot avlyssning, pp. 32-33.

147/ R. V. Jones, op. cit., p. 9.

148/ Ibid., p. 5.

174. While technical inventiveness can make it possible to take counter-measures, it can equally provide new techniques to overcome counter-measures, and so on ad infinitum. 149/

175. Certain threats to human rights not connected in any way with privacy may arise from the misuse of recent scientific and technological developments in the field of auditory and visual devices, as when a sound recording is tampered with to alter the purport of a voice message contained therein; it is noted however that General Assembly resolution 2450 (XXIII) places a particular stress on the right to privacy in this connexion, and research carried out under that resolution bears out that the right to privacy is the one most endangered by the above-mentioned developments.

2. Examples of national legislation and jurisprudence

176. /This section will be issued as addendum 1 to the present document./

3. Points for possible inclusion in draft international standards concerning respect for the privacy of the individual in the light of modern recording and other devices

177. In view of the considerable differences of opinion as to the practical effects which the creation on the national level of a statutory right to privacy would have on the protection of other rights, as well as of the different legal contexts in which such legislation would operate, it seems inadvisable to recommend a uniform adoption of legislation establishing a general right to privacy. International standards might, however, be adopted, indicating other types of action which should be taken to protect the privacy of the individual against invasions by modern recording and other techniques, along the following lines:

1. States shall adopt legislation, or bring up to date existing legislation, so as to provide protection for the privacy of the individual against invasions by modern technological devices;

2. Legislation might be drafted in such a manner as to make it easily adaptable to future technological developments:

3. States shall, in particular, take the following minimum steps:

(a) Penal Codes should designate-as-offences and provide for penalties of fine, imprisonment or both, for:

(i) the clandestine monitoring or recording of conversations except, possibly, by participants to the conversations; and except by judicial or ministerial order, and in accordance with that order, in countries which permit monitoring or recording-in-criminal investigation or for reasons of national security;

- (ii) the disclosure by any person of information so obtained;
- (iii) the clandestine viewing, photographing, filming or televising of members of households and their guests in their dwellings, except by judicial or ministerial order, and in accordance with that order, in countries which permit such actions in criminal investigations or for reasons of national security;

(b) States which permit the utilization by their own agencies of modern recording and other techniques in the investigation of crimes or for reasons of national security shall make provision to restrict the use of these techniques to cases of the most serious crimes or the most serious threats to national security. They shall lay down by law the conditions for their use, which conditions shall include:

- (i) prior authorization in each case by a judicial authority (or by an official of Ministerial rank), upon a showing of "probable cause" or its equivalent and a showing that alternative methods of surveillance are not available or not effective in the particular case;
- (ii) specification, in the authorization, of the person to be monitored, the suspected offence, the person who is to do the monitoring, and the length of the period of surveillance. States shall make provision to ensure that such authorizations are not issued in a routine manner or by delegation of authority;
- (iii) specification of the extent to which use may be made in criminal proceedings of information gained;

(c) States permitting the operations of private detectives shall license such detectives individually;

(d) States shall favour the establishment of journalists' codes of ethics including provisions concerning respect for the privacy of the individual;

(e) In addition to any possible criminal liability, civil liability should attach to either the use of an auditory or visual device in relation to a person, under circumstances which would entitle him to assume that he could not be seen or heard by unauthorized persons, or the unauthorized disclosure of information so gained;

(f) Civil remedies shall allow a person to apply for the cessation of acts thus violating his privacy and, where the act has been completed, to recover damages, including damages for non-pecuniary injury;

(g) Legislative or administrative steps shall be taken to control effectively the importation, manufacture, advertisement, sale, transfer and possession of devices suitable primarily for clandestine auditory or visual surveillance. These steps shall include the following:

/...

- (i) the manufacturers of such devices shall be required to hold a valid government licence, renewable periodically and revocable for good cause, and to submit appropriate records periodically for State inspection;
- (ii) the manufacturers of such devices shall be forbidden to sell them to anyone not having a valid government licence authorizing possession thereof;
- (iii) the unlicensed manufacture or possession of such devices shall be punishable;
- (iv) the responsible governmental authority shall compile and keep current a catalogue of the devices and components subject to its control;

(h) Legal provision shall be made for the confiscation and destruction without compensation of recording and other devices utilized in an offence involving clandestine auditory or visual surveillance, whether or not the device was intended primarily for such use.

4. States shall establish expert bodies to follow scientific and technological developments affecting the right to privacy and to draw the attention of the legislature, the executive and the public to the effects of such developments, existing or new, upon the right to privacy and to possible safeguards required.

4. Suggestions for international co-operation

178. Suggestions have been forwarded to the Secretary-General for international co-operation to protect the privacy of the individual in the following areas:

1. International regulation of penal and civil matters in respect of the publication in one country of information or pictures obtained through the illegal use of surveillance devices in another country; 150/

2. International regulation in the matter of penal measures applicable to the illegal manufacture and sale of surveillance devices; 150/

3. Establishment of an international procedure to obtain speedy recognition in other countries of orders banning publications on the grounds of invasion of privacy; 151/

4. Exchange of technical and legal experience regarding the effective protection of telecommunication secrecy. 151/

150/ Paper by Minister of Justice of the Netherlands submitted to the Sixth Conference of European Ministers of Justice, The Hague, 26 to 28 May 1970; information forwarded by the Government of Austria on 8 March 1972.

151/ Communication dated 8 March 1972 from the Government of Austria.

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IV. RECENT SCIENTIFIC AND TECHNOLOGICAL DEVELOPMENTS
INVOLVING INVASIONS OF THE PRIVACY OF THE INDIVIDUAL
BY PSYCHOLOGICAL AND PHYSICAL MEANS

Introduction

179. The last several decades have seen the invention or development of various techniques of eliciting information from individuals by psychological and physical means such as personality assessment techniques ("personality tests"), polygraphs ("lie detectors"), narco-analysis and certain blood, breath and other bodily tests, the use of which may involve invasions of the privacy of the individual.

180. It should be kept in mind in this connexion that many of these techniques and devices have medical uses and when applied in the health and medical fields have as their exclusive objective the good of the person concerned, any invasion of his privacy being an incidental by-product. ^{152/} The present study is concerned with the use of such techniques for non-medical purposes only.

A. Nature of the new methods available and their benign uses

181. The new techniques available range from those concerned with psychological reactions alone, through techniques taking into account the physical effects of a person's psychological reactions or the psychological effects of his physical reactions, to techniques measuring physical condition only.

1. Personality assessment techniques

(a) The structured personality test

182. This approach, which is perhaps the one most frequently considered in literature on the invasion of privacy, asks questions which are supposed to be answered with a limited range of specified responses such as "true" or "false" or "yes" or "no". The questions may deal with practically any subject, including virtually every aspect of one's personal life, interpersonal relations, religious beliefs, political convictions and even opinions about matters of fact such as,

^{152/} Cf. preliminary memorandum forwarded by the World Health Organization on 20 October 1970 (A/8055/Add.1) para. 24.

to cite an example, the largest number of ships entering a particular harbour during a particular year. 153/

183. Typical instruments of this nature include the Maudsley Personality Inventory, the Sixteen Personality Factor Questionnaire (16 PF) and the Minnesota Multiphasic Personality Inventory (MMPI) used in a variety of contexts. 154/ These instruments may contain anywhere from two to 18 scales measuring a variety of traits such as social introversion, maturation for success, interpersonal ascendancy, and psychological femininity or masculinity. In addition, some of these instruments serve as item pools from which several hundred other scales have been constructed. The MMPI, for instance, contains 566 items which have been used in various different combinations to construct, when last tabulated in 1960, 155/ 212 additional scales measuring traits ranging from interpersonal attractiveness to baseball playing performance. Instruments such as these, in whole or in part, have been translated into many languages including French, German, Hindi, Italian, Japanese and Spanish.

(b) Unstructured personality tests

184. A second widely noted form of personality assessment is the unstructured or projective test. 156/ This form is distinguished from the structured test particularly by the absence of a pre-ordained response format. Typically the stimulus materials used in this procedure are pictorial. The person concerned may be asked to describe, for instance, a picture, an inkblot as in the famous Rorschach test, or a cartoon. Some attempts have been made asking persons to describe a slimy material that they cannot see but are required to touch. Widely used projective techniques are picture-drawing procedures in which the respondent draws a person. Or the stimulus material may be verbal, respondents being asked to complete questions such as "The action I would most like to do is...". The stimulus may even be totally unstructured as in the case of the Thematic Apperception Test wherein subjects are asked to invent imaginative descriptions of various pictures including one blank white card.

153/ Standard surveys of this technology include P. E. Vernon, Personality Assessment, (London, Methuen, 1964); A. Anastasi, Psychological Testing (3d ed., MacMillan, N.Y., 1968); R. B. Cattell, and F. W. Warburton, Objective Personality and Motivation Tests (Urbana, Ill., University of Illinois, 1967); L. J. Cronbach, Essentials of Psychological Testing 3d ed., (New York, Harper and Row, 1969); N. Thirtha, Assessment of Personality Traits (Hyderabad, Andhra Pradesh, Hyderabad State Teachers Union, 1961).

154/ Specific citations to the publishers, costs, and traits measured by most major current, structured personality inventories, and instructioned personality tests are found in O. K. Buros, et al., Personality Tests and Reviews Highland Park, N.J., Gryphon, 1970.

155/ W. G. Dahlstrom, and G. Schlager, An MMPI Handbook (Minneapolis, University of Minnesota, 1960).

156/ A good over-view of this technology is available in D. Anzieu, Les Méthodes Projectives (Paris, Presses Universitaires de France, 1960).

185. Some partial indication of the rapid growth of structured and unstructured tests may be obtained by a comparison of a 1972 mental measurements handbook, which surveys and reviews the technical adequacy of such procedures, with the earlier editions of the same handbook. ^{157/} Over a relatively brief period the number of such procedures listed has increased from 28 in 1938 to 68 in 1940, 72 in 1949, 101 in 1953, 139 in 1959, 189 in 1965 and 225 in 1972. These figures, in fact, underestimate the actual numbers, as many instruments developed mainly for research purposes and of little commercial interest are not mentioned. The tests reviewed in that sampling are limited to those published in English.

186. It should be mentioned that the equipment used in structured and unstructured personality tests is very inexpensive and thus the tests can be given in large numbers. Many assessment devices have separate answer sheets that make the testing instrument reusable over an indefinite period of time. Machine scoring and interpretation via electronic computers is also available for the most widely used of the structured tests. This interpretation is, however, based on norms and validity data in the country of origin, which creates some difficulties when the tests are used in other countries.

(c) Situational tests

187. A quite different approach to personality assessment is that of situational tests. ^{158/} Favoured by some ^{159/} as a means of minimizing the invasion of privacy in personnel selection, these procedures simulate performance situations resembling real life problems and the individual respondent is assessed on the basis of his performance in the simulated conditions. Typical examples of such tests are leadership situations in which a group of individuals is assigned some practical task which roughly resembles some of the problems they might encounter on a job. Observations are made of who facilitates and who interferes with successful group performance. Another recent example of this genre is the In-Basket tests. This procedure consists of a series of documents designed to resemble the kind of paper-work problems that people would meet in their daily work at administrative jobs. Scores are compiled on the number of messages correctly processed from in-basket to out-basket.

(d) Perceptual tests of individual differences

188. Another category of personality assessment procedure is the perception or perceptual motor test. A highly developed instance of such an approach is the work done in the laboratory of B. M. Teplov. ^{160/} This work, which derives from the theories of Pavlov, estimates the strength of an individual's nervous system

^{157/} O. K. Buros, ed., op. cit.

^{158/} These are discussed in Vernon, op. cit.

¹⁵⁹ See Westin, op. cit.

^{160/} B. M. Teplov, Tipologicheskiye osobennosti vysshei nervnoi deyatel'nosti cheloveka (Academy of Pedagogical Sciences, vol. 1, 1956; vol. 2, 1959).

by measuring, among other things, the sensitivity of the visual and auditory perceptual system. This work is primarily pure research but ultimately is expected to have important benefits, for instance in identifying promising students.

189. Another important perceptual approach to personality assessment is the Rod and Frame test. This device requires the person being tested to rotate a rod to a true vertical position in a completely dark room with a minimum of perceptual cues. In fact the most salient visual cue is that of a rectangular frame around the rod that glows in the dark and is placed at angles that tend to mislead respondents as to the true vertical and horizontal dimensions. This apparently inconsequential task, which derives from earlier research during the Second World War on abilities involved in piloting aircraft, has subsequently been found to relate to an extraordinary range of personality characteristics, including types of psychopathology, styles of interpersonal interaction, managerial effectiveness, and tendencies to isolate emotions from the intellectual aspects of self-knowledge. 161/

(e) Psycho-physiological measurements

190. Another type of assessment is that employing psycho-physiological indices, such as cardiac (heart beat) deceleration, pupil contraction, and electrical conductivity of the skin produced by sweating. These approaches are used to identify transitory states of the personality, such as guilt, anxiety, interest, stress and emotional ambivalence. The most important application of this type from a human rights standpoint is in the "lie detector" test. This technique, which will be discussed at greater length below, attempts to detect when a person is lying, from small disruptions in the nervous system presumably created by the extra stress involved, for most normal individuals, in lying.

191. A further example of psycho-physiological personality assessment is a technique that purports to reveal "private attitudes about public things and persons". 162/ This approach examines changes in the contraction or dilation of the pupil of the eye when the person concerned is presented with pictures. In one study, for instance, pictures of leading political figures were used. This study reports that one out of three of those professing preference for one of two major candidates in a political campaign actually preferred the other candidate, preference being indicated by pupil dilation for preferred candidates and pupil contraction for disapproved candidates. Work has been done on reactions to verbal materials as well.

192. This technique also has been used to indicate the advertising effectiveness of pictorial material. Current technology usually employs cameras with the assessee's head held in a fixed position.

161/ H. A. Witkin, Psychological Differentiation (New York, Wiley, 1962).

162/ E. H. Hess, "Attitude and pupil size", Scientific American (April 1965) vol. 212, No. 4, pp. 46-54.

(f) A classification of personality assessment procedures in terms of the degree of informed consent that the respondent is permitted where assessed 163/

193. The above-mentioned techniques may also be classified according to the degree of control which the person concerned has over his responses.

(i) Reactive assessment, obtrusive and unobtrusive

194. The form of personality assessment permitting the greatest degree of voluntary control by the person concerned over what he reveals is called reactive, obtrusive assessment. Reactive assessment requires that the person being assessed make a choice as to whether or not he or she wishes to participate in that assessment. If that choice is negative, then reactive assessment cannot proceed. Either obtrusive or unobtrusive measurement may take place in the context of this assessment. Obtrusive measurement occurs whenever the respondent knows what aspect of his responses is crucial for the assessment. For instance, in a survey of political attitudes, the subject of the assessment may be whether or not one is in favour, say, of one's country adopting a certain policy. A reply of "yes" or "no" to a straightforward question on that topic in fact determines what is regarded as one's attitude.

195. There are many reactive assessment procedures, however, that have unobtrusive elements that may be of paramount interest for the assessor. A large variety of such indirect approaches within a reactive assessment have been developed. In an interview, for instance, which the person to be interviewed has consented to give, the assessment may really be not specifically concerned with what that person says but with how long the response takes, with eye gaze, eye blinks, vocal tone and amplitude and the like. Or, on a personality test, assessment experts might consider the length of time involved in taking the test - whether answers were crossed out, whether items were changed by the respondent to make them less ambiguous, whether items phrased in the first person were answered differently from those phrased in the third person, and so on. 164/ Even factual questions, apparently measuring a person's knowledge of economic statistics, have been used to measure, for example, allegiance as between management and labour unions. It was assumed in this study that generally persons would be ignorant of the actual statistics concerning average earnings, profits and the like so that the direction of error in over-estimating labour's wages or underestimating corporate profits would betray a person's fundamental sympathies. In short,

163/ Webb, Campbell, Schwartz and Seechrest, Unobtrusive Measures: Non-reactive Research in the Social Sciences (Chicago, Rand McNally, 1966) provides a comprehensive over-view of this technology and its technological justifications. See also Margaret Hermann, Indirect Methods of Personality Assessment (Princeton, N.J., Research Bulletin Educational Testing Service, 1968).

164/ See Margaret Hermann, op. cit.

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unobtrusive measurement, in a reactive context, typically involves varying degrees of deception as to what the assessment is either stated to be or might reasonably be presumed to be about.

(ii) Unobtrusive, non-reactive assessment

196. Unobtrusive, non-reactive assessment approaches occur when the person does not know that he is revealing some aspect of his wishes, interests, beliefs, values or, more generally, his personality. Furthermore, this exhibition occurs without the person having given any consent, informed or otherwise, to participating in a psychological assessment. Typically the evidence accumulated in this manner is in a public setting that provides useful information of an anonymous sort. For instance, studies have been done 165/ in museums of the erosion of floor tiles to get a cumulative record of what exhibits people most often visit.

197. Theatre audiences have been studied with sophisticated electronic hardware to detect the extent of fidgeting - a presumptive index of boredom or under-interest. One study 166/ used an electromagnetic movement meter involving an oscillator detector, a DC amplifier, and an Esterline Angus ink-writing recorder. A concealed copper screen located behind the subject's head was sensitive to the subject's movements and translated this information into electronically recorded impulses. Respiratory reactions also have been used to study reactions to films 167/ but practical difficulties make this kind of assessment more effective in the controlled conditions of a laboratory. As an example of the prevalence - if not the technological sophistication - of unobtrusive, non-reactive research in public places, may be cited a study carried out in 1965, 168/ in which a scientist sitting with a press card in the gallery, recorded 3,322 interactions among representatives at meetings of the Administrative and Budgetary Committee of the United Nations General Assembly. Each interaction was coded for location, initiator, presence or exchange of documents, apparent humour and duration. The research interest was in identifying clusters of nations that typically interact.

165/ See Webb, et al., op. cit.

166/ Kretsinger, cited in Webb, et al., op. cit., p. 152.

167/ M. M. Toulouse and R. Morengue, "Des reactions respiratoires au cours de projections cinematographiques", Revue Internationale de Filmologie, 1948, No. 2, pp. 77-83.

168/ C. F. Alger, "Interaction in a committee of the United Nations General Assembly", in J. D. Singer, ed., International Yearbook of Behaviour Research, (New York, Free Press, 1968), p. 6.

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(g) Benign uses of personality assessment techniques

198. Personality assessment techniques are used in particular in connexion with psychological research, guidance, educational and vocational counselling, and personnel administration. In psychological research, they are used both for basic research, which is directed toward a deeper understanding of the human being, and for applied research, directed toward finding solutions to specific human or social problems.

199. Personality assessment techniques used for guidance purposes are intended to enable the individual concerned to gain insight into his own personality.

200. In connexion with educational and career counselling, personality assessment techniques are used with a view to facilitating the selection of the type of education or occupation which would enable the person in question to make the most of his aptitudes. 169/

201. In personnel administration such assessment techniques are used with a view to facilitating the selection of the most qualified and suitable candidates for the posts in question, both for initial recruitment and subsequent promotion. It is considered, however, that the predictive value of such tests varies considerably, depending on their nature and on the specific use to which they are being put.

2. Questionnaires and social science research

202. In recent years there has been a great increase in the use of questionnaires and interviews as a research tool for gathering information in various fields, ranging from the collection of data for census and statistical purposes to marketing research opinion polls, and sociological or anthropological inquiries. The questionnaire technique is being used extensively by both governmental agencies and private scholars. The oral interview is more frequently used by the latter. 170/

203. While the actual method of collecting the data may appear traditional - questionnaires to be filled in and oral interviews to be given 171/ scientific and technological advances govern the manner in which the data thus obtained are analyzed and utilized; and the ease with which - owing to these advances, which include the computer - data may now be processed has been at least partly responsible for the great increase in the number and length of such inquiries and the ever-widening field of the topics considered suitable for study by this method. More recently elaborate coding procedures for use during interviews have been

169/ See, e.g., S. Bhattacharya, Guidance in Education (New York, Asia Publishing House, 1963) and H. Lytton and M. Craft, eds., Guidance and Counselling in British Schools (London, Edward Arnold, 1969).

170/ J. O. Davis, The Interview as Arena (Stanford, Cal., Stanford University Press, 1971); C. Nahoum, L'entretien psychologique (Paris, Presses Universitaires de France, 1958); E. Runge, Bottroper Protokolle Frankfurt a.M., Suhrkamp, 1968).

171/ The interviews may be tape recorded, however.

/...

developed which may concentrate on the extent and duration of pauses, the rate of speech, and the interruptions of speech as much as or more than on what is actually said during the interview. Questionnaires are typically like interviews except that one responds via paper and pencil.

3. "Lie detectors"

204. The name "lie detector" is popularly applied to a number of instruments capable of measuring changes in a person's bodily reactions, such as pulse rate, blood pressure, breathing, or rate of perspiration, and used for purposes of interrogation. The instruments can be divided into two basic types, those which measure only one bodily change (such as the pathometer, measuring galvanic skin reflex) and those which measure several such changes (polygraphs). 172/ In popular parlance, the word "polygraph" is often used as a synonym for "lie detector".

205. The "lie detector" procedure consists in the person under examination being asked series of questions by the polygraph operator. The bodily changes accompanying the verbal replies are registered by the instrument and translated by pens into patterns on graph paper, resembling those of an electrocardiogram. Certain variations in bodily reactions to different questions - some relevant and some irrelevant to the subject-matter under investigation - are interpreted, broadly speaking, as reflecting stress engendered by the need for telling an untruth.

206. Modern "lie detectors" were developed during the 1920s as an aid to police investigation of crime but important technological advances were made in the 1950s and 1960s. While many devices require the person questioned to be connected by wires to the instrument, it is now possible to administer lie-detection tests without the knowledge of the subject, by having him occupy a seemingly ordinary chair which has built into it equipment to register body heat, changes in limb volume, and nervous movements. In such cases hidden cameras may also be used to measure changes in eye-pupil size. 173/

207. "Lie detector" tests are used primarily in commercial and industrial establishments as part of regular personnel policy, and in police investigations. Their use in court proceedings is less frequent.

172/ Westin, op. cit., pp. 133 and 147. The author states that some polygraph machines also test muscle tension and that it is common to tape record and photograph the entire examination secretly for later study.

173/ Ibid., pp. 133-134. According to the author, some doubt has been expressed "whether maximum stress is generated when the subject is not told that he is being put under 'scientific, machine measurement'" but the covert polygraph techniques are considered valuable in situations "where it is not feasible to require a polygraph test or even to let someone know he is under suspicion".

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208. A new type of "lie detector", called the Psychological Stress Evaluator, has been developed and is designed to detect psychological stress from measurement of a speaker's voice, measurement that can be taken without the speaker's being aware of it. 174/

209. Professor Fred E. Inbau and Mr. John E. Reid have written the following as regards the lie detector technique:

From what we have learned over the years... we are confident that the technique, when properly applied by a trained, competent examiner, is very accurate in its indications. And the relatively few errors that do occur favour the innocent, since the known mistakes in diagnosis almost always involve a failure to detect the lies of guilty subjects rather than a finding of lying on the part of a truth-telling, innocent person.

Generally overlooked in the public appraisal of the lie-detector technique is the great value it possesses in proving innocence as well as guilt. Many a suspected criminal or suspected employee, surrounded by convincing circumstantial evidence of guilt, has had his innocence thoroughly established by means of the technique... .

Case after case illustrates the value of the lie-detector technique in establishing the innocence of accused persons in commercial situations, as well as in criminal investigations and prosecutions for rape, murder and other serious offenses... . 175/

4. Narco-analysis

210. As described in Privacy and Freedom by A. Westin, certain chemicals exist, that affect consciousness and volition in ways that might be used to lead a person to reveal information he would not otherwise disclose. These so-called "truth drugs", such as scopolamines, sodium pentathol, and sodium amytal, are relaxant agents that release inhibiting controls. 176/

211. Narco-analysis has been found to have therapeutic uses, but these are outside the scope of the present report. "Truth drugs" have also been used in police work, for example as an aid for the recall of an event or conversation which the subject cannot remember in a normal conscious state; 177/ in identifying victims of

174/ The New York Times, 5 June 1972; Newsweek, 19 June 1972, p. 103.

175/ Fred E. Inbau and John E. Reid, "The lie-detector technique: a reliable and valuable investigative aid", American Bar Association Journal, vol. 50, No. 5, May 1964.

176/ Westin, op. cit., p. 154.

177/ Seymour Gelber, "Removing inhibitions through narcoanalysis in criminal investigation", Police, January-February 1967, pp. 13, et seq.

amnesia, 178/ by helping, for example, to ascertain the victim's knowledge of a language or of a personally known fact; and in detecting the simulation of insanity. 179/ The use of narco-analysis in the psychiatric examination of suspected criminals who have entered a plea of not guilty by reason of insanity has been described as follows:

When the patient is mute and the underlying cause is not evident, narco-analysis may restore speech and thereby reveal the correct diagnosis whether it be psychosis, hysteria, epilepsy, organic brain disorder or malingering. 180/

212. Narco-analysis conducted by psychiatrists has been used by parole boards as an aid to determine eligibility for parole. 181/

5. Blood tests, breath tests and urinalysis

213. A number of situations exist in which an individual may be asked to submit, for purposes not connected with health care or medical treatment, to tests of samples of his blood, his breath, his urine, or other substances of his body. Most frequently such tests are made in connexion with civil litigation and criminal proceedings. The tests involve the withdrawal of the substance from the person concerned, the analysis of the substance by a laboratory, and the evaluation of the findings.

214. The results of tests showing the blood grouping to which an individual belongs may be used for record purposes, to identify the individual. They may also be used to exclude presumptions of paternity (but are not sufficiently developed to allow a reliable positive identification of paternity). They have been used in solving errors concerning the identity of babies, excluding false heirs in settling inheritance claims and determining filial relationships in immigration proceedings. 182/

178/ Moser and Harris, "The identification of an amnesia victim by use of scopolamine", Journal of Criminal Law and Criminology, vol. 26, 1935, p. 431.
W. G. Lennox, "Real and feigned amnesia: scientific proof and relations to law and medicine", American Journal of Psychiatry, vol. 99, March 1943, pp. 732-745.

179/ I. Virotta, "Riflessioni sulla narco-analisi: per fine di giustizia". Archivis penali, vol. 20, Nos. 3-4, pp. 130-141.

180/ John M. Macdonald, M.D., "The use of drugs in the examination of suspected criminals". Journal of Forensic Medicine, vol. 3, No. 1, January-March 1956, p. 4.

181/ R. E. House. "The use of scopolamine in criminology", American Journal of Police Science, (Chicago), vol. 2, July-August 1931, p. 328.

182/ T. O. Kins, "Blood groups and the law, a scientific and legal review", Wyoming Law Journal, vol. 9, Winter 1955, p. 85.

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215. Other blood tests are used to discover substances in a person's blood stream such as poisons, narcotics and other drugs, and alcohol. Because of the great social danger posed by drunken drivers, many countries have approved the compulsory withdrawal of a certain amount of blood by a syringe to be analysed for its alcohol content. Justice Clark of the United States Supreme Court upheld the taking of blood samples from an unconscious suspect in automobile accident cases, by emphasizing society's overriding interests:

"As against the right of an individual that his person be held inviolable... must be set the interests of society in the scientific determination of intoxication, one of the great causes of the mortal hazards of the road. And the more so since the test may likewise establish innocence, thus affording protection against the treachery of judgment based on one or more of the senses. Furthermore, since our criminal law is to no small extent justified by the assumption of deterrence, the individual's right to immunity from such invasion of the body as is involved in a properly safeguarded blood test is far outweighed by the value of its deterrent effect due to public realization that the issue of driving while under the influence of alcohol can often by this method be taken out of the confusion of conflicting contentions." 183/

216. Two other techniques, urinalysis and the "breathalyzer" test, do not require physical entry of the body. Both of these procedures have advantages and disadvantages over a simple blood test. Urine specimens usually are easily available without compulsion (particularly when the percentage of alcohol is in the culpable range), are adequate for repeated tests and can be preserved for at least a year without an appreciable loss of alcohol. 184/ The results obtained from urinalysis are, however, less reliable than those of a blood test. They are not comparable and are susceptible to error because of different rates of absorption, oxidation and elimination of alcohol in blood and urine. 185/

217. The "breath analyzer" or "breathalyzer" in its less sophisticated and most commonly used form operates by having the suspect exhale into a balloon-like instrument that registers the percentage of alcohol on his breath. While this technique is the least reliable and is difficult to correlate with a blood test, 186/ it "avoids the delicate invasion of the human body for blood extraction". 187/ The tendency seems to be to use breath analyzer results alone not to justify a conviction for drunkenness but only as a prelude to a

183/ Breithaupt v. Abram, 352 U. S. 432 (1956), at p. 439, 440.

184/ Herman A. Heise, M.D., "Concentrations of alcohol in blood and urine taken at the same time", Journal of Forensic Sciences, vol. 12, No. 4, 1967, pp. 458-459.

185/ Ibid., p. 457.

186/ J. R. Howes, R. A. Hallett, D. M. Lucas, "A study of the accuracy of the breathalyzer as operated by police personnel", Journal of Forensic Sciences, vol. 12, No. 4, 1967, pp. 444, 445.

187/ Schroeder, op. cit., p. 138.

blood test. 188/ By taking it, drivers who in fact have not consumed alcohol may avoid the need for a blood test.

218. Tests for drugs are also being devised, in view of the increasing use of drugs by individuals, including narcotics, barbiturates, tranquilizers, antihistamines and the amphetamines. 189/

188/ S. C. Versele, "La loi du 15 avril 1958", Revue de Droit Pénal et de Criminologie, vol. 44, June 1964, p. 814.

189/ C. J. Rehling, "The drug impaired driver", Police, September-October 1966, pp. 15, 17.

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B. Threats and problems concerning the privacy of the individual arising in connexion with techniques for eliciting information by modern psychological and physical methods of inquiry

219. The original motivation in attempting to apply scientific methods to the various procedures mentioned above has been, generally speaking, the search for objective criteria, untainted by personal prejudice or human error, be it in the choice of a career, the selection of a person for a given job or the search for an offender.

220. Irrespective of the question of motivation, however, methods of psychological and physical inquiry such as those mentioned above may easily interfere with the privacy of the individual concerned. The nature of the question asked in psychological and psycho-physiological inquiries may be such as to constitute a direct and open interference, as may the bodily invasions involved in the purely physical tests. Questions as to the subject's political and/or religious preferences, sex life and relationships within the family may be considered in this category, as may be the revelation of one's innermost thoughts in questioning under narco-analysis or the discovery through physical tests of filial relationships or alcoholic consumption. The recording of a person's unsuspecting, unconscious or involuntary reactions may amount to clandestine interference.

221. At the same time that these procedures violate a person's privacy, they may violate other rights of his that privacy tends to protect. Among the rights that may be affected by such intrusions are the right to freedom of thought, conscience and religion and the right to freedom of opinion, as discussed in paragraphs 50 to 52 above. Particular attention has been drawn in this context to the right of everyone to a fair and public hearing in the determination of his rights and obligations and of any criminal charge against him, and to certain procedural guarantees connected therewith. These include the right of a person charged with a penal offence to be presumed innocent until proven guilty, according to law, in a public trial at which he has had all the guarantees necessary for his defence, more specifically the right to counsel and guarantees against self-incrimination.

222. It has been maintained that no invasion of privacy takes place where the test is taken voluntarily. What is "voluntary" represents, however, a complex issue. For example, it depends entirely on the law of the particular state or locality whether a person involved in a police inquiry or in judicial proceedings, be it as a suspect or accused or as a witness, may decline a request that he submit to a "lie-detector" test or to narco-analysis and what, if any, conclusions may be drawn from his refusal.

223. Where taking a "personality" test or a "lie-detector" test is made a pre-condition for hiring, continued employment or promotion, or even where this is merely "recommended" as being "desirable", taking such a test may not be a genuinely voluntary act for a person seeking, or seeking to retain, employment; the more so as his refusal to take the test, if recorded, may harm his chances of obtaining employment elsewhere.

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224. This absence of a meaningful form of voluntary consent poses a threat to privacy particularly in cases where the personality assessment deals with intimate features of one's personal, sexual, religious or political life. Questions on these matters occur at least occasionally on many personality inventories. The polygraph has also been used to explore such subjects.

225. Quite apart from these issues, there remains the question of the scientific reliability or predictive value, in each particular case, of procedures such as those discussed above. A validity record of 80 per cent may be considered significant in a research project seeking to establish trends. The implied 20 per cent margin for error, on the other hand, may be significant where conclusions are to be drawn about an individual human being.

226. Reliability and predictive value may vary, depending on the specific test, the particular practical use to which that test is put, or the skill of the person administering the test and interpreting the results.

227. The reliability and the predictive value of personality assessment tests in the area of personnel selection seems to vary greatly. One review of the research literature in this area concluded that:

(1) The current personality theories (implied in the tests used) were not relevant to the work situation;

(2) The criteria used in many research studies were the wrong ones;

(3) Replication and follow-up research were lacking;

(4) In general, home-made personality or interest measures which are competently developed appear to be better bets for specific situations than standard personality measures with a standard system of scoring. 190/

228. Some of the personality assessment tests used in personnel selection were, moreover, developed initially for use in connexion with medical diagnosis. The Rorschach test, the Maudsley Personality Inventory, and the Minnesota Multiphasic Personality Inventory, to mention only a few widely used devices, were all developed for work with hospital populations. Their use in contexts for which they were not designed, as for purposes of personnel selection, is one major source of public opposition to these tests. The advantages of this technology may be more substantial if restricted more closely to their original purposes. To cite but one example, the Rorschach Inkblot Test 191/ was tried and found to be useless in the prediction of performance among United Nations employees. 192/

190/ D. G. Rosen, Personality Testing in Industry, Technical Report, (Ithaca, N.Y., Industrial and Labor Relations Library, 1966).

191/ Rorschach, H. Psychodiagnostics (Berne, Huber, 1942).

192/ M. Gross, The Brainwatchers (New York, N.Y., Random House, 1962) pp. 78-79.

229. In the case of the "lie detector", the results may vary depending on the quality of the instrument and the degree of training of the operator. Subjects may become disturbed by the questioning for reasons other than guilt (such as anger at being suspected or fear of being wrongly convicted) while some individuals, though aware of their guilt, may be able to remain calm. 193/

230. It has been pointed out that polygraph instruments do not measure lying, or even physiological states that accompany lying. They measure physiological change in the subject generated by emotional stress. 194/

231. Experiments give some background as to why the results of polygraphing may be unreliable. It has been found that the labelling of a state of non-specific arousal could be influenced by the interpersonal interaction occurring during the period of high arousal. 195/ The same state of arousal was labelled joy in one social setting and anger in another. It is not a difficult extrapolation to suggest that social cues could also facilitate the labelling of an ambiguous arousal state as guilt, in particular where the polygraph operator is working under a strong sense of presumed guilt. Such an effect would be especially likely where the charge was relatively vague. A related study, 196/ has shown that a supposedly infallible truth detection machine can be designed so as to convince an individual that his own false confessions are true. Mention has been made of different results obtained where different operators tested the same subject. Substantial error rates have been reported in polygraph result. 197/

232. No information seems to be available as to whether individuals of different cultures, sex and age, respond comparably.

233. Mr. John E. Reid and Professor Fred E. Inbau have written:

Before permitting the results to be admitted as evidence in any case,... the courts should require the following:

(1) That the examiner possess a college degree. (2) That he has received at least six months of internship training under an experienced, competent examiner or examiners with a sufficient volume of case work to afford frequent supervised testing in actual case situations. (3) That the witness

193/ "The truth about 'lie' detectors", The American Federationist (Washington, D.C., AFL-CIO), vol. 71, No. 11, Nov. 1964, pp. 13-20; Westin, op. cit., pp. 212-214; B. M. Smith, "The polygraph", Scientific American, vol. 216, No. 1, January 1967, p. 25.

194/ Westin, op. cit., pp. 212-213.

195/ S. Schachter and J. E. Singer, "Cognitive, social and physiological determinants of emotional state", Psychological Review, 1962, vol. 69, pp. 379-399.

196/ D. Bem, "Inducing belief in false confessions", Journal of Personality and Social Psychology, 1966, No. 3, pp. 707-710.

197/ Westin, op. cit., p. 213.

/...

have at least five years' experience as a specialist in the field of Polygraph examinations. (4) That the examiner's testimony must be based upon Polygraph records that he produces in court and which are available for cross examination purposes.

In any jury trial where the test results are admitted in evidence the court should instruct the jury that they should not consider the Polygraph examiner's opinion as conclusive, but that they are privileged to consider the opinion along with all the other evidence in the case and to give the opinion whatever weight and effect they think it reasonably deserves. 198/

234. A further threat to the privacy of the individual may arise when information obtained with his consent on the understanding that it be treated as confidential is disclosed without consent, whether through computerization or otherwise. For example, a computer "dating service" made use of the results of an extensive personality questionnaire that dealt with personal, political and sexual preferences. 199/

235. A survey 200/ of the willingness of some 130 corporations to release employment test scores to other individuals in the firm (especially immediate work supervisors), to government agencies, and even to other firms indicated that 61 firms were willing to release this information to immediate supervisors while only 25 would release it to the employee himself. Sixteen of these firms would release this information to government agencies, although the survey report does not say for what purpose.

236. The use of norms compiled in one country to interpret the meaning of an individual's personality test scores in another country may lead to misinterpretation. This is particularly likely when ready-made personality test interpretations are available through the mail. 201/

237. Claims have also been made that personality assessment procedures may discriminate against minority groups within a country. 202/

238. There is, moreover, the question of whether, and if so how, appeal can be brought against a "scientific" finding which may be erroneous, an invasion of privacy, self-incriminatory or obtained without the person concerned having had the benefit of counsel.

198/ John E. Reid and Fred E. Inbau, Truth and Deception: The Polygraph ("Lie-Detector") Technique (Baltimore, Williams and Wilkins, 1966), p. 257.

199/ J. M. Rosenberg, Death of Privacy (New York, Random House, 1969), p. 54.

200/ Ibid., pp. 78-79.

201/ Reported by Dr. C. R. Meyers, Executive Secretary of the Canadian Psychological Association, 1 May 1972.

202/ Testimony by Martin Gross; see American Psychologist: Testing and Public Policy, vol. 20, 1965, p. 959.

C. Protection of privacy in the light of modern psychological and physical methods of eliciting information

1. Studies and inquiries concerning improved protection of privacy

239. The question of psychological and physical invasions of privacy has been the subject of considerable study in recent years. Government-sponsored inquiries include the above-mentioned Younger Report in the United Kingdom; and a number of Congressional Hearings as well as a study by the Office of Science and Technology in the United States. 203/ The above-mentioned report of the Council of Europe's Committee of Experts on Human Rights also touches on the subject. 204/

240. The subject has, moreover, been considered at a number of international gatherings, among them the United Nations seminars on the protection of human rights in criminal law and procedure - held, respectively, in Baguio City, the Philippines, 17 to 28 February 1958 and Santiago, Chile, 19 to 30 May 1958 - and on the protection of human rights in criminal procedure, held in Vienna, Austria, 27 June to 4 July 1960; 205/ at UNESCO's 1970 Meeting of Experts on the Right to Privacy; 206/ the Third International Colloquy About the European Convention on Human Rights; 206/ the Ninth Congress of the International Association of Democratic Lawyers, 206/ and the Colloque sur les méthodes scientifiques de recherche de la vérité, held in Abidjan, Ivory Coast, 10 to 16 January 1972. 207/

241. An extensive technical literature exists on the individual subjects dealt with in this chapter, such as personality assessment or blood tests. In recent years, increasing attention has been paid by both scholarly and popular writers to the impact of such methods of inquiry upon the privacy of the individual and other human rights.

242. The problems discussed are ethical, technical and legal. Is it compatible with respect for human rights, more particularly respect for the privacy of the individual, to use methods such as those discussed in this chapter in order to extract information from a person without his consent or even his knowledge? Is it possible to increase the reliability of these methods of inquiry as well as

203/ See, e.g., Ninety-First Congress, Second Session, Senate, Protecting Privacy and the Rights of Federal Employees, Report to accompany S.782, submitted by Mr. Ervin, Committee on the Judiciary, 15 May 1970 (Report No. 91-873); also Privacy and Behavioral Research, Executive Office of the President, Office of Science and Technology (Washington, D.C., U.S. Government Printing Office, 1967).

204/ Cf. document E/CN.4/1089/Add.1.

205/ See documents ST/TAO/HR/2, para. 41; ST/TAO/HR/3, paras. 112-121; and ST/TAO/HR/8, paras. 72-74.

206/ See above, para. 146.

207/ Documentation forwarded on 7 January 1972 by Resident Representative of the United Nations Development Programme in the Ivory Coast.

/...

adapt them so as to reduce to a minimum the invasion of privacy they entail?
Can the law effectively regulate the use of these methods and provide remedies for persons whose rights have been violated?

243. It will be recalled that the Nordic Conference on the Right to Privacy defined that right as the right of the individual to "lead his own life protected against", among other things, "interference with his physical or mental integrity or his moral or intellectual freedom;" and that "for practical purposes" that definition was intended to cover, among other matters, "medical examinations /and/ psychological and physical tests". 208/

244. As for "personality" tests and "lie detector" tests, much of the discussion revolves around the use of these methods in employment situations.

245. Thus the Director-General of the International Labour Office, in his report entitled Technology for Freedom 209/ summarized the questions relating to personality tests as follows:

"No less serious for the future of personal freedom /than intrusion upon worker's privacy by surveillance devices/ are some of the possible consequences of the erosion of privacy by the growing use of "personality tests" and "aptitude tests" which have developed from advances in psychology and psychiatry. Clearly, tests which make it possible to place a worker in a job corresponding to his qualifications and aptitudes, or which can help to determine more accurately a worker's suitability for transfer to another job or for promotion, are to be welcomed, since they can make for improved productivity and greater job satisfaction. To the extent that such tests can be shown to measure variables, such as manual and other skills, physical dexterity or ability to handle machinery, which predict the extent to which the worker will succeed in the job or training course for which he is applying, they can be most useful tools of personnel policy. Testing may indeed ensure greater equity in selection than the more widely used interview, which permits the ruthless rejection of a candidate on any pretext which the interviewer chooses, but it presents two types of problems.

"There is evidence that testing may discriminate against culturally disadvantaged groups. Such discrimination may sometimes be intentional, though generally it is likely to be due to the simple fact that individuals who are culturally disadvantaged or belong to minority cultural groups are often handicapped when competing with others in certain types of tests. There is here a potential, if unintended, abuse of testing which can be

208/ See above, paras. 45 and 151-152.

209/ Technology for Freedom, Man in His Environment, the ILO Contribution, International Labour Conference, fifty-seventh session, report of the Director-General, part I (Geneva, International Labour Office, 1972), pp. 29-30; see also D. E. Coupland, "Aptitude tests and discrimination", International Labour Review, vol. 102, No. 3.

eliminated only if testing procedures are devised which can accommodate a diversity of cultural backgrounds.

"Secondly, tests and interview techniques which seek to penetrate personality and measure such imponderables as emotions, attitudes, mental equilibrium, adaptability, or capacity to withstand psychological stress may be designed to have the subject reveal his political views or his attitudes on intimate religious, political, sexual or family matters; a candidate, or even his family, may be subjected to gruelling interviews and other tests placing him under great mental stress and he may be under observation without even being aware of it. The conclusions derived from tests designed to penetrate an individual's subconscious and to make him reveal things about himself which bear no direct relation to his future employment may be of dubious validity, particularly if the tests are conducted and analysed by persons who are not highly qualified psychiatrists and psychologists. An individual's whole career may be compromised, and his morale unnecessarily shaken, by undependable or meaningless scores in such tests. The employer or person who decides not to employ the worker may come into possession of a mass of actual or inferred information of a highly personal nature about him which is not related to his work. Is not the whole question of the relationship to personal freedom of the encroachment of promotion and selection techniques upon privacy another issue of substantial importance for the discharge of our commitment to personal freedom?

"These issues have been made much more acute by current developments in information storage. Prejudicial information, whether unfair or misleading or not unfair but irrelevant or best forgotten, has become much more serious because much less likely to be forgotten or overlooked."

246. The (federal) Civil Service Commission of the United States has adopted the position that personality tests "fail to satisfy merit system precepts for employment", since

(1) They were developed for clinical use, and are not designed to measure the specific characteristics needed by persons working in particular occupations.

(2) These tests are subject to distortion, either purposefully or otherwise. Therefore, the scores are undependable as a basis for employment decisions.

(3) The scores on such tests can easily be grossly misinterpreted and misapplied by persons who are not qualified psychiatrists or psychologists trained to interpret such test results in the light of the total study of the individual.

(4) In view of the character of the questions asked, if the results of personality tests are used for employment purposes, the individual's right to privacy is seriously jeopardized. 210/

210/ Quoted in Westin, op. cit., 141.

/...

247. It does, however, allow for the use of such tests in connexion with "medical determinations for employment or fitness for duty" in the case of certain occupations. 211/

248. In the United Kingdom, the above-mentioned Younger Committee has taken the view that the use of polygraphs is undesirable; but that in view of the lack of evidence that they are used in that country, it would not be justified in making any specific recommendation about them. As for "allegedly intrusive forms of personality tests", the Committee had "no evidence on which either to condemn them or to make a recommendation", though it stated that it could see "the value of thorough testing of personality in selecting people for certain jobs, for example, those involving special stress". The Committee recommended that intrusive interviewing techniques such as polygraphs and personality tests, along with other matters such as questionnaires, interviews and the confidentiality of staff records, being "essentially matters affecting the good relationship between employer and employee", be dealt with in the context of the Code of Industrial Relations; and that, specifically, matters related to privacy in the context of employment, such as those mentioned, should be considered for inclusion in the Code. 212/

249. According to information available, trade union circles do not favour the use of lie detectors or personality tests in employment situations.

250. In the United States they have expressed opposition to demands that employees sign pledges at the time of hiring that they would submit to lie detector tests whenever the company so asked, and have suggested that clauses barring the use of lie detectors be included in management-labour agreements, one suggested wording for such a clause being:

"The company shall not require, request or suggest that an employee or applicant for employment take a polygraph or any other form of lie detector test." 213/

251. The same circles seem to favour legislation prohibiting the use of lie detectors in all private employment. 214/

252. In the United Kingdom, the Trade Union Congress suggested to the above-mentioned Younger Committee that, should the use of the lie detector or personality testing become widespread in personnel selection, it should be prescribed by law. 215/

211/ Cited in Westin, *op. cit.*, p. 141. This policy applies to posts covered by the Civil Service system.

212/ United Kingdom, *Younger Report*, pp. 14 and 95-96.

213/ "The truth about 'lie' detectors", *The American Federationist* (Washington, D.C., AFL-CIO), vol. 71, No. 11, pp. 13-20, at p. 20.

214/ *Ibid.*, pp. 18-19.

215/ United Kingdom, *Younger Report*, p. 95.

253. Private scholars have also pointed out that there should be an obvious concern regarding invasions of privacy arising out of the potential, or actual, employment relationship, especially in large-scale enterprises where lie detectors, personality tests and other intrusive means may be used for hiring persons, for determining the employees' general conduct and fitness for promotion, or for testing their asserted innocence in cases of theft or embezzlement. Nevertheless, it has been pointed out that banning all personality tests whatever might cut off a potentially valuable tool in selecting employees for certain positions. 216/ It has been suggested that the availability of alternative, less intrusive, methods of inquiry be made a criterion governing the utilization of personality tests, with the burden of proof resting on those wishing to utilize those tests; suggested alternative methods being record analysis, interviews that stay "within decent boundaries of privacy", aptitude and achievement tests, including simulation tests, and on-the-job trial testing. 217/

254. A number of suggestions have been made for improving personality and lie-detector tests so as to make them less violative of privacy as well as more valid scientifically.

255. As for making them less violative of privacy, it has been suggested that restrictions be placed on the type of questions that may be asked in either kind of test (or in interviews). For example, in one country draft legislation was prepared which would have barred from routine "psychological" tests and from any "polygraph" test given to civilian employees of the Executive branch, or to applicants for such jobs, questions designed to elicit from them "information concerning their personal relationship with any person connected with them by blood or marriage, or concerning their religious belief or practices, or concerning their attitude or conduct with respect to sexual matters". 218/

256. Efforts to eliminate grossly intrusive items from personality tests have been made by psychologists themselves.

257. The MMPI, which has 10 or 20 items that made it a centre of controversy, has hundreds of items that ask nothing explicitly about sex, religion, politics or personal values. The objectionable items constitute a moderate proportion of the total and, it has been asserted, could presumably be removed without severely damaging whatever validity this instrument may possess. Several approaches to the construction of a short form of the MMPI have already been undertaken. These omit a variety of the objectionable items found on the longer form. 219/

216/ W. M. Beancy, "The right to privacy and American law", Law and Contemporary Problems (Durham, N. C.), vol. XXXI, No. 2, Spring 1966, pp. 266, 271.

217/ Westin, op. cit., pp. 371-372.

218/ United States of America, Ninety-second Congress, First Session, House of Representatives, Bill H.R. 7199.

219/ W. G. Dahlstrom and G. S. West, MMPI Handbook, Revised edition (Minneapolis, University of Minnesota Press, 1971). See also P. M. Reynolds, ed., Science and Behavior: Advances in Psychological Assessment (Palo Alto, Calif.), vol. 1, 1968, pp. 80-104.

258. The following is a list of items (to be answered by "true" or "false") cited as objectionable: 220/

I feel there is only one true religion.
My sex life is satisfactory.
During one period when I was a youngster I engaged in petty thievery.
I believe in the second coming of Christ.
I believe women ought to have as much sexual freedom as men.
Christ performed miracles.
There is very little love and companionship in my family as compared to other homes.
I dream frequently about things that are best kept to myself.
Once in a while I laugh at a dirty joke.
There is something wrong with my sex organs.

259. Relatively innocuous items from the same instrument are:

I would like to be a florist.
I get angry sometimes.
I hardly ever feel pain in the back of the neck.
I enjoy a race or game better when I bet on it.
I do not like everyone I know.
I daydream very little.

260. The elimination of the more intrusive items may, however, do no more than ameliorate the problem of the invasion of privacy. What opponents of this kind of questioning want is a type of assessment, particularly in employment contexts, that will minimize any reference to personal information, no matter how innocuous.

261. The problem here is not only one of the predictive validity of information gained by means of such tests but of incremental validity. Incremental validity of a test is the degree of improvement in predictive accuracy which the test makes, beyond that already attainable by some other means of prediction. This characteristic of the performance of a test can be evaluated by various techniques such as multiple regression. 221/ What, if anything, do the offensive items add to the predictive accomplishments of the inoffensive items? This technical standard can also be applied to the "personality inventory" as a whole. Possibly a simple biography or set of references from employers in previous similar circumstances would make a prediction of future performance that was not significantly improved by the addition of information from one particular

220/ D. Madgwick, Privacy under attack (London, National Council for Civil Liberties, 1968), p. 38.

221/ See A. Goon, M. Gupta and B. Dasgupta, Fundamentals of Statistics (Calcutta, World Press, 1962), 197-209; or N. C. Kohan and J. M. Corro, Estadística Aplicada (Buenos Aires, Editorial Universitaria, 1968), pp. 338-367; or R. B. Darlington, "Multiple regression in psychological research and practice", Psychological Bulletin, 1968, vol. 69, pp. 161-182.

personality test or even any personality test. A case has been made in some research settings for the predictive power of a short relevant biography. 222/

262. On the other hand in some cases it may be the apparently innocuous interview that has no validity while the personality test does. The recommended application of this technical standard is to use the least intensive method of prediction and require incremental validity of more intensive approaches.

263. The use of lie-detector tests is opposed in many quarters not only because of the intrusive nature of the questions that may be asked and persistent doubts concerning the inherent scientific validity or reliability of the measurements involved but also because of the involuntary nature of the non-verbal reply involved and the possibility of misinterpreting the test results.

264. Many courts do not admit the results of "lie-detector" tests in evidence in penal matters.

265. Suggestions have been made, however, that the result of "lie-detector" tests be admitted if voluntarily submitted by the defence. 223/

266. The use of lie detectors by the police is, however, advocated by some on condition that the subject has given his consent, that the lie detector be handled - and its results interpreted - by an expert, and that the results be considered as supplementary information for the investigators and not as evidence that can be produced in court. 224/

267. Attention has also been drawn to the need for thorough training of the persons administering or interpreting the results of personality and lie detector tests.

268. Moreover, the responsibility of the psychologist in safeguarding the individual against abuses of intrusive assessment procedures and violations of his privacy has found expression in various psychologists' codes of ethics. Such codes may contain provisions spelling out the psychologist's obligations concerning the confidentiality of information about an individual which he obtained in the course of his teaching, practice, or investigation, 225/ barring the psychologist from availing himself of psychological methods and tools unless a professional

222/ W. Mischel, Personality and Assessment (New York, Wiley, 1968).

223/ E.g., M. M. Merker, "Polygraph for the defense", New York State Bar Journal, vol. 40, No. 8, December 1968, pp. 569-572.

224/ Memorandum forwarded by INTERPOL on 27 October 1971.

225/ E.g., Canadian Psychological Association, Ethical Standards of Psychologists, principle 6.

relationship has been established; 226/ or barring him from allowing unqualified persons to use psychological testing devices and requiring him to make every effort to prevent such use. 227/

269. Often the objections to personality assessment are not so much that some secret has been made public but that an individual has been misrepresented by an ambiguous vocabulary or a pseudo-precise quantification. A general caution as regards the entire concept of psychological measurements, not necessarily restricted to employment situations, has been voiced in the following terms: 228/

"The successes of physics have led to the belief that everything can be measured, and that when you are measuring you are being scientific...

"Psychologists and sociologists who do not always understand the limitations of measurement have been too keen to express human attributes simply by numbers, but even in physics we have sometimes seen that even the measurement of relatively simple quantities is not always easy.... And if physicists, who deal only with the simplest of natural objects, can go wrong through a preoccupation with numbers, how much more is this likely to be true of psychologists, sociologists, and economists who deal with objects as complex as human beings and human society?"

270. Another scholar has summed up the discussion on these topics by stating:

The issue of privacy obviously raised by both polygraphing and personality testing is whether employers or the government should be allowed to require individuals to have their inner processes probed through machine or test measurements. 229/

271. It has been suggested that the use of questionnaires in social science research should be regulated by legislation, 230/ and the UNESCO-sponsored Meeting of Experts on The Right to Privacy of 1970 recommended that UNESCO should explore the possibility of encouraging an ethical code for social science research. 231/

272. A report published by the Office of Science and Technology of the United States 232/ contains conclusions reading as follows:

226/ Professional-ethical guidelines for Members of the Norwegian Psychologists' Association, part IIIA.

227/ Yugoslavia, Ethical Code of Psychologists of the Socialist Republic of Serbia, principle 13, text in Psihologija (Belgrade), vol. IV, No. 4, December 1971, pp. 239-243, at p. 270.

228/ R. V. Jones, op. cit.

229/ Westin, op. cit., p. 134.

230/ Juvigny, op. cit., p. 6.

231/ Meeting of Experts on the Right to Privacy, UNESCO, Paris, 19-23 January 1970, final report (SHC/CONF.12/11), p. 3.

232/ Privacy and Behavioral Research (Washington, D.C., United States Government Printing Office, 1967).

2.1 CONCLUSIONS

From our examination of the relation of behavioral science research to the right of privacy, we have been led to the following conclusions:

1. While most current practices in the field pose no significant threat to the privacy of research subjects, a sufficient number of exceptions have been noted to warrant a sharp increase in attention to procedures that will assure protection of this right. The increasing scale of behavioral research itself is an additional reason for focusing attention on procedures.

2. Participation by subjects must be voluntary and based on informed consent to the extent that it is consistent with the objectives of the research. It is fully consistent with the protection of privacy that, in the absence of full information, consent be based on trust in the qualified investigator and the integrity of his institution.

3. The scientist has an obligation to insure that no permanent physical or psychological harm will ensue from the research procedures, and that temporary discomfort or loss of privacy will be remedied in an appropriate way during the course of the research or at its completion. To merit trust, the scientist must design his research with a view to protecting, to the fullest extent possible, the privacy of the subjects. If intrusion on privacy proves essential to the research, he should not proceed with his proposed experiment until he and his colleagues have considered all the relevant facts and he has determined, with support from them, that the benefits outweigh the costs.

4. The scientist has the same responsibility to protect the privacy of the individual in published reports and in research records as he has in the conduct of the research itself.

5. The primary responsibility for the use of ethical procedures must rest with the individual investigator, but Government agencies that support behavioral research should satisfy themselves that the institution which employs the investigator has effectively accepted its responsibility to require that he meet ethical standards.

6. Legislation to assure appropriate recognition of the rights of human subjects is neither necessary nor desirable if scientists and sponsoring institutions fully discharge their responsibilities in accommodating to the claim of privacy. Because of its relative inflexibility, legislation cannot meet the challenge of the subtle and sensitive conflict of values under consideration, nor can it aid in the wise, individualized decision-making which is required to assure optimum protection of subjects together with the fullest effectiveness of research.

/...

273. Narco-analysis for non-medical purposes is widely opposed. The International Criminal Police Organization reports that it has always made a point of warning police officers against the use of narco-analysis. It points out, moreover, that confessions or information obtained in these ways have no value as evidence, the free will of the subject having been temporarily destroyed. 233/ As in the case of the lie-detector examinations, many courts do not admit the results of narco-analysis into evidence. Here, too, suggestions have been made to admit such evidence if voluntarily presented by the defence. 234/

274. The purely physical tests such as blood tests and breath tests have generally met with less opposition than the psycho-physiological tests.

275. The question of whether evidence gained from a person's body is covered by the privilege against self-incrimination has been resolved differently in various parts of the world. 235/ The distinction frequently drawn is that the information obtained from a coerced blood test is not an oral confession. 236/ An individual has a right to remain silent and preserve his personal knowledge but must surrender evidence of a physical nature. In many jurisdictions a person may, for example, be required to try on the suspect's clothing, assume certain physical positions, surrender examples of his handwriting, and even utter certain words. 237/

2. Examples of national legislation and jurisprudence

276. /This section will be issued as addendum 2 to the present document/.

3. Points for possible inclusion in draft international standards concerning respect for the privacy of the individual in the light of modern recording and other techniques

277. /The preamble to the draft standards in paragraph 177 is intended to cover also the points below:/

233/ Memorandum forwarded by INTERPOL on 27 October 1971.

234/ Leon M. Despres, "Legal aspects of drug-induced statements", University of Chicago Law Review, vol. 14, 1947, p. 601.

235/ Gonzalo T. Santos, Jr. "Does the blood test violate the right against self-incrimination", Far Eastern Law Review, vol. 9, February 1962, p. 363.

236/ "Constitutional law - compulsory blood tests - self-incrimination", North Carolina Law Review, vol. 45, December 1966, p. 176.

237/ Herbert M. Wachtell, New York Practice Under the CPLR (New York, Practising Law Institute, 1970), p. 263.

/...

1. States shall adopt legislation regulating the administration of psychological and physical examinations for non-medical purposes by official agencies or private parties in such a way as to provide effective protection for the privacy of the individual.
2. Such legislation should be drafted as far as possible in such a manner as to make it easily adaptable to future scientific or technological developments.
3. Provision should be made for continuous assessment of new methods of psychological and physical examination for non-medical purposes, from the point of view of the protection of human rights.
4. Even when psychological or physical examinations for non-medical purposes are considered reliable, their results must never be evaluated by a non-professional and care must be taken not to place excessive emphasis upon such results as can be quantified.
5. Due attention should be paid to basic human rights in cases where a person refuses to take such an examination.
6. In suitable cases, there must be a right of appeal against the results of such an examination.
7. The law must regulate the use made of information acquired through such examinations, including its use in criminal and other judicial proceedings.
8. States shall take the following minimum steps, in particular:
 - (a) Legislation shall regulate the extent, if any, to which personality tests and "lie-detector" tests may be used in employment situations, or shall encourage the regulation of these matters by labour-management agreements.
 - (b) In psychological examinations carried out in relation to employment or education, only such information shall be sought as has a direct bearing on employment or capacity to undertake a course of study.
 - (c) Legal requirements shall be laid down for the training of persons who administer and interpret the results of intrusive assessments such as personality tests and "lie-detector" tests. The individual agent shall be licensed.
 - (d) States shall encourage the adoption of codes of ethics governing those who administer psychological examinations for non-medical purposes, containing, among others, provisions directed towards:
 - (i) protecting the integrity and welfare of the person examined;
 - (ii) requiring the informed consent of the person or his guardian for the administration of examinations, including consent to the specific use to be made of the results and the person or organization to whom they are to be divulged;

/...

(e) Special attention should be paid to the protection of human dignity in connexion with tests that depend heavily for their success upon the subject's unconsciously revealing aspects of his personality which he may have preferred to keep secret;

(f) States admitting the use of lie-detector tests as evidence in criminal proceedings shall restrict this to evidence submitted voluntarily by the defence;

(g) States shall bar the use of narco-analysis in criminal investigations and penal proceedings.

9. States shall make available civil remedies for violations of confidentiality in connexion with psychological and physical testing procedures for non-medical purposes.
