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STUDY OF THE RIGHT OF EVERYONE TO BE FREE FROM ARBITRARY ARREST, DETENTION AND EXILE, AND DRAFT PRINCIPLES ON FREEDOM FROM ARBITRARY ARREST AND DETENTION

COMMENTS OF GOVERNMENTS

Note by the Secretary-General

The Secretary-General has received the following comments from Finland, India, Japan, Mexico and the United States of America. Up to the present time, a total of twenty-seven Governments have submitted comments.

23. FINLAND

18 January 1963
ORIGINAL: ENGLISH

The basic principles, particularly those spelled out in the first four articles of the draft prepared by the Committee on the Right of Everyone to be free from Arbitrary Arrest, Detention and Exile, are in Finland embodied in all pertinent laws and decrees concerning arrest or detention. The principle set forth in article 1 is also expressed in the Constitution Act of Finland (article 6, paragraph 1), according to which "every Finnish citizen shall be protected by law as to life, personal liberty and property". (A fuller description on the Finnish legislation is to be found in Conference Room Paper No. 13, prepared by the Committee on the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile, hereafter referred to as Country Monograph - Finland.)

On most of the remaining articles implementing the basic principles in more detail, the Finnish Government has no comment to offer, since they, too, are in

conformity with the Finnish legislation. Some concepts and provisions of Finnish law do not, on the other hand, in every respect fit into the pattern of the draft principles, particularly where the articles seem to reflect a legal tradition different from the tradition of Finland. This and some other aspects are dealt with in the following:

Scope of the terms "arrest" and "detention"

As mentioned in the comment to article 1 of the draft principles, the terms "arrest" and "detention" have technical meanings which vary from country to country. In Finland, the deprivation of liberty comprises three stages - apprehension, arrest and detention. Apprehension is a measure by which a person suspected of an offence is brought before an appropriate authority or to a place of custody. Arrest is a measure by which the suspect is kept, pending preliminary investigation, in custody until it can be decided, on the ground of additional evidence obtained during the investigation, whether he shall be detained or released. Thus, in Finnish law, the concept of apprehension corresponds to the measure described in article 7 of the draft principles, whereas the concept of arrest corresponds to the measures referred to in article 6.

The distinction between "apprehension" and "arrest" may be pertinent particularly in connexion with article 7 of the draft principles. In Finland, as in a number of other countries, the right to apprehend the suspect found in flagrante delicto (in the very act or on immediate pursuit) belongs to everyone. Of course, the apprehended person has to be delivered to an appropriate police authority as soon as possible. It would seem that this provision of Finnish law is not in contradiction with the wording of article 7, although the article could perhaps be formulated in a clearer way (cf. document E/CN.4/826, paras. 123-125).

In the draft principles, the term "detention" refers only to pre-trial detention. This appears also from the heading of section one in the draft principles - "Arrest and detention of persons suspected or accused of a criminal offence" - and no reference is made to the detention of offenders already convicted. This aspect of detention may have been deliberately omitted from the scope of the draft principles, but the Finnish Government would, however, wish to observe that according to Finnish law, convicted offenders will under certain circumstances

be detained for the short period between the end of the trial and the moment when the sentence comes into force in order to secure the execution of penalty. Thus, the court shall order that the offender who has been condemned to hard labour for two years or more shall be taken into custody unless there are obviously no reasons for doing so. In any case, when the penalty is hard labour and the nature of the offence, the conduct or behaviour of the offender, or other circumstances render it likely that the convict will escape before the beginning of the execution of his penalty (which cannot begin until the sentence has acquired legal force, in Finland eight days after the sentence was pronounced or, if the sentence was appealed, after the decision of the higher court) or there are grounds to fear that he will continue his criminal activities, the court may order that he shall be detained. If the sentence is less imprisonment for two years, the court may order the offender to be detained, provided that he has no permanent place of residence in the country and there is reason to fear that he will escape. If the offender is sentenced to a penalty of less than two years' imprisonment for theft, housebreaking or concealment of stolen property or for attempting or being accessory to such an offence, the court shall order the offender to be taken into custody unless there is obviously no reason for such a safety measure (cf. Country Monograph - Finland, para. 37). The Finnish Government would therefore prefer to see a wording of article 3 which would either make provisions for the detention of convicted offenders or make it clear that the article refers exclusively to pre-trial detention.

Conditions for arrest and detention

Leaving aside the question of detention after trial, referred to above, the conditions for depriving a person suspected of an offence of his liberty, as set forth in article 5 of the draft principles, are approximately the same as those provided by Finnish law concerning apprehension, arrest and detention. However, deprivation of liberty is permitted in Finland also when there is reason to fear that the suspected person will continue his criminal activities if he is not held in custody. In the opinion of the Finnish Government, such a provision is necessary in certain cases; since the Finnish law specifies that a person cannot be arrested unless he is suspected of committing an offence for which the penalty

is hard labour or imprisonment for two years or more, this rule will apply mainly to habitual offenders who have committed serious crimes (cf. Country Monograph - Finland, para. 19).

Duties of judicial and administrative authorities

According to article 6 of the draft principles, the warrant or order of arrest should be issued only by a judge or other official authorized by law to exercise judicial power. Here the system prevailing in Finland differs from that envisaged in the draft principles. Since the preliminary investigation is carried out by the appropriate police authority or public prosecutor until sufficient evidence has been obtained, it has been considered necessary to invest them with the power to issue the warrant of detention with the effect of initiating court proceedings (litispendance). After the issuance of the warrant, the suspect shall be brought before the court in a short time fixed by law, and thereafter the court alone can decide whether he, pending trial, shall be kept in custody or not.

Under this system the possibility to abuse the power to issue the warrant of detention is minimal. In the first place, the police authorities and public prosecutors possessing that power act under official responsibility and strict supervision by their superior authorities. They are also supervised by the Chancellor of Justice and by the Parliamentary Commissioner for the control of the judiciary and the administration ("ombudsman"), both of whom have the general authority and duty to supervise all courts as well as administrative authorities. Besides, they are usually highly qualified persons with university degrees in law, thus being able to exercise proper judgement. Furthermore, the arrested or detained person is entitled to challenge the legality of the arrest or detention and to send his bill of protest in a closed envelope to the appropriate supervising authority. (Cf. Country Monograph - Finland, paras. 23-24. Concerning the institution of "ombudsman" in Finland and the other Scandanavian countries, cf. the report of the 1962 seminar on judicial and other remedies against abuse of administrative authority, United Nations document ST/TAO/HR.15.).

The requirement laid down in article 10 of the draft principles that the arrested person should be brought promptly before a judge or other officer authorized by law to exercise judicial powers presupposes the existence of a legal

body, like juge d'instruction in certain countries, to review the propriety of the arrest. In countries, like Finland, where the same purpose is effectively achieved through administrative rather than judicial control, the suspect is kept arrested pending preliminary investigation under the responsibility of the appropriate police authority or public prosecutor, whose authority is strictly defined by law and who are supervised, as explained above.

Since the system of submitting the questions of law and evidence to a judicial authority before the case is brought before the court for a final trial is not applied in Finland, it is clear that the time-limit of twenty-four hours is too short to bring the preliminary investigation to an end. In most cases it would be impossible to obtain all the evidence material needed for trial in such a short time. Therefore, the maximum time for arrest in Finland is three days. Then it must be decided by the appropriate police authority or public prosecutor whether the suspect shall be detained for trial or be released.

The principle spelled out in article 19, paragraph 3, of the draft principles is in force in Finland. However, the restrictions permitted by law are ordered by the appropriate police or prison authority and not by the court, which is only responsible for the conduct of trial and does not interfere with matters of a practical or administrative nature.

As to the principle set forth in article 27, paragraph 3, it may be mentioned that in many countries the judicial authorities do not interfere with the administrative matters referred to in this paragraph. In Finland, for example, prisons are supervised by the Prison Department of the Ministry of Justice. Police custodies are under the supervision of the appropriate Police Inspectors. In addition, both the Chancellor of Justice and the Parliamentary Commissioner for the control of the judiciary and the administration supervise all prisons and police custodies and make inspection visits to them. The latter makes a report on his observations to Parliament every year.

Article 38 of the draft principles enunciates the right of anyone who is arrested or detained to have immediate recourse before a judicial authority to challenge the lawfulness of his arrest or detention. It should be noticed, however, that in some countries an administrative procedure can be resorted to, as well, for the same purpose. Thus, for example, in Finland both the Chancellor of Justice and

the Parliamentary Commissioner for the control of the judiciary and the administration play an important role in this regard, as an immediate recourse in cases of denial of the rights and guarantees granted by law. This system does not, of course, preclude the resort to compensation for any injury caused by illegal arrest or detention or to penal sanctions to be imposed on the authorities responsible for it.

In conclusion, the wording of the draft principles would apparently have to be amended on certain points, taking into account also the different manners in which administrative and judicial authorities share the responsibilities in the cases referred to above, if the draft principles are to be made applicable to as many countries as possible.

Time-limits

As regards article 14, paragraph 1, of the draft principles, it may be mentioned that in Finland there is a time-limit fixed by law during which a case concerning a detained person shall be brought before the court, and that there is also a time-limit for adjourning the trial from one session of the court to another, but there are no restrictions as to how many times the trial can be adjourned. Taking into account that a case may involve several defendants and a vast material, it does not seem to be possible in Finland to limit the duration of detention. This would be even more difficult since the execution of a sentence cannot begin until it is final. If there were a definite time-limit for detention, it would mean that proceedings in the appellate instance as well as in the Supreme Court ought to take place within that time-limit.

Although the duration of detention in Finland may, thus, be longer than that envisaged in the draft principles, this disadvantage will be diminished by the provision in Finnish law, according to which the final sentence can be reduced on the ground of the time of detention. In practice, this provision is normally used when applicable (cf. Country Monograph - Finland, paras. 34-35).

Similarly, the time-limit set forth in paragraph 3 of article 14 cannot be applied in Finland, since the minimum term of imprisonment or hard labour prescribed by law is in most cases very short even for serious offences. Besides, the accused person, while kept in custody, may be submitted to a mental investigation, which usually takes a fairly long time.

Provisional release

The system suggested in article 16 of the draft principles is not acceptable in Finland. In particular, provisional release on bail would contradict the sense of justice prevailing in Finland. According to Finnish law, the question of arrest or detention shall be decided solely on the ground of provisions laying down the conditions for such measures. As soon as these conditions no longer exist, the detained person shall be released.

The right to legal counsel

According to article 20 of the draft principles, the arrested or detained person should have the right to be assisted by legal counsel from the very moment of his arrest. The Finnish Government considers it doubtful, however, whether this principle in its strict form can be recommended in view of the need to detect the material truth at as early a stage of the investigation as possible. The first account delivered by the suspect himself is usually most important from this point of view. During the preliminary investigation, the suspect is only asked to state the facts as they are known to him, and this he can do without the assistance of legal counsel. In this connexion it should be noticed that the account delivered by the suspect during the preliminary investigation does not bind him at the trial of the case. Therefore, this principle might be modified to the effect that a certain discretion on the part of the investigation authorities would be possible. Consequently, a similar discretionary power would also be required concerning the consultation and correspondence between the arrested or detained person and his legal counsel, envisaged in article 21 of the draft principles.

In this connexion it should be observed that legal counsels in many countries, including Finland, are not officers of the court but independent professionals. The Finnish Bar Association has a certain disciplinary power over its members, but persons who are not members of the Bar Association and even persons with no legal qualifications at all are entitled to act as counsels in Finland.

24. INDIA

14 January 1963
ORIGINAL: ENGLISH

General observations

1. Article 14 of the Constitution of India provides that the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. The Code of Criminal Procedure carefully distinguishes between cognizable offences where a police officer can arrest without a warrant from a magistrate and non-cognizable offences where such a warrant is necessary before an arrest can be made. In accordance with article 22 (1) of the Indian Constitution, a person who is arrested and detained in custody has to be informed, as soon as possible of the grounds for such arrest and he cannot be denied the right to consult or to be defended by a legal practitioner of his choice. According to article 22 (2) of the Indian Constitution and section 61 of the Code of Criminal Procedure, a person who is arrested without warrant cannot be detained in custody for a period longer than what under all the circumstances of the case is reasonable and he has to be produced before the nearest magistrate within a period which must not in any case exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the magistrate's court.

For offences entailing the punishment of death or imprisonment for life, the Government engages a counsel at its own expense to enable the accused to conduct his defence where the accused does not engage a lawyer.

2. The draft articles concerning arrest and detention on grounds unconnected with criminal law dealt with in chapter III do not fit in with the scheme of the Preventive Detention Act of 1950 as amended and extended from time to time. For instance, draft article 30 provides certain cases in which arrest and detention may be affected in matters unconnected with criminal law and mentions specifically detention of a minor by lawful order of a competent court or authority, the detention of persons of unsound mind, alcoholics or drug addicts, etc. As against this section 3 of the Indian Preventive Detention Act lays down the reasons for which preventive arrests or detention may be ordered. The Government of India are not in a position to support the draft articles which would run counter to the provisions and procedures laid down in its own enactment.

3. The draft articles concerning arrest and detention under emergency powers dealt with in chapter IV go beyond the provisions of the Defence of India Rules and the Defence of India Act. There is now an emergency in India which was declared by the President's Proclamation under article 352 of the Constitution. The rules framed powers of arrest and detention. These rules do not provide for reasons to be given for making the arrests, nor for any judicial review.

Comments on some draft articles

Draft article 5: It is suggested that the words "reasonable" and "serious" may be deleted from this article. This article may be redrafted as follows:

> "No one shall be arrested or detained unless there is sufficient cause to believe that he has committed an offence for which a penalty involving loss of liberty is prescribed by law, and unless, furthermore, there are grounds to fear that if not taken into custody he would evade the processes of the law or prejudice the results of the investigation."

Draft articles 6 and 7: According to article 6, an arrest can be made only upon the authority of a written warrant or order of arrest issued by a judge or other official authorized by law to exercise judicial power. We do not agree with these provisions. In some cases, the police officers should have the power to arrest without warrant. These cases need not necessarily be those mentioned in article 7. For instance, a habitual robber, housebreaker or thief or a vagabond may be arrested without warrant. Likewise, a person in whose possession anything is found which may reasonably be suspected to be stolen property and who may reasonably be suspected of having committed an offence with reference to such a thing, may be arrested without warrant. Similarly, he who obstructs a police officer while in the execution of his duty or who has escaped or attempted to escape from lawful custody may be arrested without warrant. These cases are merely illustrative but not exhaustive. The criminal laws of many countries do provide for arrest without warrant in certain cases.

Draft article 9: It is suggested that for the words "at the time of arrest" used in this article, the words "as soon as may be" may be substituted.

Draft article 10 (2): It is suggested that the sentence beginning with the words "The extension may be granted, etc." may be deleted.

Draft article 13 (2): The words "Before an order of detention may issue" used in this sub-clause may be deleted.

Draft articles 14 and 15: The maximum period of detention would depend upon the laws of various countries which provide for preventive detention. We do not agree with the provisions of these articles.

Draft article 17: We do not consider that it would be practicable to inform the accused or detained person of all his rights and obligations and have to avail himself of his right. It would be sufficient that if he is not denied the right to consult, and to be defended by a legal practitioner of his choice.

25. JAPAN

29 January 1963
ORIGINAL: ENGLISH

It is very significant for the protection of fundamental human rights common to all the human race that the United Nations intends to establish standard principles to which law and practice should conform to the freedom from arbitrary arrest and detention. However, it must be pointed out that in every country the procedures concerning criminal trials including the systems concerning arrest and detention originate from its history, national and social requirements and people's legal feelings, and are inseparably connected with the provisions of the constitution, penal code and other relevant laws, and the ideas, authority and function of such organs as the court, public prosecutor's office, police, etc. The same can be said of the procedures for control of aliens' entry into and exit from the country including the system of their arrest and detention. Besides, with respect to such control of aliens, it is deemed that the special circumstances in which each country finds itself in the international community must be considered. Therefore, it is deemed advisable that the said standard principles should not go so far as to set forth detailed and concrete restrictions or regulations in connexion with the system and procedures of arrest and detention but should deal with only basic general rules, and as for the detailed and concrete regulations, they should be left in the hands of the Government of each country so that it may fix on its own responsibility suitable regulations in view of the actual conditions of the country. From such point of view, the following provisions of the Draft Principles, for instance, are deemed inappropriate:

(1) the provisions of article 5 and article 13 paragraph 3 which are interpreted absolutely to prohibit arrest and detention with respect to any offence other than a serious offence for which a penalty involving loss of liberty is prescribed by law, (2) the provisions of articles 6, 10, 12, 14 and 15 which prescribe in detail limitations of time with respect to arrest, detention, etc., (3) the provisions of article 16 paragraph 1 which may be interpreted to require that an opportunity should be given to the

arrested person for obtaining release on financial security or release on bail even before the formal prosecution, (4) the provisions of article 19 paragraph 3 (it is preferable to make clear that the provisions do not apply to the period from the time of arrest until the arrested or detained person is taken to a judge or other officer authorized by law to exercise judicial powers), (5) the provisions of article 20 which are interpreted to require that the court or other competent authority should provide the suspect with counsel before his formal prosecution, (6) the provisions of article 21 paragraph 1 which guarantee the freedom of communication with the counsel, prescribing, in detail and concretely, the permitted ways of the communication and its control, (7) the provisions of article 22 paragraph 1 which are interpreted to compel the disclosure of evidences before the day of public hearing in the court, (8) the provisions of article 22 paragraph 2 which can be interpreted to prescribe that no examination of the suspect or witness can be carried out by the police official or public prosecutor without the attendance of the legal counsel of the suspect, (9) the relevant provisions of article 24 paragraph 2 which provide for the adoption of the exclusionary rule under which every evidence obtained as result (fruits) of any statement which was obtained through the prohibited methods should be excluded, (10) the provisions of article 24 paragraph 3 which provide that only the confessions made before a judge or other officer authorized by law to exercise judicial power, in the presence of the legal counsel, shall be admissible as evidence, (11) the provisions of article 26 which provide for detailed restrictions concerning the places of custody of arrested persons, officials responsible for custody, etc., (12) the provisions of article 29 paragraph 2 which restrict the cases in which aliens can be arrested or detained for procedure for deportation, and provide that the arrest or detention in the above cases shall be authorized only on a written warrant or order issued by the court or other authority, (13) the provisions of articles 30 and 31 (it is preferable to make clear that the immediate forced protection (or Sofortiger Zwang in German) which is carried out administratively by police only for the persons who are in such a state as to be feared difficult to act normally due to the influence of alcohol, stray children, sick persons, etc. is not subject to the provisions of these articles), (14) the provisions of article 32 which

treat the person, prescribed in article 30 paragraph 1 (c), who is not in normal spiritual condition in a same manner as other arrested or detained person, (15) the provisions of article 38 paragraph 1 which provide that anyone who is in imminent danger of being arrested or detained shall be entitled to take proceedings to prevent the injury which he may suffer in the future, and the provisions of article 38 paragraph 2 which leave room for their being interpreted to require the person who is under custody and has taken proceedings before a judicial authority in accordance with paragraph 1 of the said article to be produced without delay before such authority, even though his application for such proceedings has been clearly found groundless, and (16) the provisions of article 40 which are interpreted to prescribe that the State should be under obligation to pay compensation for damages with respect to the arrest and detention carried out in violation of the provisions of the Draft Principles.

26. MEXICO

21 January 1963
ORIGINAL: SPANISH

Article 1

We have no objection to this article; the principle it sets forth is fully recognized under the Mexican legal system. Article 14 of the Constitution states that no person may be deprived of his life, liberty, property, possessions or rights except as a result of proceedings before already existing courts in which the essential procedural requirements are complied with, and in conformity with laws enacted before the relevant offence was committed.

This provision furnishes an institutional safeguard, in that a person may be deprived of his liberty only by decision of a court; this implies that it is a function of the courts, of the State, to take action which has as its basic and distinguishing purpose to state the law in a specific case, establishing by means of a judicial hearing in the presence of the parties concerned the legal grounds for depriving a person of his liberty. In such proceedings there is another legal guarantee which must be observed, namely, the court must have been previously established; in other words, a person may not be tried before a special court established specially to consider his case. Furthermore, the essential formalities must be complied with in such proceedings; this means that all procedural requirements, conditions and time-limits which the law lays down, in general and on a compulsory basis, for such proceedings must be observed in full, including, naturally, the specific right of defence, right to a hearing, etc., which any defendant has. Similarly, the proceedings must be instituted and conducted in accordance with laws enacted before the action giving rise to the deprivation of liberty took place.

We also agree with the statement in the comment on article 1 concerning the difference between preventive custody, or "arrest", and imprisonment in the strict sense, or "detention", as in Mexican law the term "preventive custody" is used for cases where persons who have committed offences punishable by penalties involving loss of physical liberty are temporarily deprived of their liberty as a security measure during investigation of their case.

Thus such deprivation of liberty is not conditional upon a judgement sentencing the person concerned for a specific act, but merely upon fulfilment of the condition stated in article 16 of the Constitution as necessary for the issue of an order of arrest, namely, that it be preceded by a report, accusation or complaint substantiated by an affidavit made under oath by some trustworthy person or by other evidence showing the probable guilt of the accused.

In Mexican law, the period of preventive custody falls into two parts. The first begins at the time when the person is apprehended by virtue of a court order as provided for in article 16 of the Constitution and lasts until he is formally committed to prison or until he is released for lack of sufficient evidence against him. The second begins with the formal order of committal to prison and lasts until a final judgement is given by the court, that is, it is the period of deprivation of liberty from the time the person is apprehended on the order of the judge until final judgement is given in his case.

Article 16 of the Constitution states that preventive arrest and the act in which it has its origin, namely, the issue of an order of arrest as provided for in the same article, are constitutional only in those cases where the law lays down a physical penalty for the offence in question, either alone or in conjunction with some other penalty. The law must specify that the offence in question carries a physical penalty. If it establishes an alternative penalty, an order of arrest would not be constitutional under the terms of article 16 of the Constitution but would be a violation of that article and as such would entitle the person apprehended to invoke the remedy of amparo (a constitutional procedure for the protection of civil rights).

It should be pointed out, in connexion with preventive custody or arrest, that in Mexico the system for which the Constitution provides and the prohibitions it contains are strengthened by provisions to be found in other, less fundamental legislation. For example, articles 23 and 25 of the Preventive Police Regulations for the Federal District read as follows:

"Article 23

"The Preventive Police are forbidden to take any person into custody arbitrarily, without legal grounds for so doing, or to ill-treat persons in custody, unless it is possible to establish good reason, in the process of making the arrest or when they are in prison, whatever the offence or crime of which they are accused.

"Article 25

"In no circumstances may the Police keep a person at their disposal in custody for longer than is necessary in order to deliver him to the competent authorities; a person may never be held in custody for more than seventy-two hours."

In addition, and this is very important, as an institutional safeguard relating to the physical circumstances of preventive custody, article 18 of the Constitution states that the place for such custody shall be separate from that in which prisoners serve sentences. The reason for this rule of Mexican law is obvious, since preventive custody or arrest is merely a security measure which lasts only until the defendant is found guilty or not guilty by a final judgement convicting or absolving him of responsibility before the law. It is not, therefore, a penalty and in view of this essential difference between the two types of deprivation of liberty, different places and conditions of imprisonment are required.

In Mexico, violation of the legal guarantee of personal liberty is considered so serious that specific penalties are laid down for it. For instance, section XL of article 18 of the Federal Officals' and Employees' Liability Act makes violation of the above-mentioned constitutional provision an official offence subject to the penalties of dismissal, a fine of from 100 to 2,000 pesos and from one to nine years' imprisonment; and section XLVI of the same article establishes the same penalties for any official "who holds a person in preventive custody for longer than the maximum period fixed by law for the offence in question".

The provisions of article 18 of the Constitution are echoed in article 26 of the Criminal Code for the Federal District and Territories, which says: "Accused persons held in preventive custody and political offenders shall be confined in special establishments".

Article 2

We approve of this article of the Draft. Although not specifically stated in Mexican positive law, the rule it formulates is an overriding principle, which inspires all the provisions of the Criminal Code and the Codes of Procedure.

Article 3

We agree that, in theory, as a desideratum, imprisonment of a person suspected or accused of an offence should be regarded as an exceptional measure. Indeed, as we have said, under our legal system a person may not be arrested unless the provisions of article 16 are strictly complied with. Furthermore, provided that it is merely a matter of investigating a possible offence, those presumed to be responsible are summoned to appear voluntarily, and only when they fail to answer the third summons is an order issued for them to be produced in court by the police.

Article 4

We agree with this article, especially in view of the fact that, as already mentioned, under our legal system preventive custody is merely a security measure, lasting only until the accused is found guilty or not guilty by a final judgement convicting or acquitting him, and, not being a penalty, is never applied as one.

Article 5

We agree with this article. In Mexico, article 16 of the Constitution states that:

> "No person, his family, domicile, papers or possessions may be molested except by virtue of a written order by the competent authority stating and establishing the legal grounds for the action. No order for a person to be arrested or taken into custody shall be issued, except by the judicial authority, unless it is preceded by a report, accusation or complaint concerning a specific act for which the law lays down a physical penalty and unless the report, accusation or complaint is substantiated by an affidavit made under oath by some trustworthy person, or by other evidence showing the probable guilt of the accused; an exception is made in cases in flagrante delicto, in which any person may apprehend the offender and his accomplices, placing them without delay at the disposal of the nearest authorities. Only in urgent cases, when there is no judicial authority in the district, and when offences which entail compulsory prosecution are invoked, may the administrative authority, which is held strictly accountable, order the arrest of the accused, placing him immediately at the disposal of the judicial authority. Every search warrant, which may be issued only by the judicial authority and 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 must be solely confined, and upon conclusion of the search a circumstancial report shall be drawn up in the presence of two witnesses proposed by the occupant of the place searched, or, in the event of his absence or 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 persons to produce books and papers necessary to prove that the tax regulations have been complied with, and in these cases they shall abide by the relevant laws and the procedure prescribed for searches."

The first part of this article contains a provision which results in three legal safeguards:

(a) any act of molestation for which any State authority is responsible must be legal, that is, the "legal grounds for the action", which must be stated and established by the competent authority, have to derive from some general provision or from one which specifically states the situation in question to be a ground for such action by the authorities; in other words, there must be a law authorizing such action. The condition that the grounds for the action must be established implies that there is some legal provision relevant to the case, and that the specific supposition or situation on the basis of which the authorities claim the right to take the action in question must be that specified in the said legal provision;

(b) the authority must be constitutionally competent to take such action; that is, it must be expressly given the power to do so and that power must derive from the Constitution;

(c) the order for molestation must exist as a written document. This legal safeguard relates to the form of the action taken by the authorities, which must be that stated in a written order.

All three must be observed before a citizen may be molested, that is, before his personal liberty may be infringed, and before his family, papers, domicile or possessions may be interfered with; they must be observed if the action taken by the authorities is not to violate the first part of article 16 of the Constitution.

The second part of article 16 of the Constitution indicates that any action taken by the authorities which has the direct effect of depriving a person of his liberty except in pursuance of a court judgement is a preventive measure. According

to the text, any order for a person to be arrested or taken into custody must be issued by a judicial authority in the strict sense of the term. The Constitution does, however, make two exceptions. The first exception relates to cases of flagrante delicto in which any person, and a fortiori any authority, may apprehend an offender and his accomplices, and must then place them without delay at the disposal of the nearest authority. The second provides for urgent cases, when there is no judicial authority in the locality, and when offences which entail compulsory prosecution are involved: in such cases the administrative authority, which is held strictly accountable, may order the arrest of the accused, placing him immediately at the disposal of the judicial authority.

This same article 16 of the Constitution contains in its second part another legal guarantee of liberty, which is that the judicial authority can never proceed to issue a detention order on its own initiative. There must first be "a report, accusation or complaint concerning a specific act for which the law lays down a physical penalty". Thus it is required that the accusation, report or complaint should relate to an act which is intrinsically criminal even though the description given of it by the injured party may not be technically correct; this view has been upheld by the Supreme Court of Justice in various judgements. Moreover, the act, which must be expressly described as an offence under the law, must also carry a physical penalty specified in the general or special legal provisions in question.

This safeguard is to be considered in connexion with the provision contained in article 21 of the Constitution to the effect that it is the responsibility of the Prosecutor's Office (Ministerio Público) to prosecute offenders, inasmuch as the judge is prevented under the Constitution from acting on a report, complaint or accusation if the necessary penal action has not been taken previously by the competent authority, which is the Prosecutor's Office. This fact in itself is yet another legal safeguard for the citizen under our system, since it makes preventive arrest or custody dependent on penal action by the Prosecutor's Office, which, in its turn, must observe the provisions of article 16 of the Constitution when taking such action.

Finally, it should be stated that the second part of article 16 of the Constitution contains another legal safeguard under our system, which is that the

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accusation or complaint must be substantiated by an affidavit made under oath by some trustworthy person or by other evidence showing the probable guilt of the accused. This other evidence does not have to be such as to establish fully the corpus delicti, which, as the Supreme Court of Justice has ruled, is constituted by the material elements of the criminal act, since according to another ruling of the Court, it is not necessary to establish the corpus delicti for an order of arrest to be constitutional; it is sufficient that there should be, on the one hand, indications that a criminal act has been committed, and, on the other, circumstances indicating the probable guilt of the person in whose name the order for arrest is issued, even if during the proceedings he is found to be not guilty.

Article 6

We have no objection to this article, since in Mexico, as mentioned above, article 16 of the Constitution, which is discussed in the preceding section, expressly provides the safeguards which are proposed in the Draft.

Article 7

We have no objection to this article, since it accords with Mexican procedure. We have already said that as far as arrest is concerned, article 16 of the Mexican Constitution makes an exception in cases where the suspect is surprised in the act of committing the offence, that is, in flagrante delicto, in which event any person, and a fortiori any authority, may apprehend the offender and his accomplices, and must then place them without delay at the disposal of the nearest authorities. It has also been stated that the same article 16 of the Constitution contains another exception to the general constitutional principle that no one may be taken into custody except upon a written order by the competent authority stating and establishing the legal grounds for the action: that in urgent cases, when there is no judicial authority in the locality, and when offences which entail compulsory prosecution are involved, the administrative authority, which is held strictly accountable, may order the arrest of the accused, placing him immediately at the disposal of the judicial authority.

Article 8

We are in agreement with the provisions of this article. It is to be noted that, in Mexico, article 214 of the Penal Code of the Federal District and Territories, which is applicable throughout the entire Republic with regard to federal offences, classes as an abuse of authority the fact that any public official, government agent or his deputies, of whatever rank, has done violence to a person without legitimate cause, has molested a person without justification or has insulted a person while in the discharge of his duties or as a result thereof.

It seems pertinent to examine the laws of Mexico with regard to the various penalties provided in the regulations for arbitrary or illegal deprivation of liberty.

Apart from the special penalties applicable in cases of the violations of individual liberty which we have mentioned, it is pertinent to point out that the following is classed as an official offence in article 18, sub-paragraph LXXI of the Act on the Responsibilities of Federal Officials and Employees: "The perpetration of any other arbitrary act or act violating the rights guaranteed by the Constitution or by the respective federal laws". This offence is punishable by suspension for one month to one year, dismissal or a fine of fifty to 1,000 pesos in accordance with article 19, sub-paragraph IX of the same Act. Other provisions with regard to other specific violations of the kind in question are contained in article 18, sub-paragraphs VIII, X, XIX, XX, XXII, XXIII, XXVI, XXIX, XXXVIII, XXXIX, XL, XLI, XLII, XLIII, XLIV, XLV, XLVI, XLVII, L and LII of the Responsibilities Act.

In addition, Title XXI on "Illegal Deprivation of Liberty and other Guarantees" of the Penal Code of the Federal District and Territories, which includes articles 364, 365 and 366, characterizes various offences with regard to which the legislator's intention is to protect by punishment, as a common denominator, the right to individual liberty considered per se, and classes acts as offences according to the manner in which they are committed or the particular manner in which liberty is infringed, or the conditions sui generis of their perpetrator or victim.

It should be noted, of course, that the heading of the Title in question is not strictly correct from the legal standpoint in that it refers to "illegal deprivation of ... other guarantees" as an offence committed by one private person

against another; individual guarantees being public subjective rights and, by their nature and purpose, constituting limitations upon the public authority, it is that authority alone which can deprive citizens of such constitutional guarantees. Those guarantees, by their very nature, cannot be violated by private persons. An offence committed by one private person against the liberty, property, life, integrity or security of another, therefore, does not constitute a violation of those guarantees, and the heading in question is accordingly inapplicable.

> "Article 364. I. Any private person who, without an order from a competent authority, except for the cases provided for by law, arrests or detains another person in a private prison or other place shall, if such detention did not exceed eight days, be punished with imprisonment for a term of from one to six months and a fine of from ten to 100 pesos. If the arbitrary detention lasted beyond eight days, one month's imprisonment shall be added to the penalty for each additional day of detention; and II. any person who in any manner violates, to the prejudice of another, the personal rights and guarantees laid down in the federal Constitution of the Republic shall be subject to the same penalty."

The first provision of this rule refers in particular to illegal deprivation of the freedom of movement laid down in articles 11 and 16 of the Constitution, carried out through the physical confinement of the victim by a person not invested with authority. The elements of the offence are: (a) that it is committed by a private person, since if a person in authority illegally deprives another person of his liberty the case is classed as an offence commited by a public official or under the various forms of abuse of authority; (b) that the detention or arrest of the victim consists of his physical confinement or constraint resulting in deprivation of liberty in a private prison or any other place.

We can comment upon this rule by saying that if, as penal theory teaches us, the true normative elements of criminal acts are those which the law condemns and which therefore clearly indicate unlawful conduct, the present wording of article 364 (I) of the Penal Code, which, in describing the offence, specifically refers to the unlawfulness of such conduct and to the rules under which such conduct is classed as unlawful, meets this requirement, inasmuch as the expressions "without an order from a competent authority" and "except for the cases provided for by law" both refer to essential components of the act defined and thus contain true normative elements.

Article 9

We agree with the terms of this article of the Draft. Article 20 of the Mexican Constitution, which contains the principal guarantees which the accused enjoys during his trial and which governs all penal proceedings, specifically answers the questions raised in articles 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26 and 27 of the Draft. Therefore, since we think it of particular interest, it is transcribed verbatim below.

The article which precedes it - article 19 of the Constitution, is also given.

"ARTICLE 19. No detention may exceed the term of three days without being authorized by a formal warrant of penal arrest in which shall be specified: the offence imputed to the accused; the elements constituting it; the place, time and circumstances of its commission, and the facts brought out by the previous investigation, which should be sufficient to prove the substance of the offence and show the probable guilt of the accused. The authority ordering the detention or consenting to it, and the agents, ministers, wardens and guards executing it, shall be responsible for the violation of this provision.

"Each case shall necessarily be instituted for the offence or offences indicated in the warrant of formal arrest. Should it appear from the result of a trial that there has been committed an offence distinct from the one being prosecuted, it shall be the object of a separate accusation, without prejudice to the subsequent decreeing of the accumulated penalty, if deemed advisable.

"Any ill treatment on apprehension or in prisons, any hardship inflicted without legal cause, any tax or contribution in penal institutions are abuses which shall be corrected by law and repressed by the authorities.

"ARTICLE 20. The accused shall have the following guarantees in any criminal suit:

"1. Immediately upon his application the accused shall be released on bail, the amount of which shall be fixed by the judge taking into account the personal circumstances of the accused and the gravity of the offence with which he is charged, provided that the arithmetical average of the penalty with which the offence is punishable does not exceed five years' imprisonment, and subject only to his placing the sum of money fixed at the disposal of the authorities or furnishing a personal surety or mortgage bond sufficient to cover it; the judge shall be responsible for the acceptance of such surety or bond.

"In no case shall the surety or bond exceed 250,000 pesos unless the offence is one from which the perpetrator has derived financial benefit or

which has caused the victim a loss of property; in such cases the security shall be at least three times the benefit obtained or the loss suffered.

"2. He shall not be compelled to testify against himself, for which reason holding him incommunicado or using any other means that shall have that object is absolutely forbidden.

"3. He shall, at a public hearing and within forty-eight hours after his consignment to justice, be informed of the name of his accuser and the nature and cause of the accusation, so that he may be fully advised of the punishable act that is attributed to him and may answer the charge, making by this act his preliminary deposition.

"4. He shall be confronted with the witnesses for the prosecution, who shall, if available at the place of trial, testify in his presence so that he may ask them any questions helpful to his defence.

"5. The witnesses and other proofs that he may offer shall be admitted, granting him the time that the law deems necessary for this purpose, and he shall be aided in securing the appearance of those persons whose testimony he may request, provided they may be found at the site of the trial.

"6. He shall be tried at a public hearing by a judge or jury of citizens who are able to read and write and who are residents of the place and district in which the offence has been committed, provided the offence is punishable by a penalty greater than one year in prison. Offences commited by means of the Press against public order or internal security of the nation shall in every case be tried by a jury.

"7. He shall be supplied with all the information which he may require for his defence or which appears in the proceedings.

"8. He shall be tried within four months, if crimes are involved for which the maximum penalty does not exceed two years in prison, and within one year if the maximum penalty exceeds this period.

"9. He shall be heard in his own defence or through some person of his confidence, or both, according to his wish. Should he not have anyone to defend him, a list of public defenders shall be presented to him so that he may select the person or persons whom he prefers. Should the accused not wish to name defenders, after being required to do so, on rendering his preliminary deposition, the judge shall appoint a public defender. The accused may name a defender from the moment when he is apprehended, and shall have the right to have him present during all phases of the trial; but he shall be obliged to have him appear as many times as may be necessary.

"10. In no case may the prison term or detention be prolonged for failure to pay counsel fees or for any other loan of money, for civil liability, or for any other similar reason.

"Preventive arrest shall not be prolonged for a time exceeding the maximum fixed by law for the offence that is the cause of the trial.

"The time spent in detention shall be included in all sentences imposing a prison penalty."

Article 10

In regard to this article, it is clear that, although it might be desirable in theory for the arrested person to be immediately brought before the judicial authority which is to try him, in practice some time is necessarily required, since the police or the Prosecutor's Office (Ministerio Público), which is responsible for instituting criminal proceedings, must gather evidence of the commission of the offence and of the probable guilt of the accused for presentation to the judicial authority; the period of time specified in this article of the Draft, namely, twenty-four hours, will not always be enough for the said evidence to be collected, with the result that, lacking such evidence, the judicial authority will be obliged to release the person even though he may be guilty. For this reason, it is felt that the said period of twenty-four hours is too short and that it would be better to prescribe a longer time-limit, such as that prevailing under the Mexican judicial system, namely, three days or seventy-two hours, as article 19 of the Constitution provides. Indeed, there are lawyers in Mexico who claim that the time-limit under the Constitution should be extended in order to enable the Prosecutor's Office to gather all the necessary evidence and to obtain from the judicial authority a formal warrant of arrest in full knowledge of the facts of the case. The difficulty of gathering all the said evidence to prove the commission of the offence and the probable guilt of the accused, in order to comply with the requirements set forth in article 16 of the Constitution for instituting criminal proceedings, may be appreciated in particular in cases in which a number of persons are involved in an offence, as happens in offences against the public safety, or in cases where proof must be obtained by painstaking laboratory work. For the foregoing reasons, it is felt that the time-limit specified in this article of the Draft is too short. On the other hand, it is felt that it should not be extendible for the reason that as legally laid down it should be sufficiently long not to require any extension.

Article 11

We are in agreement with this article and, as mentioned above, in Mexico, under the provisions of article 19 of the Constitution, if a person is held in detention

in excess of three days without a formal warrant of arrest from the competent judge, the authority ordering the detention or consented to it, and the agents, subordinates, wardens or guards executing it, shall be held responsible.

Article 12

As we have said in commenting on article 10, the time-limit of twenty-four hours stipulated in the Draft is too short; under the Mexican system, according to article 19 of the Constitution, this period is seventy-two hours.

Article 13

We are in agreement with this article. Its main lines are reflected in article 19 of the Mexican Constitution, quoted above, and we shall therefore refrain from commenting on it.

Article 14

In connexion with this article, we should like to make the following observations. There would seem to be some confusion in this article between preventive custody or arrest and the imprisonment of an individual while proceedings are being conducted against him. In the former case, custody under Mexican law, may not exceed seventy-two hours without the issuance of either an order for release or a formal warrant of arrest, and a preliminary statement must be taken from the detained person within the following forty-eight hours in which he remains at the disposal of the judicial authority responsible for conducting the preliminary investigation which constitutes the first stage of criminal proceedings. If the accused is already under the jurisdiction of the judge in the case, because a formal warrant of arrest has been issued against him, several different possibilities arise: he may be released upon security, provided that the offence with which he is charged is punishable by a penalty the arithmetical mean of which is less than five years of imprisonment; if the offence of which he is accused is punishable by a penalty the arithmetical mean of which is greater than five years of imprisonment, he may not ask for release upon security and, in such case, the imprisonment will continue until judgement is pronounced in his case, but under paragraph X of the article of the

Constitution, the period of detention may not exceed the maximum term of imprisonment prescribed by law for the offence for which the person is being tried and, moreover, the defendant shall, under paragraph VIII of the same article, be judged within four months in the case of offences the maximum penalty for which is less than two years of imprisonment, and within one year, if the maximum penalty is greater than two years; in addition, the time spent by the accused in detention shall be deducted from any term of imprisonment to which he may be sentenced.

We therefore consider that a rigid system, such as that described, which is in effect in Mexico, is more suitable than the system of providing for the extension of various terms of imprisonment, as proposed in article 14 under discussion.

Paragraph 2 of the draft principle in question is well founded, since it is obvious that detention should cease as soon as the grounds which gave rise to it no longer exist; but such grounds can be no other than proof of the innocence of the accused, since in the strict sense of the law and within the framework of a trial there can be no other legal grounds by which the offender can obtain his release.

In regard to the third paragraph or part of this article, we have already said that under Mexican law, the defendant may be detained only for the length of time which the law prescribes as the maximum penalty for the offence which has given rise to the trial; but such an instance has never arisen since, as mentioned above, he must be tried within four months in the case of offences the maximum penalty for which is less than two years of imprisonment and within one year if the maximum penalty is greater than two years, so that in actual fact a term of imprisonment could never be extended beyond the maximum term prescribed for the offence in question.

Article 15

This principle can be valid only when the legal system under which the criminal proceedings take place makes no provision for fixed or rigid time-limits, as mentioned in the comments on the preceding article. However, it is inapplicable if, as in Mexican law, the time-limits are prescribed by law and may not be extended, since detention shall be considered legal in all cases where there is a formal order of commital to prison for as long as the trial continues.

Article 16

It would seem impossible to establish as a general rule, regardless of the seriousness of the offence and the other circumstances surrounding its commission, that the arrested person shall be granted provisional release in all cases, with or without financial security or other conditions. In criminal practice such a general rule would create an impunity that would run counter to the whole general theory of the application of penalties. It would be more logical to draft a rule which would make it easy for a person who has committed a minor offence to obtain his provisional release. Such a rule is already embodied in article 20, section I of the Mexican Constitution, which lays down the safeguards enjoyed by every person subject to criminal proceedings. The Committee's noble aim of eliminating the economic discrimination inherent in the bail system may be secured by other means that are also sanctioned by the Mexican legal system. For example, the chapter "Conditions of Release" in the Code of Criminal Procedure for the Federal District and Territories (articles 546 to 574) and the corresponding chapter in the Federal Code of Penal Procedure (articles 399 to 426) stipulate that in Mexico an accused person may be released either under caution or on bail, or under a sworn promise to appear, or through lack of evidence.

Article 17

We are in agreement with the substance of this article and wish to point out that such a provision is already in existence in Mexico. According to article 20, section III of the Constitution, the accused shall, at a public hearing and within forty-eight hours after his consignment to justice, be informed of the name of his accuser and the nature and cause of the accusation so that he may be fully advised of the punishable act that is attributed to him and may answer the charge. Under section IV of the same article he has the right to ask the witnesses all the questions conducive to his defence. Under section V, he may call any witnesses he wishes and submit other evidence he considers pertinent, and he shall be aided in securing the appearance of other persons. Finally, according to section VII, he shall be supplied with all the information he may require for his defence and appearance in the proceedings.

Article 18

The provisions of this article appear to be sound. Although the obligation in question does not exist in Mexican law, the accused may freely notify his

family because, according to article 20, section II of the Constitution, the accused shall not be compelled to testify against himself, for which reason holding him incommunicado or using any other means that shall have that object is absolutely forbidden. Furthermore, within the forty-eight hours from the time at which the detained person has been placed at his disposal, the judge must inform him that he has the right to defend himself or to appoint a person in whom he has confidence as his defence counsel. If he does not exercise such a right, he must be informed that the judge will appoint a defence counsel for him ex officio (article 290 of the Code of Criminal Procedure for the Federal District and Territories and article 154 of the Federal Code of Criminal Procedure).

Article 19

We are in agreement with this article. As has already been pointed out, in Mexico the holding of the accused in solitary confinement (incommunicado) is prohibited and the accused has the right to communicate with his family, his lawyer and anyone he wishes, according to article 20 of the Constitution, which sets forth the safeguards for anyone subject to criminal proceedings.

Article 20

We are in agreement with this article and the comments made above on article 18 are also applicable here. Suffice it to add that, when the accused refuses to appoint a defence counsel, the judge is under the obligation in Mexico to provide him with a lawyer known as counsel ex officio, who is paid by the Government and engages exclusively in defending accused persons who do not have defence counsel of their own. Only if the accused is duly qualified, i.e. possesses the legally registered title of lawyer, may this requirement be waived and the accused allowed to defend himself.

Article 21

We have no objection whatsoever to this article since the provision it contains is already embodied in Mexican legislation and formulated as a constitutional principle. Article 20, section IX of the Constitution, which has already been cited, states that the accused shall have the right to have his defence counsel present during all phases of the trial.

Article 22

We have no comment to make on this article. It has already been pointed out that the safeguards which the accused enjoys and which are enumerated in article 20 of the Constitution include the right of the accused to be supplied with all the information he may require for his defence and appearance in the proceedings, and that his defence counsel has the right to be present during all phases of the trial.

Article 23

We have no comment to make on this principle. The case in question is already covered by Mexican legislation. Article 183 of the Code of Criminal Procedure for the Federal District and Territories states: "When the accused, the injured party, the prosecutor, the witnesses or the testifying experts do not speak Spanish, the judge shall appoint one or two interpreters, who shall be of full age and who shall promise under oath to translate faithfully the questions and replies that are to be transmitted. Only when it is impossible to find an interpreter who is of full age shall the judge be allowed to appoint a minor, who, however, must be at least fifteen years of age. Article 184 of the Code states: "When any of the parties so requests, statements may be written in the language of the person who makes them, but the interpreter shall make the translation none the less". Article 187 states "If the accused or any of the witnesses is deaf or dumb, the judge shall appoint as an interpreter a person who can understand them, provided that the above provisions are observed". Finally, article 188 of the Code lays down that deaf and dumb persons who know how to read and write shall be interrogated in writing and shall be asked to reply in the same way.

Article 24 (1)

We are in complete agreement with the first part of this article. In Mexico, according to article 20, section II of the Constitution, the accused enjoys the safeguard that he cannot be compelled to testify against himself. Furthermore, the final part of article 19 of the Constitution lays down that any ill-treatment during arrest or custody, any hardship inflicted without legal cause, or any tax or payment imposed in penal institutions are abuses which shall be remedied by law and repressed by the authorities. Similarly, according to article 249 (2) of the

Code of Criminal Procedure for the Federal District and Territories, a legal confession made by the accused shall constitute full proof only if it is made by a person who is above the age of fourteen, with full knowledge of the facts and without coercion or violence. According to paragraph 4 of the same article, the confession must be made before the judge or court trying the case or before the official of the judicial police who has carried out the preliminary investigation.

Article 24 (2) and (3)

We are in agreement with the principles embodied in these paragraphs and the comments made on paragraph 1 show that in Mexico these principles are already applied.

Article 25

We entirely agree with the principle enunciated in this article. As has already been stated, article 20, section II of the Mexican Constitution states that the accused shall not be compelled to testify against himself. In addition, article 289 of the Code of Criminal Procedure for the Federal District and Territories states: "The judge shall in no case and on no ground order the accused to be held in solitary confinement or use any other means of coercion in order to obtain a statement;" and articles 291, 294 and 295 refer to the announcement to be made by the judge that the accused has indicated that he did not wish to make a statement, and to the fact that the judge must appoint counsel to assist him in his defence.

Article 26

We have no objection to this article. The procedural system followed in Mexico lays down that, as soon as the investigation is completed, the Prosecutor's Office shall place the accused at the disposal of the judge to whom he is consigned and shall transfer him from the offices of the criminal police, who are subordinate to the Prosecutor's Office, to the pre-trial prison, the officials of which are entirely independent of the authorities conducting the investigation.

Article 27

We agree with the content of all three paragraphs of this article. As has been indicated above, Mexican doctrine in the matter of criminal law has always held that preventive custody can never be regarded as a penalty or sanction, and our legislation therefore surrounds the accused with safeguards of every kind and prohibits the infliction of any hardship or ill-treatment, there being an express clause of the Constitution to this effect (article 19). The Mexican authorities are familiar with the contents of the "Standard Minimum Rules for the Treatment of Prisoners", adopted on 30 August 1955 by the First United Nations Congress on the Prevention of Crime and Treatment of Offenders, and approved and recommended to Member States by the Economic and Social Council in resolution 663 C I (XXIV) of 31 July 1957.

It should be emphasized in this connexion that the second paragraph of article 18 of the Constitution contains a clause dealing with the purpose of penalties and indicating that they should be designed, so far as the various forms of serving them are concerned, to lead to the regeneration and social rehabilitation of the offender, thus conforming to modern doctrine in the matter of penal law. In connexion with this precept, the Criminal Code for the Federal District and Territories follows the same lines in article 79, which reads as follows: "Article 79. The Government shall organize the prisons, penal colonies, penitentiaries, compulsory-labour institutions, and special establishments for preventive custody and sanctions and security measures involving deprivation of liberty, on the basis of work as the means of rehabilitation, by promoting the industrialization of such institutions and the development of a spirit of co-operation among the prisoners".

Article 28

Agreement is also expressed with this article, and it may be pointed out that the first paragraph reproduces the provision contained in article 21 of the Mexican Constitution, stating that: "The imposition of penalities is the strict and exclusive right of the judicial authorities".

With reference to the second paragraph of the article, which is also acceptable, it may be noted that it agrees in essentials with the following

further provisions of article 21 of the Constitution: "The administrative authority has jurisdiction in punishing violations of governmental and police regulations, which punishment shall consist only of a fine or arrest of not more than thirty-six hours; but should the offender not pay the fine that may have been imposed, his punishment shall be changed to a corresponding arrest that in no case may exceed fifteen days. Should the offender be a day labourer or a workman, he shall not be punished by a fine greater than the amount of his weekly wage or salary".

Article 29

We have the following observations to make in connexion with this article:

The first sentence of paragraph 1 is technically unsound, since it states a physical impossibility. If an alien attempts to enter a country illegally, this can only refer to an attempt which has not been completed, and that being so, the person concerned cannot be arrested by the authorities of that country - the more so if, as stated here, he is merely suspected of attempting to enter the country illegally. The wording of this clause should therefore be changed so as to refer to cases where the offence has been completed, as follows: "Any alien who enters a country illegally may be arrested by the authorities of that country". Once he has entered the country, it is proper that he should be immediately brought before the authority designated by law.

In this connexion, it is relevant to note that article 33 of the Constitution provides as follows: "Foreigners are those who do not possess the qualifications prescribed by article 30. They shall be entitled to the rights granted by chapter I, title I, of the present Constitution; but the Executive shall have the exclusive right to expel from the Republic forthwith and without judicial process any foreigner whose presence he may deem inexpedient. No foreigner shall meddle in any way whatsoever in the political affairs of the country".

In Mexico, all population questions are dealt with by the Ministry of the Interior, in accordance with the provisions of the Ministries Act and the General Act concerning the Population. Under article 31 of the latter, persons wishing to enter or leave the national territory must comply with the requirements laid down in the Act and in the Regulations made under the Act. Articles 59 and 60

specify the requirements for internment and the circumstances in which an alien may be denied entry to the country. Article 95 of the Act provides that aliens shall be liable to cancellation of their travel documents and ordered to leave the country, and may in addition, in the cases specified in that article, be sentenced to, and required to serve before leaving, a term of imprisonment of not less than six months or more than five years. Article 99 states that the expulsion of aliens, and security measures ordered by the Ministry of the Interior with a view to such expulsion, are matters of public policy with respect to all legal effects, and article 112 lays down that the institution of criminal proceedings by the Prosecutor's Office, in cases of the offences mentioned in the General Act concerning the Population, is subject to the submission of a complaint in each individual case by the Ministry of the Interior. Article 96 of the Regulations under the General Act concerning the Population lays down that, when a breach of the Regulations involves the commission of a criminal offence, the authorities for the interior shall prepare a statement clearly setting out the facts and the corroborating documents or evidence. The original of this statement, together with the documents annexed thereto, shall be forwarded, with the consent of the Minister or Under-Secretary for the Interior, to the Prosecutor General of the Republic or to the appropriate official of the Prosecutor's Office, for the institution of criminal proceedings. Article 97 of the Regulations provides that when the administrative penalty consists of a sentence of imprisonment, it shall be served in places which are appointed for that purpose and are under the authority of the Ministry of the Interior or, if no place is so appointed, in the municipal prison of the locality where the sentence is to be served, the prisoners being at the disposal of the appropriate authorities of the interior. Lastly, article 98 of the Regulations requires that, for the purpose of executing expulsion or deportation orders issued by the Ministry of the Interior against aliens under the terms of the General Act concerning the Population and the Regulations under the Act, adequate measures shall be taken and shall include the separation of aliens and their internment in migration centres or, in the absence of such centres, in places suitable for the purpose.

Article 30

We agree with the substance of the four parts of this article, since they reflect the different provisions of Mexican law, and we have therefore no comments to make.

Article 31

We agree with the substance of this article because, as mentioned above, our positive law states that one of the safeguards of the citizen is the safeguard contained in article 16 of the Constitution, to the effect that a person, his family, domicile, papers, or possessions may not be interfered with except by virtue of a written order by a competent authority establishing and supporting the legal basis of the action.

Article 32

We agree with the substance of this article, to which the comments made on article 29 also apply.

Article 33

With regard to this article, we refer to our comments on articles 14 and 15 of the Draft.

Article 34

With regard to this article, we would mention that provision is already made for such a case in article 29 of the Mexican Constitution, which states that:

> "Article 29. In case of invasion, of serious disturbance of the public peace, or any other emergency that may place the people in great danger or conflict, only the President of the Mexican Republic, in agreement with the Council of Ministers and with the approval of the Congress of the Union, and should the latter be in recess, of the Permanent Committee, may suspend, throughout the country or in any part specified, the guarantees that might be an obstacle to a rapid and easy adjustment of the situation; but such suspension shall be enforced only for a limited time by means of general prohibitions and shall not be confined to any particular individual. If the suspension takes place while the Congress is in session the latter shall grant the powers deemed necessary so that the Executive may meet the situation. If the suspension is made in time of recess the Congress shall be convened without delay for the granting of such powers".

This article of the Constitution is related to article 1, which states:

"Article 1. Every person in the United Mexican States shall enjoy the guarantees that this Constitution grants, which may neither be restricted nor suspended, except in the cases and under the conditions herein established".

These two articles, which apply in Mexico in the cases therein specified, are so clear that there is no need to comment on the precept contained in the Draft, and, since articles 35, 36, 37, 38, 39, 40 and 41 of the Draft refer to the same legal aspect, article 19 of the Mexican Constitution represents the solution which our country advocates for the situation in question.

27. UNITED STATES OF AMERICA

23 January 1963
ORIGINAL: ENGLISH

The United States has given careful study to the draft principles on freedom from arbitrary arrest and detention in a working group representative of interested agencies in the Federal Government. The members were in agreement that the principles state essential requirements for the protection of persons under arrest and detention. There were a number of suggestions of an editorial nature which the United States may offer when the principles are discussed in the Commission on Human Rights. The following preliminary comments are forwarded at this time as relating primarily to the substance of the principles:

1. Preamble. It should be made clear that the principles as stated in the document are in the form of objectives, and are not intended in any way as a binding obligation. Clarification is needed on this point to avoid restricting consideration to what may be regarded as suitable or appropriate for immediate adoption by particular States and to encourage agreement on desirable goals. For this purpose, it is suggested that the final paragraph of the Preamble be replaced by the following:

> "Recommends the following principles as the basis for law and practice regarding arrest and detention:"

2. Article 10. The requirement that the arrested person be brought promptly before a judge or other officer authorized to exercise judicial power is a basic safeguard which the United States believes should be strengthened wherever possible. For this purpose it is suggested that Article 10 be revised to state that the arrested person should be brought before the judge promptly, as soon as he becomes available within the stated twenty-four hour limit; if such officer is not immediately available, the arrested person should be brought before him as soon as he becomes available, and in no case later than twenty-four hours from the time of his arrest.

3. Articles 20-22. To clarify the right of an arrested person to counsel and to examine the evidence to be used against him, it is suggested that in Article 20 the last phrase, beginning with "unless", be revised to read "unless

he executes a written waiver of the right to counsel; however, no such waiver shall be accepted from a person who is illiterate or who is mentally incompetent".

Similarly, it is suggested that Article 22 specify the pertinent evidence to include "any statements made by the arrested person to the police, any records of medical or scientific examinations of such person made after his arrest or detention and prior statements of witnesses produced by the prosecution at the preliminary hearing".

4. Articles 31-33. Consideration might be given to expanding these articles to recognize the special circumstances usually attending detention of the mentally ill and of children in need of care. Particular safeguards are needed because such persons must frequently be taken into custody under emergency conditions, and they may not themselves be capable of communicating with others, co-operating with counsel or petitioning for judicial review of their continued detention.

5. New Articles

A. The United States would favour insertion of an article to cover the situation of a person taken from one jurisdiction to another without his consent. This might read as follows:

> "If a person is taken without his consent from one jurisdiction or country to another in violation of rendition, extradition, or other legal requirements, the authorities of the place to which he is taken shall not have jurisdiction to try him for crime or consider the merits of his detention, but shall return him to the jurisdiction or country whence he was taken without prejudice to a removal proceeding in conformity with legal requirements."

B. An additional article is also needed to prevent a conviction following improper arrest or detention being used against the person so detained. Law enforcement officials are likely to exercise greater care in respecting the rights of the accused when they know a conviction may be quashed if they violate the accused's rights. This new article might be inserted following Article 40, to read as follows:

> "When a person is convicted following arrest or detention contrary to the procedure set forth in the foregoing Articles, his conviction should be quashed by a competent court, without prejudice to a re-trial following a proper arrest or detention."
