UNITED NATIONS

GENERAL ASSEMBLY

Distr.
GENERAL

A/10158/Add.1
21 October 1975
ENGLISH
ORIGINAL: ENGLISH/FRENCH

Thirtieth session
Agenda item 74

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

Analytical summary by the Secretary-General

Addendum

CONTENTS

CONTENTS (continued)

INTRODUCTION

1. This report, which is an addendum to the analytical summary prepared by the Secretary-General (A/10158) in implementation of General Assembly resolution 3218 (XXIX) of 6 November 1974, is an analytical summary of the replies received from the following Governments during the period from 30 June 1975 to 30 September 1975: Argentina, Austria, Belgium, Byelorussian Soviet Socialist Republic, Canada, Costa Rica, Czechoslovakia, German Democratic Republic, Ghana, Greece, Ireland, Italy, Luxembourg, New Zealand, Peru, United Kingdom of Great Britain and Northern Ireland, United States of America and Yugoslavia.

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

PART ONE

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

3. Some Governments referred to the constitutional provisions of their countries against torture. The Government of Austria, referring to the prohibition of torture in article 3 of the European Convention on Human Rights, states that the Convention has the status of a constitutional law. Hence the rights safeguarded in it are constitutionally guaranteed rights within the meaning of article 144 (1) of the Austrian Federal Constitution, and anyone claiming to have been subjected to torture in violation of his rights under article 3 of the European Convention can complain to the Constitutional Court. Furthermore, any such person can appeal to the European Commission of Human Rights. In Canada, the Bill of Rights precludes officially sanctioned torture and related practices through its provision that no law of Canada shall be construed or applied so as to "impose or authorize the imposition of cruel and unusual punishment", or to "authorize or effect the arbitrary detention, imprisonment or exile of any person". In the Constitution of Ghana under chapter four, which deals with liberty of the individual and fundamental human rights, article 17 states that no person shall be subjected to (a) torture or inhuman or degrading punishment; or (b) any other condition that detracts or is likely to detract from his dignity and worth as a human being. Article 18 of the Constitution of Greece provides that torture is prohibited.

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

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

4. The Penal Code of the German Democratic Republic provides that nobody may be regarded as having committed a crime before his guilt has been proved without any doubt and has been established as legally valid in a properly conducted trial before a court or social organ of legal administration.

5. In the Byelorussian SSR, pursuant to the legislation relating to criminal procedure, investigative authorities have the right to detain a person suspected of having committed a crime which renders him liable to imprisonment only if any one of the following conditions is met: (a) if the person has been apprehended while committing the crime, or immediately thereafter; (b) when witnesses, including victims of the crime, directly identify the person concerned as the perpetrator of the offence; or (c) when obvious traces of the crime are discovered on the person or the clothing or in the immediate vicinity of the suspect, or in his place of residence (article 119 of the Code of Criminal Procedure).

6. In accordance with the Code of Criminal Procedure of the German Democratic Republic, an accused or defendant may be taken into custody only if there are cogent grounds for suspicion and if (a) there is the risk of absconding or collusion; (b) the offence charged is sufficiently grave; or (c) the conduct of the accused or defendant involves the risk of repetition. It is also required that pre-trial detention may be ordered or maintained only in so far as this is indispensable for the conduct of the proceedings. In deciding on the need or ordering and maintaining pre-trial detention, the nature and gravity of the charge, the personality of the accused or defendant, his state of health, his age and his domestic conditions shall be taken into consideration.

7. In the United Kingdom, as a general rule, a police officer may arrest a person for an offence only if either (a) it is an "arrestable offence", namely one for which the maximum penalty is five years' imprisonment or more, or (b) it is one of a limited number of other offences with a maximum penalty of less than five years' imprisonment for which a power of arrest without warrant has been conferred by statutes, or (c) he is acting on the authority of a warrant issued by a magistrate.

8. Under section 2 of the Criminal Law Act, 1967, the power to arrest a person without warrant for an arrestable offence may be exercised (a) if he is, or the officer reasonably suspects him to be, in the act of committing such an offence; (b) if the officer reasonably suspects that such an offence has been committed by him; (c) if he is, or is reasonably suspected by the officer to be, about to commit such an offence.

9. The Constitution of the Byelorussian SSR provides that no person may be placed under arrest except by decision of a court or with the sanction of a procurator. In accordance with the Code of Criminal Procedure of the German Democratic Republic, arrest is carried out at the order of a public procurator on the basis of a written warrant of arrest issued by a judge. The warrant must clearly describe the accused and indicate the reason for the arrest. The Constitution of Peru provides that no one may be arrested save under a written warrant, supported by appropriate justification, which has been issued by a competent judge or by the authorities responsible for the maintenance of public order, except where the suspect is found flagrante delicto.

10. In Canada, in making an arrest, a police officer is authorized by the Criminal Code to use as much force as is necessary to effect a lawful arrest, but not to use force that is intended to or is likely to cause death or grievous bodily harm unless he believes on reasonable and probable grounds that it is necessary for the purpose of preserving himself or anybody under his protection from death or grievous bodily harm. The Criminal Code further provides that anyone who is authorized by law to use force is criminally responsible for any excess thereof. In the United Kingdom, the law governing the use of force in making arrests and for similar purposes is contained in section 3 (1) of the Criminal Law Act, 1967, which provides that a person may use such force as is reasonable in the circumstances for the prevention of crime, or in effecting or assisting in the lawful arrest of offenders, suspected offenders, or persons unlawfully at large. Even if the arrest is justified, any use of force going beyond what is reasonable in the circumstances is unlawful, and the question of what degree of force it is reasonable to use ultimately should be determined by the courts in the light of the circumstances of each case.

11. In Canada, the initial discretion to release an arrested person prior to appearance before a justice is exercised by the police. Under the Criminal Code, the police should consider whether or not there is reasonable and probable grounds to believe that it is necessary to detain the person to establish identity, secure or preserve evidence, prevent the continuation or repetition of the offence, or to prevent the non-attendance of the accused at trial. The Criminal Code requires that the accused must appear before a justice within 24 hours after the arrest if a justice is available, or otherwise as soon as possible. Such appearance before a judicial authority independent of the police provides an opportunity for complaints regarding any alleged abuse, including physical mistreatment, at the time of arrest and during the initial detention. In the German Democratic Republic, arrested persons must be brought before a judge not later than one day after their arrest. Under section 15 of the Criminal Procedure Code of Ghana, a person who is arrested without warrant should not be kept in custody more than 48 hours, but should either be granted a police inquiry bail or be taken to Court for a determination as to whether he should be granted bail or further remanded in custody. The Constitution of Peru provides that in any case the person arrested must, within 24 hours or the equivalent period allowing for the distance involved, be brought before the appropriate court which shall, within the period stipulated by law, order his release or order him to be held in custody. In the United Kingdom, under section 38 (4) of the Magistrates' Courts Act, 1952, a person who

has been arrested by the police and is not released on bail must be brought before a magistrates' court as soon as practicable, which normally means on the next weekday following the day of his arrest. A temporary exception to this rule is made by section 7 of the Prevention of Terrorism (Temporary Provisions) Act, 1974, under which a person may be arrested for certain offences relating to proscribed organizations, or as being concerned in the commission, preparation or instigation of acts of terrorism, or as being subject to an exclusion order made under the Act. A person so arrested may be detained for up to 48 hours, and this period may be extended by the Secretary of State to up to five days. However, he is entitled to the benefit of all other safeguards applying to people in police custody.

12. In the Byelorussian SSR, in every instance in which a person suspected of having committed a crime is detained, the investigating authority is obliged to prepare a report indicating the grounds and reasons for the detention and to give notice therof to the procurator within 24 hours. The procurator is obliged to sanction the commitment to custody or to order the release of the detainee within 48 hours of receiving notice of his detention.

13. In Czechoslovakia, decision on the custody of the defendant in preparatory proceedings is made only by the prosecutor. Complaints on his decision having the effect of taking the defendant into custody or rejecting the application of the defendant to be released from custody are discussed and decided upon by court.

14. In Canada, when the accused remains in pre-trial detention, he may be remanded from time to time pending trial or preliminary hearing. Each remand is for a maximum duration of eight days, at the expiration of which the detained person should appear before an independent judicial authority. In the United Kingdom, a magistrates' court may not remand a person in custody, i.e., commit him to custody to be brought before the court at the end of the period of remand or earlier, for a period exceeding eight clear days, except when the court adjourns the trial after convicting the accused or finding the charge proved and before sentencing him or otherwise dealing with him in order to enable inquiries to be made and to determine the most suitable method of dealing with the case. In such circumstances, a remand should not exceed a duration of three weeks.

15. In Canada, following appearance of the accused in court, the justice can grant release from custody through various procedures, such as an undertaking, with or without condition, or a recognizance with or without conditions, sureties or bail. In Ghana, an accused person is entitled to apply for bail when he is brought before a court for trial, or when he appeals against his conviction. In considering the application, the Courts should assess whether it is probable that the defendant will appear at trial. The court takes into account, in addition to the nature and gravity of the offence charged, the following matter: (a) whether the defendant, having been released on bail on any previous occasion, has wilfully failed to comply with the conditions for his release on bail; (b) whether or not the defendant has a fixed place of abode in Ghana, and is gainfully employed; and (c) whether the sureties are of sufficient means.

16. Bail is refused in cases where the court is satisfied that the defendant (a) may interfere with any witness or evidence or may hamper police investigations; (b) may commit a further offence when on bail; or (c) is charged with an offence, punishable by imprisonment exceeding six months, which is alleged to have been committed while he was on bail. Bail is also refused in case of treason, subversion, murder, robbery, hijacking, piracy or escape from lawful custody, as well as when a person is being held for extradition to a foreign country.

17. The Government of Canada states that exception to safeguards guaranteed by law were ordered in October 1970, when the Federal Government invoked the War Measures Act. Made in response to appeals from the Premier of the Province of Quebec and Montreal Civic Officials, this action provided emergency powers to deal with, in the terms of the proclamation involved, a state of apprehended insurrection resulting from the existence in Canada of an organization known as the Front de Libération du Québec (FLQ) advocating and resorting to criminal offences, including murder and kidnapping, as a means of or as an aid in bringing about a governmental change within Canada. Outlawing FLQ, the emergency regulations accompanying the proclamation authorized, among other measures, the arrest without warrant of any persons believed to be members or supporters of the unlawful association, entry and search without warrant, and detention without bail.

18. The Government of the United Kingdom states that, in spite of certain minor differences, in all essential respects the Criminal Law of Northern Ireland affords a suspected criminal the same protection as that which applies throughout the remainder of the United Kingdom. However, since during the past six years a terrorist situation has existed in Northern Ireland, in order to protect the lives and property of the citizens of Northern Ireland, emergency legislation has been enacted. This legislation, the Northern Ireland (Emergency Provisions) Act 1973, has involved derogations from the protection normally afforded by the law throughout the United Kingdom, but these provisions are temporary and cannot remain in force for more than 12 months without renewal by Parliament. The Act contains three distinct parts: first, it strengthens the normal powers of the police and armed forces in Northern Ireland; secondly, it makes derogations from the normal procedures of the courts; and thirdly, it makes provision for the detention of terrorists.

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

(a) Right to be informed of the offence charged

19. The Bill of Rights of Canada provides that a person has a right to be informed promptly of the grounds for his arrest or detention, and the Criminal Code of the same country imposes a statutory duty upon any person who arrests another to inform that person of the reason for his arrest. Failure to do so may provide grounds for a civil action against the offending peace officer or citizen for false arrest. In the United Kingdom, a police officer arresting a person without a warrant must do his best to ensure that the person knows the true ground on which he is being arrested.

20. In the German Democratic Republic, after the investigation has been declared open, the accused may be interrogated. However, before the interrogation starts, the accused has to be informed of the charge brought against him.

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

21. In Austria, it is the duty of all authorities engaged in criminal prosecutions to inform the defendant of his rights, even where there is no explicit provision requiring them to do so. In accordance with section 61 of the Code of Criminal Procedure of the German Democratic Republic, the courts, the public prosecutors and the investigating organs have to inform the accused or defendant at every stage of the proceedings of his rights. These include the following: (a) to be informed of the charges; (b) to be informed of the evidence; (c) to bring forward anything that may clear him of the charge or reduce his criminal responsibility; (d) to defend himself and to avail himself of counsel at any stage of the proceedings; (e) to offer evidence and to make other requests concerning the trial; and (f) to resort to legal remedies.

22. In the United Kingdom, the judges have for many years given guidance to the police with regard to interrogation and the taking of statements. The guidance is incorporated in the "Judges' Rules", first produced in 1912 and since revised. The Judges' Rules are accompanied by Administrative Directions, approved by the judges, which describe practices to be followed during interrogations. In Canada, the standard warning given by the police upon an arrest includes the point that no statement need be given but anything the arrested person does say may be taken down and used in evidence. In Ghana, with regard to the interrogation of the accused, the Judges' Rules lay down the principle that whenever a police officer has decided to charge a person with a crime, he should first caution such person before asking him any questions, or any further questions, as the case may be. In New Zealand also, the police adhere to the Judges' Rules. The Rules, however, do not have the force of law and they are used only to guide the police, a statement obtained in breach of them being still admissible at the discretion of the court.

(c) Rights relating to the investigation

23. Under the Czechoslovak regulations concerning penal proceedings, the defendant may not in any way be forced to make a statement as to admit guilt. It follows from this that he has the right, not the obligation, to give evidence. In Italy, the right of the accused to silence is recognized, with the exception of refusal to declare his identity (article 78, paragraph 3, of the Code of Criminal Procedure).

24. Article 492 of the Code of Military Justice of Peru provides that if the accused refuses to make a statement, the examining officer shall confine his action to informing him that his resistance will not prevent the case from proceeding and that his silence may be taken as an indication of guilt. The use of coercion or of threats to overcome such resistance is forbidden.

25. Under Belgian law, the accused has not only the right to remain silent but also to distort the truth. The most barefaced lie told in support of his defence is not classed as an offence under any criminal law. In the Byelorussian SSR, articles 48 and 70 of the Code of Criminal Procedure confer upon the accused person the right to give evidence, to submit various petitions and to retract earlier testimony, while article 60 obliges the court, the procurator, the investigator and the person conducting an inquiry to inform those involved in the case of their rights and to enable them to exercise those rights. In the German Democratic Republic, during the interrogation, the accused is to be granted an opportunity to explain his actions, to invalidate the suspicion, to set forth exonerating circumstances and to propose motions. The accused may be also permitted to state his case in a written or any other form.

(d) Right to counsel

26. The Bill of Rights of Canada provides that an arrested person has a right to retain and instruct counsel without delay.

27. In Czechoslovakia, from the moment the charge is made, the defendant has the right to have a lawyer, and in many cases, including cases investigated during custody, those of persons serving imprisonment and young offenders, the defendant is obliged to have a lawyer, even during preparatory procedure.

28. In the German Democratic Republic, if the accused or defendant has a legal representative, the latter may choose independently a counsel for defence.

29. In Czechoslovakia, defendants of no financial standing are entitled to the service of a defender free or charge, even in cases where defence might not be necessary. In Yugoslavia, in cases where it is prescribed by law that the person deprived of liberty should have a defence counsel, either because the gravest criminal offences are involved or the accused is not capable of defending himself on his own (for example, a blind person), the questioning of such a person should be performed in the presence of a defence counsel and if the accused fails to engage him on his own initiative, the court should appoint an ex-officio defence counsel who will be present during the questioning of the individual in custody.

30. In Canada, with a view to enabling all persons in detention to enjoy the right of access to counsel, legal aid plans which exist in each of the provinces and the territories constitute a positive development, as does the establishment of native court workers who can interpret the proceedings to native people and give them a greater awareness of their rights.

31. In accordance with article 53 of the Code of Criminal Procedure of the Byelorussian SSR, a lawyer has the right to meet the accused privately, without any restriction on the number or duration of such meetings. In Czechoslovakia also, the defender has the right to speak with the defendant, when the latter is in custody, with no other person present. In the United Kingdom, untried prisoners remanded in prison custody are afforded immediate and ample facilities for communicating with their legal advisers. Visits by legal advisers to unconvicted

prisoners for the purpose of discussing the proceedings to which the prisoner is a party take place out of the hearing of prison officers, and there are no restrictions on correspondence about the proceedings between a prisoner and his legal adviser.

32. The Code of Criminal Procedure of Peru guarantees the services of counsel for the defence for an accused person brought before officials responsible for the administration of justice to make a statement. Article 123 of the Code states that only in an emergency or when the 24-hour period of preliminary custody is about to expire may the examining magistrate begin the examination of the accused in the absence of counsel for the defence; in such case, however, the examination may not be completed until the latter is present. The Yugoslav Law on Criminal Procedure envisages, in article 178, that the examining magistrate is bound to inform the arrested person that he can engage a counsel who will be present during questioning. It is the duty of the examining magistrate to help, if necessary, the arrested person to find a defence counsel. In case the person deprived of liberty fails to find a defence counsel within 24 hours, the examining magistrate will question him without the presence of a counsel.

(e) Right to communicate with family and friends

33. In the Byelorussian SSR, in all instances in which an accused person is committed to custody his family and the administration at his place of work, service or study are invariably notified. The investigator, procurator or judge may permit close relatives or other persons, if they so request, to visit an accused person detained in custody. In the German Democratic Republic, the public procurator must inform the next of kin of the arrested person within 24 hours after the first judicial interrogation. Exceptions to this rule are permissible only if by such notification the purpose of the investigation is jeopardized. In this case notification takes place after the reasons for the jeopardy have ceased to exist. In Italy, the family of the person arrested or apprehended by law enforcement officers must be informed without delay (article 249 bis of the Code of Criminal Procedure).

C. Protection against improper methods of interrogation

34. Under section 202 of the Code of Criminal Procedure of Austria, no unlawful methods of interrogation (promises, deceptions, threats or force) may be used to make the defendant confess or to extract other specific information. In the Byelorussian SSR, the Code of Criminal Procedure expressly prohibits attempts to obtain testimony from an accused person or a suspect by force, threats or other illegal methods (articles 15 and 120). In the Penal Code of Czechoslovakia, it is expressly stated that the statement of the defendant must not be obtained by misrepresentation of circumstances. Article 132 of the Code of Criminal Procedure of Peru absolutely prohibits the use of promises, threats or other means of coercion, even those of a mental character in order to obtain a statement from the accused.

35. In the German Democratic Republic, no arrested or detained person may be subjected to hypnosis, the administration of drugs or any other means which tend to impair or weaken his freedom of action or decision, his memory or his judgement. In Italy, various judgements of the Court of Cassation and several Courts of Appeal have established that devices such as the lie detector or narcoanalysis may not be used in the interrogation of the accused, because they debase the personality of the individual and are therefore degrading.

36. In the Byelorussian SSR, an investigator is obliged by law to observe strictly all the relevant procedural guarantees during the conduct of an investigation. Among the most important guarantees pertaining to the interrogation of accused persons are: the prohibition, except in cases which do not permit of delay, of interrogation at night (article 149 of the Code of Criminal Procedure); separate interrogation of persons summoned in connexion with the same case (articles 149 and 158); the granting to the accused of the opportunity to record his testimony in his own hand (articles 153 and 160); and the prohibition of leading questions (article 158).

37. In accordance with section 198 of the Code of Criminal Procedure of Austria, interrogations shall be conducted "with courtesy and calmness". During the interrogation the defendant should be permitted to be seated.

38. In the Byelorussian SSR, pursuant to article 63 of the Code of Criminal Procedure, the only information admissible as evidence is factual information obtained in accordance with the procedure established by law. Since article 15 of the Code of Criminal Procedure prohibits the extortion of evidence from an accused person or a suspect by force, threats or other unlawful means, even factual information obtained in a manner which violates that requirement is not regarded as evidence. In Czechoslovakia, any statement obtained from the defendant through a substantially defective procedure, in such a way that the defendant has been forced to reply to questions or that his statement has been obtained by misrepresentation is null and of no effect and cannot be used in the proceedings. In accordance with the law of Ghana, in order to be admissible, a confession must be free and voluntary, and unless it be shown affirmatively on the part of the prosecution that it was made without the prisoner being induced to make it by any promise of favour, or by menace or undue fear, it shall not be received in evidence against him. Under New Zealand law, a confession is to be declared inadmissible where there has been violence or force or other forms of compulsion. The Constitution of Peru provides that any statement obtained by violence shall be void. In the United Kingdom, breach of the Judges' Rules and Administrative Directions will not automatically lead to the exclusion of the evidence obtained because the decision is left to the discretion of the judge. However, it is an absolute rule that a confession which is found by the judge not to have been made voluntary is inadmissible as evidence against the person who made the confession. If a confession is challenged by the defence on these grounds, it will be admissible only if the prosecution proves to the judge beyond reasonable doubt that it was voluntary. In a jury trial, this question is decided by the judge after hearing evidence and argument in the absence of the jury and, if the judge rules that the confession was not voluntary, no reference to the confession may be made when the trial proper recommences. Even if the defence raises no objection to the confession, the judge must nevertheless be satisfied in his own mind as to its voluntariness.

39. In Argentina, if the person arrested does not appoint a defence counsel, any confession that he may make before the trial judge alone is valid, or if he has appointed a counsel and the latter is not present at the interrogation of the prisoner, such confession is also valid.

40. According to the law of the Byelorussian SSR, an admission of guilt by an accused person does not constitute unconditional proof of his culpability. Such an admission may be used as the basis for a charge only if it is corroborated by the entire body of evidence collected on the case.

41. In the United Kingdom, if a person in police custody wishes to be medically examined, he may arrange, at his own expense, for a doctor of his choice to carry out the examination. In any event it is the practice of the police to call in a doctor at their expense if anyone in custody appears to be ill or otherwise in need of medical attention.

D. Treatment in the place of custody

42. In accordance with the Code of Criminal Procedure of the German Democratic Republic, an arrested person is to be kept separated from convicts. Article 17 of the Constitution of Ghana states that a person who has not been convicted of a criminal offence shall be kept away from convicted persons. Under New Zealand Law persons remanded to a prison to await trial are dealt with as a category distinct from sentenced prisoners. They are, wherever possible, kept separate from the rest of the prisoners.

43. In Canada, the place where accused persons are remanded in pre-trial detention is supervised by officials independent of the investigating authority. While arrested persons will commonly be held in police cells prior to initial appearance before a justice, subsequent pre-trial detention will usually be in a local common gaol or detention centre operated by a provincial corrections service. In Czechoslovakia, the actual detention of a defendant is entrusted to the Board of Corrective Education which is under the responsibility of the Minister of Justice i.e., organs of, or officials working in, a different branch from those of the officials dealing with the interrogation or making decisions on detention. In New Zealand, nearly all arrested persons coming before the court, if not released on bail, are remanded into the custody of the Superintendent of a prison which is an institution under the jurisdiction of the Department of Justice. It is, however, possible for a person on remand in custody to be held in a police gaol (s.12 (1) Penal Institutions Act, 1954). Although such a gaol is staffed by the police, it is a penal institution and exactly the same rules apply to a person held there as if he were held in a prison under the jurisdiction of the Department of Justice. It is also possible, under s.12 (2) of the Penal Institutions Act, 1954, for a person to be remanded to a police station if he is to be detained in custody for eight days or less and for the purposes of such a remand the police station is deemed to be a penal institution.

44. In Belgium, persons detained pending trial are not required to work. In New Zealand also, persons remanded to a prison to await trial are not required to work.

45. In Austria, where a person is detained pending trial, the provisions of the Execution of Penalties Act are generally applicable. In accordance with section 184 of the Code of Criminal Procedure, such detainees may only be placed under those restrictions which are designed to ensure the object of the individual's detention or to maintain security and order in the place of detention. Detainees should be treated with calm, seriousness, firmness and respect for their honour and human dignity and with as much personal consideration as possible. In the Byelorussian SSR, the legal status of persons held in places of preliminary detention and the security measures in such institutions are governed by a specific law, the Regulations governing Preliminary Detention in Custody in the Byelorussian SSR (Decree of the Presidium of the Supreme Soviet of the Byelorussian SSR of 9 April 1970). This instrument contains an exhaustive list of the rights and obligations of persons held in places of preliminary detention and the authorities in such institutions have no right to modify the status of a detainee or to introduce any restrictions which may degrade that status for any purpose whatsoever.

46. In Ghana, persons in pre-trial detention are allowed to receive visits from their relatives, their friends and their counsel. They may choose to eat food prepared by their relatives from outside. They have access to writing materials and they can write as many letters as they may wish. In the United Kingdom, the Prison Rules provide for unconvicted prisoners to have a daily visit from their family and friends and to send as many letters as they wish.

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

A. General principles

47. The National Prisons Law of Argentina (Legislative Decree No. 412/58, ratified by Act No. 14,467) states that under the prison régime, preventive measures and remedial, educational and other treatment and assistance as may be available in accordance with the scientific progress made in this area shall be used in accordance with the particular needs of each case. In Belgium, article 13 of the Royal Decree of 21 May 1965 states that any detained person is subject to a system of individual observation, assistance, rehabilitation and, if necessary, reclassification taking into account useful scientific data as well as the conditions required for their rehabilitation. The Corrective Labour Code of the Byelorussian SSR ensures that the punishment inflicted under the Criminal Code is so administered that it not only serves as a penalty for the crime committed, but also re-educates the convicted person in the spirit of honest toil, scrupulous observance of the laws and respect for the rules of socialist communal life. The Government of Czechoslovakia states that the aim of punishment is to prevent the offender from carrying on his criminal behaviour and to reform him so that he will live in an orderly fashion as a wage-earner. The methods used for such re-education include prescribed rules for order and discipline, education through work, and cultural education. In the German Democratic Republic, imprisonment is the severest measure for criminal punishment which guarantees the effective protection of the citizens as well as the re-education of offenders who have committed serious offences or stubbornly closed their minds to all other measures of re-education by the State and society.

48. Section 22 of the Execution of Penalities Act of Austria provides that convicted prisoners be treated with calm, seriousness and firmness as well as with justice and respect for their honour and dignity. Restrictions may be imposed on them only to the extent allowed by law. The law on the Execution of Penalties involving imprisonment and the reintegration of prisoners into society of the German Democratic Republic guarantees that prisoners are treated humanely in every respect and that systematic efforts are made for their reintegration into society. Article 4, paragraph 1 of the Correctional Code of Greece provides that prison officers must fair, impartial and humane towards prisoners; and that their attitude ought to be such as not to insult personal dignity.

49. The Government of Canada considers the application of appropriate standards of selection and training for the personnel concerned to be a fundamental safeguard against ill-treatment of convicted prisoners. The provincial and federal Governments offer in-service training as well as educational leave and financial assistance to enable prison staff to complete Master's Degrees in such disciplines as Social Work, Correctional Administration and Criminology. In the same spirit, the Government of Ghana, in consultation with the University, has recently started a two-year training course for prison officers, leading to a Certificate in Prison Administration.

50. In Canada, within the aegis of the Solicitor-General of the Federal Government, studies are under way on the rights of the convicted prisoner, parole applicant, parolee and ex-offender, as is research on the legal aspects of decision-making and disciplinary proceedings within correcitonal institutions. The federal and provincial Departments of Justice are developing human rights legislation that will apply to persons in contact with the criminal justice system.

B. Medical examination and medical services

51. In accordance with the Rules for the Government of Prisons of Ireland, every prisoner shall, as soon as possible after his admission, be separately examined by the medical officer, who shall record the state of health of the prisoner and such other particulars as may be directed.

52. In accordance with the Execution of Penalites Act of Austria, there should be regular checks on each prisoners's health and weight (sect. 66, para. 1). Medical experimentation on prisoners is not permitted even if the prisoner agrees to undergo the experiment (sect. 67). When a prisoner reports sick, has had an accident or has been injured in any other way, has attempted suicide or has mutilated himself, or when his general appearance or behaviour suggests that he is physically or mentally ill, the prison physician must be informed. He should examine the prisoner and see that he gets the appropriate medical treatment and care, if necessary by a specialist (sect. 68). Where the prison doctor cannot be reached in urgent cases, section 70 provides that any other doctor may be called. In the Byelorussian SSR, medical attention is provided, not by a private practitioner, but by the medical personnel of State institutions, in accordance with the Public Health Law. In Ghana, it is the duty of the Prisons Services to ensure that every prisoner is promptly supplied with all medicines, drugs, special diets or other things prescribed by a medical officer of health as necessary for the health of that prisoner.

53. In accordance with the National Prisons Law of Argentina, if the treatment calls for major surgical operations or any other surgical or medical treatment which involves a serious hazard to life or is liable to impair the physiology of the person sentenced, his consent or, if he is a total invalid, that of his legal representative is required, as well as the authorization of the trial judge, which should take into account an expert report.

54. In Austria, if a sick or injured prisoner cannot get adequate treatment in the prison itself, he should be transferred to another, more suitable gaol or, if necessary, to a public hospital.

55. Under the laws of Argentina, a prisoner subjected to solitary confinement should be visited daily by a doctor if the prisoner so requests. The doctor should advise the director in writing if, in his judgement, the correctional measure should be suspended or attenuated on grounds of physical or mental health. In the United Kingdom, if a prisoner has to be placed under restraint to prevent him from injuring himself or others, the Governor is required to give notice of this as soon as possible to the medical officer. The medical officer is required

to say whether he concurs in the order and if he makes any recommendation the Governor must give effect to it.

C. Disciplinary and security measures

(a) Disciplinary measures

56. In Canada, inmates are given written information within two weeks of incarceration on conduct constituting a disciplinary offence and the type and duration of punishment that could be imposed.

57. In Argentina, the following disciplinary measures may be imposed by the director of the institution: (a) warning; (b) full or partial loss of privileges acquired under the regulations; (c) confinement of the prisoner in his own cell, with reduced amenities, for a period of up to 30 days; (d) close confinement for a period of up to 15 days; (e) transfer to another section of the institution where a harsher régime applies; or (f) request for the prisoner to be transferred to a different type of institutuion. The punishments provided for in article 82 of the general regulations governing penal institutions in Belgium, with the exception of confinement in a punishment cell, constitute withdrawals of privileges, such as work, reading, eating in the canteen, visits, correspondence, recreation, etc. These punishments must not be such as to affect the physical or mental health of the prisoners. In Belgium, recourse to confinement in a punishment cell is only permitted for an offence or serious lack of discipline or when other punishments have proved ineffective. The punishment cell is the same size as ordinary cells; it has a window like other cells, but it is reinforced and does not have transparent glass. The cell is heated but it has no furniture such as a chair, table or cupboard. The prisoner detained in a punishment cell is provided with a camp bed for the night. Unless there is an emergency, this punishment - which may not last for more than nine days - can be inflicted only if a doctor has examined the prisoner concerned. A medical officer must visit prisoners being punished in this way every day and submit a report if he deems it necessary to terminate the punishment for reasons of physical or mental health.

58. In the United Kingdom, the punishments which may be awarded for offence against discipline are: (a) caution; (b) forfeiture of privileges; (c) exclusion from work in association with others; (d) suspension of earnings; (e) confinement to the cell; and (f) forfeiture of remission of sentence. The maximum periods for which these punishments may be awarded are prescribed by the Rules. Corporal punishment and restriction of diet as a punishment have been abolished, except in Northern Ireland. In practice, however, corporal punishment has never been imposed in prisons there and its use in Borstals has now been suspended. Limited use is made of the power to impose a restricted diet.

59. In accordance with the National Prisons Law of Argentina, no prisoner shall be punished without first being informed of the offence with which he is charged, having an opportunity to present his defence and being heard by the director of the institution. In Canada, in cases where the disciplinary offence is a serious or flagrant one, standards for such due process measures as written notice of charge and hearing, personal attendance, and the right to cross-examine and call witnesses have been established. In Ireland, before a report of misconduct against a prisoner

is dealt with he must be informed of the precise nature of the offence and he shall not be punished until he has had an opportunity of hearing the evidence against him and of being heard in his defence. The Prison Rules, 1964, of the United Kingdom require that, where a prisoner is to be charged for offences against discipline, the charge shall be laid as soon as possible, the prisoner shall be informed of the charge as soon as possible and in any case before the inquiry which should begin not later than the next working day. At the inquiry, which should be conducted by the Governor or, in more serious cases, by the Board of Visitors, the prisoner must have the opportunity of presenting his own case.

(b) Security measures

60. In accordance with the National Prisons Law of Argentina, the use of force by prison personnel in their relations with prisoners is absolutely prohibited, except in cases of actual or attempted flight or in cases of active or passive physical resistance to an order based on law or regulations. Any member of the personnel who uses excessive force is liable to appropriate criminal and administrative penalties. The use of regulation weapons shall be limited to those exceptional circumstances in which their use is essential for preventive purposes or because of imminent danger to the life, health or security of officials, prisoners or other persons. In Belgium, article 109 of the general regulations for penal institutions provides that any violence or act of assault is prohibited and only such compulsion as is absolutely necessary for the maintenance of order is permitted. Rule 110 for the Government of Prisons of Ireland provides that a prison officer shall not strike a prisoner unless compelled to do so in self defence. In cases where the application of force to a prisoner is needed, no more force than is necessary shall be used. Articles 67 and 68 of Legislative Decree No. 17,581 or Peru provide that coercive means (rods, hoses, gases and firearms) may be used only when the attitude of prisoners points to an imminent danger of grave injury to persons or things, and that these measures may be taken only after the exhaustion of all other measures to control the rebellious prisoners. In the event of mutiny, firearms may be used upon the express order of the appropriate authority.

61. In Argentina, the use of handcuffs, straitjackets or other instruments of restraint is prohibited as a punishment. Such instruments may be used only in the following circumstances: (a) as a precaution against possible escape or during a transfer; (b) on medical grounds, with the written authorization of the medical officer; (c) by express order of the director or of the official who is legally acting in his stead, if other methods of security have failed and with the sole purpose of preventing a prisoner from injuring himself or others or from damaging the institution. In such instances, the director or the person acting in his stead shall at once consult the medical service and submit a detailed report to the trial judge and to the higher prison authority. In accordance with the laws of Austria, handcuffs may be used only where a detainee shows or is likely to show, violent behaviour; where a person arrested on suspicion of a serious crime could try to escape; or in order to prevent a prisoner from endangering his own physical safety. They may be resorted to only if there is no other possibility to avert these dangers. A prisoner may not be kept manacled longer than absolutely necessary. Handcuffs should be used as inconspicuously as possible and in such a manner as to

avoid injuries. In Belgium, under articles 107 and 108 of the general regulations for penal institutions, handcuffs, shackles and straitjackets may be used only on the instructions of the director under the medical officer's supervision and provided that other methods of restraint have failed, when a prisoner's behaviour constitutes a danger to himself or others or may cause material damage. In Ghana, mechanical restraints are used on prisoners only when the Officer-In-Charge has considered that their use will prevent a prisoner from escaping or from doing injury to himself or any other person. In New Zealand, mechanical restraint may be used only where it is necessary and it cannot be used solely for punishment. No inmate may be kept under mechanical restraint for a period exceeding 24 hours unless a Visiting Justice so orders, at the same time setting a limit on the time the restraint may continue.

62. In Austria, special security measures, such as accommodation in a high-security cell, solitary confinement etc. may only be applied under the conditions laid down by law. If their use is necessary, they may only be maintained with the permission of the court responsible for executing the sentence. In Ireland, the Governor may order any refractory or violent prisoner or prisoner of suicidal tendencies to be temporarily confined in a special padded cell, but a prisoner shall not be confined in such a cell as a punishment nor for a longer period than is absolutely necessary. A report regarding such confinement shall in every case be submitted to the Minister. In New Zealand, an inmate undergoing the punishment of confinement to a cell (solitary confinement) cannot be kept in isolation beyond 15 days and he must be visited frequently by a prison officer. In the United Kingdom, temporary confinement in a special cell is permitted for a prisoner who is refractory or violent, but not as a punishment. No prisoner may be so confined after he has ceased to be refractory or violent.

D. Supervision of prison and complaints by prisoners

(a) Supervision of prison

63. In Argentina, in accordance with the National Prisons Law, qualified prison inspectors, appointed by the administrative authority, shall conduct periodic inspections of the correctional institutions. Under the laws of Ghana, inspectors or Prisons Visitors, appointed by the Prisons Service Board, report monthly to the Commissioner for Internal Affairs through the Director of Prisons on the treatment of prisoners. In the United Kingdom, all penal establishments are subject to the direction of the Home Secretary who is answerable to Parliament for their proper administration. All establishments are subject to visits by senior officers from the regional and central headquarters of the Prison Department.

64. The general regulations governing penal institutions in Belgium confer certain powers upon administrative commissions established for each institution and consisting of three to nine members appointed by the Minister of Justice. The King's prosecutor (le procureur du Roi) for the district and the burgermaster of the community in which the institution is situated are de jure members of such commissions. The administrative commission addresses or transmits to the Minister

of Justice any information and documentation requested of it concerning the situation and running of the institution and makes any proposals it deems appropriate in the interests of the latter. One or more members of the commission take it in turn to visit the institution at least once a week during a one-month period.

65. The Canadian Penitentiary Service has a permanently established Management Audit team that visits and reports upon management problems in all federal penitentiaries.

66. In the Byelorrusian SSR, the staff of the Procurator's Office regularly visit places of detention, question convicted persons and verify that the administrative rules and arrangements governing imprisonment are in accordance with the law. In Czechoslovakia, control over custody is provided for primarily through the supervision of the prosecutor. The prosecutor has access to the prisons at any time, may speak with persons in custody when no one else is present and may order the director of the prison to redress violations of the law.

67. In Canada, the Grand Jury, by custom, on occasions at least, visits and reports upon correctional institutions in those provinces where the Grand Jury exists.

68. Intervention by the judiciary in Belgium is limited to the visits which examining magistrates are required to make once a month to persons held in places of detention in the district and which the presidents of assize courts are required to make during each session of the court to persons detained in the justice building. Both examining magistrates and presidents of assize courts, acting in their own capacities, may give orders which must be carried out either for the investigation or for the sentence. In Canada, a number of provinces have legislation providing that any judge of the courts shall at any time be permitted to visit correctional institutions within the province. Article 221 of the Organic Law concerning the Judiciary of Costa Rica provides that Judges of the Criminal Courts shall, once a week and without prior notice, visit prisons in their places of residence with a view to investigating whether the regulations are being duly complied with and whether prisoners are receiving proper food and treatment. They shall hear prisoners' complaints and transmit them to the Prison Governor and, after hearing his replies, they shall enter them in a report to be submitted to the Court in Plenary. The other major function of judges is to determine whether any prisoners are being wrongfully or unlawfully detained and to take steps in such cases to secure their release and to correct any irregularities which may come to their notice. Judges in Czechoslovakia are entitled to visit convicted offenders in establishments of corrective education and to speak with them without anyone else present. In the United Kingdom, any magistrate has a statutory right to visit a prison to which his court commits prisoners. In Yugoslavia, the president of the court, having jurisdiction over the territory in which the prison is located, has the following duties: (a) to visit at least once a week the detainees in the prison; and (b) to inform himself, if necessary without the presence of the superintendent or warders, regarding the food given to detained persons and the way in which their other needs are provided for. Detainees can be also visited at any time by the examining magistrate and the president of a higher court.

69. When the new Criminal Procedure Code of Costa Rica enters into force, the Sentence Enforcement Judge will visit all detention centres in the country at least once every six months and will inform the Supreme Court of Justice and the Institute of Criminology, as appropriate, of any irregular situations which he may discover. He will hear any detainees who so request it, and will follow up their complaints, taking such measures as he may deem necessary. He will also determine the principal features of their corrective treatment.

70. In Canada, in 1973, protection of federal inmates from inhuman and other injust practices was significantly strengthened by the appointment of an independent Correctional Investigator. The incumbent is empowered to investigate, on her own initiative or upon receipt of a complaint, inmate problems where, in her opinion, all reasonable steps to exhaust available legal and administrative remedies have been taken. Prisoners within provincial institutions have similar recourse to provincial Ombudsmen in the five provinces where they exists. Also in Canada, Members of Parliament and other elected representatives are entitled to visit penitentiary institutions

71. In Czechoslovakia, members of the Czech and Slovak National Councils have the right of access to all establishments of corrective education and the right to speak with convicted offenders with no other person present.

72. In Canada, informal inspection is provided by the occasional visits of representatives of Prisoners Aid Societies, Citizen Advisory Groups, Native Groups, various rehabilitative groups, such as Alcoholics Anonymous, and the invited general public and the media. In Czechoslovakia, members of the regional committees are entitled to vist the establishments of corrective education in connexion with their responsibilities in securing material goods for convicted offenders, taking care of their education, affording them cultural facilities etc. Each penal establishment in the United Kingdom has its own Board of Visitors which is appointed by the Home Secretary and must include a proportion of magistrates. They constitute an independent body of representatives of the local community to which any inmate may make a complaint or request. To enable them to carry out their tasks, the Prison Rules give members of such Boards the right to enter all parts of the prison, to examine its records and to talk to any inmate out of sight and hearing of the Governor and other members of the staff. The Boards report direct to the Home Secretary.

(b) Complaints by prisoners

73. In accordance with the National Prisons Law of Argentina, every prisoner on admission to the prison institution shall be provided with written information about the authorized methods of submitting requests or making complaints. If a prisoner is illiterate, the aforesaid information shall be conveyed to him orally.

74. In Canada, internal grievance procedures exist which provide an avenue for inmate complaints to the most senior official in the correctional service involved. For example, 51 grievances were presented to the Federal Commissioner of Penitentiaries in 1973/1974 of which four were upheld and remedial action was taken.

In Czechoslovakia also, every convicted person is entitled to lodge complaints to the competent authorities. In Ghana, all prisoners are entitled, without prejudice to any other means of redress legally available to them, to make complaints in writing, signed by them as to (a) any instance of assault, maltreatment or intimidation and (b) any neglect or non-performance of duties by a Prisons Officer. In Peru, every prisoner has the right to be heard by the competent authorities and may submit petitions or complaints without any restriction.

75. In the Byelorussioan SSR, every prisoner has the possibility of addressing an oral or written complaint to the Procurator. The administrations of places of detention are obliged to forward to the Procurator within a period not exceeding 24 hours any complaint or statement addressed to him by a prisoner. Upon receiving such a complaint or statement, the Procurator examines it within a time-limit specified by law, takes the necessary steps and communicates his decision to the complainant.

76. In accordance with the laws of Argentina, every prisoner is allowed, in addition to submitting requests and complaints to the director of the institution, to address himself, without censorship as to substance but in proper form, to a higher administrative authority and to the trial judge. In Austria, the avenue of appeals for complaints by convicted offenders serving a prison ends at the President of the court or at the Federal Ministry of Justice, as appropriate. The Austrian Federal Constitution, however, gives prisoners the further right to complain to the Administrative Court and to the Constitutional Court, the latter having jurisdiction where a breach of fundamental rights is alleged. In Costa Rica, if an accused person is maltreated, he may lodge a complaint with the next higher court or with the Judicial Inspectorate, and the complaint will be considered and settled.

77. In Belgium, detained persons may complain in the first instance, without being censured in any way, not only to those directly concerned with the penitentiary system, such as the Minister of Justice, the Secretary-General of the Department of Justice and the general administrative officers of penal institutions, but also to the King, Ministers, presidents of the legislative Chambers, the first president of the Council of State, the chairman of the administrative commission and the chairman of the Prisoners' Aid Committee. In Canada, all inmates have the constitutional right to communicate with their Members of Parliament and Ministers of the Crown. In the United Kingdom, prisoners have the right to petition the Home Secretary or see the Board of Visitors or a visiting officer of the Home Secretary about any matter of prison treatment. If the prisoner does not get satisfaction from any of these sources, he is allowed to write to his Member of Parliament, who is then free to take up the case as he wishes. Normally, the Member would first write to the Home Secretary but he can also refer the case to the Parliamentary Commissioner for Administration (the "Ombudsman"), or ask a Parliamentary Question or raise the matter in an adjournment debate in Parliament. Where the complaint relates to a decision of the Prison Department Headquarters, the prisoner may write to a Member of Parliament without any preliminaries.

E. Right to communicate with persons outside

78. The National Prisons Law of Argentina provides that prisoners shall not be deprived of the right to communicate periodically with their family, guardians, relatives or friends, or with persons and representatives of official or private institutions or bodies concerned with their rehabilitation. Such visits and correspondence may be restricted temporarily solely for reasons of discipline or reasons relating to the prisoner's treatment. Prisoners shall be informed of important events in social, national and international life through the mass media, special publications or broadcasts, authorized, supervised or edited by the prison administration. A prisoner shall, in the event of the serious illness or death of a relative with visiting or correspondence rights, be authorized to attend at their bedside or funeral, except when the director of the institution, for grave and substantiated reasons, decides otherwise. In all cases, the director of the institution shall communicate his decision to the higher administrative authority and to the trial judge. In Ghana, every prisoner is entitled once in every two weeks to receive a visit from friends or relatives in the presence of a prison officer. Every prisoner is entitled once in every two weeks to write one letter to friends and relatives and any number of letters to his legal advisers and his minister of religion.

79. Under article 27 of the Corrective Labour Code of the Byelorussian SSR concerning the granting of legal assistance to convicted persons serving terms of imprisonment, lawyers are allowed to visit convicted persons at the written request of the convicted persons themselves, their relatives or representatives of the community. If the convicted person or lawyer so wishes, such meetings are held in private. In accordance with the Rules for the Government of Prisons of Ireland, a prisoner on conviction may be allowed to communicate at any reasonable time with his legal adviser and be visited by him for the purpose of entering or prosecuting an appeal against his conviction or sentence.

III. REMEDIES AND SANCTIONS

A. Procedures to terminate illegal detention

80. In the United Kingdom, a safeguard lies in the writ of habeas corpus ad subjiciendum, the purpose of which is to produce the body of the detained person before the court, so that release from restraint may be ordered if appropriate. This remedy is used to test any alleged invalidity in the commitment of a prisoner, or want of jurisdiction to hold him in custody. It remains of the highest constitutional importance, for by it the liberty of the subject and his release from any form of unjust detention may be assured. Proceedings may be initiated by the person detained, by someone acting on his behalf at his request, or by anyone else who believes him to be unlawfully imprisoned. An application for a writ of habeas corpus ad subjiciendum must be made to the Divisional Court of the Queens Bench Division and must be supported by an affidavit setting out the reasons why it is claimed that the prisoner is unlawfully detained. In a criminal matter an order for release of the person restrained can only be refused, on a formal hearing, by the full Divisional Court. Facilities are made available by prison staff for prisoners, either convicted or untried, to apply for a writ of habeas corpus, although the Divisional Court has made it clear that a writ is not in general available to a prisoner in execution of a sentence, and is not to be used as a means of appeal against conviction or sentence. Legal aid is available to a detained person wishing to apply for a writ. Similarly, the basic remedy in Canadian law for illegal detention is the order for production of the prisoner before a superior court on a writ of habeas corpus. The remedy is limited in that only the regularity of the process may be inquired into, but it may be supported by another order called certiorari which requires all the proceedings to be sent to the superior court for examination. If no legal ground for detention is shown, the prisoner will be ordered to be released. In Ghana, where a person is unlawfully arrested and detained, an action for habeas corpus would lie under the Habeas Corpus Act, 1964 (Act 244), to have the person released unless it could be shown to the satisfaction of the court that the person is under lawful custody. The Constitution of the Republic of Peru provides that breach of any individual and collective rights recognized by the Constitution constitute grounds for application for a writ of habeas corpus.

81. In the Byelorussian SSR, responsibility for ensuring compliance with the law in regard to the detention of persons as a measure of restraint and in all places of detention, rests with the Procurator-General of the USSR, the Procurator of the Byelorussian SSR and the relevant agencies of the Office of the Procurator. One of the important functions of the Procurator is his obligation immediately to liberate from custody anyone illegally arrested or illegally kept under guard in places of detention (Statute on Supervision by the Procurator's Office in the USSR, article 34). In Czechoslovakia, control over the legality of the preparatory proceedings is exercised by the prosecutor. The proceedings are conducted by investigators of the prosecution and National Security organs and/or other bodies usually under the supervision of the Ministry of the Interior. The prosecutor is entitled, inter alia, to cancel their illegitimate or unfounded decisions and refer

the case to another body. The prosecutor may also take a direct part in the preparatory proceedings and may conduct them himself. In the German Democratic Republic, the public procurator as an institution independent of the executive organ supervises the conditions of custody, which includes verification of compliance with the relevant laws. Public procurators must exercise special care in supervising the legality of pre-trial custody.

B. Exclusion of confessions obtained illegally

82. In Canada, statements of arrested or detained persons are not admissible in evidence in proceedings brought against them unless it is demonstrated before the presiding judicial officer that they have been obtained voluntarily. Evidence obtained as a result of indications contained in improperly induced statements is, however, admissible if relevant.

C. Civil remedies and state compensation

83. In Canada a person maliciously prosecuted without reasonable ground and who has been acquitted has a right of civil action for damages against the complainant and the instigator of the prosecution. In the United Kingdom, a police constable who unlawfully arrests or detains another person without warrant or who detains a person for an unreasonable time without taking him before a magistrate, or a prison governor who keeps a prisoner in custody without sufficient warrant of commitment etc. may be liable to an action for false imprisonment. The plaintiff need not prove that the imprisonment was unlawful or malicious, but needs only to make a prima facie case by proving that he was imprisoned by the defendant. The onus then lies on the defendant to provide any justifications.

84. In Austria, any culpable illegal act by a security officer enforcing a law makes the Federal Government liable for damages and under certain conditions, the Federal Government has a right of recourse against its guilty agent.

D. Disciplinary sanctions

85. In Austria any misuse by the police of their powers to use force is punishable under the strict disciplinary rules enacted in the Civil Service Regulations (sect. 87 ff). Greek legislation concerning public servants contains provisions which provide for disciplinary punishments, including the penalty of dismissal from public service for public servants who commit torture on detained or imprisoned people. In the United Kingdom, police officers are liable to be dealt with in disciplinary proceedings for any infringement of the police Discipline Code. Under this code it is an offence, among other things, for a police officer (a) to make an arrest without good and sufficient cause; or (b) to use any unnecessary force towards a prisoner or other person with whom he may be brought into contact in the execution of his duty. Where a police officer is charged with a breach of the code, the case is heard by a chief constable (normally the one commanding

the force in which the accused officer serves) or, in the Metropolitan Police, a Disciplinary Board. If the officer is found guilty, the punishments which may be imposed range from a reprimand or a fine to dismissal from the force. He has a right of appeal, which is directed to the Secretary of State.

86. As regards prison officers, their Code of Discipline lays down strict rules of procedure for dealing with offences against discipline. With regard to the treatment of inmates, a prison officer commits an offence against discipline if he is guilty of: (a) unlawful or unnecessary exercise of authority - that is to say, if he (i) deliberately acts in a manner calculated to provoke an inmate, or (ii) uses force unnecessarily in dealing with an inmate or, where the application of force to an inmate is necessary, uses undue force; (b) improper relations with inmates or ex-inmates - that is to say, if he (i) communicates with an inmate for an improper purpose, or (ii) uses obscene, insulting or abusive language to an inmate.

E. Penal sanctions

87. Under the Criminal Code of the Byelorussian SSR, unlawful arrest is punishable by deprivation of freedom for a period not exceeding one year and unlawful detention is punishable by correctional labour for a period not exceeding one year or by dismissal from office. The abuse of authority or official position is punishable by deprivation of freedom for a period not exceeding three years, by corrective labour for a period not exceeding one year or by dismissal from office. If it is accompanied by force, the use of weapons or acts which torment the victim and insult his personal dignity, the act is punishable by the deprivation of freedom for a period not exceeding 10 years. In Peru, unlawful detention by a public servant is punished by the penalty of imprisonment not exceeding two years and disqualification for a period equal to twice the duration of the sentence.

88. The laws of the Byelorussian SSR provide that efforts to extract evidence by means of threats or other unlawful action constitute an offence punishable by imprisonment for up to three years. The penalty is increased to imprisonment for 3 to 10 years where such efforts are accompanied by the use of force or by insults against the person being interrogated.

89. In accordance with the Criminal Code of Argentina, a penalty of imprisonment or rigourous imprisonment for a term of one to five years and deprivation of civil and political rights (inhabilitación especial) for twice the term of imprisonment shall be imposed on: (a) any public official who, in the performance of his duties, commits ill-treatment against a prisoner or subjects him to illegal constraints; (b) any public official who subjects the prisoners in his custody to severe or vexatious treatment or illegal constraints (article 144 bis). Any public official who subjects the prisoners in his custody to any kind of torture shall be liable to imprisonment or rigorous imprisonment for a term of 3 to 10 years and permanent deprivation of civil and political rights (inhabilitación absoluta y perpetua). The maximum term of imprisonment shall be increased to 15 years if the victim is a political refugee. In the event of the death of a victim of torture, the term of imprisonment or rigorous imprisonment shall be from 10 to 25 years (article 144 ter).

90. In Austria, section 312 of the Criminal Code provides a penalty for tormenting or neglecting a prisoner. It provides a prison term of up to two years for any official who intentionally or negligently inflicts physical or mental torments on a prisoner or any other person detained under official orders. Where the offence results in severe bodily harm, the offender can be imprisoned for up to three years; where it results in bodily harm with serious permanent disablement, a prison term of up to five years may be imposed; and where the offence results in the victim's death, the law provides for a prison term of 1 to 10 years. Article 308 of the Penal Code of Greece provides for penalties that are imposed on prison officers who violate the provisions forbidding torture and cruel treatment.

91. In Austria, where an official makes use of an opportunity available to him on account of his official duties to commit an offence punishable under general penal provisions, section 313 of the Criminal Code provides that the maximum prison term or fine normally carried by the offence may be exceeded by one half. Similarly, in Cameroon, provision is made for a more severe penalty when certain kinds of attack upon the physical integrity of prisoners have been committed by officers.

92. In the United Kingdom, a criminal or disciplinary offence committed by a police officer against a private person may come to light through a complaint made by that person or someone acting on his behalf. Under section 49 of the Police Act, 1964, a chief officer of police must record, and cause to be investigated, any complaint made by a member of the public against an officer of his force. On receiving the report of the investigation, the chief officer, unless satisfied that no criminal offence has been committed, must send it to the Director of Public Prosecutions, who, as an authority entirely independent of the police, decides whether criminal proceedings should be instituted. If the Director takes the view that the evidence does not justify the institution of criminal proceedings, the chief officer decides whether disciplinary action should be taken.

93. In Belgium, detained persons, like any free citizen, may lodge a complaint directly with the authorities responsible for legal action concerning offences committed against themselves or of which they are aware and may institute proceedings against prison officers without any prior authorization (article 24 of the Constitution).

F. The Ombudsman

94. In Canada, five provinces have enacted legislation creating the post of provincial Ombudsman to investigate independently complaints of injustice in administrative decision-making. These officials, who report to the provincial legislature rather than the Government, have a broad mandate to conduct confidential inquiries into administrative discretion where it falls within provincial jurisdiction, to the exclusion of federal and municipal authorities, and where the discretion is unrelated to policy determination.

G. Petitions to international organs

95. In Austria, convicted offenders can appeal to the authorities provided for in the European Convention on Human Rights in respect of violations of the rights safeguarded by that Convention. Correspondence by prisoners with the European Commission of Human Rights may not be restricted in any way. The United Kingdom also has, under article 25 of the European Convention on Human Rights, recognized the competence of the European Commission of Human Rights to receive petitions from persons or organizations who claim violation of the rights set forth in the Convention, including article 3 of the Convention which declares that "No one shall be subjected to torture or to inhuman or degrading treatment or punishment".

PART TWO

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

96. The Governments of Greece and Ireland state that they accept generally the principles set forth in articles 24 to 27 of the draft principles.

97. The Government of Australia states that Australia is in agreement with the general concepts that form the basis of articles 24 to 27 of the draft principles on freedom from arbitrary arrest and detention prepared for the Commission on Human Rights. However, it is of the view that further consideration is required of the scope of the articles and of matters of detail contained in the articles. Australia attaches great importance to the elaboration of these principles and suggests that it would be desirable that they be given early consideration by the Commission on Human Rights with a view to their being developed into an international instrument.

98. The Government of Austria considers that articles 24 to 27 of the draft principles seem, to a very large extent, to bear the imprint of the philosophy underlying the Anglo-American type of legal system, in particular its criminal procedures, which are not necessarily compatible with continental legal systems. Thus, for example, the Anglo-American concept of inadmissible evidence contrasts with the Austrian principle that the court is free to assess the evidence.

99. It is the view of the Government of Canada that the appropriateness of the content of articles 24 to 27 may vary according to the political and socio-economic circumstances in which they are to be applied. It follows that their applicability may vary from place to place and, for a particular location, over time.

"Article 24 1/

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

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

1/ Article 7 of the International Covenant on Civil and Political Rights reads as follows: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

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

Observations and comments

Paragraph 1

100. The Government of Austria considers that paragraph 1 of article 24 should state more clearly that this provision is only fully applicable to persons detained pending trial rather than prisoners serving a sentence. On the other hand, it does not seem fair to provide the intended protection only to "arrested or detained persons" and not to persons involved in a criminal investigation without being detained. With respect to some of the methods enumerated, a distinction should be made as to whether they are applied for the purpose of interrogation or for other purposes. In particular, an absolute ban on physical compulsion is only conceivable with regard to its use in interrogation, not with respect to unavoidable measures of compulsion without which order and security cannot be maintained in places of detention.

101. The Government of Austria also considers that some of the terms used to describe prohibited methods are vague ("inducements", "protracted questioning" etc.). It seems therefore necessary to make it clear, by adding the word "improper" to these terms or in some other way, that individual standards must be applied in each case depending on the circumstances and the person being interrogated. With respect to the means used to threaten or influence a detainee ("threats or inducements of any kind"), the main emphasis should rather be placed on the inadmissibility of the action threatened. Also, an absolute, unlimited prohibition seems appropriate only with regard to torture and acts of violence. Even in the case of "drugs or any other means which tend to impair or weaken his freedom of action etc.", a prohibition would seem to be relevant only with regard to their use in interrogation or for other inadmissible purposes, since, for example, a medically indicated soporific may impair a person's freedom of action and decision.

102. The Belgian Government finds the words "protracted questioning" very vague and fears that a prisoner who wishes to retract a compromising statement may complain that he was subjected to "protracted" questioning, whereas in fact it may only have lasted some three hours. It would seem that this text is aimed at the reprehensible practice of deliberately prolonging an interrogation with intent to cause physical discomfort, such as lack of sleep, in order to dull an individual's mental processes. The words "excessively protracted questioning" would therefore be a better way to express the concern of the authors of the text.

103. The Government of the United Kingdom states that the article would be clearer if a fuller form of words were substituted for "protracted questioning", which presumably is intended to catch incessant questioning without adequate rest and refreshment.

104. In the view of the Cameroon Government, it seems necessary to include a reference to a medical certificate in paragraph 1 of this article so as to enable the person arrested or detained to establish, if necessary, that he was subjected to physical or mental torture during his arrest or imprisonment. Persons arrested or detained should be allowed an examination by a medical officer at any time. The Government therefore proposes that the following text be added at the end of paragraph 1: "The person arrested or detained must be allowed an examination by a medical officer at any time".

Paragraph 2

105. The Cameroon Government proposes that subparagraph 2 should be supplemented in the following way, so that any statement by the prisoner obtained through one of the methods prohibited in paragraph 1, or any evidence obtained as a result thereof shall not be admissible in evidence even against a third party: "Any statement which he may be induced into making through any of the above prohibited methods, as well as any evidence obtained as a result thereof shall be null and void and shall not be admissible in evidence against him or against a third party in any proceedings".

Paragraph 3

106. The Government of Austria feels that this paragraph gives rise to serious misgivings since, in its view, such a provision is drafted in terms of Anglo-American legal thinking exclusively. Investigations would be seriously hampered by making it illegal for the court to evaluate confessions or admissions made by a defendant before non-judicial investigators. Besides, this would not be in the interests of the defendant, as it may be expected to prolong the investigation considerably. Since the question of a previous confession or admission falls within the province of "free evaluation of evidence" by the competent court, there is no reason why this whole problem should not be left to the discretion of the court, all the more since the question whether a confession was voluntary or not is definitely among the issues on which the court is bound to rule. The same Government also considers that such a rule could be included among the principles underlying the draft that a confession made by a defendant may not be accepted as sufficient proof of his guilt but only as one piece of evidence which does not relieve the authorities of their duty to conduct an official inquiry into all the other evidence.

107. The Cameroon Government feels that it would be more judicious to allow the person interrogated the possibility of retracting his confession, whether it was made voluntarily or not, at any stage of the proceedings. The introduction of this idea in paragraph 3 calls for the following amendment: "No confession or admission by an arrested or detained person can be used against him in evidence unless it is made voluntary and not retracted" (the rest of paragraph 3 would be deleted).

108. The Government of the United Kingdom, while agreeing that no confession or admission should be used unless it is made voluntarily, does not accept that such a statement should be admissible only if it is made before the defendant's counsel or before a judge or other authorized officer.

109. The Government of the United States considers that it may be that, under some legal systems, methods other than those specified in paragraph 3 of article 24 are available to protect the rights of persons in custody, particularly where it can be shown that the statement was voluntary or that rights were freely and knowingly waived.

110. The Government of Yugoslavia considers that paragraph 3 of article 24 cannot be accepted. It is suggested that the paragraph be restyled to the effect that only in those cases where the judge has failed to make it possible for the person deprived of liberty to engage counsel and to ensure the presence of counsel during the questioning, the statement made by that individual must not be used against him in evidence.

"Article 25 2/

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

Observations and comments

111. The Government of Austria states that since the purpose of article 25 seems to be to stipulate that nobody may be forced to accuse himself of illegal acts, it is suggested to replace the term "required" in the article by "compelled".

112. In the Belgian Government's view, there would seem to be a risk that, if the accused person detained is formally informed of his right to silence, in some cases it might encourage him to a mistaken cleverness, prejudicial to his own interests, whereby he would remain silent rather than express his regret.

113. It is the view of the Government of the United States that the present text should be strengthened by requiring that the arrested persons be informed that any statement made may be used as evidence against them and that they have the right to the presence of counsel, either retained or appointed, if they so choose.

2/ Paragraph 3 (g) of article 14 of the International Covenant on Civil and Political Rights reads as follows: "3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: ... (g) not to be compelled to testify against himself or to confess guilt".

"Article 26

"The arrested person shall not be kept in police custody after he is brought before the competent authority as provided in article 10. 3/ The officials responsible for his custody shall be entirely independent of the authorities conducting the investigation."

Observations and comments

114. The Government of Austria states that, given the existing administrative structure in Austria, complete independence of the officials responsible for custody from the investigating authorities is not practicable in that country.

115. The Belgian Government believes that the distinction between the officials responsible for the custody of the accused and the authorities conducting the investigation is not always easy. In principle, apart from the penal institution whose staff are indeed independent of the authorities conducting the investigation, the custody of the prisoner, during the preliminary investigation, is entrusted to a police department which is not responsible for the investigation. However, one or two prisoners might have to spend several hours on the premises of the law enforcement officers for the purpose of a hearing or identification. In that case, the law enforcement officers must necessarily ensure the custody of the prisoner for a certain period of time.

116. In the view of the Government of the United Kingdom, it seems desirable to allow the competent authority the discretion of returning a defendant to police custody for a limited period. In the United Kingdom, such a period is limited to three days. Such discretion would, for example, be useful where the place where the court or other competent authority sits is at a considerable distance from the prison.

117. The Government of the United States understands the requirement that officials responsible for custody must be entirely independent of the authorities conducting the investigation to mean that prison officials should have no investigatory or prosecutory functions, and the article might be revised to say this.

118. The Government of Yugoslavia is of the opinion that this provision is justified in cases where the prison is administered by authorities other than the court. However, if the prison is within the jurisdiction of the court, the fact that the investigation is carried out by the examining magistrate of that court should not present an obstacle. It should be considered, nevertheless, that the person conducting the investigation cannot supervise the prison.

3/ Paragraph 3 of article 9 of the International Covenant on Civil and Political Rights reads: "Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release ...".

"Article 27

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

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

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

Observations and comments

Paragraph 1

119. The Government of the United States believes firmly that, based on the principle that a defendant is innocent until proved guilty pre-trial detention should be humane and cannot operate to deprive the individual of his right to prepare for his defence. Every effort should be made to provide a safe, secure environment affording the individual access to counsel, family members, medical care and other services during the period of confinement. The article might be strengthened specifically to include some of these ideas, although some are included by reference in the Standard Minimum Rules for the Treatment of Prisoners. The Government endorses those rules in principle.

Paragraph 2

120. United Kingdom practice accords with the provisions of the Standard Minimum Rules for the Treatment of Prisoners in relation to persons held in prison custody, but the Government of the United Kingdom considers the Rules too strict in respect of, and in many cases inapplicable to, persons held in police custody in the period before trial, which in the United Kingdom is invariably very short. For instance, Rule 21 (2) which requires the provision of physical and recreational training and Rule 40 requiring the provision of a library are quite inappropriate in those circumstances.

Paragraph 3

121. The Government of Austria is of the view that paragraph 3 of article 27 cannot be implemented in Austria, since the supervision of prisons falls within the province of the Department of Justice, i.e., the executive branch of government. The appointment of inspectors by judicial authorities is incompatible with the principle of the separation of powers underlying the Austrian Federal Constitution.

122. The Belgian Government feels that the last provision in article 27 appears to be incompatible with the Belgian system for the execution of sentences, since, apart from an advisory capacity of the judicial authorities, this matter is entirely under the jurisdiction of the executive power. It is inconceivable in the Belgian legal system that the judicial authorities could exercise control over a matter which falls within the competence of the executive power alone.

123. The Cameroon Government proposes the following provision: "The judicial authorities shall supervise all places of custody and report on the management and treatment of arrested and detained persons therein."

124. The Government of Ireland considers that inspectors or, as is the case in Ireland, visiting committees in respect of prisons do not necessarily have to be appointed by the judicial authority.

125. The Government of the United States feels that it is unobjectionable and perhaps desirable to permit judicial inquiry where there is reason to believe that abuses have taken place in the prison system. It is not clear, however, that judicial officers, whose main function is to try and to decide cases, should have permanent and continuous responsibility for prison supervision.

126. The Government of Yugoslavia agrees that prisons should be within the jurisdiction of the judicial authorities or that judicial competence should be ensured with regard to the supervision of prisons. However, it is considered that there is no need for a particular organization of the supervising service. Whether the supervision will be effected by specifically appointed inspectors or by the president of the court, as is the case in accordance with Yugoslav laws or by other methods which ensure judicial competence, is a matter to be left to the criminal law system of each State. The Government, therefore, proposes that paragraph 3 of article 27 be amended to the effect that supervision should be performed by persons who are members of the judicial organs or who are designated by those organs.
