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HUMAN RIGHTS AND SCIENTIFIC AND TECHNOLOGICAL DEVELOPMENTS

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

Report of the Secretary-General

(Addendum)

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INTRODUCTION

1. The Secretary-General submitted, at the twenty-ninth session of the Commission on Human Rights, a report on respect for the privacy of individuals and the integrity and sovereignty of nations in the light of advances in recording and other techniques (E/CN.4/1116, Add.1-3 and Add.3/Corr.1), prepared in accordance with paragraph 1 (a) of General Assembly resolution 2450 (XXIII) and resolution 10 (XXVII) of the Commission on Human Rights.

2. The present document contains additional information, received too late for inclusion in documents E/CN.4/1116 and Add.1-2, relating to respect for the privacy of individuals in the light of advances in recording and other techniques. Such material was received from the Governments of Australia, Belgium, France and Ireland.

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Part One. RESPECT FOR THE PRIVACY OF INDIVIDUALS IN THE LIGHT OF  
ADVANCES IN RECORDING AND OTHER TECHNIQUES

I. RECENT SCIENTIFIC AND TECHNOLOGICAL DEVELOPMENTS INVOLVING INVASIONS  
OF THE PRIVACY OF THE INDIVIDUAL BY PSYCHOLOGICAL AND PHYSICAL  
EXAMINATIONS FOR NON-MEDICAL PURPOSES (material supplementing  
document E/CN.4/1116)

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

Blood tests, breath tests and urinalysis 1/

3. Breath tests, often administered to persons suspected of driving while under the influence of alcohol, are of two kinds. The first consists of having the suspect exhale into a simple testing device which indicates the presence of alcohol in the breath and its approximate concentration. This test may generally be administered by a policeman on the spot. Where the reading seems to indicate the presence of alcohol exceeding the concentration permitted by law, the policeman may be empowered to arrest the person in question and take him to a police station or other designated place for the purpose of a breath analysis. This procedure, which must generally be carried out by a qualified laboratory analyst, is more precise than the simple test and allows the calculation of equivalences between the percentage of alcohol present in the breath and the corresponding percentage of alcohol present in the blood. The manner of carrying out these tests and their standing as evidence in a trial may be subject to detailed regulation. 2/

B. Protection of privacy in the light of the new psychological  
and physical methods of eliciting information 3/

4. It may be noted that legislation and subsidiary regulations concerning breath tests, blood tests etc., frequently specify not only the exact nature of the equipment to be used in carrying out tests or analyses and the precise method of analysis to be applied, but also the scientific assumptions on which findings are to be based, such as the specific concentration of alcohol in the blood that will be taken, in effect, to constitute impairment of faculties for the purpose of driving a vehicle; or the maximum period that may elapse from the time of an accident until specimens are taken for the purpose of an analysis determining the

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1/ See paras. 213-218 of document E/CN.4/1116.

2/ Cf., e.g., Australia, New South Wales, Motor Traffic Act 1909-1968, sect. 4 E; Western Australia, Breath Analysis Regulations, 1966; forwarded by the Government of Australia on 18 January 1973. See also Ireland, Road Traffic Act 1968, sect. 29, forwarded by the Government of Ireland on 18 January 1973.

3/ See paras. 239 to 275 of document E/CN.4/1116.

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alcohol content of the blood at the time of the accident; or the concentration of alcohol in a person's urine that corresponds to the concentration of alcohol in his blood. 4/

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4/ E.g., Australia, New South Wales Motor Traffic Act 1909-1968, sect. 4 E (added by Act N° 64 of 1968, s. 2(b)), forwarded by the Government of Australia on 18 January 1973; France, Act N° 70-597 of 9 July 1970, Art. L.1<sup>er</sup>, amending the Code de la route, forwarded by the Government of France on 5 February 1973; or Ireland, Road Traffic Act, 1968, part V, sect. 29, and Road Traffic Act, 1968 (part V) Regulations, 1969, communicated by the Government of Ireland on 18 January 1973.

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II. EXAMPLES OF NATIONAL LEGISLATIVE AND OTHER MEASURES AND JURISPRUDENCE RELATING TO THE INVASION OF PRIVACY BY NEW AUDITORY AND VISUAL DEVICES AND TECHNIQUES (material supplementing document E/CN.4/1116/Add.1)

5. A draft law for the protection of privacy and of the human personality was submitted to the Belgian Senate in 1972. According to the commentary accompanying the draft, it would be the purpose of that law to provide a broad civil remedy (une action générale en droit civil) for any violation of privacy and of the human personality; as well as "heavy" penalties for violations of privacy committed by any means whatever, including recent technological devices for auditory and visual surveillance. The law would be so worded as to allow for new inventions to be brought within its scope without the need for amendment. It would protect not only natural but also juridical persons and public authorities and bodies, with a view to safeguarding, for example, the economic secrets of corporations, the work of scientific research centres, the sessions of the Cabinet or the deliberations of tribunals.

6. To prevent abuses in the enforcement of this law or a broadening of its provisions by fortuitous majorities in Parliament, the powers granted to the Procureur du roi and the juge d'instruction could not be broadened except by a special law adopted by each chamber of the Legislature by a two-thirds majority of all its members. 5/

7. French courts have held it permissible for a photographer to take pictures of the outside of a walled-in property; 6/ on the other hand, they have ruled it to be an offence for a photographer who surreptitiously entered a walled-in property to take photographs of the home situated therein. 7/

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5/ Sénat de Belgique, session of 1971-1972, 26 January 1972, draft law concerning the protection of privacy and of the human personality and commentary thereon, forwarded by the Government of Belgium on 15 February 1973.

6/ Roger Nerson, "La protection de la vie privée en droit positif français", Revue internationale de droit comparé, 1971, No. 4, p. 747, citing A. Rouast, note D.P. 1920.2.9, col.2, sous Grenoble 15 juillet 1919; forwarded by the Government of France on 5 February 1973.

7/ Ibid., citing Trib. Seine, 15 février 1952, Gaz. Pal. 1952.I.164; Trib. gde. inst. Seine 1<sup>er</sup> avril 1965, J.C.P. 1966.2.14572, obs. R.L.

III. EXAMPLES OF NATIONAL LEGISLATIVE AND OTHER MEASURES AND JURISPRUDENCE CONCERNING INVASIONS OF PRIVACY BY MODERN PSYCHOLOGICAL AND PHYSICAL TESTING METHODS FOR NON-MEDICAL PURPOSES (material supplementing document E/CN.4/1116/Add.2)

A. Regulation of the use of personality assessment, "lie-detectors" and narco-analysis

8. A draft law for the protection of privacy and of the human personality, submitted to the Belgian Senate in 1972, would subject to penal sanctions certain serious infringements upon the human personality directly related to the concept of privacy. The commentary accompanying the draft makes reference in this connexion to the use (for non-medical purposes) of chemical and other substances which may influence behaviour, intelligence or memory. 8/

9. The utilization by governmental authorities, including the police, of "lie-detectors" and of narco-analysis is prohibited in France. Data obtained by such methods would not be accepted as proof by the French courts. 9/

B. Blood, breath and urine tests

1. Penal proceedings and traffic cases

10. Legislation comparable to that enacted in Queensland 10/ exists in other Australian states, though specific provisions vary. The Motor Traffic Act, 1909-1968, of New South Wales 11/ makes it an offence punishable by a fine of up to 400 Australian dollars, imprisonment for up to six months, or both, for a person to drive a motor vehicle "whilst there is present in his blood the prescribed concentration of alcohol". A member of the police force may require a person to undergo a breath test if he has reasonable cause to believe that the person while driving such a vehicle violated any provision of the Motor Traffic Act or its regulations or, judging by his manner of driving, has alcohol in his body; or was the driver of a vehicle involved in an accident in a public street.

11. If the breath test indicates that the specified concentration of alcohol "may be present" in the person's blood, or if the person refuses or fails to undergo the breath test, the policeman may arrest him without a warrant and take him "with such force as may be necessary" to a police station or another place he

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8/ Sénat de Belgique, session of 1971-1972, 26 January 1972, draft law concerning the protection of privacy and of the human personality; forwarded by the Government of Belgium on 15 April 1973.

9/ Information forwarded by the Government of France on 5 February 1973.

10/ Summarized in document E/CN.4/1116/Add.2, paras. 38-42.

11/ Forwarded by the Government of Australia on 18 January 1973.

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considers desirable, where he may require the person to submit to a breath analysis. Exceptions to the requirement to undergo a breath test or a breath analysis are made on specified medical grounds. No breath test or breath analysis may be required once two hours have elapsed from the occurrence of the event that gave rise to the demand.

12. Refusal or failure to undergo a breath test is punishable by a fine of up to 200 Australian dollars. Refusal or failure to submit to a breath analysis is punishable by the same penalties as are foreseen for the main offence. These penalties apply also where a person wilfully does anything to alter the concentration of alcohol in his blood before submitting to breath analysis.

13. A person required to undergo breath analysis may request to have, in addition, a sample of his blood taken for analysis at his own expense by a legally qualified medical practitioner.

14. The member of the police force operating the breath analysing instrument is to deliver to the person concerned a written, signed statement specifying the concentration of alcohol in the latter's blood and the day and time of day the analysis was completed.

15. The concentration of alcohol present in the person's blood, as determined by a breath analysing instrument (which must be operated by a member of the police force so authorized by the Police Commissioner) may be given in evidence in proceedings for the offence referred to in paragraph 10 above. A statement of this kind, provided the analysis was made within two hours of the occurrence in question, is deemed conclusive unless the defendant proves that the concentration of alcohol in his blood at the time was less than 0.08 grammes of alcohol in 100 millilitres of blood. 12/

16. In the Australian state of Victoria, analyses of blood samples taken and analysed by properly qualified persons are admissible evidence in a trial for manslaughter or for negligently causing grievous bodily harm arising out of the driving of a motor-car (and certain other offences), in cases where "the question of whether /a/ person was or was not under the influence of intoxicating liquor" or "the percentage of alcohol in /his/ blood ... at the time of an alleged offence" is relevant to the trial or hearing in question. The blood sample must be taken within eight hours after the alleged offence. 13/

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12/ New South Wales, Motor Traffic Act 1909-1968, section 4 E. This section was added by Act No. 64 of 1968, s. 2 (b). A person who, as required, submits to a breath analysis under section 4 E shall not be charged with the offence, foreseen under the older section 5, of driving while "under the influence of intoxicating liquor".

13/ Victoria, Crimes Act 1958, sect. 408; forwarded by Government of Australia on 18 January 1973.



17. Where such evidence is given and accepted by the jury or court, an opinion by the analyst that the percentage of alcohol in the person's blood was .05 per cent or less (expressed in grammes per 100 millilitres of blood) at the time of the alleged offence is considered prima facie evidence that the person was not under the influence of intoxicating liquor "to such an extent as to be incapable of having proper control of a motor-car at that time". An opinion that the percentage of alcohol was more than .05 per cent is accepted "as evidence, together with any other relevant and admissible evidence, in determining whether or not" the person was under such influence. The analyst's certificate concerning the percentage of alcohol found in the blood sample may not be tendered in evidence without the consent of the accused, unless it is proved that a copy of the certificate was "personally served" on him. The accused may require that the person who gave the certificate attend the proceedings for purposes of cross-examination. 14/

18. The Act specifies that no blood sample may be taken and no evidence of the result of any analysis be tendered unless the person concerned has expressed his consent to the collection of the blood. The onus of proving consent is on the prosecution. Mere failure or refusal to consent may not be used in evidence against the person concerned or "referred to in any way against his interests" in any proceedings. 15/

19. Detailed regulations have been issued in Australia governing the actual procedures to be used in the taking and analysis of blood and breath specimens to determine alcohol content. Thus the Blood Sampling and Analysis Regulations, 1966, of Western Australia, 16/ issued under that state's Traffic Act of 1919, specify in detail the equipment and procedure to be used in taking the blood sample, the methods of analysis that may be utilized, as well as the points the analyst is to consider in his assessment of the percentage of alcohol in the blood. They also provide that of the maximum 15 millilitres of blood that may be withdrawn for this purpose, approximately one half is to be turned over to the person concerned. The sample is to be taken by a medical practitioner in the presence of a member of the police force, and the regulations specify the manner of sealing the two packages and of affixing the signatures of the practitioner and the policeman.

20. The Breath Analysis Regulations, 1966, of Western Australia, 17/ issued under the same Act, include step-by-step instructions for operating breath analysing equipment; require the use of a standard solution, to be provided by the Government Chemical Laboratories, for testing the breath analysing equipment; and specify the method of calculating the percentage of alcohol that was present in the blood of the person concerned at the time of the occurrence in question. The Regulations

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14/ Ibid., sect. 408 (2), (5) and (6).

15/ Ibid., sect. 408 (10).

16/ Published in the Government Gazette of Western Australia (No. 68) of 13 July 1970, forwarded by the Government of Australia on 18 January 1973.

17/ Forwarded by the Government of Australia on 18 January 1973.

provide that where a person does not co-operate in having his breath analysed, the analysis shall not be carried out and the person authorized to undertake the analysis is to record the reason therefore.

21. French legislation of 1970 provides for penalties of fine or imprisonment or both for persons who (even in the absence of manifest signs of drunkenness) drive a vehicle while the alcohol content of their blood exceeds a specified percentage. The penalties foreseen are imprisonment from 10 days to a month, a fine from 400 to 1,000 francs, or both, where the alcohol content of the blood ranges from 0.80 grammes up to 1.2 grammes per mille; and imprisonment from one month to one year, a fine of 500 to 5,000 francs, or both, where the alcohol content equals or exceeds 1.2 grammes per mille. 18/

22. Officers or agents of the administrative or judicial police shall require alcohol breath tests of persons suspected (l'auteur présumé) of certain offences which entail suspension of the driver's licence for a maximum of three years; and of drivers involved in traffic accidents resulting in bodily injuries. They may, moreover, require such tests of any driver involved in any traffic accident whatever.

23. Where the breath test indicates the existence of an "alcoholic state" or where the driver refuses to undergo the test, the police officer or agent is to arrange for "medical, clinical and biological" examinations with a view to obtaining proof of the existence of such a state. A person refusing to submit to these examinations is liable to the heavier of the penalties mentioned in paragraph 21 above. 19/ The manner of carrying out the breath test and the above-mentioned examinations was to be laid down by administrative regulation. 20/

24. Regulations concerning breath tests and the above-mentioned medical, clinical and biological examinations were accordingly issued in 1971. 21/ The regulations concerning the latter specify that the steps involved in such a procedure comprise clinical medical examination including the taking of blood samples; analysis of the blood; and medical interpretation of the results. These examinations are to be carried out on the person assumed to be responsible for the infringement of the law or the accident in question; they may be carried out on the victim where this appears to be indicated. Where no examination is undertaken ex officio, suspect and victim are each entitled to request that an examination be carried out on his own person. 22/

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18/ Persons driving a vehicle while in a manifest state of intoxication are liable to the heavier of these penalties.

19/ Heavier penalties are foreseen where the case involves negligent homicide or injuries, etc., under the provisions of articles 319 and 320 of the Penal Code.

20/ Act No. 70-597 of 9 July 1970, amending the Code de la route, forwarded by the Government of France on 5 February 1973.

21/ Decrees Nos. 71-819 and 71-810 of 1 October 1971, forwarded by the Government of France on 5 February 1973.

22/ Decree No. 71-819, art. I, re art. R.15.

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25. The Road Traffic Act of Ireland was amended in 1968, to make it an offence for a person to drive a mechanically propelled vehicle in a public place "while there is present in /the driver's/ body a quantity of alcohol such that, within three hours after so driving or attempting to drive, the concentration of alcohol in his blood will exceed a concentration of 125 milligrammes of alcohol per 100 millilitres of blood". 23/

26. A member of the Garda Síochána (police force) "whenever he is of the opinion that a person in charge of a mechanically propelled vehicle in a public place has consumed intoxicating liquor", may require that person to provide a specimen of his breath, to indicate the presence of alcohol in the breath. Refusal to comply with such a request constitutes an offence, and policemen may arrest without warrant any person who has been driving or attempting to drive a mechanically propelled vehicle in a public place (or is or has been in charge of such a vehicle with intent to drive and who in their opinion is committing or has committed an offence under this section of the Act. 24/

27. A person thus arrested and brought to the police station may be required to undergo an analysis of his breath or blood, or both. He may opt for a urine test instead of the blood test; either of these must be carried out by registered medical practitioners designated by the person in charge of the Garda station. Refusal to comply with a request to submit to such analyses constitutes an offence. The fact that a defendant failed to provide a specimen of breath, blood or urine for analysis may be given in evidence at hearings on charges of drunken driving. 25/

28. Detailed regulations have been issued laying down the procedures to be followed, the instruments to be used and the records to be kept when taking and analysing specimens. They also specify the terms in which the arrested person must be cautioned as to his obligations to comply with the request for specimens and informed of his right to have additional analyses carried out by a doctor of his own choice and the manner in which this is to be done. The regulations, moreover, specify the equivalence of the concentration of alcohol in a specimen of urine to the concentration of alcohol in the blood (a given concentration of alcohol in the urine, expressed in milligrammes per 100 millilitres, being defined as the equivalent of a concentration of three fourths of that amount of alcohol in the blood). 26/

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23/ Road Traffic Act, 1968, section 29, amending Road Traffic Act, 1961; communicated by the Government of Ireland on 18 January 1973. The provisions of the 1961 Act made it an offence for a person to drive or attempt to drive a mechanically propelled vehicle in a public place while under the influence of intoxicating liquor or a drug to such an extent as to be incapable of having proper control of the vehicle.

24/ Road Traffic Act, 1968, sect. 28.

25/ Ibid., sect. 28, 30, 33, 36 (2).

26/ Road Traffic Act, 1968 (part V) Regulations, 1969, communicated by the Government of Ireland on 18 January 1973.

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## 2. Civil proceedings

29. The Motor Traffic Act 1909-1968 of the Australian State of New South Wales makes provision for breath tests and breath analyses in cases where persons are suspected of, in effect, driving while under the influence of alcohol (see above paragraphs 10-15). The legislation provides, however, that for the purposes of any contract of insurance the fact that a person has submitted to a breath test or breath analysis, the result of the test or analysis, or the fact that he was convicted of driving a motor vehicle "whilst there was present in his blood the prescribed amount of alcohol" shall not be admissible "as evidence of the fact that that person was at any time under the influence of or in any way affected by intoxicating liquor or incapable of driving or of exercising effective control over a motor vehicle". 27/

30. In a case involving refusal by a mother and child to take a blood test in a dispute over the legitimacy of the child, the Cour de Cassation of France in 1968 held that taking a blood sample from a person constituted a bodily intervention, which could not be carried out against the wishes of the person concerned. The Court further pointed out that, unless otherwise provided by law, the judge decides freely what significance he wishes to attribute to a refusal to undergo such an examination; and consequently upheld a lower court decision to the effect that such a refusal by itself, "in the absence of any other admissible evidence", was not sufficient to establish the falsity of a claim of filiation. 28/

31. The French Commission for the Reform of the Civil Code proposed inclusion in the Civil Code of an article reading as follows:

"When a person refuses to undergo a medical examination ordered by the court at the request of one of the parties to the proceedings which involves the use of only scientifically recognized methods and involves no serious bodily risk, the judge may consider as proven the facts which the examination was intended to establish." 29/

32. This proposal was not adopted, however. French legislation of 1972 concerning paternity matters implicitly reaffirms the above-mentioned rulings but contains no new provisions as to the conclusions which a judge is entitled to draw from the refusal of one of the parties to undergo a blood test. The judge will continue to arrive at his conclusions in accordance with his personal conviction (intime conviction). Certain former limits concerning application of the concept of personal conviction have been eliminated but the judge is nevertheless not obliged to consider as proven those facts which the test was intended to establish. 30/

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27/ Forwarded by the Government of Australia on 18 January 1973.

28/ Cour de Cassation (1<sup>re</sup>), 2 April 1968 (Recueil Dalloz Sirey, 1968, 41<sup>e</sup> Cahier, Jurisprudence (4 December 1968), p. 705), forwarded by the Government of France on 5 February 1973. See also paragraph 80 of document E/CN.4/1116/Add.2.

29/ Recueil Dalloz Sirey, op. cit., p. 706, forwarded by the Government of France on 5 February 1973.

30/ Information forwarded by the Government of France on 10 October 1973.