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COMMITTEE AGAINST TORTURE

CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES
UNDER ARTICLE 19 OF THE CONVENTION

Third periodic reports of States parties due in 1998

Addendum

NETHERLANDS
(ANTILLES AND ARUBA)*

[3 September 1998]

* The initial report submitted by the Government of Netherlands is contained in document CAT/C/9/Add.1; for its consideration by the Committee, see documents CAT/C/SR.46 and 47 and Official Records of the General Assembly, Forty-fifth Session, Supplement No. 44 (A/45/44), paras. 435-470. For the second periodic report, see CAT/C/25/Add.1, 2 and 5; for its consideration, see CAT/C/SR.210 and 211/Add.1 (closed) and Official Records of the General Assembly, Fiftieth Session, Supplement No. 44 (A/50/44), paras. 111-131.

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Part One

Netherlands Antilles

I. INFORMATION OF A GENERAL NATURE

Introduction

1. This report is submitted in accordance with article 19 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which entered into force with respect to the Kingdom of the Netherlands on 21 January 1989. The present periodic report is submitted as much as possible in accordance with the general guidelines regarding the form and contents of periodic reports. This report deals with the period from 1 January 1994 to 1 January 1998.

2. This third periodic report provides an update on issues covered in the second report (CAT/C/25/Add.2). It also contains information about new developments in legislation and policy, particularly with reference to articles of the Convention which occasioned additional questions by the members of the Committee against Torture during the consideration of the previous report. Such developments are then compared with or viewed in the context of the former or current situation. Where the information contained in the former report was deemed incomplete or unclear, a more detailed account is given of how the Convention is now being implemented. Reference is made to the previous reports in the case of articles where no far-reaching or significant developments have taken place.

General legal framework

3. Until 1995 the Criminal Code of the Netherlands Antilles did not explicitly prohibit torture. It did, however, contain provisions relating to various forms of assault (arts. 300-322). If broadly interpreted, these articles of the Criminal Code of the Netherlands Antilles were applicable to many forms of torture. In 1995, however, the Government of the Netherlands Antilles decided to make the act of torture punishable as a separate criminal offence rather than as a form of assault or serious assault. The circumstances leading up to this decision will be described in the section of this report containing information on article 1.

Authorities having jurisdiction and remedies

4. Criminal procedure in the Netherlands Antilles is governed by what is known as the “expediency principle”. This means that for reasons of public policy the Public Prosecution Service may decide not to prosecute in a particular case. However, under the Revised Code of Criminal Procedure any interested party may lodge a complaint with the Court of Justice of the Netherlands Antilles against such a decision. The Court then hears the interested party. If necessary, the person whose prosecution is desired can be also heard. The Court may then independently decide to direct the Public Prosecution Service to prosecute.

5. Even where no complaint has been lodged the Court may direct of its own volition that a prosecution should be brought or continued (under article 28 of the Code of Criminal Procedure). In such a case the provisions of articles 14-27 of the Code of Criminal Procedure apply by analogy. It follows that before such an order is made the Procurator-General will first be asked to report on the case.

Previously noted problems

6. To understand the background to the introduction of the new Code of Criminal Procedure it is necessary to go back a long way. The 1914 Code was, in essence, based on the Dutch Code of 1838. Partial amendments were subsequently made to the Code to update it, but these tended if anything to make the system less clear. In view of the specific expertise needed to draft an entirely new code, the then Government of the Netherlands Antilles decided that this major legislative operation should be prepared by a special committee. As it was felt that the committee should be broadly based its members were chosen from a variety of professions. The Committee for the Revision of the Criminal Code and the Code of Criminal Procedure was established by National Decree of 8 July 1985. Its terms of reference were to advise the Government on how the two Codes should be amended and updated. Although charged with the revision of both codes, the committee confined its attention initially to the Code of Criminal Procedure.

7. After a lengthy, time-consuming and complex process the Uniform Code of Criminal Procedure for the Netherlands Antilles entered into force on 1 October 1997. The introduction of this Code has greatly improved the legal position of suspects, for example in relation to the powers of the police during the investigation of criminal offences. These powers include arrest and detention, searches of homes and other premises, searches of body and clothing and seizure of objects. Under the new Code a variety of conditions must be satisfied before the police are permitted to exercise these “coercive” powers. These include the following general conditions:

The exercise of the power should not be unreasonable taking into account the interests at stake;

The authority to exercise the power may not be used for a purpose other than that for which it was conferred;

The power may be exercised only if the goal cannot be achieved by other less radical means;

The infringement of rights caused by the exercise of the power must be consistent with the gravity of the offence.

8. A suspect has the right to remain silent and is not obliged to answer any questions asked by the police. Prior to any interrogation by law enforcement officers regarding a suspect's involvement in a punishable act, the person concerned must be advised that he or she has the right to remain silent. The officers or magistrate conducting the interview must at all times refrain from acts designed to extract a confession by the suspect that is not given of his or her free will (article 50 Code of Criminal Procedure).

9. Prior to interrogation the suspect also has the right to request the assistance of a lawyer. During interrogation it may be decided to detain the suspect in the interests of the investigation. This is known as police custody. An order for detention in police custody may be made for a maximum of two days. Where necessary, this may be extended for a further eight days (articles 83-91 Code of Criminal Procedure). Under the Code of Criminal Procedure every suspect held in police custody is provided with a lawyer free of charge for the duration of the custody.

The Ministry of Justice

10. It was mentioned in the previous report that the infrastructure did not provide the Minister of Justice with a separate government department. It was also noted that the judicial entities did not function as a whole but largely independently. This meant that it was not possible to make structural changes to the judicial system. This problem was tackled in 1993 when a Ministry of Justice was established. The Ministry is now for the most part operational. One of the most important tasks of the Ministry is monitoring the implementation of certain international instruments such as the Convention against Torture and developing sustainable policies to ensure their implementation.

11. One of the activities of the Policy Affairs Department is to supervise and support the reorganization of the prison system of the Netherlands Antilles. The Legal Affairs Department plays a major role in helping to develop criminal justice policy. It does this by giving expert advice, creating the framework for policy and providing guidance and support. The Department also advises on the extent to which policy goals can be achieved by means of new or modified legislation.

Funds for the organization of courses

12. The country's financial situation is still very critical. Nonetheless, the authorities continue to make every effort to provide training for law enforcement officers. This is sometimes done in cooperation with non-governmental organizations. Recently, for example, in-service training was provided for prison officers, with particular emphasis on the various parts of prison law, criminal law and criminal procedure as contained in the Revised Code of Criminal Procedure.

II. INFORMATION RELATING TO THE ARTICLES IN PART I OF THE CONVENTION

Article 1

13. The Government of the Netherlands Antilles decided in 1995 that torture should be made a separate offence and that it would not await completion of the revision of the Criminal Code, which began in 1997 after the revision of the Code of Criminal Procedure was finalized. As mentioned previously, the revision of the Code of Criminal Procedure was a lengthy and time-consuming process. Owing to delays in the parliamentary consideration of the legislation, it was no longer feasible to introduce a separate offence of torture as part of the revised Criminal Code in the short term.

14. Needless to say, the acts covered by the definition of torture in article 1 of the Convention against Torture in the criminal law of the Netherlands Antilles were already designated as criminal offences, in particular in title XX of Book 2 of the Criminal Code of the Netherlands Antilles. However, the Convention imposes an obligation to take a number of measures to cover special cases where pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. These special measures include establishing universal jurisdiction, excluding the defence that the acts were committed pursuant to an order from a superior officer or public authority and ensuring that extradition to other States parties is possible for this offence.

15. It is therefore a logical consequence of the Convention that a separate offence of torture be introduced rather than bringing prosecutions under criminal provisions not specially drafted to cover the crime of torture. It was for this reason that the Government decided that a separate “offence of torture” should be created. Pursuant to article 1 of the Convention, the Government chose a definition which is in keeping with the system of criminal legislation in the Netherlands Antilles and yet at the same time covers the different elements that constitute this offence. The text of the Country Ordinance on the Criminalization of Torture (PB 1995, 197) is attached to this report as an annex.

16. If prosecutions for torture are brought on the basis of definitions of offences not intended for this purpose, this can mean that not all acts meriting prosecution are covered. For example, the definition of the offence of aggravated assault presupposes that serious physical injury has been caused, including the form of mental injury referred to in article 84, paragraph 2, of the Code of Criminal Procedure. In view of the provision of the Convention a separate paragraph has therefore been included to show that forms of mistreatment which cause mental anguish rather than physical pain can also constitute torture. However, there must be a situation of great fear or other form of serious mental anguish, and the acts responsible must be deliberate.

17. The Country Ordinance (Official Bulletin 1995, 197) introduces sanctions for all acts of torture prohibited under the Convention. It also introduces the principle of universal jurisdiction, and provides that an order from a superior officer or a public authority may not be invoked as a justification of torture. Attempted torture is also an offence.

Article 2

The police

18. As mentioned before in section I of the report (Information of a general nature), the Ministry of Justice has - since its recent establishment - played an important coordinating role in the implementation of the Convention and also in the reorganization of the police force. The police force is still in the process of being reorganized. A Police Branch is currently being set up within the Ministry to assist the Minister of Justice in his management duties, for example human resource development. The Police Branch will also

help the Minister to implement the Convention. As such it will form part of the official machinery that carries out the supervisory duties of the Minister of Justice.

19. A complaints committee on police brutality and ill-treatment was established in 1994. This consists of a physician, a law lecturer of the University of the Netherlands Antilles and a former public prosecutor. The committee has been authorized to conduct investigations independently. Anyone who has a complaint can contact the committee. The committee will then proceed to investigate the complaint and report its findings and recommendations to the Minister of Justice. The Minister of Justice decides on the appropriate action to be taken in each case. Parliament is informed of the results of the investigation and the decision taken by the Minister.

20. In May 1994 a bill was also passed which establishes and regulates the functioning of a National Investigation Department (NID). The NID became operational in 1997 and falls directly under the jurisdiction of the Procurator-General. This department has a staff of only three, and operates as an independent investigation agency with regard to criminal cases against civil servants and authorities, among others the police and prison personnel. At the moment the NID is engaged in several ongoing investigations. It is worthwhile mentioning that the NID is very understaffed in view of the current workload. This is why the existing police force's own Bureau of Internal Affairs deals with matters of a disciplinary nature.

Remand centre

21. The Netherlands Antilles has obligations under both the Convention against Torture and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. With reference to the latter Convention and in view of recent events in the remand centre in Willemstad, Curaçao, it is important that the Committee should have the following information.

22. In 1994 the European Committee for the Prevention of Torture and Inhuman or Degrading Punishment (CPT) visited the Netherlands Antilles. Part of the CPT's published report contained serious criticism of conditions in the prison and remand centre at Koraal Specht. The main criticism was of the physical conditions in which the prisoners were kept. However, the physical violence that occurred was only on a very limited scale. This was viewed as a positive sign.

23. In its reaction the Government of the Netherlands Antilles discussed the measures that had been taken in the short term in response to the remarks and recommendations of the CPT. It should be emphasized that the Government is very concerned about the conditions in Koraal Specht, particularly the overcrowding and its consequences. A very high priority is therefore still given to a thorough overhaul of the prison system. Various measures have already been taken to tackle this undesirable situation and others are under consideration.

24. The reorganization activities are based on several reports prepared at the request of the Government (e.g. Di Korekshon pa Korekshon - Problems of

the prison system in the Netherlands Antilles) and on the CPT's report following its inspection visit in 1994, in which it made several recommendations for improvements.

25. In November 1996 a new director of the prison system was appointed. A master plan for implementation was presented to the Council of Ministers, where it was debated and approved. This has also led to the conclusion of a cooperation agreement between the Netherlands Antilles and the Netherlands. The latter will assist in the reorganization process, which will be lengthy, time-consuming and costly. A mixed working group has been given the task of overseeing and speeding up implementation of the reorganization process. It is also expected to produce proposals for the recruitment and selection of prison personnel and expansion of the capacity of the prison.

26. In the meantime some short-term modifications have been made. These include: expansion of the capacity for holding illegal aliens; refurbishment of police cells that could not be used because they did not comply with such basic conditions as proper lighting and ventilation; appointment of more prison personnel; construction and use of classrooms; maintenance of buildings in 1995 and 1996; implementation of security procedures in 1997; introduction of new posts such as a public relations officer and the Internal Affairs Bureau, appointment of a management team and expansion of personnel affairs; courses for middle management; implementation of new and improved selection standards to attract better educated personnel; refresher courses for personnel; implementation of new induction programmes for recruits; reactivation of the internal support team; commissioning of the semi-open prison.

27. It is regrettable that despite the efforts to improve conditions within the prison system a prison riot could not be averted. The riot lasted for three days (7-10 August 1997) and was occasioned by an announcement by the governor that visiting hours would be changed. The inmates took advantage of the abnormally low staffing levels. Cell doors were lifted off their hinges and the prisoners went on the rampage causing serious damage to the premises. After consulting with the Minister of Justice and the police, the prison governor decided not to use force to quell the riot since he wished to avoid casualties.

28. The Parliament of the Netherlands Antilles was very concerned about these events and urged the Minister of Justice to investigate the matter. The Minister of Justice set up an independent committee to investigate the causes of the riot and also the allegations that prison personnel assaulted inmates and that fellow inmates assaulted each other both during and after the riot. The committee, known as the Paula Committee after its chairman, was established on 4 September 1997 and was given one month to present its findings to the Minister. A copy of its findings is attached to the present report. It should be noted that the annexes to which the Paula Report itself refers have not been included here.

29. After completing its investigation the Committee concluded that the basic causes of the August riot were as follows:

(a) The change in the prison visiting rules;

(b) The way in which this was communicated to the inmates;

(c) The management's refusal to discuss the changes with the inmates;

(d) The alleged sabotage by prison personnel;

(e) The abnormally low staffing level on the day in question.

30. As regards the allegation of assault by the prison personnel, the Committee could find no evidence that prison personnel had assaulted inmates during the disturbances. However, the Committee did find that incidents had occurred on 11 and 18 August which needed to be investigated by the National Investigation Department. It was clear from the statements by inmates, which were substantiated by some of the prison staff, that irregularities had indeed taken place on the dates mentioned. The Committee found evidence of assaults on some inmates, some committed by prison guards and others by fellow inmates.

31. The Committee considered the situation in the prison to be dangerous and explosive and presented a list of recommendations for improving the safety of both inmates and prison guards. It made the following recommendations:

(a) The cells that were destroyed should be restored as soon as possible;

(b) Consideration should be given to the idea of transporting the most dangerous criminals to high security facilities in the Netherlands;

(c) Alternatively, such prisoners should be incarcerated in emergency barracks;

(d) Regime differentiation should be reintroduced;

(e) Qualified personnel should be appointed without delay to assist the prison governor;

(f) The problem of the abnormally high level of sick leave should be tackled;

(g) New internal rules should be introduced;

(h) The Minister should urge the National Investigation Department to finish its investigation into the irregularities as soon as possible;

(i) Rehabilitation programmes should be improved.

32. Shortly after the publication of the Paula Committee's Report, the Minister of Justice announced that:

(a) A Dutch project manager had arrived in September 1997 to take charge of the reorganization of the prison system and that this had now reached the stage at which preparations for structural measures could start in accordance with the Master Plan and the Implementation Plan;

(b) A second project manager had also been appointed to supervise the preparations for the infrastructural side of the process;

(c) Building work to repair the damage was in progress;

(d) Transferring the most dangerous criminals to the Netherlands was not an option because the Netherlands too had overcrowding problems in its prisons;

(e) Efforts were being made to tackle the issue of overcrowding, for example by considering alternative ways of punishing offenders; a working group had recently been established to look into this matter;

(f) The Netherlands had made funds available for the construction of a new prison;

(g) Technical support would be provided by the Netherlands for the reorganization of the prison system.

33. It should also be noted that the Prison System Ordinance has been approved by Parliament (PB 1996, 73). A copy is attached to this report. This new ordinance will greatly improve the position of prisoners by serving as a safeguard of their rights. Among the items it covers are the classification of the penal establishments, the different types of prison regime, management and supervision, work arrangements, the mental and spiritual welfare of the prisoners and complaint schemes. However, the ordinance has not yet taken effect because the requisite supplementary legislation to implement the new provisions is still being prepared. Draft texts of the ordinance are already available. The Government intends the ordinance to take effect as soon as possible.

34. The Netherlands Antilles has committed itself to observing and respecting the laws and standards of war and to render their violation punishable. These commitments have been entered into in various conventions that apply to the Netherlands Antilles. The implementing legislation is the Order of 16 June 1954. The conventions can also be implemented by means of the ordinance of 2 February 1993 implementing the Convention on the Prevention and Punishment of the Crime of Genocide and by means of the Criminal Code (Book 2, Titles 1 and 11). The bill that regulates implementation of the Convention against Torture does not explicitly specify that war and political instability are not circumstances warranting exemption from the provisions governing torture. However, this can be inferred from article 4, which states that an order from a superior officer or a public authority or a statutory provision (articles 44 and 45 of the Criminal Code) does not constitute a ground for immunity from criminal liability in the case of the criminal offence of torture. This article also corresponds to article 3 of the ordinance implementing the Genocide Convention. Although it is naturally inconceivable that any statutory provision of the Netherlands Antilles could be invoked as a justification of torture, it should be remembered that in view of the far-reaching form of extraterritorial jurisdiction to which this offence is subject provisions of foreign law could also be invoked. This is why mention of article 44 of the Criminal Code is essential.

Article 3

Admission and expulsion of illegal aliens

35. Illegal aliens who have been arrested pending their expulsion are no longer housed in police premises but are kept instead in purpose-built premises. The complex can accommodate around 100 illegal aliens. In other respects reference should be made to previous reports.

Article 4

36. Even before torture was made a separate offence, it was possible, as mentioned previously in this report, to prosecute it under other existing offences of the Criminal Code if these were broadly interpreted. However, such an interpretation did not properly fulfil the requirements of the treaty provisions. This was one reason why it was decided to introduce a separate offence of torture.

37. It follows from article 1 of the Convention that even in the case of an attempt to commit torture or acts constituting complicity or participation in torture, the official capacity of the person concerned remains an element of the offence. In such cases, the actual perpetrator of the offence need not act in this capacity. The first part of the article of the implementing ordinance implements the treaty obligation in such a way that an official who is an accomplice or participant in torture commits an offence. The second part covers the position of a person who is not himself a public official or person acting in an official capacity, but is induced by an official to commit torture or commits torture with the consent or acquiescence of a public official.

38. Attempt to commit a criminal offence and acts constituting complicity or participation in offences are criminalized in articles 47, 49 and 50 of the Criminal Code. Article 47 provides that an attempt to commit an offence is itself an offence if the intention has been revealed by the offender's starting to carry it out and if completion of the act was prevented purely by circumstances independent of the offender's will. This principle is repeated in article 5 with regard to the criminalization of torture.

Article 5

39. The separate Ordinance to implement the Convention on Torture, which has been presented to Parliament and debated and approved, establishes universal jurisdiction for the criminal offence of torture. This is regulated in article 6.

40. There is no obvious reason why there should be an obligation to establish this far-reaching form of extraterritorial jurisdiction. The offence of torture does not have any intrinsically cross-border characteristics. In practice the offender and victim often have the same nationality and the offence is usually committed in the territory of the State of which the offender and victim are nationals. It should also be noted that as long as offenders have the support of the social or political circle in which they move they will have no reason to flee. The mere fact that torture

is a very serious offence which arouses widespread indignation and concern is not in itself a sufficient justification for application of the principle of universality.

Article 6

41. The rules of the Code of Criminal Procedure of the Netherlands Antilles are applicable to offences falling within the jurisdiction of the courts of the Netherlands Antilles. The courts have the power to direct that a suspect be taken into custody or other measures taken to ensure his or her presence, provided that the normal conditions applying to such measures are fulfilled. Under the Extradition Act these measures may also be taken in connection with extradition, even before a request for extradition has been submitted.

42. Under articles 187 and 221 of the new revised Code of Criminal Procedure, a preliminary investigation must take place as soon as there is reason to believe that an offence has been committed.

Articles 7 and 8

43. Reference is made in this respect to the previous reports.

Article 9

44. The Code of Criminal Procedure now contains a new part concerning international judicial assistance. This specifies the grounds for refusing a request for judicial assistance and includes a special rule governing interviews by foreign police officers (arts. 555 et seq.).

45. Where such a request is based on a convention, it will be granted wherever possible. Even if it is not based on a convention it will still be granted if it is reasonable and provided that it is not contrary to a statutory regulation or a direction of the Minister of Justice. Article 559 lists the grounds on which a request may be refused. Article 560 provides that requests for mutual assistance in connection with offences of a political nature may not be granted without an authorization by the Minister of Justice. This authorization may be given only for requests based on a convention and after consultation with the Minister of General Affairs. Articles 561 to 565 set out the procedure to be followed.

Article 10

46. One of the conclusions in the previous report was that the training given to police officers, prison officers and forensic instructors in prisons (FOBA) was insufficient. The management of the remand centre introduced a new training programme in 1992 as part of the reorganization process and is constantly engaged in upgrading the training programmes.

47. New training programmes have been introduced for police officers too as part of the reorganization process. New recruits now go through an induction programme known as “Police 2000” at the Police Academy. This concentrates on teaching social skills. In this connection the police management have developed a policy on interpreting the tasks of the police force and its

officers throughout the 1990s. The induction programme also provides both professional and non-vocational on-the-job-training to ensure that police officers have the right attitudes and skills to enable them to cope with the rapid changes that are taking place in society.

Article 11

48. Interrogation of suspects and other related matters is regulated in the Code of Criminal Procedure. The general instructions on how to perform interrogations are given to the police in the Code of Criminal Procedure. A judge will not use any evidence which has been obtained through improper use of police powers under the law. If no other evidence can be adduced, it will not be possible to prove that the accused committed the offence and he or she will have to be acquitted.

49. If the evidence has been obtained directly by means of a breach of fundamental principles and this has seriously prejudiced the defence's case, it may not be admitted in court. A breach of this kind will be deemed to have occurred where statutory rules or rules of unwritten law have been infringed.

50. As mentioned under article 2 of this report, the NID is the independent entity under direct supervision of the Procurator-General which is responsible for investigating cases involving public officials, police officers or prison officers. Since 1995 the NID has been charged with supervising the functioning of the public officials referred to above.

51. There is an independent board of visitors for the prisons and remand centres (established by National Decree of 14 December 1962, Official Bulletin 1962, No. 160). The function of this board is to supervise and assist the governor of such institutions and the Minister of Justice. Because the inmates are in a position of dependency, there should be a completely independent body which they can approach if they so wish. The members of the board of visitors are appointed by the Minister of Justice and they report to the Minister. Since it is essential that the board has regular and systematic contact with both management and inmates, monthly meetings are held. The members of the board are authorized to enter and inspect any parts of the prisons at any time. The board has the obligation to monitor and report any abuse of power. It has become very efficient in carrying out its supervisory duties.

52. The courts can also play a supervisory role if inmates apply to them. Prisoners may require that their case be handled in accordance with the legal provisions of the Convention. Proceedings before the courts are usually brought by way of application for an interim injunction.

Articles 12 and 13

53. A public prosecutor may initiate a criminal investigation and the Procurator-General has the responsibility to ensure the proper prosecution of a criminal case. Furthermore, the Procurator-General may give the public prosecutor instructions about how to conduct an investigation.

54. Under article 15 of the Revised Code of Criminal Procedure the right of complaint entitles the prisoner to file a complaint with the relevant judicial authorities. The right is modelled on the modified right of complaint introduced in the Netherlands in 1984. The right of complaint also applies where the police or criminal justice authorities are dilatory; after a reasonable period the prisoner may file a complaint for non-prosecution. This applies even where no decision has been taken not to prosecute.

55. The NID falls directly under the jurisdiction of the Procurator-General and offers a greater guarantee of an independent and objective investigation where a complaint is filed about police brutality. This is an improvement on the previous situation where complaints about ill-treatment were investigated by colleagues of the accused police officers.

56. The Prison System Ordinance makes provision for the establishment of a complaints committee for the remand centre/prison. The draft ordinance has been debated and approved by Parliament, but has not yet become law for the reasons mentioned previously.

Article 14

57. The law of the Netherlands Antilles provides several means by which victims of crimes of violence may obtain compensation. Both the Civil Code (arts. 1382-1397 d, for damage caused to others) and the Revised Code of Criminal Procedure (art. 206, for damage caused by the offender) of the Netherlands Antilles contain provisions governing compensation and damages that ensure that the victim of an act of torture obtains redress.

58. The position of the injured party too is greatly improved under the new Code of Criminal Procedure. During the trial the victim may apply for compensation not exceeding ANG 10,000. But the victim may also obtain support and assistance during the investigation. For example, the police may arrange a simple compensation scheme with the offender, after which the prosecution is discontinued.

Article 15

59. The Code of Criminal Procedure of the Netherlands Antilles contains rules (arts. 381-387) for the evaluation of evidence. As mentioned previously, evidence that is obtained unlawfully may not be used by the prosecution.

60. The position of witnesses has been bolstered by safeguards in the new Code, which take effect where the balance in the proceedings is in danger of being disrupted because the witness can no longer discharge his or her statutory duty to help in ascertaining the truth. If witnesses are threatened to such an extent that it would not be reasonable to expect them to give evidence in public, the law of criminal procedure should afford them protection by allowing them to give evidence in private without revealing their identity.

61. The Revised Code of Criminal Procedure describes such a witness as an anonymous witness. In many criminal cases the police need statements from

witnesses to produce evidence that the suspect has committed the criminal act of which he is suspected. Particularly in the case of serious offences it is important to the suspect that no testimony be given against him. In such cases, there may be a serious threat to the witnesses. By law the examining magistrate may now direct in such cases that a witness will remain anonymous. The witness will be questioned in such a way that his or her identity remains concealed.

Article 16

62. Reference is made here to the previous reports and to the section of this report dealing with articles 10 to 14.

List of annexes*

1. Report of the Committee of Inquiry, established by National Decree of 4 September 1997, No. 1, into the riot in the remand centre and prison on Curaçao.

2. National Decree of 5 January 1994, No. 4, establishing the Steering Committee on Alternative Penal Sanctions.

3. National Decree of 15 September 1997, No. 18, amending the National Decree of 5 January 1994.

4. National Decree of 6 November 1997, No. 10, establishing the Advisory Committee on the Alternative Disposal of Criminal Cases.

5. National Ordinance of 13 October 1995 implementing the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

6. National Ordinance of 27 June 1996 to establish principles for the prison system.

7. Instructions of the Minister of Justice of 1 January 1996 on the prevention of torture, the use of cells and the treatment of arrested persons.

* These annexes may be consulted in the files of the Office of the United Nations High Commissioner for Human Rights.

Part Two

Aruba

I. PENAL AND PENITENTIARY SYSTEM

A. General

63. While Aruba's young and advanced constitutional system contains the main legal safeguards required by the human rights conventions, other legislation gives shape to the criminal law, the law of criminal procedure and the law governing the execution of custodial sentences. Aruban criminal and detention law thus meet the requirements of the human rights conventions. However, as this legislation is rather dated in a number of respects, it has not always fulfilled the requirements imposed by Aruba itself in its Constitution. In recent years, concentrated efforts have therefore been made to rapidly modernize this legislation where necessary, particularly in the area of criminal procedure and detention law. This has resulted in modern legislation based on the human rights conventions and also in legislative projects that are on the point of completion.

B. The Constitution of Aruba

64. When Aruba obtained its separate constitutional status in 1986, it seized the opportunity to introduce a constitution of its own - the Constitution of Aruba, based on the European Convention for the Protection of Human Rights and Fundamental Freedoms, the International Covenant on Civil and Political Rights, the European Social Charter, the Constitution of the Kingdom of the Netherlands and the Constitution of the Netherlands Antilles. Aruba's Constitution lays down the fundamental rights of persons subject to the law of Aruba. The guiding principle in this respect is the notion that citizens should be afforded protection against and support by the authorities. What is of essential importance to the Convention is above all the right of inviolability of the person laid down in article I.3 of the Constitution. As a result, acts which in any way constitute an infringement of the physical integrity of a person are prohibited in the Constitution. Exceptions to this right are permitted only if and insofar as they are provided for by law. This is implemented, for example, by Aruba's new Code of Criminal Procedure (AB 1996 No. 75).

65. A number of the European Convention's provisions also appear almost literally in the Constitution. Examples are the principle of equality, the principle of legality, the presumption of innocence and the ban on imposing the death penalty. Article I.5 of the Constitution also contains detailed provisions governing the lawfulness of arrest, detention and imprisonment. This article, which is closely modelled on article 5 of the European Convention and the case law resulting from it, covers all cases of deprivation of liberty (art. I.7). Finally, the Constitution includes a provision on legal assistance (art. I.7) and provisions governing due process and the independence of the judiciary (chap. VI).

C. Criminal law

66. The principle of legality applies under both the criminal law and the law of criminal procedure. Under article 1, paragraph 1, of the Criminal Code of Aruba (AB 1991, No. GT 50), no offence is punishable unless it was an offence under a provision of the criminal law existing at the time it was committed (see also article I.6 of the Constitution). Under article 9 of the new Code of Criminal Procedure of Aruba which took effect on 1 October 1997, prosecutions are brought only in the cases and in the manner provided for by country ordinance (i.e. a formal statute of the Aruban legislature). This means that the substantive and procedural criminal law of Aruba always accords primacy to the principle of legal certainty. An individual may not be punished for acts that are not defined as criminal by law; every act taken by the authorities under criminal procedure should also be justified to the individual. In this way all forms of arbitrary action against the individual are in principle made impossible.

67. The Criminal Code of Aruba was inadequate in two ways in terms of the legal rights protected by the European Convention. As mentioned in the previous report, there were first of all several outdated regulations governing the execution of custodial sentences that were no longer applied in practice. For example, article 14 of the Code provides that the courts can order that a person sentenced to a term of imprisonment of more than five years should be shackled when working. Outdated regulations of this kind, which are no longer in keeping with modern views on the treatment of prisoners and the nature of custodial sentences, will be repealed when the new law on imprisonment is introduced. The new bill governing the execution of custodial sentences is presently being considered by the Advisory Council and will in due course be submitted to the Aruban parliament. If this becomes law, the Criminal Code of Aruba will cease to contain any provisions governing the execution of custodial sentences. The existence of such provisions is no longer in keeping with the idea that imprisonment should be geared to the rehabilitation of convicted prisoners (see also sect. E).

68. Second, the Aruban Criminal Code provides only indirectly that torture and other forms of inhuman or degrading treatment are punishable offences (this too was mentioned in the previous report). Although there are extensive provisions for punishing assault (arts. 313-318) and extra sentences are available for imposition on public officials convicted of assault (art. 46), torture as such is not a criminal offence under the Code. This is why the implementing legislation referred to in the previous report has now been redrafted. As a result, a bill to implement the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment is now being publicly debated in the Aruban parliament. This legislation will shortly introduce the specific offence of “assault committed by a person in the course of his duties in the service of a government body against another person either with a view to obtaining information or a confession from the latter or to punishing him, intimidating him or another person or compelling him or another person to do or allow something, or out of contempt for that person’s claims to human dignity”. This offence carries a term of imprisonment not exceeding 15 years, or 20 years (life) if the offence results in death (see also the notes on articles 2-4 of the Convention against Torture). It is expected that the bill will become law on or around the date when this report is considered.

D. Criminal procedure

69. The constraints that can be used against a defendant in the course of criminal proceedings and how this can be done are exhaustively regulated in Aruba's Code of Criminal Procedure, to which reference has already been made. The entry into effect of this new Code was a milestone in the history of Aruba's criminal law system. The rights of suspects have been greatly improved in the new Code. Very importantly, provision is now made in many places in the law for the assignment of defence counsel. If necessary, the assistance of counsel may be free under a legal aid order. Whenever a suspect is deprived of his liberty, he is entitled to the immediate assistance of defence counsel. Indeed, counsel may be consulted even before the first interview by the police. This means that from the moment of the initial contact with the criminal justice authorities a suspect can be assisted by a lawyer, who can monitor the lawfulness of the treatment accorded to the suspect in the course of the criminal proceedings and can apply to the court in the event of any irregularities. This provides a strong safeguard against arbitrary and unlawful action by the authorities.

70. The new Code also provides other fundamental safeguards against unlawful action by the authorities. First of all, the application of constraints against a suspect is made the subject of precise rules. Before a constraint is employed, it will have to be clear in each case whether certain minimum conditions for the application of the measure have been fulfilled. If the police or public prosecutions service fail to fulfil these conditions, they will be sanctioned by the courts for applying the relevant constraint. In addition, article 71 of the Code provides that constraints used against a suspect (i.e. the pre-trial constraints under criminal law, including physical constraints) must not be unreasonable in the light of the different interests involved in the case and may also be used only for the purpose for which they are ultimately intended. Furthermore, it must not be possible to achieve the object of the constraint in some other less radical way. Lastly, there must be reasonable grounds for believing that the seriousness of the infringement caused by the constraint is justified by the seriousness of the offence. These general principles of due process, which were originally derived from unwritten law, are intended to help ensure that application of a custodial measure cannot degenerate into an independent punitive process.

71. Finally, articles 178 to 181 of the Code create an explicit procedure for individuals to claim compensation for the unlawful application of pre-trial constraints. If constraints are judged to be out of proportion to their lawful object they are held in law to have been an unlawful act by the authorities.

72. In summary, Aruba's system of criminal procedure is based on the principle that the legitimacy of each government act should be demonstrated to the individual concerned. If constraints are used, their application must be in accordance with various rules that can help to minimize abuse of power.

E. Detention

73. Detention is possible in Aruba only in circumstances where it has been regulated by law. Detention infringes the fundamental rights of personal

liberty and safety guaranteed in the Constitution and the right to move around, reside and choose a place of residence freely in Aruba. It also follows from the Constitution that where a person is deprived of his liberty the procedural rules given by or with the authorization of parliament should be observed. The power to deprive a person of his liberty must therefore be laid down by law. Deprivation of liberty may occur only in the cases listed exhaustively in article I.5 of the Constitution. These are successively:

Lawful detention after conviction by a competent court;

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

Lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence, fleeing after having done so or prejudicing a criminal investigation;

Lawful detention of a minor for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

Lawful detention of persons to prevent the spreading of infectious diseases and of persons of unsound mind, alcoholics and drug addicts;

Lawful detention of persons to prevent them entering the country illegally and of persons against whom an action is being taken with a view to deportation or extradition.

74. Once a person has been detained, the detention should be served in accordance with the principles of the rule of law. The current regulations do not provide an adequate framework for this as they date from a time when the need for offenders to be rehabilitated and for prisoners to have legal rights enforceable against the authorities had not yet been recognized. At present the regulations comprise the Prisons Act (PB 1930, No. 73) (based on article 26 of the Criminal Code of Aruba), the Prisons Order (PB 1958, No. 18) and the Prison Staff Instructions (PB 1958 No. 19). Together with Titles II and III of Book 1 of the Criminal Code of Aruba, these regulations constitute the law governing the implementation of remands in custody, custodial sentences and other forms of detention. Like Aruba’s Criminal Code, the Prisons Order and the Prison Staff Instructions contain no explicit ban on torture and merely contain an instruction “to treat prisoners considerately, without fraternizing with them” (article 13 of the Prison Staff Instructions).

75. In view of the desire to modernize detention law in its entirety and strengthen the position of prisoners, a bill to regulate the execution of custodial sentences was drafted. This bill was announced during the fourteenth session of the Committee against Torture in 1995. However, the bill in its original form has been subjected to a thorough review on the recommendation of the Advisory Council of Aruba, which has led to some delay. The bill has now reached the stage where it can be presented to Aruba's

parliament in the near future. The bill does not contain an explicit ban on torture. Nor would such a ban be logical since the whole purpose of the bill from the point of view of the rule of law is to emphasize the rights of prisoners and to prohibit outright any action that would limit or undermine these rights (including fundamental rights) still further. In view of this express recognition of prisoners as independent persons having rights and duties under the law, it follows that it is unnecessary to formulate a ban on torture within the prison system. Here too, however, torture is of course a criminal offence under the general provision on torture in the bill to implement the Convention against Torture.

76. All the permitted infringements of the fundamental rights of prisoners have been explicitly defined and the conditions on which the infringements are possible have been listed exhaustively. If these rights are nonetheless infringed unlawfully, for example as a result of the way in which the detention is implemented, prisoners have a lawful right to complain about this to an independent board of visitors which is responsible for checking that custodial sentences are executed lawfully. A prisoner may be assisted by counsel in a complaint procedure. The rulings of the board of visitors on a prisoner's complaint are binding on the authorities responsible for implementing the detention.

77. The bill defines precisely what infringements of the physical integrity of prisoners are permitted and on what conditions. Any search of prisoners to discover whether they have prohibited objects in their possession may not go beyond an external search of their body and clothing. Prisoners may be required to undergo medical treatment only if they have - or are thought to have - a sickness that poses a serious threat to their health or the health of other prisoners. Finally, physical coercion - including the use of force - is permissible only if and insofar as this is absolutely necessary in order to maintain order or security in the prison, carry out decisions of the authorities in relation to the sentence or prevent the prisoner from escaping. It is explicitly provided in this connection that physical coercion may never be used if the consequences (for the prisoner) would be out of proportion to the object served by the coercion. It is also provided that when coercion has to be used the authorities should choose the form that will achieve the desired effect with the minimum of harm. In addition, a doctor should always be called in to examine a prisoner within 24 hours when force is used. Prisoners may complain about the use of force to the board of visitors mentioned above.

II. INFORMATION RELATING TO ARTICLES OF THE CONVENTION

Article 2

Paragraph 1

78. The measures to prevent the possibility of torture in Aruba take two forms. First of all, the possibility of torture is precluded by law in Aruba. The right of every individual to inviolability of the person is enshrined in article I.3 of the Constitution of Aruba (AB 1987 No. GT 1). Under this article, the fundamental right of inviolability of the person may be limited only by or pursuant to country ordinance, in other words by Aruban

legislation. The provision has therefore been elaborated in various items of legislation. The most important of them are the Criminal Code of Aruba (AB 1991, No. GT 50) and the bill to implement the Convention against Torture, which is expected to be passed by the Aruban parliament and become law in the near future. Under this bill, torture will be an offence not in the Criminal Code but in a special ordinance. The definition of the offence of torture has been closely modelled on article 1 (1) of the Convention, and the offence carries very heavy custodial sentences (varying from 15 years' imprisonment to life). For a detailed description of the content of the Code and the bill, reference should be made to the notes on article 4 of the Convention below.

79. Second, the possibility of torture is avoided by a system of preventive supervision and regular checks on the treatment of prisoners. The supervision and checks are presently arranged in three ways. First of all, the Aruban Correctional Institute has a board of visitors. This board has been instituted on the basis of the Board of Visitors (Prisons and Remand Centres) Order (AB 1995 No. GT 25) and is charged - in essence - with supervising the way in which custodial sentences and non-punitive orders are executed. Under article 4, opening words and (a), of the Order referred to above, the board is responsible in particular for "supervision of all matters relating to the institution, especially the treatment of prisoners and the observance of the regulations". For this purpose, the members of the board are entitled to gain access at all times to all parts of an institution and to all places where prisoners are kept (art. 5 (1)). Under article 6 of the Order the board is empowered to ascertain the wishes and feelings of the prisoners by personal contact with them and the prisoners can communicate with the board free of censorship. In this way, irregularities in the treatment of prisoners can be made public. The board is required to report before 1 March of each year to the minister responsible for the prison system on its work in the past year.

80. The board of visitors will also acquire a judicial role when the bill governing the execution of custodial sentences becomes law. Under this bill the rights and duties of prisoners are defined in detail. Prisoners will be entitled to complain to the board of visitors about limitations on the rights to which they are entitled and about violations of their rights. The board acts in this respect as a complaints court that is independent of the criminal justice authorities and gives judgements binding on the prison administration. The chairman of the board of visitors is a member of the Aruban judiciary.

81. The second guarantee of the supervision and checks to ensure the proper treatment of prisoners is provided by the new Aruban Code of Criminal Procedure. This Code first of all implements article I.5, paragraph 3 (a), of the Constitution, under which a prisoner may apply to the courts for a quick decision on the lawfulness or otherwise of his detention. Under the Code a suspect has the right to be brought before a judge within three days of his arrest (art. 89, para. 1). This right applies while the suspect is still in police custody. Even afterwards, however, the lawfulness of the detention is checked at regular intervals (during remand in custody). Although the purpose of the courts' involvement is primarily to ensure that the conditions for the application of detention have been fulfilled, the Code does not prevent the subject of practices contrary to the Convention being raised during the hearing. There is therefore judicial supervision of detention both in police cells and in a remand centre.

82. A provision that is of exceptional importance in relation to the treatment of prisoners, particularly those in police custody, is article 90 of the Aruban Code of Criminal Procedure. This article defines the measures, including coercion, that can be taken against a prisoner during pre-trial detention. The constraints that can be employed against a prisoner under this article and that involve an infringement of the fundamental right of inviolability of the person may be ordered only by the public prosecutor, who must first obtain the authorization of the examining magistrate (a member of the judiciary). A special form of redress for such an infringement exists under the above-mentioned article 90, paragraph 7, in the form of an action to the Joint Court of Justice of the Netherlands Antilles and Aruba.

83. Lastly, the Code of Criminal Procedure gives prisoners the right to be assisted by counsel. Counsel may be involved at a very early stage - even before the start of the first police interviews - and is always assigned free of charge during police custody. This means that the way in which prisoners are treated is always monitored at first hand by a lawyer representing the prisoner, who can intervene immediately if his client is treated in a manner contrary to the Convention.

84. The statutory system also provides various ways in which prisoners can, in appropriate cases, obtain compensation through the courts for unlawful treatment or seek an injunction to restrain any future acts constituting unlawful treatment. These claims can be based on the Aruban Code of Criminal Procedure or instituted as a purely civil action. In addition, where there has been an unlawful and serious infringement of the fundamental rights of a person in pre-trial detention, the case law shows that the courts may in practice rule that the demand by the public prosecutor for a custodial sentence or constraint is not admissible and immediately release the prisoner.

Paragraph 2

85. Aruba’s legal system contains a number of special items of legislation that cover emergencies of the kind referred to in article 2, paragraph 2, of the Convention. However, the basic requirement that action by the authorities should be lawful and in accordance with the rule of law continues to apply in full in this legislation.

Paragraph 3

86. Paragraph 3 of article 2 of the Convention stipulates that an order from a superior officer or public authority may not be invoked as a justification of torture. Articles 44 and 45 of Aruba’s Code of Criminal Procedure contain specific provisions governing observance of statutory regulations and orders given by a superior. Under these articles a person who commits a criminal offence in the course of implementing a statutory regulation or obeying orders given by a competent authority is not punishable. However, a public servant invoking this defence must show that the relevant order was given by the competent authority or that he obeyed the order believing in good faith that it had been given by the competent authority.

87. In order to rule out any possibility that an order by a superior may be invoked as a defence to a charge of torture, the bill to implement the

Convention against Torture explicitly provides that such a defence is excluded (article 3 of the bill). This means that there can be no discussion whatever about the question of whether a public servant may avoid conviction for torture by invoking the defence of an order given by his superior. Article 3 of the bill also explicitly excludes the possibility that a public servant can raise the defence that he was implementing a statutory regulation.

Article 3

88. Aruba's immigration policy involves the restrictive application of the scope provided by the Admission and Expulsion Ordinance (AB 1993 No. GT 33). A major consideration is the small size of the country: it would not be feasible to allow people to enter Aruba without restriction in order to settle and work there. This would make excessive demands on the available infrastructure and lead to undesirable situations. In view of this limited capacity to absorb foreigners, aliens can be admitted only if this would be in the real interests of Aruba or if there are pressing reasons of a humanitarian nature.

89. In order to stay in Aruba, an alien must have a valid residence permit. Anyone found in Aruba without a valid residence permit may be removed by the Minister of Justice under article 19 of the Admission and Expulsion Ordinance or by the Procurator-General under article 15. Appeal lies against a decision of the Minister of Justice pursuant to the Administrative Decisions Appeals Ordinance (AB 1993 No. 45).

90. In accordance with article 2 of the Charter of the Kingdom of the Netherlands and the Admission and Expulsion Ordinance, requests for asylum in Aruba that are made in Aruba are dealt with by the Aruban authorities. Requests for asylum in the Netherlands that are made in Aruba are dealt with by the Netherlands mission. The 1967 Protocol relating to the Status of Refugees took effect in Aruba on 1 January 1986. The term "refugee" is limited in both the 1951 Geneva Convention and the Protocol to persons who have a well-founded fear of persecution. The right of the State to decide who should be treated as a refugee is preserved. If someone is treated as a refugee the parties to the Protocol may not expel or return such a person. Since Aruba has no statutory procedure for dealing with asylum requests, each request has to be dealt with on an ad hoc basis. This is because there have hitherto been scarcely any requests for political asylum. Although there are therefore no official procedures, the authorities concerned work together as closely as possible in order to determine whether there is a well-founded fear of persecution (this fear must be supported by facts) and, if there is, to provide adequate protection for the person concerned. Consultation also takes place with the Ministry of Foreign Affairs in The Hague, the missions of the Kingdom abroad and the relevant international organizations. The final decision on a request for asylum is taken by the Minister of Justice.

Article 4

91. Criminal liability for torture is regulated in the bill to implement the Convention against Torture. Other forms of physical violence are offences under Aruba's Criminal Code.

92. The perpetrator should in principle be a government official or other person acting in an official capacity. This action may consist of physical acts, attempts to commit such acts or procuring, permitting or tolerating such acts. As the forms of assault that qualify as torture constitute aggravated forms of assault, attempts too are offences.

93. Articles 313-318 of the Criminal Code of Aruba provide that the offence of assault and the aggravated forms of assault carry penalties. The sentences for the commission of such offences are included in these articles: the maximum sentences range from 2 years' imprisonment for assault (art. 313, para. 1) to 15 years' imprisonment for serious assault committed with premeditation (art. 316, para. 2). The sentences may be increased by a third for officials who commit the offence in the course of their duties (art. 46), where such officials breach a special legal duty or, in committing the offence, abuse a power, opportunity or means given to them by virtue of their office. The maximum sentence for serious assault committed by an official in the course of his duties is therefore 16 years (art. 316, para. 1, in conjunction with art. 46), but 20 years if the victim dies (art. 316, para. 2, in conjunction with art. 46). These are very much in line with the sentences contained in the bill to implement the Convention against Torture.

94. As regards the difference between the offences of torture and assault, it should be noted for the sake of clarity that under the terminology of Aruban criminal law only very serious forms of assault are eligible to be treated as torture. To treat torture as serious assault within the specific meaning of articles 315 and 316 of the Criminal Code would not, however, do justice to the purpose of the provisions of the Convention. Serious assault presupposes the causing of serious physical injury, including the mental injury referred to in article 84, paragraph 2, of the Code. Torture could, however, assume forms that involve severe pain or suffering but leave no physical or mental traces. This is why it would not be sufficient to use the term “serious assault” in the Ordinance implementing the Convention. Although reference is made to assault rather than serious assault in the definition of torture, it should nonetheless not be inferred from this that the definition does not extend to forms of assault that are less serious in terms of the pain and suffering caused than a serious assault occasioning physical injury.

95. The maximum term of imprisonment that can be imposed in Aruba is life (art. 11, para. 1). Article 14 of Aruba's Constitution also provides that the death penalty may not be imposed. It follows that this penalty no longer appears in Aruba's Criminal Code. It should also be noted that the maximum sentences do not apply merely to the perpetrator of the offence but also to those who arrange for or intentionally procure the commission of the offence or participate in it (art. 49).

Article 5

96. Articles 2-8 of Aruba's Criminal Code regulate jurisdiction. Articles 2, 3 and 8 of the Code are important in relation to the Convention. Under these articles the criminal law of Aruba is applicable to any person who commits torture either in Aruba or on board an Aruban aircraft or vessel,

insofar as this jurisdiction is not precluded by international law. Aruban legislation therefore complies with the requirement of article 5, paragraph 1 (a), of the Convention.

97. In order to comply in full with the obligations formulated in article 5, paragraph 1 (b) and (c), and paragraph 2, of the Convention, article 5 of the bill to implement the Convention against Torture contains a universal jurisdiction clause. Under this provision, any person who commits torture outside the territory of Aruba commits an offence as defined in articles 1 and 2 of the bill. Although article 5, paragraph 2, of the Criminal Code of Aruba already partially provided for Aruba to have jurisdiction in the cases referred to in article 5, paragraph 1 (b), of the Convention, it was not possible to bring a prosecution in all cases.

Article 6

Officials responsible for investigating offences

98. Under the Code of Criminal Procedure (art. 184) the persons charged with investigating offences are police officers and special police officers, insofar as the latter have been appointed by or on behalf of the Minister of Justice. Others persons charged with investigating offences are those who have been designated in special statutory regulations as being responsible for enforcing the provisions of the regulations, for ensuring their observance or for investigating the offences defined in them (art. 185). Persons who are competent to investigate are the procurators general, the public prosecutors and the local police chiefs. If they exercise this power, they are designated as investigating officials for the purposes of the Code of Criminal Procedure (art. 1). The change in the situation whereby the public prosecutor is no longer charged with investigating but is merely competent to investigate reflects the fact that investigations are the specific responsibility of the criminal investigations department of the police.

99. The public prosecutor or Chief Public Prosecutor supervises the investigation and may issue orders to persons charged with investigating or competent to investigate offences (art. 183, para. 1). As regards general supervision, however, the Chief Public Prosecutor is bound by any instructions given by the Procurator General (art. 4, para. 2, Judiciary Organization Ordinance; see also art. 14, Code of Criminal Procedure). This means that the Procurator General, as head of the Public Prosecutions Service, can issue guidelines concerning investigations and sentencing demands. Only on appeal can the Procurator General give direct instructions for a further investigation (art. 183, para. 3). The public prosecutor has control of the entire preparatory investigation, subject to the provisions in the new Code of Criminal Procedure regarding the intervention of the examining magistrate (art. 183, para. 2).

Consequences of norm violations

100. As a result of the provisions of the conventions relating to human rights and the principles of due process, the courts have gradually acquired a greater freedom to weigh all the interests in an action. This jurisdiction to consider the different interests has supplemented their jurisdiction to apply

the law. Inspired by the human rights conventions the courts have in recent decades developed their own “extra-legislative” system of sanctions. If the Public Prosecutions Service infringes the principles of criminal procedure, the courts may rule that its case is inadmissible or, where the infringement is less serious, that its evidence is not admissible. The requirement in each case is that the norm that has been violated is intended for the protection of the suspect and that the interests of the suspect have indeed been prejudiced by the violation.

101. The suspect or his counsel may also refer the question of a norm violation to the courts. Depending on the stage which the proceedings have reached, the judge who hears such an application will be the trial judge, the judge in chambers or the examining magistrate. It should be noted incidentally that the courts may themselves decide of their own volition to consider a norm violation (art. 413, para. 1). The main rule is that the judge examines whether the norm that has been breached can be rectified in a way that is in keeping with the nature and scope of the norm. He may issue the necessary instructions for this purpose (art. 413, para. 1). According to paragraph 2 of article 413, there will be no rectification if:

(a) This is no longer possible in practice;

(b) The Code has made a different provision for the relevant case; or

(c) The interests of the defence or the prosecution would be disproportionately harmed by rectification.

102. Separate provision is made for cases where the period allowed for deprivation of liberty has been exceeded. Under article 413, paragraph 3, this period may be extended in exceptional circumstances. However, this is possible only if the release from custody would undermine faith in the legal system to such an extent that it is definitely in the public interest that the prisoner should continue to be deprived of his liberty. Where this is the case the judge may, at the request of the public prosecutor, fix a new period of detention within not more than 24 hours of the expiry of the original period. In addition, it is necessary that the Code should fix a new period and that the statutory requirements should be fulfilled.

103. When rectification as referred to in paragraphs 1, 2 and 3 of article 413 is not possible, the norm violation does not as a rule have any consequences (art. 413, para. 4). Under paragraph 5 of article 413 there are two exceptions to this rule:

(a) Where a special statutory provision already stipulates the consequences of a norm violation (in other words, the act is a procedural nullity);

(b) In the event of infringement of norms essential to the proceedings the judge may decide in his final judgement to impose a procedural sanction, either of his own volition or at the request of the Public Prosecution Service or the defendant (or his counsel).

104. In the latter case (infringement of norms essential to the proceedings) the law provides the following sanctions:

(a) Reduction of sentence (art. 413, para. 5 (a));

(b) Exclusion of evidence (art. 413, para. 5 (b));

(c) Non-admissibility of the case of the public prosecutions service (art. 413, para. 5 (c));

(d) Compensation in addition to or instead of the above-mentioned sanctions (art. 413, para. 6).

105. If the sentence is to be reduced, there must be reasonable grounds for believing that the prejudice caused by the norm violation can be compensated. Evidence may be excluded only if the results of the investigation have been obtained directly by the irregularity and it is also reasonable to assume that the defence has been seriously prejudiced by the use of these results of the investigation. The Public Prosecutions Service's case will be held to be inadmissible only if the way in which the case has been handled has deprived the defendant of a fair trial.

106. The seventh and last paragraph of article 413 refers to all the previous paragraphs: when assessing a norm violation and considering what consequences should be attached to it and when weighing the various interests in a case, the judge must take special account first of all of the nature, importance and scope of the norm that has been violated, second of the seriousness of the violation and third of the degree of culpability of the person who violated the norm.

Pre-trial constraints - general

107. Book 3 of the Code starts with a general provision that codifies some general principles of due process (art. 71). The consent of a judge is required for the application of very far-reaching pre-trial constraints. Three new pre-trial measures are searches in the body (art. 78, para. 3), DNA testing (art. 79) and the tapping of data communications (arts. 167-174).

108. Article 71 sets out the general conditions that apply to the use of every form of pre-trial constraint. It does not alter the specific statutory requirements that govern the application of particular pre-trial constraints. The general conditions of article 71 are a codification of the most common unwritten principles of due process. These principles serve as general guidelines in determining the scope for discretion left by the application criteria (e.g. suspicion, serious objections and interests of the investigation).

109. The application of every form of pre-trial constraint is subject to the following general conditions:

(a) The use of the constraint must not be unreasonable, taking account of the different interests in the case (application must not be arbitrary);

(b) The power to apply a constraint must not be exercised for a purpose other than that for which it was granted (application must not be an abuse of power);

(c) The object of the constraint cannot be achieved in a different, more efficient and less radical way (subsidiarity);

(d) The seriousness of the infringement that will be caused by the constraint is justified by the seriousness of the offence (proportionality).

110. The codification of these principles does not mean that other (unwritten) principles cannot be invoked. This is evident even from the fact that article 413 deals with the consequences of violations of "norms", which are defined in paragraph 1 as being both regulations and rules of unwritten law.

Constraints involving deprivation of liberty: interview, police custody and pre-trial detention

Interview

111. It follows from article 73 that a suspect who has been arrested must be taken to a place of interview. Before the interview starts the suspect is advised of his rights (art. 82). In addition, article 48 provides that a suspect must be given the opportunity to exercise his right to legal assistance. Thereafter there are four possibilities:

(a) The interview starts immediately;

(b) The suspect is immediately detained in police custody;

(c) The suspect is brought before the examining magistrate to be remanded in custody;

(d) The public prosecutor or Chief Public Prosecutor releases the suspect.

112. It follows that an investigating official is not obliged to use all or part of the period of six hours which is allocated for the interview under article 80. Whether the official does so depends entirely on the circumstances. The period of six hours is intended as a maximum; if the interview can be completed more quickly, the suspect may not be forced to "serve out" the six-hour period. Under article 80, paragraph 2, the period starts at the moment when the suspect arrives at the place of interview. If, however, the suspect is not in a proper state to be interviewed, the period starts when he is.

113. In principle, the period between 10 p.m. and 8 a.m. is not counted in determining the maximum period. However, the Chief Public Prosecutor may direct that an interview started before 10 p.m. will continue thereafter if this in the interests of the investigation. The period of the interview after 10 p.m. is deducted from the six hours (art. 80, para. 1).

Detention in police custody

114. The public prosecutor or Chief Public Prosecutor before whom the suspect is brought or who has himself arrested the suspect may order after the interview that the suspect be detained in police custody in the interests of the investigation (art. 83, para. 1). Before the order is made the suspect is questioned by the public prosecutor or Chief Public Prosecutor. He is also informed that he will be assigned legal counsel free of charge for the duration of the police custody (art. 83, para. 2).

115. Under article 86 detention in police custody is possible only in the event of an offence for which pre-trial detention is permitted. If the trial has started, such an order may no longer be made for the same offence.

116. Article 87 specifies the periods. The order for detention in police custody remains in force for a maximum of two days. Only the public prosecutor is empowered to extend this order and may do this once for a maximum of eight days in the interests of the examination. An extension is permissible only in the event of urgent necessity. In keeping with the Brogan judgement of the European Court of Human Rights, the new Code provides that a suspect must be brought before the examining magistrate as quickly as possible, but in any event no later than 24 hours after the public prosecutor has ordered an extension of police custody. The maximum period that may elapse between the arrest of the suspect and his appearance before the examining magistrate is 3 days and 16 hours.

Pre-trial detention

117. Title VIII of Book 3 deals with pre-trial detention (remand in custody by order of the examining magistrate, further remand in custody by order of the district court and arrest by order of the district court). Article 100 specifies the cases in which pre-trial detention may be ordered:

> "1. An order for pre-trial detention may be made where there is a suspicion of:
>
> "(a) an indictable offence which, according to the statutory definition, carries a term of imprisonment of four years or more, or
>
> "(b) one of the indictable offences described in article 204, paragraphs 1 and 2, articles 236, 245, paragraph 3, 259, 266 and 298, paragraph 1, articles 321a, 334, 339, 339a and 366, paragraph 1, and articles 368, 404, 405, 410 and 431 of the Criminal Code.
>
> "2. The order may also be made if the suspect has no fixed address or place of residence in Aruba and he is suspected of an indictable offence that carries a term of imprisonment."

118. An order as referred to in article 100 may be made under article 101 only if there are "serious objections" against the suspect. In addition there should be a real risk that he will abscond or a belief that he constitutes a real threat to society (art. 101, para. 1). Article 101, paragraph 2, gives an exhaustive list of the grounds for a belief that a suspect constitutes a

real threat to society. In brief, there must have been a serious breach of the legal order or a danger of recidivism or perversion of the course of justice.

119. An order for remand in custody is valid for a maximum of eight days and may be extended once for a maximum of eight days. The orders are always made by the examining magistrate on the application of the public prosecutor (arts. 92 and 93). The examining magistrate hears the suspect either before making the first order or at the earliest opportunity thereafter (art. 92, para. 3). Where application is made for the remand in custody to be extended, the examining magistrate should question the suspect if he believes there are grounds for doing so (art. 93, para. 3).

120. Before the start of the trial, an order for further remand in custody (art. 95) or arrest and remand in custody (art. 96) is made by the examining magistrate on the application of the public prosecutor. Under article 98, paragraph 1, an order for further remand in custody or for arrest and remand in custody by the examining magistrate remains in force for a period to be specified by the examining magistrate but not exceeding 60 days (art. 98, para. 3). In principle, the trial should therefore start within 90 days of the date on which the order for pre-trial detention takes effect. In special cases, however, the order may be extended once for a maximum of 30 days (art. 98, para. 4).

121. If the order for further remand in custody or for arrest and remand in custody has been made at the trial, it remains in force for an indefinite period and until it is cancelled. The same applies if the trial has started within the period of 60 days referred to in article 98, paragraph 1 (art. 98, para. 2).

122. An order for pre-trial detention may be cancelled at any time. This is done either by the examining magistrate or by the court depending on the stage of the investigation (art. 103, para. 1). A suspect who applies for the first time for the remand to be cancelled is given the opportunity to be heard about the application. Thereafter the judge is no longer obliged to hear the suspect on such an application. Appeal too lies only once against an order for pre-trial detention. By way of compensation, article 98, paragraph 5, provides that the suspect is given the opportunity to be heard on each application under article 98 (art. 98, para. 5).

123. The Code also provides for the possibility of suspending and postponing pre-trial detention (arts. 111-118). Depending on the stage of the proceedings, either the judge who ordered the pre-trial detention or the court that tries (or last tried) the case is competent to hear such an application (art. 114).

124. Part 7, Title VIII, Book 3 of the Code deals with pre-trial detention in the case of final judgements. Paragraphs 1 and 2 of article 105 are intended, in brief, to prevent a situation in which the duration of the pre-trial detention exceeds the duration of any non-suspended custodial sentence that is imposed. In the event of a constraint measure which entails - or may entail - deprivation of liberty the pre-trial detention therefore continues. If the notice of summons and accusation is quashed (art. 105, para. 5) or if appeal

is lodged against acquittal on the facts or on a point of law (art. 105, para. 6), the trial (at first instance or on appeal) should start within three weeks of the final judgement.

125. If appeal is lodged after the final judgement at first instance, the orders referred to in articles 96 to 103 are made by the Joint Court of Justice (art. 108, para. 1). An order for further remand in custody or for arrest and remand in custody is valid for a period not exceeding five months and may be extended by the Joint Court of Justice once for a period not exceeding 30 days if there are good reasons for doing so. However, the Joint Court of Justice should assess within 30 days of appeal being lodged whether the cases and the grounds referred to in articles 100 and 101 are still present (art. 108, para. 3).

126. Article 108, paragraph 4, provides that an order for further remand in custody or for arrest and remand in custody applies for an indefinite period (until no appeal is possible) if it has been made during or after the trial or if the trial has started within the period specified in article 108, paragraph 3. This also applies if appeal in cassation has been lodged against the final judgement or if the Supreme Court has referred the case to the Joint Court of Justice in accordance with article 14 of the Cassation Regulations of the Netherlands Antilles and Aruba.

Preliminary judicial investigation

The structure of the preliminary judicial investigation

127. The Code is intended to reduce the role played by the examining magistrate as an extension of the investigating authorities. In fact, the examining magistrate has a passive role that consists of monitoring and checking. It is the public prosecutor who has complete charge of the preliminary investigation as a fully fledged dominus litis. At decisive moments his acts are checked or legitimated by the examining magistrate. This principle is reflected in article 155, paragraph 2; the public prosecutor has control of the entire preliminary investigation, without prejudice to the provisions concerning the intervention of the examining magistrate.

128. The passive function of the examining magistrate is evident, among other things, in relation to the use of pre-trial constraints. In principle, the examining magistrate cannot apply a constraint of his own volition either in the course of the preliminary investigation or otherwise; as a rule, he is dependent on an application by the public prosecutor. However, there are the following exceptions to this principle:

(a) The seizure of all objects liable to seizure (art. 130);

(b) An order for the surrender or transfer of any object liable to seizure (art. 131);

(c) An order for the surrender of “items of mail” insofar as they are obviously intended for or sent by the suspect (art. 140 in conjunction with arts. 127-129).

129. After the completion of the preliminary judicial investigation the examining magistrate may exercise his powers (including the power to impose constraints) of his own volition during any investigation order by the trial judge or the court sitting in chambers. In such circumstances there is no objection since the examining magistrate is acting as on the instructions of an independent court. The Code specifies four cases in which further investigation may be required:

(a) Further investigation after completion of the preliminary judicial investigation but before the trial starts (art. 274);

(b) Further investigation to determine whether a notice of summons and accusation is well-founded (art. 359);

(c) Referral back to the examining magistrate during the trial (art. 359);

(d) Referral back to the examining magistrate after resumption of the trial where the investigation has proved to be incomplete after due deliberation (arts. 390-391 in conjunction with art. 359).

130. The passive position of the examining magistrate is also apparent in relation to the application of constraints. An order for detention in police custody is made by the public prosecutor or Chief Public Prosecutor. Any extension is ordered by the public prosecutor. This extension is reviewed by the examining magistrate within 24 hours (art. 89, para. 1). The orders for pre-trial detention are always made by the examining magistrate on the application of the public prosecutor, but they are in the nature of an authorization. The public prosecutor does not have a duty to make use of this procedure.

131. Further evidence that the public prosecutor is in charge of the entire preliminary investigation is the fact that the use of a special constraint (see Book 3) is never dependent on the condition that a preliminary judicial investigation has been or will be instituted. Naturally, however, the authorization of the examining magistrate is always required for the application of very far-reaching constraints.

132. The examining magistrate still plays the pivotal role in interviewing and examining suspects, witnesses and experts. Only in the context of a preliminary judicial investigation can a suspect who is at liberty and any witnesses and experts be summoned to appear before the examining magistrate. Although the public prosecutor can appoint experts under article 190, only the examining magistrate can swear them in (art. 263), compel them to appear (art. 262, in conjunction with art. 247, para. 2) and impose a duty of secrecy on them (art. 271).

133. The scaled-down role of the examining magistrate in the investigation means that in his review role he can act as the appeal body for those cases in which the suspect wishes to challenge the actions of the public prosecutor.

The course of the preliminary judicial investigation: application and termination

134. If the public prosecutor considers that a preliminary judicial investigation is necessary in connection with an offence in accordance with the provisions of article 187, he applies to the examining magistrate for an investigation to be instituted immediately (art. 221). The suspect too can try to have an investigation started if he is in pre-trial detention and has not yet been committed for trial (art. 224, para. 2).

135. The termination of a preliminary judicial investigation is irrevocable (art. 272). Further investigation by the examining magistrate is possible only if he is so instructed by the court sitting in chambers or the trial judge.

136. The termination of a preliminary judicial investigation (in conjunction with the decision on whether or not to continue the prosecution) is regulated as follows. The examining magistrate terminates an investigation in two cases (art. 272). First of all, he terminates it if he believes that the investigation has been completed or there are no grounds for continuing it. In such cases the public prosecutor arranges within a month of the decision to terminate the investigation for the suspect to be committed for trial (art. 275 in conjunction with art. 279, para. 1) or to be sent a notice of discontinuation of prosecution (art. 279, para. 1). In the latter case the prosecution is terminated. Unless new evidence becomes known, the suspect can no longer be prosecuted in law for that offence (art. 179, para. 1, in conjunction with art. 282). In addition, every pre-trial detention order is cancelled by such notice (art. 283).

137. Second, the examining magistrate terminates a preliminary judicial investigation if the public prosecutor informs him in writing that the prosecution will be dropped. In such a case article 276 provides that the public prosecutor must inform the suspect immediately that he will not be prosecuted further in respect of the offence to which the investigation related (para. 1). In addition, every pre-trial detention order is cancelled at the moment of the decision to terminate the investigation (para. 2).

138. Under article 274, further investigation may be carried out by the examining magistrate after the termination of the preliminary judicial investigation and before the start of the trial.

The trial

Instituting proceedings

139. Usually proceedings are instituted by the service on the suspect of a notice of summons and accusation issued by the public prosecutor. The proceedings start at the moment of service (art. 284). Article 285 lists the requirements which the notice of summons must satisfy. The general requirement is that the suspect must reasonably be deemed capable of understanding the charge against him. Article 290 specifies that the period of the notice of summons should be seven days in normal cases. Until the

trial has started, the public prosecutor can cancel the notice of summons (art. 291). Articles 299-301, which are in a separate part, deal with the institution of appeal proceedings.

Judicial measures in cases of urgency

140. What is of special significance is that the public prosecutor has the power in criminal proceedings to apply to the court on the basis of considerations relating to criminal procedure for measures that are not regulated by law. In this way the public prosecutor is able to respond adequately in the pre-trial period to a breach of the legal relationship between the parties concerned caused by the offence. For example, in some circumstances it may not be possible to arrange for the immediate termination of the situation constituting the offence or to exclude the possibility of a repetition of the offence (by pre-trial detention or by conditions imposed on suspension of such detention). The public prosecutor can also act more effectively to deal with acts of the suspect which improperly disrupt the balance of the procedural system of checks and balances (e.g. by unlawful influencing of the parties to the proceedings). Examples of measures for which application may be made by the public prosecutor, as cited in the explanatory memorandum to the bill, are a ban on committing any further offence and, in special cases, house arrest.

Article 7

141. Under articles 2 to 8 of Aruba's Criminal Code and article 5 of the bill to implement the Convention against Torture, Aruba has jurisdiction over crimes of torture no matter where and by whom they are committed. This means that the criminal justice authorities can prosecute the perpetrator even if the offence has been committed elsewhere, provided that the perpetrator is in Aruba. The obligation to prosecute in such cases - an obligation which follows directly from article 7 of the Convention - can therefore be fulfilled.

142. In such a case the ordinary rules of criminal procedure that are applicable under Aruba's Code of Criminal Procedure apply. It should be noted with regard to article 7, paragraph 3, of the Convention that the rules of the European Convention for the Protection of Human Rights and Fundamental Freedoms are - in any event insofar as they are relevant - directly applicable.

Article 8

143. Under article 3, paragraph 1 (h), of the Charter for the Kingdom of the Netherlands extradition is a Kingdom matter. This means that Aruba and the Netherlands Antilles cannot regulate the subject of extradition independently. The existing legislation on extradition consists of the Netherlands-Antilles Extradition Order (published in the Official Bulletin of the Netherlands Antilles, 1983 volume, No. 84), i.e. an Order in Council of the Kingdom. The surrender of war criminals is another subject that is regulated in the case of Aruba and the Netherlands Antilles by an Order in Council adopted by the Government of the Kingdom, namely the Surrender of War Criminals (Netherlands Antilles and Aruba) Order (published in the Official Bulletin of the

Netherlands Antilles, 1954 volume, No. 115). It would be advisable to include the Convention against Torture in the list of conventions given in article 1 of the Order that can serve as a ground for extradition.

144. The Netherlands Antilles Extradition Order is also due for review, and discussions on this subject are currently in progress between the parties. Although this Order does not expressly provide that extradition can take place only pursuant to a convention, it follows from article 2, paragraph 3, of the Constitution of the Kingdom of the Netherlands that extradition should be based on a convention. Since this requirement is not elaborated in the Netherlands Antilles Extradition Order, this order - unlike the Netherlands Extradition Act - does not contain a summary of conventions that can serve as a basis for extradition.

Article 10

145. Since obtaining its separate constitutional status in 1986 Aruba has regulated independently all matters relating to the police and the prison system. One result of this has been increased emphasis on the correct treatment of prisoners and arrested persons in accordance with the provisions of the Constitution of Aruba safeguarding human rights.

Aruba's police force

146. Police training from the basic level upwards deals with the subject of universal human rights, including the rights of suspects and persons under arrest. The training course for police certificate I includes lessons on the theme of human rights and police ethics. This is also a compulsory subject at levels II, III and IV.

147. As regards in-service training for the police, the subject of human rights will also be covered in a basic skills course due to start shortly. This will take the form of workshops on the treatment of persons under arrest, and will be given on the spot by various bodies including the Aruban branch of Amnesty International. The police force thinks it important that the course should be tailored as far as possible to meet the practical requirements of the job. The basic skills course is intended to provide training for the police in those areas not otherwise covered in police training.

148. The guidelines relating to police treatment of persons under arrest are laid down in the Code of Criminal Procedure and, more specifically, in police orders. These guidelines describe in some detail the procedures for arrest, custody, interrogation and treatment of prisoners.

Aruban Correctional Institution (KIA)

149. During their training the staff of the KIA are taught about the rights of prisoners and human rights in general. Among the subjects dealt with are criminal law, the law of criminal procedure, introduction to law, prison law, first aid, conflict resolution, use of firearms, internal prison rules, social skills, human rights and ethics, sport and self-defence. It is intended in

the future to alter the KIA training decree so that the staff receive retraining and further training. The KIA currently employs two social workers to assist and counsel the inmates, and also to train the staff.

150. It is planned to change the training in the near future to provide separate courses for two distinct jobs, namely a course for prison officers whose duties will consist of guarding, looking after and counselling the prisoners and another for prison guards who will be explicitly responsible for the security of the building or the staff and for the transport of prisoners. In anticipation of an amendment to the training decree, 23 people are now being trained as prison officers.

Articles 11 and 15

151. The general rule of conduct is that prisoners should be treated with the utmost care. A police officer is obliged to advise a suspect of his rights both at the time of the arrest for a criminal offence and at the start of the interview. The internal hierarchy of the police and the division of responsibilities and powers serve in general as a guarantee that a check is kept on the proper treatment of the suspects and prisoners. In addition, any dysfunctional behaviour of police officers is regularly raised in job performance interviews.

Interview rules

152. The Code of Criminal Procedure contains regulations that expressly govern interviews of suspects (see paras. 111-113 above).

153. Article 81, paragraph 1, of the Code of Criminal Procedure also provides that persons who are held in police custody should not be subjected to any limitations other than those that are absolutely necessary for the purpose of their detention. An investigating official should also inform a suspect before his interview that he is not obliged to answer questions (art. 82, para. 1 (b), Code of Criminal Procedure).

154. The official conducting the interview should also refrain from doing anything intended to obtain a statement that cannot be said to have been freely made. It follows that he must refrain from assault, mental or physical coercion, promises, etc. Failure to observe this regulation means that the investigation is void and that the trial judge may refuse to accept the official report containing the results of the investigation as evidence of the offence with which the suspect is charged. The results obtained in this way may be treated by the judge as evidence unlawfully obtained. Unless there is sufficient other evidence available that has been lawfully obtained, the accused will be acquitted.

155. The first safeguard which a suspect has is that he must be informed of his rights at the time of his arrest (art. I.5, para. 3 (b) of the Constitution of Aruba). Furthermore, a suspect has the following safeguards under the new Code of Criminal Procedure. Article 50, paragraph 1, provides that the suspect has the right to refuse to answer questions. The principle underlying this rule is that no one can be obliged or forced to incriminate himself. This is one of the basic principles of criminal procedure. The

suspect is normally advised of his rights at the moment when he is taken to the place of interview and in any event before the interview starts (art. 82, para. 1).

156. In addition to the oral notification referred to in paragraph 1 of article 82, the suspect is given a form stating his rights in a language he understands (art. 82, para. 2). The model of the form is adopted by order. The form is always available in at least the following languages: Dutch, Papiamento, English and Spanish. If there is serious doubt as to whether a suspect has understood the notification, the interview does not start until the assistance of an interpreter has been obtained (art. 82, para. 4).

157. Other safeguards are provided for by article 48, paragraph 3, of the Code of Criminal Procedure. This article gives the suspect the right to legal assistance. The intention of the legislator is that a suspect should be advised of his rights before the start of the first interview (police interview). If the suspect states that he wishes to exercise this right and this decision is the product of his free and rational choice, the interview must be postponed until counsel has talked to the suspect. An exception to this rule is possible only if the investigation does not admit of any delay or it would not be reasonable to await the arrival of counsel.

158. **Article 49 of the Code of Criminal Procedure** gives the suspect the right to legal assistance during the interview. A suspect is entitled to obtain legal assistance in all cases in which he is interviewed in accordance with the provisions of the Code. Counsel is given the opportunity to make remarks during the interview. An exception to this is article 48, paragraph 4: counsel is not entitled to be present during the interviews conducted by investigating officials - these are the police interviews.

Article 12

159. The Public Prosecution Service investigates any suspected cases of torture. The head of the Public Prosecution Service - the Procurator General - is empowered to issue instructions to officials charged with police duties to prevent, detect and investigate indictable or summary offences if he considers this to be necessary in the interests of justice.

160. The National Criminal Investigation Department can be assigned to investigate criminal acts performed by police officers and special officials with police powers. The National Criminal Investigation Department was established by ministerial decision of 23 February 1993. If the Chief Public Prosecutor considers it necessary, he may request the Procurator General to order an investigation by the National Criminal Investigation Department.

161. The general criterion is that the National Criminal Investigation Department is used in cases where there must be no doubt whatever about the objectiveness of the investigation. The objectiveness of such an investigation may be assumed since the National Criminal Investigation Department is relatively remote from the police officers and officials with police powers. The Department is called in to investigate cases of the use of force which are reported to the Public Prosecution Service in accordance with

the rules of the National Decree on the Use of Force and Safety Searches. This applies in any event where the force employed causes death or serious physical injury.

162. A police officer is authorized to use force against persons or property in the lawful discharge of his office or duties, although this is subject to strict rules. For example, the use of force must be justified by its aim, taking account of its dangers, and it must not be possible to achieve the aim in some other way (art. 3 of the National Police Ordinance, AB 1988, No. 18). Moreover, the use of force must be preceded wherever possible by a warning (art. 2). The use of force is regulated in greater detail in a separate national decree (the Decree on the Use of Force and Safety Searches by the Police; AB 1988, No. 60).

163. Under article 11 of the National Decree on the Use of Force and Safety Searches by the Police, every police officer who employs force against persons in the course of his duties must immediately report this and the reasons for and consequences of the force to his superior or department head, who must then immediately inform the head of the police force. If the force employed by the officer has resulted in physical injury of more than a minor nature and in all cases in which a firearm has been used, the public prosecutor must be notified by or on behalf of the head of the police force, first of all orally without delay and thereafter in a written report within 48 hours (art. 11, para. 6, of the National Decree on the Use of Force and Safety Searches by the Police). Whether the police force itself or the National Criminal Investigation Department is charged with the investigation depends on the gravity of the offence.

164. Investigations of offences by staff of the Aruban Correctional Institution (KIA) are governed by the same rules as investigations concerning police officers and officials with special police powers. Cases involving the use of force should also be dealt with in the same way, although if the force has not caused death or serious physical injury and no injury has been caused by the use of firearms the investigation will in principle be carried out by the Aruban Police Force. If an arrested person or prisoner dies while in the custody of the KIA the investigation is conducted by the National Criminal Investigation Department.

165. The Board of Visitors is responsible for ensuring that the rules are properly observed within the KIA and has access to the KIA at all times. Once a month a representative of the Board is present to hear the complaints of the inmates. Complaints regarding prison guards are then discussed with the governor. If necessary, the Board reports the matter to the Minister of Justice. Neither the governor nor the Board is competent to impose sanctions. Disciplinary measures are taken in Cabinet and then approved by the governor.

Article 13

Suspect and counsel

166. Article 47 of the Code of Criminal Procedure states:

"1. A suspect is a person who is reasonably suspected on the basis of facts and circumstances of being guilty of a criminal offence.

"2. During a prosecution a suspect is a person against whom the prosecution is brought."

The facts and circumstances referred to in paragraph 1 should provide grounds for a reasonable suspicion of guilt: the view of the investigating official is therefore not necessarily decisive. In addition, the suspicion of guilt should be limited as far as possible to one or more given persons: an abstract indication of a widely defined group of people cannot as a rule provide an acceptable ground in law for suspicion of a criminal offence.

167. The Code provides a system of early intervention. Each suspect who is detained in police custody is assigned counsel as soon as the detention order is made (art. 62, para. 1). Depending on the financial resources of the suspect the assignment is made either at the expense of the suspect or free of charge (or partially free of charge) (art. 61). If no order for police custody is made, a person suspected of an indictable offence who has been found to lack financial resources is assigned counsel at his request as soon as the prosecution starts (art. 63).

168. A suspect is entitled to inspect the case documents. As soon as the preliminary judicial investigation has been concluded or, if there has been no investigation, as soon as the suspect has been committed for trial, the suspect's right to view the case documents may no longer be subject to restrictions (art. 53). In principle, the above also applies if any investigation has not resulted or will not result in a prosecution (art. 51, para. 3). During the preliminary investigation the public prosecutor may refuse to show the suspect certain case documents if this is definitely necessary in the interests of the investigation (art. 51, para. 1). The documents referred to in article 52 may never be withheld from the suspect.

169. Finally, the Code contains a number of rights inspired by the European Convention on Human Rights. For example, articles 55-56 of the Code lay down the right to a hearing within a reasonable time as guaranteed in article 6, paragraph 1, of the European Convention, and article 318, paragraph 3, of the Code confers the right to obtain the attendance and examination of witnesses for the defence on the same conditions as witnesses for the prosecution. The rules for bringing the suspect before the examining magistrate have also been brought into line with article 5, paragraph 3, of the European Convention and the way in which the European Court of Human Rights interpreted the expression "brought promptly" in the Brogan judgement.

Judicial measures and urgent necessity

170. People whose interests are directly affected by a criminal case may apply to the criminal courts for an "interim injunction". The Code makes a special effort to ensure that interests that have been violated by the offence receive balanced treatment. Naturally, the legislator was not able to make provisions to cover every eventuality in practice. This is why the interim injunction procedure in criminal cases may provide a remedy. If an interested party needs a more specific measure for which the law makes no provision, he

can take action independently. For example, the victim may request a restraining order in cases in which the suspect is not or cannot be remanded in custody (under such an order the suspect is barred from entering certain streets or neighbourhoods). In addition, a third party with an interest in the case could request leave to inspect the case documents with a view to legal action to be instituted by him.

Judicial impartiality

171. Article 304 of the Code has been drafted to take account of the De Cubber and Hauschildt cases heard by the European Court of Human Rights, both of which concerned a trial judge who had previously been involved in the preliminary investigation. Article 304 provides as follows:

> "A judge who has carried out any investigation as examining magistrate or taken any decision in the case shall not take part in the trial, on pain of nullity."

172. As regards an examining magistrate who has taken any decision in the preliminary investigation, the Supreme Court has ruled that the mere involvement of a judge in decisions on pre-trial detention does not affect his impartiality. However, the situation is different where a decision in the preliminary investigation deals in such depth with the question of guilt that the suspect's fear that the judge is not impartial is objectively justified. This was the case in the Hauschildt case: according to the European Court of Human Rights there is too little difference between the question of whether a "particularly confirmed suspicion" exists with regard to a suspect (a requirement in Denmark for the application of pre-trial detention) and the question of guilt. As the Code also excludes as trial judge a person who has taken any decision in the preliminary investigation, this in any event avoids discussion of the question of whether the pre-trial detention requirement of "serious objections" does not in some cases go just as deeply into the question of guilt.

Anonymous witnesses

173. Although the legislator recognizes that the admission of statements by anonymous witnesses may prejudice the fairness of the trial, the Code nonetheless contains an arrangement for witnesses who have been threatened. The legislator justifies the restriction of the suspect's right of examination on the grounds that it is not acceptable in a State governed by the rule of law that the evidence - and the judgement of the court based on it - should be affected by the threat of violence. The European Convention on Human Rights (in particular art. 6, para. 3, opening words and (d)) does not exclude evidence obtained by means of the statement of an anonymous witness made in the preliminary investigation. In each case the European Court of Human Rights has stated at the outset that the provision of rules about the admissibility of evidence is first and foremost a matter of national law and that the evaluation of the evidence is generally a matter for the national courts. Nonetheless, a number of minimum requirements can be inferred from the decisions of the European Court of Human Rights, particularly in the Kostovski and Doorson cases. These conditions are as follows:

(a) The interests of the defence must be weighed in the appropriate cases against those of the witnesses and victims summoned to give evidence; this may lead to a witness being heard anonymously; the suspect should always be given a sufficient and proper opportunity to examine the anonymous witness and challenge his testimony;

(b) The judge should satisfy himself of the identity of the witnesses and form an opinion about their reliability;

(c) A conviction may not be based solely or to a decisive extent on the testimony of anonymous witnesses.

174. In view of the above the Code of Criminal Procedure contains a strict rule governing the conditions in which an interview can be conducted anonymously. These may be summarized as follows. First of all, the witness in question must have been seriously threatened in connection with the statement to be made by him (art. 261, para. 1). This requirement is elaborated in article 261, paragraph 2:

> "A serious threat within the meaning of paragraph 1 may be assumed if:
>
> "(a) the witness may consider that a threat exists to such an extent in respect of the statement to be made by him that it is reasonable to fear for the life, health or social functioning of the witness or another person;
>
> "(b) the witness has indicated that on account of this threat he will not otherwise make a statement; and
>
> "(c) there is good reason to suppose that the witness will not be able to appear at the trial for that reason."

175. Second, the objections of a witness who wishes to have complete anonymity are checked by the examining magistrate. The latter should list these objections in an official report. He also states in the official report whether he considers the objections to be well founded (art. 261, para. 4).

176. Third, there is the criterion of proportionality: a witness may not be examined anonymously if the indictable offence in question is not one for which pre-trial detention is permitted (art. 261, para. 3).

177. Fourth, the examination of an anonymous witness is entrusted to the examining magistrate, who thereby provides the judicial safeguard for the collection of evidence in the preliminary investigation. In urgent cases, however, the witness may also be examined by the investigating official if it is not possible to await the examination by the examining magistrate (art. 261, para. 8). An example would be very special cases in which time is of the essence and the witness must be heard immediately (e.g. because he or she is going abroad). The safeguards which apply to an examination by the examining magistrate should then be observed as far as possible.

178. Fifth, article 161, paragraph 4, contains a number of regulations relating to the course of events during the examination. The examining magistrate ensures that the witness cannot be recognized. In principle, the suspect and his counsel may attend the examination. In exceptional cases they (and hence the public prosecutor too) are excluded from the examination and are only given the opportunity to submit written questions.

179. Finally, the anonymous witness should be sworn in by the examining magistrate (art. 261, para. 6). This rule is important in relation to article 335. Under this article, a statement made under oath to the examining magistrate by a witness who cannot appear at the trial may be deemed to have been made at the trial provided that it is read out in court.

180. To ensure that the identity of an anonymous witness is not disclosed, article 252, paragraph 2, provides for a right to refuse to give evidence. Article 251, paragraph 1 (the right to refuse to give evidence in one's official capacity), applies by analogy to judges, the members of the Public Prosecutions Service and other persons familiar with the identity of a witness who has been examined on the basis of the provisions of article 261.

181. A suspect may oppose the “deployment” of an anonymous witness at the trial. The basic premise is that it is the trial judge who ultimately decides whether the testimony of an anonymous witness will be allowed in evidence (Explanatory Memorandum, p. 114). To enable the judge to make an informed decision on this point, he is given the power in article 338, paragraph 1, to examine the witness in private. This power allows the trial judge to form an opinion independently of whether the procedural and substantive criteria of article 261 (regarding admissibility and reliability) have been fulfilled.

182. If the trial judge takes the same view as the suspect and sees no reason for the witness to remain anonymous, two courses of action are possible under paragraph 2 of article 338. First, he may direct that the witness will be heard anew by the examining magistrate, but on this occasion not anonymously. However, the public prosecutor can prevent this by withholding his consent. If it is immediately clear that the public prosecutor will not give consent or if the unreliability of the witness is of such a kind that even an examination which is not anonymous will not yield usable evidence, the second course of action becomes applicable. In such cases the court may rule that the statement of the relevant witness will not be allowed as evidence.

183. If the trial judge considers that the conditions of article 261 have been fulfilled, he maintains the anonymity of the witness. The official report then continues to be part of the documents. He may possibly decide that the witness should be examined again by the examining magistrate on the basis of the questions to which he (the trial judge) wishes to have an answer (art. 338, para. 3). Further investigation by the examining magistrate is also possible with a view to rectification of any procedural errors (art. 338, para. 4).

184. A separate provision has been made in accordance with article 261, paragraph 7, for anonymous witnesses who have been heard not by the examining magistrate but by other officials (for example the police). An investigation can be instituted on the application of the public prosecutor into whether the

objections to disclosure of the identity of the witness are well founded. The judge may examine the witness for this purpose in accordance with paragraph 1 of article 338. Before hearing the witness, he gives the suspect or his counsel the opportunity to make observations (art. 339, para. 1). Following the examination the judge decides whether the witness is entitled to claim anonymity. If the decision is negative, article 339, paragraph 2, applies: the witness is not examined anonymously, provided that the public prosecutor gives consent for this. If the judge considers that the claim to anonymity is justified, he decides that the witness may be examined by the examining magistrate as an anonymous witness and can supply a list of questions which he wishes to have answered (art. 339, para. 3). The purpose of article 364, paragraph 5, is to ensure that where a trial is resumed after a stay a threatened witness continues to receive the protection he has been promised.

185. Book 5, Title IV, Part 4 (Evidence) contains the final provision governing anonymous witnesses. According to article 385, paragraph 2, the statement of an anonymous witness cannot be used as evidence unless the witness has been examined in accordance with the provisions of paragraph 4 of article 261. In addition, the statements of anonymous witnesses can be used as evidence only if they are largely corroborated by other evidence.

The injured party

186. An injured party may join as a party to criminal proceedings at first instance for a claim not exceeding 50,000 guilders. It is also necessary that the claim should not have been submitted to the civil courts and that it is of such a nature that it is suitable for decision in the criminal proceedings (art. 374, para. 1). A special feature of this arrangement is that under article 374, paragraph 2, the injured party may also join proceedings in respect of a criminal offence that is disposed of ad informandum. The joinder occurs at the trial (see art. 374, para. 2) and may not occur for the first time on appeal (art. 374, para. 4).

187. A victim may register as an injured party even during the preliminary investigation (art. 206, para. 1). As a consequence, an injured party who requires assistance and support as a result of the offence will receive the requisite counselling (art. 206, para. 4). In addition, injured parties can, under article 206, paragraph 3, arrange to be informed by the public prosecutor of his decision on whether or not to prosecute. If the case is prosecuted, the public prosecutor keeps the injured party informed of developments of importance to the latter in the further proceedings. If the case is not prosecuted, he informs the injured party of his right to complain about the non-prosecution (art. 209).

188. Even before the trial, namely from the time when the proceedings are instituted, both the injured party and his lawyer may inspect the case documents at the court registry on condition that this does not hamper the progress of the case (art. 376, para. 1). Under article 376, paragraph 4, the arrangements concerning the inspection of case documents (arts. 51-54) apply by analogy.

189. In order to support its claim, the injured party or his lawyer may submit documents (art. 377, para. 1), ask the presiding judge for leave to

introduce witnesses and experts (art. 377, para. 2) and also put questions to each witness and expert, provided that they relate to the damage suffered or the amount of the damage (art. 378, para. 1). Finally, the injured party may explain (or have explained) his statement of claim after the public prosecutor has made his closing speech. This is also possible under article 379 after the public prosecutor has made a second speech in accordance with the article 353, paragraph 3. The judge rules on the claim of the injured party at the same time as giving judgement in the criminal case (art. 380, para. 1). The claim will be admissible only if the case ends in a conviction (art. 380, para. 2).

Article 14

190. The help to victims provided by the Public Prosecutions Service and the police must satisfy the following criteria:

(a) The victim must be dealt with correctly and where necessary on a personal basis;

(b) The victim should be supplied with information as quickly as possible, and this information should also be clear and relevant;

(c) The victim should be assisted in making maximum use of the right to claim compensation in the course of the criminal proceedings; this may be compensation for pecuniary and non-pecuniary damage.

191. The Code sets out to emphasize the judicial and hence impartial role of the officials charged with administering justice in the various stages of the criminal proceedings.

Decision on whether or not to prosecute

192. If the public prosecutor considers on the basis of the police investigation that the suspect must be prosecuted, he takes the necessary action as quickly as possible (art. 207, para. 1). The Code codifies the expediency principle: the public prosecutor may decide not to prosecute for reasons connected with the public interest. The public prosecutor may attach conditions to such a decision and must take special account of the interests of the injured party (see art. 207, para. 2). For example, the condition may be an obligation to pay compensation or to repair what has been damaged.

193. If there are considered to be grounds for prosecution, the public prosecutor decides whether the case is suitable for extrajudicial disposal (art. 208, para. 1). The article provides a statutory basis for the power of the public prosecutor to enter into an agreement (on a voluntary basis) with the suspect for the performance of community service by the latter. In exchange, the public prosecutor agrees not to press charges. This article does not in fact exclude the possibility of another special condition being imposed on the suspect in addition to the community service, for example an obligation to indemnify the victim.

Judicial measures in cases of urgency

194. Where a criminal court convicts a suspect, it may impose a pecuniary penalty as an extra guarantee of performance of the sentence. If such a penalty is not paid, the court may, on the application of the Public Prosecutions Service, order that the offender be detained for such period as it may determine (art. 43, para. 7).

Compensation after application of pre-trial constraints

195. The compensation scheme applies to all pre-trial constraints. Article 178, paragraph 1, refers to damage suffered as a result of application of a constraint. Damage includes any injury not consisting of pecuniary damage (art. 178, para. 3).

196. Since article 178, paragraph 1, refers to compensation for a person who has suffered damage, such person may be not only the suspect (or former suspect) but also a third party. The legislator is thinking in this connection, for example, of a third party whose home has been searched, a witness who has been wrongly detained for refusing to answer questions, a victim who was originally treated as a suspect and a person whose privacy has been violated as a result of the tapping of a suspect's conversations. The arrangement is intended to be exclusive, and it therefore precludes any recourse to the civil courts (art. 182).

197. The arrangement distinguishes between damage suffered as a result of the unlawful application of a pre-trial constraint and that suffered as a result of its lawful application. In the former case there is a right to compensation and in the latter case compensation may be granted if this is reasonable and fair. Whether the application of the constraint was lawful or unlawful is assessed at the time when the constraint was applied (art. 187, para. 2).

198. Under article 178, paragraph 1, a right to compensation exists when application of a constraint was unlawful (for example because the manner of application was out of proportion to the offence in question).

Annex

NATIONAL ORDINANCE in connection with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (National Ordinance implementing the Convention against Torture)

BILL

IN THE NAME OF THE QUEEN!

THE GOVERNOR OF ARUBA

Whereas:

it is necessary to make certain provisions under the criminal law in connection with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted in New York on 10 December 1984 (Treaty Series 1985, 69);

Has, after hearing the Advisory Council and after consultation with Parliament, adopted the following national ordinance:

Article 1

1. Where a public official or other person in the service of the authorities, acting in the course of his duties, assaults a person who has been deprived of his liberty with a view to obtaining information or a confession, punishing him, or causing him fear or coercing him into doing or permitting something or out of contempt for his claim to human dignity, such acts shall, if they are capable of achieving their intended aim, be construed as torture and carry a term of imprisonment not exceeding fifteen years.

2. Intentionally causing a state of great fear or other form of serious mental anguish shall be equated with assault.

3. If the offence results in death, the perpetrator shall be sentenced to life imprisonment or to a determinate sentence not exceeding twenty years.

Article 2

The following persons shall be liable to the same sentences as those specified for the offences referred to in the previous article:

(a) a public official who, by one of the means referred to in article 49, paragraph 1 (b), of the Criminal Code of Aruba (AB 1991 No. GT 50), incites the commission of the form of assault referred to in article 1 or intentionally permits another person to commit this form of assault;

(b) a person who commits the form of assault referred to in article 1, if a public official has, by one of the means referred to in article 49, paragraph 1 (b), of the Criminal Code of Aruba, incited in the course of his duties the commission of the offence or has intentionally permitted it.

Article 3

Articles 44 and 45 of the Criminal Code of Aruba do not apply to the offences referred to in articles 1 and 2.

Article 4

The offences made punishable in articles 1 and 2 are indictable offences.

Article 5

The criminal law of Aruba is applicable to everyone who commits one of the indictable offences described in articles 1 and 2 of this national ordinance outside Aruba.

Article 6

1. This national ordinance shall take effect on the day after that of publication of the Official Bulletin of Aruba in which the announcement is made.

2. This national ordinance may be cited as the National Ordinance implementing the Convention against Torture.

Issued at Oranjestad

The Minister of Justice
