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the Prevention of Crime and the
Treatment of Offenders

1950 Meeting

DETENTION OF ADULTS PRIOR TO SENTENCE

Observations and comments submitted by the Division of
Human Rights with reference to the human rights
programme of the United Nations

Introductory remarks

Personal liberty or freedom is an essential human right. Detention and arrest are among the most serious attacks on this right. But imprisonment is a penalty normally attached to most offences and is generally regarded as a civilized and fully admissible form of punishment. Furthermore, in order to ensure the effective prevention and punishment of crime, it is sometimes necessary to detain an individual either for purposes of investigation or as a precautionary measure to make sure that the ends of justice are not defeated. In the case of detention prior to sentence, the purpose of which is not punishment but prevention, it is particularly difficult but all the more necessary to strike a just balance between security in personal freedom on the one hand and the legitimate requirements of the administration of penal justice on the other.

The primary goal is to ensure that no one can be detained or imprisoned except in accordance with the existing provisions of penal law which should not be repugnant to the standards set by the United Nations and that the power extended to the authorities for the prosecution of offenders and the decision on preventive measures be limited to the bare minimum. To achieve this goal, any

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action of the authorities, whether executive or judicial, which may affect personal freedom and security must be carefully hedged about with guarantees and limitations.

To protect the right to freedom by setting out such guarantees and limitations has been and still is one of the main objectives of the organs of the United Nations in the field of human rights.

Both the Universal Declaration of Human Rights, adopted by the General Assembly of the United Nations on 10 December 1948, and the Draft International Covenant on Human Rights, still under discussion^{1/}, devote a large place to such problems as the grounds and conditions of detention, the treatment of detained persons and the guarantees of the rights of defence.

I. ARREST AND DETENTION PRIOR TO SENTENCE IN THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

Article 3 of the Universal Declaration of Human Rights states that "Everyone has the right to life, liberty and security of person".

With regard to liberty, this article establishes a fundamental principle which is defined and clarified in the succeeding articles dealing with such matters as prohibition of slavery, equality before the law, guarantees against unjust arrest, detention and exile, right to a fair trial, right to presumption of innocence until proof of guilt, right not to be subjected to torture, inhuman or cruel treatment or punishment, and others.

1. Grounds and conditions of arrest and detention

The right of the individual to be protected against arbitrary deprivation of liberty is defined in article 9 of the Declaration which states:

"No one shall be subjected to arbitrary arrest, detention or exile."

This extremely brief statement is the result of extended debates in the Commission on Human Rights (2nd and 3rd sessions) and in the Third Committee of the General Assembly (3rd session). Significantly enough, the delegates at these meetings were in general agreement as to the purpose of the provision and as to

^{1/} At the time of writing these observations and comments, the General Assembly is considering policy decisions concerning the Draft Covenant. Its final form, including that of the provisions discussed in this paper, will be fundamentally affected by the decisions of the General Assembly.

the rights they intended to protect: they wanted everyone to have the right to test the legality of his arrest; they wanted no one deprived of his freedom except in cases and according to procedures prescribed by prior legislation. The discussion centred mainly around the form to be given to the article. In this respect, it is interesting to compare the text adopted by the Commission on Human Rights at its second session with the final text of the article; the former reads as follows:

"No one shall be deprived of his personal liberty or kept in custody, except in cases prescribed by law and after due process. Everyone placed under arrest or detention shall have the right to immediate judicial determination of the legality of any detention to which he may be subject and to trial within a reasonable time or to release."

At the 3rd session of the Commission, it was pointed out by the Chairman that this text contained four main features, as follows: (1) no arrest or detention except in cases prescribed by law; (2) after due process; (3) immediate judicial determination of the legality of detention; (4) trial within a reasonable time or release. While no opinion was expressed in the Commission tending to exclude any of these features from the scope of the provision, the majority felt that the Declaration should express general principles and not deal with measures of application or set forth details for which the proper place was the international Covenant. For these reasons, the abbreviated form of the article was found preferable.^{1/}

This point of view was subsequently adopted by the Third Committee and by the plenary session of the General Assembly which adopted the final text of article 9 of the Declaration by 43 votes to none, with one abstention.

2. Treatment of persons detained prior to sentence

The right to life, liberty and security of person (article 3 of the Declaration) includes by implication the right to physical, moral and intellectual integrity of the human being.

Torture combines in itself attacks on physical integrity when it harms the body and attacks on personal liberty in general when applied in order to extort confessions and statements; mental torture, psychological cruelties, any form of inhuman treatment or any degrading measures constitute violations of the moral and intellectual integrity of the individual.

^{1/} E/CN.4/SR.54.

Article 5 of the Universal Declaration of Human Rights states that:

"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

There was general agreement in the Commission on Human Rights that a clause prohibiting torture and cruel or degrading treatment or punishment was needed in the Declaration^{1/}. The successive drafts of the provision vary little; but while in the draft of the 2nd session of the Commission on Human Rights, the text became paragraph (3) of article 7 dealing with guarantees concerning legal proceedings and penal law, it was made into a separate article at the 3rd session.

As was pointed out by the Chilean representative to the Drafting Committee at its second session, this article applies both to persons detained in preventive custody and to convicted persons^{2/}. Clearly, if torture and inhuman, cruel or degrading measures are not allowable even as penalties, they are much less so when they have no connexion with punishment and are inflicted upon persons under arrest or suspicion. Article 5 of the Universal Declaration of Human Rights implies that such brutal treatment must be prohibited, whether it occurs as part of the proceedings or in the form of police measures or penalties imposed by judicial sentence.

3. Right to presumption of innocence until proof of guilt; guarantees of the right of defence

The right to be presumed innocent until proved guilty as well as the right to all the guarantees for the defence at a public fair trial are part of the right of everyone to liberty and security of person (article 3 of the Universal Declaration of Human Rights). They find their expression in article 11, paragraph 1, of the Declaration which states:

"Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence."

There was general agreement in the Commission on Human Rights concerning the principle that everyone charged with a criminal offence must be presumed innocent until proved guilty according to law. The discussion centred

^{1/} E/CN.4/AC.1/SR.3 & 10.

^{2/} E/CN.4/AC.1/SR.40

59

exclusively around the question whether exceptions to the rule of publicity of trials should be incorporated in the text; the majority decision was against it^{1/}.

During the debates before the General Assembly, several delegates emphasized the great importance of the sacred rights of defence and that of the presumption of innocence^{2/}.

After a brief debate concerning the proposed insertion of exceptions to the rule of publicity of criminal trials, the text previously adopted by the Commission on Human Rights became the final text of article 11, paragraph 1 of the Declaration.

II. ARREST AND DETENTION PRIOR TO SENTENCE IN THE DRAFT INTERNATIONAL COVENANT ON HUMAN RIGHTS

The problem of detention prior to sentence is treated in the Draft Covenant with more detail than in the Universal Declaration of Human Rights; members of the Commission on Human Rights felt that the Covenant should "go further than the Universal Declaration of Human Rights and have a precise legal meaning"^{3/} and that its first objective was to punish the most serious infringements to liberty^{4/}.

Articles 6 and 7 of the Draft Covenant deal with the grounds and conditions of arrest and detention, while article 4 prohibits torture and cruel, inhuman or degrading treatment or punishment. Article 10, paragraph 2, proclaims the right to be presumed innocent until proved guilty and spells out the guarantees of the defence. An additional "Article on persons deprived of liberty and on penitentiary system", has been proposed by France at the 6th session of the Commission on Human Rights, on which no final action has been taken.

^{1/} E/CN.4/SR.55 and 56.

^{2/} Report of the Third Committee of the General Assembly, 3rd session, page 266.

^{3/} E/CN.4/SR.147, page 3.

^{4/} E/CN.4/SR.147, page 18 (France).

1. Grounds and conditions of detention prior to sentence

Article 6 of the Draft Covenant^{1/} provides as follows:

- "1. No one shall be subjected to arbitrary arrest or detention.
2. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
3. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
4. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. Pending trial, detention shall not be the general rule, but release may be subject to guarantees to appear for trial.
5. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided without delay by a court and his release ordered if the detention is not lawful.
6. Anyone who has been the victim of unlawful arrest or deprivation of liberty shall have an enforceable right to compensation."

The debates at the 6th session of the Commission on Human Rights centred chiefly around paragraphs 1 and 2 of the article and the meaning of the word "arbitrary", as applied to "arrest" and "detention".

In the view of the minority, the term "arbitrary" did not constitute any real safeguard against arbitrary action^{2/} and was therefore inadequate^{3/}. This group proposed to incorporate in article 6 a list of cases "where the State could legally infringe individual liberty"^{4/}, thus implying that all cases of arrest and detention other than those listed would be outlawed by the Covenant. The proposal was rejected on the ground that no exhaustive list of exceptions could be made^{5/} and that a general limitation clause, such as provided by paragraph 2 of the article, was preferable.

^{1/} Annex I to the Report of the 6th session of the Commission on Human Rights, page 16.

^{2/} E/CN.4/SR.146, page 14 (Australia).

^{3/} E/CN.4/SR.147, page 8 (U.K.).

^{4/} E/CN.4/SR.144, page 12 (U.K.).

^{5/} E/CN.4/SR.147, page 4 (Yugoslavia), page 4 (France), page 5 (U.S.), etc.

The opinion of the majority, as expressed by the Chairman, was that "it should be unambiguously stated that "arbitrary" refers not only to the conformity or non-conformity of an act with the law but also to the nature of the law itself"^{1/} and that the Commission could formally record its opinion that "arbitrary meant both illegal and unjust"^{2/}. While the proposal so to define the word was not put to vote in view of an objection by the representative of China, the Chairman expressed the consensus of opinion in the Commission when she pointed out that "the word had been purposely chosen in order to cover all possible cases in which an arrest or detention should not take place"^{3/}.

In his subsequent comments on the Draft International Covenant on Human Rights, the Representative of the United Kingdom has stated that "the discussion in the Commission has shown that there is no agreement on the question whether this paragraph (1) merely says in another form what is said in paragraph 2 or whether it adds to the conception in paragraph 2 the further conception that the law itself must be a just law. The United Kingdom could not in any event agree that the latter conception is one which can properly be included in this article"^{4/}.

Paragraphs 3 and 4 of article 6 did not give rise to any debates on matters of principle but rather on the use of such terms as "promptly", "within a reasonable time", "any charges", which were considered too vague by several representatives. For example, the representative of Lebanon stated that "in some countries, a month might be considered a short time. Human beings have a natural right to liberty, and the officer who arrested a person must have valid grounds for such action. There is no reason why the person concerned should not be immediately informed of those grounds. If there were no grounds, there was no reason for an arrest"^{5/}. It was pointed out on the other hand that

^{1/} E/CN.4/SR.147, page 7 (U.S.).

^{2/} E/CN.4/SR.147, page 10 (U.S. and India).

^{3/} E/CN.4/SR.147, page 11 (U.S.).

^{4/} Commission on Human Rights, Report of the 6th session, page 25.

^{5/} E/CN.4/SR.145, page 5.

many difficulties might arise in the application of these paragraphs because of the divergencies between the various legal systems in force and that the Commission should therefore refrain from entering into questions of detail which would only accentuate these difficulties.^{1/} However, at the suggestion of Australia,^{2/} a distinction was brought in paragraph 3 between the communication of the reasons of the arrest, which could and should be done immediately, and the communication of the charges. During the debates on paragraph 4, it was emphasized that while preventive detention might prove necessary in some cases, such detention should be the exception and not the rule: the sole purpose of preventive detention should, in fact, be to guarantee the appearance of the accused for trial where, in the opinion of the court, there were insufficient grounds for admission to bail, as, for example, in the case of serious crimes involving the death penalty.^{3/}

In connexion with paragraph 5, it was pointed out that in many legislations there was a marked difference between "arrest" and "detention"^{4/} and it was suggested that a distinction be made "between arrest properly so called and committal, the two actions being juridically different"^{5/}. It was also explained that "arrest was the initial detention, that habeas corpus applied in all cases of detention and that the protection contemplated in paragraph 5 was against detention because it was the general term".^{6/}

Debates concerning paragraph 6 of article 6 showed marked differences between the legal systems of participating States: in the U.S., the rules of liability in the case of unlawful arrest were not as onerous as in the proposed text, but made a distinction as to whether the mistake of the law enforcement officer was accidental or wilful, resulted from a bona fide exercise of judgment or from malice^{7/}; in France, on the other hand, the right to

^{1/} E/CN.4/SR.145, page 9 (U.K.).

^{2/} E/CN.4/SR.145, page 10.

^{3/} E/CN.4/SR.145, page 15 (France and Chile).

^{4/} E/CN.4/SR.145, page 17 (Chile).

^{5/} E/CN.4/SR.145, page 17 (France).

^{6/} E/CN.4/SR.145, page 17 (U.S.).

^{7/} E/CN.4/SR.147, page 17 (U.S.).

compensation existed in all cases of illegal arrest or deprivation of liberty, even if the illegality was accidental: illegality as such established a right to compensation^{1/}.

It was stressed that the provision written into the Covenant "should not represent a lessening in international law of existing civil rights"^{2/} and that while officers of the law should not be discouraged from the fearless performance of their duties if they knew that they would be held accountable for every mistake, they should not be encouraged to take their responsibilities too lightly^{3/}. The representative of Denmark reminded the Commission that it had been previously decided that paragraph 6 "should reflect the progressive point of view that the individual had the right to compensation for unlawful arrest, no matter who was responsible for it or for what reasons it had been effected"^{4/}. The right to compensation consisted in the right to apply to a court which was not free to declare itself incompetent and was obliged to grant compensation if it found that a real case existed^{5/}. The granting of the compensation must not be automatic, but based on the consideration by the Court of questions of fact, such as the situation surrounding arrest, the conduct of the person arrested, etc.^{6/}

It was also noted in the record that the word "compensation" was intended to cover both moral and material damages^{7/}.

The purpose of article 7 of the Draft Covenant^{8/} is to limit the cases of lawful detention and imprisonment by prohibiting it in civil matters. The provision reads as follows:

^{1/} E/CN.4/SR.147, page 18 (France).

^{2/} E/CN.4/SR.148, page 4 (Australia).

^{3/} E/CN.4/SR.148, page 4 (Lebanon).

^{4/} E/CN.4/SR.148, page 6.

^{5/} E/CN.4/SR.148, page 8 (France).

^{6/} E/CN.4/SR.148, page 8 (Australia).

^{7/} E/CN.4/SR.148, page 9.

^{8/} Annex I to the Report of the 6th session of the Commission on Human Rights, page 16.

"No one shall be imprisoned merely on the grounds of inability to fulfil a contractual obligation."

Article 7 is specifically meant to prevent imprisonment where an individual finds himself unable to fulfil his contractual obligation, but not to "provide immunity for dishonest persons"^{1/}. The Commission felt that it was unnecessary to mention explicitly that a person could be imprisoned for failure to pay a maintenance allowance, because "Article 7 was only intended to prohibit prison sentences for debt"^{2/}.

As to the phrase "merely on the grounds", it means that the inability to fulfil contractual obligations does not constitute sufficient grounds for detention, but it does not do away with the possibility of imposing a prison sentence on other grounds^{3/}.

2. Treatment of persons detained prior to sentence

Article 4 of the Draft Covenant draws inspiration from article 5 of the Universal Declaration of Human Rights^{4/}. It reads as follows^{5/}:

"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected against his will to medical or scientific experimentation involving risk, where such is not required by his state of physical or mental health."

Article 4 being in the nature of a general principle, the intention of the Commission on Human Rights was to use the broadest formulae possible. It was decided not to define such terms as "torture" or "treatment" in order not to limit their scope of application.

The word "torture" applies to every form of torture^{6/}; it includes moral, psychological ways of torturing human beings as well as physical torture^{7/}.

^{1/} E/CN.4/SR.150, page 6 (Chile).

^{2/} E/CN.4/SR.150, page 7 (Australia, U.K.).

^{3/} E/CN.4/SR.150, page 8 (Lebanon).

^{4/} E/CN.4/SR.183, page 11 (Australia).

^{5/} Annex I to the Report of the sixth session of the Commission on Human Rights, page 15.

^{6/} E/CN.4/SR.141, page 3 (Egypt, U.S., U.K., Australia, Lebanon).

^{7/} E/CN.4/SR.141, page 8 (Philippines).

Certain forms of mental torture are becoming generally used for the purpose of paralyzing the will of the individual and causing an accused person to confess crimes he has never committed. Referring to the use of penthotal on persons detained prior to sentence, several delegates stressed the necessity of prohibiting and denouncing it specifically^{1/}. The majority of the Commission felt, however, that article 4 should be limited to evils which could be defined in simple language and that no list of all the methods used to extract confessions would be complete^{2/}.

As to the word "treatment", it expresses a wider idea than "punishment" and is even more important in the text^{3/}. However, it was pointed out that because "treatment" covered such a wide range of actions, expressions such as "degrading treatment" have no tangible and universally accepted standards and might be brought to include "mere humiliations"^{4/}.

The representative of the World Health Organization took part in the discussion of what became the second sentence of article 4, dealing with medical and scientific experimentation. The Commission on Human Rights felt that such experimentation was one of the aspects of the general problem of cruel treatment^{5/} and that it was the duty of the Commission to bring the problem to the notice of organs which would have to give their opinion on this draft provision^{6/}.

An additional "article on persons deprived of liberty and on penitentiary system"^{7/} has been proposed by France to the Commission on Human Rights at its sixth session; it reads as follows:

"All persons deprived of their liberty shall be treated with humanity.

"Accused persons shall not be subjected to the same treatment as convicted persons. The penitentiary system shall comprise treatment directed to the fullest possible extent towards the reformation and social rehabilitation of prisoners."

1/ E/CN.4/SR.141, page 3 (Egypt).

2/ E/CN.4/SR.141, page 5 (U.K.).

3/ E/CN.4/SR.141, page 4 (France).

4/ E/CN.4/SR.141, page 3 (U.S.).

5/ E/CN.4/SR.183, page 11 (Australia).

6/ E/CN.4/SR.183, page 12 (Belgium).

7/ Commission on Human Rights, Report of the sixth session, page 26.

By resolution E^{1/}, subsequently approved by the Economic and Social Council at its eleventh session^{2/}, the Commission on Human Rights decided to postpone consideration of all additional proposed articles until its first session in 1951. No comment on the additional article proposed by France is therefore available at the present time^{3/}.

3. Right to presumption of innocence until proof of guilt; guarantees of the right of defence

Article 10, paragraph 2, of the Draft Covenant is based on article 11, paragraph 1, of the Universal Declaration of Human Rights. It contains a practically identical sentence concerning the presumption of innocence, but lists in six sub-paragraphs, the various guarantees of the right of defence. It reads as follows:^{4/}

"Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

- (a) To be informed promptly of the nature and cause of the accusation against him;
- (b) To defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case where he does not have sufficient means to pay for it;
- (c) To examine, or have examined, the witnesses against him and to obtain compulsory attendance of witnesses in his behalf who are within the jurisdiction and subject to the process of the tribunal;
- (d) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
- (e) No one shall be compelled to testify against himself, or to confess guilt;
- (f) In the case of juveniles, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation."

^{1/} Commission on Human Rights, Report of the sixth session, page 6, paragraph 31.

^{2/} Resolution 303 (XI) C of the Economic and Social Council.

^{3/} See, however, footnote ^{1/} on page 2.

^{4/} Annex I to the Report of the 6th session of the Commission on Human Rights, pages 16-17.

There was consensus of opinion in the Commission that, under existing legal systems, a person has to be proved guilty beyond reasonable doubt before sentence can be passed on him^{1/}; it was stated that all legal systems recommend that a person should not be condemned unless his guilt had been proven beyond reasonable doubt^{2/}.

Only sub-paragraphs (a) and (b) gave rise to any substantive discussion in the Commission.

Concerning sub-paragraph (a), the distinction between "nature" and "cause" of crime was explained, the "nature" being the type of crime committed and the "cause" being the reasons for the accusation^{3/}. It was also stated that, when a person is accused of a crime, it is not sufficient to tell him what he has been accused of: he must also be informed of the nature of the offence, the seriousness of the crime and the penalties attached^{4/}.

With respect to sub-paragraph (b), members of the Commission wanted to avoid giving the impression that legal assistance should always be free: the defendant should pay for legal assistance if he has the means to do so^{5/}. As to the words "the interests of justice", they are intended to cover both the case of an accused unable to find legal assistance and that of an accused person who has no means of paying for such an assistance^{6/}.

1/ E/CN.4/SR.156, page 9 (India).

2/ E/CN.4/SR.156, page 9 (France).

3/ E/CN.4/SR.156, page 12 (France).

4/ E/CN.4/SR.156, page 11 (Yugoslavia).

5/ E/CN.4/SR.157, page 3 (U.K.).

6/ E/CN.4/SR.157, page 5 (Australia).