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

## COMMENTS OF GOVERNMENTS
Note by the Secretary-General

The Secretary-General has received the following comments from the Government of the Federal Republic of Germany. Up to the present time, a total of thirty-one Governments have submitted comments.

### 31. FEDERAL REPUBLIC OF GERMANY

TRANSLATION

I. The intention of the United Nations to establish principles on freedom from arbitrary arrest and detention is welcomed. The Federal Government is convinced of the value which such principles may acquire as a means of ensuring increased protection against arbitrary action by the authorities. In order to achieve, as soon as possible, a comprehensive and exact conformity between, on the one hand, law and practice and, on the other hand, the principles to be established, it would be advisable to take into account not only the basic conceptions of the Anglo-American legal system, but also those of the continental European system, which are in very close accordance with the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950. Attention should also be given to the ideas developed at the Meeting of the United Nations Consultative Group on the Prevention of Crime and the Treatment of Offenders held in Geneva from 5 to 15 December 1961. In this connexion, the Federal Government believes it appropriate to make the following comments on particular provisions of the draft:

II. Ad article 5

While the idea that detention pending investigation should be allowable only where serious offences are involved is to be welcomed in principle, it should be remembered that the prevention and punishment of less serious crime, such as begging, vagrancy or prostitution, would be almost impossible unless detention pending investigation could be ordered for these offences. The Federal Government assumes that detention pending investigation may in future be ordered for these less serious offences also, since in English law the term "offence" covers minor as well as major infringements of the law. The Federal Government is of the opinion therefore that the term "serious offence" should be understood to include all offences of any consequence for which a penalty involving deprivation of liberty is prescribed.

Under article 5, paragraph 1(c), of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, deprivation of liberty is permitted if arrest or detention is necessary to prevent the person concerned from committing an offence. The danger of a further offence being committed has already been embodied as grounds for arrest or detention in the procedural law of various countries of continental Europe. Article 5, paragraph 1 (c), of the European Convention on Human Rights should also be taken into account in drafting article 5 of the Principles. One of the points made at the above-mentioned Meeting of the United Nations Consultative Group at Geneva, too, was that the main purpose of the detention of untried persons was to prevent the suspect from committing new crimes or from causing harm to himself or others. Representatives of some States also held the view that in the case of serious crimes there was no alternative to detention (United Nations document ST/SOA/SD/CG.1 of 28 May 1962, paragraph 102).

Ad article 6

The Federal Government assumes that the expression "on application" does not mean a formal application but only a request submitted to the judge. It would lead to difficulty if the issue of a warrant or order of arrest were made dependent on a formal application. Thus, for example, under German law the judge must sometimes issue the warrant or order of arrest without an application from the public prosecutor (the police have no right of application in any case). This situation arises chiefly in cases where a person placed under provisional arrest is brought before a judge by the police.

It does not seem absolutely necessary for the protection of the person arrested or detained that, as provided for in paragraph 2, the warrant or order of arrest should be shown to him within twenty-four hours. Perhaps it would be enough to provide that the warrant or order of arrest shall be made known to the arrested person without delay and shall subsequently be handed over to him.

Ad article 7

In the Federal Republic, an offender found in flagrante delicto who it is suspected might escape or whose identity cannot be immediately established may be arrested, not only by the police or other legally authorized officials but also by anyone, for the short time required to obtain his personal particulars. For the prosecution of an offence for which no measure involving deprivation of liberty is prescribed by law, it should be possible to detain the suspect for a short period of time to obtain his personal particulars. Besides being provided for by the German rules of criminal procedure, this arrangement is allowed under article 5, paragraph 1, of the European Convention for the Protection of Human Rights and Fundamental Freedoms. It would appear to be expedient to take this provision of the European Convention on Human Rights into account.

Ad article 8

Article 8 prohibits the use of force against the person to be arrested unless he resists or attempts to escape. The term "use of force", however, also includes, for example, the handcuffing of the arrested person. This measure may become necessary because the offender is particularly dangerous or because, without actually having attempted to escape, he is suspected of being likely to do so. The general prohibition of the use of force contained in article 8 would mean an unjustifiable restriction of the safeguards which are necessary in connexion with a detention or arrest and which must remain permissible.

Ad article 9

The Federal Government interprets the term "of the reasons for his arrest" in article 9 as meaning not the specific grounds for suspicion, but the fact of the issue of a warrant or order of arrest and the charge against him which it contains, as evident to the police officer making the arrest from the copy of the order which he uses for the purpose, for in making the arrest the police may have knowledge of the warrant or order of arrest, but not of the specific grounds which led to its being issued. Any steps taken to enlighten the arrested person as to the grounds for

the arrest would therefore, at the time of the arrest, have to be confined to informing him of the issue of the warrant or order as such and of the charge against him.

Ad article 10

To prevent abuses in the application of the second sentence in article 10, paragraph 1, the Federal Government would consider it expedient slightly to extend the time-limit for bringing the arrested person before a judge. The time-limit of twenty-four hours is a little too short. In many cases poorly-staffed police stations would not be able to keep within the time-limit, particularly as it may be necessary at the same time to interrogate witnesses or to secure clues and traces so as to be in a position to submit the indispensable minimum of evidence to the judge who is to make the decision as to detention (article 5, paragraph 1). It is therefore to be feared that, owing to the somewhat rigid time-limit of twenty-four hours, an arrangement along the lines of the second sentence in article 10, paragraph 1, would be open to abuse. It is consequently proposed that consideration be given to the more flexible solution of German law - a solution which has also been incorporated in the Constitution of the Federal Republic of Germany - whereby the arrested person must be brought before the judge not later than the day after the arrest. This provision has proved its value in practice. Reference is also made to article 5, paragraph 3, of the European Convention for the Protection of Human Rights and Fundamental Freedoms which, instead of fixing a strict time-limit, provides that the arrested person shall be brought promptly before a judge.

It is assumed that article 10 does not prohibit the police from releasing a provisionally arrested person (article 7) on their own authority, for it would be definitely against the interests of the arrested person if, instead of being released immediately by the police when the suspicion against him lapsed, he had in certain circumstances to remain in custody for some length of time in order to be brought before the judge.

Ad article 13

Article 13 presumes two types of warrant, i.e. the "order of arrest" authorizing a deprivation of liberty of up to twenty-four hours and leading to the procedure mentioned in articles 9 to 12, and the "order of detention" permitting a deprivation of liberty not exceeding four weeks. It may be pointed out that German law recognizes only one type of judicial warrant. There are no strict limits on the duration of the detention which may be authorized by a warrant issued by a judge. Such a warrant

may be issued even if the accused has not yet been heard. This applies in particular if the accused has absconded or is in hiding. If, however, the accused is arrested on the strength of the warrant, he must be brought before the judge, who must then give him a hearing. The judge decides, according to the results of the hearing whether or not the warrant should be maintained. If he considers that the warrant should be maintained, there is no need to issue a new warrant, as article 14 seems to require, and the arrested person remains in custody on the strength of the original warrant.

It is assumed that article 13 does not require the introduction of two types of warrant in countries whose law has not previously provided for such a procedure.

Ad article 14

The imposition of a definite limit on the length of time for which detention may be ordered is perhaps in accordance with Anglo-American criminal procedure, but it is not quite appropriate to the continental European system, which is governed by the ex-officio principle. Under the criminal procedure of continental Europe, the due release of the detainee is ensured through the obligation of the Public Prosecutor to investigate the exonerating circumstances also, and through the obligation of the judicial authorities to be sure at all times that the grounds for detention still exist. It may further be pointed out that experience of difficult cases has shown the time-limits provided for in the second and third sentences of paragraph 1 to be insufficient for a proper investigation. It would therefore seem appropriate to extend the time-limit after which the continuation of detention would be subject to the existence of serious reasons and the decision of a higher judicial authority. A time-limit of six months is proposed. Provision for such a time-limit has already been included in a Government bill amending the German Code of Criminal Procedure.

Paragraph 3 does not sufficiently take into account the wide range of punishment provided for by the legal system of continental Europe. Thus, for instance, under German law, punishment for larceny ranges from one day's to five years' imprisonment. If, therefore, paragraph 3 were applicable, the result might be that a person accused of larceny could be detained pending investigation only for twelve hours. Paragraph 3 should therefore be deleted. An adequate limitation of the period of detention is guaranteed by paragraph 1.

Ad article 15

As the ex-officio reviews of detention provided for in article 15 take place at relatively short intervals, they threaten to prolong detention to the detriment of the detainee. It would therefore seem expedient to lengthen the intervals between reviews. Although under German law a formal ex-officio review of detention only takes place within certain time-limits ranging from three weeks to three months, the prosecuting authorities must at all times during the period of detention consider ex-officio, and also without formal review, the question of whether the grounds for detention still exist.

It is not clear whether by the expression "by someone on his behalf" a representative of the detainee, in particular his counsel, is meant. The intention is perhaps that application in the interests of the detainee may be made by any third party. This would be in accordance with article 38, paragraph 3. It is doubtful, however, whether there is any need for application by a third party to be authorized, and under German law there is no parallel for this. The detainee and his counsel will usually be the ones most likely to know what steps should be taken against the detention order.

Ad article 17

As the draft is intended to serve for protection against arbitrary arrest and detention, it would probably be sufficient if the obligation to provide information extended only to information concerning appeal against the warrant or order of detention. The court, moreover, cannot tell at each stage of the proceedings which rights and obligations may happen to be in the interests of the person detained or arrested. If the accused has legal counsel, the provision of such extensive information by the court would be uncalled for. It should therefore be provided that - apart from information regarding appeal against the order of detention - additional information by the court regarding rights and obligations should be given only if the arrested or detained person expresses to the court his desire for such information.

Ad article 19

The German rules of criminal procedure take into account the principle of the indulgent treatment of the detained person, which requires that he shall not be accommodated among prisoners, nor, so far as it can be avoided, with other detainees. Accommodation together with other detainees is often not in the interests of the arrested or detained person, particularly in view of the danger of ill-treatment by other inmates. In many cases solitary confinement may even be absolutely necessary to prevent the detainee from prejudicing the results of the investigation by communicating information to other detainees or the outside world through fellow-detainees. The prohibition of solitary confinement should therefore be deleted.

It may be recalled that under Rule No. 86 of the Standard Minimum Rules for the Treatment of Prisoners mentioned in article 27, paragraph 2, of the draft, arrested or detained persons must sleep alone in single rooms.

Ad article 20

The Federal Government construes the expression "provide" to mean that the arrested or detained person who has not succeeded in finding legal counsel will be supplied with the addresses of solicitors. If, however, it means that the court must, ex-officio, provide counsel for the arrested or detained person, this should be regarded as necessary only in cases where the detention has lasted for some time (say, three months).

Ad article 21

The implementation of this provision could lead to difficulties in cases where there is a danger that the arrested or detained person might prejudice the investigation. The possibility of supervising communication with counsel should not therefore be ruled out entirely. The Federal Government is of the opinion, however, that supervision of the arrested or detained person's communication with his counsel is so serious a matter that it should be ordered only by the judge. In cases in which the suspected person has been taken into custody because it was feared that, if left at liberty, he might prejudice the results of the investigation, provision should therefore be made for the possibility of proceeding as follows: where the investigation might otherwise be jeopardized, the acceptance of communications which the detained person is not allowed to inspect may, by order of the judge, be refused, and consultations with counsel may take place only in a judge's presence.

Article 21 provides for communication with counsel by telephone without the possibility of censorship. Since in these circumstances it is hardly possible to establish whether the arrested or detained person is really speaking with counsel, unrestricted freedom to communicate with counsel by telephone should not be allowed.

Ad article 22

This provision, like those of articles 24 and 25, has no basic connexion with the object of the draft, i.e. to afford protection against arbitrary detention and arrest. Provisions concerning the examination of records and documents, the right of counsel to be present during examinations, the prohibition of certain methods of interrogation, the prohibition of the use of evidence obtained by violating the prohibition on the use of such methods, the obligation to inform the arrested or detained person of his right to maintain silence - all these are just as important to suspected or accused persons who are at liberty. To prevent undesirable inverted conclusions, such provisions should be avoided in a draft which deals only with detention and arrest. The following additional comments may, however, be made on the particular provisions:

a) There should be no provision entitling an accused person to examine records and documents. Such documents would provide the accused with a rich source of ideas as to how he might prejudice the results of the investigation. The danger that the detained person may tamper with the documents, and particularly with the pieces of evidence contained therein, should not be underestimated. Nor is it advisable to give counsel an unrestricted right to inspect records and documents, thereby enabling him to interfere with investigations by the Prosecution. It should therefore be provided that, so long as the investigation is in progress, the prosecuting authorities need permit the examination of records and documents only in so far as this can be done without jeopardizing the investigation.

The right of counsel to be present at every examination of the arrested or detained person or of witnesses or experts, as provided for in paragraph 2, cannot, for practical reasons, be implemented while the investigation is in progress if only because of the delay in the proceedings which notification of counsel would entail. The more promptly the Public Prosecutor takes action in the first place, the better are the prospects of an adequate clarification of the facts. The procedural law of continental Europe is based on the principle that the purpose of criminal proceedings is to discover the material truth; and this is an axiom which should be embodied in the United Nations Principles. There should be no

need for counsel to be admitted to all examinations of the arrested or detained person, for, under German law at any rate, only statements made in court during the trial are usually of any consequence. The case is different, however, where, prior to the trial, the judge, for special reasons, conducts preliminary investigations, such as the interrogation of witnesses or experts, or visits the scene; for these are procedures which anticipate such hearing of evidence as normally takes place at the trial itself. In such cases provision should be made for counsel to be notified of the time when evidence is to be taken. However, it is also recommended that a provision be included to the effect that counsel need not be notified in cases where notification is impracticable owing to the danger of delay. This would apply to cases where evidence may have ceased to exist by the time counsel has arrived (e.g. when the witness is dying). Moreover, it should be pointed out that, under the present wording of paragraph 2, counsel could delay the examination merely by failing to attend, a position which cannot be considered acceptable.

Ad article 24

This provision is welcomed, but the wording of some details could be improved so as to give the arrested or detained person greater protection.

The term "inducements of any kind" does not seem to be concrete enough. Perhaps a more precise definition of what was probably intended would be: "threats of unlawful measures or the promise of an advantage not provided for by law". The term "protracted questioning" is somewhat vague; it is not clear how freedom of action or decision can be impaired by such questioning. Furthermore, if a competent examination is to be carried out, the interrogator must be allowed to exercise his discretion as to the point at which a particular question is to be asked. In this connexion a prohibition of deceit would be sufficient; and the prohibition of protracted questioning could therefore be omitted without disadvantage.

The reference in paragraph 2 to any statement that "may" be obtained by one of the prohibited methods mentioned in paragraph 1 seems too broad. The question should be whether the statement "is" obtained by one of these methods. Furthermore, it seems to be going a little too far not only to forbid the use of statements obtained by the prohibited methods but also to exclude downright any evidence, even if obtained by other means, merely because it has somehow been obtained in connexion with the non-admissible statement. On the other hand, it is necessary to state explicitly that the prohibition in paragraph 1 applies with or without the arrested or detained person's consent, and that statements obtained in violation of the prohibition may not be used in evidence even if the arrested or detained person agrees to their use.

The wording of paragraph 3 is decidedly too narrow. The confession made by an arrested or detained person to persons other than a judge should also be admissible in evidence against him. This is in accordance with the continental European principle of criminal procedure that the aim should be to discover the truth. The requirement that the confession must have been made voluntarily is covered by paragraph 1 and need not be repeated. Finally, paragraph 3 is drafted in such a way that counsel would be able to prevent a usable confession from being obtained simply by failing to attend the examination of the arrested or detained person. The question should be considered whether paragraph 3 should not simply be deleted.

Ad article 25

A protective measure requiring the arrested or detained person to be informed before every examination or interrogation of his right to maintain silence seems to be going too far. The conveyance of this information would, however, seem appropriate before the first examination by the police, the Public Prosecutor or the judge as the case may be; and provision for this has now been made in a German Government bill to amend the Code of Civil Procedure.

Ad article 26

Under German law, detention institutes are generally under the authority of the Director of Public Prosecutions. The officials of an institute for detention pending investigation are therefore not fully independent of the authorities conducting the investigation. It would, however, be sufficient for the protection of the arrested or detained person to require that after being brought before the judge he should be placed in an institute which is independent of the police.

Ad article 30

If, as it so appears, the term "sentence of a competent court" covers only sentences and not also other judicial declarations such as decisions and orders, article 30 would seem to be very narrow. The situations listed in sub-paragraphs (a) to (d) cover most cases in which, under German law, deprivation of liberty is permissible under general or special police regulations. Nevertheless, various situations in which, under German law, deprivation of liberty is clearly justified are not mentioned, although in these cases, too, deprivation of liberty would seem to be appropriate and is entirely compatible with legal theory. It would therefore seem desirable to expand at least two of the reasons which are listed as justifying deprivation of liberty. To sub-paragraph (a) should be added, in accordance with the corresponding provision of the European Convention on Human Rights, article 5, paragraph (1)(b): "or in order to secure the fulfilment of any obligation prescribed by law". This would also cover cases in which a court, in the event of non-fulfilment of an order, based on law, issued by certain public authorities, may impose a penalty of coercive detention instead of a fine which would be irrecoverable. Provision for such coercive detention has been made, for example, in German tax legislation.

In addition, sub-paragraph (c) should be extended so as to provide that vagrants or persons unwilling to work may be placed in penitentiaries by decision of a court for the purpose of rehabilitation. Article 5, paragraph (1)(e) of the European Convention on Human Rights, which in general corresponds with article 30, paragraph 1(c), of the Principles, has this desirable broader sense. In addition, a new sub-paragraph reading as follows should be inserted:

"(e) the arrest or detention of soldiers in accordance with military disciplinary regulations".

No explicit mention is made of cases in which the police may lawfully arrest persons for short periods to remove existing or imminent dangers to public security and order, such as the case in which a person is taken into custody by the police for a short period for his own protection. The Government of the Federal Republic of Germany assumes that such deprivation of liberty for a short period is not prohibited by the Principles.

Ad article 31

Since according to German law no written order is, or, in the nature of the case, can be, required for provisional arrest under the military disciplinary regulations, there should be no reference to article 30, paragraph 1(e), in article 31. Article 31 should therefore begin as follows:

"No person shall be arrested or detained on any of the grounds set forth in article 30, paragraphs 1(a) to (d), above, except ....."

Ad article 32, paragraph 1

It is not clear why the arrested or detained person should be heard only in the cases covered by article 30, paragraphs 1(a), 1(b) and 1(c), and not also in the cases covered by article 29 and article 30, paragraph 1(d). However, this is not of any practical importance in the Federal Republic of Germany, where the right to be given a hearing is guaranteed by the Constitution, although in certain emergencies (e.g. in the case of provisional arrangements), a prior hearing may be dispensed with. This practice, however, does not appear to be prohibited by article 32.

There are fundamental objections to the second and third sentences of paragraph 1. While it is true that in certain procedures under German law the persons concerned have the right to avail themselves of counsel of their own choosing, neither the court nor any other authority is obliged to inform them of this right; nor would this seem to be necessary.

The rule laid down in the third sentence of paragraph 1, whereby the person concerned must be provided with counsel if the interest of justice so requires, also goes further than German law. The relevant Federal Act on court procedure

in case of deprivation of liberty, which is applicable in cases of deprivation of liberty under the Aliens Registration Order, the Federal Social Assistance Act, the Federal Infectious Diseases Act and the Venereal Diseases Prevention Act makes no provision at all for the assignment of counsel. Only in cases where the person concerned has not been heard is he provided with a curator for the proceedings in court. Under only a few of the laws of the German Länder governing court procedure in cases of the confinement of persons of unsound mind, drug addicts or alcoholics, is there provision for the assignment of counsel. The compulsory assignment of counsel would thus be contrary to a number of laws governing court procedure in cases of deprivation of liberty. The Government of the Federal Republic of Germany cannot at present see any need to provide for the assignment of counsel in all such cases. It may be mentioned that, as far as confinement for medical reasons is concerned, many people in the medical profession regard the assignment of counsel as a measure harmful to the well-being of the person to be confined.

Ad articles 34 to 37

The need to regulate the powers of arrest and detention in emergencies is recognized. However, every regulation of this kind must, on the one hand, be such that it will not be abused in minor emergencies so as to weaken constitutional guarantees, and must, on the other hand, contain no rules which it is already obvious that the State authorities could not observe in cases of extreme emergency, even with the best intentions.

It seems doubtful, for instance, whether it would in fact always be possible to keep within the time-limit of twenty-four hours provided for in article 36, Time-limits expressed in hours should be replaced by a more flexible arrangement.

It is also very doubtful whether it would be possible in an extreme emergency to hear the detained person's counsel within the short prescribed time-limit. Provision should therefore be made for the hearing counsel as soon as the opportunity arises. The same applies to periodic review of detention provided for in article 36, paragraphs 2 and 3. Consideration should be given to the question

whether the difficulties to be coped with in emergencies would not be better met by more flexible regulations than by short rigid time-limits. A regulation which made more allowance for the possible practical difficulties would only add to the validity of the proposed principles.

Ad article 38

It does not seem fitting that the accused person may take proceedings even if he is only in imminent danger of being arrested. In such cases it is by no means certain that a warrant or order of arrest will actually be issued; hence recourse to the court would not be a necessary measure for the protection of the accused. The words "or is in imminent danger thereof" and "or to prevent the threatened injury" should therefore be deleted. It does not seem necessary for the protectio of an arrested or detained person who challenges the legality of his arrest or detention that he should invariably, as provided for in paragraph 2, be brought before a judicial authority. This may even be to the arrested, or detained person's disadvantage, as for example when the decision in a case where the legality of the warrant or order of arrest is challenged has to be made by a higher judicial authority, and it takes some time to transport the arrested or detained person to the seat of that authority. The second sentence of paragraph 2 should therefore be reconsidered.

Under German law, the person sentenced to punishment must, in principle, bear the costs of the proceedings. Moreover, costs are charged when, for example in proceedings regarding the confinement of persons of unsound mind the legality of the confinement is challenged and the challenge is unsuccessful or withdrawn. There would seem to be no urgent need for adopting a different arrangement.

The power of any person to institute proceedings as provided for in paragraph 3 seems to be superfluous, since the arrested or detained person and his counsel can be left to exercise their rights as they see fit. In its present form the provision would only be an incitement to litigious persons.

It does not seem desirable to prescribe compulsory penal or disciplinary sanctions for every case in which a procedure contrary to the law is adopted through negligence. Such sanctions could be a serious impediment to action by the prosecuting authorities. The obligation to apply disciplinary measures at least when an infringement is committed through negligence, would be a violation of the principle of [illegible] which underlies German disciplinary law.