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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

1. The Secretary-General has received further replies from the following Governments: the Congo (Léopoldville), El Salvador, Malaysia and Switzerland. Up to the present time a total of forty-six Governments have sent in replies.

2. The Government of the Congo (Léopoldville) stated that it had no observations to make on the draft principles on freedom from arbitrary arrest and detention.

3. The comments of the Governments of El Salvador, Malaysia and Switzerland are reproduced below.

42. El Salvador

17 December 1963
[ORIGINAL: SPANISH]

"Most of the above-mentioned draft principles are already laid down in our Political Constitution and in our ordinary legislation. Reference is made below to the articles which contain these principles and to those of the draft principles which would involve amendments to our legislation.

Art. 1

Article 1 of the draft principles provides as follows: "No one shall be subjected to arbitrary arrest or detention." This principle is proclaimed in

article 166 of our Political Constitution, the first part of the first paragraph of which reads as follows:

> "No power, authority or official may issue an order for detention or imprisonment which is not in accordance with law, and such orders must always be in writing."

Art. 2

Article 2 provides: "Anyone suspected or accused of a criminal offence shall be presumed innocent until proved guilty and shall be treated as such." This is a particular case of the general legal principle: Quilibet praesumitur bonus, usque dum probetur contrarium. This principle is recognized implicitly in the first paragraph of article 164 of the Constitution, which says:

> "No one may be deprived of his life, freedom, property or possessions without having first been heard and found guilty by a court in accordance with the law, nor may he be prosecuted twice for the same offence."

By providing that before a person can be deprived of his freedom, he must first have been heard and found guilty by a court, this article undoubtedly requires that the alleged acts for which he is to be deprived of his freedom must be proved, the proof being established after full argument on both sides. It is obvious that until the proof is established, the person is presumed not to have committed the act of which he is accused, that is to say that he is presumed innocent.

Art. 3

In our Constitution, the exceptional character of arrest or detention, indicated in article 3 of the draft principles, derives from article 166, which is itself an exception to article 164.

Art. 4

The provision that arrest or detention before sentence is not a penalty, contained in article 4 of the draft principles is implicit in the second paragraph of article 166 of the Constitution in which detention is considered as a measure assisting investigations.

Art. 5

The requirement that no one shall be arrested or detained without reasonable cause, formulated in article 5 of the draft principles, is laid down in article 66 of our Code of Criminal Procedure.

Arts. 6 and 7

The requirement that an arrest can be made only on the basis of a written warrant issued by a competent authority, set out in article 6 of the draft principles, is laid down in the first part of the first paragraph of article 166 of the Constitution; and the power to detain an offender caught in flagrante delicto without a warrant is laid down in the second part of the same paragraph and in article 68 of the Code of Criminal Procedure.

Art. 8

The provision that force may not be used, laid down in this article, is included in the general provisions of article 319 of the Penal Code, which provides for the punishment of offences committed by public officials.

Art. 9

According to the second paragraph of the above-mentioned article 166 of the Constitution, detention while investigations are proceeding may not continue for more than three days and the relevant tribunal must notify the person detained of the reason for his detention, receive his deposition and order his provisional release or detention within the said time-limit.

Art. 10

The obligation to bring a person who is arrested before the competent judicial authority within twenty-four hours, enunciated in article 10 of the draft principles, is laid down in article 67 of the Code of Criminal Procedure. The extension of that time-limit would require legislative action to amend article 67, after consultation with the Supreme Court of Justice.

Art. 11

Failure to bring the arrested person before the competent judicial authority within the prescribed time-limit, mentioned in this article, is punishable under article 317, paragraph 2, of the Penal Code.

Art. 12

Once the arrested person has been brought before the competent judicial authority, under the second paragraph of article 166, the latter must, within three days, notify the person detained of the reason for his detention, receive his deposition and order his provisional release or detention. The same obligation is laid down in article 70, paragraph 3, of the Code of Criminal Procedure and failure to comply with this obligation is punishable under article 317, paragraph 141, of the Penal Code.

To reduce this period to twenty-four hours, as proposed in article 12 of the draft principles is contrary to our Constitution, and the provision could not at present be adopted by El Salvador.

Art. 13

The safeguards for a person under detention laid down in this article of the draft principles are embodied in articles 75, 76 and 77 of the Code of Criminal Procedure.

Arts. 14 and 15

Article 14 of the draft principles proposes that the period of detention shall not exceed four weeks, which may be renewed for a further period not to exceed four weeks, a time-limit being laid down in paragraph 3. To ensure that detention is not unduly prolonged, article 15 provides that it shall be reviewed at regular intervals not exceeding four weeks.

To achieve all this, it would be necessary to amend our Code of Criminal Procedure, after consultation with the Supreme Court of Justice.

Art. 16

Chapter VII of the Code of Criminal Procedure allows the provisional release of the arrested person with financial security.

The other formalities, set out in paragraph 2 of the same article, would require an amendment of the above-mentioned Code.

Art. 17

In order to impose on judicial authorities the obligation, which they do not now have, to inform every arrested or detained person of "all his rights and obligations and how to avail himself of his rights", as proposed in this article of the draft principles, it would be necessary to make an addition to the Code of Criminal Procedure. The provision of such information is really the responsibility of the arrested persons counsel. Nevertheless, the judges grant a hearing to arrested persons on request and inform them of the status of their case. In addition, article 192 of the Code of Criminal Procedure provides that after the decision authorizing both parties to submit evidence, the prisoner or his counsel must be present at the proceedings at all times.

On the other hand, it is natural that a person should be provided on admission to prison with the information indicated in the "Comment" on this article.

Art. 18

It would be necessary to enact legislation in order to impose on the competent authorities the obligation to give the family of the detained or arrested person the information referred to in this article.

Art. 19

Article 83 of the Code of Criminal Procedure, which authorizes the trial judge (juez de la causa) to issue a written order that the prisoner be held incommunicado leaves it to the discretion of the judge to determine the reasons for holding the prisoner incommunicado and the kind and extent of the restrictions to be applied. It would be necessary to enact a law amending this article,

after consultation with the Supreme Court of Justice, in order to prohibit the judge from taking such action, as laid down in paragraph 1 of article 19 of the draft principles, and to establish that a person may be held incommunicado only for the reasons indicated in paragraph 3. We should like to point out that, under our law, a person may not be held incommunicado for more than eight days.

Arts. 20 and 22

The right of an arrested person to be assisted by a legal counsel of his own choice and the right of both to examine records and inspect documents, mentioned in draft articles 20 and 22, are laid down in chapter IV of the Code of Criminal Procedure. The legislature would have to amend this Code to make the presence of the counsel compulsory in the cases covered by article 22, paragraph 2.

Art. 21

Communication between the arrested or detained person and his counsel - which is the subject of article 21 of the draft principles - is guaranteed by article 83 of the Code of Criminal Procedure, which expressly provides that communication between them may not be hindered. Communication in writing and in person is governed by the laws and regulations relating to places of detention. A new law is required to authorize, in addition, communication by telephone or other means.

Art. 23

Article 173 of the Code of Criminal Procedure requires that in the case contemplated in this article the examination shall be conducted with the assistance of an interpreter.

Art. 24

The following articles provide guarantees for the detained or arrested person against the methods mentioned in this article of the draft principles: article 169 of the Code of Criminal Procedure and articles 319 and 324 of the Criminal Code.

As regards paragraph 3 of this article of the draft principles, legislative action would be required to add to article 404 of the Code of Criminal Procedure the requirement that a confession before a judge must be made in the presence of the counsel of the detained or arrested person, and to delete article 415 of that Code, which accepts a confession not made before a judge as sustaining evidence.

Art. 25

This article provides that "No one may be required to incriminate himself". This is implicit in article 404 of the Code of Criminal Procedure, which provides that a confession before a judge must be spontaneous. Consequently, if the detained or arrested person does not wish to make an incriminating admission, he will not do so. In order to impose on the competent judge the obligation to inform such persons, before they make their statement, that they have the right to refuse to make any statement, it would be necessary to enact legislation to enable the requisite addition to articles 404 and 169 of the Code of Criminal Procedure.

Art. 26

In connexion with this article, we wish to point out that under our law, once the detained person has been brought before the competent judge, he is not returned to police custody but, in accordance with article 73 of the Code of Criminal Procedure, must be held during his detention "in places separate from arrested and convicted persons, provided that this is feasible, the only consideration being that he shall not escape". Such places are not under the administration of the police authorities.

Art. 27

As regards article 27, the different articles of the Code of Criminal Procedure that we have already mentioned make it clear that pre-trial detention is only a procedural measure. Articles 319 and 324 of the Criminal Code, already referred to, provide adequate protection against improper treatment of the detained or arrested person.

The supervision mentioned in article 27, paragraph 3, is prescribed, in respect of convicted and detained persons by book III, title II, of the Code of Criminal Procedure, entitled "The supervision of penal institutions", which places obligations on the judicial authorities. It goes further than paragraph 3, for while that paragraph entrusts such supervision to inspectors appointed by judicial authorities, under the above-mentioned title II, those authorities must exercise it themselves by making personal inspections.

Art. 28

The principle expressed in this article of the draft principles is to be found in article 81 of the Political Constitution, which provides that it is the function of the judicial power to judge and to cause judgements to be enforced in criminal matters, and in article 167 thereof, which reads as follows:

> "The judicial power alone has the power to inflict punishment. The administration may, however, punish any offences committed against the law, regulations or ordinances, by arrest for a period not exceeding fifteen days or by a fine. If the latter is not paid, the time-limit of the arrest may be extended, but shall not exceed thirty days."

This article does not provide that the decisions taken by the administrative authority under it shall be subject to review by the judicial authorities. For that reason, and also because article 4 of the Constitution lays down the principle of the separation of the Legislative, Executive and Judicial powers, any law which provided for such a review would be unconstitutional.

Art. 29

Paragraph 1 of this article says: "Any alien suspected of attempting to enter a country illegally may be arrested by the authorities of that country". This could be done only if the alien in question was already in the country which he was attempting to enter. If not, the authorities of the country must not detain him, for if they did so, they would not be respecting the national sovereignty of the country in which the alien was.

To allow the judicial authority to act in the cases contemplated in the two paragraphs of this article, new legislation would be required in El Salvador. Deportation in El Salvador at the present time is an administrative matter.

Arts. 30, 31, 32 and 33

With respect to the cases contemplated in draft article 30, there are various legal provisions in El Salvador:

regarding sub-paragraph (a), articles 1261, 1262 and 1265 of the Code of Civil Procedure;

regarding sub-paragraph (b), article 244 of the Civil Code and article 8, paragraph 3, of the Criminal Code;

regarding sub-paragraph (c): 1., persons of unsound mind, article 466 of the Civil Code; and 2., alcoholics and drug addicts, the Dangerous Condition Act;

regarding sub-paragraph (d), the Health Code.

Where alcoholics and drug addicts are concerned, the procedure provides for a real court hearing before a judge in criminal matters.

The special provisions laid down in the other articles referred to above would require ad hoc legislation.

Arts. 34, 35, 36 and 37

These articles refer to a state of emergency in which "it becomes necessary to provide for special powers of arrest and detention". Article 175 of our Constitution specifies the cases in which the guarantees laid down in articles 154, 158 (first paragraph), 159 and 160 may be suspended; but the articles cited earlier which are the guarantee against unlawful detention or imprisonment remain in force.

To take care of the specific provisions of the above articles of the draft principles, amending legislation would be required.

With regard to article 37, we wish to point out that, under our Constitution, the Republic of El Salvador is not responsible for unlawful acts committed by its officials.

Arts. 38 and 39

With reference to these articles, anyone who is unlawfully detained or arrested may institute proceedings under the relevant articles already mentioned

in this report. In addition, in order to obtain his release, he may apply for a writ of habeas corpus before the Supreme Court of Justice or courts of second instance under the second paragraph of article 164 of the Constitution.

Art. 40

Regarding this draft article, we wish to state that the personal responsibility of Salvadorian officials for the improper discharge of the duties of their office is laid down in article 220 of the Constitution. As we pointed out before, the State is not held responsible for acts committed by its officials.

Art. 41

The provisions of this article are in harmony with those of article 221 of our Constitution, which guarantees the principles established in it.

> "Art. 221 (first paragraph). The principles, rights and obligations established by this Constitution may not be modified by the laws regulating their exercise."

43. Malaysia

22 November 1963
ORIGINAL: ENGLISH

"The principles enunciated in the above draft suffer from too much emphasis being unnecessarily placed in favour of the individuals. There is no harmony achieved in the right and duty of the Government (which represents the larger interests of the community) to govern and the right of the individuals concerned to be free from any form of restraint on their liberty. The principles seem to start with a pricri assumption that individuals are helpless angels and that all Government powers are bad and, therefore, if exercised, must be scrutinized in such a way as not to hamper the freedom of the individuals, despite the fact that the arrest and detention and the procedure emanating therefrom are justified having regard to the prevailing conditions in any particular country. Even though Malaysia is a country which recognizes and practises Parliamentary democracy based on the ideals of the freedom of individuals, the need for some sort of

safeguard in order to restrain the very existence of this system and also to maintain law and order is inescapable. Thus, it is viewed that principles concerning human rights must be stated in a way which represents a happy balance between the freedom of the individuals on the one hand and the rights and duties of the Government to govern on behalf of and in the interests of the community as a whole on the other. If these draft principles are accepted, most of our laws will become illegal and hence it would be very difficult for the Government to govern and maintain peace and security and establish order and good government.

2. Further, the principles suffer from having too many details and elaborations which cannot be appropriately called 'principles'. These details should be left out and only principles should be stated. If the principles are stated in such a way as to encroach too much on the province of domestic jurisdiction, attempts to create a universal standard of human behaviour through statement of principles of human rights will not receive much attention and co-operation of Governments.

Specified comments

3. Without prejudice to the rights of the Federal Government from making further comments on these principles, provisional comments are set out as follows:

Article 1

The second definition of arbitrary arrest is untenable from the point of view of our law since it might bring our law and even the Constitution into conflict with this definition.

Article 5 - Serious offences

Our Penal Code does not know what a serious offense means. An offence is either punishable by imprisonment or fine or by both imprisonment and fine.

Article 10

For the purpose of computing a twenty-four hour period, public holidays should not be counted.

Article 13

Paragraph 2 should be struck off.

Article 14 - Paragraph 1

Our law allows an unlimited period of extension of detention provided the arrested person is brought before the Magistrate's Court once a week. The length of detention is, however, at the discretion of the Magistrate with a right of the accused person to have the Magistrate's order set aside by the High Court. To consider whether or not period of detention should be extended, the Magistrate must have regards to the nature of the case, interest of the community on one hand, and the interest of the accused on the other. Special problems arising out of the police investigation will be a good ground to allow extension, but no extension will be allowed if having regard to the nature of the case the consequence of allowing such extension would unnecessarily prolong the accused's agony and anxiety about the criminal charge against him.

As regards paragraph 3 of this Article, this should be struck out since our law does not recognize minimum sentence. Our law simply provides maximum sentence, the imposition of which by Magistrates and Judges is, however, only a matter of judicial discretion, having regard to the requirements of justice in each particular case.

Article 15

It is not clear what is meant by a review ex officio. If it means that review ex officio is an officer whose duty is to interview and review the cases of individual detainees, this provision does not exist in our Criminal Procedure Code, which governs arrest and detention pending trial. Our Criminal Procedure Code provides that a person, if arrested, must be brought before a Magistrate with twenty-four hours, and that unless subsequently released on bail, must be brought before him once a week.

Article 16

This is to be struck off because in our law bail does not depend upon financial security. The test which is applied by our judicial authorities is

whether or not the person concerned, if released, will attend the Court on the date when he is asked to. Thus, on the basis of his good character alone a person can be allowed bail.

Articles 17 and 18

These should be struck off because it would be very difficult to work out in practice. Moreover, a person is always presumed to know the law.

Article 19 - Paragraph 3

The phrase 'may be ordered by a Judge or other officer authorized by law to exercise judicial powers' should be amended by substituting for it a phrase 'may be required'. The word 'only' in the second line should be deleted. The right of the detained person to communicate should also be limited in favour of the need of the police investigation to be without any let and hindrance. Thus, a proviso to this effect must be included in this Article.

Article 20

The last two sentences beginning with 'he shall be immediately' and ending with 'capable of defending himself' should be deleted. Our law has no provision for legal aid except in cases where a man is charged with an offence punishable with death.

Article 21 - Paragraph 1

The last sentence must be deleted.

Article 22

Both paragraphs should be deleted.

Article 24 - Paragraph 3

The expression 'in the presence of his counsel and before a judge or other officer authorized by law to exercise judicial power' should be deleted.

Article 25

The second sentence should be deleted.

Article 26

The whole Article should be deleted.

Article 27

Paragraph 2 should be deleted.

Article 29 - Paragraph 2

The last two sentences beginning with the words 'such arrest and detention' and ending with the words 'deportation proceedings are pending' should be deleted.

Article 32 - Paragraph 1

The last sentence beginning with the words 'If he does not have counsel' and ending with the words 'provide him with counsel' should be deleted. Our law has no provision for legal aid.

Article 36 - Paragraph 1

The last two sentences should be deleted.

Article 37

The right of a person who is illegally detained to obtain compensation must be subject to the laws and regulations which may be passed by Parliament to legalize certain fact and indemnify certain situation.

Article 39

This Article should be deleted. In our law, a public servant who executes the law is not liable unless there is a proof of malice."

44. Switzerland

15 November 1963
ORIGINAL: FRENCH/GERMAN

I

Article 11

The immediate release of an arrested person as the automatic consequence of an unwarranted delay in bringing him before a judge or other judicial authority might, in certain circumstances, be too extreme a course of action. The punishment for such a delay should not be visited on society, yet that is what would happen if a person released because he had not been brought before the competent judicial authorities in time were a dangerous criminal. The magistrates at fault in not having given a hearing to an arrested person within the specified time-limit of twenty-four or forty-eight hours, on the other hand, should be declared responsible, and the person not granted a hearing within the time-limit should, depending on the circumstances, obtain redress for illegal detention.

Article 14, paragraph 3

Under some codes, the judicial authority has considerable latitude in fixing the penalty. Such codes therefore provide for a wide range between the maximum and minimum penalty. This is the case in the Swiss Criminal Code, which provides for a minimum term of imprisonment of three days.

Thus, in the case of offences which on the face of it appear to be of a certain degree of seriousness and complexity, a remand in custody not exceeding one-half of the minimum term of imprisonment would clearly be too short.

Article 18

In some cases, there may be good reasons for leaving it to the arrested person to decide whether or not he wishes his family to be notified or, in appropriate cases, for permitting him to notify them himself in the manner he thinks best (article 19, paragraphs 2 and 3). The case may, for example, concern a foreign worker, arrested for a relatively harmless offence (such as a customs violation, an offence under the game laws, etc.), whose family is still residing in his country of origin.

Article 24

The question arises whether it is not too much to require that a confession by the accused, in order to be valid, must be made before his counsel. In some cases, a lawyer does not consider it necessary to be present every time his client goes before the examining judge. Moreover, in certain exceptional circumstances, the examining judge may have valid reasons for an interview with the accused at which the latter's counsel is not present. A court clerk must, of course, always be present at such interviews.

At the trial itself, where the court considers all evidence freely and the accused has the right to withdraw any previous confessions, there can hardly be any reason not to include any voluntary confessions made by the accused before the examining magistrate in the records of the case, either as an item of evidence or as an item tending to support the evidence, solely because they had been made in the absence of counsel for the defence.

Article 25

This provision is not necessarily a safeguard for the accused, who may be mistaken about the implications of the formula in question (that is to say, he may be unsure of the interpretation which will be placed on his silence), or who may consider it to be a mere formality.

Article 30

The wording used in sub-paragraph (b) ("lawful order of a competent court or authority") should also be used in sub-paragraph (a) in order to cover, in that sub-paragraph also, cases of non-compliance with lawful administrative decisions.

On the other hand, it might perhaps be sufficient to replace sub-paragraphs (a) to (d) by the following general formula: "the arrest or detention of a person pursuant to a lawful order of a court or competent authority".

Article 36

The establishment of a special court, up to half of whose members might be drawn from outside the judiciary, does not appear to provide all the necessary safeguards.

II

Federal Department of Justice and Police

Police Division

It seems clear from the preamble to the draft principles that the intention is to incorporate them in an instrument similar to the Universal Declaration of Human Rights, which would serve as a guide for the law and practice of all States. Consequently, it would be wrong to apply to the draft principles those criteria which govern accession to a convention and, in so doing, to enunciate the reservations which Switzerland, at least, would have to make on the basis of existing Swiss law. It is assumed, rather, that quite general comments from the standpoint of the safeguards of personal freedom proper to a State recognizing the rule of law are called for, and that the Swiss report should address itself to the problems raised by the draft principles, irrespective of the existing law.

It may be said first, as a general comment, that the interrelationship of the individual sections into which the draft principles are divided requires some clarification. Article 1, which does not form part of any of the various sections, declares that arbitrary arrest includes any arrest under the provisions of a law, the purpose of which is incompatible with respect for the right to liberty and security of person. Sections I-IV, which follow, deal with the principles to be respected in case of arrest and detention: first, in criminal proceedings before the judicial authorities; secondly, in administrative penal proceedings; thirdly, in non-criminal administrative proceedings; and fourthly, in proceedings under special powers granted as a result of a duly proclaimed national emergency. Article 30 contains an obviously restrictive list of the cases in which arrest and detention are to be permitted in non-criminal proceedings. Thus, the question arises whether arrest, or detention of any kind, in any cases that cannot be subsumed under sections I-IV must be considered arbitrary within the meaning of article 1. None of the draft principles states this explicitly, but neither do they imply the contrary. It is desirable, therefore, that this point should be clarified.

Some clarification is also needed with regard to the relationship between the provisions of individual sections and those of other sections. Simply, as an example, the relationship between section II (article 28) to article 3 may be mentioned.

Again, greater clarity might be achieved if the material range of application of the provisions of section I was even more precisely defined. Persons suspected or accused of a criminal offence include persons who have been arrested and detained for the purpose of extradition. Such detention, however, is not the same as detention pending penal investigation, and while the rules laid down in section I of the draft principles may be appropriate to the latter type of detention, they are much too complicated for detention for the purpose of extradition and would inevitably lead to an unwieldiness in extradition proceedings which would serve neither the purposes of the draft principles nor the interests of the arrested person. It is true that arrest for the purpose of extradition might conceivably be regarded as falling within the scope of article 29, paragraph 2, of the draft principles; but that clause refers to arrest with a view to deportation, the latter term presumably being used in its technical legal sense; extradition is not the same as deportation, although it is often similar in effect. Thus, it is reasonable to doubt whether the draft principles cover detention for the purpose of extradition at all.

If it was intended, however, that detention for the purpose of extradition should be subject to the rules set out in section I, it must be pointed out that a number of provisions in this section would be inappropriate to extradition proceedings. For example, in the case particularly of extradition arrangements between neighbouring States, it is inconceivable that arrest for the purpose of extradition should be restricted to cases where the accused has failed to appear in court without sufficient cause, as a strict interpretation of article 3 would require, or that extradition proceedings should be conducted without the detention of the accused. Again, the prohibition, in article 5, of detention unless there is reasonable cause to believe that the person detained has committed a serious offence, would rule out the system customary in Europe, of extraditing without investigating questions of guilt or of fact, since the mere existence of a warrant or order of arrest can scarcely be regarded as reasonable cause within

the meaning of the draft principles. Another impediment inappropriate to extradition proceedings is the provision, in article 26, that the arrested person shall not remain in police custody after judicial confirmation of the warrant or order of arrest.

Section III provides, in connexion with non-criminal proceedings, that arrest or detention shall be permitted only in the cases mentioned in articles 29 and 30, i.e., primarily in the case of persons who attempt to enter a country illegally (article 29, paragraph 1) or who are to be deported (article 29, paragraph 2), and also in the case of persons of unsound mind, alcoholics or drug addicts (for the purpose of their treatment or rehabilitation), persons with infectious diseases, minors, and persons failing to comply with the lawful order of a court (article 30). This raises the following questions, in particular:

(a) Is the removal of a person from a country (Ausschaffung) "deportation" within the meaning of article 29, paragraph 2? No definition of this term is given, either in the draft principles contained in section III or in the corresponding explanatory passage in the report (pp. 249 et seqq.). It must be assumed, however, that the term is used in its technical legal sense and covers only the juridical institution known to English law. Nor, on the other hand, do persons to be removed from the country (auszuschaffen) come within the scope of article 29, paragraph 1, and they are covered by article 30, paragraph 1 (a), only if they are to be expelled (ausgewiesen) by a court order. Moreover, the explanations given on page 249 of the report indicate that this provision deals primarily with arrest under an order to appear in court. However, to our knowledge, both expulsion (Ausweisung) and removal (Ausschaffung) by administrative authority, are so common that they should certainly be covered by the draft principles. Certainly, not all the decision of an administrative authority are challenged in court, even where such action is possible. Once they have become enforceable, however, it must be made possible to execute them manu militari, and for this purpose arrest must be permitted. A provision to this effect should therefore be added to the draft principles contained in Section III. Reference may also be made in this connexion to the comments above on detention for the purpose of extradition.

(b) Does article 30 cover the care of the neglected or depraved, or persons unwilling to work, or of the feeble-minded, under the provisions of welfare legislation?

These persons cannot simply be classified as being "of unsound mind" within the meaning of paragraph 1 (c). The explanations given on pages 249 et seqq. of the report seem to indicate that the term refers only to persons who are mentally ill in the medical sense. Nevertheless, in the absence of a definition, this cannot be determined. In any event, the institutional care of the neglected or depraved or of persons unwilling to work should be declared permissible in the draft principles, since in many cases it is necessary and unavoidable in the interest of the person concerned. Care of this kind cannot be simply branded as arbitrary because it is not mentioned in the draft principles.

(c) What principles shall apply to persons whose presence in the State of residence is illegal but who, for specific reasons, cannot be removed from the territory of that State?

From the wording of article 30 of the draft principles it must be assumed that the arrest of such persons and their confinement in institutions, or any other limitation of their personal freedom, within the meaning of the draft principles, should be regarded as arbitrary. Nevertheless, there may be compelling reasons for such action, and where such reasons exist it would appear unreasonable that the State of residence must either refrain from such action or stand accused of applying measures that are arbitrary within the meaning of the draft principles. An addition to section III is therefore desirable in this connexion also.

(d) What principles shall apply to the transfer or conveyance in transit through a State of persons to be extradited from another State to a third State, or handed over to a third State for the purpose of confrontation with other accused persons?

This category of persons again lies outside the purview of either article 29 or article 30 of the draft principles. There are, however,

bilateral agreements under which each Contracting State is required, in such cases, to keep in detention and deliver to the authorities of the other State persons transported through its territory. In any event, the transfer or conveyance in transit of prisoners is an essential feature of international legal assistance. It can scarcely be the intention to declare continued detention arbitrary in such cases although it is provided for in binding international agreements.

From these considerations, which do not claim to be exhaustive, it is clear that the provisions of section III of the draft principles still disclose certain omissions and require further revision. Otherwise, there would be a danger of producing a purely declaratory statement much of which would be doomed from the outset to have only a theoretical value, because it failed to take into account certain necessities of national life and international intercourse.

In this connexion, it may also be asked whether judicial review of decisions on arrest and detention - which the authors of the draft principles appear to regard as the only means of providing safeguards in a State that recognizes the rule of law - together with the constant succession of further reviews prescribed throughout must not inevitably lead to an overloading of the courts or an excessive proliferation of new courts. One result of such a trend may be that judicial proceedings relating to decisions on arrest and detention become a matter of routine, with far greater damage to respect for personal freedom than would be caused if such decisions were reviewed through the processes of administrative law, provided that the latter were subject to rigorous control and to the criticism of public opinion and of the legislature.
