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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 Governments of Ireland and Romania. Up to the present time a total of forty-eight Governments have sent in replies.

2. The comments of the Governments of Ireland and Romania are reproduced below.

45. Ireland

13 January 1964
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"The Government of Ireland consider that it might be more appropriate if the Draft Principles were confined to a general statement of principles and of fundamental legal rights rather than a detailed statement such as is contained in the present Draft Principles. While Irish law generally is in conformity with most of the contents of the proposed articles, there are many matters of detail covered in the articles with regard to which the Irish Government would have reservations.

With regard to the Preamble, the Government would suggest that it might be more in accordance with the purpose of Draft Principles if the final operative words beginning 'Agrees ...' were eliminated and replaced by 'Proclaims the following Draft Principles'.

Article 3

In the opinion of the Government, the article goes too far in saying that a person suspected or accused of an offence may only be arrested or detained 'as an exceptional measure'. At the same time it may be mentioned that it has always been the law in Ireland that a person who is arrested should be brought as soon as possible before a District Justice or a Peace Commissioner. It is suggested that the word 'immediately' might be replaced by 'as soon as possible'.

Article 5

This article would mean that even in a murder case an arrest should not be made unless there were grounds to fear 'that if not taken into custody he (i.e. the accused) would evade the processes of the law or prejudice the results of the investigation'. Apart from arrest, detention following arrest is justified on certain grounds which are not so much in the discretion of the police as permitted judicially. Some provisions of Irish law authorize arrest where the alleged offence is not punishable by imprisonment, e.g. simple drunkenness (i.e. in a public place) and malicious damage. In these cases, however, the temporary detention implicit in the arrest is intended to prevent the continuation of the offence at that particular time.

Article 6

The Government would have considerable difficulty in accepting the present provisions of article 6. There are a number of statutory provisions in Ireland which permit of a person being arrested without a warrant.

Article 7

See comments under article 6.

It is not clear that the article as drafted covers cases in which the police would wish to use their powers of arrest without warrant as e.g. when a policeman reasonably suspects a person of being about to commit a serious crime.

Article 8

The Irish authorities would like to see the word 'absolutely' replaced by the word 'reasonably' in view of the possible misinterpretation which might be given to the article as it stands at present.

Articles 10, 11 and 12

The Government considers that it is not possible to go into detail or to fix upon any specific time limit within which a person should be brought before the Court etc.

Article 13

See generally comments on articles 5, 6 and 7.

Article 14

The Irish authorities feel that in this article also it is a mistake to attempt to lay down specific time limits.

A detained person may appeal at any time to a higher Court against his detention as ordered by the lower Court while awaiting trial. This right extends to a right to appeal against the amount of bail fixed by the lower Court as the condition on which the accused may be released while awaiting trial.

As far as District Court proceedings in Ireland are concerned there is an automatic review of a person remanded in custody since such remand is only permitted for eight days.

Article 15

See comment on article 14.

Article 16

Under Irish law, a person may be remanded in custody or on bail only. There is no provision for provisional release otherwise than on bail, but the amount of the bail may be trivial. In appropriate cases, however, such as where the charge was brought on a summons, the Court need not formally remand the defendant at all, but can adjourn the hearing until some later date, in which case the defendant continues at liberty and no question of bail arises.

Article 29

The Minister for Justice in Ireland, unless he acts ultra vires, cannot have his actions reviewed by the Courts in relation to the admission etc. of aliens.

Article 31

Habeas Corpus proceedings are always open to a detained person. In these circumstances, the provisions of the article appear acceptable.

Article 32

The Irish authorities feel that this article goes too far. As far as Irish practice is concerned, existing safeguards against improper detention have proved adequate without the necessity of the provisions of this article.

Articles 34 to 37

The Government do not feel that these articles as at present drafted are satisfactory and reserve the right to make further comments upon them at a later stage.

Article 38

The Irish authorities consider that this article might be confined to the first and third paragraphs.

Article 40

In Ireland, the State in practice accepts responsibility for meeting costs awarded by the Courts against a public official in respect of something done by him in the course of his duties at least to the extent of ensuring that, if an official is unable himself to meet such an award, the State will do so. Such a grant is, however, ex gratia but not 'enforceable'."

46. Romania

13 February 1964
ORIGINAL: ENGLISH

"I. Remarks on the relevant legislation of the Romanian People's Republic

The principles explicitly or implicitly embodied in the provisions of the draft on 'Freedom from Arbitrary Arrest and Detention' are enshrined in the legislation of the Romanian People's Republic, and their observance is ensured by numerous and adequate guarantees.

1. In its article 87, the Constitution of the Romanian People's Republic provides:

'Citizens of the Romanian People's Republic are guaranteed inviolability of the person'.

'No person may be placed under arrest except by decision of a court or of the Procurator, in conformity with the provisions of the law'.

(Explanation: the word 'arrested' refers both to deprivation of liberty as a preventive measure and to deprivation of liberty as the manner of execution of penalties which involve such deprivation.)

2. In order to provide effective guarantees of this constitutional principle and to safeguard individual liberty against arbitrary arrest, the Code of Criminal Procedure of the Romanian People's Republic specifies:

(a) Those cases in which preventive measures of deprivation of liberty may be taken (article 200 covers the measure of 'arrest', article 250 the measure of 'detention').

(Note: The Code of Criminal Procedure of the Romanian People's Republic establishes two categories of preventive measures involving deprivation of liberty, namely: 'retention' or 'confinement', which to a certain extent corresponds to the term 'arrest' in the United Nations draft, and 'preventive arrest', which corresponds to 'detention' in the same draft.)

(b) Authority to take the above measures. Such authority is vested in the organs of criminal prosecution (articles 200 and 249), the Procurator (State Attorney) (articles 179^{2} and 249^{1}), the trial organs (articles 289^{2} - last paragraph, 289^{3} - last paragraph, 305^{1}, 320 - paragraph 2, and others).

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(Note: The organs of criminal prosecution, under the system of the Code of Criminal Procedure of the Romanian People's Republic, are, 'the organs of criminal enquiry', and 'the organs of criminal investigation'. The competence of each category of organs is determined by law. Both the organs of enquiry and those of investigation are endowed with judicial attributes, as stipulated in article 186-186[4].)

(c) The procedure to be followed in taking each preventive measure and in putting such measures into effect (articles 200-201[3] in the case of arrest and articles 249, 250, 252, 256-60 in the case of detention). Such measures are required to be instituted in writing by warrant of arrest or detention, as the case may be, with a statement of the grounds and evidence for the measure instituted.

(d) Competence to exercise control over the lawfulness and validity of the preventive measures: in the preliminary phase of the criminal process, i.e. in the phase of criminal prosecution, such measures are subject to review by the State Attorney in charge of the prosecution, while in the trial phase jurisdictional supervision is exercised by the next higher court (articles 201[1], 252, 392, paragraph 2).

Apart from the review instituted by the State Attorney upon his receipt of the writs by which preventive measures have been ordered, observance of the provisions which guarantee individual liberty is also assured by the State Attorney's continuous supervision of the entire course of the prosecution; thus he may intervene at any time to cause an abusive measure to be rescinded (article 179[2]).

(Note: In the system of criminal procedure of the Romanian People's Republic, the Procurator (State Attorney) performs the functions of an organ endowed with judiciary attributes; accordingly, the control and supervision exercised by the Procuracy in the phase of criminal prosecution are of judicial nature and subject to regulation by the Code of Criminal Procedure.

On the other hand, it may be noted that in the system of State organization of the Romanian People's Republic the Procurator enjoys independent status both in relation to the judicial bodies and in relation to the central organs of

State administration and the organs of local government; he is hierarchically subordinate solely to the Procurator General of the Romanian People's Republic, who in turn is responsible only to the supreme organs of State power, in accordance with articles 75 and 76 of the Constitution of the Romanian People's Republic.)

(e) The duration of each preventive measure of deprivation of liberty and the conditions in which the time limit may be extended: for the measure of 'arrest' the time limit is twenty-four hours (article 201), which in exceptional cases, and on the basis of specially stated reasons, may be extended by authority of the prosecuting organ for four more days; such extension, however, does not take effect unless it is confirmed by the Procurator (article 201^{1}); as regards the measure of 'detention', the time limit is one month in cases where a criminal investigation is carried out, and two months in cases where a penal enquiry is instituted (article 253); in exceptional circumstances the time limit for this measure may be extended, for stated reasons, up to three months; an extension in excess of three months may only be authorized by the Procurator General. Extensions of up to three months may be authorized, for the first additional month, by the Procurator in charge of the prosecution, and, for the remaining two month period, by the Procurator hierarchically superior to the former (article 254).

(f) Provisions relating to the cessation of preventive measures of deprivation of liberty, or to voiding extensions of the time limits thereof: there are provisions for cases where preventive measures lapse as a matter of right, the organs of criminal prosecution and the judiciary bodies being under an obligation to order the immediate release of the detainee (article 201, paragraph 2; 201^{1}, paragraph 2; 252, last paragraph; 255; 320, penultimate and last paragraphs); similarly, there are provisions for an accelerated procedure in cases where persons under detention are involved (article 29, 286 paragraph 2) or even for summary procedure (articles 505^{1} and 505^{11}); lastly, the possibility of provisional release of detainees is provided for (articles 123-126).

(g) Adequate arrangements to enable persons in a state of deprivation of liberty to exercise their right of defence: the organ of criminal prosecution is obliged to inform the accused, at the first interrogation, that he has the right to choose his defence counsel or to request that such counsel be designated ex officio (article 76, section 1, paragraph 3); the accused has the right, after the first interrogation, to communicate freely with his defence counsel (article 76, section 1, paragraph 1); the accused has the right to make submissions to the procurator on the subject of the preventive measure (article 76, section 1, paragraph 5; article 252, paragraph 3; article 255, paragraph 6 and article 264^{7}); the accused may file complaints with the hierarchically superior State Attorney against the Procurator in charge of prosecuting his case (article 264^{10}); the defendant under detention has the right, at the trial stage, to demand disqualification of the judge who previously, in his capacity as an organ of criminal prosecution, issued the arrest warrant, or, in his capacity as Procurator, confirmed the said warrant (article 53, paragraph 2); the courts are under an obligation to bring to trial the defendant who is under detention (article 299, section 1, paragraph 2), and the State Attorney is under an obligation to participate in the judgement of cases where persons under detention are brought to trial (article 290, paragraph 1); the detained defendant has the right to file a declaration relating to the utilization of means of recourse either before the trial court or before the administration of the place of detention (article 384, paragraphs 2 and 7).

3. In addition to provisions of a procedural character, the legislation of the Romanian People's Republic also contains substantive regulations (material right) whose purpose it is to guarantee personal liberty and to ensure the observance of legal provisions relating to preventive measures of deprivation of liberty.

(a) The Criminal Code of the Romanian People's Republic refers to, and provides criminal penalties for, the following offences in which individual liberty constitutes the juridical object of penal protection:

- "illegal arrest" regardless whether it involved 'arrest' or 'detention' (article 272);

- 'illegal execution of an arrest', which refers to confinement of a person under arrest or detention in a place other than the one authorized by the law or applicable regulations (article 273);
- 'toleration of illegal arrest', referring to the offence of the person who omits to take immediate steps to cause an illegal arrest to be rescinded upon learning that such arrest has taken place, provided that it was this person's obligation to intervene (article 275);
- 'unjust repression', referring to the offence of the organ of criminal prosecution which caused a person known by that organ to be innocent to be subjected to detention (article 291);
- 'culpable failure to denounce', which refers to the offence of a person who, knowing evidence which would tend to establish the innocence of a person under detention, omits to communicate such evidence to the competent authorities (article 271).

(b) The Criminal Code of the Romanian People's Republic provides moreover that the time during which a defendant was under arrest or detention shall be deducted from the penalty which he may be sentenced to serve; while in cases of multiple offences, if the accused was placed under detention in connexion with one of the counts of the indictment but was acquitted on this count at the trial stage, the period of arrest or detention of the defendant shall be deducted from the penalty which he may be sentenced to serve for offences covered in other counts of the indictment; this provision is applicable irrespective whether judgement on the various counts is pronounced simultaneously or separately (article 64).

(c) The Code of Criminal Procedure of the Romanian People's Republic provides the right of compensation for a person subjected to wrongful detention, regardless whether his innocence is established in the prosecution or trial phase (article 566). Procedure for securing such compensation is established by law (article 567-71).

A person whose innocence is established in the course of the post-trial review of the verdict is likewise entitled to compensation (article 431).

II. Comments and Proposals concerning the draft principles

1. While the draft prepared by the Special Committee of the Human Rights Commission of the Economic and Social Council is entitled 'Draft Principles on Freedom from Arbitrary Arrest and Detention', its substance exceeds the scope indicated in the heading; indeed its provisions deal not only with principles, but set forth detailed norms looking toward a quasi-uniform regulation of the application of these principles in the legislative codes of the various States Members of the United Nations.

For example, the draft contains norms as to competence, norms as to procedure, norms concerning time limits for arrest and detention as well as restrictions on possible extensions of such time limits, norms as to arrangements for reviews - including automatic and special, periodic and unscheduled reviews; norms as to the procedural status of persons under arrest or detention; norms relating to provisional release, norms concerning the probative value of statements made by an accused under arrest or detention, etc.

Provisions of detail are not and cannot be regarded as principles; their inclusion in the draft endows them, however, with the character of recommendations that are somehow suggested to be mandatory. This position is not acceptable, since draft principles drawn up by United Nations commissions must confine themselves to recommending such principles as may eventually be embodied in the legislations of States Members of the United Nations, rather than recommending detailed regulations which would seek to effect modifications in, and, by implication, unification of such legislations, or to effect alteration and unification of their judiciary systems. The legislation of each State (in the case of the draft this would refer to the law of criminal procedure) and the organization of its judicial machinery (in the case of the draft this would refer to the organs of criminal investigation and enquiry, the procuracy and the courts proper) reflect the specific nature of the socio-political system of the State concerned, the objective conditions of the development of social relations in the said State, the demands and reflections of the social conscience etc. It is permissible to address an appeal to a State Member of the United Nations that it should embody in its legislation recommendations relating

to principles adopted by the United Nations, but it is not permissible to require it to implement recommendations which are not in the nature of principles at all but would rather tend to impose the adoption of norms that conflict with the specific nature of the legislation of that State.

Accordingly we are of the opinion that there is a discrepancy between the heading of the draft, which refers to principles, and its content, in which norms not in the nature of principles have been incorporated. We therefore propose to delete these detailed norms along the lines of the observations and proposals which follow.

2. Following the sequence of the text as it appears in the United Nations draft, we put forward the following proposals:

(a) The provisions of articles 1, 2 and 3 (first sentence), which contain principles, should be retained.

The second and third sentences of draft article 3 should be deleted on the ground that they do not concern principles, while the norms set forth therein should not be generalized and do not conform to the procedural system of numerous States, among them the Romanian People's Republic, which use a system other than the Anglo-American one.

(b) The provisions of articles 5, 6 and 7 should be reduced to the principles contained therein and merged into a single text.

Thus, of the provisions contained in article 5, one need only retain the principle that no one shall be arrested or detained without sufficient grounds; of the provisions of article 6, one should retain the principle that an arrest or detention can be effected only upon the authority of a suitable written document, supported by evidence, and issued by the competent organ in conformity with the law; while, of the provisions of article 7, one should retain the exception to the effect that a written order of arrest can be dispensed with in cases of apprehension in flagrante delicto or of urgent necessity. The remaining provisions are detailed norms regulated by each body of legislation in accordance with its system of criminal procedure and taking account of the specific conditions prevailing in the given country.

As regards cases in which preventive measures of deprivation of liberty may be required, we believe that it is necessary to set forth a principle rather than to draw up a restrictive list. If criminal justice is to be administered effectively and if one is to ensure the inevitability of the enforcement of criminal law against persons who commit offences, it is occasionally necessary to resort to preventive measures of arrest or detention; the cases in which that necessity arises may vary from State to State in line with the prevalent characteristics of local criminality, the nature of the reaction of public opinion, the opportunities available to offenders to escape criminal prosecution, and many others.

We therefore propose that there should be a draft principle to the effect that: 'Arrest or detention shall be allowed only in the case of an offence punishable by a penalty involving deprivation of liberty, and only if the measure is necessary for the administration of criminal justice. The cases in which the measure is necessary for the administration of criminal justice shall be prescribed by law'.

The comment on this principle could explain that the following are generally considered to constitute cases of necessity: cases where the offence is serious (the laws of each State will specify how severe the penalty must be for the offence in question to be deemed serious); where there is good reason to fear that the accused will evade prosecution or punishment; where there is a danger that the accused may, if left at liberty, hamper or obstruct the proceedings (by destroying, concealing or tampering with material evidence, influencing witnesses, etc.); where there is a risk that the accused would continue his criminal activity or give rise to public disorders, etc., if left at large.

There is no need to provide for cumulative grounds for preventive action, taking the gravity of the offence in conjunction with other considerations of necessity, as in article 5. Arrest or detention may sometimes be justified solely by the gravity of the offence, without the necessity for any further grounds. Conversely, arrest or detention may be justified solely because there is good reason to fear that the accused may evade prosecution, and in such cases the gravity of the offence is immaterial, so long as the offence

is punishable under the law by a penalty involving loss of liberty and so long as the penalty cannot be applied if the accused is left at large. The same applies in cases where the arrest or detention is required by the existence of a danger that the prosecution may be hampered by the destruction of material evidence, the intimidation of witnesses etc., if the accused is left free, or cases where the arrest or detention is necessary in order to prevent the accused from continuing his criminal activity. In all these cases the gravity of the offence is immaterial.

In the case of extradition, the mere fact that the presence of the accused is required is sufficient to justify issuing a warrant for his arrest, to accompany the other documents comprising the letters rogatory.

(c) The provisions of article 8 do not, strictly speaking, constitute a principle. The use of force only in cases of necessity and only to the extent required by necessity is an exception for which provision is made in most areas of the law and there is therefore no justification for representing the non-use of force as a principle falling specifically within the scope of the draft.

We accordingly proposed that this provision should be deleted.

(d) In article 9-12 dealing with arrest as a preventive measure, principles proper are combined with a number of detailed regulations. We believe that the principles should be retained and the detailed regulations deleted.

We propose that there should be a single article containing the following provisions:

'No one may be kept under arrest for more than twenty-four hours. As an exceptional measure, the authority ordering the arrest may extend the duration of the custody, with a statement of reasons and with the approval of the judicial authority competent under the law. The law shall specify for how many days the period of custody may be extended'.

'The arrested person shall be informed of the reasons for taking this measure'.

The comment accompanying this text could explain that the extension should not be granted for more than a few days; that the procedure for requesting and

authorizing the extension should be governed by the legislation of each country in accordance with the system in force; that the arrested person may be notified orally or handed an order of arrest stating the reasons for the arrest.

(e) The provisions of article 13, regarding detention, should be brought into line with the provisions of the preceding articles.

In article 6, for example, (see our proposal under (d) above), it is stated that arrest or detention can be ordered only in writing, and only by the judge or authority competent under the law.

We therefore propose that article 13 should be replaced by the following text: 'The written order authorizing the detention must contain all the particulars necessary for the detained person to be adequately informed of the reasons for the measure. The law shall specify the requisite particulars'.

'The order of detention may be issued at any stage of the criminal process.'

'Before the order is issued, the person to whom it pertains shall be given a hearing, if present.'

'The order of detention shall be delivered to the detained person at the moment when it is carried into effect.'

Under the Anglo-American system the detention order is always preceded by a warrant for arrest, so that the accused is always present when the order of detention is issued. Under other types of legislation, such as that in force in the Romanian People's Republic, the detention order may be issued without being preceded by an arrest ('retention'). We have therefore proposed above that the hearing of the accused, prior to the issuance of the detention order, should take place when the accused is present.

We feel that in article 13 there should be no mention of a suspect, but only of an accused, since detention should only take place once criminal proceedings have been set in motion '<u>in personam</u>' against the person whose detention has been ordered.

(f) Paragraph 1 of article 14 contains not a principle but a detailed norm fixing the period of detention and the length of a possible extension. The text should recommend a principle, not a detailed regulation implying that the legislation of individual States should be made uniform in this respect - something which in our view is hardly admissible.

The principle which we believe should be recommended in paragraph 1 is the following: 'The detention may last no longer than is necessary according to the circumstances provided by law'.

In connexion with article 5 it was indicated that the law should specify the cases in which preventive measures involving deprivation of liberty are necessary and therefore justified.

Paragraph 3 of article 14, which provides that the period of detention shall not exceed one half of the minimun term of imprisonment prescribed by law for the offence committed, is unacceptable and, in some cases, even inapplicable.

It is unacceptable because it cannot be reconciled with the purpose of detention as an institution. It is generally known that under the system of indeterminate penalties, i.e. with a special minimum and maximum, the minimum is always very small compared with the maximum, so as to provide ample scope for the individualization of the penalty. Let us suppose that a person accused of an offence punishable by a term of imprisonment ranging from six months to five years, is held in custody on the grounds that there is good reason to fear that, if left at liberty, he may abscond or evade prosecution. According to the provisions of article 14, paragraph 3 of the draft principles, this person would have to be released as soon as the period of detention attained half the length of the special minimun prison sentence, i.e. three months, even though the grounds for fearing that he will abscond are just as serious, or may even become more serious, in cases when the findings of the investigation show that there are aggravating circumstances such as to require a penalty close to the maximum of five years, if not actually the maximum. One may well ask, therefore, why preventive measures should be taken against the accused at all, when he will evade prosecution in any case once the three months have elapsed? A measure which cannot achieve its purpose is a pointless measure.

We therefore propose that the provisions of article 14 (3) should be deleted, since the natural time limit for detention is that determined by necessity, as indicated in the text we proposed for paragraph 1.

However, as we pointed out earlier, the provisions of paragraph 3 are also inapplicable in the case of certain States, i.e. those whose penal laws do not provide for the establishment of special minimum penalties but only for special maximums (e.g. up to two years or not exceeding five years). This applies in the case of the Penal Code of the R.S.F.S.R., as regards most offences; the Penal Code of Poland; the Netherlands Penal Code as regards most offences, as well as the Norwegian, Danish and Swiss Penal Codes.

This constitutes a further argument in favour of deleting paragraph 3.

(g) Article 15 also contains a detailed regulation, rather than the recommendation of a principle, since its provisions do not recommend that there should be a review of the necessity for holding a person in custody, but instead specify the intervals at which there should be a review, the manner in which it should be conducted, and the person at whose instance it may be initiated.

We consider that article 15 should be worded differently, so as to recommend a principle, i.e. the principle of reviewing the grounds for the preventive custody.

At some point the text of article 15 should also include a second principle, relating to the right of a person who has been wrongfully detained to have the abuse acknowledged and remedied by the competent authority. To this end the provisions of article 38 would have to be incorporated into the text of article 15, as it also contains detailed regulations specifying when, by whom and in what manner abuses in the matter of detention can be remedied or prevented. In other words recommendations are made for a particular set of regulations which would have to be uniform for all countries.

We propose that article 15 should contain the following provisions, embodying principles:

'The necessity for continuing the detention shall be subject to periodic review. The law shall specify by which authority, at what intervals and by what procedure the review shall be carried out'.

'Any person who has been detained or who is liable to detention shall be entitled, if he considers that he is being wrongfully detained or that his detention has been wrongfully ordered, to apply to the court or competent judicial authority with a request that the wrongful detention be discontinued or prevented'.

The comment on this text might contain suggestions for detailed regulations, making it clear, however, that each State shall institute and specify its own regulations regarding the procedure of reviewing detentions and the right of the detained person to complain, in keeping with its own system of legislation.

(h) The text of article 16 concerning 'provisional release' contains specific provisions prescribing uniform rules for the use of all States regarding both the procedure for release (paragraph 1) and the manner of securing a provisional release without bail (paragraph 2). In place of these provisions we feel that it would be preferable to recommend a principle which all States Members of the United Nations could incorporate into their laws, in keeping with their particular system of legislation.

We propose that article 16 should be worded as follows:

'Any person whose detention has been ordered shall be given an opportunity to obtain his provisional release at any stage of the proceedings, including the time at which the detention is ordered. The law shall prescribe the conditions in which provisional release may be granted, the guarantees to which it might be subject and the procedure for filing and considering applications for release'.

The comment on this text could, if necessary, state that release might be granted subject to financial security, to custody as a guarantee of appearance or an undertaking not to leave the locality, etc. It could also indicate the procedure for entering an application ex officio, at the instance of the detained person or his family, etc., each country being left free, however, to adopt regulations in keeping with its own type of legislation and its own circumstances and requirements.

(i) Articles 17 to 27 contain detailed provisions pertaining to the treatment of persons who have been subjected to preventive measures involving loss of liberty (arrest or detention).

These provisions do not recommend principles but prescribe a set of rules for adoption by all States. While a principle could be reflected in any legislation, the rules laid down in articles 17 to 27 of the draft are unacceptable in the case of many States, on the one hand because they seriously interfere with the system of guarantees designed to ensure the proper administration of criminal justice and, on the other hand, because they can only be incorporated into the criminal procedure of some States by supplanting the existing system.

There is no doubt that all the provisions of the draft are inspired by a commendable concern to shield everyone from the hazard of wrongful arrest and detention. But the procedural institutions of 'arrest' and 'detention' were themselves created and are applied for the very purpose of effectively guaranteeing human rights, particularly in the matter of combatting crime. It would be a mistake if, out of a legitimate desire to reduce the risk of wrongful arrest or detention to a minimum, the procedural institutions of arrest and detention were to be divested of content and made to function in a vacuum.

The draft seems to be based on the assumption that any arrested or detained person is the victim of an abuse - an innocent person wrongly deprived of his liberty. However this does not correspond to the facts, because it is generally known - and there are figures to confirm it - that, as a rule, arrested or detained persons prove to be guilty, and abuses are the exception, while the category of abuses also comprises cases of factual error arising out of the conjectural nature of certain pieces of evidence or sources of evidence. Moreover, the proposed text of article 5 already provides that no one shall be arrested or detained unless there is reasonable cause to believe that he has committed a serious offence. Consequently the procedural rights granted to the arrested person are not based on the presumption of innocence but on other grounds, which are fully justified. It would be a mistake if, in granting arrested or detained persons procedural rights or privileges, the preventive measures of arrest or detention were to be robbed of all utility.

To give an example, article 5 of the draft states that the arrest or detention must be motivated by the existence of a danger that the processes of the law may be hindered if the accused is left at liberty and is able to

destroy evidence, remove traces of the crime, influence witnesses, etc. However article 17 et seq. provide that the arrested or detained person is entitled, from the outset, to contact his family, any 'person of his confidence' and his counsel; that the arrested or detained person may communicate with other persons in writing or by telephone, etc.; that the arrested or detained person must be informed of and may at any time examine any of the records of the case, etc. It is therefore questionable whether, in such conditions, the arrest or detention can still serve to ensure the proper conduct of the investigation, to safeguard the evidence and preserve the traces, and facilitate the discovery of the accomplices, accessories after the fact or aiders and abettors, when the arrested or detained person has the opportunity to make any arrangements he likes through his contacts with his family and other persons, or by means of correspondence. What further need is there for arrest or detention when it is robbed of its force as a result of unlimited rights accorded to the arrested or detained person? When dealing with criminals, who will take every opportunity to obstruct justice, it is most necessary for the judicial organs to be free to carry out their functions without the danger of prying or harmful disclosures. But the provisions of the draft are such as to defeat the purpose of these elementary precautions.

We consider that the law should prescribe severe sanctions in the case of anyone who wrongfully deprives an innocent person of his liberty. But we do not think it wise or prudent to allow the administration of criminal justice to be jeopardized by an unrealistic body of rules governing the treatment of persons subjected to preventive measures involving loss of liberty.

We propose that in place of the provisions of articles 17 to 27, the following principles should be embodied in a single article:

'The arrested or detained person shall have the same rights as a suspect or accused person who is at liberty.

'The arrested or detained person shall also have the right:

- to be assigned a legal representative ex officio, if he has no counsel of his own choice;

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- to communicate, in the conditions and in the manner provided by law, with his counsel, with members of his family or with other persons;
- to be given an opportunity to defend himself by being informed of the particulars concerning him in the records of the prosecution;
- to be kept in a different place of custody and under different conditions from those prescribed in the case of convicted persons.'

The comment to this text might give some suggestions of the kind contained in the provisions of articles 17 to 27, but only to serve as a guide, and not as recommendations. In any case, we do not feel that the comment to this text is the appropriate place to speak, even for the sake of guidance, of measures which would, without exception, apply both to accused persons under arrest or detention and those left at liberty (e.g. such measures as the assistance of an interpreter for those who do not know the official language, the provision that no form of compulsion may be used to extract confessions or statements, or the right of any accused person to refrain from answering questions put to him). To mention these measures as mandatory in the case of arrested or detained persons might give the erroneous impression that they are not generally applicable to all accused persons, irrespective of whether they are at liberty or not.

(j) The provisions of articles 28 to 37 lie outside the scope of the problem dealt with in the draft, as it is entitled, i.e. the problem of establishing principles designed to safeguard the freedom of the individual against wrongful arrest or detention. However, while any arrest or detention is a deprivation of liberty, not all forms of deprivation of liberty are, legally speaking, arrests or detentions.

The draft should, in our view, be confined to a statement of principles relating to arrest or detention, applied as preventive measures in criminal procedure.

The draft, quite rightly, does not deal with deprivation of liberty in execution of a court sentence. The draft ought likewise not to deal with all those forms of deprivation of liberty which constitute not an 'arrest' or 'detention', but a 'confinement' (internement) ordered on grounds extraneous to criminal law.

- The text of article 28 thus deals with the execution of penalties under so-called administrative penal law, that is, the question of contraventions or petty offences. However, even when it results in deprivation of liberty, this type of penalty is not in the nature of a preventive measure and cannot be treated as an arrest or detention within the meaning of article 1 of the draft. We would mention that under the legislation of the Romanian People's Republic, contraventions do not come within the scope of criminal law. They constitute administrative violations and do not entail penalties involving loss of liberty.
- Article 29, paragraph 1, deals with a situation which could constitute either a criminal offence or a petty offence according to the circumstances. There is therefore no need for a special provision in the draft since where a criminal offence has been committed (illegal crossing of the frontier under article 267 of the Romanian Penal Code), the principles contained in articles 1 et seq. of the draft will be applied in connexion with the arrest or detention of the offender, whereas if the action constitutes a petty offence (contravention) there can be no preventive arrest or detention.
- The provisions of article 29, paragraph 2, deal with the 'confinement' of persons liable to deportation. This type of confinement is also not in the nature of an arrest or detention and is not part of criminal proceedings, being an administrative measure.
- The provisions of articles 30 to 33 similarly deal with certain types of 'confinement' as a non-criminal, administrative measure, such as: confinement as a means of physical restraint to ensure compliance with a court order; the confinement of minors who are morally or materially exposed to corruption; the confinement of persons of unsound mind, alcoholics or drug addicts, or the confinement of persons suffering from contagious diseases. None of these cases of confinement have anything in common with arrest or detention for the purposes of the draft principles, as entitled.

- The provisions contained in articles 34 to 37 deal with 'confinement' of a political nature during a state of emergency (state of siege) - improperly described in the draft as arrest or detention. In setting forth principles respecting wrongful arrest or detention, the draft does not employ the terms 'arrest' or 'detention' in the usual sense, but in the juridical sense of preventive measures specifically pertaining to the criminal process. Therefore cases of confinement ordered at a time of emergency cannot be dealt with in the draft, either as non-criminal measures or by virtue of the grounds which give rise to them since, in principle, measures prompted by necessity take precedence over the established regulations. We would mention that where an offence punishable under criminal law is committed during a state of emergency, the principles relating to preventive arrest or detention will be applied in so far, of course, as they do not conflict with special (exceptional) normative enactments which provide for exceptions.

We accordingly believe that all the provisions contained in articles 28 to 37 of the draft should be deleted.

(k) The provisions of article 38 should be amended so as to recommend a principle along the lines indicated in paragraph (g) above, where we proposed that the amended text of article 38 should be incorporated in article 15. This alteration is also in keeping with our proposal that the provisions of articles 17 to 28 should be amended and compressed into a single article (see paragraph (i), above) and that the provisions of articles 28 to 37 should be deleted (see paragraph (j)).

(l) In an inappropriately worded text, article 39 recommends that failure to comply with the provisions of the draft should be subject to sanctions. This is not possible. Penalties should apply in the case of breaches of those national laws which reflect the principles embodied in the draft. The text also contains some terms that are unsuited to the context. An 'authority' ('autorité' in French text of the draft principles) cannot be the active perpetrator of an offence or breach of discipline; the word 'volontairement'

cannot be coupled with 'negligence' (any act is voluntary, but the voluntary act may be committed either wilfully or culpably); the word 'provoque' ('causes') has, in criminal law, a limited application which pertains to the contribution of the person who brings about an action on the part of another. Lastly, 'contravention' and 's'expose' ('subject to') are also open to criticism.

We propose that the text of article 39 should be worded as follows: 'Wrongful arrest or detention shall entail criminal or administrative liability or both, on the part of persons who, with premeditation or malice, order such measures or maintain them in force, in violation of those provisions of the law which reflect the principles set forth in the draft'.

(m) The text of article 40 contains rules concerning the right of the wrongfully arrested or detained person to obtain compensation.

The text should recommend compensation in principle but should not lay down rules on the subject. The rules given in the text establish the right to compensation for violations of the provisions of the draft - something which, again, is inadmissible since this right can only apply in cases of a breach of the laws of the State concerned.

The rules in the text of the draft make the State jointly liable with the official or agent who has committed the abuse - which we consider to be equally inadmissible, since the question of the responsibility of the State is a matter of municipal law.

We propose the following text:

'Any person who has been wrongfully arrested or detained shall be entitled to compensation. The law shall specify the circumstances and conditions in which, and the procedure whereby, reparation may be obtained'.

(n) We consider the provisions of article 41 to be uncalled for, since the articles of the draft cannot have the effect of repealing or amending the laws of the State, and there can therefore be no question of invoking them to that end.

III. Conclusions

If the draft principles are left in their present form, they will give rise to objections on the part of various States, in view of the incompatibility of many of their provisions with the system and type of legislation in force in those States.

In our comments and proposals we have sought to endow the draft with a precise content, made up of principles rather than detailed regulations."
