UNITED
NATIONS

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Economic and Social
Council

Distr.
GENERAL

E/CN.15/1996/18
30 April 1996

ENGLISH
ORIGINAL: SPANISH

COMMISSION ON CRIME PREVENTION
AND CRIMINAL JUSTICE
Fifth session
Vienna, 21-31 May 1996
Item 7 of the provisional agenda*

UNITED NATIONS STANDARDS AND NORMS IN THE FIELD OF CRIME PREVENTION AND CRIMINAL JUSTICE

Development of United Nations minimum rules for the administration of criminal justice

Report of the Secretary-General

Summary

The present report was prepared pursuant to Commission on Crime Prevention and Criminal Justice resolution 4/2 of 9 June 1995, in which the Secretary-General was requested to seek more comments from States on the advisability and on the specific content of the draft minimum rules for the administration of criminal justice in order for him to submit an analytical report, including options on how to proceed in this matter, to be considered by the Commission at its fifth session. As of 30 April 1996, the Secretariat had received a total of 48 replies from Member States. Comments were also received from six institutes.

*E/CN.15/1996/1.

V.96-81838T

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INTRODUCTION

1. The present report has been prepared pursuant to Commission on Crime Prevention and Criminal Justice resolution 4/2 of 9 June 1995 entitled "Proposal for the development of minimum rules for the administration of criminal justice". In that resolution, the Commission requested the Secretary-General to seek further comments from States on the advisability and on the specific content of the draft minimum rules for the administration of criminal justice in order for him to submit an analytical report, including options on how to proceed in this matter, to be considered by the Commission at its fifth session.

2. The Economic and Social Council, in its resolution 1994/17 of 25 July 1994, took note of the draft United Nations minimum rules for the administration of criminal justice submitted by the Government of Argentina to the United Nations Office at Vienna and contained in document E/CN.15/1994/11.

3. In the same resolution, the Council requested the Secretary-General to seek comments from all Member States and from other appropriate sources on the desirability of preparing and adopting United Nations minimum rules for the administration of criminal justice on the basis of a draft prepared by a group of experts, and to submit a report to the Commission at its fourth session, requesting that the latter follow up this matter at its fourth session.

4. Pursuant to the above-mentioned mandate, the Secretary-General, in October 1994, addressed a note verbale to Governments and relevant institutes and to intergovernmental and non-governmental organizations, inviting them to submit observations and comments on the desirability of such draft rules. A summary of the replies received, including those from various institutes, was submitted to the Commission at its fourth session (E/CN.15/1995/7/Add.1).

5. The Commission, in its resolution 4/2, took note of the above-mentioned report, welcomed the replies submitted, and called for further comments to facilitate its consideration of the matter.

6. Accordingly, the Secretary-General, in a note verbale dated 11 August 1995, reminded those Member States that had not yet submitted comments of the possibility of doing so, and invited them to send their replies.

7. As of 30 April 1996, a total of 24 Member States had submitted additional replies (see annex).

8. By 30 April 1996, the following 48 Member States had submitted replies to the notes verbales sent by the Secretary-General in October 1994 and August 1995: Argentina,* Australia,** Austria, Bahrain, Barbados,** Belarus, Canada, Chile,** Colombia, Croatia,** Cuba, Cyprus, Denmark, Ecuador, Estonia,** Finland, France,** Germany, Ghana, Guatemala,*** Iceland,** Iraq,** Japan,* Jordan, Kazakstan, Kuwait, Luxembourg, Malaysia,** Marshall Islands,** Mauritius,** Namibia, New Zealand, Oman, Panama, Peru, Philippines,** Portugal,** Qatar,** Republic of Korea,** Saudi Arabia,*** Slovakia,** South Africa,** Switzerland,* Syrian Arab Republic, Turkey, Uganda,** United Kingdom of Great Britain and Northern Ireland and United States of America.**

9. Replies were also received from the following six institutes: the United Nations Interregional Crime and Justice Research Institute (UNICRI), the Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders, the European Institute for Crime Prevention and Control, affiliated with the United Nations, the Arab Security Studies and Training Centre (ASSTC), the International Centre for Criminal Law Reform and Criminal Justice Policy, and the International Federation of Business and Professional Women.

10. The present report analyses the comments received on the draft United Nations minimum rules for the administration of criminal justice and its specific contents.

11. Owing to the detailed nature of most of the replies, it has not been possible to include them in their entirety. Instead, either summaries or excerpts indicating their essential points are given. The Secretariat has deposited the original replies in its archives.

I. OPINIONS ON THE DESIRABILITY OF THE MINIMUM RULES

A. Quantitative analysis

12. A total of 57 replies were received from Member States and institutes. Broadly speaking, the replies contained diverse and, in many cases, detailed comments and information.

13. Some Member States and institutes did not consider it desirable to draft minimum rules on the administration of criminal justice, or not, at least, in the present situation (Canada, Japan, Luxembourg, United Kingdom, Asia and Far East Institute and European Institute).

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*Member State which replied to both notes verbales sent by the Secretary-General.

**Member State the reply of which was received in response to the note verbale sent by the Secretary-General in August 1995, and which is covered in the present report.

***Member State the reply of which is covered in the present report, although it was received in response to the note verbale sent by the Secretary-General in October 1994, but too late for inclusion in the previous report.

14. Other States were in favour of formulating such rules, provided positive results emerged from further investigation of the desirability of such an undertaking in general and the reservations submitted regarding the content of the draft rules (Finland, Namibia, Republic of Korea and UNICRI).

15. The United States of America suggested that further studies should be carried out by those in favour of the project to identify which precepts were completely original or added something new to the existing instruments on rules and standards, and would be universally acceptable despite differences between criminal justice systems.

16. Australia and Cuba made a general suggestion that a more detailed study should be undertaken of the issues involved.

17. Some replies did not give detailed views regarding the general desirability of the draft rules but offered criticisms and proposals for amendments with respect to specific rules (Bahrain, Colombia, Kuwait, Malaysia, Oman, Qatar, Syrian Arab Republic and ASSTC).

18. Other Member States specifically stated that they viewed the drafting of minimum rules as generally desirable, but at the same time proposed individual changes (Austria, Belarus, Chile, France, Ghana, Jordan, Mauritius, Peru, Switzerland and Uganda), or indicated their basic agreement, together with the fact that their domestic legislation was compatible with the draft rules (Barbados, Croatia, Ecuador and New Zealand).

19. Other Member States replied that they were in favour of the drafting of minimum rules for the administration of criminal justice, some proposing additions to the rules already drafted (Argentina, Cyprus, Germany, Guatemala, Kazakstan, Panama, Philippines, Saudi Arabia and Turkey). Slovakia stated that its criminal justice procedures were in general conformity with the draft rules, while also pointing out that the rules set a high international standard and sufficient guarantees for the independent and objective administration of criminal justice.

20. To sum up the situation in very approximate terms, about a quarter of the replies expressed their opposition or substantial reservations regarding the proposal to formulate minimum rules for the administration of criminal justice. About one half of the replies were either directly or indirectly in favour of the draft rules and proposed amendments of varying degrees, while the final quarter of the respondent States agreed that the proposal was necessary and supported its specific content.

B. Qualitative analysis

21. Certain replies opposed to formulating the minimum rules were based on the premise that the field of criminal justice administration was already covered by other relevant instruments (Canada, Japan and the European Institute). Those replies were therefore in favour of intensifying efforts aimed at implementing the existing instruments rather than drafting a new one.

22. Reference was made to the surveys on compliance with the existing standards which, in pursuance of previous decisions, were being conducted in four areas. The concern was expressed, with regard to this activity, that the drafting of new minimum rules could dilute the efforts already being deployed and prove to be premature (e.g. United Kingdom).

23. The United States considered that the draft minimum rules attempted to bridge (and be applicable to) widely different criminal justice systems in terms of legislation, rules of procedure, policies, practices, traditions and culture. That could lead to problems, given, for example, the fundamental differences in approach between some aspects of the civil and common law systems.

24. Various comments emphasized the differences between the Member States in terms of their culture and legal tradition, and argued in favour of showing respect for those differences (e.g. Republic of Korea). More specifically, the indisputable diversity of the existing procedural systems, whether inquisitorial, adversarial or mixed, and whether based on common law or State law, prompted the conclusion, in some cases, that only rules applicable to all the different systems would be admissible (Colombia and Finland).

25. While some replies criticized what was considered to be a lack of clarity in the rules regarding their basic purpose (e.g. Colombia), others noted the tendency of the rules to disregard other procedural systems in favour of an adversarial and oral system (e.g. France and Germany). Some of the latter expressed doubts as to the ability of the proposed model to solve the problems that it set out to tackle.

26. Lastly, reservations were expressed regarding not so much the possibility of devising an objectively preferable model as the likelihood of its being implemented by the Member States, or their will to do so, whether the States in question were the most advanced or developing countries.

27. Those in favour of drafting minimum rules for the administration of criminal justice insisted on the need to make every possible effort to ensure the practical observance of human rights in the field of criminal justice, and remarked on the consistency of the draft rules with other instruments adopted by the United Nations (Australia and Germany). Argentina indicated its desire to support the draft rules, despite the fact that they might entail criticism of its existing domestic legislation, which would have to be brought into line with the standards of the new instrument.

28. Other observations reflected the belief of their authors that the solutions afforded by the draft rules provided an effective way of remedying serious shortcomings in the existing procedural systems. Mention was made of the adversarial and oral model as an effective means of avoiding excessively lengthy trials and reducing the number of prisoners held awaiting trial (Germany).

29. Support was frequently expressed for the elaboration of a new instrument through references to the compatibility of the domestic legislation of the countries concerned at least with the principles embodied in the draft rules (Australia and Barbados).

30. Finally, a great many suggestions were forthcoming for amending or supplementing the rules, indicating a desire to cooperate, by means of constructive criticism, in the work of improving the proposed rules and international standards for the administration of criminal justice.

C. Evaluation

31. Summing up the quantitative analysis, it may be stated that most of the replies indicate, whether through constructive criticism or more explicitly, basic agreement with the idea of drafting minimum rules for the administration of criminal justice.

32. In qualitative terms, all the replies (except those expressing specific reservations) agree on the need to ensure respect for human rights in the field of criminal justice as elsewhere. This view is evident even where the stance is taken that this need is already met by existing instruments (Japan and the European Institute) or where, with regard to other activities already under way, the concern is expressed that efforts directed towards the successful attainment of a common goal might be diluted.

33. As for the question of whether it was actually possible to establish a set of minimum rules of general application and value, a number of replies expressed basic doubts prompted by sociocultural and historical differences between the States and their legal systems in terms of the basis of their legislation (common law or statute law) or the type of judicial system adopted, whether inquisitorial, adversarial or mixed (Colombia

and European Institute). Other replies showed greater optimism in that respect, or at least a readiness to make the effort to overcome the difficulties involved.

34. In that connection, some replies (Oman and Qatar) gave specific examples illustrating the general problem of translating legal texts and the potential for misunderstanding inherent in the original undertaking which was concerned - exclusively - with minimum rules for criminal procedure (as a specific area within the administration of criminal justice in general).

35. While some authors expressed doubts regarding the implementation of the minimum rules rather than the possibility of reaching consensus on their content, others indicated their confidence in the effectiveness of the new instrument as a means of promoting at least some of the necessary changes.

36. The other arguments put forward with regard, for example, to the merits of a specific procedural system, while also concerned to some degree with the feasibility of establishing a new international instrument along the lines of the other minimum rules established by the United Nations, had more to do with its content. That aspect - the content of the draft rules - is dealt with below.

II. OPINIONS ON THE CONTENT OF THE MINIMUM RULES

37. The draft rules will now be considered in the sequence followed by the group of experts. The comments made on the basic ideas contained in each chapter will first be analysed and then suggestions will be made regarding the content and form of individual rules. An endeavour will be made to avoid repeating comments with identical content. Owing to the widely differing types of reply received in terms of their detail and to the frequently used technique of confining comments to those rules prompting reservations or suggestions, a purely quantitative analysis would have been insufficient.

A. Comments on the draft rules

Preamble

38. Two States endorsed the principles and aims set forth in the preamble to the draft rules, while another stressed the need to work towards greater uniformity in the relevant national legislations. In order to bring out more fully the relevance of the minimum rules to the field of criminal justice, one State suggested referring to the International Covenant on Civil and Political Rights (Resolution 2200 A (XXI) of 16 December 1966) instead of the International Covenant on Economic, Social and Cultural Rights (Resolution 2200 A (XXI)). One State expressed reservations regarding the preamble for the same reasons.

Section A: General principles of procedure

39. *Rule 1.* This rule concerning the principle of ex officio criminal prosecution received support with regard to the exclusive competence of the State to conduct the prosecution of a criminal offence. One reply, however, mentioned "systems with private prosecution" without specifying whether what was meant was systems entailing private competence to perform all the different functions involved in criminal proceedings, in particular that of judgement, or, alternatively, only the subject of paragraph 2, namely private intervention at the start of State proceedings and/or the prosecutive function itself. With regard to paragraph 1, a suggestion was made to delete the word "sole" on the grounds that the State should be the "last" instance in the entire criminal procedure; alternative wording was suggested as follows: "The authority to institute and to conduct a prosecution in respect of any offence shall rest with the State." Another suggestion regarding the drafting of this paragraph was to delete the words "in accordance with the law" in order to avoid misunderstandings arising from this reference to national legislation. A number of replies pointed out a

certain lack of clarity in paragraph 2 regarding the relationship between the sole competence of the State to conduct a criminal prosecution (paragraph 1) and the competence of private persons to - solely - bring about the institution of criminal proceedings and assume prosecutive functions, two countries proposing improvements to the paragraph. Some replies indicated reservations regarding this exceptional and limited competence afforded in specific circumstances by the legislation of certain Member States. One State pointed out that paragraph 3 of rule 1, related to mechanisms for judicial control, seemed to be inconsistent with its own legislation.

40. *Rule 2.* This rule concerning the separation of the basic functions within criminal proceedings (paragraph 1) and the relationship between the investigatory authorities and the police (paragraph 2) was accepted by several Member States, which drew particular attention to the consistency of that rule with the European Convention on Human Rights; one reply recommended a change in the wording of the first paragraph. Attention was drawn to possible contradictions between the two paragraphs, and various criticisms were made of the content of paragraph 2. Starting with the prosecutive principle affirmed in paragraph 1, which was not criticized as such, one country suggested, with regard to paragraph 2, that all entities fulfilling investigatory and prosecutive functions should be referred to collectively as "investigatory authorities", which would permit application of the rule both to those national systems in which the Office of the Attorney General or Department of Public Prosecution served as investigatory authority and to systems in which investigation was entrusted to examining magistrates (thereby disqualified from judging cases investigated by them). Concerning the content of paragraph 2, one country considered the functional subordination of the police to the investigatory authority to be in violation of the principles of the independence and separation of the police from the judiciary. Some used the absence of such subordination in their own legal systems as an argument against that rule. Other Member States, however, demonstrated on the basis of their own legislation the possibility of maintaining the administrative independence of the different entities and combining this independence, within the exclusive framework of criminal proceedings, with the competence of the investigating authority to direct and/or monitor the work of the police in connection with the investigation of offences (in this regard, there was also a proposal for a drafting amendment). One State considered the phrase "in terms of functions come under" to be vague, and requested that it be made more precise.

41. *Rule 3.* The comments on this rule indicated a basic agreement regarding the possibility of introducing in domestic legislations certain exceptions weakening the principle of "lawfulness". One country, however, drew attention to the fact that the existence of directives would serve to exclude discretionary powers since the two were mutually exclusive. Regarding the need to establish clear and general limits on discretionary powers, another country deemed it sufficient to have unwritten rules which were derived from the country's legal tradition. In order to avoid ambiguities in the text, one reply suggested a change in the wording of this rule.

42. *Rule 4.* This rule concerning the guarantee of a "lawful judge" gave rise to favourable comments on the intent of the provision, but also to a number of criticisms prompted by terminological concerns and differences between the legal systems of the Member States with regard to the organization and competence of their courts. In suggesting the deletion in paragraph 1 of the word "prosecutions", one State took to its logical conclusion an interpretation which was commonly given to the original text but was apparently not intended, since the original text seeks to deal exclusively with the function of judgement perceived as separate from the investigatory and prosecutive functions. A revised wording for paragraph 1 was proposed, whereby it would refer to the judicial functions of admitting the charge, the evidence and the submissions (referred to at present, perhaps ambiguously, as "prosecutions") and ruling on the charge ("findings"). Two replies drew attention to a further, basically terminological, problem, namely that the word "judge" used generically in the draft rules would appear to exclude entities with judicial functions which, depending on the particular legal lexicon, carry other titles such as "magistrate", "juror" etc. Elucidation of this terminological point would reveal substantive agreement with regard to the guarantee itself. One State expressed the opinion that there was no need for such a self-evident rule as the one stating that the courts should be impartial. Other

Member States emphasized the value of paragraph 2. In order better to express the purpose of the guarantee, namely to afford protection against the danger of partiality, one State suggested that the following words be added at the end of the second sentence of paragraph 2: "in such a way as to eliminate any danger of partiality in the specific case." With respect to jury-based systems, another State suggested the following addition to the second sentence: "National legislations shall establish ... and cases of incompetency, recusation and dismissal of judges." With regard to paragraph 3, one reply criticized the last point as a contravention of the principle of two-tier proceedings and as jeopardizing the expeditious nature of proceedings, thus drawing attention to a possible ambiguity in the original text. This reply also proposed that the term "ordinary courts" be replaced by "legally competent courts" in order to bring out the concept of the prohibition on ad hoc courts more clearly, such courts not being foreseen by the constitution of the country concerned. The proposal to confine the judgement of serious offences to courts composed of several members (paragraph 4) was considered worthwhile but incomplete, in that it did not indicate criteria for distinguishing between serious and minor offences or define the term *tribunal colegiado*. One State considered that paragraph 4 was so unclear that it should be deleted from the rules. Another suggested redrafting it. Yet other replies saw a conflict between the proposal and systems permitting the judgement of serious cases by single-person courts or by juries.

Section B: Principles governing legal proceedings

43. With regard to the rules contained in this section, one country suggested that, for reasons of classification, it be moved to the section on the judicial authorities.

44. *Rule 5.* A number of countries accepted this rule in principle, while others proposed its deletion, one country expressing the view that specific domestic legislation should not be replaced by general international provisions which possibly took insufficient account of the particular national situation.

45. *Rule 6.* A number of countries expressed their agreement with this rule, while one State felt it should be moved to the section "General principles of procedure" in order to forestall the argument that the procedural rights of the defendant were liable to be limited on the pretext of ensuring expeditious proceedings.

Section C: Rights of the defendant

46. *Rule 7.* This rule which, together with the other provisions in the section, was received favourably by one State, was considered unclear by a number of other States, one of which pointed out some contradictions with rule 18. In addition, the practical necessity was mentioned of having certain measures that could be applied without a previous hearing. One State, however, made a positive reference to the rule of natural justice, which provided for the right to a hearing.

47. *Rule 8.* With regard to this rule, one country reserved its judgement because it considered the wording to be unclear. One State indicated its agreement with paragraph 1, provided the rule was not intended to apply to the police. Another State took a more far-reaching stance, suggesting a change in the wording replacing the phrase "prosecuting authorities" by "investigatory authorities". With regard to the actual information furnished in advance to the person under suspicion, one State requested that the reference to the right to the assistance of a lawyer be deleted. Paragraph 2 met with a positive response from several countries, but considerations of practicality and the speed of proceedings were also invoked.

48. *Rule 9.* Regarding this rule, some Arab-speaking Member States noted problems of translation in relation to the word "statement". One State considered the part of paragraph 1 concerning inducement to confession "by means of ... reward or any other similar device" to be unacceptable, interpreting it as a prohibition not only on illicit advantage, but also as an impediment to the offering of procedural incentives to secure the cooperation of the person being questioned with the judicial authorities. The same State was

also in favour of deleting paragraph 2 because of the diversity of national legal systems. Another State considered disciplinary sanctions to be insufficient in the case of a violation of the prohibition established in the previous paragraph. In the same context, one State proposed a drafting change offering the compromise solution of allowing criminal and/or disciplinary sanctions.

49. *Rule 10.* Of the three comments received on this rule, one tended generally to favour free evaluation of evidence. According to the other two, it was excessively rigid to establish that evidence obtained in violation of rules 8 and 9 was inadmissible. These latter comments emphasized the distinction to be drawn between defects relating to the source of the evidence and defects in the evidence itself, and also between statements made by the defendant and evidence in the strict sense.

50. *Rule 11.* Concerning this rule, a number of Member States reaffirmed the right of the defendant to defend himself even when qualified legal assistance was available. One State, however, indicated that, because of the financial constraints on various States and the risk of glorifying crime and criminals, all reference in the rule to the assistance of a lawyer should be deleted. Other Member States departed from the premise, at least in principle, that the defendant did indeed have the right to the assistance of a lawyer. This right to the assistance of a lawyer (paragraph 1) was described by one State as unconditional. Another State expressed doubts as to the particular element of the defendant's free choice of defence lawyer in view of the implied financial burden for the State and/or the existence of States with legal aid centres. In another reply, one State expressed opposition to exercise of the right to the assistance of a lawyer "at all stages of the proceedings", considering that such assistance should not be permitted in the first 20 hours of police custody. Regarding the mandatory participation of a lawyer in serious cases (paragraph 2), one reply drew attention to a possible conflict with the right of the defendant to defend himself. Some Member States, however, rejected the possibility of legal assistance being provided against the will of the defendant, and others accepted certain limitations on the right to defend oneself. One reply proposed that the scope of the mandatory defence should be extended and specifically referred to cases involving crimes carrying the death penalty. Another State preferred to limit compulsory defence by excluding cases in which the outcome might be, directly or indirectly, a short custodial sentence. One State proposed a drafting change in paragraph 2 of the Spanish text, whereby the word *intervención* (by the lawyer) would be replaced by *participación*:*

Section D: Right of defence

51. *Rule 12.* This rule, which, together with the other provisions of the section, was acceptable to one State, prompted two further comments regarding the limits on the right of the counsel for the defence to advise the defendant at every phase of the proceedings (paragraph 1). One State expressed interest in being able to continue to exclude the first 20 hours of police custody from the guarantee, whereas another State suggested that the execution phase of a custodial sentence should also be explicitly included in the guarantee. With regard to paragraph 2, a request was made in one reply for clarification regarding the actual substance of the prohibition on taking into consideration an examination of the defendant in which the latter had not first been advised of his or her rights by a lawyer. One State expressed its opposition to a general or absolute prohibition because that would necessarily tend to interfere with efforts to ensure expeditious proceedings. One State was opposed to permitting restrictions on communications between the defendant and his or her lawyer, and therefore proposed that paragraph 3 be deleted, a stance that was echoed by two further replies. One State admitted the possibility that certain exceptions might be made to the prohibition, but only in the case of a serious threat to national security or public order. The same State felt that communications with criminal intent should be excluded from the guarantee protecting the confidentiality of communications between the accused and his or her counsel (paragraph 4). Another State noted the lack of theoretical agreement regarding the subject-matter of paragraph 5, namely the nullification of evidence obtained through violation of the right of defence, and therefore requested that the rule be redrafted with greater precision.

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*The English version would not be affected by the change.

52. *Rule 13.* With regard to its general intention, this rule concerning the participation of the counsel for the defence in investigations requiring the presence of the defendant met with support from a number of States, with only one State requesting its deletion. One State considered that the verb "attend" would be preferable to "take part in" in connection with investigations, and another State pointed out that the right of the defence lawyer to attend investigations did not imply any obligation or, consequently, any prohibition on investigations conducted in the absence of the lawyer. In addition, one State suggested amending the third sentence - regarding the consequences of rejection of an application to present evidence - to the effect that the defence counsel should not be able to appeal against such a decision, but only lodge a complaint.

53. *Rule 14.* In view of the differences between procedural systems, one State considered that the rule on the access of the defence counsel to acts, documents and items of evidence would have to be adapted to the investigatory proceedings recognized by some national legislations and to the needs of cases of detention and pretrial custody. One State furnished information on the existence, within its own domestic legislation, of a general obligation on the part of the prosecuting authority to grant access to relevant information and the mechanisms for restricting it in exceptional circumstances. Another State requested an amendment of paragraph 2 with a view to permitting restrictions "in the interests of justice" during the phase following the formal indictment also. In another reply, one State drew attention to possible conflicts between the legitimate interest of the defence counsel in having such access and the equally legitimate interest of protecting the safety of judges or witnesses.

54. *Rule 15.* This rule drew a favourable comment from one State.

Section E: Coercive measures

55. One country expressed its basic agreement with the entire section. Another explained its interpretation of the term "coercive measures" as being equivalent to custodial measures, thus drawing attention to problems of the original Spanish text of the draft rules.

56. *Rule 16.* One State linked this rule with the guarantee of respect for the dignity of the human person, and urgently advocated inclusion in the text of a reference to the "principle of the protection of the person as a social being". Another State pointed out differences between the definition of the proposed guarantee and its own domestic legislation, which permitted the use of the coercive measure of pretrial detention for the additional purposes of protecting the defendant or dispelling public fears.

57. *Rule 17.* Regarding the principle of the proportionality of coercive measures embodied in this rule, one State repeated its reference to the principle of respect for humanity. With regard to the factors to be considered in assessing the proportionality of a coercive measure, another State suggested that a distinction should be drawn between the objective and the subjective gravity of the offence.

58. *Rule 18.* One State expressed its support for this rule concerning competence to impose coercive measures. One reply criticized the imprecise drafting of the provision, and another State considered the text as a whole to be too rigid to be a minimum rule, while another recommended seeking a more general formula for paragraph 2. Several Member States described their own domestic legislation in this area, and pointed out ways in which it differed from the text of the rule. More specifically, one State suggested that paragraph 1 should be deleted and the wording of paragraphs 2 and 3 amended, since it did not see the need to adapt the guarantee of judicial approval of the decision on coercive measures to the particular preferences of domestic legislation regarding the assignment of investigation tasks to different types of authority such as the courts, the Office of the Public Prosecutor or the police. One State recommended drawing a distinction, in the context of paragraph 1, between decisions restricting personal rights and other procedures adopted in the investigation. Another State suggested changes in the structure of paragraphs 2 and 3 in order to differentiate more clearly between normal cases and cases in which it is not possible for a court to take a prior decision in view of the urgency of the need to enforce the measure. In its comment, one State referred

to the subject of the guarantees provided under emergency or martial law conditions. Another State requested clarification of the phrases "direct infringement of fundamental rights of the person" in paragraph 2 and "such measures" in paragraph 3.

59. *Rule 19.* This rule on guarantees applicable where an individual is deprived of his personal freedom by the State authorities, whether through preventive custody or not, drew the criticism of one State, which considered that it did not take into account the situation of developing countries, and also of another State, which felt it to be in conflict with its domestic legislation. Another reply raised doubts regarding the scope of the guarantee in terms of the gravity of the offences and the status of the investigation, while other States proposed drafting amendments to paragraph 1 with a view to specifying more precisely and completing the list of requirements relating to the grounds for detention. A number of Member States indicated their disagreement with the time-limits envisaged in paragraph 2. One of these invoked economic and technical considerations as the basis for its comment. Other comments dwelt on conflicts with their respective domestic legislation, where provisions of their own laws were occasioned by the need to combat certain specific crimes such as terrorism and drug trafficking or crime in general, and one of these countries (from the European region) acknowledged the discrepancy between its current legislation and the requirements of the European Court of Human Rights. Another State considered that the precautionary provisions contained in paragraph 3 went too far in the direction of reducing detention periods. Another recommended deleting the reference to *habeas corpus* in paragraph 4 and seeking a more precise formulation of the guarantee.

60. *Rule 20.* This rule on preventive detention prompted a number of comments regarding discrepancies with domestic legislation and also with respect to administrative detention in the case of a threat to national security or the public order. Regarding paragraph 1, two States expressed their agreement with the basic idea that preventive detention should not be of the nature of advance punishment. Some Member States did not accept the restriction entailed by the provisions establishing that a measure should not be enforceable unless accompanied by sufficiently justified suspicion of the commission of a punishable offence (rules 16, 19, paragraph 1, and 20, paragraph 1, second sentence). Two States, one of them with reservations, invoked the danger of future offences as further grounds for ordering preventive detention. Two further States put forward the enhanced efficiency of the investigation as a consideration, and also pointed out the effect of freedom on the defendant. Criticism was also directed at what was seen as the effect of paragraph 2 of establishing the expectation of a custodial sentence of more than two years as grounds for preventive detention. One State indicated that its legislation did not establish maximum limits on preventive detention, and that the European Convention for the Protection of Human Rights and Fundamental Freedoms did not establish any such limits either. Another State recommended replacing the expression "statutes of States" by "laws of States".

61. *Rules 21 and 22.* The last Member State referred to above also proposed adding, in the text of rule 21, the words "and punishment" after the word "treatment". Regarding rule 22 concerning the internment of the defendant in a psychiatric clinic as part of the investigation of an offence and the responsibility of the alleged offender, it should be pointed out that this gave rise to comments from two States regarding the treatment of mentally deranged persons in general, and also prompted a suggestion by another country for redrafting paragraph 1. With regard to this first paragraph of the rule, which seeks to limit the measure of internment by referring to the grounds for ordering deprivation of freedom in the form of preventive detention, one State proposed that the provision should be admissible in cases where internment was justified in the interests of the investigation. While the subject-matter of paragraph 2 did not, for one State, fall within the scope of criminal proceedings, three other States indicated their reservations regarding the limitation of internment to six weeks and, hence, the requirement to obtain the consent of the defendant or members of his or her family in cases where the State wished to impose internment for a period of more than six weeks.

62. *Rule 23.* This rule, regarding investigatory methods involving body searches, prompted references by one State to its domestic legislation and reservations on the part of several countries concerning the limits established in paragraph 1. Another State recommended establishing different guarantees for defendants,

victims and third parties, and amending the wording of paragraph 1. Objections were also raised to the criteria of the necessity of the measure and judicial approval; the value of extending the range of possible evidence and the discretion of the investigatory authority, whether in the form of the courts, the Public Prosecutor or the police, were recommended as alternatives. One State expressly endorsed the qualification established in paragraph 2.

63. *Rule 24.* While indicating their basic agreement with this rule, several States recommended that it be redrafted with greater precision.

Section F: Oral proceedings

64. *Rule 25.* Several States came out in support of the oral character of criminal proceedings. Some Member States linked the guarantee provided by this rule of an oral and public hearing - of the petition of the defendant at least - with adversarial systems of criminal procedure and highlighted the difficulties involved in adapting it to different systems. One State recommended dealing with this subject in the section on suggestions for States. Another requested a more precise drafting of the rule in order to establish the scope of the guarantee more clearly. Some comments pointed out the necessity of excluding certain phases of the proceedings, such as the investigation or the consideration of appeals by higher courts, from the scope of the guarantee established in paragraph 1. One State recommended a mixed system whereby certain cases could continue to qualify for a written judgement. In two other replies, greater precision was called for in defining admissible exceptions to the principle of public hearings such as, for example, cases involving issues of the protection of public morals or protection of the injured party (especially in sexual offences) and minors.

65. *Rule 26.* With regard to this rule, one State felt the two sentences to be mutually contradictory. The first permitted proceedings to be instituted in the case of voluntary absence of the defendant, while the second excluded this possibility in the case of a serious offence. Another State criticized the second sentence for its lack of clarity and requested a precise definition of the term "serious offence".

66. *Rule 27.* One State pointed out that this rule was incompatible with civil proceedings in which the parties themselves (Public Prosecutor and defence) decided what evidence should be submitted to the court.

67. *Rule 28.* A recommendation was made in one reply to include the principle of "continuity" in this rule regarding formal immediacy in order, as far as possible, to prevent undue influences on how the court forms its conclusion.

68. *Rule 29.* One State said that its own legislation was consistent with this rule except for paragraph 3, which seeks to codify the right to be heard by permitting not only the court and the prosecution to question witnesses in oral proceedings, but also the defendant and his counsel. Another State requested that paragraph 2 be deleted, partly because of its lack of clarity and partly because of discrepancies with that State's domestic legislation. For organizational reasons, one State proposed that at some future date a section, including rules 29, 30 and 33, be created under the heading of "judicial evidence". It was also recommended that efforts be made to attain greater conceptual clarity.

69. *Rule 30.* One State drew attention to the difficulty of applying this rule in a procedural system based on civil law suits in which the expert evidence is brought by the parties. Another State requested that, in order to ensure the objectivity and impartiality of the expert evidence, the rule should extend to experts the possibilities of abstention and challenge applicable to judges.

70. *Rule 31.* One State recommended moving this rule according the defendant the right to "the final word" to the section of the draft rules on the right of defence. Another State indicated that its own legislation allowed for exceptions to the provisions embodied in paragraph 2 and commented on the burden of proof

of guilt in this regard. One State considered that the issue at stake in this rule was a concept of civil law which did not square with the traditional common law adversarial system, in which the accused had the right to testify in the same way as any other witness.

71. *Rule 32.* Suggestions were made to incorporate this rule in section A on general principles of procedure or in section C on the rights of the defendant.

72. *Rule 33.* One State fully supported the content of this rule, while another suggested that paragraph 2 would be more acceptable if, in addition to referring to nullity, it also established the non-existence of illicitly obtained evidence. With regard to paragraph 3, one State expressed its concern at a possible conflict between that provision and the principle of the free evaluation of evidence.

73. *Rule 34.* Regarding this rule, which guarantees that the reasons be given for a sentence passed in conformity with the principle of two-tier proceedings, one State drew attention to systems based on trial by jury which operate according to different principles, and suggested looking into a possible wording to allow for exceptions. Another State recommended including in the draft rules a section on sentences, in which this present rule could be included.

Section G: Appeals

74. One State accepted this entire section of the draft rules and stressed its own efforts to bring its domestic legislation, in one particular area of inconsistency, into line with the standards established in the rules. This position was shared by another country, which expressed doubts, however, regarding the specific needs of military justice.

75. *Rule 35.* One reply drew attention to discrepancies between this rule and the appeal regimes operated under the different procedural systems.

76. *Rule 36.* This rule on the prohibition of *reformatio in peius* did not draw any comment.

77. *Rule 37.* Pointing out special features of their own procedural systems, two States indicated their basic agreement with the first sentence of this rule on appeals against judicial measures, adopted during the pretrial phase or phases, which infringe the rights to freedom, property and privacy. One of the two States expressed reservations regarding the resubmission of appeals in cases where the restrictions on rights are maintained (second sentence).

78. *Rule 38.* One State, while not opposing the idea underlying this rule, recommended having a fresh look at the finer points of the procedure for challenging convictions on the grounds of judicial error, especially with regard to the timing of the release of the convicted person.

79. *Rule 39.* This rule on compensation of damage in the event of judicial error or a miscarriage of justice did not attract any comment.

Section H: The victim

80. With regard to the intent of this section, which received specific support, attention was drawn in one reply to the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power adopted by the General Assembly in 1985 and to the need for national and international strategies in this area.

81. *Rule 40.* One State proposed that this rule be made more precise by further qualifying the assistance required as follows: "material, moral, legal or other assistance they need." Two other countries considered that it would be helpful to clarify the term "victim" by, for example, using instead the term "victim of an

offence". One reply warned that States which did not recognize the right of the victim to the assistance of a defence lawyer would have some difficulty accepting this rule.

82. *Rule 41.* This rule did not draw any comment except for a suggestion by one country that it precede rule 40, since it dealt with a more general principle.

83. *Rule 42.* One State requested clarification of the terms "victim" and "injured party", while another suggested that the rule might be improved by including a reference to the right to the assistance of a lawyer paid for, where appropriate, by State institutions.

84. *Rule 43.* One State considered this rule to be unnecessary in view of the obligation of the person committing a crime to compensate the victim, while another pointed out contradictions between the two parts of the rule (possibly rectifiable by stylistic amendment). Another State proposed that an addition be made to the text of the rule as follows: "States are recommended to set up funds ... and also to adopt legislation and other measures ... ."

Section I: Suggestions for States

85. *Rules 44 to 46.* The suggestions by the drafting group regarding the guarantee of access for all citizens to existing international courts (rule 44) and the establishment of an international court to protect the rights established in the text under consideration (rule 45) prompted a wide range of comments. A number of Member States were either directly or indirectly opposed to rules 44 and 45, either out of confidence in their own national judiciary or because of the danger of undermining national sovereignty, the disadvantages presented by external interference in the relations between the State and its citizens and possible conflicts of competence between different international courts. Other commentators doubted the efficacy of international courts or the advisability of according them wider competences than those of the European Court of Human Rights. Some States, while expressing sympathy with the overall aim of the rules, considered these suggestions to be premature. Two States recommended that steps be taken in the direction of the suggestions, but cautiously and with the introduction of regional courts. Lastly, a recommendation was made to undertake more detailed studies on the basis of the experience gained in implementing the minimum rules and of a special survey involving all the Member States. In addition, one State advocated improving the drafting of the rules.

B. Additional proposals

86. In addition to the large number of suggestions offered for improvements in the drafting of the rules or aspects of the guarantees established by them, Argentina, the State responsible for putting forward the draft rules, proposed several additional rules.

87. In order to define more clearly the discretionary powers of the prosecuting authority (principle of appropriateness), it was suggested that a provision be included establishing that the Public Prosecutor's Office should be able to withdraw from the prosecution of a punishable offence only when:

(a) The offence does not carry a heavy penalty;

(b) The examining court approves the termination of the prosecution.

88. With regard to preventive custody, it was proposed that the protection afforded to detainees be strengthened by adding rules on the following:

(a) Mandatory periodic review - whether officially instigated or at the request of any interested party - of the question of whether the requirements for preventive custody have been fulfilled;

(b) The desirability, where the preventive purpose can be achieved by other means, of alternative measures to preventive custody such as, for example, house arrest, ban on visiting specific places or people, and an obligation to report periodically to the court.

89. As a criterion for observance of the guarantee of two-tier proceedings, it was proposed that the higher instance should be empowered to review:

(a) The correct application of the law to the facts established;

(b) The reasonable consideration of evidence;

(c) Compliance with the rules set forth in national laws and other guarantees of due process.

90. With regard to rule 24, a request was made for the addition of an explicit prohibition on using evidence obtained in violation of the guarantee ("exclusion rule").

91. It was indicated that, as a consequence of the principle of guilt and proportionality, the courts should, according to the proposal, have the assistance of specialized bodies specifically established for the purpose of furnishing them with the data necessary for awarding the most appropriate sentences and treatment measures in each individual case with a view to social reintegration.

92. Lastly, it was recommended that States engage in public information campaigns aimed at increasing public awareness of the fact that observance of the guarantees is not a factor contributing to increased levels of crime.

C. Evaluation

93. The following conclusions may be drawn on the basis of the replies received:

(a) Notwithstanding the very reasonable reservations expressed, in most of the replies an interest was discernible in maintaining the effort to draft minimum rules for the administration of criminal justice;

(b) In order to coordinate endeavours to improve both the efficiency of criminal procedures and the position of defendants and other parties involved, it might be worthwhile studying the relationship between the content of the text under consideration and other existing international instruments, as well as other texts in related fields;

(c) Despite the marked differences that exist between procedural systems such as, for example, the inquisitorial and adversarial systems, and also between the basis of procedural rules constituted either by laws or by common law traditions, a degree of uniformity has been demonstrated among the procedural problems noted, together with a reduced range of approaches to solving them. This should make it possible to achieve sufficient common ground to establish minimum mandatory rules with a view to framing and implementing the necessary procedural guarantees, or at least, formulating recommendations;

(d) The efforts to achieve progress in the draft minimum rules should perhaps take account of the effects of economic and sociocultural problems on the implementation of the solutions established;

(e) With a view to fostering an even more constructive dialogue among Member States, it might perhaps be worth trying to clear up any misunderstandings in the interpretation of the draft rules due partly to the need for stylistic amendment of the original text and partly to differing perceptions of the issues at stake deriving from different national legal traditions;

(f) The replies received did not indicate any strong support for the idea of establishing new international courts.

III. OPTIONS

94. At the present stage of the discussion a number of different approaches could be taken:

(a) To request the Secretary-General to continue the evaluation and/or preparation of a new text reflecting the views expressed in the replies received;

(b) To seek further replies on specific issues raised in the text;

(c) To evaluate the draft rules individually on the basis of the replies received, either at the level of the Commission in plenary session or within one of its working groups;

(d) To establish an intersessional group of the Commission for the purpose of revising the text in the light of the replies received;

(e) To regard consideration of the proposal as completed.

95. Having considered the above-mentioned options, the Commission might wish, in view of the interest expressed by the States in the text and the large number of proposals and recommendations received, to request the Secretary-General:

(a) To invite a group of experts to review the draft rules in the light of the replies received, giving particular attention to aspects of legal procedure and associated problems pertaining to the different legal systems, extrabudgetary funds being made available for such a purpose;

(b) To prepare a report on the relationship between the text and other relevant international instruments and to identify the use and application of such instruments in the administration of criminal justice.

Annex

REPLIES FROM GOVERNMENTS ON THE DRAFT UNITED NATIONS MINIMUM RULES FOR THE ADMINISTRATION OF CRIMINAL JUSTICE: STATUS AS OF 30 APRIL 1996

Country	*Language*	*Date*
Argentina	Spanish	16 February 1996
Australia	English	7 November 1995
Barbados	English	22 August 1995
Chile	Spanish	17 November 1995
Croatia	English	17 October 1995
Estonia	English	25 March 1996
France	French	27 December 1995
Guatemala	Spanish	26 May 1995
Iceland	English	26 April 1996
Iraq	Arabic	2 February 1996
Japan	English	25 March 1996
Malaysia	English	27 September 1995
Marshall Islands	English	20 September 1995
Mauritius	English	6 November 1995
Philippines	English	20 October 1995
Portugal	French	30 April 1996
Qatar	Arabic	30 October 1995
Republic of Korea	English	21 November 1995
Saudi Arabia	Arabic	14 April 1995
Slovakia	English	23 February 1996
South Africa	English	18 March 1996
Switzerland	English	15 September 1995
Uganda	English	15 December 1995
United States of America	English	1 March 1996